

26 OF 1987

IN THE PRIVY COUNCIL

No. of 198

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION COMMERCIAL LIST

BETWEEN:

KOORAGANG INVESTMENTS PTY, LIMITED

Appellant (Plaintiff)

AND:

RICHARDSON & WRENCH LIMITED

Respondent (Defendant)

TRANSCRIPT RECORD OF PROCEEDINGS

Volume II

SOLICITORS FOR THE APPELLANT

Clayton Utz & Company,
Australia Square,
SYDNEY, N.S.W.

By their Agents:

Clifford-Turner,
Blackfriars House,
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SOLICITORS FOR THE RESPONDENT

Freehill, Hollingdale & Page,
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SYDNEY, N.S.W.

By their Agents:

Linklaters & Paines,
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59-67 Gresham Street,
LONDON. EC 2V 7JA U.K.

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CASE FOR THE DEFENDANT

KEITH WILDON HODGSON

Sworn and examined:

MR.MORLING: Q. Is your name Keith Wildon Hodgson. A. Yes it is.

Q. Do you live at 4 Hamilton Parade, Pymble? A. Yes I do.

Q. Are you a director of Richardson & Wrench Ltd? A. I am.

Q. In 1968 did you then become the director in charge of valuations for that company? A. That is correct.

Q. You had previously been with the company for about ten years? A. Yes, that is so. 10

Q. You are a valuer by profession? A. I am.

Q. You have given evidence very frequently in cases in this Court and the Land and Valuation Court? A. Yes, in most Courts.

Q. In 1973 were you still the director of valuations for the defendant? A. I was.

Q. In fact, have you held that position continuously from 1968 until now? A. Yes.

Q. In 1973 did the company carry on business inter alia as real estate agents and valuers? A. Yes, it did. 20

Q. Did it have premises in Sydney at that time? A. Yes, at 92 Pitt Street.

Q. For a while were your premises temporarily in 109 Pitt Street? A. During the reconstruction of 92 Pitt Street we were in 109 Pitt Street, yes.

Q. You have been in 92 Pitt Street, apart from that, for quite a number of years? A. About 80 years, I think.

Q. In 1973 did the company have a number of divisions?
A. Yes, it did.

Q. Was one of those divisions called the Valuation division? 30
A. Yes, it was.

Q. Who was in charge of that? A. I was.

Q. Were you in charge of the running and operation of that division of the company? A. Yes.

Q. Have you remained in charge of it since then? A. Yes.

Q. There was a number of staff employed in that division, was there? A. Yes. It varied in numbers from time to time.

Q. Going back to 1973 did you yourself do much valuation work then? A. I was fully engaged with valuation work and always have been.

Q. Was this in addition to your administrative duties as the director in charge of the department? A. Yes.

Q. Were there other valuers engaged in the department in 1973? 10
A. There were about five - as I try to recall it - in 1973.

Q. Was the position in 1973 any different from what it was in 1972 or 1974? A. There were fluctuations over the time when people left and when we engaged other people. The number would have been reasonably constant.

Q. About how many valuers were on the staff of the division in 1973? A. As I recall it, five.

Q. In addition, what other staff was in the division? A. There were girls. There were usually three permanent girls including the head girl of the company and sometimes there was a temporary employed. 20

Q. Were they girls employed to do secretarial work? A. Yes.

Q. If it were found necessary to get assistance for them, what was done. A. I arranged for a temporary girl to be obtained from one of the agencies.

Q. In relation to the five or so valuers, what provision was made for their accommodation in the office? A. The Valuers had what could be called a cubicle or an office, general accommodation on the floor.

Q. Did the company have stationery with its letterhead on it? 30
A. Yes.

Q. Did you authorise any removal of the stationery from the company's premises? A. Only if it had been turned into a document that we intended to go out. (Objected to).

Q. Did you authorise any member of the staff to remove the firm's stationery from the premises? From time to time I imagine the company sent out valuations and letters, did it not? A. Yes.

Q. Apart from the sending out of valuations to the company's clients and contact with them, did you authorise anybody on the staff to use the stationery for any other purpose? A. No. 40

Q. Or to take the stationery away from the office for any other purpose? A. No.

Q. Who were the valuers in 1973 and onwards? A. There was Mr. Rathborne, a Mr. Blakely, Mr. Davies, latterly I think there was Mr. Scrimger, Mr. Rowan.

Q. Were they all qualified valuers? A. Yes, they were all qualified.

Q. What system did you have in 1973 of keeping a record or file in respect of instructions received? A. If instructions were received, they were entered onto a sheet that allowed me to see what work was coming in and the nature of the work that was coming in and from that I was able to allocate it to the appropriate valuer. 10

Q. Who would make the entry on such sheets? A. The person who received the instruction or the request for instructions.

Q. How were instructions received? A. Sometimes by telephone; sometimes by personal contact at the office; sometimes by letter.

Q. If instructions were received, who would allocate the person responsible to execute the task in hand? A. I would. 20

Q. Was there any practice observed about persons who had received instructions passing them onto you for the allocation of the task? A. Would you repeat that?

HIS HONOUR: Q. Say Mr. Blakely got the instructions. What was the practice there? What used he have to do there? A. He would write it on the list and I would decide in terms of which valuer might do it.

MR. MORLING: Q. Would that list be brought to your attention? A. I would make it my business to see it once, twice a week, or three times a week, depending on the times also that items were added to it. 30

HIS HONOUR: Q. Was there a central list, was there, that people used to write on or did each individual have a list? A. Each individual had a list. That might be removed from his list onto a more appropriate place.

MR. MORLING: Q. Were these lists kept for any length of time? A. Until the end of the month, by which time they would become out of date and any work undone would be transferred from the bottom of that list into the head of the new list for the new month. 40

Q. Do you now have any lists of that kind which were kept for the first six months of 1973? A. No, we haven't any. We never ever kept them.

Q. Did you keep any contact with the valuers on your staff as to the jobs they were doing? A. Yes.

Q. What was the practice observed as to keeping a record or file on a matter in which the company had been asked to make a valuation? A. It would not be until the work had been completed totally that one would regard the file as being complete 10 and at that stage it would be entered into the valuation register as an entry and from there it would be filed into a permanent record in a valuation book with perhaps 25, 30 other valuations. There would be a cross-reference from the register to that book.

Q. Before the valuation had reached finality, was there a file kept in respect of each matter which was being processed? A. The Valuer would have up to that stage in his possession, commencing with the instructions, a bundle of papers that gradually grew as he did his field notes, as he did his inquiries and as he obtained any other information he might have sought or might have given to him. During all that time it was a working file and was in his care. 20

Q. When a valuer had reached the stage where he wished to put down in writing his valuation, what did he do? A. He sought out one of the girls and either gave her the written work that he might have done for transfer into typing or he might dictate the work to her.

Q. Was there any practice as to consultation with you as the director in charge of the division in respect of any valuations or any class of valuation? A. Yes. There were certain valuations and it is so far back in time now that it is difficult to be precise about this. There was a limit which I regarded as one - (Objected to). 30

Q. What was the practice about valuations say over a certain amount? A. That is what I was just going to say. There was, as far as I can recall it, a limit of \$100,000 in respect of which I wished to be kept informed on the way in which the valuer was going about his valuation.

Q. In such cases what was your practice as to contact with the valuer? A. The valuers knew very well that would be the case and would not proceed with the valuation without having had a conference with me. 40

Q. If a valuer had reached the stage where he wished to dictate the valuation or to have one typed and there was not a secretary available to take the dictation or do the typing, what would happen? A. I don't think that at any particular

moment of the day he could expect to have a typist available to him, and so the time would come when he could get hold of a girl because they were not working to full capacity all the time. If perchance they were and it looked as though that state of affairs would carry on, then I would arrange for a temporary girl to come in.

Q. When you arranged for a temporary girl, did she always come to the office to do her work? A. She was engaged to work in the office, yes.

10

Q. She worked in the office? A. Yes.

Q. What was the practice as to the number of copies made of a valuation prepared for a client? A. There would be the original. There would be one carbon on white paper, and there would be what we term the pink copy, the office record, which would become the file record in our valuation book.

Q. Was there any practice as to backing the original valuation with any cover? A. Yes. Again that, to a certain degree, was subject to the quantum of the valuation. Valuations over a certain figure, perhaps it might have been \$250,000 or \$500,000—I cannot remember now - would go into a rather better cover than the ordinary run of valuations. There was a manilla folder with our printed name and the word "Valuation" on it for the lower category, perhaps, and a morocco-style one for the better ones.

20

Q. In addition to the original, would any other copy be handed to a client? A. Yes. That original and that carbon copy would both be within the folder, and became the client's property.

Q. Was any further copy made for retention in the company's records? A. Yes. The pink copy that I referred to.

30

Q. What happened to the pink copies? Were they physically placed anywhere? A. They went into the valuation books as permanent records.

Q. Are the valuation books bound or rather filed, are they?
A. They are not unlike these on the Bar table. Those along there are more like them.

Q. You are indicating the black folders near the Associate?
A. Yes.

Q. What practice was adopted for sending the valuations to the clients?

40

A. If I had determined that a client was one who had established credit with the company, his valuation would go to him together with an invoice. If it was a person who had no credit rating he would either be phoned or a letter would be sent to him saying that the valuation was ready and that on receipt of a cheque for a required amount or on his personally calling and presenting us with a cheque, he would be given the valuation.

Q. Who prepared the invoices for the fee in respect of the valuation? A. The invoice was typed by the typist at the time that they completed the typing of the valuation. 10

Q. What would then happen to the invoice after it had been typed? A. It would be enclosed with the valuation and the three copies of it that there were in the book would go down to the Accounts Department, one would form a ledger copy, one would form a reminder in the event of delayed payment.

Q. I take it it was necessary for valuers to spend a lot of their time out of the office, was it, in the field? A. It was the only way they could get valuations done, yes.

Q. Was there any practice about where valuers did any writing up of their valuations, as to where they did it? 20
A. Preferably they did it in the office because they were there to tend to all the other innumerable things that go on in valuation business but often, perhaps to relieve boredom, they would write them on a plane or on a train, or whatever it was that they happened to be delayed in getting back to the office, but the pencilled notes and that sort of thing were converted into notes to give the girls when they arrived in the office.

Q. Were they ever typed away from the office? A. Never to my knowledge. 30

Q. Has the company retained its 1973 records and files in respect of valuations made in respect of instructions received from clients? A. Yes.

Q. Have you searched the company's records to ascertain whether you can find any record of any kind relating to the valuations made of the property 233,235,237 Glebe Point Road in March 1973 and the valuation of land 18-20 East Crescent Street, McMahons Point in June 1973? A. I have searched the records. There is nothing. 40

Q. Is there any record of any invoice having been sent to anybody in respect of those valuations? A. No.

Q. Or any fees having been received in payment for those valuations? A. No.

Q. Is there any file of any kind relating to those valuations? Have you searched and found any? A. No, there is nothing.

Q. Were you aware in 1973 that valuations were being made of those properties? A. No, I was not aware at all.

Q. You said a little while ago if a client had credit then his valuation was sent only if not another course was adopted. Who decided whether a client would be given credit or not? A. Any director of the company. In actual fact it was more me than the others.

10

Q. Did anybody working in the Valuation Division except yourself have authority to give credit? A. No.

Q. Was there any practice observed by the secretaries working in the division as to keeping a record of work which they were doing? A. Yes. It was an unofficial but additional check between the registration area, and the accounts area. They drew from the accounts department blocks of numbered invoices and they were accountable for. So that there would not be any embarrassment, a girl drawing one of those forms would, on an arrangement that I instituted, put the numbers of that block down the line of a foolscap sheet and opposite the number that she had entered she would then place the address of the property valued and the valuer's initials. There would be the date on which it was sent out. She would have a column that allowed for payment because she would have a note of the receipt that she sent against that invoice number and the date on which she typed it. I think, there were about five or six columns and those columns were then able to be checked backwards through either the registration area or the accounts area and the girl could not be blamed for having perhaps lost an invoice. It also prevented invoices from being stolen or mislaid in some way and it was a ready check for me on the amount of fees per month that were coming in and the number of valuations that were being done.

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Q. For how long after those lists were made were they kept? A. By chance rather than any other arrangement, they have all been kept many, many years.

Q. Have you checked to see whether there is any entry on any of those lists relating to these two valuations? A. There is none.

40

HIS HONOUR: Did you have a secretary with initials S.C.? A. Yes.

Q. Who was that? A. Mrs. Sue Coleman.

MR. MORLING: Q. Was any work done gratuitously for clients?

A. Yes, there were occasions when work was done. We regarded it, quite often, as a charitable gesture to do some work for some of the organisations and institutions that were deserving of that sort of thing.

Q. Who decided whether you would waive a fee? A. Well usually I would make a preliminary decision and probably discuss it with the managing Director or one of the co-directors and I can't ever remember that situation not then having been adopted. 10

Q. Did anybody other than yourself in the valuation division have any authority to waive the fee? A. No.

Q. Was there any system in the office in 1973 where messages would be left for members of the staff? A. Well, I suppose the point at which that happened, and happens everywhere, is at the switchboard.

Q. Was there a clipboard somewhere in the office? A. No, I can't particularly remember any particular point other than the switchboard where messages would be left. 20

Q. Was there any practice whereby valuers working in the division kept a record of the instructions they were executing? A. Well, that goes back to what I was talking about before, the clipboard on which they wrote their valuation instructions if they came in.

Q. When valuations were typed by the secretarial staff, was there any practice as to identify the valuation with either the valuer who had prepared it or the typist who had typed it? A. Both initials were used. There was the valuer's initials came first and then the typist's initials followed. 30

Q. I think there was a space on the cover sheet -- there was a space on the front page of the valuations where those initials would commonly be put, is that right? A. What we term the "Reference box", yes.

Q. What was the practice as to the signing of valuations, in 1973? A. All the valuers signed them with the words "Richardson and Wrench Limited".

Q. From time to time were bad debts incurred in running this side of the company's business? A. Yes.

Q. Did you concern yourself with the bad debts provisions? A. Well, the responsibility of drawing attention to the bad debts, I suppose was an accounts department function and the 40

accounts department used to provide a list at the end of each month or just prior to the end of the month in which there would be the three months of bad debt and I received a copy of that for the valuation department. That would be circulated among all the valuers, each with the valuations that he had undertaken, marked with his initials and it was his responsibility to report back to me his success, firstly, in recovering the money and, secondly, a reason why he wasn't able to recover the money so that I, in turn, could regard the debt as either a short term one or truly a bad one. 10

Q. Prior to November, 1972, had the company done work for a company called Giles Bourke Holdings -- done valuation work?

A. The name "Giles Bourke" the "Holdings" part is hindsight, the "Giles Bourke" part, I can remember the name but whether I distinguished it as "Giles Bourke Holdings" at that time, I can't recall, no.

Q. Can I ask you to look at that document? (shown). Did you produce that document in November 1972? A. Yes, I did.

Q. Can you identify (counsel approached) the signatures on it? 20
A. Yes. That is "Rowan".

Q. The first one is "Rowan". The second is --? A. That is "Large" who was an unqualified person still doing his exams at the time. The third is "Rathborne".

Q. Is that Mr. T.G. Rathborne? A. Yes. The fourth is Mr. Davies and the fifth is Mr. Blakely.

Q. Were they all valuers engaged as at 20th November, 1972 in the valuation division? A. Yes. I only have the reservation that I think that F.E. Large -- I can't remember his initials -- Large -- was a trainee at the time awaiting qualifications. He only did work under supervision. 30

Q. And did you circulate that document to all the valuers then working in the division? A. Yes. They were the only ones.

Q. Did it come back to you signed in its present form?
A. Yes.

Q. And prior to sending it to the valuers, did you check the bad debts position in respect of the persons or companies mentioned in the document? A. I consulted with accounts on that before I wrote that memo. 40

(Memorandum from Mr. Hodgson to Messrs. Rathborne and others, dated 20th November, 1972, tendered without Exhibit note with objection, admitted and marked Ex. 7)

Q. Did you ever countermand that instruction? A. No.

Q. I just take you back to an early matter in relation to preparation of copies of valuations. Did Richardson and Wrench in 1973 issue photostat copies of valuations. A. No. I can't recall a photostat being issued as a valuation.

Q. Would a client sometimes ask for a further copy of a valuation which he has already received? A. Yes.

Q. How was such a request complied with? A. Well, we would tell him that, for a fee, we would provide him with a typed facsimile of the valuation that he had, providing he could establish himself as the owner of the valuation and it would be typed as an original and copy and both would be stamped with the word "Copy" and the fee would be about \$15 at that time, as I recall it. 10

Q. When did Mr. Rathborne join the staff of Richardson and Wrench Limited? A. I think it was July 1970.

Q. I think he had previously worked for a company known as Lend Lease Homes Pty. Limited, had he not? A. Yes.

Q. And when he joined Richardson and Wrench, in what capacity was he employed? A. In Richardson and Wrench. 20

Q. Yes? A. He was a valuer.

Q. For how long was he employed? A. Until the 31st May, 1974.

Q. What were Mr. Rathborne's duties in 1973; in the first half of 1973? A. He was engaged as a valuer to make valuations for the company's clients in accordance with our established practice in making valuations, that is, that they go out in a certain form which included an invoice and that he charged and was ultimately responsible for the fee - - responsible to me for the fee, at least - - that he had the valuation registered by the typists and that the copies and working papers and any documents that he had were filed with the typed third copy. 30

Q. What authority, if any, did he have to make valuations for persons who were not clients? A. None.

Q. What authority, if any, did he have to employ people to type valuations, outside the office, or inside the office for that matter? A. He had no hire or fire authority at all.

Q. What authority, if any, did he have to give credit? A. None.

Q. Or to make gratuitous valuations? A. None.

Q. What authority, if any, did he have to remove office stationery and letterhead from the office? A. None.

Q. When Mr. Rathborne was appointed, did the company have a document called a "company manual"? A. Yes, it did.

Q. And does part of that manual relate to the valuation department? A. Yes.

Q. (Approached) Is the document I am now showing you the company manual as it existed when Mr. Rathborne joined the company, with the exception of the three pages which are clipped together and which follow immediately page 65 in the manual? (shown) A. Yes, it appears to be, on a quick look. The basis of it is as it was then and these pages are the pages that were in it at that time. 10

Q. And were the three pages clipped together added some time after 1973? A. Yes. I can't recall now the precise date but it was after 1974, I think.

Q. After 1974? A. I think. I can't remember, now.

Q. And the pages which are particularly relevant to the valuation department, I think are pages headed "Procedures relating to the Valuation Department" commencing on page 63 and running through to page 66? A. That's right, yes. 20

(Company manual tendered: objected to)

Q. Can I ask you this before I tender it: were the three pages clipped together included in the manual after Mr. Rathborne left the company's service? A. That is my impression now, yes.

(Defendant's company manual with the exception of three pages clipped together tendered, admitted with objection and marked Ex. 8) 30

Q. Did you ever give Rathborne permission to have valuations typed outside the company's offices? A. No.

Q. Did you give Rathborne the manual when he joined the valuation division? A. Yes.

Q. And did you see what he did with it? A. Well, he took it and opened it.

Q. And was it kept in the office? A. Yes. It was available in my office. That wasn't the only one. It was available in other offices.

K.W. Hodgson, x

Q. It does, of course, deal with divisions other than the valuation division? A. Yes.

(It was agreed between the parties that in Ex. A the two valuations are signed in the name of "Richardson and Wrench Limited" in the handwriting of Mr. Rathborne)

Q. Mr. Hodgson, I think I have asked you this, but did you give Mr. Rathborne permission to remove stationery or letter-head from the Company's offices? A. No.

10

Q. Would you look at that bundle of 32 documents? (shown) Indeed, I think you have done that over the lunch hour, have you not? A. Yes, I have.

Q. Are the words "Richardson and Wrench Limited" which appear at the foot of each of those documents, in Mr. Rathborne's handwriting? A. I think so, yes.

Q. Have you any doubt about that? A. No.

(32 documents above-mentioned M.F.I.5)

(Witness stood down)

(Further hearing adjourned to Friday, 6th June, 1980 at 9.30 a.m.)

20

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
) No. 3568 of 1976
COMMON LAW DIVISION)
)
COMMERCIAL LIST)

CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED

v.

RICHARDSON & WRENCH LIMITED

FIFTH DAY: FRIDAY 6th JUNE, 1980

HIS HONOUR: Have you come to any conclusion as to what you want to do with that question that we parted on last night? 10

MR. CLARKE: Yes your Honour. It seemed to me that as the argument in relation to these documents is so interwoven with ultimate argument, it might be better delayed, subject to objection, at this stage, and reserved for argument. I would anticipate that I would be in a position to deal with that without having to seek any indulgence at any time, but I would only seek some reservation in that regard.

HIS HONOUR: I thought it might help, in the eventual despatch of this case if I did start to think about how you are going to put this, and without binding you in any way, I just find myself in some difficulty in trying to see how you are going to formulate this argument. It almost looks like a circular proposition. I read Morris' case last night and I had another look at the New Zealand decision, and essentially what the New Zealand case does for you is, by the majority it seems to suggest that in a situation where some accountants or auditors certify public accounts for a company, which it was reasonable for them to foresee would be published to the world at large there is a duty of care, and in the circumstances there may or may not have been breach. 20 30

In Morris' case what the court said was that there was a pre-existing duty of care, and that it was no excuse in that situation to say that it was a servant, even acting outside the course of his employment, who brought about the damage. But you see the circularity in what comes first. Now how are you going to get round that?

MR. CLARKE: Your Honour, there are two ways I propose to approach it. The first way is that we would put the argument on the assumption there was a duty of care - and I appreciate the circularity - and deal with the question of fraud of the servant, if I can put it in that way, first, and seek to 40

establish that if there was a duty of care, then the fraud of the servant did not remove that duty, or the defendant's responsibility.

HIS HONOUR: That is a proposition I do not find a great difficulty with.

MR. CLARKE: The second proposition is then to look at the circumstances. If one then accepts, we would say, that the defendant's responsible in law for the activities of his servant, albeit in the fraudulent sense, then that situation extends to a situation in the Hedley Byrne; so the duty arises where the defendant, either itself in its normal course, issues valuations, or whether valuations are issued for which it would in normal circumstances be responsible. 10

HIS HONOUR: Where there is a duty of care; that is where the circularity comes in.

MR. CLARKE: We put it that they are not. If they were genuine valuations, there would be a duty of care; and what we say is that once one establishes under the fraud area that they are responsible for his valuations, the same duty arises.

HIS HONOUR: The difficulty that I feel with it at the moment is, it neglects the very special nature of this Hedley and Byrne count. But anyway, I understand what you say, and we will talk about it later. I just wanted to know how you are going to put it. 20

MR. CLARKE: There is no case that I know of that seeks to involve a marshalling as it were of the Hedley Byrne situation; but that we would say really is that it is aligned to the straight fraud cases. There is also of course the fraud count, which might loom very large as this case gets deeper.

HIS HONOUR: One other thing before we resume the evidence - I do not know if either or both of you have read a judgment of the High Court which was published I think early this month, Wyong Shire Council and Scherr. It seems to treat this question of foreseeability in a way that has -- 30

MR. CLARKE: Yes, foreseeability has gone; everything is foreseeable. I was in that case, and Mr. Justice Glass disagreed with what the Chief Justice said in an earlier case, and he was upheld in that view.

HIS HONOUR: I do not know what role, if any, it might play in this case, but it might affect the way one looks at Hedley and Byrne and the scope of the duty once you put foreseeability to one side, in a sense. 40

MR. MORLING: Your Honour, I do have a short witness who I would like to interpose. I think Mr. Hodgson will be in the box, one

way and another, for some time; and my friend has no objection if I interpose her.

MR. CLARKE: I am taken a bit by surprise, your Honour; but I certainly have no objection.

(32 valuations, formerly M.F.I.5, admitted subject to objection and marked Ex. 9).

HELEN LYNNE CLARKE
Sworn and examined:

MR. MORLING: Q. Is your name Helen Lynne Clarke? A. Yes it is.

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Q. You are a housewife? A. Yes.

Q. You live at 86 Norman Avenue, Thornleigh? A. Yes

Q. In 1973 did you work at Glebe Point Road, Glebe? A. Yes I did.

Q. For whom did you work there? A. I worked for a company named Fidelity Acceptance.

Q. What was the address where you worked? A. 233 to 235 Glebe Point Road.

Q. When did you commence work there? A. In February 1973.

Q. Did you know a Mr. Bourke? A. Yes.

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Q. Did he introduce you to a Mr. Rathborne? A. Yes he did.

Q. What work did you do there? A. Secretarial, clerical work.

Q. Were you a typist as well as doing clerical work. A. Yes.

Q. From time to time did Mr. Rathborne give you any work to do. A. Yes.

Q. What sort of work did he ask you to do? A. Valuations.

Q. Did he give you anything on which to type valuations.
A. Yes, he provided me with paper to type on.

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Q. Did the paper have any letterhead on it? A. Yes, it was Richardson & Wrench paper.

Q. Where were you when Mr. Rathborne gave you typing work to do? A. In my office.

Q. In Glebe Point Road? A. Yes.

Q. Were you ever employed at Richardson & Wrench? A. No.

Q. Or did you ever go to their offices? A. No.

Q. Before you typed the first valuation, were you given anything as a precedent? A. Yes, I was given a format to follow.

Q. (Approaches witness) I am showing you Ex.B, Mrs. Clarke. Can you recall whether you typed that? A. Yes, I would say I typed it.

Q. Would you look at Ex. C. Can you recall whether you typed that - and I am referring only to the original documents which form parts of those two exhibits? A. Yes, I would say I did. 10

Q. Over what period of time were you typing out valuations at the Glebe offices for Mr. Rathborne? A. I couldn't tell you the exact time - a matter of months, I would say.

Q. When did you leave the employ of Mr. Bourke at Glebe Point Road? A. I think November 1974, I am not sure.

Q. Are you able now to recall how many valuations you typed out at the Glebe Point Road offices, for Mr. Rathborne?
A. No, I could not give an exact number. 20

Q. Would you know whether it was two or 20 or 200? A. Oh, approximately 30, I would say.

Q. Did you look at the bundle of documents which is Ex. 9; are you now able to recall whether you typed those documents? (Witness looks at documents?) Can I just interrupt you for a moment, before you finish looking through them: do you have any way of identifying the sort of typing which you used to produce out at the Glebe Point Road offices in those days?
A. I don't know what you mean?

Q. Can you recognise documents which you typed? A. I would say. 30

Q. Yes, thank you; would you keep on looking at them? A. I think I typed all of these, except I don't recall this one.

Q. You typed all documents in Ex. 9 except one marked 3rd April, 1974, in respect of property described as being 399 Glebe Point Road, is that right? A. Yes.

Q. Can I draw your attention to the documents and indicate to you that there is a window on the first page of every document; do you follow that. A. Yes.

Q. Can I draw your attention to the fact that in some of the windows there appear some initials typed in? A. Yes.

Q. When you typed in initials in windows, who told you what initials to put in? A. Mr. Rathborne.

Q. Are you now able to remember whether, when you first started to type valuations, you typed initials in the windows of the valuations? A. No, in the early valuations I left it blank.

Q. You had no instructions what initials to put in, in the early valuations? A. No.

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Q. When you typed valuations, did you only type an original or did you type copies as well? A. I typed an original only.

Q. And after you had typed them, what did you do with them? A. They were signed and photocopied.

Q. Did you see who signed them? A. Yes I did.

Q. Who was that? A. Mr. Rathborne.

Q. And did you say photostat copies were made? A. Yes.

Q. Was there a photostating machine in the office? A. Yes.

Q. Was anything done to put a backing or binding on the valuation after they had been typed? A. Yes, after they had been photocopied they were bound.

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Q. Who did the binding? A. I did.

Q. Where did you get the binders or backing from? A. They were provided by Mr. Rathborne.

Q. And there is some green tape on I think all of the originals; from where did you obtain the green tape? A. It was purchased from the local stationers.

Q. Did you ever take any of the valuations anywhere? A. Yes, I took a number of them to Roland Gridiger's office.

Q. Was he a solicitor? A. A solicitor.

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Q. Can you recall if you took any others anywhere else? A. No.

CROSS EXAMINATION

MR. CLARKE: Q. Mrs. Clarke, you have of course given evidence of these matters or similar matters way back in 1975, have you

not? A. Yes.

Q. And the position was that when you first got instructions to type a valuation, you got them from Mr. Bourke, did you not?

A. I was asked to type valuations by Mr. Bourke, yes.

Q. To do them at Mr. Rathborne's behest, is that right?

A. Yes.

* Q. And you were asked to do that because you were told that the valuations were needed urgently, and people were very busy in Richardson & Wrench?

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MR. MORLING: I will object to what Mr. Bourke may say, your Honour.

HIS HONOUR: I would not have thought it was admissible, but I am going to admit it nonetheless, Mr. Clarke, because I do not know how his case is going to be put finally. As I indicated earlier, I have some difficulty in seeing it, so I will admit it.

(Question marked * read).

WITNESS: Yes, that is right.

MR. CLARKE: Q. You told us a moment ago that with the early valuations you did not put anything in the window because you had received no instructions to put anything in the windows?

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A. Yes, that is correct.

Q. (Approaches witness). I show you part of Ex. 9; by 20th March, 1973, you had received the instructions to put initials in the window, had you not? A. Yes.

Q. And I take it that you typed on the correct date always?

A. Yes.

Q. So that the date one seems of these valuations you typed is the date on which you actually typed it? A. Yes.

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Q. And thereafter, if initials did not appear in the box, it was just because you forgot to do it at the time, is that right?

A. Possibly yes.

Q. Once you had the instructions to put the initials in, you did not deliberately leave them off any later valuations?

A. No.

Q. Also the valuations when typed were always taken, were they not, as quickly as possible to Roland Gridiger & Co.

A. The majority were taken. Some were retained in our own files.

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Q. Do you remember which ones were retained in your own files?
A. No.

Q. But certainly the original valuation was retained either in your own files or sent to Mr. Gridiger? A. Yes, that is correct.

Q. As secretary you did, from time to time, did you not, make payments for valuations to Richardson & Wrench? A. I made payments to Richardson & Wrench on some occasions, but I can't recall what the payments were for.

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Q. (Approaches witness). I want to show you a photostat copy of a letter, and I call for the copy held by the defendant; it is a letter from the defendant to Group Unity Securities of 18th December, 1973. Perhaps in the meantime I can just work from the copy. Do you see that letter addressed is that to your attention? A. Yes.

Q. Would you just have a look at that. Does that letter refresh your memory that payments were made by you in respect of some valuations, to Richardson & Wrench? A. I can't recall, having seen that letter before.

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Q. But do you recall now, in any event, having made payments to Richardson & Wrench for valuations? A. As I said before, I can remember payments being made to Richardson & Wrench but I can't recall what they were for.

Q. You have got no recollection what they were for? A. No.

Q. Did you see other Richardson & Wrench valuations, other than the ones you typed? A. I can't recall.

Q. You mean you cannot recall one way or the other? A. No.

Q. Did Richardson & Wrench to your knowledge do any work for you, leaving aside valuations - do any other work for the company? A. They could have done work prior to my working for the company.

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Q. No - while you were there? A. I don't recall any.

Q. You have no knowledge of any work Richardson & Wrench did for any of the companies you worked for? A. No.

Q. (Approaches witness). I want to show you, incidentally, some more valuation reports, and there is one related to 18 Blandford Avenue, Waverley? A. Yes.

Q. It is dated 30th March, 1973. Would you just have a look

at it. It is signed on the back; do you recognise that as Mr. Rathborne's signature? A. Yes.

Q. And is that your typing of that valuation? A. Yes, I think so.

Q. In the box where there is a stroke, was that your habit to put a stroke? A. Yes.

Q. And Mr. Rathborne gave you the instructions to put the initial "SC", did he? A. Yes, that is right.

Q. And if you look, in with this there is a copy of valuation bearing date of January 25th, 1972? A. Yes. 10

Q. And it relates to 18 Blanford Avenue, Waverley; do you see that? A. Yes.

Q. Again on Richardson & Wrench letterhead; do you see that? A. Yes.

Q. The signature in the copy is not Mr. Rathborne's? A. No.

Q. I want to ask you whether you in fact simply copied the copy valuation, simply copied it word for word until you came to the amount at the end? A. I didn't copy any valuations word for word. 20

Q. If one looks - assume this for a moment - at the original and the copy, it is word for word until one gets to the last paragraph, the estimated amount? A. Yes.

Q. Do you say that you did not copy it word for word? A. No.

Q. Or was it dictated to you? A. I received most of the valuations by dictation, which I took in shorthand.

Q. From Mr. Rathborne? A. From Mr. Rathborne.

Q. Would he be reading something when he gave you dictation? A. Only from notes, generally. 30

Q. Well, there may have been cases where he was simply reading something such as this copy valuation, might there not? A. I don't recall. I never noticed him doing it.

Q. Well, do you just deny in this particular instance simply copying out the earlier version, with a substituted value given by Mr. Rathborne? A. Yes.

Q. You deny that, do you? A. Yes.

Q. Again if one looks at 51 Ferry Road, Glebe valuation, 30th March, 1973, again that is your typing, is it not, in the original valuation? A. Yes.

Q. Mr. Rathborne's signature? A. Yes.

Q. And an earlier copy valuation of 14th June, 1972, not in your typing? A. No.

Q. And signed by someone other than Mr. Rathborne? A. Yes.

Q. And you did not simply copy the earlier one? A. No.

Q. Would you have a look at a valuation dated 17th September, 1973, for McGurgins Lane, Mullumbimby. Was that typed by you, or not? A. I don't recall using this initial. 10

Q. Just have a look at the typing? A. No, I don't think I typed that, but the typing is similar.

Q. You don't think you typed that? A. No.

Q. I show you one in relation to 55 Gottenham Street, Glebe of 13th December, 1972. Would you have a look at that typing - again different initials? A. I don't recall using any other initials.

Q. Other than "SC"? A. No. The typing is similar to the typeface that my typewriter had. 20

Q. I will put that with the other one. But if one looks at the copy in respect of 51 Ferry Road, Glebe and compares that with the original of the same Ferry Road, Glebe, there appears to be a difference in the typing of those two, does there not? A. Yes.

Q. And if one looks at the one we are now looking at 55 Gottenham Street, Glebe - it appears to be more consistent - take your time - with the original which you typed rather than the copy? A. Yes. 30

HIS HONOUR: Q. Well, did anybody else use your typewriter, so far as you were aware? A. Not as far as I was aware.

MR. CLARKE: Q. Again, 49 Gottenham Street, Glebe, the initials are "TGR/AB", and signed in Mr. Rathborne's writing? A. Yes.

Q. Did you type that one? A. Well, as with the other one, the typing is similar but the initials I don't recall.

Q. And there is one without anything in the box, for the Court House Hotel and adjoining shops at Mullumbimby? A. Yes.

Q. Is that one you typed or not? It is signed by Mr. Rathborne again? A. I remember typing valuations of properties at Mullumbimby. I probably did type that one, yes.

Q. That is one dated - inside it is shown as 7th March, 1973, although the outside says 6th March, 1973? A. Yes.

Q. And again freehold property at Mullumbimby, 18th April, 1973, nothing in the box, but again signed by Mr. Rathborne? A. Yes.

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Q. Is that one you typed? A. The typing is very similar, yes.

Q. And then 3rd August, 1973, 33 Glebe Point Road, signed by Mr. Rathborne and with the initials "TGR/SC"; is that one that you typed? A. Yes, I would say so.

Q. And going back to the Mullumbimby one that we last dealt with, having a look at the two typings, have you any real doubt that they were both typed by you? A. No, the typing is very similar, yes.

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Q. And then 14th August, 1972, 23 Glebe Point Road, "TGR/SC", and Mr. Rathborne's signature; is that another one you typed - I draw your attention to the fact that the date inside is 1st August, 1973? A. Yes.

Q. Perhaps you might just look at these four and tell me whether you typed those four? A. Yes, I typed them.

Q. And finally one, under instructions from a company called Group Unity Syndications Pty. Limited, dated 30th March, 1973, nothing in the window, but signed by Mr. Rathborne? A. Yes.

Q. Is that one that you typed? A. Yes.

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Q. And Mr. Rathborne was to your knowledge a director or shareholder of Group Unity Syndications Pty. Limited? (Objected to, rejected).

(12 valuations, originals of which were typed by Mrs. Clarke, M.F.I. 6).

(Three valuations, said not to have been typed by Mrs. Clarke, M.F.I. 7).

MR. CLARKE: Q. Mrs. Clarke, you have said that you can't remember what you made the payments for, and I want to refer

you to a statement you made in evidence. You were asked this question, "And do you remember making, did you have anything to do with making payments on behalf of any of the companies for valuation?" and your answer was, "Sometimes, yes". The next question, "Do you remember making some payments to Richardson & Wrench?" and the answer was, "Yes I do". Now would you like to see that in a transcript? A. No.

Q. Perhaps I will just show it to you. (Approaching witness). You see the reference, p.94, second question? A. Yes.

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Q. Do you accept that you gave that evidence? A. Yes.

Q. And when you gave that evidence it was the truth, was it? A. Yes.

HIS HONOUR: Mr. Clarke, I think it is not inconsistent with her inability to recollect. Really, the payments to Richardson & Wrench do not necessarily refer to valuations.

MR. CLARKE: Q. Do you remember what the approximate amounts of payments were you made? A. No.

Q. You were asked by Mr. Morling some questions about photostats being taken of some of the valuations in at the office, is that right? A. Yes.

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Q. And if a photostat was taken, what would happen to the original? A. A photostat was made in all cases, and in most cases the original was taken to Roland E. Gridiger & Co.

Q. And the photostat was retained in the office records? A. The photostat was recorded.

Q. Would this be correct, that in all cases the original was sent, and in some cases, copies as well? That is possibly correct.

Q. And can you recall any one case where just a photostat copy was sent to Gridiger? A. No.

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Q. You speak about typing up the valuation in the manner we have seen, with the green tape? A. Yes.

Q. And then you were asked, "After he signed it, you put the back sheet on it, did you?" and the answer was, "Photocopied it first", and that was correct, was it not? A. Yes.

Q. You made two photocopies? A. Yes.

Q. And then you placed it in a back sheet and put the tape on it? A. Yes.

Q. And the next question, "What happened to the valuation after that? A. It was taken in to the solicitors"? A. Yes.

Q. "The solicitors Roland E. Gridiger & Co", and then you were asked, "Was it the original which was sent?" and the answer was, "Yes". The next question, "Were any copies signed as well? A. Not usually, sometimes". That was the procedure that was followed, was it? A. Yes.

RE-EXAMINATION

MR. MORLING: Q. Were there any other typists working in the office of Mr. Bourke whilst you were working there? A. No. There was a typist working in the office of Peter Craig Real Estate, which was downstairs. 10

(Witness retired and excused).

KEITH WILDON HODGSON

On former oath:

HIS HONOUR: Mr. Hodgson, you are bound by the oath you took yesterday.

MR. MORLING: Q. Mr. Hodgson, I want to now take you to early 1972. At that time can you recall having any conversation with anybody from the Kooragang company? A. Yes - well, perhaps not distinguished as Kooragang, but certainly A.F.L. 20

Q. Can I ask you this: you know a Mr. Simpson who was at that time working for Australian Fertilizers Limited? A. Yes I do.

Q. Can you recall having a conversation with Mr. Simpson early in 1972? A. Yes.

Q. How did that conversation come about? A. He telephoned me to say that his company was considering the probability of lending money and that a small finance company would be formed to operate to distribute that money in first mortgage areas wherever it could, and that they were not very aware, as a newcomer to that field, and that perhaps with the experience that Richardson & Wrench had had in dealing with other companies, that we might be able to give them guidelines to assist them in the formation of the real estate side of the operation. 30

Q. What did you say, as best you can recall? A. I told him that merely from the real estate side of the operation I could assist him, and that I would be glad to call and discuss it at a suitable time, and that was eventually agreed to and I attended their offices in North Sydney. 40

Q. Then you went to the North Sydney offices of Australian Fertilizers did you? A. Yes, and met Mr. Simpson and Mr. Satchwell and had a discussion on the methods that I saw perhaps as reasonable and proper ones to commence the operation that they had in mind.

Q. As best you can, can you tell his Honour what you can recall of that conversation? A. Well, it is so far back now that it is difficult to do more than say that the essence of the conversation was committed to a later letter, and followed pretty well, I would think, the discussion itself. I could not be precise on the details of the conversation, though.

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Q. I will turn up that letter in a moment. But in due course was there some correspondence between Richardson & Wrench and Kooragang? A. Yes there was.

Q. And in particular I think there was a letter of 21st February, 1979 which is document G.9 of Ex. A? A. Yes.

Q. Did that letter more or less follow the lines of the matters which had been discussed at the talk in the North Sydney office? A. Yes, and among the various items that were discussed I do remember were the subject of sample forms for Kooragang, or as it was to be Kooragang I think at that stage, to pattern their correspondence on.

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Q. Are you able now to recall any part of the conversation which dealt with the situation where a formal valuation would not be required from Richardson & Wrench but some informal expression of opinion might be called for? A. Yes. I pointed out to them that there were occasions when a valuation might be unnecessarily sought and that would be an expensive exercise, and indeed that in some cases we might perhaps reject a proposition as not being a suitable one for them, and that to overcome that problem we would do what is termed a "foot-path examination" - we would look at a property, sum up whether or not, from its external appearance, it would appear to have satisfied their requirements, and for that we would charge a fee of \$25, which would become part of the total fee in the event that we were instructed to carry on and do the valuation for them.

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Q. Part of the total fee if you were later instructed to carry out a full valuation - do I apprehend correctly what you said? A. That is right.

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Q. You said just a moment ago words to the effect that you might reject a property, or some such words; was there anything said about properties which might, in your opinion, not be suitable for mortgage purposes? A. Well, no doubt there was.

I can't remember the circumstances now, but the mere fact that the precautionary footpath examination was suggested would indicate that the situation was in my mind and that there would be properties that could be rejected as not being suitable securities.

Q. Had the Australian Fertilizers Limited Group been clients of Richardson & Wrench for some time, as at 1972? A. Long before my entry into the company, yes.

Q. And had that been a continuing client/valuer relationship? 10
A. Yes.

Q. Can you recall whether anything was said as to whether you would regard yourself as the mortgagor or the mortgagee's valuer, in those cases in which a formal valuation would be called for? A. Yes, the whole tone of the conversation was, -- (Objected to: withdrawn).

Q. What was the effect of what you said on that matter - that is to say, as to whose valuer you would regard yourselves as being, in those cases in which you were called upon to make a formal valuation pursuant to the arrangement which you were discussing in the conversation? A. I believed that Kooragang was the person from whom we would get our instructions, as the person who wanted the valuation. 20

Q. Who would be paying for the valuation? A. The intending mortgagor.

Q. Apart from what appears in the correspondence, do you have now any independent further recollection of matters discussed at that conference? A. Oh, I think I outlined in a general way - because it could only be a general conversation - the types of things that would be necessary for them to have in valuations, and that included the -- 30

Q. Doing the best you can, will you tell his Honour the sorts of things which you outlined in the conversation? A. Well, the land and its dimensions; the zoning of the land; the nature of improvements; if they were not owner-occupied, the details of tenancies; repairs. That generally, I think, would have covered the types of things that we discussed.

Q. Can you recall whether Mr. Simpson or Mr. Satchwell themselves raised any particular matter which they would be looking for in your valuation of price? A. Oh, they said, I think, if I remember correctly, that they were seeking property that would appreciate in value, and not be left on their hands as a problem property; properties that were not peculiar in an area, that were typical of an area; and at all times that there was the necessity that those properties be proper securities for what 40

they intended to lend on.

Q. Can you recall that in the letter of 21st February there is reference to a desire to have a valuation which will show land and buildings separately? A. Yes, I can remember that.

Q. Are you able now to remember whether anything was said about that in your conversation? A. Well, that would not have been at the initial conversation; that was after I received the letter.

Q. After you received the letter, did you continue to have any contact, either over the phone or in any other fashion, with any executives of Kooragang? A. Yes, as I recall it now, it would be a fairly frequent contact that we have, much more frequent than in the former A.F.L. days. 10

Q. If I can just take you to the period of time up until the end of June 1973; during that time, was there a Mr. Minks in the Kooragang organisation? A. Yes, he was introduced I think almost as soon as - I am not sure of this, but my impression is that he came to the company and was introduced as a person who was part of the Kooragang arm of the company. 20

Q. Between February 1972 and the end of June 1973, can you recall which persons at Kooragang you had any contact with, either directly or by telephone? A. Well, very frequently it would have been Mr. Satchwell; quite frequently it would have been Mr. Simpson; and on a reasonable number of occasions after Mr. Minks came, Mr. Minks would contact us. After Mr. Minks left --

Q. No, I will come to that later; just leave it to the first period. Were these contacts mostly by telephone or exclusively by telephone, or what? A. Mostly by telephone. Sometimes they would call at the office, at our office, and I do remember on one or two occasions calling at their office. 30

Q. Can you now tell his Honour the sorts of matters which were discussed when these contacts were made? A. Oh, generally for some problem that arose, in their minds, on the nature of a property, or the lack of information that we might have been able to get quickly enough to allow them to proceed with their loan, or the intention to lend.

Q. Was there any reference in any of these contacts to a request for a separate land and a separate building value? A. Yes, I remember discussing that with Mr. Simpson. I pointed out to him that it was a rather academic situation, that the merge point of land and buildings was such that one conferred value on the other - or conversely, that one depreciated the other - and that it was a rather unnecessary exercise, because 40

they were looking at the whole, in every case other than a case - which I cannot recall having arisen - where it was purely land that they were considering.

Q. Were you contacted in any fashion at all by anybody from Kooragang in relation to that company's intention to lend moneys on the property 233, 235, 237 Glebe Point Road? A. No, never.

Q. Were you contacted at all by anybody from Kooragang in respect of its intention to lend money on the security of the property at East Crescent Road, McMahon's Point? A. No, never. 10

Q. In 1973, and in particular July 1973, had an inquiry come to the company's valuation division in relation to a valuation which did not bear any valuer's initials, how would the inquiry be dealt with? A. Oh, supposing it was a phone call, it would have commenced at the switchboard, and the switchgirl would have asked me to take the call, because she would not have any initials or name referred to her; and it was general practice that any valuation inquiry came to the Valuation Department and she would have had no option but to pass it to me. 20

Q. And suppose it had been made orally by a person coming to the premises, would the same thing have applied? A. Yes, that person would have been directed to me.

Q. And if a letter had come in, the same thing? A. That would have automatically come to me, yes.

Q. Would you have had any difficulty, in July 1973, in ascertaining whether a valuation which purported to be one of your company's valuations was in fact one of the company's valuations? A. No, there is no difficulty in discovering that.

Q. Just one small matter of detail from yesterday, which may not be clear from the transcript. You said that the pink copy of valuation was filed? A. Yes. 30

Q. After it has been made; was there anything filed with the pink copy? A. The pink copy and the working papers were all filed together.

MR. MORLING: Your Honour, there are just a few matters to deal with some of the files, which I think have not been dealt with by Mr. Clarke, which I would like to deal with now. I was proposing to have a word with Mr. Clarke between now and 2 p.m. on Monday, to agree between ourselves as to which of the files to tender. But I was not going to go through the tedious task of taking the witness through all the files. I think it is my intention to tender all the files listed on the interrogatories. 40

There are one or two I would like to deal with now. Could I have access to a number of those files produced by Richardson & Wrench Limited.

HIS HONOUR: Yes.

(Short adjournment).

ON RESUMPTION

MR. MORLING: I was intending, your Honour, to ask Mr. Hodgson about a few matters referred to on the document which is annexure A to the interrogatories. I presently have in front of me only photostat copies of original documents which, for some reason I do not understand, are not presently in court. I do not think this is going to be critical material, and I shall certainly produce the originals to my friend on Monday in case he wishes to verify them. 10

HIS HONOUR: Very well.

MR. MORLING: Q. (Approaches witness). I propose first to ask the witness about a property which is noted as 39 Rhodes Street, Hillsdale, which is the third item on p.2 of annexure A. Mr. Hodgson, have you been able from your company records, to get some working papers which were brought into existence for the purpose of making that valuation? A. Yes. 20

Q. I am showing you what is a photostat copy of those working papers; can you, by reference to those papers, tell me who it was who actually made that valuation? A. It was Mr. Weir.

Q. I draw your attention to a handwritten note headed, "Kooragang, Ray Little, 39 Rhodes Street, Hillsdale". Whose handwriting is that? A. Mine. He spoke to me on the phone.

Q. Did Mr. Little speak to you? A. Yes, and I wrote down details of what he was talking about. 30

Q. And in respect of that matter, did Mr. Ray Little of Kooragang ring you and discuss certain aspects of the valuation in respect of that property? A. Those details that I have noted, yes.

Q. Can I next draw your attention to a property, 91 Wolseley Road, Point Piper, which is on the list attachment A. By reference to your file I think it can be seen that in fact a formal valuation was not provided, but a letter was written to Kooragang on 3rd January advising that you had made an external inspection of the property? A. Yes. 40

Q. By reference to the handwritten notes which form part of your file can you tell me whether there was any oral contact between Kooragang and Richardson & Wrench in relation to that matter? A. Yes, Mr. Simpson telephoned me and said that Ray Little wanted to talk about a property; I gave it to Mr. Weir to make the contact.

Q. And is there any handwritten note in the file which enables you to be certain of that? A. Of my - no, I can only recall that I did that.

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Q. You can recall in respect of that matter? A. Yes

Q. The details of that particular matter, for my purposes, do not matter. Can I show you another Richardson & Wrench copy file relating to yet another matter, not on the list attached to the interrogatories, and relating to a property known as 202/204 Milperra Road, Milperra? A. Yes.

Q. Can you yourself recall having some discussions with somebody from Kooragang about the valuing of those premises? A. Mr. Minks got in touch with me and said that there were two valuations being sent over to me.

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Q. Can you tell me approximately when it was that Mr. Minks got in touch with you? A. Oh, it would only be about the date of this letter; I could not say when - that was 10th August, 1972 - and that he wanted an inspection of a property at 202/204 Milperra Road, on the basis of the footpath inspection, to see whether it would be a suitable proposition for their purposes. I can't remember now whom I gave that job to, but I think it might have been Mr. Weir. ~~Mr.-Weir-discovered-that-202/204 was-not-a-property-that-anyone-had-any-intention-of-borrowing money-on-~~ (Objected to, struck out).

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Q. Did you later have some conversation with somebody at Kooragang about it? A. Well, I spoke to Mr. Simpson.

Q. What did you say about it? A. I told him that the property was not a property on which funds were being sought.

Q. Did you say how you had found that out, in your conversation with him? A. Through my valuer, I told him, yes.

Q. Well, can you just say now what you said to Mr. Simpson to explain your belief that nobody was seeking funds on the property? A. Only that the valuer could not make contact with anyone at the property who was of a mind to borrow money, and an examination of the reports that were with the instructions to do the footpath examination showed that really the property was 377/381 Hume Highway, Liverpool.

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Q. Then did you sort out, in your conversation with Mr. Simpson, that you had been given the wrong address? A. Yes.

Q. And was anything said then about you valuing the property at the right address? A. After I had been talking to Mr. Simpson on the problem, he said to abandon all reference to the job.

Q. And nothing more was done about it? A. No.

Q. Can I now show you some working papers in relation to the last property on p.1 of the annexure to the interrogatories, being property 43/49 Norman Street, Peakhurst. Are you able, by reference to the working notes, to indicate firstly whose handwriting is on the page headed, "Ray Little, Australian Fertilizers"? A. That was Mr. Maher. 10

Q. And who was he? A. He was a valuer in the later stages of 1974 or 1975.

Q. And is there, in his handwriting, on one page of the working notes, this material, amongst other material, "Ray Little, Australian Fertilizers, 213 Miller Street, North Sydney, (Kooragang Investments), 43/49 Norman Street, Peakhurst, factory, Hygienic Lily, L.J.H. valuation \$225,000,13/8/73", and then K.J. - Hodgson, is it? A. I don't know who that is. 20

Q. I think "L.J.H." are the initials of a very well-known real estate firm, are they not? A. Yes it is - Hooker's.

Q. I think on 6th December, 1973, a letter was written by the defendant to the plaintiff saying, inter alia, that "\$225,000 approximates the present market value of the premises"? A. Yes.

Q. If I could just quickly show you some working papers in relation to a property 318 Burns Bay Road, Lane Cove, which is another property not on the list. Can you, by reference to those papers, tell me whether there was any contact between Kooragang and Richardson & Wrench, by telephone or -- ? A. apparently a telephone message to Mr. Weir from Kooragang. 30

Q. Are you relying for that on written note in the file?
A. Yes.

Q. Are you referring to the page which is headed, "Richardson & Wrench Limited valuation request", and about the middle of the page, "Mr. Simpson informed that Mansell valuation considered excessive - suggested \$140,000", is it C.W. -- A. C.R. Weir.

Q. And there are Mr. Weir's initials? A. Yes. 40

Q. And the date 22nd November, 1973? A. Right.

Q. Was there a valuer called Mansell in practice in 1973?

A. Yes.

Q. And he practiced somewhere in the metropolitan area, did he? A. Out in the Double Bay area, he had his office.

Q. And then can you also recall, by reference to a letter dated 26th February, 1974, which the defendant wrote to the plaintiff, that there was a verbal advice given to the plaintiff in respect of properties 15/23 Hunter Street, Parramatta, and 372 Chapel Street, Bankstown? A. Yes.

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Q. Coming to the period after July 1973, Mr. Hodgson - you remember I prefaced my earlier questions in this area by asking you to deal with the period between February 1972 and the end of June 1973? A. Yes.

Q. Now after Mr. Minks left Kooragang, was there any shift in the persons with whom you had most contact at Kooragang? A. Well, there was none with Mr. Minks, and in his place there was Mr. Little, and there was a reasonable number of conversations on the phone with him.

Q. And let me take the period July/August through to the end of 1973; was the sort of contact, which you have spoken to his Honour about as having taken place before June 1973, continuing to take place in that period? A. Yes.

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Q. That is to say, in the latter part of 1973? A. Yes.

Q. Mr. Hodgson, I am sure I have asked you this, but it might not be clear enough; did you give any permission to Mr. Rathborne to make gratuitous valuations or to give credit? A. No, never.

CROSS-EXAMINATION

MR. CLARKE: Q. Mr. Rathborne was, in 1973, the senior valuer, was he not? A. On terms of age, but there was no appointment as senior valuer.

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Q. He was treated as the man senior amongst valuers below you? A. Yes, that would have been the case.

Q. You had had, in 1972, a chief valuer named Healey? A. Yes.

Q. That was a special post as chief valuer? A. Yes.

Q. When he left in 1972 there was no chief valuer appointed for 1973? A. No.

Q. So that the senior valuer in the Department or the Division, I think you call it, was Mr. Rathborne? A. Yes.

Q. In 1973 you had to spend a deal of your time out of the office in particular regard to two large pieces of litigation in which you were involved as an expert witness, did you not?

A. Some time, but I can't remember the detail of time.

Q. But, you see, there was the Seatainers case was one of them, was it not? A. Yes.

Q. And the other case, I am not sure if the spelling was right, was the Lanyon case near the A.C.T.? A. Yes, Lanyon. I didn't spend much time in the A.C.T. It was a case in which I spent a lot of time in the office rather than down there and the Court proceedings themselves were very short, as I recall it.

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Q. The Court proceedings were subsequent to 1973, were they not? A. Yes.

Q. What I am putting to you is: In 1973, in the first six months, a lot of your time was taken up on those two matters? A. Yes.

Q. I take it some time during that period you went on holidays or were absent from the office for other reasons?

A. I no doubt was on holidays. I have been frustrated for holidays pretty well all my working life.

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Q. And absent from the office in relation to other matters, I take it? A. Yes.

Q. And is it right to say that whilst you did the valuation work, most of your work was involved in litigation? By that I mean, most of your time was spent doing valuation for potential litigation? A. They tended to be my responsibility, but I did --

Q. If you were not at the office, would inquiries be directed to the senior valuer? A. Well, there was no senior valuer in that sense, so it would go to any valuer.

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Q. You say that, but in point of fact the man next under you was Mr. Rathborne - he would be the senior man of the Division?

A. You are putting that to me like that, Mr. Clarke, but we had no pecking order in the Department at all.

HIS HONOUR: Q. Well, when you were away, was there anybody who would carry out the duties that you had in regard to allocation of work or dealing with inquiries which were directed to the man in charge? A. Probably because of the way in which the company operated, Mr. Cook, our managing director, would have looked at any of that sort of thing. He himself was a valuer and he had been for many, many years and pretty

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well all letters and things of that nature would come across his table anyway. So, he probably would be the person who did that sort of thing.

MR. CLARKE: Q. You don't suggest, do you, that every inquiry that came in for a valuation over the 'phone was directed to you? A. Oh no.

Q. What happened was that some clients had more than just one valuation a year - they were repetitive clients, in a sense?

A. Yes.

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Q. Those clients, in the main, were serviced by one valuer?

A. No, that is not so.

Q. You see, let me suggest to you that there was what was called a set valuer for some clients. A. No, that is not correct either.

Q. Let me put it specifically: You know what I mean by the Giles Bourke group of companies? A. Yes.

Q. Let me put specifically to you that, first of all, during 1972 and 1973, and perhaps even into 1974, there were a large number of valuations done by your company for that group of companies? A. There were a number done. I can't actually say that it was a large number.

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Q. We will go through them, but it was certainly more than a dozen - more than twenty? A. Yes.

Q. And in the initial stages the valuations for that group of companies were done almost without exception by Mr. Stewart Rowan, were they not? A. As far as I can recall, yes.

Q. And he left the company, that is Richardson & Wrench, at the end of 1972.? A. Yes.

Q. When he left, a Miss Black also left, who was a typist there? A. Yes.

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Q. When he left Mr. Rathborne took over doing the valuations for the Giles Bourke group of companies? A. Yes.

Q. Again, almost without exception, if not without exception, Rathborne did all those valuations? A. Well, I can't be certain whether "all" is the correct term.

Q. Well, nearly all, if not all? A. Yes.

Q. If a valuer is doing a job for a man and while out on the job the man asked him to do another one, I take it you would

expect that valuer to accept the instructions to do the valuation? A. Yes.

Q. And in that sense there would be a number of valuations which would come into the office, as it were, which do not go through you? A. That's so.

Q. Similarly, valuers were senior members of staff, weren't they? A. They have a reasonably senior status in the company.

Q. They were not, for instance, treated like schoolboys?
A. No.

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Q. They were out on the road a lot? A. Yes.

Q. And they did not have to punch the Bundy every time they came in, for instance? A. No.

Q. They were given latitude as to the times they were in the office. A. Well, their work governed that rather than them being given latitude.

Q. They were not subject to periodical checks to see that they were doing all the work they were supposed to be doing?
A. Yes, they were.

Q. And subject to the checks as to the times they spent in the office? A. At times I did make checks on them, because I knew what the rough ratio of fieldwork to office work should have been.

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Q. Did you ever speak to Rathborne and criticise him for not doing his work? A. Yes.

Q. When was that? A. I can't remember the exact time now, but he was on a job that I set him in the Tamworth area, I think it was, for one of the bakery companies and he had not completed his work and he, in fact, wrote and apologised and gave me an excuse for the reason he had not been completing it.

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Q. That was in 1974, fairly soon before he left? A. It could have been, I can't remember exactly.

Q. That was when he was away, not long before he resigned from the company? A. I can't be precise, but it was in the latter part of his time in the company.

Q. Can I depart from that for the moment. I want to ask you something about what you said this morning. You were asked whose valuer you would be, and you remember you gave the effect of discussions you had with Mr. Simpson back in 1972? A. Yes.

Q. You said, I think, that so far as your belief was, Kooragang was the person from whom you got instructions and the mortgagor would pay you? A. Yes.

Q. Did you mean to suggest by that, that Kooragang - that your understanding was that Kooragang would actually give you instructions to do a valuation? A. Not actually give us instructions to give a valuation, but they would become the holder of one of our valuations.

Q. You knew very well that A.F.L. considered Richardson & Wrench their valuers, didn't you? A. Yes. 10

Q. That was made plain to you again in 1972 when Mr. Simpson came to you about advice for this Kooragang? A. Yes.

Q. Prior to the Kooragang setup, you would have been expected to be described as the A.F.L. valuers, the company valuers? A. Yes.

Q. You understood, did you not, that so far as Kooragang was concerned, you were going to be the company valuers? A. Yes.

Q. The setup was this, wasn't it, that first of all Kooragang made it plain to you that they were relying on you quite heavily for advice and guidance in this area? A. Yes 20

Q. And they were going to continue to rely on you in respect to loans that they thereafter made? A. Yes.

Q. Please do not think that there is a double meaning there, there is not intended to be a double meaning. You were aware that they proposed, initially, to lend sixty per cent of a Richardson & Wrench valuation? A. Yes.

Q. And then after discussion with you, that was increased to sixty-five per cent, and you were aware of that, weren't you? A. Well, I was aware of discussions of which we were part, and that was changed. 30

Q. I think there were discussions with their solicitors also? A. Yes.

Q. But, you were aware that it was changed? A. Yes.

Q. And that thereafter it would be sixty-five per cent of a Richardson & Wrench valuation? A. Yes.

Q. There was concern voiced by the Kooragang board, after discussion with you, as to the pros and cons of the undesirability of putting a borrower to the expense of getting a Richardson & Wrench valuation if the project was just, obviously, 40

not a workable proposition? A. Yes.

Q. In order to cover that situation, the system of what I might call, I think you called, footpath inspections and reports, was set up? A. Yes.

Q. If a proposal was put to Kooragang, they would get in touch with you and say: Well, we have got this proposal. Before we require a valuation, would you have the footpath inspection done and just see whether there is anything in it? A. Right.

Q. If you said: It is a dud, nothing further would happen? 10
A. That's so.

Q. That, I think, was shown in that Milperra file this morning?
A. Yes.

Q. If you said: Well, it looks a proposal, from there you would receive instructions and I will come to them in a moment, eventually to prepare a valuation? A. Yes.

Q. However, procedurally, it was made clear, was it not, that those instructions would come only from the mortgagor?
A. Yes.

Q. And so Kooragang, if they received a sort of preliminary okay from you, would write you a letter saying that: You may hear from the mortgagor if you do value for and on behalf of an intending mortgagee? A. Yes. 20

Q. So, the instructions for a formal valuation was never given by Kooragang, but by the mortgagor? A. Oh, I think that the situation was one that had a little bit of dichotomy in it. There was an instruction that we had in our formal talks, that that was the way that Kooragang would get its valuation and the instructions would come in that way because it suited them to have the borrower pay for it. 30

Q. Also, it may be that the borrower, after your footpath inspection, might not, for other reasons, proceed; he might not wish to incur the cost of a valuation? A. That's right.

Q. So, it was always thrown back on the borrower, if he wanted to proceed and if he wanted to, he would instruct you to prepare a valuation? A. Yes.

Q. You were aware that certainly as at May 1973, that Kooragang would not lend money without a Richardson & Wrench valuation of some type - not a quickie, but a Richardson & Wrench valuation?
A. Would you repeat the date again? 40

Q. May 1973. A. Yes.

Q. I think later, perhaps September/October 1973, more flexibility was introduced into the system whereby on one occasion I think there was a sale in Double Bay, a recent sale, which was merely reported on by your company, as demonstrating a reasonable value? If you can't recall that, say so. A. Well, I just can't recall that one, no.

Q. Kooragang were, however, were they not, discussing with you ways in which, perhaps, the cost of getting these valuations, the cost could be minimised - avoided in some circumstances? 10

A. Well, if there was a valuation issued, there was no question of whether the cost would be avoided.

Q. Let me put it this way; that a number of the files show that in the early stages at any event, other valuations were submitted with loan applications to Kooragang? A. Yes, I recall that.

Q. But, they would always require, certainly until about May 1973 anyway, a Richardson & Wrench valuation before they would lend? A. Yes.

Q. And they approached you in 1973 for advice about this question of acceptance of other valuers' valuations, didn't they? A. Yes. 20

Q. What they wanted you to do, or they wanted to get an indication of whether you would confirm valuations of some other nominated valuers? A. Yes.

Q. And you said - there is no criticism of you - that you would not confirm, formally confirm, other valuers' valuations, but you gave - perhaps I ought to take it one step at a time; you would not confirm other valuers' valuations? A. Yes, I remember that. 30

Q. But you said that your company advised Kooragang that they could accept valuations by Richard Stanton & Hardie & Gorman without any further reference to you? A. I can't remember whether they were the two limited - yes, but they were two anyway.

Q. There was another valuer, whose name had cropped up and I think he appeared in the Milperra file you were shown today and I won't mention his name, but there was another name that your firm advised Kooragang that they could not accept that valuation. A. That's so. 40

Q. Until May 1973, and indeed continuing on until September or even later, they would not lend -- A. I don't want to leave any impression of criticism of other valuers, that is what I wanted to say.

Q. Up until September/October 1973 anyway, you were aware, were you not, that except perhaps in regard to the two, or the valuers you indicated today, accepted that Kooragang did not lend moneys, except on the basis of a Richardson & Wrench valuation? A. As far as I am aware.

Q. And then still sixty-five per cent of that valuation?
A. Again, I am only aware of that by hindsight.

Q. I am sorry, you were not aware of that before? A. Well, I don't think they ever said to us in each and every one, that we have lent a certain amount of money. 10

Q. But, you knew that was the system, to lend sixty-five per cent? I am sorry, up to sixty-five per cent is more accurate than sixty-five per cent? A. Yes.

Q. Coming then to Richardson & Wrench itself, of course you have said that you have been valuers for very many years?
A. Yes.

Q. And you pride yourselves in your reputation in the community and in 1973? A. Yes.

Q. As being reputable and experienced and skilful valuers?
A. Yes. 20

Q. This was something - I do not say that you advertised - but you let be known as pride, as being reputable as skilled valuers. A. Within being able to advertise, yes.

Q. There is no doubt that Mr. Rathborne - and I want to leave out office procedures - had authority to accept instructions to prepare a valuation? A. Yes.

Q. He had authority to complete a valuation? A. Yes.

Q. And he had authority to sign that valuation with the corporate name, Richardson & Wrench Limited? A. Yes. 30

Q. You did say yesterday in your evidence what the procedure was in 1973, do you remember that? A. Yes.

Q. I don't want to be pedantic, but was that the procedure during the whole of 1973 or part of 1973? A. Oh, I think it was the whole of 1973.

Q. You see, isn't this the situation; that there was a fairly dramatic change in your procedure in late 1973? A. I can't pinpoint dates to when changes did take place, but I don't think that was 1973.

Q. Let me suggest that a change took place in October 1973 when a new system was introduced. A. If you have pinpointed it to October, I will accept that, but I thought it was later than that.

Q. Do not misunderstand me, there was another change effected when those three pages were added to the manual, was there not?
A. Yes.

Q. I am talking about a change preceding that change and I am suggesting that the system you described yesterday was a system that came into operation in October 1973? A. No, I don't agree with that.

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Q. What do you say the system was in 1973 when you received a request for a valuation? How was it recorded? A. It went on to a slip on a clipboard.

Q. And you allocated the work, is that right? A. Yes.

Q. Do you say there was a job register at that time? A. No.

Q. So, there was a slip on the clipboard. What happened to it then? A. Well, it remained there until it was dealt with and crossed off and it became an active assignment.

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Q. By that you mean it was allocated to some person. A. Yes.

Q. That slip, would you describe them as work sheets. A. No.

Q. Work sheets are rather more the field notes, are they?
A. Yes, that's right.

Q. Is this accurate, that in recording valuation applications the practice was to record it on work sheets, which was noted by the employee receiving the telephone call? A. Yes.

Q. After October 1973 the company policy was altered in the recording of valuation applications in order to lessen the incidence of bad debts? A. Would you read that again, please?

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Q. After October 1973 the company policy was altered in the recording of valuation applications in order to lessen the incidence of bad debts? A. Well, that may be ---

Q. That is right, isn't it? A. That's right, that we were concerned with bad debts, but I just can't recall the exact situation that took place.

Q. What was, in July, just so that I understand you, 1973 - take that date because it is right to assume, is it, that in

the procedure operating in July, it had been operating for sometime before then? A. I inherited most of it, yes.

Q. What was the procedure when an application was received?

A. Well, it would come in as a 'phone call or a letter or a personal call: the particulars would be taken down such as they were - they were not always full particulars, but they were taken down on a sheet, that was the one that was mentioned a few moments ago called a valuation form - the address that was the subject of the valuation would be put on those clipboards and then the job would eventually become a job for a particular valuer. 10

Q. Was it given a job number? A. No.

Q. And when the valuer completed his valuation, what would he do? A. Oh, he would either write out his valuation or he would dictate it to one of the typists and she would then bind the valuation into a cover, write a covering letter which was a standard letter, complete an invoice and then let the valuer know that the valuation was completed and ready for signing.

Q. So that there was no register or anything like that at that time? A. No, the only register was the final register of work done. 20

Q. But, was that really a register or a file in which valuations and work papers were kept? A. Oh no, it was a register. It was called "Register".

Q. Of completed valuations? A. Yes.

Q. And then the change in October 1973 was, as you said to lessen the incidence of bad debts, which was a problem in the company? A. Yes.

Q. And, thereafter, all valuation applications were entered in a job register and given a job number? A. If that was the change you were talking about, yes. We introduced a job register to enter the jobs as soon as they come in. It replaced the slips you were talking about. 30

Q. Was it right that "prior to October 1973 that the senior member of the Department of attendance in the case in which I was present, it was my duty to designate work to valuers"? A. Yes.

Q. Would this be right also, that if Rathborne was, for instance, the senior member in attendance, it was then his job to designate work to valuers? A. No. 40

Q. Isn't this right, it was the company's policy that the senior member in attendance in the Department could designate work to valuers? A. That's right, yes.

Q. And if he was the senior member in attendance on a particular day at a particular time, would not that have been his task? A. No, you are putting it hypothetically to me. Mr. Cook, if I was not there, would have taken that over and quite often discussed with me the priorities for work, in any event.

Q. Did that system continue to operate, you and Mr. Cook?

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A. Yes.

Q. No change? A. Not until - I can't remember the date, but when we appointed Mr. Weir.

Q. That was October 1973, wasn't it? A. I can't say precisely but, yes, it would have been in October 1973.

Q. And he was appointed manager to give the work out? A. Yes.

Q. If you and Mr. Cook were not there, I take it that happened from time to time? A. It would be a rarity when we were both away.

Q. Who would do it then? A. Well, I could only guess at that now but ---

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Q. The senior member present? A. Rathborne did never show any indications of being an administrative person. I doubt that he would have.

Q. I wasn't asking you about Mr. Rathborne, but who had been the senior member present would have done the delegation?

A. But by inference, it would have been him.

Q. You then bring in Mr. Rathborne and say that because of his nature he would never have done it? A. No.

Q. I am talking about the practice, but that is what he would have been expected to do? If someone wanted a valuation, the senior member would have done it. (Objected to by Mr. Morling; question rejected).

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HIS HONOUR: Q. Mr. Hodgson, you would hardly describe the managing director as the senior member present in the department?

A. He took a very active interest.

Q. But, you would hardly describe the managing director as the senior member present in the department would you, Mr. Hodgson? A. I suppose not in those strict terms.

Q. In those circumstances, if that does not adequately describe him who does it describe? A. It was written at a time when the intention at all times was to have a manager of the valuation department.

Q. MR. CLARKE: Q. I am sorry, I do not understand. When you say that was written, you mean, what was written at the time, when it was always the intention to have a manager in attendance in the department? A. I don't understand your question?

Q. I thought you just said it was written at a time when it was the intention to have a manager of the valuation department? 10
A. Yes, when a situation - I can't remember whether it was written or discussed - but that situation was one that was made and a circumstance to follow.

Q. You see, what I am about to put to you is that that statement, that prior to October 1973 - I will read the whole lot, "It was the company's policy that the senior member in attendance in the department, in the case that I was present in, it would be my duty to designate work to valuers." I am putting to you that that is a statement that you made after great consideration 20
and you made it in 1974? A. Yes.

Q. You accept that? A. Yes.

HIS HONOUR: Q. And did you make that statement reciting some written documents or some aspect of company policy? A. No, I had in mind the company policy, your Honour.

Q. When you said it was written at a time, was it written out in some document as a matter of company policy? A. I can't remember whether it was discussion or whether it was in the company manual, but it was certainly a matter that we recognised as one to observe. 30

MR. CLARKE: Q. You then said, "After October 1973 a Mr. Weir was employed as valuation manager and it was his duty to designate the work to valuers within their own capabilities on a basis where no one valuer had a set client". You said that, didn't you? A. Yes.

Q. Then you added, "That has been my policy since I have been with the company." A. Yes.

Q. So, can we take it that your policy, since you have been with the company was, until October 1973, as you stated, that the senior member in attendance in the department would designate work to valuers? A. I think the referral to my policy in that, was that valuers would not have set clients. 40

Q. Are you seriously suggesting that you are saying that you

are stating it was a policy of yours that valuers did not have set clients. A. Yes.

Q. I will read it to you again, "It was his duty, "that is Mr. Weir, "to designate the work to valuers within their own capabilities on a basis where no one valuer had a set client." Are you saying that on the basis of no valuer ever had a set client? A. That that was to be avoided, yes.

Q. That was introduced in October 1973, was it, or was it always the policy? A. No, that was always the situation.

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Q. I thought you said yesterday that you kept a fairly regular check on the accounts? A. Yes.

Q. And that is right, isn't it? A. Yes.

Q. And particularly in 1973, the first six months, the workload of Richardson & Wrench was pretty heavy, wasn't it? A. Has been pretty heavy for three years.

Q. It has been suggested by your counsel that the 1972/73 period was a boom period in your company? A. Yes.

Q. During that period there was quite a problem growing up of bad debts which was giving you concern? A. Yes.

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Q. So, I take it, that during the first six months of 1973, you were following closely the state of the accounts each month? A. Yes, on a monthly basis.

Q. I do not suggest more than a month. The records you would see would be, what, the sundry debtors ledger or would it be the actual invoices that you would look at? A. No, the company secretary would prepare a list from the accounts department to show debts of one to three months outstanding and he would let me have that at the end of the month's trading.

Q. I suppose you saw that some clients' names crept up fairly regularly, or cropped up fairly regularly? A. I suppose I did. I can't remember details of that now.

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Q. You would be concerned, if that happened, to determine who the valuers were that were allowing this to happen? A. I knew that because of the address, which I would relate to the valuer who did the job, not the client so much, because our work was registered on a geographic basis.

Q. So, you would have known, for instance, if the Bourke group of companies was in default in payment in the first six months of 1973? A. At a stage when it had been drawn to my attention, yes.

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Q. Each month, if it had been in default right from the start of the year? A. Yes.

Q. So, if it had been in default at the end of January, one to three months, you would have known about it at the end of January or the early part of February? A. Yes.

Q. And similarly in March and April? A. Yes.

Q. You would have known initially that that was really, a lot of that if not all of that, was Mr. Rowan's responsibility so far as it related to 1972? A. I can't remember whether there were debts as a result of that, that could be attributable to the work he did for them. I can't remember.

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Q. I put this to you: Did you also - I think you delegated or designated a lot of the jobs? A. Yes.

Q. Can I take it then that in most cases you would know which valuer had been given a particular job? A. Yes.

Q. Did you designate Mr. Rowan for most, if not all - most of the Giles Bourke jobs? A. Yes, the trouble would be that I would not know if they were Giles Bourke or not. We did not have a client register, we had a geographic register.

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Q. Some of his companies got a credit rating, didn't they? A. Yes.

Q. Did you give that credit rating? A. After any company had paid for work, until it became known that it would not pay for work, it had a credit rating otherwise half the city would have been blacklisted.

Q. I rather thought you said in your evidence previously, in another place, that it was really only professional persons and persons well known to you that got a credit rating. A. I may have said that, but it was not within the strictures of that, because business has to have latitudes.

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Q. That is what I want to come to, that a company like Giles Bourke Holdings, if it did a few jobs and paid for them would be then extended credit? A. Yes.

Q. And that company was, by the end of November 1972, extended credit, was it not? A. Yes.

Q. And, similarly, Group Unity Securities Pty. Limited was extended credit? A. Yes.

Q. And Peter Craig Real Estate Pty. Limited, you know to be another one of the Giles Bourke group of companies? A. I do now.

Q. And that was also extended credit? A. Yes.

Q. You knew that, for instance, a Giles Bourke company, on a fairly regular basis, you would know that up to the end of 1972, Mr. Rowan was doing nearly all their work? A. I think I can remember that, yes.

Q. And with Group Unity Securities, the same thing? A. Yes.

Q. It was not simply on a geographic basis either, was it?
A. I don't know what you are driving at there. I can't answer that.

Q. I rather thought you said that you designated jobs to valuers, broadly on a geographic basis? A. Yes. 10

Q. What I am putting to you is that the jobs in respect of Giles Bourke, were not simply allocated on a geographic basis?
A. I don't know what other way they would have been, that is the only way they were done.

Q. What I am putting to you is that they were allocated to him initially, in the first place by you, do you agree with that?
A. Probably, I can't remember.

Q. And thereafter the probability is that he was rung direct?
A. Well, he might have been. 20

Q. Mullumbimby, of course, fits into your special category in the manual, does it not, as being outside the metropolitan area?
A. I don't know that there is a special category.

Q. I might be mistaken, Mr. Hodgson, but jobs would be accepted in the metropolitan area, but outside the metropolitan area they would be considered on their merits? A. Yes.

Q. When Mr. Rathborne started doing Giles Bourke Holdings' work, that is because you designated that he take over from Mr. Rowan a particular job? A. No.

Q. Or that he would do the first Giles Bourke Holdings job that came in? A. No. 30

Q. He somehow got the job, you don't know how, is that the position? A. Well, I can't remember now.

Q. He may well have been introduced to Giles Bourke by Rowan?
A. Well, it could be speculated that way, yes.

Q. He could have taken over, in effect, nearly all the Giles Bourke work without reference to you? A. The jobs would have gone on to those sheets in the metropolitan area, because otherwise when they eventually got to the register I would have wanted to know why there were some jobs not on the sheets and getting on to the register. 40

Q. I understand that, but I am now talking about, that he may well have got many instructions that are on the register from Giles Bourke personally, without any knowledge from you? A. Well,

in the initial contact through the 'phone, I would not know who was talking to whom.

Q. It was not uncommon for some client to ring up a particular valuer he had spoken to before and ask "Would you do a valuation for this?" A. Yes.

HIS HONOUR: Q. Mr. Hodgson, say one of your valuers, Mr. Blakely, he got the instructions. He would write it on the list and what would happen then? Would he do the job or would you direct who would do the work? A. Well, it became partly the amount of work that a valuer had and whether or not he could cope with the amount. It also became a question of whether or not he was competent enough to do a particular job and there were considerations like that, that I gave to allocating the work. 10

Q. But it would be you who would decide the question? It would not be a question of the valuer just going out and doing the job? A. Not once it was on these lists, no your Honour.

Q. And it went on the list always because he wrote it up as soon as he got the instructions? A. Yes, if it had been written up there would have been a corresponding entry ultimately in the register because I would have known if there was an omission of some sort. 20

MR. CLARKE: Q. But you are not suggesting that whenever, for instance, Mr. Rathborne out in the field accepted a job and then he came back and entered in on a register or a list, you would decide that he would or would not do the job, are you? A. There was no reason I should not have told him he could not do the job. 30

Q. But you did not do it, did you? A. Oh, I can't remember now.

Q. You did not tell him he could not do a job? A. I think there might have been cases, as there were with every other valuer.

Q. Look, Mr. Hodgson, if he came in with a job and entered the register, the normal procedure was that he would simply continue that job? (Question withdrawn).

Q. If he accepted a job out in the field and, in fact, for instance, started work on the job out in the field, and when he came back in the office and entered it on the list, the normal practice would have been for him to continue with the job, would it not? A. Probably. 40

Q. Invariably? A. Well, I don't know about that. I can't recall the circumstances where I can pinpoint such a situation to be able to say "Invariably".

Q. Valuers were given some type of discretion, weren't they? A. Well, they had certain discretion in carrying out their work, yes.

Q. I want to take you to something you said. You did, prior to 1973, make an exhaustive search of the records of your company, did you not? A. Yes. 10

Q. And you gave evidence at the Petty Sessions Court on 10th October, 1975, when you were examined by the Crown Prosecutor, Mr. Foord, and cross-examined by Mr. Rolfe? A. Yes.

Q. And you were asked this question by Mr. Foord, and if you would like to look at it, please say so:

"Q. Mr. Hodgson, recollecting as well as you can, do you remember what records, if any, you have found of valuations for the company, Group Unity Securities Pty. Limited and associated companies or related companies after, say, 1st November, 1972?" 20

A. Yes.

Q. You understood at the time that you were asked that question, the companies associated or related to Group Unity Securities Pty. Limited? A. Yes.

Q. You said you found that:

"There were in our records about three entries for Fidelity Acceptance in the late part of 1972 about the November period, 1972. I found an entry for Peter Craig Real Estate of about July 1973 and then I found about four for Group Unity Securities in the latter part of 1973 and as far as I can recall they were the only ones done by the company for that group generally." 30

That was the answer you gave? A. Yes.

Q. Then there was some objection and you were asked, again by Mr. Foord:

"Q. What you have just stated, was that made after an exhaustive search of the records? A. Yes".

Q. Do you agree with that? A. Yes.

Q. Now, when you gave that evidence, was that right? Were they the only, I think eight you say - about four so we can say eight or nine for the three companies - were they the only ones you had found? A. Really, at that time we didn't know whom we were looking for and I had to search, because of the geographic nature of our register, for names of companies and I answered that on oath at the time, to the best of my recollection as being what I had identified.

Q. After an exhaustive search? A. Well, an exhaustive search is going through everything I could find. 10

Q. And you were putting forward, in that portion of your evidence, that you really had searched as hard as you could to find everything in the company records about those three companies? A. Yes.

Q. And there were, you said, thrown up only eight such valuations, eight or nine? A. If I found nine I would have said nine, or whatever it was.

Q. And, in point of fact, the position is that valuations done by you for those three companies exceeded greatly the number of nine, didn't they? A. Yes, I can't tell you. I have not gone to the stage of getting them and counting them. I couldn't tell you what it is. 20

Q. In fact, during 1972 you had done quite a number of jobs for them and given them credit? A. Yes.

Q. In 1973 you had done more jobs for them and given them credit? A. Yes.

Q. I will go through those jobs with you after lunch, but before I come to that I want to come to this: You remember this memorandum? Perhaps you might take a look at it (Ex.7 shown). A. Yes. 30

Q. You, I think, said yesterday that the instruction was never countermanded? A. Yes, that is so.

Q. Do you mean by that that you never directly, by written memorandum or word of mouth, countermanded it, or do you mean it was not countermanded in any form at all? A. Any form at all.

Q. You see, you know, don't you, that within four weeks of that memo more valuations were done by your company for one of those companies? A. That was disclosed to me ultimately, yes. 40

Q. You would have known by January/February 1973, wouldn't you?
A. No.

Q. Why not? A. Because, as I recall it, and this was one reason why my remarks in the commital trial were deficient, the person who was needing the valuation was a name that was not associated with the group. The person who would ring and say: I would like a valuation, would not be a name associated with that group.

Q. But did the client's name not go down on the list? A. No.

Q. And when the invoice was sent out, was it not sent to the client? A. It was sent to whoever gave us the instructions or on the basis of what those instructions were, to whom they nominated. 10

Q. What I am suggesting to you is that Group Unity Securities, just one of the names mentioned in your memorandum, gave instructions through someone in December 1972, add if that had been the position, if you accept for a moment that that was the position, you would have become aware that there were additional debts for Group Unity Securities early in 1973, wouldn't you? A. Yes. 20

Q. And you would have been most concerned about that, because there had been a direction that no credit be given. A. Yes.

Q. Unless the money outstanding at the date of your memo had been paid, you would not have been concerned at all then? A. Well, it would not have shown up as a debt in the monthly returns.

Q. But the payment of those companies of all outstanding debts, would have released the valuers from that instruction, wouldn't it? A. Yes. 30

HIS HONOUR: Q. How would they have known that the money was paid? A. I used to send the monthly returns that came from the accounts department with a question against each valuer as to why he had incurred a bad debt and that one would not be there, your Honour.

Q. If there was someone incurring a bad debt in contravention of your direction, you would be especially concerned to chase that up, wouldn't you? A. Yes.

Q. And it is right, isn't it, that you did not chase up, in December 1972, with Mr. Rowan any further credit given to the group of companies shown in the memorandum? A. I can't remember that now. I can't remember that detail. 40

Q. And in early 1973 you did not chase up that with Mr. Rathborne? A. Yes, all the time we were chasing Mr. Rathborne.

Q. Did you give him a prohibition against taking any further work from those companies? A. I can't recall that circumstance, but I probably would have spoken to him about it.

Q. You see, there were, in the early part of 1973, a number of jobs done and invoiced for the companies shown on that memorandum? A. Yes.

Q. And if Mr. Rathborne had persisted in taking instructions from a defaulting creditor against your explicit direction, you would have dismissed him, wouldn't you? A. I would have spoken to him at least about it, and told him not to do it any further. Whether that happened, I cannot recall, because the accounts department would be following the debt up and there would be a time lag until I found about it. 10

Q. However, if he persisted in the practice of giving credit to someone, after you had told him to stop it, as a warning as it were, and told him not to do it any more, you would not have tolerated him remaining there? A. No, if he persisted in the face of what I told him. 20

(Luncheon adjournment)

HIS HONOUR: Q. Mr. Hodgson, you are bound by the oath you took previously. A. Yes, your Honour.

MR. CLARKE: Q. Mr. Hodgson, coming back to what I call the Giles Bourke group of companies, you knew by the time of Ex.9 that there was a Giles Bourke group of companies which included at least the four companies that are contained in the memorandum? A. Yes, I think that was the only ones I knew.

Q. You might not have known the names of the other companies but you knew that there were other associated companies because the words appear in that memorandum? A. Yes. 30

Q. (Approached). I am showing you some copy letters from your files which have been produced and there is a letter of 25th October, 1972, addressed, I take it, from Richardson & Wrench. It is a pink copy on your files? A. Yes.

Q. Addressed to Fidelity Acceptance Pty. Limited? A. Yes.

Q. And the initials appear SNR:SC? A. Yes.

Q. And the SC is Sue Coleman, is she not? A. Yes.

Q. And the SNR Stewart Rowan, is it not? A. That is correct. 40

Q. So it was a letter written by Mr. Rowan to Fidelity Acceptance and it shows as at that date I think ten outstanding accounts, nine of them typed as being due by Fidelity Acceptance and one is due by Giles Bourke Holdings, and that "Giles Bourke Holdings" is written in there by someone apparently. Do you have trouble reading? A. Yes, that is right.

Q. And there are ticks against I think all of those with the exception of the bottom one which has got "Giles Bourke Holdings" on it? A. Right.

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Q. Those ticks indicate at some time those debts were paid? A. I couldn't be certain of that.

Q. You have got no idea what they mean? A. No, I can't remember what they would have indicated.

Q. On 29th November there is a copy of a letter from you to Mr. John Bourke, is there not? A. Yes.

Q. And AB as the typist was Miss Black? A. Yes.

Q. If one looks at that letter it appears clear that instructions were taken to value properties at Dulwich Hill and Glebe on 28th November, 1972, and you are telling Bourke that you cannot go ahead while a number of accounts, which you list below, remain unpaid? A. That is so.

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Q. And those accounts seem to cover periods between April, 1972, for Giles Bourke Holdings, and October, 1972 for Fidelity Acceptance. That seems to be the time span? A. Yes.

Q. And it would appear from the invoice numbers that none of the matters in the letter of 29th November, 1972 are the same matters as appear in the earlier letter? A. Well -

Q. I am sorry, there is one; 21305 appears in both, yes. A. With that exception.

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Q. There is one duplication which is the only account in the earlier letter which has got a cross against it in your duplicate, in your copy letter? A. Yes.

Q. Having regard to the contents of the letter of 29 November, would it be reasonable to say that all the debts referred to in the preceding letter, with the exception of the one invoice No. 21305, were paid? A. Probably. I can't be certain without seeing the actual documents, but probably.

Q. If we go forward then to 27th July, 1973, there is a copy letter signed under your name? A. Yes.

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Q. Over your name, in July, 1973, relating to valuations for 49, 51, 55, 57 and 59 Gottenham Street, Glebe. You see that?

A. Yes.

Q. And 19-23 Glebe Point Road, Ultimo? A. Yes.

Q. And 532 New Canterbury Road, Dulwich Hill? A. Yes.

Q. And there is then a statement that those valuations "were forwarded to you together with our memo of fees on 12th and 14th December respectively". So it is clear, certainly by July you were aware that credit had been given in respect of a substantial number of valuations in December of 1972? A. Yes.

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Q. The next statement deals with the company's auditors drawing attention to the long-outstanding accounts and then there are two accounts, 22606 for \$183.50 and 22660 for \$395? A. Yes.

Q. And those accounts, I take it, if they are long-outstanding, you would have been aware of them July, June, May, April, that sort of range? A. Probably yes.

Q. There is no doubt that certainly by July you were well aware that credit had been given in December to Fidelity Acceptance Pty. Limited in December, 1972? A. Well, I would only say that I had become aware that they were responsible for the fee. I don't know that I had checked back to see how they had got the credit.

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Q. I think I have read out what you said. On 18th December, 1973, another letter by you, this time to Group Unity Securities Pty. Limited, and in that letter you refer to moneys being outstanding still from 12th December, 1972? A. Yes.

Q. November, 1973? A. I just can't see November. Oh, yes, yes, yes.

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Q. October, 1973? A. Yes.

Q. And September, 1973? A. Yes.

Q. So that it is apparent, is it not, that both in December, 1972 and at least from September to November, 1973, credit was being given to Group Unity Securities and Fidelity Acceptance? A. Yes.

(Four letters from the defendant to Bourke marked for identification 8)

Q. If I could again just refer you to the letter of 27th July, 1973, which does not have any initials but has your name at the

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bottom? A. Yes.

Q. We see the properties 49, 51, 55, 57, 59 Gottenham Street, Glebe? A. Yes.

Q. I just want to show you a valuation taken from m.f.i. 6, 51 Gottenham Street, Glebe (shown). If you look at the letter of 27th July, 1973, you see the reference to "memo of our fees of 14th December"? A. Yes.

Q. And 12th or 14th? A. Yes.

Q. If you look at the valuation I am showing you of 51 Gottenham Street, it is dated 13th December, 1972? A. I noticed that, yes. 10

Q. And that would certainly appear to have been charged for by your firm? A. As far as I can see it was typed by us.

Q. That was not responsive. A. Well, under the circumstances it would have been charged for.

Q. You take the view, do you, that this was typed by you? A. I think so.

Q. What gives you that view? A. The set-out and the fact that it hasn't got, as is usually the case, SC. It has got AB. 20

Q. It has got AB and what else about it do you say suggests to you it was typed by your firm? A. It doesn't show the type face of the impounded typewriter that was at the Glebe office and taken by the police.

HIS HONOUR: Q. But whether it was typed by you or not, it was certainly charged for by Richardson & Wrench, is that right? A. Yes, your Honour, yes.

MR. CLARKE: Q. I will come back to this in more detail later but I show you another one from the file relating to the Court House Hotel and adjoining shops, Mullumbimby. It has got nothing in the box? A. No. 30

Q. It is dated March, 1973 and it bears Mr. Rathborne's signature? A. I think so, yes.

HIS HONOUR: Q. Mr. Rathborne's signature or the corporate name - A. The corporate name, your Honour.

Q. - in Mr. Rathborne's handwriting? A. Yes, your Honour.

MR. CLARKE: Q. What do you say about that one? Was that charged for by your firm? A. No. I don't think so.

Q. You did, however, charge for some valuations at Mullumbimby, did you not? A. Yes, I think.

(Mr. Clarke read on to the record the valuations comprised in m.f.i. 6, as follows:

1st August, 1973 - 23 Glebe Point Road, Glebe
30th March, 1973 - 18 Blandford Avenue, Waverley, also
known as 13 Dickson Street, Waverley
The original, 23rd March, 1973, 51 Ferry Road, Glebe, 10
and also a copy of the same property valued at
14th June, 1972
51 Gottenham Street, Glebe as at 13th December, 1972
The Court House Hotel and adjoining shops, Mullumbimby,
7th March, 1973
Freehold property at Mullumbimby 18th April, 1973
33 Glebe Point Road - 3rd August, 1973
27th July, 1973 - 60 Forsyth Street, Glebe
23 Avon Street, Glebe - 27th July, 1973
62 Forsyth Street, Glebe - 27th July, 1973 20
40 Forsyth Street, Glebe - 30th July, 1973, and also
a photostat valuation of Egan & Associates
Old Bangalo Road, Byron Bay - 30th March, 1973)

(Documents comprised in m.f.i. 6 to be released to Mr. Austin at close of proceedings today to enable photostat copies to be made)

MR. CLARKE: Q. (Approached). I show you a bundle that has got the number 20 on the top right hand corner, valuation No. 403-27. Where would that number be recorded? A. That is one of those valuation books that I spoke of and that is the folio number for that book. 30

Q. It is a valuation prepared for Giles Bourke Holdings of 14th August, 1972, of 23 Glebe Point Road, Glebe Point, with a valuation of - If I use the word "valuation" I am short-cutting the words "We estimate the fair market value" because they are the words used in all, or virtually all, the valuations in this case? A. Yes.

Q. You also use the format, "We recommend the property as an eligible security for the advancement of funds by way of first mortgage." You have used that format regularly? A. Yes. 40

Q. And also sometimes just "by way of mortgage only", you have used, have you not? A. I don't know. I think that we were always using "first". That is sometimes omitted.

Q. For this property Mr. Rowan carried out in August, 1972, the valuation for the Bourke Company, Giles Bourke Holdings Pty. Limited, did he not? A. Yes.

Q. You look at a letter on the file from Giles Bourke addressed to Richardson & Wrench, attention Mr. S. Rowan? A. Yes, but it didn't go to him.

Q. There is on the document handwritten "Mr. Hodgson"?
A. Yes.

Q. And you say that means that it went to you, is that right? 10
A. For allocation of the work, yes.

Q. Then if we look at, in a file which has got written on the right hand top "valuation No. 411-6", a valuation apparently of 23 Glebe Point Road and 24 Grose Street, Ultimo, is that correct? A. Well, that has been questioned and I would agree, knowing the area, that it is not Ultimo. It is Glebe.

Q. I just wonder about the end, "and 24 Grose Street"?
A. Glebe Point Road at that particular point has a little street behind it called Grose Street.

Q. Anyway the valuation is TGR:SC and it is clearly 23 Glebe Point Road when you look at the end of the valuation is it not? 20
A. That quotes it, but it is a property with a back and a front to it.

Q. All I am seeking to establish is that it is a valuation of the same property that we were talking about a moment ago, 23 Glebe Point Road? A. Yes.

Q. And in the ensuing period, according to the valuer, it had risen in value up to \$70,000? A. Yes.

Q. And they would appear to be valuations recorded by your company in your company records? A. Yes. 30

Q. I just want to take a valuation from m.f.i. 6. Now this valuation has been said to be typed by - A. I am just looking at these for a sec., please.

Q. When you look at the photostat copy that is immediately after in the bundle, the valuation we have just been talking about, that appears to be 19 to 21 Glebe Point Road, does it not? A. Yes.

Q. And you can see it from the next page? A. Yes.

Q. Incidentally, that is a very short valuation; not much more than one page, is it? A. That is so. 40

Q. I take it that all those valuations in the two files we have been talking about are valuations of which there are records in the company? A. These two are (indicated documents).

Q. From the file with valuation No. 403-27 and No. 411-6?
A. Right.

Q. I want to show you a valuation said by Mrs. Clarke to have been typed by her and it is a year later in August, 1973. It bears that date although the back sheet is 14th August, 1972 which I think is the date of the preceding valuation of that property, is it not? A. Yes.

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Q. According to this valuation from mfi 6 the value remains \$70,000? A. I can't see it from there - yes.

Q. So that it is the same value as given in December 1972?
A. Yes.

Q. Now if you have a look at the first valuation, that is 14th August 1972, the document taken from mfi 6 - the first one I show you was, of course, the one in your records with the initials SNR:SC? A. Right.

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Q. And they are identical, the one from mfi 6 and the earlier one except in regards to the amount? A. No.

Q. The wording from the starting of, "For the land....." - from then on? A. Well I don't think that is so - yes it is, yes.

Q. They are identical in the body? A. Yes.

Q. Now certainly I have shown you a valuation of August 1972 done by Rowan and a bundle of a number of valuations, 19-21 Glebe Point Road, 23 Glebe Point Road and 532 New Canterbury Road for Fidelity Acceptance in the file dated December 1972?
A. Yes.

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Q. And they would appear all to have been done by Mr. Rathborne, would they not? A. Yes - I don't know about that one.

HIS HONOUR: Q. I am sorry, you don't know - A. There is a photocopy with an indistinct initial on it.

MR. CLARKE: Q. In respect of the photocopy you don't know.
A. No.

Q. I think that is another photocopy of No. 23? A. Yes.

- Q. Working from the file, the file on property no. 60/62 Forsyth Street Glebe, date 8th May, 1972, the valuation of apparently Mr. Rathbourne? A. Yes, Mr. Rathborne.
- Q. Then 49/51, 51/57/59 Gottenham Street Glebe. Don't worry about the letters - A. Yes, Mr. Rathborne.
- Q. Mr. Rathborne as to one? A. You have them all here? 2, - 5 of them?
- Q. 5 dated in December 1972? A. Yes.
- Q. 225 Annandale Street Annandale dated 30th March, 1972? 10
A. Rowan.
- Q. That is Mr. Rowan. Incidentally, you take the view, do you not, that 1973, the practice in your firm was to have colons between the initials of the valuer and the typist, is that right? A. Not necessarily. I can't remember what peculiar attitude the girls then took of that. There was nothing laid down about it.
- Q. 260 Johnson Street Annandale, September 1972? A. Yes, Mr. Rathborne.
- Q. 27/29 Cameron Street Balmain, 8th May, 1972? A. Yes, 20
Mr. Rathborne.
- Q. Here is one much later in point of time. It is 20th December, 1974, Macquarie Terrace, apparently that seems to be Mr. Maher? A. Yes that is Mr. Maher.
- Q. 64 Broomfield Avenue Cabramatta, 21st September 1972?
A. Mr. Rowan.
- Q. 44/46 Reiby Street Enmore, 25th August, 1972? Mr. Rathborne.
- Q. 39 Charles Street, Erskineville, 1st May, 1972. A. Mr. Rowan.
- Q. 261 Glebe Point Road, Glebe, 5th May, 1972? Mr. Rathborne. 30
- Q. 237 Glebe Point Road, Glebe, 16th May, 1972? Mr. Rowan.
- Q. And that is, of course, one of the subject premises, is it not? A. Yes.
- Q. And 25, 25A, 27, 29 Glebe Point Road, and 24 Grose Street Glebe. They seem to be all one valuation? A. Mr. Rowan.
- Q. November 1973, 37 Glebe Point Road? A. Mr. Rathborne.

- Q. June 1972, 40 Forsyth Street Glebe? A. Mr. Rowan.
- Q. 15 Forsyth Street Glebe, 18th October, 1973?
A. Mr. Rathborne.
- Q. 23 Avon Street Glebe, 14th June, 1972? A. Mr. Rowan.
- Q. 19th October, 1973, 27 Avon Street Glebe? A. Mr. Rathborne.
- Q. Then there is no.141 Bridge Road Glebe and no.91 Bridge Road Glebe and the file is endorsed "Valuation not issued but copy valuation", again Mr. Rowan, is it not? A. Yes.
- Q. 138 Bridge Road, Glebe, 19th October, 1973? A. Mr. Rathborne. 10
- Q. 51 Ferry Road Glebe, 14th June, 1972? A. Mr. Rowan.
- Q. 18th September 1972, 62-64 Toxteth Road Glebe?
A. Mr. Rathborne.
- Q. 128 Pymont Bridge Road Glebe, 18th August, 1972.
A. Mr. Rowan.
- Q. 24th April, 1972, 64-66 Wellington Street Mascot?
A. Mr. Rathborne.
- Q. 74 O'Connor Street Newtown, 18th April, 1972?
A. Mr. Rowan.
- Q. 468/10 Herbert Street, Newtown, 4th May, 1972? 20
A. Mr. Rathborne.
- Q. And 53 William Street, Redfern, 1st May 1972? A. Mr. Rowan.
- Q. All those valuations were done for either Group Unity, Giles Bourke Holdings or Fidelity Acceptance or, perhaps, another associated company, were they not? A. I did not check every one of them through.
- Q. That is what the bundle is, this bundle, it is produced in answer to a subpoena? A. Yes, but I didn't check to see which ones.
- Q. If you accept for the moment that they all relate to the companies, you would agree first of all, that there are a very large number of valuations done that went through the firm's records 1972/74? A. Yes. 30
- Q. And, leaving aside late 1974 all, I think, done either by Rowan or Rathborne? A. Yes.
- Q. And, whilst Rathborne did some before December 1972, you

agree he did some in the early stage when Rowan was also doing some? A. Yes.

Q. Thereafter Rathborne did them all? A. Without an actual check on each date written down I would say, probably, yes.

Q. And it would be right to say that both before and after the two valuations in question in this case, Rathbourne was doing valuations for one or other of these companies and putting them through, doing some valuations, and putting them through the company's registers or lists? A. I don't know how I could be certain that I can relate the two subject valuations to any others, because I haven't got any records. 10

Q. If you accept for the moment one subject valuation bears dated March 1973 and the other June 1973, it is clear Rathborne was doing the valuations for these companies and putting them through the records, both before and after those dates? A. Before and after those dates there were things going through.

(Folder containing sundry files of the defendant relating to valuations made for the Giles Bourke group mfi 9) 20

Q. Incidentally, in those files there is only a few of them in which working papers are attached to the valuation, do you agree? A. I have looked at so many files over the last few weeks - in the time I looked at them here now - I was not looking for that and could not say for certain.

Q. If that was the position - A. These papers have been handled so many times by so many people I can't say what they were like in their original state.

Q. But the working papers were to be kept with valuations, that was the system? A. Yes. 30

Q. And do you say they might have become lost being handled by legal representatives, or authorities? A. Both. They have been out of our possession for a long time. I could not say they were the same now as when we bundled them up.

Q. And what is also clear is that valuations were issued from your firm on credit to one or other of these companies in December 1972? A. Yes.

Q. And in September and afterwards 1973? A. Yes.

Q. And, you might have answered this before lunch, but the probability is that the ones issued after November 1972 were done then because there had been satisfactory arrangements made about payment? A. I can't remember but probably that was so. 40

Q. And would it be true to say that one of the problems encountered in the office was that because the valuers were busy doing their valuations they were not always rigid in their adherence to the systems about accounts and the making of invoices? A. That may have been so.

Q. That was so, was it not? A. I can't now go back to an incident so that I can say yes, I can only say probably.

Q. What I am putting is that that problem continued until late 1973 and that the change in procedure in 1973 was brought about primarily because of that problem? A. No it was not primarily because of that, it was primarily to correct the situation that permitted the copying of valuations. It was a side issue that we did something at the same time that allowed us to take some corrective action on bad debts. 10

Q. Mr. Hodgson, I think the system that you are talking about is when you required a corporate seal or valuation seal on all your valuations, is that what you are talking about? A. Yes.

Q. And that was a system you introduced only when you became aware of this problem? A. Yes. 20

Q. And you did not become aware of this problem until 1974? A. That is right - I am sorry, I am mixing the two dates.

Q. What you did in 1974 to minimise the risks of this happening - of copying happening was to require all your valuations to be issued under a valuation seal affixed and signed by the director? A. Yes.

Q. And you eliminated the practice whereby valuers could sign valuations with the corporate name? A. Yes.

Q. And in 1973 the change was because of bad debt incidents? A. Yes. 30

Q. And one of the factors leading to that was the fact that valuers did not always follow the procedure? A. Yes.

Q. And while, I suppose, a valuer might have been hauled over the coals if he did not follow the procedure it was not treated as a dismissal matter, for instance, was it? A. No.

MR. CLARKE: I call for a memo of 26th November, 1973 to the valuers on staff from the director (produced)

Q. (Approaching) That is a copy of a memo that you issued in November 1973 in an endeavour to obtain more rigid adherence in the office procedures in relation to accounting and recording? A. Yes. 40

(Copy memorandum as above mfi 10)

Q. And would it be accurate to say that insofar as the rigid adherence to office procedure in the recording of instructions, before October 1973 there was a little laxity in the firm?

A. No, I don't think there was a little laxity in the firm at all.

Q. And that the valuers were given a bit of latitude?

A. No, not given any latitude.

Q. They could, for instance, go out and accept instructions in the field? A. They can hardly be stopped. I would not know what they were doing in that sense.

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Q. If there was any prohibition against it you would find out and could stop it - there was no prohibition against it, was there? A. No.

(Manual, Ex. 8 handed to Mr. Clarke)

Q. This manual, p.63 I think, is primarily directed to those persons who might need to refer matters to the valuation department, although in part it is directed to the valuation department also, but don't you agree primarily it is directed to other persons? A. The whole manual is written so it is meaningful to the whole company, so, I suppose, in that sense the answer could be yes.

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Q. There is nothing here, pp.63/66 laying down the prohibitions of what a valuer shall do or shall not do, is there. A. No.

Q. You said for instance you did not give permission to Mr. Rathbourne to take company stationery out of the office. A. Yes.

Q. Would there have been an objection to him taking it out in the field, to the country, for instance, to have typed in the field a valuation? A. Yes, I would have objected.

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Q. You would have objected? A. Yes.

Q. Did you ever say that to him - A. The occasion never arose so that I didn't have to.

Q. You did not know he was taking stationery away? A. No, I had no idea.

Q. And if you had known, you say you would have objected? A. Yes. If I had known it was being taken as it was, I would have objected very strongly.

Q. If you had known it was taken for one job, say in Mullumbimby,

would you have objected to that? A. Yes.

Q. Did you ever tell Mr. Rathborne this was something that was prohibited? A. But I had no occasion to because I expected him to act properly and not do it.

Q. But you never laid down any prohibition to him, you did not tell him in express terms he could not take the stationery away? A. No.

Q. And you said yesterday valuations were sometimes done free on a charitable basis? A. Yes. 10

Q. They were also done free for other than charitable bases sometimes? A. Whatever way they were done free would be a basis that could be encompassed within the term charitable, I think.

Q. For Mr. Dusseldorp, would that be charitable? A. That is a matter of a different order. I don't think I had that in mind when I made the answer. It was not one I had any control over or discussion about.

Q. And you of course, were cross-examined at some length about free valuations? A. Yes. 20

Q. I don't want to go through each one but there were other instances, apart from Mr. Dusseldorp, when there were free valuations issued out? A. I can't remember them now.

Q. I am just putting to you that some were issued because of a particularly good client, for instance? I would have to have my memory refreshed on those, I can't remember.

Q. Some because you were managing them? A. That is a different circumstance again I think.

Q. But free ones were given when you were managing agents? A. The answer to that, I suppose, is that we were only off-setting what we were getting as managing agents, in any event. 30

Q. And in some of these free valuations, or some of these free valuations were, I take it, prepared by valuers under your supervision? A. Without being able to recall them I could not answer that at all. I could not be drawn into that. It would not be an answer I could give truthfully.

Q. If it were not a valuer only you, who would do the valuation? A. I can recall Mr. Dusseldorp, that was done by Mr. Cook, the managing director. Other than that, and I have had my memory refreshed on it, I could not recall any others. 40

Q. There was also another area where there were no invoices issued for individual jobs and that was in the area of bulk billing, was it not? A. It would not have been a bulk bill if it did not have an invoice, yes, there was an invoice.

Q. The invoice was not drawn up for each job, it was drawn up with the bulk? A. Yes.

Q. So that you might have 8 or 10 valuations and then a bill sent in bulk? A. But not as a surprise, it would have been a pre-arranged matter. 10

Q. And the fact you sometimes did free valuations would be known to your valuers? A. I suppose it would.

Q. You did not hide it from them? A. No.

Q. And the fact you did bulk billing would be known to your valuers? A. Well they would be involved in it, probably.

MR. CLARKE: Q. Could I go just to something else for the moment, Mr. Hodgson. You I think dealt with this question of the slow down in the boom of 1973 in the earlier evidence in the commital, did you not, or don't you recall? A. I recall something about it being asked, yes. 20

Q. What was said then was that you thought that there were signs of a slow down in the boom before September 1973? A. I may have.

Q. This is the question: "You have a general awareness, have you not, in 1973 there was generally a real estate boom up until about September that year? A. I don't think it was as far as September but I -----". Do you agree you gave that answer to that question? A. Yes.

Q. "I suggest to you that the boom came to a grinding halt when the then Treasurer, Mr. Creen, put up the bond rate in September 1973? A. Yes, but I think there were signs of it beforehand". You gave that answer too? A. If it is there I must have, I can't remember the answer. 30

Q. This is given on 10th October, 1975, when you would have had a much better recollection of the events of 1973 than you would now? A. I certainly would.

Q. You were then asked "Are you sure about that" and you said "Well I am only relying on my memory of the situation now but I think there were signs of it before then". I give you the answer to fill it in and put it fairly to you. There was a long question suggesting somewhat later and you said "Probably 40

it could, I don't argue the point as to when it was, I just said that my memory was that it seemed to be a bit earlier than September. Q. However you agree that the suggestion that, might we say, the credit squeeze started in September, 1973 is one you don't necessarily disagree with? A. Yes. Q. It was exacerbated in April 1974?" I haven't read the whole question, and your answer was "May or a date somewhere about then". Do you accept that you gave that evidence? A. Yes, I agree with it.

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Q. Is that your recollection now that in fact the boom had started to slow down before September 1973? A. I have looked at a lot of things since then and in fact examined documents which suggest to me that I might have been putting it a little bit early but I think that probably I was incorrect at the time, trying to go back to my memories of the two years earlier, but I do remember. About Christmas time that a minor boom crash occurred and almost overnight there was a change in real estate but I think that might have been December 1973.

Q. What you were doing in 1975 was recalling that from your own recollection, weren't you? A. Yes.

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Q. What you are doing now when you tend to correct that is to draw on material that you have since read? A. Well I have been asked this question in connection with other matters and I have had to refresh my mind a couple of times.

Q. Let me just put it to you that there were in fact signs about mid-1973, those signs being the withdrawal from the market of some of the entities that had up to then been investing heavily in the market? A. Could have been.

Q. Whilst there was no drop in the values in the latter part of 1973 there was somewhat a slow down in activity in real estate? A. I think that if I was to do a proper study to give a very accurate answer on this I would find that it was in certain sectors of real estate that it was evident but not in all.

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Q. You heard Mr. Leafe give evidence yesterday? A. Yes.

Q. You heard him talk about a five per cent permissible difference between values given the same base material of income on a property such as McMahons Point? A. Yes.

Q. Your view is that the range might be slightly more, perhaps five to ten per cent? A. That would be the ideal situation to have, yes.

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Q. In the committal proceedings you were being cross-examined in much the same way as Mr. Morling cross-examined here, to

suggest that there could have been a marked divergence in the situation? A. Unhappily there often is.

Q. Could you just answer my question? A. I thought that was answering.

Q. I asked you whether you were cross-examined about whether there was marked divergency? A. This morning?

Q. No, in the committal proceedings were you cross-examined at some length to suggest that there was a marked divergence between values of property such as the Glebe property in question here? A. Yes. 10

Q. You were cross-examined on the Lanyon and also on the Seatainer matter and a few others? A. Yes.

Q. You were at pains to point out that those types of valuations bore no relevance to a consideration of any discrepancy in relation to a cottage property or a property such as the Glebe property in question? A. Yes.

Q. You also adhered to the proposition that the range that you would expect on such a property would be five to ten per cent either way of the market value? A. Yes, that I would expect. 20

Q. I want to put that this is what you said: "Q. The approach of a property valuer in relation to the valuation of dwelling accommodation on such a property" - you can take it as Glebe - "your experience of a permissible margin or difference between competent valuations having regard to your own experience as a valuer and your knowledge and experience of other competent valuers, is that a plain question?" and your answer "Yes, I would expect that five or ten per cent to satisfy that type of situation." First of all, do you agree that is what you said back in 1975? A. Yes. 30

Q. Was that your view at that time? A. That was the ideal situation to have, it was my view on that basis, yes.

Q. That is what you were saying, you accepted the discrepancy you might expect to find between competent valuers in respect of a dwelling property in Glebe? A. Yes.

Q. You were cross-examined - p.351 - "You said yesterday, 'I would expect five or ten per cent would satisfy that situation' and you said yes. I would just like to ask you about that. What do you mean by 'I would expect five or ten per cent would satisfy that situation' and you said 'There should not be a margin greater than five per cent or ten per cent for the type of property in the Glebe area. Q. But what do you mean, margin between what, on what would be a market value for the property?" First of all you said that, did you not? A. Yes. 40

Q. Do you adhere to that? A. As an ideal, yes.

Q. As a practical reality that you should not expect between competent valuers for a dwelling house in Glebe the difference of the margin you stated? A. You should not expect on that basis, yes.

Q. The same comments would apply to the Glebe premises in question here, would it not? A. Yes.

Q. Also the McMahons Point premises in question here?

A. On the same paramaters that we have been given.

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Q. Given the same income? A. Yes.

Q. Accepting that you extend the margin slightly more than Mr. Leafe, you go five to ten per cent, in broad terms you agree with his approach? A. Broadly, yes.

Q. You yourself prepared in 1974 a valuation on the McMahons Point property? A. No, I disagree with that.

Q. You prepared a document? A. A letter.

Q. Mr. Hodgson, you have also, have you not, or someone under your supervision has prepared a value of the McMahons Point premises as at June 1973? A. I can't remember that one being done.

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Q. Have you never worked out in your mind a value of McMahons Point premises as at June 1973? A. No, I haven't, I can't recall that.

Q. You were asked in the interrogatories, this question, and incidentally you provided the answers for the interrogatories yourself, did you not? A. We did them in conjunction with ----

Q. You prepared the affidavit verifying them? A. Yes.

Q. You were asked in the interrogatories "Has the defendant by itself, its servants or agents at any time given consideration to an estimate as at 26th March, 1973, of the fair market value for mortgage purposes of the Glebe property?" Perhaps I will show you your answer. It is an answer in which a claim of privilege is made but the clear answer is that an estimate ---- can you see that? A. Yes.

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Q. I want you to read the lot but I just want to record the earlier part: "Yes, but has not performed the task of valuation on the requirements of proper and accepted valuation techniques

a fair market value of the Glebe property for the purposes stated in the interrogatories. Such consideration was given following the obtaining of legal advice etc." and a claim of privilege is made in respect of the answer. Clearly you were saying that you had given consideration to an estimate as at 26th March, 1973, of the fair market value of the Glebe property. A. I just say no, that there was no fair market value as at 26th March made by me, I can't say any more than that.

Q. You say the same in respect of the McMahons Point property, you have never made an estimate as at the relevant date in June 1973 and no one under your supervision has done so? A. I can't recall that either property has been done. 10

Q. In preparing the letter relating to McMahons Point of 18th November, 1974, you did give quite detailed consideration to values as at that time, did you not? A. Again, as far as I recall at that time of that letter there was virtually nothing to rely on.

(Mr. Morling objected to the general line of questioning on McMahons Point.)

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MR. CLARKE: Q. (Counsel approached) I am showing you a photostat copy of a document with the word "Workings" on top of it. Is that your handwriting? A. That is, yes.

Q. And this was the summary of a number of working papers for the preparation of the document of November 1974, was it not? A. No, I don't think so.

Q. You see, I want to test that, Mr. Hodgson. In a letter of November 1974 your final paragraph comes to an estimate at \$100,000 and this document postulates that you should adopt \$100,000? A. I don't necessarily agree with that. 30

Q. Well, if that wasn't the working paper for the preparation of the letter of 18th November, what was it? As far as I can recall, I did some notes on those notes at a time that may have been at or about that date for -- they are not there -- but some workings that were raised, I think on Mr. Cook's behalf. I can't remember whose but they had nothing to do with me.

Q. Look, Mr. Hodgson, this sheet headed "Workings" which is produced in discovery in this case could bear on nothing other than this letter of 18th November, 1974, could it? A. No, I don't relate the two. I can distinctly remember doing that at a time when afterwards I found that some inquiries had been made on zoning or something like that. There were sketches and other things that weren't done at my direction. 40

HIS HONOUR: Q. In the letter, exhibit U, you gave a figure of \$100,000, right? A. Yes, your Honour.

Q. You didn't pluck it from thin air, did you? A. It was pretty close to being that.

Q. Do you say you didn't have any working papers or any calculations whatever in order to arrive at the figure of \$100,000.

A. We did no sales and we didn't have any developers looking at it as a development site. It indicates there that I had some reference to rent but I hadn't worked any rents out on it so whether I had those rents or not, I can't remember. 10

Q. Are you telling me that you made no calculations of any kind before preparing and sending forward your letter of November 1974? A. As far as I recall, your Honour, that would have been the case. I had discussions with others in the office.

MR. CLARKE: Q. Well, Mr. Hodgson, you see you refer in these workings to "see attached papers" and to "rent statements".

A. Yes.

Q. And you refer to the property producing about \$17,000 nett when fully let. Do you say this was done at some time other than November 1974? A. No, I am not saying that at all. I am saying I can't remember when that was done but at the time I thought that it was done after that letter was written. 20

HIS HONOUR: Q. By "that letter" you are referring to exhibit G(?)? A. Yes. I am pretty certain that was done afterwards.

Q. What would have been the purpose of working up figures which merely went to arrive at the same figure which you had already stated in your letter of November 1974? A. I think, if I remember correctly, your Honour, I can't, again, be certain of this but Kooragang when they were told about the or got the letters were very unhappy about the figures that we put on and I think we went backwards to try and give them something by way of reassurance but we couldn't. 30

MR. CLARKE: Q. Is that what you say now, recalling that these workings were simply after Kooragang had received your letter of 18th November 1974, which is exhibit U? A. I think so. I can't be certain now.

Q. And there is no letter from you in any way confirming or re-affirming the letter of 18th November, 1974, is there? A. No, it was a phone call. 40

Q. Do you swear there was a phone call? A. I said I think I had these dicussions and I think I had them with Andrew Simpson.

Q. Thank you. And when did you have those discussions?

A. I think it was after the -- there were discussions because this was based on the situation where the property, both properties, I think, were to be auctioned and obviously there would have been a flow of discussion and it was for the basis of trying to give a reasonable reserve at the time in the depressed market that the letters ever arose that we were asked on that basis.

Q. Would you like to look at those 13 pages of workings? 10

A. They are the ones I was just referring to, none of them are mine and they weren't raised by me or on my direction.

Q. Weren't they raised on your direction? A. No. I think they were raised for Mr. Cook.

Q. You adopt a figure of \$100,000 on those working papers, don't you? A. I said that I looked at this, yes - not those working papers - because if I go through them now and look at them all those would be sales, probably. That would have nothing to do with those letters.

HIS HONOUR: Q. When you say "this" what were you referring to? 20

A. There were some written extracts of sales transactions commencing with East Crescent Street, McMahons Point. I don't know when they were obtained but there were obtained, as I recall it, for Mr. Cook.

Q. Well, sequentially you say what happened was, you wrote exhibit U and said the property was worth \$100,000. Kooragang said, that's terrible, how can you say that, and you then sat down or somebody sat down and worked out how the figure of \$100,000 would be the correct figure. A. Yes, and in support of that now I now see, your Honour, that we have here a sketch which shows the old zoning circumstances and another one which says "U Code". Now, we couldn't have got those under those circumstances without it being done at a different time to the date of those letters. Again, I can't recall the date but I think the date was some time afterwards. 30

MR. CLARKE: Q. Mr. Hodgson, you made specific reference in the letter of 18th November to "zoning" and are you suggesting that the Code was changed; there was no Code 18th November, 1974? A. I think that at that time there was an area when the whole Code situation in the North Sydney area was in a state of flux when they weren't deciding what they were doing. 40

Q. If that a serious answer? A. I am trying to recall it. Yes, it is a serious answer.

Q. Your process of reasoning to get \$100,000 was to capitalise \$17,000 at 10½% to arrive at \$160,000 and then you took off \$60,000 because rents could fall in uncontrolled tenancies and

there was a possibility of increasing protected tenancy rentals?
A. Yes.

Q. And then you came to consider eight town houses on a valuation of \$12,500 each; you reached a figure of \$100,000 also and then you said, "Town house sites command much higher figures. The cost through excavation could be extremely high"? A. Right.

Q. And that is how you arrive at your \$100,000 in your workings written out in this photostat documents, isn't it? A. Well, it is thinking transmitted into words in a fashion that one supported the other, but it is not a valuation. 10

Q. But do you say when you use the words "adopt \$100,000", that did not find its way into the letter of 18th November, 1974? A. No.

Q. What were you adopting \$100,000 for? A. Well, I think that after years and years of experience one can have a sense of what a property might be worth and what the highest situation one could realise might be, in the event that a buyer was about, and I think that my impressions of both properties were -- neither having been inspected properly because we couldn't get through -- would have been one of those things which is an every day circumstance with the setting of reserves, an impression of the market that is taken as being the reserve figure. 20

Q. Mr. Hodgson, just listen, please, to the question. You said the words "adopt \$100,000"? A. Yes.

Q. For what purpose were you adopting that figure? A. For the purposes of a reserve. As far as I can remember now, the reason for those letters being raised.

HIS HONOUR: Q. Mr. Hodgson, I am confused now. Was the document that Mr. Clarke has been showing you a document you prepared in justification of the letter, exhibit U, which posited a figure of \$100,000? A. I am not sure which is "U". Is "U" the letter, your Honour. 30

HIS HONOUR: Q. Yes. Which came first? A. I think that those workings were commenced that I found to be in the office, afterwards and not prior. I don't mean my own writing. My own writing, I can't recall now whether it was at or about the same time but I do feel that that note was made afterwards and it was made as a result of discussions.

Q. That is the point I am getting to. Is the explanation for the words "adopt \$100,000" the fact that you already had \$100,000 in the letter and that is why you were adopting that figure. A. Oh, I see. I couldn't say whether there was any 40

significance in the word "adopted". It is a common word, as far as I am concerned, in making notes -- "adopt \$100,000" or -- (Interrupted).

Q. In what sense do you commonly use it? A. Well, in a note to myself I used it as the reasonably figure to accept.

Q. But usually one starts off the calculations and then comes to a figure, not vice versa, that you start with a figure and then you work up a calculation to support it? A. But I have put in very rough form, two sentences in those notes. One says "On the basis of rents it looks as though there was 17,000 nett" and I have -- "17,000 gross", I think it said.

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MR. CLARKE: Sorry. It said "nett".

WITNESS: Well, on that nett figure I capitalised it and the other basis I used, unit sites at 12,000 each so that out of that I came to the conclusion that a figure of \$100,000 was a reasonable figure to adopt.

MR. CLARKE: Q. Is this what you are saying: This was prepared some time after the letter of 18th November, 1974, this workings written by you -- some time after? A. I don't know about "some time after" because I don't think that the conversations were had and certainly the discussions, that they were intended, if that was for auction on reserves were some time after it would have been. I don't know. Maybe a week or ten days.

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(Mr. Clarke called for original of document headed "Workings" together with attached papers and rent statement).

Q. Mr. Rathborne in 1973 complained to you on a number of occasions about secretarial facilities, didn't he? A. No. I disagree with that. The "large number of occasions" is quite wrong.

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Q. Did he ever complain to you in 1973 about secretarial facilities? A. I don't think that the word "complain" is even appropriate. He did say that he couldn't get his work done, on one or two occasions that I can remember and I think that those occasions were occasions that quite quickly were attended to by the obtaining of a temporary girl.

(Document previously called for produced)

Q. I will also come back to that, but what I understand you are saying, it was satisfied by a temporary but what I am suggesting is that there were quite a large number of complaints

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from him that his work wasn't getting done? A. I don't know who he complained to. It wasn't me on a "large number of occasions".

Q. And you have never said anything to him contrary to that, is that what you are saying? A. No, I don't think so.

Q. When Richardson and Wrench issued a valuation -- sorry -- an estimate of the market value with a note on it about recommendation of first mortgage security in the form that we have discussed, it would be issued in general practice to a mortgagor, would it not, or a potential mortgagor? A. A potential mortgagor, yes. 10

Q. And you were aware particularly in 1973, that mortgagors often shopped around for money? A. Well, I was never in that end of that style of business so I could only say that that is probably a thing that happened.

MR. CLARKE: Q. When it was issued direct for an intending mortgagee you did not know to whom it was going to be given, did you? A. That is right.

Q. You would have expected it was either given to one particular proposed mortgagee or more likely to a number of persons who might be interested in lending money? A. I had no reason to believe that there were people shopping around in that fashion. With our valuation, I would not have known. Our valuation was given to a person who appeared to need it because he told us why he needed it but he did not then confide in us what he was going to do with it. 20

Q. It would be highly likely it would be given to more than one person that you directed it to? A. In that he found a person because that person required a valuation. 30

Q. But in that instance you would have expected to have been given the name of the potential mortgagee? A. Sometimes we were.

Q. When you were not given the name of a potential mortgagee you knew it was possible that there might be a number of people being approached? A. No, I don't think so. I think that you are putting to me which, in those days, was not a question which ever entered my head because the circumstance had not been related to me by anybody.

Q. You were not aware in 1973 that your valuations, headed for an intending mortgagee, might be disseminated amongst a number of lenders in the real estate security market? A. If I had known I would have objected strongly because we were charging for copies and here was somebody, without our approval, copying. 40

HIS HONOUR: Q. You needed an authority copied: He might have found person "A" was not to his liking and taken it to "B"?

A. But that would not have been disseminated in the way Mr. Clarke put it to me.

MR. CLARKE: Q. You were aware it was possible that if the borrower could not get a loan from the person who he had in mind to lend the money, because of your valuation, he might take it to some other borrower? A. He is still in his search then.

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Q. So that you were aware it could be done, and I will deal with the original only, or did you have in mind also that your signed copy might be shown to the mortgagee? A. We believed, whether we were correct or not, I don't know, because again we were not told what happened but we believed that the original would go to the person who ultimately became the lender and the carbon copy became the copy of the person who purchased the valuation.

Q. Not only did you believe you knew that, for instance Kooragang was sent by you simple carbon copies on occasions, did you not? A. On occasions, yes.

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Q. You knew that potential borrower was getting a carbon copy. A. Yes.

Q. You knew it was a possibility that other mortgagees were given carbon copies by the owner rather than the original?

A. No, we did not know what an owner did with his.

Q. You never even recognised the possibility? A. No.

Q. So far as you were concerned you had rigidly in your mind, even though you gave an original and a copy to the person who ordered it, he would, as a matter of rigid form, give the original to a borrower? A. I believed that that situation held, yes.

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Q. Never did you expect your signed copy to be given to a borrower? A. No, because I believed that on the basis they were done - before one was done - it has a copy that had a cover on it and the other one was folded in loose behind it and obviously the better looking one would obviously become the one the monies were raised.

Q. You know what the market place is, do you not? A. Yes.

Q. You know, when you talk about real estate, the estimated market values? A. Yes.

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Q. One is not considering only one potential purchaser, one is looking at what the purchaser might pay, bearing in mind the market place was, proposed competing purchasers? A. Yes.

Q. You did not mean to say you did not think a proposed mortgagor might seek to see where he could get the best deal?
A. No doubt he did, but the mechanics of that was not something that concerned me. I suppose in terms of the draft mortgaged documents that have been properly issued through Richardson and Wrench there are a lot that have not been acted upon.

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Q. You would recognise that that was a possibility, a borrower might do that, seek to get the best deal he could get from a number of companies? A. Yes.

Q. You would recognise also that it is possible he was doing it at the one time, making application to a number of entities at the one time? A. I don't think that was something we sat down and busied ourselves about, the fact to us was a man wanted a valuation because he wanted some money and under those circumstances the only factor that we concerned ourselves with was giving him what he asked for.

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Q. You had no endorsement on your valuation that it was not to be copied, did you? A. No.

Q. You must have recognised that if a man was seeking to see where he could get the best deal, say from half a dozen lenders, he would send your valuation to the half dozen lenders? A. He may have, I don't know, because I never ever saw them.

Q. You recognised that possibility? A. It was a possibility.

Q. You recognised it? A. No, I did not recognise it.

Q. You did not think about it? A. No.

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Q. You are aware of the modern marvel of the photostating machine? A. The modern one but not the same one in 1973.

Q. The advantage of a photostating machine is instead of being simply a typed copy it produces a photographic image of the original document? A. Yes.

Q. Together with headings and signatures? A. Yes.

Q. You would agree if you see a photostated copy document you would expect it to be a photograph of an original that is identical? A. Yes, well, except the colour.

Q. A lot of photostating machines were used a lot in Sydney before the 1970's, were they not? A. They were not like the machines today. Yes, there were some, yes.

Q. There were photostating machines even used way back into the 1950's, they have been improved? A. Yes.

Q. Did it not ever occur to you that if a borrower was looking for money for six or so different entities at the one time that his practical way of doing that from valuations was to take photostat copies? A. No, I still insist that as far as I was concerned the copying of our documents came as a surprise to me.

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HIS HONOUR: Q. Prior to June 1973 you never encountered a copy of a photostated copy of Richardson and Wrench's valuation that had not been made in your office note? A. We have searched and I cannot recall one being presented to me, your Honour.

MR. CLARKE: Q. Of course you did not, as you said, put any prohibition on copying the original document itself? A. As it did not occur to me it was not one of those things I would have -----

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Q. Incidentally, would you agree your documents, wherein you take the ones we saw today, the copied ones we saw today, which end up with the format "We estimate a fair market value" and the immediate preceding paragraph gives a recommendation about whether it is good security or not? A. Yes.

Q. Do you describe that as a valuation? A. Yes, provided it is headed at the top "Valuation".

Q. In giving a valuation are you regarded as encumbent upon the valuer to satisfy himself as to the zoning of the property? A. A valuer would before he quoted anything on the zoning have asked at the Town Planning Department of the Local Council and get some verbal indication.

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Q. In some of your valuations the paragraph headed "zoning" is couched in terms such as "we have made enquiries"? A. Yes.

Q. But it was important, was it not, for a valuer to go to the council and to make enquiries to satisfy himself, as best he could what use could be made of the land and of the possibilities there were in regard to it? A. Yes.

Q. Likewise, in respect of a valuation of premises let as flatettes, it is important to satisfy yourself, firstly, as to the condition of the flatettes? A. We would not issue a valuation if we could not inspect the property.

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Q. That is different to your report of 1978 and what you call a valuation? A. That is why it is referred to as a report.

Q. Because you could not inspect -----A. And therefore could not satisfy the conditions we set ourselves of what a condition should be.

Q. It is also essential, is it not, to determine the income generated by the flatettes? A. Yes.

Q. And if you are going to value it primarily on an income producing property as flatettes it is essential that you satisfy yourself solidly that the information that you have is correct? A. Well, correct as it possibly can be, yes. 10

Q. And I suppose the source of that type of information would be a managing agent showing you the rent return sheets? A. The statement, yes.

Q. And they are the statements, such as that statement that you referred to in your handwritten working document when you said, "See attached papers and the rent statements"? A. Yes.

Q. You would work out what was coming in from each flat and then work out your gross income from that? A. Well, purely as an arithmetic exercise but it had nothing to do with what the proper rent might be because I had not seen the flats to see what might be appropriate. 20

Q. If you knew that the premises were the subject of a contract of sale, at the time that you were valuing it, you would want to know what the sale price was? A. Is this a hypothetical situation or these valuations.

Q. Yes, I am talking about these situations? A. Yes, I would try and find out if there was a sale in the contract or a sale occurred. 30

Q. You would want to look at the contract to see if there was anything special about the contract? A. If there was a contract in existence.

Q. Particularly to see whether any of the rents were stipulated in the contract? A. Yes.

Q. You compare those rents against your visual inspection of the premises and determine what you thought was a proper return for the building? A. Yes.

Q. Bearing in mind any information or lack of information you had as to the length of time of those leases or tenancies? 40

A. It would have some bearing, yes.

Q. If you knew one was for five years? A. Yes, that is what I meant, it would have some bearing.

Q. Also what would be critically important in 1973 was whether there were any rent controlled occupancies? A. Whether it would be critical, did you say?

Q. Yes? A. Yes, it would be.

Q. Because rent controlled occupancies could have a marked effect on the value of premises? A. Yes.

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Q. If you had three out of say eighteen or nineteen flat premises that were rent controlled it would have a deflating effect on a value, would it not? A. If they remained as rent controlled they would but they might have an inflating effect because merely to have a controlled tenancy did not say you had it forever.

HIS HONOUR: Q. You would not consider it a proper valuation to produce one based on earning potentials which did not refer to the fact that the entirety of the flats contained rent controlled property, would you? A. You would make some allowance.

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Q. Not only would you make some allowance but it would not be proper to produce a valuation that did not refer to the fact the block contained rent controlled properties? A. In the context of it?

Q. Yes? A. Yes.

MR. CLARKE: Q. You have, of course, seen Mr. Rathborne down here have you not? A. Yes.

HIS HONOUR: Q. You gave some evidence at the commencement of the cross-examination as to the procedure you established with Kooragang for the purpose of providing valuations. Do you remember that? A. Yes, I do.

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Q. Was there any discussions as to the procedure that was to be adopted in circumstances where there had been a relatively recent valuation carried out by Richardson and Wrench, albeit not at the behest of Kooragang? A. No, I don't think that either of us - party raised that situation because both of us, I believed at the time ----- (objected to)

Q. It just was not discussed? A. No.

K.W. Hodgson xx

Q. That situation did not arise, to your knowledge, at any time prior to June 1973? A. I cannot remember now, your Honour, but there may have been a time when a valuation - there was one, I think, I can't remember the detail.

(Witness stood down)

(Further hearing adjourned to Tuesday
10th June, 1980, at 10 am.)

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

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No. 3568 of 1976

CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED

v.

RICHARDSON & WRENCH LIMITED

SIXTH DAY: TUESDAY: 10TH JUNE, 1980

MR. MORLING: Your Honour, can I just deal with a few matters before we resume. First may I tell your Honour a development about a witness, which is outside my control. I ascertained yesterday that a valuer I proposed to call, and whose valuation has been given to Mr. Clarke, was suddenly admitted to Mona Vale Hospital in the last few days with what he assures me, and his doctors assure him, is a quite minor heart attack; I had expected to be told before I came to court this morning that the witness would be discharged from hospital today, and he told me when I spoke to him that although he had a preference, if he was discharged today, to be called next Tuesday, he would be willing to come to court tomorrow. I regret I at this point of time simply do not know what the position is; I will have an inquiry made during the morning. But he was to be called after Mr. Hodgson, and when Mr. Hodgson's evidence finishes today, if it does finish - and I think it will - I will have to ask your Honour's indulgence in that respect. I hope not, but it may be I will be forced to ask your Honour to let me call him on Tuesday.

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Dealing with another matter, your Honour will recall that in my cross-examination of Mr. Gilbert I referred to a number of extracts from the Sydney Morning Herald. The transcript at p. 107 takes the very reasonable course I think of not setting out the whole of the extracts. I have in court the extracts from the Herald from which I was reading; I have had typed out the paragraphs to which I was taking the witness, and the most convenient course may be merely to tender the extracts, and I will leave the book with Mr. Clarke, and should he wish to amplify it, he can do that later if that is convenient.

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(Extracts from Sydney Morning Herald, tendered without objection and marked Ex. 10).

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I have endeavoured, so far as I can recall, to refer to all the paragraphs from which I quoted. My memory may be fallible, and I am quite happy to tender the whole extract, which is quite long, or delete them if Mr. Clarke thinks fit. My recollection is that the ones I have extracted are the ones I put to Mr. Gilbert.

There is one matter relating to the transcript, which I feel is of such importance that it ought to be dealt with now, because it arises out of the evidence of Mrs. Clarke, who, unless we can reach some agreement about it, will have to be recalled. Let me say at once that the error which I will respectfully suggest Mr. Clarke made was entirely unintentional. Mrs. Clarke's evidence commences at p. 161. (Addresses his Honour). I would like to suggest, with respect to my friend, that the 12 documents should be 11, and the one in respect of 15 Gottenham Street, Glebe should not have been part of the bundle. I suggested it would be necessary to recall the witness if there was any doubt about it.

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HIS HONOUR: You might like to think about it, Mr. Clarke, and let us know the result.

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MR. CLARKE: Yes your Honour. What concerns me about this is that what I did was to go through every one in the bundle, and I have that recollection, and I put one in one bundle and one in the other. It may be that I left one out, but that is not my recollection. The transcript certainly seems to suggest that I left one out, but it appears up in the air, that it does not fit in one bundle or the other, the way the transcript reads. I recall, when I was asking her in relation to one - and I cannot say it was this one - perhaps mild surprise at her answer, but I do not remember which one it was. I thought I put something to Mr. Hodgson about this particular one.

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MR. MORLING: If I can indicate to your Honour, it would be my submission that that analysis of the transcript would indicate that the document was never put to the witness as a document, and the evidence would indicate that at no stage did she say that she typed a valuation on 3rd December, 1972, with the initials "A.V.", and if there is any doubt about it, I would need to recall the lady, but I would suggest the evidence is clear as it stands.

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HIS HONOUR: Well, certainly at the moment it clearly supports you, and Mr. Clarke may agree with that view.

MR. MORLING: The other thing is this: your Honour was good enough and my friend was good enough to assent to the proposition that when I was leading Mr. Hodgson's evidence in chief, I did not stay to go through the files in a way which I thought was unnecessarily tedious, and I left that part of my examination in chief open. I would like, I think

reasonably briefly, to go through the files. As my friend has been interrupted, so to speak, by time in his cross-examination, he thinks it would be better if I do it now, as a resumption of examination in chief, and I will defer until the proper time my re-examination of the witness. If I could have access to the exhibits, which I think are for the most part all in those binders, and also the green backed folders, and if I could indicate what I propose to do. Any amount of leading which I do can immediately be found to be correct or incorrect by a more detailed examination of the exhibits themselves. For instance if I put to the witness a leading question that on 28th November, 1972, he received a letter from the plaintiff, it will be found to be in the file.

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MR. CLARKE: Before my friend starts, at p. 206 I called for some documents, and it is not recorded in the transcript, but what was said then was that they would be produced at 10 o'clock on Tuesday; and whilst later on the page it said, "Documents previously called for produced", that must be a reference to some other document. Your Honour will recall I deferred further cross-examination on that aspect until I had these handwritten notes produced.

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HIS HONOUR: Yes. What is the position there?

MR. MORLING: Some of the documents were brought into existence because of the threat of litigation in this case. In fact, without saying what is in them, they are memos from a gentleman who is a director - not Mr. Hodgson - to Mr. Broadley of Freehills, about Mr. Ray Little calling to see him and raising the question of valuations, saying they had lost money, and they would like court action, and so on.

HIS HONOUR: I do not think the call extended to that, really. I think if one starts reading the transcript about p. 203, one can see what document Mr. Clarke wants. Mr. Clarke, I can see you might be in some difficulty, if Mr. Morling follows the line he is contemplating; you have not been through the documents in the detail he has. If at the end of the further examination in chief you need to look through the files, let me know.

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MR. CLARKE: Yes your Honour.

MR. MORLING: What I propose to do is to go through one by one the files in respect of the valuations listed in Attachment A to the answer to interrogatories and then deal with a few additional files which are not there mentioned.

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KEITH WILDON HODGSON
On former oath:

HIS HONOUR: Mr. Hodgson, you are bound by the oath you took last time.

MR. MORLING: Q. Mr. Hodgson, Ex. 1 is the plaintiff's file in respect of the property 65 Alexander Street, Crows Nest, and in that file, (approaches witness) marked with a flag is a copy letter from the plaintiff to you dated 28th February, 1972, in which reference is made in the last paragraph to the fact that in company with Mr. D. Minks, you had already made a preliminary inspection of the property? A. Yes.

Q. Can you recall inspecting that property for Mr. Minks? A. I can remember going to the property, yes. 10

Q. And in that letter I think the plaintiff informed you that the company had been asked to consider and advance on the property, and if so instructed, would you value the land, "For and on behalf of an intending mortgagee"? A. Yes.

Q. And on 6th March, 1972, in a letter which also appears in the file, Ex. 1, did the defendant reply to the plaintiff advising that a valuation had been made? A. Yes, that is correct.

Q. The next item on that list is property 7-9 The Corso, which is Ex. D (Approaches witness). On 9th February, 1972 - this letter is already in evidence in some other place - did you write a letter to the Secretary of Australian Fertilizers, the first paragraph of which reads, "We refer to the writer's conference at your office today, and attach hereto more detailed information on the property at Nos. 7-9 The Corso, and number 2 Market Street, Manly"? A. Yes. 20

MR. MORLING: Your Honour, if I can just interpolate here, I do not think that letter is on the file Ex. D, but I think it does appear in another exhibit in the agreed bundle of documents. So that your Honour will know this is not a haphazard exercise, what I am endeavouring to do is to get into one place the fact that I think, save in one case, there was direct communication between the plaintiff and the defendant. It is G.2, part of Ex. A. 30

Q. The third property on the list is 288 Maroubra Bay Road, which is dealt with in Ex. 2. (Approaches witness). This property is the subject of the plaintiff's file, Ex. 2, and on 11th July, 1972, does your file disclose a reference to instructions from "Australian Fertilizers Jim Minks"? A. Yes.

Q. Can you recall in whose writing those instructions are noted? A. No, I can't now. 40

Q. Those instructions of course appear only on your file and not on the plaintiff's file? A. That is right, yes.

Q. And on 28th July, 1972, did the plaintiff write to the defendant as per the letter which is in the plaintiff's file Ex. 2, again stating that the plaintiff had been asked to consider making an advance, and asking whether, if you were so instructed, you would make a valuation? A. Yes.

Q. Then on 10th August, 1972, did the defendant write to the plaintiff informing the plaintiff that an inspection of the property had been made, and enclosing a copy of the valuation, and that letter does not appear to be on the plaintiff's file? A. In the first part, it is yes to that one; and no to this.

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MR. MORLING: Your Honour, it is a question of mechanics. I do not want to make unnecessary paper. If your Honour has no objection, I will add the copy letter of 10th August from the defendant to the plaintiff and also the handwritten instructions, to that Exhibit.

HIS HONOUR: Yes, that will become part of Ex. 2.

Q. Mr. Hodgson, could I just ask you this: you were being paid by the intending borrower or mortgagor for these valuations? A. Yes.

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Q. You prepared, as you told us the other day, a nicely bound original and a copy? A. Yes.

Q. And as I understand what you told Mr. Morling, you sent the copy to Kooragang, the plaintiff? A. In that particular case I think the copy went to Kooragang, but in most cases an original went to Kooragang, as far as I can recall.

Q. Who instructed you to do that? A. To do what, your Honour.

Q. To send the original to Kooragang, or the copy, as the case may be? A. Well, that was in the original discussions we had, that the original would go to Kooragang.

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Q. But this is what intrigues me a bit. You had a discussion with the plaintiff, Kooragang; you were getting payment from somebody else. Had you ever had instructions from that third party that you should supply Kooragang with either the original or a copy? A. I can't remember the details now, but I think there was a letter that covered that situation, if I am correct in my memory on those circumstances.

Q. What, that in each instance you obtained an authority from the intending borrower that you should supply Kooragang with the valuation, did you? A. I could not say whether in each case.

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Q. But that was the general course of practice, as you recollect it? A. Yes.

MR. MORLING: Q. The next valuation on the list (approaches witness) is one of a property 11 Hardie Street, Neutral Bay, which file is already part of Ex. H, and your file indicates that on 31st May, 1972, you received a letter from the plaintiff addressed to the Manager of Richardson & Wrench Limited, saying that the company - that is to say, the plaintiff - had been asked to consider an advance on the property and if so instructed, 10 would you make a valuation? A. Yes.

Q. And that letter does not appear to be on the plaintiff's file; and that letter has a note at the bottom of it that it contains an enclosure, which is a loan proposal? A. Yes.

Q. Then on 29th June, 1972, did you write to the plaintiff saying "Please find enclosed valuation, a copy of which has been forwarded to Lepad Pty. Limited"? A. Yes.

MR. MORLING: Your Honour, we now get into difficulty, because Ex. H contains a number of files. I would wish to add to that part of Ex. H which deals with the property 11 Hardie Street, Neutral Bay, the letters of 31st May, 1972, from the plaintiff to the defendant, and the reply 29th June, 1972. For my purposes it would be quite sufficient if I read it onto the transcript, but if your Honour would rather have the document annexed, it is all right. 20

HIS HONOUR: I do not want the document.

MR. MORLING: The letter of 31st May, 1972, from the plaintiff to the defendant, after giving reference to the property at 11 Hardie Street, Neutral Bay, reads:

"The company has been asked to consider an advance on the above property as detailed in the attached application. No action is required of you unless instructed by the applicant to make a valuation, the cost of which is to be borne by the applicant. 30

If so instructed, will you kindly value 'for and on behalf of an intending mortgagee', and also indicate the value of the land as distinct from the value of improvements. We would request a separate submission to the company based on the valuation 'guidelines' included in our letter of 22nd February, 1972. 40

On receipt of a request from the applicant, we would appreciate your prompt attention to this valuation".

Was your reply of 29th June, 1972, in these terms:

"Please find enclosed valuation of the above property, a copy of which has been forwarded to Lepad Pty. Limited.

Our valuation of \$150,000 includes a land content of \$72,200. This land figure would be considerably increased once the North Sydney Council's Outline Scheme is implemented, as the subject property is to be designated for maximum density residential development.

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Q. The next property on the list is 451-465 Glebe Point Road, and that file, the plaintiff's file, is already Ex. 3. On the plaintiff's file in a letter of 5th May, 1972, is there a letter signed by Mr. Minks as financial analyst, giving certain details in respect of the property? A. Yes.

Q. Then does the file also indicate that on 29th May, 1972, the plaintiff wrote to the defendant in terms which are fairly standard terms, saying that a valuation may be called for?

A. Yes.

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Q. And in respect of that same property is there a letter in your file, which is not in the plaintiff's file, dated 25th July, 1972, addressed to Mr. Simpson at Kooragang in these terms:

"As instructed, we have made an inspection of the abovementioned property and now have pleasure in enclosing herewith our valuation, a copy of which has been sent to Mr. B. Kosack, Parkes Developments Pty. Limited"?

A. Yes.

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Q. Is the next property on the next one known as 27 to 29 Tryon Road, Lindfield, and that is part also of Ex. H. I think the plaintiff's file indicates that on 6th June, 1972, it wrote to your company giving details of a prospective mortgage proposal? A. Yes.

Q. That letter is on the file; and the file also discloses that the plaintiff wrote to the defendant on 13th July, 1972, in the usual terms, suggesting the valuation might be called for? A. Yes.

Q. But there is not on the plaintiff's file a letter of 10th August, 1972, in these terms, written by the defendant to the plaintiff:

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"In accordance with your instructions we have made an inspection of the abovementioned property and now

have pleasure in enclosing herewith our valuation, a copy of which has been sent to A. Norton, real estate agents".

A. Yes.

Q. Is the next property No. 161-163 Military Road, which also forms part of Ex. H; and again in respect of that property is there, in your file but apparently not in the plaintiff's file, a letter of 25th January, 1973, from the plaintiff addressed to Mr. Hodgson, Richardson & Wrench Limited, a letter in these terms:

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"The company has been asked to consider a loan on the above property as detailed in the attached application. No action is required of you unless instructed by the applicant to make a valuation, the cost of which is to be borne by the applicant.

If so instructed, will you kindly value 'For and on behalf of intending mortgagee' and also indicate the value content of the land as distinct from the value of improvements.

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On receipt of a request from the applicant, we would appreciate your prompt attention to this valuation".

Is the next property 17-25 Wentworth Avenue, which is part of Ex. K. In addition to what appears in the plaintiff's file; is there in your file a handwritten note on a written form which refers to some instructions having been received from Mr. J. Minks? A. Yes.

Q. Can you recall in reference to the file in whose handwriting the notation is of Mr. Minks' instructions?

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A. The writing appears to be Mr. Davies'.

Q. And do Mr. Davies' initials appear on the valuation which was made? A. Yes they do.

Q. And without going to the detail, is there a note in the plaintiff's file that on 19th January, 1973, some instructions were received from Mr. J. Minks, and thereafter some details appear?

A. Yes.

Q. That is 17-25 Wentworth Avenue - that is in the defendant's file. Is the next property 228 Headland Road, and is that file Ex. 4. (Approaches witness). I think there is in the plaintiff's file, being Ex. 4, a copy telex of 20th March, 1973, which speaks for itself but refers to Richardson & Wrench

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having already valued this property in Brookvale in May 1972 for \$250,000, and they have confirmed that this valuation would be increased if valued again in March 1973. Is the next valuation 34 Talara Road, GyMEA, which is part of Ex. H. Mr. Hodgson, are you at this stage able to recall any conversation of any kind which you had with anybody from Kooragang about Talara Road? A. I can't be sure of any conversation that I had, but I have a faint memory of an instruction coming in or a request coming in, to which I allotted a valuer on that job for Kooragang.

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Q. You say this is only a faint memory? A. Yes.

Q. Is the next property 200 Crown Street, East Sydney, and is that part of Ex. L. Is there, in your file, a letter of 13th April, 1973, which I think does not appear in the plaintiff's file, and is the letter addressed to Mr. Minks at Kooragang and does it read:

"In accordance with you instructions, we have made an inspection of the abovementioned property, and now have pleasure in enclosing herewith our valuation. Our memo of fees is also enclosed".

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A. Yes.

Q. Is there also, in your file, a note on 16th March, 1973, of some instructions having been received from a Mr. J. Minks?

A. Yes.

Q. And in whose handwriting is that? A. That again appears to be Mr. Davies.

Q. And did Mr. Davies in fact make the valuation in that case? A. Yes he did.

Q. Is the next valuation 51-53 Bay Street, which forms part of Ex. E. (Approaches witness). I draw your attention to the fact that part of Ex. E is a copy of a telex of 22nd August, 1973 from Mr. Satchwell to Mr. Paech, which makes reference to Richardson & Wrench having provided an informal maximum valuation of \$400,000? A. Yes.

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Q. And I think you do not have a record of having made any valuation at all in this matter, is that right? A. I have not been able to turn one up, no. I have no record.

Q. Can you recall any telephone conversation about this one?

A. No I can't.

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Q. Can I assist you by asking you whether you can recall any reference to the Double Bay office in this matter? A. I remember that Double Bay office gave some advice to Kooragang.

Q. Can you recall yourself having mentioned the Double Bay office to anybody at Kooragang? A. I told the Kooragang people that the best source of information would be the Double Bay office.

Q. I think somewhere in this file there is a reference to a note by Mr. Little of 15th August, 1973, which refers to that. And on 24th August, 1973, did Richardson & Wrench write to the plaintiff confirming a telephone conversation that had been had with Mr. Ray Little on 16th August indicating that the subject property would be worth in the vicinity of \$350,000 to \$375,000? A. Yes.

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Q. Is the next valuation on the list East Crescent, which is McMahon's Point; I will not deal with that. Is the next one 40 Cogee Bay Road, which is part of Ex. K; and without going to that file, will that file indicate that on 14th August, 1973, the plaintiff wrote a letter to the defendant in the usual terms advising him that a valuation might be called for? A. Yes, I have seen that.

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* Q. Is the next property 43-49 Norman Street, Peakhurst; is that part of Ex. J. I just ask you whether, in respect of the property 43-49 Norman Street, is there in your file some handwritten instructions headed, "Mr. Ray Little", and does it read thus in part, "Mr. Ray Little, Australian Fertilizers, 213 Miller Street, North Sydney (Kooragang Investments)" then some handwritten references to a property and a reference to "L.J.H. valuation, \$225,000, 13th August, 1973"? A. Yes.

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Q. I think I asked you about this last Thursday? A. Yes.

Q. And then is there in your file but I think not in the plaintiff's file, a letter of 6th December, 1973, from the defendant to the plaintiff reading as follows:

"In accordance with your instructions an inspection of the above property has been carried out and it is considered that the property is an eligible security for the advancement of funds by way of first mortgage to an amount of \$140,000.

It is further considered that the valuation of the property mentioned by you in the amount of \$225,000 approximates its present market value".

40

A. Yes.

K.W. Hodgson, x.

Q. Is the next property Wollongong Road, Fyshwick, and is that part of Ex. H, and there will be found in that part of Ex. H a letter of 8th August, 1972, from the plaintiff to you in the usual terms, advising that a valuation might be called for?

A. Yes, I have seen that one.

Q. The next property is the one at 233-237 Glebe Point Road, and I will not ask you about that. Is the next one 39 Rhodes Street, Hillsdale, and is that part of Ex. K. (Approaches witness). Is there in your file in that matter some handwritten instructions, I think you have identified as being in your handwriting on a previous occasion, is that right?

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A. Yes, that is correct.

Q. And they are headed, "Kooragang, Ray Little, 39 Rhodes Street, Hillsdale, \$600,000", with some details of the property, and ending up with the words, "Slade, Cromack & Brown, value \$950,000"? A. Yes.

Q. And are Slade, Cromack & Brown a firm of valuers, or what are they, or don't you know? A. I am not sure.

Q. And does your file indicate that the defendant wrote to the plaintiff on 21st January, 1974, in these terms:

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"In reference to your verbal inquiry with regard to mortgage of the above property, we confirm our verbal advice, that we consider the present estimate and value for and on behalf of an intending mortgagee to be \$920,000.

We recommend the property as an eligible security for advancement of funds by way of first mortgage only, up to a sum of \$600,000.

Our memo for fees for \$25 is enclosed herein".

30

A. Yes.

Q. Is the next one on the list a property known as 65 Hume Street, Crows Nest, and is that part of Ex. H. I think it is sufficient for my purposes if I read onto the record that in the plaintiff's file produced there is a letter from the plaintiff to the mortgagor dated 8th August, 1973, which states, inter alia, that, "We have advised Richardson & Wrench that a valuation may be required". In a letter of 8th August, 1973, from Kooragang to another Mr. Simpson, who was apparently the Manager of the Southland Provident Finance Pty. Limited, the final paragraph of which reads in part, "We have already advised Richardson & Wrench Pty. Limited that they may be approached for a valuation of the property in question"? A. Yes.

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Q. Is the next property 269 Harbord Road, Dee Why, which is part of Ex. K. (Approaches witness). In that matter does your file disclose that on 13th December, 1973, Mr. Simpson, as manager of the plaintiff, wrote to the defendant in these terms:

"We have been approached to lend sixty-five percent of your valuation on a property, Lot 4, 269 Harbord Road, Dee Why.

Donald Cameron & Associates, acting on behalf of the borrower, Michael Reginald Pevsner, will approach you to carry out the valuation, which will be at the borrower's cost, and which should be paid to you before the valuation is sent on to us".

10

A. Yes.

Q. Is the next one 78-80 Perry Street, Matraville, is it part of Ex. J, and does the plaintiff's file disclose that there is a valuation from your company dated 2nd January, 1974, and you may take it from me that the advance was made some time in July 1974? A. Yes.

20

Q. Is the next one 1 Thurlow Street, Moore Park; is that Ex. G. (Approaches witness). Is there a letter on Ex. G dated 2nd August, 1974, from the plaintiff to the defendant in the usual terms, advising you that a valuation might be called for? A. Yes.

Q. Is the next one 21 Guilfoyle Avenue, Double Bay, which is Ex. F. (Approaches witness). Does the plaintiff's file disclose that in a letter of 16th July, 1974, written by the plaintiff to Donald Cameron & Associates, in the final paragraph of that letter reference is made to "We have already advised Richardson & Wrench that they may be approached for a valuation of the property"? A. Yes.

30

Q. And I think, if I may now have access to the plaintiff's file in respect of 399-403 Victoria Road, there is a cross-reference here to indicate involvement of your company; is there, on the plaintiff's file, in respect of a property 399-403 Victoria Road, Chatswood, which forms part of Ex. J, a letter dated 16th July, 1974, from the plaintiff to the defendant, which reads in part as follows, "We have been approached to lend money secured by first mortgage as follows". Then there is a reference to another property. Then, "(2) 21 Guilfoyle Street, Double Bay, on account of Sam and Sonia Sankey - flats"? A. Yes.

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Q. And indicating further in the letter that you may be asked to make a valuation, "To the borrower's accounts and which should be paid to you before the valuations are sent to us"? A. Yes.

Q. Is the next property 1059-1063 Victoria Road, Ryde, which is part of Ex. K; and without going to the file it will be seen that there is a letter on that file dated 20th December, 1973, from the plaintiff to the defendant in the usual terms. Now is the next property 399 to 403 Victoria Road, Chatswood, which forms part of Ex. J. (Approaches Witness) and does that exhibit indicate a letter from the plaintiff to the defendant of 16th July, 1974, in the usual terms? A. Yes, that is correct. 10

Q. The next property on the list is No. 202-214 Milperra Road? A. Yes.

Q. And this is the property which you mentioned in chief as being one in which a wrong address was given, is that right? A. That is so.

Q. And in respect of which you had some discussion with Kooragang, and as a result, no valuation was called for or made? A. That is correct. 20

Q. (Approaches witness). Can I approach you in respect of that matter and did your instructions in respect of that matter come under cover of a letter dated 10th August, 1972, from the plaintiff to the defendant, in the following terms:

"I have enclosed a valuation done by Stanley Thompson of a property at 202-214 Milperra Road, Milperra. Would you please arrange for a 'quickie' inspection of the property, and advise me if it is a suitable mortgage proposition. Does the addendum to the valuation alter the valuation significantly? 30

Signed by Mr. Minks? A. Yes.

Q. And was there annexed to that letter a copy of a valuation dated 15th March, a copy of a valuation dated 26th February, 1972, and an addendum thereto of 5th March, 1971, both from Stanley Thompson Real Estate Pty. Limited. A. Yes.

Q. In addition to those files on the list, do you produce from your own records three or four files in which - perhaps Milperra Road is not on the list - which are not the subject of exhibits, but which relate to other occasions when your company was approached by the plaintiff? A. Yes. 40

Q. Was one of those in respect of a property known as 91 Wolseley Road, Point Piper? A. Yes.

Q. Do your files indicate that there was some telephone conversation with either Andrew Simpson or Ray Little at Kooragang? A. Yes.

Q. Then on 3rd January, 1973, did the defendant write to the plaintiff in these terms:

"We wish to advise that we have made an external inspection of the abovementioned property. From this inspection, our knowledge of property sales in the locality, and the level of rentals being paid for flats 2 to 5, we consider that a guideline to the present market value of the property is estimated to be \$500,000. If converted to Strata, it is considered that the market value in one loan could be \$510,000.

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It must be appreciated that such guidelines have been made on an outside inspection of the building only. Should any or all of the flats be renovated, such renovations could add up to \$25,000 per flat, depending on the extent of such renovations. Our memo of fees is enclosed herewith".

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A. Yes.

Q. Was there another occasion when the plaintiff approached you in respect of a property known as 318 Burns Bay Road, Lane Cove? A. Yes.

Q. Can you personally recall this matter, or not? A. I can recall instructions being received.

Q. Did you initially get some telephone instructions from Mr. Andrew Simpson some time in February 1974? A. Yes.

30

Q. And did you eventually write to Mr. Simpson at Kooragang on 26th February, 1974, in these terms:

"Re property, No. 318 Burns Bay Road, Lane Cove. The abovementioned property has been inspected externally as requested, and an estimate of its current market value is considered to be \$700,000. Our memo of fees is enclosed".

Then you made reference to some other fees? A. Yes.

Q. Were you also asked by the plaintiff to advise it in respect of properties known as 372 Chapel Road, Bankstown, and 15-23 Hunter Street, Parramatta? A. Yes we were.

40

Q. And did you receive a letter of 14th November, 1973, in respect of those two properties? A. Yes.

Q. Can you recall what happened about the carrying out of those instructions, or not? A. I can recall that there was either a telephone call or a note. I could not be certain whether there was a note sent to Kooragang in connection with the external inspection of them.

Q. Can I draw your attention to a handwritten note on your file, is that in your handwriting or not? A. No. 10

Q. Whose handwriting is that in? A. That is Mr. Weir.

Q. And does that read, "Mr Simpson informed that Mansell valuation considered excessive. Suggested \$140,000"? A. Yes.

Q. And finally I think the instructions which you received in the letter of 14th November, 1973, from the plaintiff in relation to the Parramatta and Bankstown properties was in these terms:

"We have been approached to lend money on the following properties:

(1) Nos. 15,15A,17, 19, 21 and 23 Hunter Street, Parramatta. These properties are currently being purchasd for \$531,026. It is the borrower's intention to eventually erect a tower building on the land. We would appreciate your confirmation of the value of these properties for the purpose proposed. 20

(2) 372 Chapel Road, Bankstown. This is a two-storey brick structure. The ground floor contains an arcade of 9 lock-up shops and an island kiosk. The arcade has access through to Kitchener Parade. C.W. Mansell and Associates Pty. Limited have valued these premises as: 30

Land	\$90,000
Improvements	\$85,000.
Total:	\$175,000.

Would you please give a check valuation on this property.

Some time ago it was agreed we would pay you a fee of \$25 for such check valuations, and although you have carried out some of these, we have not received a charge. It would be appreciated if you would render an account with each report. 40

K.W. Hodgson, x.

Your prompt attention to this request would be appreciated.

So far as you are aware, Mr. Hodgson, are the files which I have taken you through this morning, all the files which have dealt with business transactions which the defendant has had with the plaintiff? A. Yes.

MR. MORLING: Your Honour, there is only one matter, another important matter, which I should have asked in chief and I did not. Your Honour will recall that when I tendered Ex. 9 there was an objection; I think Mr. Clarke considered overnight whether he would argue the matter, and next day they became Ex. 9; they were originally marked. I did not the next morning ask Mr. Hodgson what his records disclosed in respect of these 32 valuations, and I should have done that. If I could just do that now.

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HIS HONOUR: Yes.

MR. MORLING: Q. (Approaches witness). Mr Hodgson, Ex. 9 consists of 32 valuations. As to all of those valuations, save one, in respect of 399 Glebe Point Road, Glebe, as to which I will ask you some separate questions, does the defendant have any record of those valuations having been made through the company? A. No, there is no record.

20

Q. I now show you one which is in respect of No. 399 Glebe Point Road, Glebe, and which purports to be dated 3rd April, 1973? A. Yes.

Q. Have you been able to find, in the company's records, some papers relating to a property known as 399 Glebe Point Road, Glebe? A. Yes.

Q. I think there is, tucked into the valuation which forms part of Ex. 9, a letter from the defendant to Roland Gridiger and Co.? A. Yes.

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Q. Your Honour, that letter was just tucked into that valuation. Your Honour's Associate was good enough to hand it to me yesterday. I do not know whether it was in there originally or not. Can you recognise the typing on that document as being the sort of typing which the Richardson & Wrench girls produce? A. Yes.

Q. Were you able to find in the records some documents, which I will in a moment tender, consisting firstly of a photostat copy of a valuation of a property 399 Glebe Point Road, Glebe? A. Yes I was.

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Q. I think it is pretty obvious, your Honour - I think there is a very faint reproduction of the date, but it appears to be 3rd April 1973, does it not? A. Yes, I think so too.

Q. And then is there some red ink handwriting on that poor photostat copy? A. Yes.

Q. Can you recognise whose handwriting that is? A. It appears to be Mr. Rathborne's.

Q. Then did you find a carbon copy of a valuation, which bears the initials, "TGR: YF"? A. Yes. 10

Q. And did you have a young lady whose initials were "YF" working with Richardson & Wrench Limited in March 1974? A. We did.

Q. And this document is dated 26th March, 1974, and there is a pencil line through it, and over the top of it the words, "3rd April, 1973"? A. Yes.

Q. If you go back to what I shall call the original valuation, being part of the 32 valuations forming part of Ex. 9, would you look closely at the manner in which the date is typed? A. Yes. There have been erasures.

Q. You say you think there have been erasures? A. Yes. 20

Q. And have you searched for any record of a valuation having been made in Richardson & Wrench's offices on or about 3rd April, 1973, in respect of the property 399 Glebe Point Road? A. Yes.

Q. Is there any such record? A. No.

Q. However, have you looked under the entry of Gridiger for the following year, 1974? A. Yes.

Q. And is there any entry there relating to, not to any of the plaintiff companies, but to Gridiger? A. Yes.

Q. And does the valuation as to the date of which you say you think you can see some erasures, is that entered in the 1974 records under the name of Gridiger? A. It is. 30

Q. I just use the expression "The plaintiff companies". I am sure I meant to say "the Bourke Group of companies". Mr. Hodgson, I think I put a question to you a moment ago to this effect, that you had not found any entry in the company's records relating to the plaintiff companies in respect of this valuation. May I ask you this: were you able to find any record in respect of the Bourke Group of companies relating to 399 Glebe Point Road, Glebe, either in 1973 or 1974? A. No. 40

Q. But you were able, were you not, to find the entry which you have told his Honour about, made in 1974, under the reference to Gridiger? A. That is so.

MR. MORLING: I would tender those files, and that is all I have to ask him.

(Short adjournment).

ON RESUMPTION:

HIS HONOUR: What is your attitude to the tender, Mr. Clarke?

MR. CLARKE: I take the same objection I took to the other 31. I don't take any further objection. 10

(Copy documents being letter from the defendant to Roland Gridiger and Co., of 22nd March, 1974: copy valuation with original date of 26th March, 1974 and pencilled date 3rd April, 1973, and photostat valuation of property 399 Glebe Point Road, Glebe admitted after objection and marked Ex.11).

(Discussion as to pleadings: Mr. Morling to look at form of pleadings overnight).

K.W. HODGSON: K.W. HODGSON (On former oath). 20

Four letters dated 29th November 1972 from Richardson and Wrench to Mr. John Bourke; 25th October, 1972 from Richardson and Wrench to the manager Fidelity Acceptance Pty. Ltd; 27th July, 1973 from Richardson and Wrench to the manager Fidelity Acceptance Pty. Ltd., and 18th December, 1973 from Richardson and Wrench to Group Unity Securities Pty. Limited formerly m.f.i. 8, tendered; admitted without objection and marked Ex.X).

MR. CLARKE: Q. That is your signature, is it not, on the bottom of that memo? A. Yes, it is. 30

(Copy memo from Mr. Hodgson to the Valuation Department staff dated 26th November, 1973, formerly m.f.i. 10 tendered, admitted without objection and marked Ex.Y).

(Mr. Clarke tendered 12 valuations, the originals of which were said to have been typed by Mrs. Clarke; formerly m.f.i.6: admitted subject to adjustment tomorrow morning, and marked Ex.Z).

(Three valuations said not to have been typed by Mrs. Clarke and formerly m.f.i. 7 tendered, tendered, admitted subject to adjustment tomorrow morning and marked EX.BB). 40

Q. Mr. Hodgson, on Friday you gave evidence in relation to the separate valuations of land and the premises that Kooragang were calling for, remember giving that evidence? A. Yes.

Q. And you said this, "Can you recall that in the letter of 21st February there is reference to a desire to have a valuation which will show land and buildings separately" and you replied, "Yes I can remember that"? A. Yes.

Q. "Are you able now to remember whether anything was said about that in your conversation? A. Well, that would not have been at the initial conversation, that was after I received the letter". You said that also, did you not? A. Yes. 10

Q. And was that your recollection, that there was no discussion about separate valuations of the land and premises until after you received the letter of 21st February? A. No. That is not what I implied.

Q. Can you tell me what you meant when you said "that would not have been the initial conversation that was after I received the letter". What were you meaning there? A. Simply that on the basis of land and buildings being a requirement, there arose occasions later on where the separation of the two components would have been a totally academic and useless one to have pursued. 20

Q. But there was, of course, right from the outset, a state of requirement at Kooragang that there be these separate valuations of the land and premises, was there not? A. Well the letter said so.

Q. But you see, even before that letter, that had been stated to you, had it not? A. I can't remember exactly what was discussed in all the detail I did discuss. 30

Q. Have you no recollection of that being discussed before the letter? A. No clear recollection, no.

Q. Is it your best recollection it was discussed before the letter? A. The best I could say is probably it was.

Q. And in point of fact there was also, prior to the letter of 21st February, a discussion between you and, I think, Mr. Simpson, wherein you recommended an increase on the limit of 60 per cent they were proposing? A. I can recall I was invited to make comments about it and I think probably as a result of that I did suggest that I might look at that but there was not entirely - well I don't think I could take it as being a recommendation by me - it was the result of an invitation. There was no direct advance by me on that subject. 40

Q. You would agree that you indicated to Mr. Simpson that the loan requirements of 60 per cent of your valuation, that is Richardson and Wrench's valuation at 11 per cent per annum over two years would severely restrict Kooragang's ability to lend?
A. I am waiting for the question?

Q. Do you agree that is what you indicated to Mr. Simpson?
A. I think from memory I did, yes.

Q. And do you agree that you pointed out that 65 per cent or 66 and two third's per cent is more in keeping with normal lending, 11 per cent, 11 and a half per cent? A. That was the understood figure that was adopted by members on first mortgage. 10

Q. But answer my question, you pointed that out to Mr. Simpson?
A. Yes.

MR. CLARKE: Q. I am suggesting that was pointed out to him before the letter of 21st February. Can you recall one way or the other? A. No, I couldn't.

Q. (Approaching with document H3 from file 587/12, defendant's discovery documents) Is that your handwriting? A. Yes.

Q. That is an undated memo in your handwriting which I suggest summarised the results or the suggestions put forward in the early discussions before the letter of 21st February? A. I can remember drafting that up, but I can't remember when. 20

Q. There is included a valuation to 60 of land, improvements, total assessment? A. I don't think it is 60, I think it is "to be of". I think it is my scrawl for "be". You can see the stroke down to make the "e".

Q. Can I ask you to look at the other ee's? It is my suggestion to you that it bears no resemblance to any other "e" in the document? A. I wouldn't discuss that, I just say that is "be" and not 60. 30

Q. "Valuation to be of land, improvements, total assessment"?
A. Yes.

Q. "If property condemned by R. & W. as mortgage security write separate letter". Is that correct? A. Yes.

Q. That was a memo by you brought out in the very early stages, wasn't it? A. I don't know that it was a memo. I think that that was an aide-mémoire to myself.

Q. But it was brought out in the very early stages? A. Yes.

Q. To set up the system for the preliminary information which 40

was to include whether the exterior was good or bad - correct?
A. Yes.

Q. The zoning of the area? A. Yes.

Q. The zoning of the building? A. No, it was just to be the zoning of the property.

Q. And whether the area was good or bad for mortgage? A. Well, I would not be considering the area, it would be property again.

Q. The words are "area - good/bad for mortgage"? A. Well, 10
it is just a rough phrase to relate back to both area good and whether the property is bad for mortgage. I don't think it can be read directly that area and mortgage are related because I don't think I have ever contemplated an area having a mortgage value, good or bad.

Q. The words are "area - good/bad for mortgage". Those are the words you used? A. When it is an aide-mémoire that would be suitable for me to what I meant.

Q. Below that in a separate box is "formal val. N"? A. Yes.

Q. And the reference to difference of land and improvements? 20
A. Yes.

Q. From time to time Richardson & Wrench gave separate valuations for land and improvements, didn't they? A. On some of them by request and some of them when we did them in the initial report, I think, but again I can't remember precisely.

Q. Let me suggest to you particularly in the initial stages Richardson & Wrench always did separate valuations for land and buildings? A. I can't be certain of that.

Q. Well, the files will tell us. And let me suggest also there was no particular request in each instance for those separate 30
valuations? A. Again I can't be certain.

Q. The scheme was, that Kooragang wanted, that there should be these separate valuations. That was the scheme they wanted?
A. I don't know what they had in mind. Certainly it was in the letter.

Q. Insofar as the letter said what they had in mind, that was clearly what they had in mind as expressed in the letter? A. Yes.

Q. Would you agree with the proposition that over the period your company got more and more lax about providing these separate 40

valuations? A. I wouldn't agree with that.

Q. They did on occasions even later on do the separate valuations, in 1973? A. I can't remember, I can't be precise on those dates, and the circumstances.

Q. When you refer to a discussion with Mr. Simpson I take it that discussion took place some time after the letter of 21st February, 1972? A. It probably did. There were lots of discussions. I can't recall exactly when it might have been.

Q. What I put to you is that the company Kooragang simply in the latter stages accepted your valuations without any requirement of separate valuation for land and buildings? A. Well, I don't know what they did. We just sent the valuation, and if there was an enquiry back we attended to it. If there was not, we did not know whether they had accepted it or just discarded it; I wouldn't know.

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Q. You have recently looked through the files, have you not? A. Yes, but I haven't committed every detail to memory on them.

Q. Did you look at this aspect at all? A. I noticed it on some, but I didn't go through it for that purpose.

20

Q. You did not take the dates or anything, when the separate valuations were on some? A. No, I didn't distinguish those in that way.

Q. There has been some talk of the initials in the box of Richardson & Wrench values. The idea of those initials is if anyone wishes to ring up Richardson & Wrench they would ask for that reference? A. I suppose so. I don't think that always happened though.

HIS HONOUR: Q. What is the purpose of putting them on the document, for your information? A. Well, it is to distinguish the author and the person who typed the valuation, rather than anything else for our purposes. No doubt to an outsider it would be an indication of whom they could contact. We use it for our internal purposes.

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MR. CLARKE: Q. This is what you said on a previous occasion, is it not? "Q. And the idea of the initials in the box was that if anyone wanted to make an enquiry about the valuation report... who to connect them with"? A. Yes.

Q. And your answer was "Yes, and so that we would know ourselves" -- correct? A. Yes.

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Q. So there was that dual purpose in the initials? A. Yes.

Q. I think you are aware that on occasions initials were inadvertently left off valuations that came from your office?

A. There would be very few, but that could have happened, yes.

Q. More likely than not that would happen when you had temporaries there rather than the regular girls? A. That is what I have noticed, yes.

Q. So if anyone received a valuation with initials on it the girl would invariably ask that person "Are there initials?" or "What reference on the valuation?" - the telephonist would?

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A. Probably; I can only guess at that.

Q. And the caller would be referred to the person whose initials x were on the valuation? A. Yes.

Q. Furthermore, there were not many regular girls in the office in 1973, were there? There were three, I think? A. You are confining it to the valuation?

Q. The valuation department, yes? A. Yes, there would be three.

Q. There was Coleman. Who were the other persons? A. There were people that - most girls other than Miss Coleman and Miss Murphy did not stay a long time. There was one girl called Ann Black, and she was replaced, I think, by a girl called Roslyn Beach, and she was replaced by a girl named Yvonne Foster. A movement of girls makes it very difficult for me to remember exactly which ones there were.

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Q. And you have said in the main valuation work was assigned on geographical boundaries? A. As far as it can conveniently be done it was, yes.

Q. And you also recognise particularly with the Bourke group of companies for one period of time there was one valuer doing all valuations? A. That is as it turned out, yes.

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Q. That would make it easy for a girl to know who had prepared a particular valuation for a client, if it was a repetitive client? A. I suppose it would.

Q. What I am putting to you is that particularly Miss Coleman, back in 1973, would have had a good idea who had done the valuations for particular clients who were known to her? A. I don't understand what you mean by known to her.

Q. Assuming she had typed a number of valuations for one of your valuers, all those valuations being typed for a group such as Group United - do you follow that? A. Yes.

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Q. On that assumption, if anyone rang up about Group United and the telephonist spoke for instance to Miss Coleman, she would be able to say "That was so and so who did that valuation, because he does them all"? A. I don't think so. I think from my observations and memory of that sort of thing no one would answer an enquiry without going to the register and getting the file.

Q. Let me suggest in 1973 a girl like Miss Coleman, insofar as she had done typing for a particular valuer, would have a good idea what particular larger clients that valuer did work for? A. She might have in a general way, but I don't think the girls kept a memorised list of them by any means. It was quite often difficult as far as the girls were concerned to have them remember what they had done in terms of a particular property or a particular client. They relied on the register. 10

Q. Can you tell me who was the valuer who got most of the work in the Glebe area back in 1973? A. Well, I haven't counted one against the other, but it would seem to me it was Mr. Rathborne who did it. 20

Q. Did you assign work on a geographic basis mainly? A. Yes.

Q. Who was the person you were assigning work to in the Glebe area in 1973? Was it Mr. Rathborne? A. No, the work of Rathborne with what is -

Q. I am just asking who did you assign the work to in the Glebe area in 1973? A. As far as I can recall there was very little I did assign in that area.

Q. So most of the Group United associated company valuations in 1973 which went through your books went through without you actually assigning them, is that right? A. Most of them would have, yes. 30

Q. Would it be correct to say from your experience that some clients got used to a valuer and usually requested the same valuer? A. Over the years that has been a common habit that we have stopped whenever we have found that it has occurred.

Q. But is something you found happening, that a client seems to rely on a particular valuer in the department? A. Yes.

Q. What you say is because of your system you would find out about it pretty quickly and you would stop it? A. Yes.

Q. But you did not take any steps to stop Rathborne, who was going for well over a year for the one client? Can we take it that is because your system did not throw it up? A. It is hard 40

now for me to recall that in those circumstances whether the system threw it up or not. I can remember speaking to Rathborne about the fact he was incurring debts with a group that I did not approve of.

Q. When did you have that conversation? A. I have just said I can't remember those circumstances. I can't remember when.

Q. It might have been 1974? A. It would hardly be 1974, because the 1974 period was one when by May 1974 he had resigned, after having been spoken to several times on other matters.

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Q. Yes, but what about early 1974? He resigned the end of May 1974? A. Yes.

Q. So it could well have been in 1974? A. Yes, as well as other times.

Q. Incidentally, you did make a statement to the police in relation to this matter, did you not? A. Yes, I remember making one.

Q. And you did not suggest in that statement you had ever complained to Rathborne about his valuations for Group United or Bourke previously? A. I can't remember the detail of that statement now, but if it is in there then apparently I did not.

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Q. Could I then turn to something else? I just still fail to quite appreciate what you say the system was in the early part of 1973, that is until October 1973. If a person rang up, for instance, and spoke to you, where would you record the request for a valuation? A. I would write it on one of the instruction forms while the person was talking to me, or immediately after the person had finished talking to me.

Q. You would write it on an instruction form, is that right? A. That is right.

Q. (Approaching) I want to show you a document Mr. Morling showed you this morning from the defendant's files, relating to Mr. G. Selby. It is a photostat document, with "Richardson & Wrench Limited" on the top, and below it the word "valuation", and the words "date received", and filled in in ink is a date. Below that, "instructions from", and "Mr. J. Minks", you see that? A. Yes.

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Q. Is this the type of form you call an instruction form? A. Yes. It varied at various times, but that was basically the type of instruction form used.

Q. When talking of an instruction form you are talking about this type of document, although it might have had slightly different verbiage at different times? A. Yes.

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Q. This particular document is not in your hand? A. No.

Q. Is it Mr. Davies'? A. Yes, Mr. Davies.

Q. Was it the practise if Mr. Davies, for instance, received a phone call and request for valuation he would fill in such an instruction form? A. Well, if you say "such an instruction form", if it came from Mr. Minks it would probably have come to me and I would have said "Davies, take these instructions".

Q. In that instance you would not note it down anywhere?

A. No.

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Q. Well, you agree with that proposal? So the instructions are noted by Mr. Davies on the form headed "valuation"?

A. Yes.

MR. CLARKE: That is from the defendant's file "G. Selby 415/31".

(Instruction sheet dated 19th January, 1973 tendered and marked Ex.BC.)

Q. I want to refer to a case in which perhaps you received the instruction. I think you have said unless you delegated it immediately to Mr. Davies you would fill out an instruction form of a similar type to Ex.BC, is that right? A. Yes.

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Q. Then I take it you would give that instruction sheet to a particular valuer with your instruction for him to do the valuation? A. Yes.

Q. And he would keep the instruction sheet with his files at that stage, is that right? A. I am not clear on what you mean by files.

Q. He would take the instruction sheet and keep it with his documents, whatever documents he had? A. Well, it would become a file by itself.

Q. Was there any other initial recording of that receipt of instructions? A. Yes, at one time in 1973, before the alteration of our arrangements, that would go on to the sheets that were put up for each month for work in hand.

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Q. So that when the instructions are received it would be written on to the instruction form, and would it then be written on to these sheets? A. Almost straight away, yes.

Q. If it was received by you who would put it on the instruction sheets? A. Because I received it, I did not have to do every clerical function, I can't remember, but probably I would have given it to a valuer to do. I can't remember.

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Q. That would be the normal practice? You would expect the valuer who received your instruction, together with the instruction form, to enter it on the sheets of work in hand? A. And I would ultimately see it, because I would be looking for reduction of work all the time.

Q. Each valuer did not have a sheet of work in hand by him, but there was in the office a sheet for all work in hand in the valuation department? A. No, each valuer had a sheet hanging up on which the work allocated for his particular abilities was put, because it was the purpose of the sheet to sort out the work for which a particular valuer was occupied against another one. 10

Q. This is a sheet he would put on a clip board, would he?
A. Yes.

Q. Where would he hang that sheet? A. That was in a section of the office that had no particular name, it was in a prominent part of the valuation section where the registers were kept.

Q. Really it was a sheet on which were recorded all the jobs he had in hand at that particular time? A. All the jobs which for the month were hopeful to be done, because I kept it running on a monthly basis. 20

Q. I understood you to say they were separate sheets for each valuer? A. Yes.

Q. So if you had five valuers in the department there would be five sheets for the month? A. Indeed, the hooks still stay there.

Q. All put on the same hook? A. No, five hooks, one for each valuer.

Q. At the end of the month the valuer would take his sheet down, cross off the work he had done, and put any new ones on? A. No, he would cross it off daily. Whenever an inspection had been completed I would know that area had then been dealt with, so it was a day to day or every second day change in the situation on these sheets. 30

Q. These sheets would give you an idea at any one time what valuation the valuer involved was about? A. Yes.

Q. And those sheets - they are the ones put on the hook - the ones that are destroyed what, a few months later? A. They would probably only have a life of a month and a half, because they would exhaust themselves. 40

Q. Because once they were fully crossed off that sheet was

thrown out? A. That is so.

Q. In respect of crossing off the sheet did anyone police to ensure that any job crossed off the sheet was the subject of a valuation? A. There probably was a cross reference, I can't remember now, but there probably was a cross reference, because I would have a fair idea of the work that was going on and what the valuers were supposed to do and -

Q. You do not recall any particular scheme of policing, do you? A. I can't recall one.

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Q. You would have to have a pretty specific scheme of policing if you were having one, because some jobs might not proceed to fruition and yet they would still have to be crossed off? A. They would stand out as being a job because there would only be peculiarities in these things such as resumptions, and if it was a resumption the word "resumption" would be written alongside it to highlight the reason for not having been cleaned up.

Q. Or a particular client might decide he did not want the valuation after all? A. In those circumstances we most generally - or we always had an instruction sheet at least, depending on when the instructions were cancelled, but at least that would itself be cancelled and that would be kept for some time in the event it was revived, and often it was revived.

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Q. The point is that it would be crossed off the list of work in progress? A. Yes.

Q. Although no invoice might have been sent for it? A. Certainly there would not be an invoice if no work had been done.

Q. The position is, as I understand you, that the papers that form Ex. 11 were turned up by you under a search against the name Gridiger? A. Yes.

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Q. That was a search of what? What did you search? A. The register was searched.

Q. What register, the valuation register? A. Yes.

Q. That turned up a valuation what, of date March 1974? A. Yes.

Q. As I understand you, what you are saying is you searched the records in respect of 399 Glebe Point Road but you only turned up anything on your records by reference to the name Gridiger, it was filed under the name Gridiger? A. Yes.

Q. In order to get there, to find these documents which are Ex. 11, you went first of all to your valuation register? A. That is right.

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Q. There was an entry in the valuation register against the name of Mr. Gridiger, is that what you say? A. Yes.

Q. Was the location of the premises described in that register? A. Well, the address would be, yes.

Q. And then there would be the date of the valuation? A. Yes.

Q. And the date that was shown in the register was March 1974, is that right? A. I think it was, yes.

Q. When did you search the register to find this reference to 399 Glebe Point Road, Glebe? A. I had it searched, because I could not do all the things there were, and it was searched in my absence. 10

Q. When was this search carried out or when was the instruction given? A. Oh, it was carried out yesterday, as far as I know.

Q. Is this the position, you had not discovered these papers that form part of Exhibit 11 before yesterday? You had not located them? A. Yes, they were some papers that, if I can remember correctly were the subject of the police looking at, but that would be away back in 1974 or somewhere.

Q. Where is your valuation register now? A. All the registers are kept in the office, they are daily reference books and they are kept in the office all the time. 20

Q. Have you been through that register under the name of Gridiger for the period December 1972 to March 1974? A. With the police, yes.

Q. No, I mean yourself? A. Yes, with the police.

Q. Recently? A. Oh, I suppose so. I wouldn't like to say how many times we have had to examine these registers for a particular purpose, and files extracted and files put back again, but I couldn't say recently or not.

Q. What was the purpose yesterday of searching the register? A. To see whether there was a valuation at that address, ever done by us. 30

MR. CLARKE: It would appear these registers would be documents at least relevant in these proceedings, and so far as I know we have never seen them. We would like to see them overnight.

MR. MORLING: Certainly.

(Luncheon adjournment)

AT 2 P.M.

MR. CLARKE: Q. On Friday I asked you this question

"Q. You were cross examined - p.351 - 'You said yesterday, "I would expect five or ten per cent would satisfy that situation" and you said yes. I would just like to ask you about that. What do you mean by "I would accept five or ten per cent would satisfy that situation" and you said "There should not be a margin greater than five per cent or ten per cent for the type of property in the Glebe area. Q. But what do you mean, margin between what, on that would be a market value for the property". First of all you said that, did you not? A. Yes."

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A. Yes.

MR. CLARKE: It would appear "A. Should appear before the words "On what would be a market value".

(Above correction made to transcript p.200. Same question, fourth line, "accept" changed to expect".)

Q. On Friday I was asking you some questions about this report of 18th November, 1974 and the handwritten document called "workings" which I suggested to you was the basis for that valuation, and you denied that, do you remember that? A. I didn't accept the valuation, and I denied -

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Q. You accepted it was a letter of 18th November, 1974?
A. Yes.

Q. And I was putting to you the document in your handwriting called "workings" formed the basis for that letter, and you denied that? A. That is right.

Q. That document called "workings", did that come into existence before or after the letter of 18th November, 1974?
A. At some time after, I can't remember when.

Q. You are sure about that? A. Yes, positive.

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Q. Can you tell me what the purpose for that was? A. I can't remember the purpose in detail, but I can remember that there was some question raised by enquiry and dissatisfaction about the fact that \$100,000 was adopted, and subsequent to that at some time I thought well, somebody else might at some stage want to know what \$100,000 meant, so I put down a few notes on it, and that is how, as far as I can remember, it came into existence.

Q. You did, however, in preparing the workings, have regard to other material and rent statements, did you not? A. There were a collection of notes there that I gathered from various sources that had been accumulated over some period, and yes, I referred to those in the note.

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Q. (Approaching) I want to show you a bundle of documents come from the defendant's discovery. It is pinned together, and the front sheet says "Valuation number 20 Kooragang Investments property number 18-20 East Crescent, McMahons Point, 230-237 Glebe Point Road, Glebe: Date 18th November, 1974"? A. That is right.

Q. The top document in the file is the letter of 18th November, 1974 to which reference has been made? A. Yes.

Q. Immediately behind that document is the handwritten workings, 10 is it not? A. Yes.

Q. And then if one looks at behind that there is a photo-stat copy of a handwritten letter in the form which ultimately was typed and became the letter in relation to both properties, and which accompanied the letter in relation to 18-20 East Crescent Street? A. Except for - (indicating).

Q. Except for the words "Fee to report on A and B \$50"? A. Right.

Q. Then behind that is some correspondence which I need not go into but seems to be dated prior to 18th November, 1974, you see that? A. Yes. 20

Q. Some memos, telephone calls and things like that? A. Yes.

Q. Another memo, the top part of which is in your handwriting, is it not? A. None of it is.

Q. Whose handwriting is that? A. I think most of it is in Mr. Walters.

Q. Some other memos, telephone calls, again prior to 18th November, 1974? A. Yes.

Q. Then a rent statement for September 1974, do you see that? A. Yes. 30

Q. Then handwritten notes by someone other than yourself? A. Yes.

Q. Do you know whose handwriting that is? A. They are of one of the valuers, Blakely.

Q. All dealing with periods prior to November 1974? A. Yes.

Q. The rent statement to which you refer in the workings is the rent statement of September 1974? A. I can't remember whether it is September. Yes.

Q. And the attached papers all relate to pre-November 1974?
A. Yes.

Q. Do you still adhere to the statement that "workings" was not the basis for your letter of 18th November, 1974 relating to 18-20 East Crescent Street? A. Yes I do.

Q. Did the workings ever find their way into a formal document?
A. No.

Q. Were there any workings for your letter of 18th November, 1974? A. No.

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Q. None at all? A. None whatever, And all these documents were consolidated for the purposes of this court case. They came from everywhere.

Q. In your workings you refer to the difficulty of the site, do you not? A. Yes.

Q. And again that appears in the letter of 18th November, 1974?
A. Well, I wouldn't have changed my mind between the writing of a letter and writing out some notes afterwards to show the sort of figure there was.

Q. You were, of course, in your letter of 18th November, 1974, saying that as at the time of the letter the fair market value subject to existing tenancies was \$100,000? A. Yes.

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Q. You have said your letter relating to McMahons Point was qualified by the other letter in which you said the McMahons Point property was inspected by you and Mr. Walters on 15th November but not all occupancies could be inspected but you saw sufficient of the premises to give you a report for your records. You see that? A. Yes.

Q. Well, how did you arrive at the figure of \$100,000? A. I can't remember now, but we looked at the property on the basis of in the market conditions there were at the time I considered to be a suitable figure for expressing its 1974 value.

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Q. You must have had some basis for doing that? A. I no doubt did, but it is a process any competent valuer goes on with, but he does not get to the stage his note is a permanent sort of thing in his mind.

Q. He does a valuation in one of a number of ways, doesn't he, either by capitalising the income obtainable, or by looking at it as a development site, or in relation to comparables?
A. Yes. He might do all three if it was a proper thing to do - in relation to a property, yes.

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Q. Which one did you do in coming to the estimation of \$100,000?
A. I have got no idea now, I can't remember.

Q. No notes at all? A. No. It was only a footpath inspection

Q. But this resport was very different from a footpath inspection report wasn't it? A. Not all of them, I don't think.

Q. You knew the purpose of a footpath inspection was to simply see whether there was any prospect for a potential mortgage or not? A. Yes.

Q. You were seeing this for a very different purpose, weren't you? A. We were looking at this on the basis of a known legal situation on which we had discussed the problem before we even went there. 10

Q. What do you mean, a known legal process, on which you had discussed the problem? A. We knew this property was one on which the Kooragang people were already giving consideration to taking action against us.

Q. When I asked you this question, "Your process of reasoning to get \$100,000..... was to..... could be extremely high". In relation to those questions we were, to be fair to you, we were talking about the handwritten note workings? A. There was one thing I thought I heard you say, to take \$60,000 off something. I can't remember that. 20

Q. (Approaching) I show you your workings again. You come to a figure of a capitalisation of \$160,000 in your workings. Do you see that? A. Yes.

Q. Now before I go any further, what you were saying on Friday was that however, these workings bore no relationship to the letter of 18th November, 1974, is that what you were saying? A. Yes. 30

Q. And they came into existence afterwards? A. Yes.

Q. You were simply trying to justify your figure of \$100,000 in your letter? A. No. There is no need to.

Q. You were not doing that exercise? A. No.

Q. And then you said, after arriving at the figure of \$160,000, "but this would assume good repairs, no vacancies and no protected tenants as rents could fall in uncontrolled tenancies and there is no possibility of increasing protected tenancy rentals.....100,000"? A. Right.

Q. And that is where you take off \$60,000 commission, do you 40

see? A. It is where I have adopted 100 instead of 160. I suppose you could by deduction say 60,000 was deducted.

Q. And you get also to the \$100,000 figure by your alternative of 8 town houses at \$12,500 each? A. Yes.

Q. Now in 1974 the market was not buoyant as it had been in 1973? A. No.

Q. And if we compare the first 6 months of 1973 with the last 6 months of 1974 there was a very different market? A. That is right. 10

Q. What do you say was the effect of the difference in the market on prices of land and buildings such as the McMahon's Point property at East Crescent Street? A. Well it was in effect - the buyers went out of the market so that property generally became difficult to sell.

Q. If for instance you wanted to sell very quickly, a forced sale, you would have to have expected quite a - well - a much smaller price than you might have expected in 1973, is that right or not? A. Well, on a forced sale, no matter when, you would have the same situation. A forced sale is what it means, that the person is anxious and desperate, perhaps, to sell. 20

Q. Was it any more difficult, 1974, for a forced sale than 1973? A. I suppose there are bargain sales in the market always.

Q. You did not think it would be any different? A. It could be a different level.

Q. How much? A. I couldn't say, it is too long ago to be able to get a particular level on it.

Q. Generally speaking, if a person was prepared to wait, might be 6 months, 12 months, or a bit longer, he could command a price in 1974 comparable to what he received for the same property in 1973, assuming a property like this in McMahon's Point? A. It is a hypothetical situation. I could not say yes to it without reservation. 30

Q. But from your recollection that is right, is it not? A. No, I don't think it is (objected to: withdrawn)

Q. In giving an estimate of the market value as you did in 1973 in a number of instances, what were you looking at? Do you understand that?

HIS HONOUR: Q. I think you are being asked, you gave estimates 40

of market value, when you did were you applying the traditional test of the vendor willing to sell but not anxious - is that what you were using? A. In essence that is what it is in every situation.

Q. What are the words? A. A vendor not over-anxious and a buyer - a not - over-anxious buyer and a not unwilling seller.

MR CLARKE: Q. Can we think of a market value in that sense. Do you say there was any drop in market values between June 1973 and October 1974 for a property such as 18/20 East Crescent Street McMahon's Point? A. I think there must have been. Again you are asking me to apply my mind to a situation that is extremely difficult to be certain about. The funds dried up so that eliminated a lot of buyers. 10

Q. I am really asking you the extend of the drop - 10%, 20%? A. I have already said I can't remember now. There have been so many variations over the years it would not be right without proper analyses for me to give any particular figure.

Q. This working document refers to 18/20 East Crescent Street, McMahon's Point? A. Yes. 20

Q. And it refers to it in late 1974? A. Yes, in whatever period-it would have been late 1974.

Q. Let me suggest to you, recalling as best you can, that whilst you capitalised \$160,000, in view of the state of the market and the other matters you mentioned, you thought that was too high for the market value? A. It was unlikely to achieve that, not that it was too high.

Q. And you would agree that the capitalisation method you used, assuming the rents were \$17,000 was an appropriate capitalisation method if that income had been in-coming in 1973? A. No, it had nothing to do with it - advice I took was that I was not to give consideration to any figures for any of the properties as at the relevant dates. 30

Q. Would you just listen to the question. Would you agree that, if assuming the rents were \$17,000, the process by which you got to \$160,000 would have been an appropriate method to have valued this property in June 1973? A. Again, I can't remember what the circumstances would have been that I applied directly to that.

Q. Is not capitalisation of net rents an appropriate method for a start? A. It depends - (question objected to: rephrased). 40

Q. In 1973 capitalisation of rent for income producing property was a, generally speaking, Brokers method of arriving at a valuation? A. Subject to that income producing property being

at its highest and best as income producing property.

Q. And this property at McMahon's Point, in 1973, subject to the same proviso, it was an appropriate approach, was it not?

A. I could not say, I never ever saw it.

Q. If it was - if that was the highest and best value of this property in 1973 that would have been the appropriate approach?

A. I think in 1973 it could have well been doubtful.

Q. You understood the assumption I asked you to make. It was, if it was the highest and best value, this would have been the proper approach? A. On that hypothetical situation, yes.

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Q. In 1973 - I am only asking for your best recollection - a demand for income purposes of the type of property that 18-20 East Crescent Street was there, was there not? A. Again I am not entirely happy with saying there was. These were shared accommodation units for a large part and they were not nearly as popular as self-contained units.

Q. What I suggest is that there was a greater demand for this type of property as an income prospect than there was on a redevelopment basis? A. I would have to contradict that. There was a tremendous surge in redevelopment property all through Sydney.

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Q. Was there, to your recollection, any redevelopment in this particular area, and I mean East Crescent Street? A. I have not personal acquaintance with a property I could nominate but all around that area were redeveloped sites. There were quite a few new home unit style buildings I can recollect, going right away down to the water.

Q. Of course the existence of protected tenancies is quite a deterrent to redevelopment prospects, is it not? A. No it is not at all. There was provision in the Act to allow the removal of tenants who were holding up - a minority of tenants - who were holding up and otherwise developable property.

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Q. But (a) that was not always successful, the ejection proceeding, there was a risk involved? A. There was a risk, yes.

Q. And there would be time lags? A. In some cases there might be time lags. In others there would not be.

Q. Why wouldn't there be, because you would negotiate successfully with the tenant? A. Sometimes like the Arab, they packed up their tents and quietly steal away - when they knew this was happening.

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Q. Is that your idea of protected tenants who manage to stay protected to 1973? A. I can't particularly say in 1973 I knew of that but I have seen that happen over a period.

Q. Let me go back to the office for a moment and ask this. You would agree that the first 6 months of 1973 it was very busy, much busier than the previous 7 months? A. The whole office?

Q. The valuation department? A. Both - all parts of the office.

Q. Much busier, much greater pressure in the first 6 months of 1973? A. Yes. 10

Q. By the time you had written the letter of 29th November, 1972 (Ex. X) you were aware Mr. Bourke was involved, at least, in Giles Bourke Holdings, Fidelity Acceptance and Group Unity Securities Limited. Do you want the letter? A. No, I am contemplating the words "at least". I think it covered all the ones at that time I knew.

Q. You were aware those 3 companies were under the umbrella of Mr. John Bourke - I think you call him Mr. John Bourke. A. Seemed to be. 20

Q. In making valuations, or preparing valuations for mortgage purposes - and by that I mean which you endorsed for or on behalf of the intending mortgagee, or similar words? A. Yes.

Q. Did you, in 1973, consider it important to make reference to any works carried out on the building without council consent? A. I didn't think it was a situation, unless it had been drawn to our attention by somebody, that we would be likely to know about.

Q. So you thought it was not part of the need for valuation to include any reference to illegal works or works that had not been approved? A. I regarded it as a solicitor's responsibility, not the valuers. 30

Q. Even though works were taking place at that time - of the valuation? A. I think, as far as the valuer is concerned, he makes a valuation of what he sees, not anything else, unless he is given plans and specifications to show what might be happening.

Q. But surely, Mr. Hodgson, if works are being carried out that are subject to a direction to pull down, then that has an effect on the value? A. If somebody omits to tell the valuer, that can't be something he knows about. 40

Q. So the valuer, in your view, has no obligation to inquire as to whether works taking place are subject to approval.

HIS HONOUR: From whom?

MR. CLARKE: Q. From the Council? A. No I don't think he has to inquire from the council on matters like that.

Q. But he does inquire in respect of zoning? A. Of course, that is a function of valuing.

Q. Only because zoning relates to value? A. It relates to real estate in the sense that it has to be an approved accepted form in which the valuer gives his valuation and relates to value in that way. 10

Q. Is there any difficulty in inquiring of council as to whether works have been the subject of approval or not? A. I don't suppose there would be any difficulty in making one of many many inquiries but councils would be able to provide the information, I suppose - but I don't believe that it is a valuer's function, to do that sort of inquiry.

HIS HONOUR: Q. When you say "I suppose" are you using that as a figure of speech or is it intended to indicate you do not really know one way or the other? A. I think the last part of my answer is that I do not believe it to be a valuer's function. I think it is a solicitor's function and therefore I am only speculating on whether it would be easy to find out. 20

Q. You do not know one way or the other? A. No.

MR. CLARKE: Q. You said in answer to a question I asked, you said valuers (p.187) had certain discretions in carrying out their work - valuers employed by Richardson & Wrench? A. Yes.

Q. And you said you had given evidence to similar effect in the commital proceedings? A. I suppose, so I can't remember that now either Mr. Clarke. 30

Q. Let me remind you, "And any person in a senior position is expected to have a discretion" and your answer was "yes". Remember that? A. I can recall a question like that anyway, yes.

Q. And the power to make decisions was the next question? A. Limited decisions, only decisions within what he is able to do, yes.

Q. And then he must have the power to make decisions himself and the answer was asserted - "Q.A senior valuer would - A. I would not distinguish between a senior valuer or any other person. Q. He is not expected to ask permission to do 40

everything is he? A. No, not everything". That is the answer you gave? A. Yes.

Q. Of course you would distinguish between the discretion which a senior valuer had as compared, for instance, to a typist, would you not. A. Well I would be looking at them both in their own particular spheres and I suppose in those circumstances I would say yes.

Q. You took - it was your view that a valuer had the power to make decisions relevant to any valuation he gave? A. Are you talking now about Richardson & Wrench? 10

Q. Yes? A. It would only be the power in the sense he was doing a valuation that was a proper valuation that Richardson & Wrench allowed him to do.

Q. Assume the valuations received in the office - take one of the Group Unity valuations received properly in the office and done by Richardson & Wrench - instructions received for the office to do the valuation and subsequently the valuation is prepared by Mr. Rathborne and invoiced? A. Yes.

Q. He would have a discretion to carry out and complete - he would have power to make decisions to complete that valuation reasonably expeditiously - complete it formally in written form and sign it and at least have it available if the bill was paid, would he not? A. Yes. 20

Q. And with clients to whom credit was being afforded he would have authority or discretion to send it to the client? A. He would have to clear with me whether the client had that credit arrangement.

Q. If there was a standing credit arrangement he would not have to clear with you every time? A. No, not with a standing one. 30

Q. And if credit had been given as a matter of practice, unless there was a prohibition - and the nature of the prohibition you talk about in October, November, 1972, which is part of the evidence - he could send out - send out the valuation on credit without referring to you on each occasion? A. Yes.

Q. Coming to another thing, I wanted to ask you this, you might remember on Friday I asked you about interrogatory 14 and interrogatory 44 in which answers had been given by your company and you had verified or sworn an affidavit verifying the truth of those answers? A. Yes. 40

Q. The question was, 40, "Has the defendant by itself its servants or agents, at any time given consideration to an estimate as at 26th March, 1973 of the fair market value

for mortgage purposes of the Glebe property"? A. Yes.

Q. And the answer was "Yes but it has not performed the task of estimate in accordance with the requirements of proper and accepted valuation techniques the fair market value of the Glebe property for the purpose stated in the interrogatory" and then the answer says it was given for the purpose of getting legal advice. Was that a true answer? A. I think I would rephrase the answer.

Q. Would you like to see it? A. Yes, I would like to see it (shown to witness) Yes I have read that. 10

Q. The question is was that a true answer? A. I think it is a true answer in essence and it is quite clear to me that it was intended in that way.

Q. You told us the other day that you did not do the estimate that is referred to in that answer? A. That's right.

Q. And nor anyone, as I understand it, under your supervision?
A. Yes.

Q. But it is correct to say, is it, that an estimate was done by a servant or agent of the defendant? A. No, that is not right either. We have never done a fair estimate for mortgage purposes - exercise. 20

Q. I am sorry, I am not asking about mortgage purposes, I am asking if the answer given was a true answer and the answer was it was never done for mortgage purposes, but there was some estimate prepared at 27th March 1973? A. Well I don't think that is right.

Q. Is this the position that it is not a true answer?
A. It has to be in those circumstances.

Q. So when it says the word "yes" it is just not true. Have a look again. I put to you that is just not true, the answer "yes" there? A. I don't think so, I can't recall the situation that the yes fits to. 30

Q. The position, whichever way it works out, the answer "yes" qualified as it is, is a wrong answer? A. I think so on what I can recall.

Q. Because you say you have never done an estimate, even of the qualified nature mentioned in respect of the Glebe property as at March 1973? A. Right.

Q. Nor any servant or agent of your company? A. No.

Q. You agree with that? A. Yes. 40

Q. I think we have dealt with some of this so I do not want to go into it in detail -- in the committal you were asked

whether Mr. Rathborne was authorised to sign valuations for Richardson & Wrench - do you remember that? A. Yes.

Q. You were asked, "He did sign them, Richardson & Wrench Ltd?" and the answer again was, "Yes". That was true?

A. Yes.

Q. And you were asked, "He was authorised to sign, Richardson & Wrench, in respect of valuations that he in fact made, is that right? A. Yes". That is, if he in fact made --? A. I cannot remember what might have happened to that answer now.

10

Q. In fact, that was the position, was it not, he was authorised to sign Richardson & Wrench on valuations that he made?

A. Yes.

Q. I asked you the other day whether Mr. Rathborne made complaints about the lack of typing facilities in the first six months of 1973 -- do you remember that? A. Yes.

Q. Do you agree that he did make complaints of that nature?
A. Oh, I can remember some complaints and I can remember taking action as the result of those complaints but I cannot remember details of it.

20

Q. Well, in fact, what you say is that there were complaints by Mr. Rathborne about the lack of typing facilities in having his reports typed and that there was more than one of those complaints. You say that, don't you? A. Yes, I cannot give details, though.

Q. You then say I think that whenever you got complaints you would get extra temporaries in, -- is that right? A. Yes.

Q. But the position is from time to time in that busy time, the first six months of 1973, it was not unusual to have your valuers saying they were having real trouble having their valuations typed? A. No, that is not the case. Temporaries were brought in to alleviate that position immediately.

30

Q. But what was being put to you by them was that they were complaining, they were not simply saying, "Get me a temporary", but they were complaining they were being held up? A. It is too far off to say exactly what happened, but the facts speak for themselves in that I got temporary girls in.

Q. In any event, you are certainly aware of some disquiet from Mr. Rathborne in 1973 as to the service he was getting from the typing facilities? A. Yes, I can remember that.

40

Q. In respect of valuations that you issued to a person and put, not in the body of it but at the top, "For and on behalf of the intending mortgagee" -- incidentally, it was quite a normal

practice back in 1973? A. If it was known that a person was wanting a valuation for mortgage purposes, yes.

Q. And if you did not know the name of the proposed mortgagee, you knew that upon payment for the valuation by a client, it then became his valuation? A. Yes.

Q. To do with as he wished, really? A. Yes.

Q. And to submit it to whichever persons he thought he could get funds from that he decided at his discretion? A. Yes.

Q. It just never occurred to you he might do that by photocopying it? A. No. 10

Q. Now I want perhaps to just ask you one question about a document Mr. Morling showed you this morning -- (approached). This is a document which relates -- if you would like to hold it in the light -- to 43/49 Marian Street, Peakhurst? A. Norman Street.

Q. Yes, and it was a document from your files -- that is right, is it not? A. Yes.

Q. Headed "Ray Little"? A. Yes.

Q. Could you tell me whose handwriting that is in? A. For all this, Marr. 20

Q. All the writing that is in black of the photostat part there is notes Mr. Morling might have made and apart from the letters "OK" was Mr. Marr? A. That's right.

Q. But you do not know who the OK is? A. No.

Q. Is that a copy of the instruction sheet, or what is that? A. No, that is just a set of notes that Marr put together from whatever sources that he might have obtained them.

Q. Well, your file constitutes that set of notes, a copy of a letter from Mr. Little, which does not seem to be attached. It is typed -- a written copy of the letter which is typed out dated 6th December, 1973. A. Yes. 30

Q. Ex. 2 is the plaintiff's file relating to Maroubra -- (approached). So far as I can see on the file, the first letter of communication with you appears to be a letter which is the formal type of letter of 28th July 1972, in the second paragraph of which says, "If so instructed will you kindly value for and on behalf"? A. Yes.

Q. And the valuation which appears to be an original valuation is signed by someone from Richardson & Wrench. Do you know whose signature that is? A. Mine.

Q. And it is under instructions from Mr. A. Gal?
A. Yes.

Q. For and on behalf of an intending mortgagee?
A. Yes.

Q. There does not appear to be -- and I might be wrong about this -- any request for footpath inspection in the file? 10
A. Well, there is not in the file as far as I can see because this is the beginning of it.

Q. There was included earlier valuations or copies by Stanley Thompson? A. Yes.

Q. Of 2nd December 1970? And Norton of 4th May 1972?
A. Yes.

Q. You were going to say --? A. I was going to say there is an indication --

Q. From the two documents in your file were added in your handwriting the words "Preliminary inspection only" on the instruction form? A. Yes. 20

Q. Are there any other documents in your file that show that preliminary inspection was carried out? A. No.

(Further hearing adjourned to 10.00 a.m. Wednesday, 11th June, 1980.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
)
COMMON LAW DIVISION) No. 3568 of 1976
)
COMMERCIAL LIST)

CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED v. RICHARDSON & WRENCH LIMITED

SEVENTH DAY: WEDNESDAY, 11th JUNE 1980

HIS HONOUR: Mr. Morling, what are you going to do about the defence?

MR MORLING: We would expect to be able to deliver it during the course of, if not the morning the afternoon, a copy of the proposed amendments, both to your Honour and to Mr. Clarke. We would propose to make some amendments along the lines to indicate specifically to explain a point; but also to perhaps more particularly deal with the circumstances out of which a duty of care of the Hedley Byrne kind might arise. But I am sorry, I have not got the actual document typed as yet. 10

KEITH WILDON HODGSON
On Former Oath:

CROSS-EXAMINATION Cont'd. 20

HIS HONOUR: You are bound by the oath you took previously.

MR CLARKE: Your Honour, could I have access to Exs.J and H. I should say I do not propose to adopt the course of going through every one of these files with Mr. Hodgson. I will prepare a schedule of what we say comes from it, which I will hand to your Honour in address.

HIS HONOUR: Yes, whatever course commends itself to you.

MR CLARKE: Perhaps before I question Mr. Hodgson, there was a matter that was outstanding yesterday relating to what might be called the twelfth valuation. Whilst I had some personal doubts about the matter, the transcript is fairly clear, and I would not want Mrs. Clarke recalled to deal with that aspect. So that I will accept the situation as outlined by Mr. Morling, that there were eleven which she said that she had typed; there were three she said she did not type; and this fourth one was not dealt with by her specifically, but I cross-examined Mr. Hodgson about it, and perhaps it ought to be tendered as a separate tender. 30

HIS HONOUR: All right. There will be extracted from Ex.Z valuation of the property 51 Gottenham Street, Glebe. That will now become Ex.BD and accordingly Ex.Z will consist of eleven valuations, the originals of which are said to have been typed by Mrs. Clarke.

MR CLARKE: Q. Mr. Hodgson, yesterday with Mr. Morling you dealt with a number of the plaintiff's files and of course in some cases they were supplemented by material from your own files? A. Yes.

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Q. You were asked at p.220 this question, "Is the next one 78-80 Perry Street, Matraville, is it part of Ex.J, and does the plaintiff's file disclose that there is a valuation from your company dated 2nd January 1974, and you may take it from me that the advance was made some time in July 1974? A. Yes." You recall giving that evidence yesterday? A. Yes.

Q. And that was all the evidence that you gave in respect of that property yesterday morning? A. Yes.

Q. (Approaches witness) I just want to show you the file. I might say, your Honour, rather like Mr. Morling, the purpose is to record material on the transcript. Omitting photographs, the back document is a letter from Roland Gridiger & Company to the plaintiff dated 2nd April 1974? A. Yes.

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Q. You will see the last paragraph states, "We are enclosing a valuation report from Richardson & Wrench valuing the property at \$212,500"? A. Yes.

Q. Then there is what appears to be an inter-office memo between Mr. Simpson and Mr. Little, or something to that effect? A. Right.

30

Q. Then there is a signed typed copy of a Richardson & Wrench valuation of 2nd January 1974? A. Yes.

Q. Is that your handwriting? A. Yes.

Q. Whilst the valuation has "TGR:RB", you have signed Richardson & Wrench Limited"? A. Yes.

Q. Then there is correspondence between the plaintiff and Gridiger? A. Yes.

Q. Some financial matters from a chartered accountant? A. Yes.

Q. Some other documents which are either financial - if you would like to look at it - or relating to the principles of the borrowing company? A. Yes.

Q. Then there is a copy of the loan application, which refers to the name of the valuer and the estimated market value?

A. Which is different.

Q. I has \$212,000; they have omitted the \$500, is that so?

A. Yes.

Q. But it is Richardson & Wrench Limited? A. Yes.

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Q. Then there is the telex to Mr. Hamer, and that is dated 16th July 1974, referring to Richardson & Wrench and the valuation for the right figure, \$212,500? A. Yes.

Q. Then there is a copy letter of 17th July for offer of loan?

A. Yes.

Q. And then after that there is a letter from Gridiger accepting? A. Yes.

Q. You would agree there is nothing on that file showing any contact between Kooragang and Richardson & Wrench after Kooragang was approached in April 1974? A. No, that is so.

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Q. And there is no file you have got that shows anything about this matter either, or that takes it any further?

A. No.

Q. In the register, the entry would appear under the relevant suburb, Matraville, and the borrower or whoever asked for the valuation's name would appear - in the register? A. Yes.

Q. (Approaches witness) You will see that the valuation was "under instructions from Mr. Green, Utility Finance Pty Ltd"?

A. Yes.

Q. So that either Mr. Green or Utility Finance's name would appear in the register? A. That is correct.

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Q. I wanted then to ask you questions about part of Ex.H, which is 78F in the files and relates to a company called Larata Investments Pty. Limited. You gave some evidence about this yesterday, and I will come back to that in a moment. (Approaches witness) This file is not in quite clear chronological order, but the back document is a letter dated 10th April 1973, which is a notification of an offer which is conditional on certain things - do you see that?

A. Yes.

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Q. "We have received a valuation of the above-named property", but that is the only reference to valuation? A. Yes.

Q. Then there is a letter from solicitors to the plaintiff, 18th April 1973, seeking that the plaintiff's solicitors advise of their requirements? A. Yes.

Q. Correspondence transit slip of the plaintiff relating to some communication from Elliot Tuthill & Co? A. Yes.

Q. And then 26th April, a copy letter to Minter Simpson & Co?
A. Right.

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Q. The next document I wish to take you to is 9th February 1973, which is of course prior to all those earlier documents, which puts forward the application in writing to Mr. Minks. It is put forward by Barclays of Australia and they say they forward details of the above proposition, and there is enclosed with that letter a mortgage proposition No. A622, which deals with general matters such as statement of assets and liabilities. I think there is a heading "present valuation of property", although it is not a valuation by a valuer; is that right? A. Well, it does not appear to be.

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Q. And some financial figures, and a plan? A. Yes.

Q. The next document immediately in front of the letter of 9th December 1973 is a photostat copy of a valuation, under instructions from Mr. J. Merton, C. A. Sanders & Company at Jannali? A. Yes.

Q. And there is a photostat copy of a valuation dated 27th March 1973 from Richardson & Wrench. The initials are "GES:KK", and I take it "GES" is Mr. Scymgeour? A. That is right.

Q. And "KK", was she a temporary at the time? A. Yes, she was only there a short time.

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Q. And there is a photostat copy corporate signature? A. Yes.

Q. Is that Mr. Rathborne's? A. No, that is mine.

Q. That is your writing; thank you. Then there is a covering letter from Barclays to Mr. Minks saying, "Please find enclosed copy of Richardson & Wrench valuation dated March 27th 1973, for \$300,000"? A. Yes

Q. And that is the valuer and the photostat copy valuation?
A. Yes.

Q. Then there is a memo to Mr. Little of 2nd April 1973 referring to an inspection by him? A. Yes.

Q. And a document called a loan proposal? A. Yes.

Q. And then a letter of Minter Simpson of 3rd May 1973?
A. Yes.

Q. There is correspondence from Elliot Tuthill of 7th May 1973? A. Yes.

Q. Correspondence relating to Elliot Tuthill again? A. Yes.

Q. Another copy of a letter of 10th April 1973, to which we first referred? A. Yes. 10

Q. And the telex, "Attention Mr.Hamer"? A. Yes.

Q. Then it goes forward really into June, and it is solicitors corresponding with their clients Kooragang? A. Yes.

Q. And some matter relating to apparently another loan from some other company to Larata? A. Yes.

Q. Then there is a copy of your file under valuation 411/24?
A. Yes.

Q. Which has got on the right-hand side, "Mr. J. Merton, C. A. Sanders & Co"? A. Yes. 20

Q. There is a letter of 27th March 1973 seeking your valuation? A. Yes.

Q. And if you look, you will see it is \$300,000? A. Yes.

Q. And then there is also, 1st March 1973, an instruction sheet which has got the word "valuation" written on the top?
A. Yes.

Q. In which it is said the instructions come from Mr. Merton C. A. Sanders & Co, is that right? A. Yes.

Q. A valuation and account to Elliot Tuthill & Co, a Mr. Bennison? A. Yes. 30

Q. You will agree, won't you, that in both files it is clear that the valuation was requested by someone other than Kooragang? A. Yes.

Q. And that valuation, when completed, was sent to someone other than Kooragang? A. Yes.

Q. And there is no record of either the copy or original being sent by your company direct to Kooragang? A. Yes.

Q. You agree with that proposition, don't you? A. Yes.

Q. And I think you said yesterday that in all cases where Kooragang had either said that they required a footpath inspection or had written a letter in the usual form where they said, "If you are instructed, please prepare a valuation for and on behalf of" etc, either the original or a copy of the valuation was sent direct to Kooragang? A. Yes.

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Q. So that so far as the files are concerned, there is not the slightest indication that Kooragang ever got in touch with you about that matter? A. That is right.

Q. You said yesterday that you had some faint recollection about an instruction - do not remember saying that? A. Yes.

Q. Mr. Hodgson, if you had received an instruction from Kooragang, surely that would have appeared in the records?
A. Yes, either the warning letter or a request to do an outside inspection.

Q. I am sorry, what sort of letter did you say? A. The standard letter.

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Q. The warning letter; I see. But if you had received an instruction or been told a request for a valuation was coming in, and had allotted a valuer, you would have noted somewhere on the records "Kooragang", wouldn't you? A. Yes.

Q. And the reason for that is to ensure that either a valuation or a copy went direct to Kooragang? A. Yes.

Q. And isn't this the position, that in the absence of any record at all of Kooragang, it is highly unlikely there was any contact between Kooragang and yourself? A. I do have a faint recollection of talking to Mr. Scrymgeour about that one, but whether it was for Kooragang or whether it was a discussion that arose afterwards, I can't remember, but I do remember a discussion with him.

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Q. You remember a discussion with Mr. Scrymgeour, you said?
A. Yes.

Q. But you don't remember a discussion with anyone else?
A. Arising out of a discussion with somebody else, yes I had a recollection of some reason why that one was discussed; it tends to be because it was a contact with Kooragang, but I can't be certain.

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Q. If Kooragang had made any contact suggesting an interest, that would have been endorsed somewhere on the file, would it not? A. Well, not in all cases. In two or three of the cases that we went through yesterday there is, collected in one letter, three different properties and perhaps it was a circumstance where they mentioned another one. For instance, when we did the footpath inspection on them in the Eastern Suburbs they also raised another property that perhaps they would want us to look at, and I can remember quite distinctly that we were never ever asked afterwards to do it, and that was a property I think in Macleay Street. 10

Q. But either in your records or in their records is some record of that? A. Well, I have never seen any, there is only just a note in it for Macleay Street, which they suggested distinctly we might have to have a look at.

Q. But you say there is a note there? A. Yes.

Q. And there is absolutely no note of any contact between Kooragang and yourself in relation to this property? A. None that we have discovered. 20

Q. And you say there is a faint memory; you have got no note to refresh your memory about that faint memory, have you? A. No.

Q. And whom do you recall faintly speaking to, apart from Mr. Scrymgeour? A. I can't remember who it was - other than him. I can't remember who it was now, but it was one of those things that is so remote in time now that it is very difficult to recall what the circumstance was that prompted me to have the discussions.

Q. It might have been for instance a later awareness that Kooragang had had an interest in that transaction? A. Oh, it might have, I don't know, but I don't think that it was a "later", when it gets to recent times. It was a long time ago. 30

Q. Oh yes; you are talking about 1973/1974? A. Yes.

Q. I do not want to take time on the details of this, but in one or two matters - Lapan I think is one of them, and that is in Ex.H also - the valuation and invoice were sent to Kooragang and were the subject of corrections by Kooragang; they let you know either orally or in writing that they required the valuations to be on the instructions of someone other than themselves, and the invoice sent to the mortgagor? A. Yes, I remember that. 40

Q. Incidentally, in the register of mortgages do you enter up footpath inspections also? A. I think you are talking about the valuation register, aren't you?

Q. I am sorry, in the valuation register, do you enter up footpath inspections? A. Not unless they have been for some reason committed to writing. The register only bears not of written work.

Q. Well, in Kooragang's case, for some footpath inspections you did commit it to writing? A. I can't remember the details of those now. I think that most of them that were committed to writing were a flow-on straight into a valuation. 10

Q. Yes, thank you; but what I was asking you, if there was an initial writing which was a footpath inspection, would you enter that up as well as the formal valuation - enter it up in the register? A. I can't remember that a situation like that might have occurred, but if any sort of a report became a formal report, it would go into the register.

Q. And that would apply also to the McMahon's Point letter of 18th November 1974, would it? A. Well, yes, that is a typical example of the sort of thing. 20

Q. And that went into the register as a valuation, did it not? A. No, it went in just as an entry. Just because it is in the valuation register does not mean it is a valuation; there are reports there, there are all sorts of things that, for the want of another place to put them, are put for easy reference and recall.

MR CLARKE: Could I have the register for McMahon's Point and for Glebe, please?

HIS HONOUR: The registers were produced to you last night, I take it? 30

MR CLARKE: Yes, your Honour, and this morning.

Q. While that is being turned up, you were in 1973 I think the director of valuations of Richardson & Wrench? A. Yes.

Q. And the Real Estate Reviews that Mr. Morling cross-examined Mr. Gilbert on were I take it part of the records, the old historical records of Richardson & Wrench? A. Yes.

Q. I am suggesting to you that Richardson & Wrench, in the end of the year 1973, had this to say, and I want to know whether you agree with it: "It was a year of change. Conditions could only be described as booming for the first half, with the tempo easing off towards the middle of the year as the signs of financial restraint were first evidenced"? A. Yes.

Q. Was that correct? A. As far as I can remember back, Yes.

Q. In the 1974 Real Estate Review you were still at that time director of valuations of Richardson & Wrench? A. Yes. 10

Q. Do you agree with this statement, a reported Richardson & Wrench statement: "Values declined on an average by approximately 20 percent, resulting in fewer sales being reported, as many vendors were reluctant to accept the prices offered. The high rates of interest, rather than shortage of finance, accounted for the decline. Do you agree with that proposition? A. Well, I don't know whether that refers to a specific area of real estate or what. It is an extract by itself. It might be of a certain type of real estate.

Q. (Approaches witness) I do not want to take time, but the paragraph above it begins, "Again in the residential sector"; if you would just read that to yourself? A. Yes, it is as I thought; it refers to a residential sector. It refers to the ordinary home rather than anything else, in that context. 20

Q. Thank you. Perhaps we will have that paragraph above it read. It says, "Again in the residential sector, sales volume was down, with a drastic depletion of sales in the medium and lower price range. Homes in excess of \$50,000 sold reasonably well, particularly in the Upper North Shore and in the Eastern Suburbs", and then there appears the paragraph which I read? A. It only confirms what I am saying, yes, that the single dwelling -- 30

Q. -- please just listen to me. What I am asking you is, do you say that that note about values declining relates only to the residential sector? A. Yes.

Q. And do you agree with that as a proposition what was said there? A. Yes, as single dwellings.

Q. In relation to investment properties, it merely reported, "There was little interest shown in investment properties. The net yield was not sufficiently attractive to compete with the high interest rates offered in the short-term money market and through debenture stock issues"? A. Yes. That would be a fair statement for the time, as I remember it. 40

Q. Incidentally, I think you have told us this, but this valuation register is a reference work in everyday use, is it not? A. Yes.

Q. If for instance you are asked to do a valuation on a property, you would check back to see whether you had ever done one before on the same property, for instance? A. Yes, or people often ring up to talk about a valuation.

Q. (Approaches witness) The east Crescent Street entry is East Crescent Street, 18-20 the date is 18th November 1974? A. Yes. 10

Q. The valuation folio is 474/20? A. Yes.

Q. Description, commercial premises? A. Yes.

Q. Kooragang Investments? A. Yes.

Q. Valuer, KWH? A. Yes.

Q. Amount of valuation, \$100,000? A. Right.

Q. And under "remarks" there is no remark made at all? A. No.

MR MORLING: Your Honour, may I seek a ruling on this. If my friend is putting this to credit, I have no objection. But I rather suspect he is now off that and putting this straight as to value indirectly as at 1973. I think your Honour, if not formally but informally, ruled that that was not permissible. Now I do not take exception to the cross-examination if it goes to credit, but if it goes beyond it, I do. 20

MR CLARKE: What I will be seeking to do - this part goes actually to credit, and I am testing what he said earlier. But I will be seeking to draw some aid from what this man has done in the past, in support of our evidence, but I will not be putting forward what was done in 1974 is a strict valuation, or anything like that. 30

HIS HONOUR: Mr. Morling, I will admit it on the question of credit in the absence of Mr. Clarke convincing me otherwise, I do not think it is admissible for any other purpose.

MR CLARKE: Q. (approaches witness) Then I was just asking you that there is no entry under the "remarks" column, do you see that? A. Yes.

Q. Whereas in relation to for instance mortgages, there is always written in the word "mortgage"; by "mortgage" I assume it is a valuation for mortgage purposes? A. Yes. 40

Q. Is there any reason why you enter the word "mortgage" there under the "remarks"? A. Well I think the girl probably finds that she has a column there to put something in and it is very evident if it is a mortgage valuation. If it is some other not quite so clear purpose that the valuation was raised for, she probably would not enter it unless she came and asked.

Q. (Approaches witness) I want to show you Glebe and it starts with an entry on 7th December 1970? A. Yes.

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Q. And one finds a lot of entries under the column "remarks" - mortgage, mortgagee, I think, mortgage, mortgagee. Do you see that? A. Yes.

HIS HONOUR: Q. Mr. Clarke, you said "I am showing you Glebe"; do you mean Glebe in general or some particular --?

MR CLARKE: Q. Mr. Hodgson, the valuation register is collected under suburbs, is it not? A. Suburbs and locations, yes.

Q. For instance, under the alphabet for "G" are collected suburbs and locations beginning with the letter "G"? A. Yes.

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Q. Starting with Galston and continuing right through? A. Yes but that sounds as if it is limited only to suburbs.

Q. I said "suburbs and locations"? A. Yes.

Q. And I am now dealing with the second and third pages of the entries relating to Glebe? A. Yes.

Q. For instance, in relation to an unnamed property, the Australian Wool Board, there are the words "see report" in the column; do you see that? A. Yes.

Q. And let me suggest that reports are treated differently than valuations? A. Oh, that might be so, and that is something that is quite normal.

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Q. As a matter of practice? A. Yes.

Q. For instance, under one dated 17th April 1967 there is a valuation stated - that is an amount of valuation - with the words beside it, "Report - Glebe Point"? A. Yes.

Q. And one immediately below it has got no amount of the valuation, and has got the word "report"? A. Yes.

Q. And a number of others on the first page of the Glebe valuation register, "reports issued" on another couple of occasions? A. Yes.

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Q. And indeed, if one goes to Glebe Point Road, second last entry on the third page, "233-237 Glebe Point Road, 18th November 1974", originally the initials were "KHW" in the same colour ink as the entry? A. I think it is, yes.

Q. And written over in black the initials "KHW"? A. Yes.

Q. And originally the entry under the column "Amount of valuation" was \$100,000, in the same colour pen as the rest of the entries? A. Yes.

Q. And that has been crossed out, and in black the word "report" inserted? A. Right. 10

Q. Then also in black there is a bracket beside the words "Glebe Point Road"? A. Yes.

Q. And in black this is added, "And 18-20 East Crescent Street, McMahon's Point"? A. Yes.

Q. Is any of that your handwriting, the black handwriting? A. Yes.

Q. That is your handwriting? A. Yes.

Q. When did you make that entry? A. Probably - I can't remember - probably at the time that we denied, in response to a letter from Kooragang, that we had done a valuation, a correction to show that not only were we writing to say that never has a valuation been done, but also to say that we were bracketing them as the thing that they were intended to go out as, and that was as a report. 20

Q. So that having received that notification from Kooragang, you corrected your records to show that no valuation had issued in respect of Glebe, that property in Glebe? A. Yes, and McMahon's Point because they were bracketed.

Q. Well, you did not correct the entry under McMahon's Point though, did you? A. Well, that would only be a -- 30

Q. Well, did you or did you not? A. That would be an admission on cross-reference.

(Short adjournment)

MR MORLING: Q. (Approaching) The 1974 report of Richardson & Wrench which Mr. Clarke asked you questions about - the second last paragraph of the report from which he was reading just prior to the adjournment is in these terms - "While 1973 will be remembered as the boom year, 1974 will be regarded as the year to forget. The industry as a whole was savagely mauled resulting in a degree of nationalisation with the loss of many small agents and a number of skilled workers being made difficult to re-train or replace in the future"? A. Yes. 10

Q. There was reference to the initials "K.H.W." to whom does that refer? A. Mr. Walters.

Q. What was his position? A. He is presently the general manager of Richardson & Wrench.

Q. What was his position in past years? A. He was the director of the Auction and City Sales division.

Q. Mr. Clarke asked you questions about a case with Seatainers and the Lanyon case. Were there two Seatainer cases, one which went for some weeks or months last year? A. Yes. 20

Q. And you were not involved in that case at all? A. No.

Q. Is the case to which you were referring a case before Mr. Justice Else-Mitchell some several years ago? A. Yes it was.

Q. How long did that case, to your recollection, take in the Land & Valuation Court? A. Totally about one or two days.

Q. I think the Lanyon case was heard in the High Court in Sydney? A. It was, yes.

Q. You were asked questions about \$100,000 which you wrote in 1974 - in respect of the McMahon's Point land? A. Yes. 30

Q. There was, indeed, on one of the documents Mr. Clarke showed you, a reference to a fee of \$50 being charged in respect of both the Glebe Point Road valuation and the McMahon's Point valuation? A. Yes.

Q. Would you look at that document. Is that a copy of an invoice sent to the plaintiff by Richardson & Wrench in respect of work done which is described as "inspecting and reporting" at 18/20 East Crescent Street, McMahon's Point, and 223/225 Glebe Point Road, Glebe? A. Yes.

Q. And does the ledger copy show that on 27th November 1974?
A. Yes.

Q. A sum of \$50? A. That is correct.

Q. And you may recall Mr. Clarke asked you a number of questions about a file which was produced, in which file there were particulars of a large number of transactions and sales and rentals and so on? A. I remember the one you mean.

Q. The working file. In particular there are, I think, sales referred to? A. Yes.

10

Q. You told Mr. Clarke that that file was - you said all the documents were consolidated for the purposes of this court case. What did you mean by that? A. Well various parts of that file as it now stands were in various parts of the company for the purpose of the general administration that we undertake. For instance, the Fair Rents Board was searched to try and establish what the rentals were when we were invited by Kooragang to take over the property and they would be in the management department.

Q. Did Kooragang ask you to take over the management of the East Crescent property? A. Yes.

20

Q. Are you able to recall when they made that report? A. Well it may not be - it would not be one of my functions. The best I could say, it would be probably about October 1974.

Q. And if there is a rental statement in the workings file, from what file would such a rental statement likely to have been obtained before the file was consolidated? A. Well I think I can remember obtaining that from the management department and I think it was at the Crows Nest office.

Q. Did a fee of \$25 in 1974 cover the work involved in analysing or looking at sales or making a valuation which you yourself would describe as a valuation? A. No, it was merely to look at a property, gather the impression one can from experience and then report back usually verbally on the impressions that were gained.

30

Q. Had you in 1974, gone through the exercise of looking at sales, working out numbers of town houses that might be put on a site, calculating rentals and that sort of thing, would a fee of \$25 be appropriate for such work? A. No.

Q. For this client? A. No, nor for any client.

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MR MORLING: I have, on the bar table, m.f.i.9. May I extract from that file documents and approach the witness?

Q. I show you the file which is taken from m.f.i.9 which I think is your valuation file 393 - 19 in respect of property 64/66 Wellington Street, Mascot? A. Yes.

Q. Did your company keep in its accounts department a ledger copy in respect of every job in respect of which a fee was rendered? A. Yes, that is correct.

Q. I show you a document. Is that the ledger copy showing the fees rendered and paid in respect of valuation of 64/66 Wellington Street, Mascot in file 393 - 19? A. Yes, it is. 10

Q. And by reference to that ledger copy are you able to indicate what fee was sent - if it was paid and if so when (Question objected to: allowed).

Q. Does the ledger copy indicate a fee of \$134.50 rendered in respect of that job on 24th April, 1972? A. Yes.

Q. And does it indicate whether any part of that fee has ever been paid? A. No, that is blank.

Q. Does that mean it has never been paid? A. Yes, that is so. 20

Q. Do you produce file 408 - 25 in respect of properties 49/51 Gottenham Street, Glebe? A. Yes.

Q. Do you also produce an entry from the ledger in respect of an account for \$183.50 rendered in respect of the valuation of those properties on 14th December, 1972? A. Yes.

Q. And does the card indicate that fee was paid on 17th December, 1973? A. Yes.

Q. Do you also produce file 411 - 6 in respect of properties 19/21 and 23 Glebe Point Road and 532 New Canterbury Road, Dulwich Hill? A. Yes. 30

Q. And were fees of \$395 rendered on 12th December 1972 in respect of the valuations on those properties? A. Yes.

Q. And do you produce the entry in the ledger which indicates that those fees have not as yet been paid? A. That is correct.

Q. What is the handwriting written on that ledger copy?
A. They appear to be the company's secretary's notes.

Q. It looks like, "Send to solicitor"? A. Yes.

Q. And does W/O mean "Written off"? A. Yes. And reference to the folio on which it was written off.

Q. And in respect of that last file I draw your attention to the fact that there is attached to the back of the papers in the file a document which has in green ink "copy of plaintiff's document D.K."? A. Yes.

Q. Now are you able to indicate just how that document got on the file. I think it is pretty obvious that it would have been put there when litigation commenced? A. It is not mine.

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Q. It is not yours but it just happens to be on that file. Is that right? A. That is right.

MR. MORLING: To save time might I have these three files marked and I will determine later with my friend which will be tendered.

(Three files m.f.i.11.)

Q. Mr. Clarke asked you questions about some valuations issuing from Richardson & Wrench to Fidelity Acceptance in December 1972. Do you recall those questions? A. Yes.

Q. And he drew your attention to a letter which now forms part of Exhibit "X" which is over your name and dated 29th November 1972, in which you wrote to Mr. John Bourke pointing out that there were unpaid fees? A. Yes.

20

Q. Now when the valuations were issued to Fidelity Acceptance in December 1972, that is to say a couple of weeks after you wrote that letter, were you aware at the time the valuations issued that they were being issued? A. No.

Q. Mr. Clarke asked you some questions as to whether you had a conversation with somebody from Kooragang in which the question of the acceptance of valuations by Richard Stanton & Hardie & Gorman was raised? A. Yes.

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Q. And I think in substance you said that valuations of those companies could be acted upon? A. Yes.

Q. When you had that discussion with the Kooragang representative did you have in mind any circumstances in which Hardie & Gorman and Richard Stanton & Company would be furnishing valuations to Kooragang if Kooragang took up the suggestion (Objected to; rejected).

Q. Can you recall whether at that discussion there was any reference to the way in which valuations might be obtained from Hardie & Gorman and Stantons if Kooragang chose to engage them? A. As best I can recall if the names of various valuing companies came up and I reduced that to a short list for various reasons with those mentioned in particular - assuming a similar sort of arrangement to the one we were discussing.

MR CLARKE: I object to the last part of that answer. I am not sure if that is what he said or what he is assuming. 10

HIS HONOUR: Q. I think you are saying that is what you said? A. That is the best I can remember. It is difficult to be precise on that.

MR MORLING: Q. Mr. Clarke asked you questions as to whether you did not understand that Richardson & Wrench would be going to be Kooragang's valuers as a result of the discussions held in 1972. In respect of what matters did you understand Richardson & Wrench would be Kooragang's valuers? A. In their new activity of being a lender in the money market and requiring a valuation from us on the basis that they ordered the valuation from us - in terms of the letters that I drafted that they ultimately used. 20

Q. Mr. Clarke asked you whether it was not a fact that Rathborne had authority to accept instructions and to make valuations. In respect of what matters did Rathborne have authority to accept instructions? A. Going about the proper business of Richardson & Wrench.

Q. And who was Mr. Dusseldorf? A. He was the managing director of Lend Lease Corporation. 30

Q. When you were making valuations for Kooragang for which you were charging fees of \$25 and not referring to the 1974 valuation but to other occasions, footpath valuations? A. Yes.

Q. Did you make calculations of the kind which are included in the workings which you were cross-examined about? A. No. There were no workings, it was just the impression that I mentioned a few minutes ago, that it was or was not suitable in terms of reviewing it.

Q. You were asked questions by Mr. Clarke as to whether or not valuers should not disagree by more than a certain percentage when making a valuation of the same property? A. Yes. 40

Q. What is your view as to the possibility of disagreement between competent valuers in a case in which the comparable rentals approach is used and the capitalisation of comparable rentals is used? A. Well there could be large divergencies. There are immediately introduced into the exercise imponderables that are immediately the opinion of respective valuers.

Q. You were asked questions by Mr. Clarke as to the answer given in the interrogatory I think, No. 40? A. Yes.

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Q. You told him you yourself did not make any valuation of the lands involved in this case as at 1973. Is that right? A. Yes.

Q. Have you been able to think overnight of the reason why interrogatory 40 was answered as it was? A. Yes.

Q. What position did Mr. Levi occupy in the company? A. Formerly Mr. Levi was chairman of Lend Lease Corporation, but he died some two years ago, I think.

Q. Can you tell his Honour now if you can recall why interrogatory 40 was answered as it was? A. We took advice from our legal advisers as to the situation that we found ourselves in with letters from Kooragang, or Kooragang's solicitors.

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Q. You mean threatening action for damages? A. Yes - and we, following the advice we received, reported to the Corporation on the situation, and the Corporation asked, under those circumstances, that a meeting be held with a member of our legal advisers and Mr. Levi and they foreshadowed for that meeting certain information being obtained and arising out of that Mr. Cook, our then managing director, did go and look at the properties so that he could answer questions in the event that those questions were raised on Glebe and McMahon's Point.

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Q. Did Mr. Cook and Mr. Levi have some discussion about the very claims before this court? A. I was going to come to that.

Q. If I could shorten it, was it your belief at the time the interrogatory was sworn that in those discussions Mr. Cook expressed views about values? A. Yes.

Q. To Mr. Levi? A. Yes.

Q. And where is Mr. Cook now? A. Mr. Cook has been retired for about two and a half years and spends most of his time - indeed he is still in England.

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Q. You were asked some questions about whether a valuer should not enquire as to the legality of work being carried out on a building. Do you have any understanding as to whether Councils issue certificates in respect of the legality of such work? A. Yes.

Q. What certificates are they? A. It is a certificate covered by 317A under the Act.

Q. And in your experience as a valuer who obtains such certificates if the question of legality of improvement has to be considered? A. I have always found it to be the responsibility of a conveyancer rather than anyone else. I do not know of a situation where I have considered it my responsibility to ever ask for one. 10

Q. I think Mr. Clarke asked you whether Mr. Rathborne was authorised to sign the name Richardson & Wrench in those valuations which he, in fact, made? A. Yes.

Q. And the sort of valuations which Mr. Rathborne, in fact made - was he authorised to sign with the name of Richardson & Wrench (Objected to: allowed). 20

Q. Can you answer the question? A. I can remember verbally following something that I think is written in the company manual - I told all the valuers they were to sign "Richardson & Wrench" for the work that they did for Richardson & Wrench and head office.

HIS HONOUR: Q. Mr. Hodgson, there is no doubt, is there, that you anticipated that if X came into Richardson & Wrench and asked for a valuation of property, he may use that valuation for a variety of purposes? A. Yes.

Q. And one of those purposes, it was apparent to you, might be to borrow money on the faith of the valuation? A. Supposing it had been made out in a form for mortgage purposes, your Honour, yes. 30

Q. And when you say "supposing it was made out in a form for mortgage purposes" that is to say it was made out in a form which contained sufficient information to inform a person who might be interested in lending money on it? A. Yes, but not only that, we distinguished - if merely a valuation for a specific purpose was called for, for instance, for a person to decide on value for book purposes or something like that, it would not be headed up "for and on behalf of an intending mortgagee" - nor would it contain a recommendation for mortgage in it. 40

Q. Let us say I came into your office and said "I have this residential property and want to know its market value, would you give me a full valuation report?" Would you cross-examine me as to the purposes for which I wanted it? A. Yes. You might not be prepared to tell me but I would ask.

Q. But in the general course of events you do issue and you did in 1973, issue a considerable number of valuations without any specific purpose in mind on the part of either the person ordering the valuations as disclosed to you or - ? A. No, 10
I don't think so your Honour. I think that if they bore "for and on behalf of" it was evidence of the fact that we were told or had asked to find out that they would be used for mortgage purposes.

Q. But it is right, is it not that you issued a considerable number of valuations which do not say "for and behalf of..." anybody, which just, on their face, were straightout valuations of properties? A. Yes, but I would still say we asked what they were for.

Q. Let us accept you asked and were not told? A. Yes. 20

Q. Even though you were not told you were appreciative of the fact that a number of people might not want to tell Richardson & Wrench about their business and might have been desirous of obtaining reports for borrowing money on the property the subject of the valuation? A. Yes.

Q. Equally, as I think you have already said, it was clear to you that even in a situation where a report might have been obtained for a proposed loan from X, the loan might ultimately be made by Y? A. Yes.

Q. And the mere statement, "for and on behalf of X" in the body of the report did not, in your view, constitute any restriction on using it to apply to Y for a loan? A. No, 30
I had in mind they were still intending; until they became the lender.

Q. I think it was not live to your mind, perhaps, in considering the matter now you will agree it would have been quite conceivable for A, B or C to come into Richardson & Wrench, not disclose the purpose for which they wanted a valuation report, obtain one, and go along to Kooragang and apply for a loan? A. Quite. 40

Q. And in those circumstances you would not have expected Kooragang to require them to obtain another valuation, would you? A. No, but I think that most lenders at the time, if they had had, let us call it an open valuation, one not distinguished as a mortgage valuation, most lenders would ask

us to put that firm recommendation into the body of a re-typed valuation and we would do that.

Q. You have had experiences of this kind? A. Oh yes.

FURTHER CROSS-EXAMINATION

MR CLARKE: Q. The passage where he said "assuming the same arrangements" - I think you just said your experience of most lenders - in answering his Honour - is that if they got an open valuation not a "for and on behalf of"? A. Yes.

Q. - when you were answering Mr. Morling about this conversation, which I suggest was in May 1973, between yourself and Kooragang about whether you would confirm the valuations of other valuers and you went through some names, you told Mr. Morling that the discussion was - your last words were - "I reduced it to a short list for various reasons of those mentioned, assuming the same arrangements as with Richardson & Wrench"? A. Yes. 10

Q. And do you mean to say you said to Kooragang, or they said to you, "Can we accept these other valuations if we go through the same procedure as we go through with you" or were you in your own mind assuming such arrangement? A. Yes. 20

Q. You mean that in your own mind you were assuming the same arrangement? A. Yes.

(Witness retired and excused)

DONALD GEORGE WIGGENS
Sworn and Examined:

MR MORLING: Q. Is your name Donald George Wiggins? A. Yes.

Q. Do you live at 8 Wyndela Street, Davidson? A. Yes.

Q. Are you the head office investment officer of the M.L.C. Insurance Company Limited? A. Yes. 30

Q. What is the full name - ? A. The Mutual Life and Citizens Insurance Company Limited.

Q. In 1972/73 were you the New South Wales Investment Officer?
A. Yes.

Q. Have you had about ten years experience in the finance industry? A. Yes.

Q. What was the principal activity of the New South Wales branch office when you were the investment officer? A. Mainly mortgage security against real estate.

Q. Have you had experience in your ten years with the M.L.C. and in the years 1972/73 with the investment of money on security of first mortgage on real estate? A. Yes.

Q. Did your company use any particular valuer in respect of valuations in the Metropolitan area (objected to: allowed).

Q. Would you answer the question? A. We used Hardie & Gorman Pty Limited as our principal valuers in the Sydney Metropolitan area. 10

Q. Were you involved in the day to day operation of the company's lending business in 1972/73? A. Yes, I was responsible for it in the state of New South Wales and the Australian Capital Territory.

Q. From time to time did you have to consider the making of advances of monies in situations where you had valuations from Hardie & Gorman, whether those valuations had been produced at your request or otherwise? A. Yes. 20

* Q. Did you have any practice, and if so, what was it, as to contacting Hardie & Gorman before making a decision as to whether to rely on one of their valuations? (objected to)

(Witness requested to leave the court room).

(Discussion followed in the absence of the witness).

HIS HONOUR: Mr. Morling sought the evidence of Mr. Wiggins as to the practice followed by the M.L.C. in its activities in lending money on first mortgage as evidence on the basis of which he can ask me to conclude that the practice in the industry followed a certain course. Mr. Clarke objects to the admissibility of the evidence on the basis that his clients stood in a completely different position from the M.L.C., that the industry is large and varied and that because it embraces everybody from the novice to the expert, it is impossible to draw a conclusion as to industry practice. 30

I think that it is right to say that the matters referred to by Mr. Clarke may well, in the result, induce a court not to accept the evidence as being sufficient to establish an industry practice. Nonetheless I think it is admissible as but one step in establishing or otherwise what the situation was so far as it applied to practitioners in the field of money lending. 40

Suppose that Mr. Morling were to call evidence from a variety of people with various degrees of expertise in the industry, it is still appropriate and necessary for him to start with a person who happens to be an expert in the field. I also bear in mind that the plaintiff held a moneylender's licence and that therefore it represented itself as being at least engaged in the relevant field.

I will admit the evidence proposed to be called by Mr. Morling.

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(Witness returned to witness box)

(Question marked * read by Court Reporter)

WITNESS: This would depend on whether we instructed Hardie & Gorman to do that valuation for us as a prospective mortgagee or whether we were relying on a valuation done by them and - any other circumstances?

MR MORLING: Q. Will you deal with both those situations?

A. In the first instance we issued the instructions which was writing to the Chief Valuer whereby we requested him to carry out a valuation on a particular property with sufficient description on it to enable him to clearly identify it. We would ask them to carry out the valuation for mortgage purposes so those instructions would be issued in writing and in due process of time we would receive the valuation pursuant to those instructions.

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Q. What about the other situation? A. This is if a valuation was produced; a photostat copy of the Hardie & Gorman valuation prepared for another mortgagee.

Q. For another mortgagee or just for the mortgagor's purposes?

A. In either case we would contact Hardie & Gorman again, the chief valuer, and make them aware of the fact we were in possession of a valuation and seek their confirmation - or perhaps we would bring them under notice that the M.L.C. had the valuation and was relying on that valuation as a basis for decision making and that we sought their confirmation that the valuation would be acceptable for M.L.C. mortgage purposes.

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Q. Why did you do that (objected to: not allowed)

Q. And if the valuation which was produced to you was stated to be "for and on behalf of ..." an intending mortgagee would you still follow that practice you just mentioned?

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A. Yes.

Q. Can you tell me, in 1972/73, how much, in terms of monies outlaid, the M.L.C. was outlaying on the security of first mortgage in respect of real estate? A. Housing and commercial securities?

Q. Yes? A. Approximately fifteen million dollars.

Q. That is annually? A. Yes.

Q. Mr. Wiggins, did you, if a valuation, -if in 1973 you were considering making an advance on the security of real estate and you were furnished with a valuation which was five months old at the time that you were making the decision, whether or not to lend on security of the real estate, did you have any practice as to contacting the valuer in such a case (objected to on the same basis as previously: allowed).

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Q. Would you answer that question? A. We would seek an indication as to whether that valuation was suitable in the current context because we were concerned there may have been some changes in zoning or there could have been circumstances which would have suggested in that five months period the valuation report was no longer relevant for our purposes and we would seek the valuation firm to either (a) confirm that that valuation figure would be pertinent at the time we were considering the application or we would ask them to carry out an updating of the valuation figure with a view to determining the current mortgage value.

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HIS HONOUR: When you were asking the witness, would you do this or that, you were asking whether the M.L.C., under his supervision, would do that?

WITNESS: In accordance with the practice that had been accepted by senior management as being the basis we should proceed on.

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CROSS-EXAMINATION

MR CLARKE: Q. You said you have ten years experience in the industry? A. In the investment area?

Q. Yes? A. Yes.

Q. Does that take you back to 1970? A. October 1970.

Q. And I take it when you went to the M.L.C. you simply picked up existing practices, did you? A. When you say when I went to the M.L.C., I had been there twenty years.

Q. When you entered the investment section you just followed on existing practices? A. Yes.

Q. There was a well worked out arrangement with Hardie & Gorman I take it? A. There was a basis of understanding reached between management of Hardie & Gorman as to the procedures to be followed under certain circumstances, yes.

Q. And that arrangement had been worked out before you went into the investment section? A. Yes.

Q. And you followed the procedure laid down some years before? A. Yes, I might add that it was also expected of the investment officer at that time, if they viewed the situation needed to be reviewed in the light of circumstances, the opportunity was there to discuss that with senior management and reach another understanding.

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Q. But you have given evidence of the practice, it was in existence when you went there? A. Yes.

Q. And so far as you were concerned it was arrived at by an understanding with Hardie & Gorman? A. Yes.

Q. And you required a Hardie & Gorman valuation for every loan made? A. In the majority of cases.

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Q. Some cases you simply did not use them? A. There were cases where Hardie & Gorman were unable or unwilling to act. There may have been a situation where they were the agents in respect of the seller of a particular property and they felt they did not want to act as valuers - valuers for a prospective mortgagee and in those cases we sought an independent valuer.

Q. Were there any cases in which they did not give indication one way or the other and you made a loan on the valuation of other valuers? A. I am sorry -

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HIS HONOUR: Q. Was there a situation in which a prospective borrower already had an up to date valuation by someone else and came along and presented that? A. If we were prepared to accept that valuation as a basis for approval we would seek from the firm in question an undertaking from them in writing that they understood the M.L.C. were relying on that valuation and they confirmed in writing the valuation was suitable for normal purposes.

MR CLARKE: Q. The question I was asking was did you make loans at times on the basis of valuations from valuers other than Hardie & Gorman without giving Hardie & Gorman the opportunity to prepare a valuation? A. Yes.

Q. And you were at pains, I take it, to ensure that valuers who produced a valuation on which you might be contemplating making a loan, were aware that your company was going to rely on that valuation? A. Yes.

Q. And I suppose there was discussion at times while you were there on the effect of the M.L.C. v Evatt case? A. Not in my presence. 10

Q. I take it also you gave evidence earlier that sometimes you got a photostat or copy of another valuation, is that right? A. Yes.

Q. Or sometimes a photostat or copy of a valuation by Hardie & Gorman? A. Yes.

Q. Produced by a mortgagor? A. Yes.

Q. And that was quite a usual occurrence back in 1972/73 was it not? A. I would not say usual but it certainly happened. 20

Q. And quite often? A. I am not in a position to answer.

Q. It did happen from time to time? A. Yes.

Q. And you were aware, I take it, that some borrowers circulated photostat copies of valuations with applications for loans? A. Yes.

Q. To various potential lenders? A. Yes.

Q. What was the size of the investment section - was it a large department of the M.L.C.? A. In numerical strength about eight people.

Q. To your knowledge how long had it been in existence? A. The New South Wales branch was created as a separate branch in 1957. Prior to that the investment activities had been conducted from the Head Office for many years. 30

Q. And the investment involves not only real estate, but other loans as well? A. Yes.

Q. Now, when you would ring up Hardie & Gorman, you would be at pains to let them know you had a valuation and you were going to rely on it so that they would have an opportunity to tell you you could not rely on it? A. Yes.

Q. And you were concerned, they knew the M.L.C. requirements on a valuation? A. Yes.

Q. And you knew this valuation had not been prepared for the M.L.C. - the one we are talking about? A. Yes.

Q. And you were concerned to ensure that the valuations to be issued met all the M.L.C. requirements? A. Yes. 10

Q. So there were three things you were concerned about, one, if you thought it was out of date you would want it to be updated? A. Yes.

Q. Two, you wanted them to know the M.L.C. could rely on it so that they could say "you can't rely on it", and three, you wanted to be sure that Hardie & Gorman confirmed that the valuation issued would satisfy all the M.L.C. requirements as to a valuation? A. Yes.

Q. And these were in operation for many years? A. Yes. 20

Q. Can you tell me this, Mr. Morling asked about a valuation about six months old. As I understand it you would, every time you got a valuation that had been obtained by someone other than yourselves, every time you would check with them to let them know you were relying - and to see if it satisfied your requirements? A. Yes.

Q. Sometimes you would see if it still applied? A. You look at the date of every valuation.

Q. So I suppose even if it were a month old you would want to ask if it still applied? A. Yes. 30

Q. What about two weeks old? A. If the valuation was not performed under our instructions we would seek that confirmation at all times.

Q. So you would always seek the confirmation that it met your requirements and was ongoing at the present time? A. Yes.

RE-EXAMINATION

MR MORLING: Q. Supposing it had been made to your instructions but at a time five months before you were making a decision to make the loan. In those circumstances would you raise the question of the age of the valuation?
A. Yes.

Q. Mr. Clarke asked you whether it was not common practice to have photostat copies of valuations shown to you. If you were sent a photostat copy of a valuation from some source other than the valuer whom you had commissioned to make the valuation, would you, in that situation, take any course to check the valuation (objected to: allowed).? A. Yes, and we would check with the valuer to ensure that the valuation was satisfactory for our purposes.

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HIS HONOUR: Q. You told Mr. Morling that even if a valuation was made on your instructions, you would still confirm that it was an up to date one if it was - what was the cut-off point?
A. Oh, I don't know I could give a specific figure - I suggest three months would be the normal time. It would be governed by the circumstances that we would consider may be pertinent to that particular property. If we felt there was a possibility of rezoning or some change in values in that area that may affect the figures for the period between the time the valuation was done and the time we were considering it.

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(Witness retired and excused)

ROBERT ATTWOOD LIDDELL
Sworn and Examined:

MR MORLING: Q. What is your full name? A. Robert Attwood Liddell.

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Q. Where do you reside? A. 5 Anne Marie Close, St. Ives.

Q. Are you the general manager of United Dominions Corporation Limited? A. Yes.

Q. In 1972, 1973 and 1974 were you then the assistant general manager? A. Yes.

Q. Situated in Sydney? A. Yes.

Q. Was part of the business of the company the lending of money on security of real estate? A. Yes.

Q. And back in 1972, 1973 what was the approximate amount of money which the company was putting out on first mortgage on security of real estate? A. In Sydney?

Q. Yes? A. About ten million dollars, twelve million dollars per annum.

Q. For how long have you been engaged in the finance industry?
A. I have had twenty-one years with U.D.C. and prior to that fourteen years with the Commonwealth Bank.

Q. In 1972 and 1973 did the company have arrangements to obtain valuations of real estate being offered as security for loans? A. Yes. 10

Q. And did the company have a number of valuers to whom it referred the question of the valuation of real estate?

Q. Yes.

Q. And from time to time was the company furnished with valuations of real estate by those valuers? A. Yes.

Q. When your company was making decisions in 1973 as to whether or not it would advance money on the faith of valuations of real estate, whether those valuations came from valuers whom your company had instructed or otherwise, did you have any practice as to getting in touch with a valuer before relying upon his valuations? A. Yes. 20
(Objected to: question allowed for reasons given previously).

Q. What was your practice? A. Each of the valuers was approved and our instructions to staff were to make contact and authorise the valuations ourselves.

Q. When you say each of the valuers was approved, were you referring to the valuers whose valuations you accepted - did you ever act on the valuation of a valuer without your company contacting them? A. No. 30

MR CLARKE: I object to all these questions.

HIS HONOUR: Your objection is noted, question allowed.

MR MORLING: Q. Would you sometimes be furnished with a valuation by one of your approved valuers but the valuation not having been initially commissioned by your company?

A. That could happen but only very occasionally.

Q. And when it did happen did you have any practice about getting in touch with the valuer? A. Yes. Our instructions to the staff were again to make contact with the valuer. 40

Q. Why did you give your staff instructions to contact the valuers (Objected to: not allowed).

Q. Assuming in 1973 you had been furnished with a valuation by one of your approved valuers which, at the time you were considering whether or not to make an advance, was about five months old - did you have any practice as to raising the question of age of the valuation with the valuer before making a decision whether or not to lend on the strength of the valuation? A. The answer would be yes, we would need to instruct the valuer or we would need a letter from the valuer confirming that the valuation was suitable for our own purposes. 10

Q. After what period of time following the date of the valuation would you require such a letter from the valuer? A. It was a difficult period of course, from 1972 through to 1974. Values were increasing at a fairly rapid rate. I would think it would be in the region of two to three months.

UPON RESUMPTION:

CROSS-EXAMINATION

MR. CLARKE: Mr. Liddell, is it accurate to describe United Dominion Corporation as a finance company? A. Yes. 20

Q. Does that mean its essential business is either taking money in in the sense of borrowing money or lending money out? A. Yes.

Q. And was that the position in 1972/1973? A. Yes.

Q. For how long had that been the position? A. Since 1954.

Q. I think you are the assistant general manager now, is that right? A. I am the general manager now.

Q. In 1972/74 you were assistant general manager? A. Yes.

Q. I take it you were there for some years before that? A. In Sydney and in Brisbane. 30

Q. In Sydney since when? A. 1967.

Q. Mr. Morling asked you a number of questions about a practice followed by your company, do you recall that? A. Yes.

Q. And in a number of them you answered in this way, "We gave instructions to our staff". Is this right, when our talks about the practice there has been developed in your company a particular mode of dealing with particular types of transaction such as real estate lending or commercial lending of a different type? A. Right.

Q. And there are well laid down procedures followed by your company? A. Yes.

Q. Which result, I take it, from your company's experience in the field over many years? A. Yes.

Q. And as it sees areas where improvements or refinements can be achieved it seeks them to implement those improvements or refinements? A. Yes.

Q. And so your system in 1972 would have been an evolutionary system in the sense of being built up over a number of years? A. Yes.

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Q. Is it right that when we talk about instructions to staff that they were written instructions, memos? A. Yes.

Q. Manuals? A. Yes.

Q. Which are relevant for the particular needs of your company? A. Yes.

Q. And you haven't got, I take it, any of these memos with you now? A. No.

Q. For instance, you were asked by Mr. Morling a question to this effect, that if you had a valuation from an approved valuer that was more than five months old if anyone after the expiry of five months wanted to borrow on security of the property in respect of which the valuation was made, you would take steps to ensure that the valuation was relevant as at the time of the application for loan? A. Yes.

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Q. Was that contained in a written memorandum, the instruction to that effect? A. I can't answer that.

Q. You mean you don't know one way or the other? A. I can't answer -- I don't know one way or the other.

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Q. Certainly there would be no memorandum mentioning, for instance, the period of five months, would there? A. No.

Q. And in questions developing that area you were asked what really was the time beyond which you would seek to see whether the valuation was relevant for the time of the application for loan? A. Yes.

Q. And I think you said this, it would depend on a number of circumstances, but generally speaking it might be two to three months? A. Yes.

Q. Was there any written memorandum to that effect? A. Not to my knowledge.

Q. Was that type of matter left within the discretion of lending officers? A. No. The practice, as you rightly said, built up over a period, instructions issued from time to time and instructions were contained in separate memorandum back to the branches or to the lending officers and finally they were combined into a formal instruction.

Q. And when was that? A. That developed from 1961/1962. 10

Q. And when you say a formal instruction, I take it you mean a formal written instruction? A. Formal documented instruction.

Q. When did that come into existence? A. Progressively from 1961, 1962.

Q. There was no one comprehensive document incorporating all these instructions? A. There was a complete revision three, four years ago which is not relevant to this particular case.

Q. As at 1972/1973 there were a number of memos bearing different dates which cumulatively formed the instruction? A. Right.

Q. Was there any one of those that dealt particularly with the time which you must review a valuation, in the sense to which I have been speaking? A. I can't answer that without researching the files. 20

Q. If for instance we get a period of increase in values, which I think 1973 in the first six months certainly was, was it not? A. Yes.

Q. And valuations issued in say, February 1973 of a not exceptional property, I mean an average property, and three months later there is an application for loan based on that early valuation, for a start your only indications would be that the property may have increased in value in the meantime, that is right, isn't it? A. Yes. 30

Q. And if there was no indication of any zoning problems, in a situation like that, would it then be incumbent on an employee to check whether that valuation was still relevant as to time? A. Yes, the reason being that we had a panel of valuers and they valued on our instructions.

Q. How many were on that panel? A. At any one time, about six.

Q. But I am assuming -- perhaps assume that you got a valuation in February 1973 and in June 1973, that is four months later, 40

the borrower approached you - assume that in February he withdrew his application for loan but you had the valuation from one of your approved valuers to your limit of the valuation on the property, now if there had been no indication of a zoning change in that period would you on account of time alone instruct your officers to check whether that was still relevant as to --- A. That would depend on circumstances and the amount, but if the amount was any way large the answer is yes, we would ask for an update.

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Q. What do you mean by large? A. It would depend on the approval officer; we operate under a system of discretionary authorities and each branch manager has a discretionary authority and so up the line, and in the normal course if applications were in excess of \$50,000 we would need an update, because it would go forward to a different approval officer.

Q. Is there any instruction which sets a time limit when you need an update? A. No.

Q. When you say there are discretionary levels, I take it each approval officer would have a discretion within his levels as to whether he wanted an update or not? A. Yes.

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Q. Now you mention that there were in 1972/1973 approved valuers. A. Yes.

Q. And would I be correct in assuming that you informed those approved valuers of your particular requirements in a valuation? A. Yes.

Q. And you did have, I take it, particular requirements that suited what your need was at the time? A. Yes.

Q. So that any valuer who did a valuation at your request would know that, provided he was an approved valuer, would know what he had to fulfil? A. Yes.

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Q. So that if you received a valuation or a copy valuation from a borrower, no matter who the valuer was, you would want to ensure that that valuation fulfilled your particular needs? A. Yes.

Q. And it was more than just reading the valuation, wasn't it? A. Yes, completely.

Q. You had to check whether certain requirements that you needed met were met in fact? A. Yes.

Q. And if the valuation was from someone who wasn't approved, not one of your approved valuers, obviously you would need to check that closely? A. Well, we always arranged for one of our

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approved valuers to re-value for us.

Q. So you would never loan except on the basis of a valuation by one of your approved valuers? A. Correct.

Q. And that was a particular rule of your company? A. Yes.

Q. Am I right, that applied without exception? A. Yes.

Q. So that if you receive a valuation from the borrower made by a valuer other than an approved valuer I take it you would not check with that actual valuer as to his valuation, you would simply require a valuation by an approved valuer?

A. Yes, right; if we received such a valuation we would copy it and send a copy to our own valuer and he would then use that as a basis for his own searches and enquiries and then re-value based on that. 10

Q. It wouldn't be a matter of getting in touch with that not approved valuer, it would simply be a matter of ensuring you got your own valuation from an approved valuer? A. Yes.

Q. If you requested a valuation from an approved valuer and it came through a month later, because of some delay in issue, would you do anything about checking that valuation or would you simply accept it as its face value? A. If it came a month after --? 20

Q. Yes. A. We would be following up within forty-eight hours as to why we hadn't received it.

Q. If it came a month later, would you concern yourself with checking its veracity?

HIS HONOUR: Q. I take it what you say is it never ever happens? A. Really, it didn't happen.

MR. CLARKE: Q. Now if you received from a borrower a valuation of an approved valuer which you had not requested - do you follow that? A. Yes. 30

Q. You would always get in touch with that approved valuer, is that right? A. Yes.

Q. And your primary concern or what you were primarily inquiring about was whether all your particular requirements were met by that valuation? A. No, we were concerned to ensure that valuation was suitable for our purposes.

Q. Well, whether the application was suitable for your purposes means whether it met your requirements? A. Not necessarily, because there could be a number of valuations, if we didn't issue the instructions we would not know the assumptions for the valuation. 40

Q. If your purpose was mortgage you would be concerned to inquire that it was suitable for your mortgage needs, is that right? A. Yes.

Q. If the valuation was for and on behalf of an intending mortgagee you would notwithstanding that still get in touch with the approved valuer to see whether it met your needs?

A. Yes. Perhaps go even further than that, we always did and do insist that we receive a letter from the valuer so that we can ensure a contract between the valuer and ourselves for the purposes of that valuation. 10

Q. Well, you were always concerned to ensure with the valuer you were going to rely on this valuation? A. Yes.

Q. And as you have said, the purpose was to try and ensure a contract? A. Yes.

Q. Is this a fair statement, there was never a case in which you received a valuation from a borrower, even one of your approved valuers, that you went ahead with the loan without getting your own letter from the valuer? A. Well, I can't answer that, the instruction was that we needed a letter addressed to us. 20

Q. You don't say that that was any more than an instruction given, you would assume the practice because of the instruction?

A. Yes, we have a series of branch inspections, so --

Q. Of course, misses do happen but it is not the practice?

A. Right.

Q. Secondly, insofar as a valuation might be out of date in the sense it was three or four months old, even though by an approved valuer and even though requested by you initially, the question of whether an update would be obtained would depend on the particular circumstances that might be relevant to that matter and to the greater discretion of the officer in charge? A. Yes. 30

RE-EXAMINATION

MR. MORLING: Q. If the loan in 1973 had been about \$100,000 and the valuation was five months old as at the time that decision was being made whether or not to advance the sum of \$100,000 on the security of land, would the discretion of any officer in the hierarchy extend to dispensing with an update?

A. In those cases each of those applications would come through me and I would require an update. 40

(Witness retired)

(Three bundles of documents relating to valuations to premises 64/66 Wellington Street, Mascot, 19/21, No. 23 Glebe Point Road, Ultimo and 532 New Canterbury Road, Dulwich Hill, and 49, 51, 55, 57 and 59 Gottenham Street Glebe, together Ex. 12 and formerly part of m.f.i.9)

(Further hearing adjourned to 10 a.m. Tuesday 17th June, 1980.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
) No. 3568 of 1976
COMMON LAW DIVISION)
)
COMMERCIAL LIST)

CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED

v.

RICHARDSON & WRENCH LIMITED

EIGHTH DAY: TUESDAY, 17TH JUNE 1980

SIDNEY MERVYN MATTHEWS
Sworn and examined:

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MR. MORLING: Q. Is your full name Sidney Mervyn Matthews?
A. It is.

Q. Do you reside at number 20 Walker Avenue Narrabeen?
A. I do.

Q. Are you the managing director of Unity Mortgage Corporation Limited? A. Yes.

Q. And is that a company - was it taken over by a company known as Milton Corporation? A. Yes.

Q. And what year did that take place? A. 1973.

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Q. Since 1973 have you also been, as well as the managing director of Unity Mortgage Corporation, in charge of the mortgage department of Milton Corporation? A. I have on and off, not all the time.

Q. And that corporation is a large company on the stock exchange which has a variety of interests in the financial field? A. It has.

Q. Were you the managing director of Unity Mortgage Corporation before it was taken over in 1973? A. I was for nine years.

Q. And when did you join Unity Mortgage Corporation Limited?
A. 1964.

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Q. What was the principal business of that company in 1972 and 1973? A. Lending on first mortgage securities.

Q. Had that been its principal business since you joined the company in 1964? A. Yes.

Q. How many employees did you have in 1972, 1973? A. There were five.

Q. About how much, in terms of money, was the company putting out to first mortgage annually in 1972 and 1973? A. In round figures three million. I think in 1972 it was 2.95 million and in 1973 2.82 million.

Q. Did you have the day to day running of that company? A. Yes.

Q. What was the size of the loans which the company made in those years? A. Well they varied from small amounts, say \$8,000 up to, I think the biggest one I made was somewhere around the \$300,000 but the average one would have been around the \$40,000 mark. 10

Q. Did the company have any valuers of real estate from whom it sought valuation advice - I want to ask you questions related to 1972 and 1973. Do you follow? A. Yes.

Q. In that time did the company have any valuers from whom it sought advice as to the value of real estate offered as security? A. Yes. We had four or five on a panel. The four or five, of course, were used for varying centres around the Sydney area, due to the topography of the location of the valuer. 20

Q. Was it the practice of the company to obtain valuations from a member of the panel before deciding whether or not it would advance money on the security of lands offered for mortgage purposes? A. Yes.

MR. CLARKE: I take the same objection as previously and it applies to all these practices.

HIS HONOUR: Yes.

MR. MORLING: Q. Did the company have any practice as to making some direct contact with the valuer before acting on a valuation? A. Yes. 30

Q. What practice did the company have? A. On receipt of a written valuation I would contact the valuer to discuss various aspects of the valuation and if satisfied with their replies I would proceed to approve the loan application or, in the case of the bigger loans, recommend them to the Board.

Q. If an intending mortgagor came to the company not having any valuation of the real estate he was offering as security, what practice would you follow? A. We asked him to lodge a valuation fee with the company and proceeded to instruct one of our panel of valuers to value the subject property. 40

Q. If an intending mortgagor approached your company already having obtained, without reference to you, a valuation from a valuer on the panel, what practice would you observe? A. We always - and this was standard practice - we always contacted the valuer and made known to the valuer that the company was considering lending on his valuation report and questions were asked of him in respect to various matters.

Q. If the lands being offered as security were leased did you have any practice as to discussing with a valuer whether the property was leased and if so, on what terms? A. Yes. That was standard practice and in most cases of course we asked for copies of leases to be forwarded to the company for perusal. 10

Q. Can you recall whether the situation ever arose where an intending mortgagor produced to your company a valuation from a valuer not on your panel but who was a very well know city valuer like Hookers or Stantons or Richardson & Wrench? Can you recall? A. Yes. They were rare but I can recall cases.

Q. Did you adopt any practice in such a case of either making contact with that outside valuer or having it checked? A. Yes. It was standard practice to contact the valuer and in a number of cases - 20

Q. When you say, the valuer, you mean Richardson & Wrench or Hookers or Stantons? A. Yes, the company which produced the valuation - I would contact them under normal circumstances and discuss the valuation with them and in a number of cases, depending on the size of the loan, a check valuation would be made.

Q. By whom? A. By one of our panel.

Q. Did you have any practice as to checking with the valuer on your panel in respect of the valuation which was, say five months old as at the time you were deciding whether or not to advance money on the security of the real estate referred to in the valuation? A. Yes. 30

Q. And what was that practice? A. The practice was to request the valuer to update his valuation.

Q. Why did you adopt that practice? (Question objected to: rejected).

Q. Can you recall whether you sometimes received from an intending mortgagor a valuation which was addressed to a company other than your own? A. Yes. 40

Q. Did you adopt any practice in respect of such a valuation?
A. Yes.

Q. What practice did you adopt? A. I would always contact the valuer, that was standard practice. I would also have a check valuation.

Q. By whom? A. By one of our panel.

Q. Do not answer this question in case it is objected to. Why did you adopt that practice? (Question objected to: rejected).

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Q. For how long in 1972, 1973 did you regard a valuation as being current in the sense that there was no need to check it by reason only of the lapse of time after it had been made? (Question objected to: rephrased).

Q. Did you have any practice as to what period of time after the making of a valuation you would regard as being sufficient to require an updating of it? A. Six weeks.

Q. Before 1964 when you joined Unity Mortgage Corporation had you, for a time, been the general manager of a company known as Credit Purchase Corporation Limited? A. No, that was a previous job - when I joined Unity Mortgage my previous employer was a Melbourne group who had branches in both Sydney and Brisbane - Australian Equity Corporation Limited - and I was the regional manager for that group in New South Wales and Queensland.

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Q. At some stage in your career, not necessarily just before 1964, had you been employed by Credit Purchase Corporation Limited?
A. Yes. I was general manager of that company from its inception. I was general manager there for probably, six, seven years.

Q. What years? A. 1955 to 1962, 1963.

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Q. And what was the principal business of that company while you were its general manager? A. Lending on first mortgage was the principal business.

Q. And were the practices which you observed in relation to checking with valuers whilst you were managing director of Unity Mortgage Corporation any different from the practices which you observed whilst you were general manager of Credit Purchase Corporation? A. No, exactly the same.

Q. For how long have you been engaged in the finance industry?
A. Since I was 17 except for the six years when I served with the A.I.F.

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Q. From time to time do you come into contact with the managers of other finance companies? A. Yes.

Q. Have you had discussions with them? A. Yes.

Q. Have you had any opportunity of, either through conversation or other ways, of observing what practices they observed in 1972 and 1973 in relation to checking with valuers on valuations which they had made? A. Yes.

Q. In your experience did the practice of other persons in the finance industry in those years differ from your practice? 10
(Question objected to: question rephrased).

Q. Apart from what you were told by other people in the industry did you yourself have any - did you have any occasion - were there any occasions when you actually - (Question not pressed).

HIS HONOUR: You have never ever gone and observed the transaction of business in other companies' offices, have you? A. Not apart from the companies I have been employed with.

MR MORLING: Q. Mr. Matthews, in 1972, 1973, were there ever occasions when you were furnished with photostat copies of 20
valuations? A. Yes.

Q. Did you observe any practice in relation to those? A. Yes. ~~They were never acceptable to me.~~ (Objection to the answer; struck out at his Honour's direction).

Q. What practice, if any, did you observe as to checking photostat valuations? A. I would immediately ring the company or the valuer concerned and discuss the photostat copy with him.

Q. Do not answer this question until my friend has a chance to object. Why did you observe --- (Question objected to; rejected). 30

CROSS-EXAMINATION

MR. CLARKE: Q. Mr. Matthews, is that correct, whenever your company - and this is 1972/1973 - was considering lending, whether it got a valuation itself or whether one was presented to it by a proposed mortgagor, you would always ring up the valuer and have a chat with him? A. Yes.

Q. And then the valuation would come in to you? A. Yes.

Q. And, just so that - if you yourself got from the mortgagor a valuation fee - that was a practice, is that correct. A. Yes.

Q. And then your company would ask one of your panel of 40
valuers to prepare a valuation. A. Yes.

Q. Together with, I take it, an invoice? A. That is right.

Q. And you would pay for the valuation with the fee that had already been paid by the mortgagor? A. Yes.

Q. So that you were really yourself obtaining the valuation from the valuer, that is correct, is it not? A. Yes.

Q. After getting the valuation, you yourself, as a practice, would always ring the valuer and discuss aspects of the valuation with him. A. Yes.

Q. And that happened in every case where you yourself ordered the valuation, did it? A. Yes. 10

Q. You would have in your mind, perhaps would you, that there might be some problems with a particular proposal. A. Yes.

Q. And that is what you would want to always clarify with the valuer? A. Certainly.

Q. So that whoever ordered the valuation or from wherever it came, you would always, as a practice, get in touch with the valuer? A. Yes.

Q. And discuss with him aspects that you considered relevant to the valuation? A. Yes. 20

Q. Then you were asked whether a valuation came in directed to some other person as an intending mortgagee, I think you said you would always contact the valuer to discuss aspects with him? A. Yes.

Q. And did you say you would always require a check valuation from one of your panel? A. Yes. We would always ask for a check valuation.

Q. Are you assuming that, for instance, that the valuation was prepared by someone other than your panel or did it apply to one of your panel? A. If the valuation prepared by our panel was addressed to another company I would still ask for a check valuation. 30

Q. By the same valuer? A. No.

Q. To whomever the valuation was addressed, you would always, as a practice, speak to the valuer to discuss aspects of his valuation? A. Yes.

Q. Now you were asked as to whether there was a practice when valuations were somewhat out of date, as to when you would require an updated valuation? A. Yes.

Q. And you said there was such a practice in your company in 1972, 1973? A. Yes. 40

Q. Incidentally, this company had been in existence for how long, Unity Mortgage Corporation? A. I think since 1951.

Q. And you went to it, what, in the mid sixties? A. 1964.

Q. Was there any distinction in out of date valuations between valuations by a member of the panel and valuations by someone who was not a member of the panel? A. No, not as regards date of valuation.

Q. Well if one of your panel gave a valuation a month before you were considering the loan, did you have any practice in relation to updating that? A. Not one month, no. 10

Q. What was the cut off time? A. About six weeks, otherwise that was the generally accepted method.

MR. CLARKE: I object to that answer.

Q. Do you mean in your company? A. Yes, in my company.

Q. So that if the market was rising or tending to rise over a period of two or three months and there had been no indication of a change in zoning you would still, even with a six weeks old valuation, require an updating.

Q. And that would be, of course, at the expense of the borrower? A. Yes, in most cases. 20

Q. What cases would it be that it was not at the expense of the borrower? A. If it was one of our panel, if the valuation was one of our own panel we would say to him: We are having a check valuation of this on an updated basis or would you kindly update the valuation. Sometimes the company would, in view of the clientele we are dealing with, would pay for the valuation itself.

Q. I take it a check valuation for something six weeks old would merely be confirmation by your panel, if it had issued the original one, was still valid? A. That is correct. 30

Q. I am right, am I not, in this, that whether you have sought a valuation and obtained one from your panel or whether the potential mortgagor came into your office with a valuation it had obtained for an intending mortgagee, your practice was identical in both cases, that you would get in touch with the valuer? A. Yes.

Q. To discuss aspects of the valuation? A. That is right.

Q. And in that discussion you would make a claim the reason you were interested was because you proposed lending? A. Yes, 40

proposed lending.

Q. Am I right also that sometimes, subject to speaking to the valuer, you would accept valuations from valuers other than on your panel? A. Very rare occasions.

Q. There was no practice in relation to it? A. No, but there would be a check on it with the valuer.

Q. Did it happen so rarely you did not develop the practice in relation to it? A. No, that is right.

Q. But what you said was, in your evidence in chief, it was rare that you acted on the basis of a valuation from other valuers? A. That is right. 10

Q. And you would always follow your normal practice of discussing the valuation with him? A. Yes.

Q. And in a number of cases, depending on the size of the loan, you would get a check valuation from one of your valuers? A. Yes.

Q. And in some cases you would not? A. If it was a thousand dollars I would not worry about the check valuation.

Q. I thought you said your loans were in the region of \$8,000 to - A. Yes, in the main. 20

Q. Did you ever lend \$1,000? A. Yes.

Q. On a first mortgage? A. Yes.

(Witness retired and excused)

MR. MORLING: I gave to my friend the proposed amendment to the defence and he informs me he has no objection to it. May I have your Honour's formal leave to amend in accordance with the documents I forwarded to your Honour on Thursday. We will have it typed during the day.

HIS HONOUR: I grant leave to the defendant to amend his statement of defence in accordance with draft initialled by me and placed in the papers. 30

CHARLES ALAN WOODLEY
Sworn and examined:

MR. MORLING: Q. Is your full name Charles Alan Woodley.
A. It is.

Q. Do you reside at 660 Port Hacking Road Dolans Bay? A. Yes.

Q. You are a valuer? A. Yes.

Q. A director of Fuller Flanders & Associates Pty. Limited?
A. Yes.

Q. I think you became an associate to the Commonwealth Institute of Valuers in 1953? A. Yes.

Q. And have you practised mainly in the city of Sydney as a valuer since that time? A. Yes.

Q. I think you are presently chairman of one of the valuation boards of review? A. Yes, the New South Wales Board of Review. 10

Q. For which area? A. Parramatta and Wollongong.

Q. For how long have you been the chairman of that valuation board of review? A. Two years as chairman -- alternating chairman it is actually.

Q. Are you a member of the Administrative Appeals Tribunal?
A. Yes.

Q. A valuation expert member of that tribunal? A. Yes, I am a part time member appointed by the Australian Government as a valuation expert.

Q. I think you are a Fellow of the Commonwealth Institute? 20
A. Yes.

Q. And have been for quite some years? A. Yes.

Q. Were you formerly employed by a director of R.V. Dimond Pty. Limited? A. Yes.

Q. For how long have you been with Fuller Flanders? A. Nine years.

Q. And have you frequently given evidence in cases in the Land and Valuation Court over the last 10 years or so? A. Yes.

Q. You were asked to prepare, were you not, a valuation of property known as 233 to 237 Glebe Point Road, Glebe, as at 26 March 1973? A. Yes. 30

Q. I think you were asked to do this last Tuesday, were you not? A. Yes I was.

Q. And you only completed the valuation over the weekend?
A. That is right.

(Valuation by Fuller Flanders & Associates Pty. Limited of property 233/237 Glebe Point Road, Glebe, tendered, admitted without objection and marked Exhibit 13.)

Q. I would like you initially to describe in general terms Glebe Point Road, say between where number 155 Glebe Point Road is, as to which I will ask you some questions later, and going up to the three hundreds in Glebe Point Road. Would you describe it generally to his Honour and, how, in your opinion, the properties 233/237 Glebe Point Road fit into that general picture? 10

A. Yes. I could do that. I referred to it in general terms in the report. If I could turn that up for a moment. First of all at page 1 I described the location where the subject property is and I refer to it as adjoining the ancient Britain Hotel at the corner of Pymont Bridge Road, a wellknown landmark, and the Glebe T.A.B. on the other side and a motel and shops opposite. Surrounding property is residential. That is where it is located.

Q. How does the commercial appearance and business of the subject property compare with other stretches of Glebe Point Road? 20

A. I will take it from where 155 is and go down. At the end where 155 is located, that is a post office precinct - the post office being at the corner of Glebe Bridge Road and St. Johns Road. Also there is the Courthouse, the old town hall, which is no longer used as a town hall, and the old St. John's Church together with a considerable amount of the original residential homes on the opposite side. The type of development there includes a chemist shop, restaurant, milk bar, various service type uses and, although that is what they call the hill area at Glebe - it would originally serve the Glebe development, the Glebe Trust land, it is not the strongest part of the shopping centre. 30

Q. You mean the busiest? A. Yes, not the busiest part of the shopping centre.

(Six photographs of Glebe Point Road area tendered; admitted without objection and marked Exhibit 14.)

Q. For how long have you been generally familiar with this area? A. Ever since I have been working in Sydney I suppose you could say.

Q. I show you a photograph, part of the last tender, which shows premises 155? A. Yes. 40

Q. Marked real estate? A. Yes.

Q. Are those premises down towards the city or the university end of this stretch of Glebe Point Road? A. Yes, that is the

second from the bottom corner right on the fringe.

Q. At the same time I show you another photograph which has endorsed on it - 175 Glebe Point Road? A. Yes.

Q. Is that a few doors up from 155? A. Yes.

Q. You observed the quality of the structures there? A. Yes.

Q. From your recollection is their present appearance much different from what it was in the past years, as you can recall?

A. Well, looking at the first photograph -

Q. 155? A. Yes. Adjoining that on the right is an old hardware shop and that is typical of the condition that all those properties were in prior to the sale to private owners when they were redeveloped. 10

Q. When did that take place? A. About 1972 or thereabouts, the subject one, 155 in the centre of the photograph has been completely remodelled with a new shop front and the interior has been gutted and converted to a real estate office. Upstairs is still the residential residence. The other one, the second photograph I think in 1973 it was probably in that condition but I couldn't say for certain. 20

Q. Is it apparent there has been no significant painting work done to the most of the buildings shown in the photograph, for many years? A. Yes. That was the result of the property being owned by the Glebe Administration Board so, rather than not end the 99 year lease and coming back to the board, the lessees were not spending money on it.

Q. I show you a photograph, 233/237? A. Yes.

Q. You have told his Honour they are situated between the hotel and the T.A.B.? A. Yes.

Q. And were so situated in 1973? A. Yes. 30

Q. When you said that the area of the 155/175 was not the strongest part of the shopping centre, do those photographs, in your view, demonstrate that? A. Well I suppose they demonstrate the state of repair more than anything else. This second area is the stronger location.

HIS HONOUR: Q. The second being 233/237? A. Yes.

MR. MORLING: Q. I show you a second photograph marked on the map 233/237 Glebe Point Road in which there is a large camphor laurel tree? A. Yes.

Q. Does that show the parking area at the back of 233/237?

A. Yes.

Q. And it goes on to an adjoining property, does it? A. Yes.

Q. And the two final photographs. Is the one which has the garages right up to the lane alignment at the rear of 175?

A. Yes. That used to be a garage but it is a greenhouse with plants in it.

Q. And the other one? A. That is a parking area.

Q. It is a parking area at the back of 155? A. That is right. 10

Q. Now you then describe in some detail the improvements on the property. I don't propose to take you to that. On page 2 you describe the property? A. There is a plan which is probably easier to follow.

Q. In terms of suitability for the purposes of a real estate agent or some similar user, how would you describe the improvements on the subject land - and by the subject land I now propose to refer only to 233/237 Glebe Point Road? A. Well from my point of view and a valuation point of view I would say an original buyer for the premises in 1973 would have been a real estate or development company who could use the premises as they were. They had an office layout and parking at the rear with access for salesmen to park in. 20

Q. On page 4 you refer to the town planning considerations and you refer in the last paragraph to a past use of number 237 as a Greek restaurant? A. Yes.

Q. Without telling his Honour what you were told you might indicate what sources you went to to inform your mind about the area generally and past usage in the area? A. Yes. I contacted two people previously employed by Peter Craig Real Estate as the salesmen who were familiar with what was happening with the locality at the time and I spoke to a Mr. Barry White who previously occupied the butcher shop, number 331. 30

Q. Do you mean 231? A. 231. He actually bought these premises.

Q. He is the current owner? A. Yes. He has been in that area since 1954 and as a butcher and retained the butcher shop and leased that and bought the property, the subject of the valuation and he was very very familiar with the whole of what was happening in the area in 1973. I had to rely on something of that nature to assist me. He gave me the full particulars I have given in the report. 40

Q. If I could take you to the middle of page 5 under the heading "General". You say inter alia that it would have been reasonable to conclude that considerable demand could be anticipated for well erected premises at Glebe suitable for a real estate agent and developer at that time? A. Yes.

Q. What was the state of the real estate and development market as at March 1973? A. Well I suppose you would say it was the top of a crest. That would be the best way to describe it. It was still very buoyant and particularly in Glebe. There is evidence that market values have increased rapidly and were still maintained. I would imagine a real estate agent knowing this activity at that point of time would have been most anxious to obtain premises in the locality and I made that assumption for the purposes of my valuation. 10

Q. At the foot of page 5 you set out - there and going onto page 6 - the valuation approach which you have taken, have you not? A. Yes.

Q. The first approach was to take the evidence of comparable sales - and you will develop that later? A. Yes. 20

Q. And did that give you a figure of about \$130,000 subject to a matter to do with the improvements then being carried out on the land? A. Yes.

Q. Why did you take a second approach, that is to say a capitalisation approach? A. Well, it is in valuation practice, it is normal to check one approach by a second approach if it is possible and I always do that. That is why I did it.

Q. And in respect of both approaches you made an adjustment by reason of the position with the Leichhardt Council? A. Yes.

Q. Which was your primary approach, comparable sales or rentals? A. Comparable sales. 30

Q. In your experience as a valuer if sales of comparable lands are available is the comparable sales approach preferable to capitalised rentals? A. Yes.

Q. Why is that? A. Well a valuer - of course a valuer has to arrive at a market value and it is the market that creates the value so if you have sales evidence, that is the market and that is the best evidence.

Q. Can I ask you to turn over to the schedule headed "Schedule of Sales"? A. Yes. 40

Q. Did you find number 237 had been sold on 11th May, 1972? A. Yes.

MR. MORLING: I tender contract of sale of 11th May, 1972 between Wyatt & Anor. and Giles Bourke Holdings Pty. Limited.

HIS HONOUR: Show it to Mr. Clarke and if he agrees with it you probably do not need it.

MR. MORLING: Q. Do you draw attention that special condition 1 was in the following terms - the purchaser shall pay the agent's commission in respect of the subject sale and secondly completion was to be effected within five weeks of the date of contract and there was a lease noted in the schedule to the contract?
A. Yes.

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HIS HONOUR: You would prefer the contract to go in?

MR. CLARKE: No, provided the purchaser's name is noted.

MR. MORLING: Q. Can you tell his Honour what use you derived from that transaction in valuing the subject property? A. Yes. It is apparent there were special conditions in the contract that could have influenced the price paid - we have a buyer who was an agent and probably would not incur commission but the vendor would get the benefit of the cut price - we have a lessee who may have been considered to have reduced the value of the property. The commission paid by the purchaser and the lease burden on the property could have reduced the price from a high figure had it not been in existence.

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Q. Do I understand what you are saying, the presence of a tenant may have resulted in the purchase price being less than a vacant possession price? A. Yes.

Q. And the fact that the purchaser was paying the agent's commission again would make the price more valuable to the vendor? A. Yes. I would like to say it has to be weighed against the fact that the adjoining owner was buying the property.

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Q. What significance has that to you? A. The adjoining owner could find advantage in that property buyer may not find. Therefore it is a factor to be taken into account. I would say the two would offset each other at least and I adopted that at being a reasonable gauge of the market value of the property.

Q. When you say you adopted that, you mean you adopted the sale? A. Yes.

Q. What about its date some 10 and a half months before valuation date? A. I have analysed that this way, most of these properties are a similar type of property, similar types of buildings, and as a matter of convenience I have analysed them at a rate per metre on foot frontage. This has 4.3 metres

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frontage to the street, to Glebe Point Road, which, analysed at \$5230 per lineal metre - if you adjust that for date, the 10 months at 7% per month, it results in a figure of \$8,891 per lineal metre as at 26th March, 1973.

Q. Why would you adjust it at 7% per month? A. Because of the rapid increase in the market between 1972 and 1973.

Q. What evidence do you have of that? A. Some of the other sales I referred to in the schedule indicate that that was the rate of increase.

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HIS HONOUR: Q. At page 4 of the document you say, number 237 which was previously used as a Greek restaurant and club was purchased for consolidation in 1972. Did you make any allowance for the fact it was purchased for consolidation? A. Yes I did. I mentioned that in my remarks previously your Honour. When I said that is the adjoining

Q. These sales are used by you as comparable sales? A. Yes.

Q. Do you feel you can use it as a comparable sale notwithstanding it was purchased for the purposes of consolidation?

A. Well I think that the other factors I mentioned which depreciated the value have to be taken into account and weighed up and I, as I said earlier, took both the depreciating effect and the adjoining owner effect into account and adopted that as a reasonable compromise between the two as equal to a vacant possession value.

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Q. That must be one of the matters - one of the most difficult matters to take into account to know what the desires or needs of an adjoining owner might be and what he is prepared to pay?

A. It is difficult but that is not the only sale evidence we have, looking at the sales further down Glebe Point Road they would support \$22,500 just as a vacant possession sale.

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MR. MORLING: Q. And is the fact that as at 26 March 1973 the owner then has a consolidated site which is being valued, does that give him an advantage when he is offering a site available for use by a real estate agent such as was then available on the site? A. Well in my view for the use to which that purchaser proposed to put it, it enabled him to expand the parking area at the rear and create a very good real estate office. I think it was probably equally as valuable as three shops with a real estate agent as with one.

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Q. Do you wish to say anything else about that sale at this point of time? A. I think the state of repair is noted. That is the only other thing I wish to draw attention to. It was in very poor repair and this Greek Club had virtually had the front painted up. It was not like a shop, it was like an

unlicensed club where the Greek people went for social activities and it was in poor repair.

Q. Can we pass to 175 now? A. Yes.

Q. Would you tell his Honour what you made of the sale of 175 Glebe Point Road? A. Particulars are given there. I have taken 5.17 metres at \$6,915 and adjusted those for the two months difference to a figure of \$7,883.

Q. Two months - it was sold 12th January 1973? A. That is right.

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Q. I know you have spoken about the location of that property but you described it as being an inferior location. Why, in your opinion, would the subject land be superior as a commercial site and in particular as a site for a real estate agent's office? A. The section to the - generally to the north of Pymont Bridge Road which is the hotel - the corner occupied by the hotel and which is where the traffic lights are located is the real heart of Glebe. The strongest point in the shopping centre is to the north of Pymont Bridge Road because of the greater concentration of residential population in that particular section. The activity of all the shops north of Pymont Bridge Road is considerably greater than those at what I call the post office precinct down near St. John's Road which is where 175 is located.

Q. Do you wish to say anything else about 175, and in particular its comparative advantage or disadvantage so far as rear lane access is concerned? A. Well as you saw from the photograph the premises are not actually provided with any offstreet parking at all. They are occupied by part of the plant shop of what was the tenant and is now the owner. It has no offstreet parking, it has rear lane access but no offstreet parking.

Q. I think part of the Glebe Street frontage of that parcel consists of a doorway leading to a residence upstairs? A. Yes.

Q. And the other part is given over to the greenhouse, the Perfumed Garden? A. Yes, the plant shop.

Q. It is a fact that part of the commercial shop is occupied by a doorway an attraction or a detraction? A. From a rental point of view obviously the shop would be worth more if it occupied the whole of the frontage than occupying - I think probably three quarters of it or whatever it may be. The bigger the frontage of the shop the bigger the rent that is paid and obviously it would not attract as much rental with the entrance to the residence cut off the shopfront.

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Q. Is there anything else you wish to say about that site.

A. No.

Q. How does the price paid compare with the price paid for 237 when making allowances for the difference in dates of sale? A. Well I think the two figures shown there are 8891 for the first one and 7883 for the second one and I believe that reflects the relationship between the two locations.

Q. Now the next, 165 Glebe Point Road? A. Yes.

Q. I think we have a photograph of this - there is probably one in evidence. You described it as an old two-storey shop an dwelling in poor repair? A. Yes. The butcher shop does appear to be in reasonable repair but I would have no exact knowledge of how it was in 1973. At the moment as I inspected it at the weekend, it is in reasonably good repair but I would have no exact knowledge of how it was in 1973. It is in reasonably good repair for a butcher shop.

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Q. In respect of that property you were only able to ascertain the date of transfer from the council records? A. Yes.

Q. So you had to make an assumption that the contract would have been dated perhaps some time in January if the sale was actually completed in April. A. Yes.

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Q. And how does the price paid for that property compare with the price paid for 237? A. Well direct analysis, 5.145 metres on 7094 per metre adjusted for the two month difference would give 8087. It is higher than 175 but I believe that would be attributable to the fact that the property was sold as a butcher shop with butcher shop fittings and that is why it would be somewhat higher than the other one further up the road in the same precinct.

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Q. Normally being further up the road would make 175 more valuable? A. Normally in that location it would be a stronger position than the butcher shop although it would be fairly marginal.

Q. Is there anything further you wish to say about that sale?
A. No.

HIS HONOUR: Q. Which were the sales you took into account to arrive at the 7% per month increase in value? A. There were some prior sales of 165 and 155 and I think the particulars are in that other schedule, Mr. Morling.

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MR. MORLING: Q. Are you referring to schedules prepared by Mr. Cossack? A. That is right.

HIS HONOUR: Q. It is only on the basis of those two properties that you arrived at the 7% per month, is it? A. I have had regard to those mainly, yes your Honour but I have also had regard to the fact taking into account what was paid for 237 in 1972 and what the sales indicate its value should be in 1973.

Q. There is a circularity in that argument, you are pulling yourself up by your own bootstraps. If you have regard to the sale in 1972 and try to measure it against subsequent sales by applying the 7% to it - A. That would be an alternative to applying 7% to do a direct comparison in point of time and it would show the same answer. I am suggesting it would be 8891 a lineal metre. In the circumstances of this matter I was provided with prices and those prices - sales in respect of 175 - the price sale in August 1972 was 21,290 and the per centage increase per month indicated was 12% in respect of 165, the previous price, which is the butcher shop was 26,960. That was resold at 26,500 which shows 4%. There is also a sale of 155 prior to the one referred to in the evidence of \$17,000. That is the real estate office. That has been renovated and that shows an increase of 10% and I have adopted 7%. 10 20

Q. And the sales - I think you had some conversation with a director of the company which purchased some properties from the Glebe Administration Board? A. I have had, yes.

Q. So the sales were not probably the administration board to sitting tenants who sold on but from the Glebe Administration Board to a particular company? A. Yes. The history of that is Yathom Investments Pty. Limited.

Q. Mr. CLARKE: I object. There will be primary evidence in relation to this matter. 30

HIS HONOUR: I admit it as something he was told and not as evidence of the truth of the matters that he is referring to.

WITNESS: Yathom. That is a company formed by two people, Mr. Yates and Mr. Thom. I have that wrong - however they were two people in occupation of this row of shops owned by the Glebe Administration Board and when the leases fell due and referred to the board they would not sell them separately and so these two people formed a company, Yathom, and they purchased the whole row of the shops which were subdivided and sold to the people in them and arrangements were made between the parties as to the prices that might be paid and that is how it happened. Then, of course, each person sold out down the line and that is how this chain of events came about. 40

MR. MORLING: Q. And quite apart from that sales event, from your general valuation experience what was happening to the

values of property of this kind in the 12 months before March 1973? A. They were increasing very rapidly. Most types of real estate were increasing very rapidly.

Q. Is there anything further you wish to say about 175?

A. I had arrived at a figure of 8087.

Q. Can I take you to 155 and ask you what use you made of that sale? A. Yes. The analysis of that is 4.93 metres, 6,288 dollars per lineal metre. There is no adjustment for date required because that was March 1973. 10

Q. If I could stop you there, when you say "there is no adjustment for time required" are you therefore, from a sale like this, do you have a basis for comparison which is not affected by your 7% per month increment view? A. Yes that is right.

Q. What use do you make of this sale? A. Well it is necessary to look at it - you will notice it is somewhat lower than the other figures arrived at on the other analysis but it is not out of line, in my view, when you take into account the fact that the premises were in very poor repair. I did speak to a man called Greg Norbury, a partner in Martin Norbury & Middleton who bought that shop and he told me they spent a lot of money and time completely getting it up and making it suitable for use. He said at the time they bought it it was a plant shop in poor repair and that that was the state of repair at that time. 20

MR. CLARKE: I understand this is probably admissible as some sort of explanation given the same happens to my expert.

MR. MORLING: Q. You say this does physically bear the appearance of having been renovated in recent times? A. Yes.

Q. A new shopfront and new brickwork? A. Completely new shopfront and interior walls being demolished and ceilings replaced and painted out and renovated. On that particular sale also you have to bear in mind its location is right at the bottom of the shopping centre. The shopping centre in that section starts at St. John's Road where the post office is. It runs down the hill to Parramatta Road. So that of course you will notice the shop next door is an old hardware shop which is on the end of the shopping centre and this one I assume to be in a similar condition to that one in the photograph, which is very poor and taking into account the state of repair and the inferior location I do not think that figure is out of line. 30 40

Q. Looking at the totality of the sales evidence, how did you use it? A. I used it this way, on the basis of that evidence I concluded that the original, the premises I was valuing, if they were still in their original condition as all these sales

would be, a - 8,800 - a lineal metre which gives a figure of \$105,000. Assuming them to be in the same condition as all the other properties - in addition there have been extensions and renovations. You have quarry tiles, studio areas, completely modernised. Taking all that into account I believe the alteration would add \$25,000 to that figure, which would give a figure of \$130,000 which analyses back to a figure of \$11,000 a lineal metre over all the premises. In my valuation calculation that is the figure I used. I think it is on page - 10 on the first annexure. The top following page 6.

Q. And does that figure of \$11,000 - odd per lineal metre reflect your opinion as to the value of the subject property as improved and renovated when compared with the value of the lands the subject of the comparable sales as sold in their condition at the time of their sales? A. Yes and it can be further analysed the amount of \$89,000 and improvements \$41,000 which gives \$130,000.

Q. How was that analysis done? A. I determined a land value of \$7,500 a lineal metre by analysis of the other sales evidence - 20 by taking away the value of the improvements from the sale price and arriving at a land value - that showed \$5,000 a lineal metre for the other section beyond the post office and in my opinion this would be worth 50% more, \$7,500.

Q. If you have theoretically two vacant sites, free of all buildings, one 165 and one 235 and 235 would be worth half as much again. A. Yes.

UPON RESUMPTION:

MR. MORLING: Q. Was it possible after the three properties were acquired by Giles Bourke Holdings to sell separately but let parts of them? A. Yes, that has now been done actually. 30

Q. What if any physical changes were necessary to enable that to be done? A. Probably the best way to answer that would be to say - what has happened now the present owner has got three, he occupies one shop as a newsagency, then he has two shops leased out, one for a cassette sales shop and the other for a frock shop and the frock shop has had to build an internal stairway up to the first floor. They are the only structural alterations that were necessary. The rest of the top floor is leased out I think to an architectural office and they go up the internal stairways through the cassette shop so that we now have four separate occupancies so that could have been done although if you are running a big large group or State organisation you would not have done it but it could have been done. 40

Q. I will come to the deduction which you make for certain unauthorised work in a moment but is there anything further

you wish to say about the comparable sales approach which you took before we leave it? A. No, I don't think so. I think we have covered it.

Q. Will you tell his Honour how you went about taking a second approach of using capitalised rentals? A. Well, I tried to establish the rental value of the premises first of all. I did that by looking at rentals of other shops in Glebe Point Road which I think are tabulated there.

Q. That is on the schedule headed "Schedule of Shop Rentals"? 10
A. Yes.

Q. Can we start at that? Briefly if we can? A. The first one happens to be the property that was purchased and renovated as a real estate office. In this respect it probably should be given some weight because it was a real estate office. The rental paid for that was \$40 a week in 1973, April 1973. That was the rent paid by Martin, Norbury & Middleton, agents to Mrs. Martin who purchased the property. Mrs. Martin was the wife of Martin in the estate agents practice and there could well have been some favourable consideration on that account, it is not possible to tell but the rent anyway was \$40 a week. That was only for the front half of the shop. The rest of the shop had not been renovated and the dwelling was let separately at \$20 a week. I have made no reference to the dwelling there but it was let separately at \$20 a week. Using that as a basis, that is of course the rental as you see it in the photo as a new shop, so it does appear to me to be somewhat less than you would expect for a new shop. That appears to be what you would get for an old shop although I think there may be some doubt on the level of that rent. It shows a rate of \$8.11 a lineal metre per week. 20 30

Q. Is the adoption of a lineal metre as the measure of valuation something which valuers commonly do? A. Only where the shops - virtually the whole row of Glebe Point Road are similar, similar depths in most cases. One exception would be the news-agency but where they do have a similar depth it is just as easy to do that as to use it on a square foot basis but an alternative is to use a square foot basis or square metre basis.

Q. Do you wish to say anything more about that one before we pass to 171? A. No. I believe it is probably less than its proper rent that is as a renovated shop. 40

Q. You made that more in relation to 155? A. Yes.

Q. Do you wish to say anything more about that property so far as rental is concerned? A. No.

Q. What use did you make of the lease of number 177? A. Well, I went through all of these rentals which I have stated at the bottom in that schedule how I used it but perhaps we should go to each one first and then come back to it?

Q. Yes? A. 171 was an old newsagency. It had a bit more depth which explains the rent I think. I spoke to the present proprietor of the property, who is a tenant actually; he told me that there were in fact no access stairs at all to the first floor, they had been removed at some prior date. As far as he was concerned it was simply a lease of a shop. There was no use made at all of the premises above and he said that had been the situation as far as he knew for some years and it certainly gives that appearance, it is very dilapidated above the shop. The shop itself has been extended to take in what would have been one of the living rooms originally of the shop and dwelling and it is deeper than for instance number 155 which was only half the depth. Just looking there straight as a shop rental it shows \$11 a lineal metre per week and I think that is because of the extra depth and perhaps there should be some adjustment made for the dwelling but I do not know how to make one so I have then put it in for the shop rent. There is no use for the upper floor unless you spend a lot of money to put a dwelling in and I do not think the tenant would do that.

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The third one is 333A. Those first two shops are in the St. Johns Road precinct, the post office precinct, number 333A however is up Wigram Road or the Toxteth Hotel precinct which is a strong shopping centre, probably equally as strong as the subject property; certainly much stronger than the St. Johns Road area but I would say that probably it would be equal to the one that we have to value. Now that showed a rental on my analysis of \$45 a week for the shop. The tenant paid \$60 a week but that included a dwelling at the rear of the shop. At the time that it was leased in August 1973 it was actually a hairdresser; it is now a cake shop. I spoke to the proprietor of the cake shop who told me the history of it and assured me that when that lease was entered into in August 1973 it was in fact a hairdresser and in poor condition. He does not use the dwelling at all himself, he just keeps it locked up for storage, but there is a dwelling and it had four rooms, I walked through and I think it had four rooms. The fact of the matter is I do not think you could put more than \$15 a week on that which would leave \$45 for the shop in very poor repair and that analysed at \$8.20 a lineal metre and that shop is

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just the average depth of all the other shops. As I say, at the bottom of that schedule comparing the rentals that I have analysed there with the subject premises which were very modern, as I said here they are modernised, renovated, there were decks at the rear which overlooked the city skyline, it had a marvellous view which could add to the value of the premises from a rental point of view. There were parking spaces at the rear. None

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of these other properties had that - sorry, 155 had one parking space at the rear.

Generally speaking, the premises I had to value were worth in the vicinity of double in my view the ones I looked at so I adopted a \$15 a lineal metre per week as a rental value for the premises, that is to say, the ground floor premises, and I proceeded then to assess a value for the first floor and the basement and I arrived at a rental on that basis.

Q. Can I take you then to the first page of workings which follows p.6 of the valuation? The ground floor rental is calculated at \$9,258 per annum in the way indicated? A. Yes. 10

Q. How did you get to \$15 per square metre for the first floor offices? A. Well, there was some difficulty in doing that. Those offices are very good offices. They have aluminium sliding doors opening onto the decks and there is a quarry tiled area which has what I would call a studio ceiling which is a pitched beam roof with coloured glass skylights - most attractive - and it would not be possible in my view to find a comparable rental but I adopted a figure of \$15 a square metre on the basis I thought that would be the minimum you could get for it without really taking any comparable sale. 20

Q. On what experience do you draw in making that adoption of \$15 per square metre? That is about that, \$1.40 a square foot, is it? A. Yes, about that. If you had an office location where you could find rentals I would imagine that they would be around about \$2 a square foot or \$20 a square metre if it was part of an office building in the location. This is not that. The access to this is by a wooden stairway through the centre of the shops and although it is very nice I do not think you could put \$2 a foot on it, \$20 a square metre, so I put \$15. I do not think there is any way I can give you a comparable on that one. 30

Q. Is it part of your training to be intimately concerned with the valuation of various types of office space. A. Oh yes.

Q. You took \$10 a week for the basement. Why do you do that? A. Well to be quite honest, once again there were no comparables. I felt that was a nominal amount more than anything else. There are three lock up storage rooms down there and I am certain you would get \$10 a week for them from one of the tenants of the shops but there is no comparable evidence on that. That is really a nominal type of figure. 40

Q. Then the outgoings you perhaps can speak to if you are asked about them but do you say that they would be proper outgoings to allow before reaching a net rental? A. Yes.

Q. Why did you take seven per cent as the capitalisation rate?

A. Well there are two points about this. You might note that I put the estimated outgoings to an owner occupier. Now obviously an owner occupier would not have the same vacancy as an investor, he would be occupying at least the whole of the ground floor himself; he may have tenants upstairs in which case he may have a vacancy factor of some degree so I have taken that into account and I have calculated the vacancies only on the first floor and basement rentals. In regard to management I have assumed if he was an agent he probably would have paid management to himself but anyway I have charged it. Rates and taxes are fairly factual. Insurance, that is a full figure, I have allowed for reinstatement value which is double, it has added value, and I do not think that that would be anything but accurate. It may be high if it is anything. Repairs, maintenance and renewals would be a reasonable allowance in my view and I do not think there would be any other outgoings that an owner occupier would be faced with. Taking that into account I have arrived at \$9,500 nett and the seven per cent capitalisation rate is the one that I think is applicable to a property being purchased for owner occupation.

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Q. Why do you say that? A. Just from my knowledge of the market. An investor might want nine per cent if he is simply going to take the rent as an income producing investment but where an owner is in occupation the return acceptable I have found to be seven per cent on the basis of sales analysis and that can be pretty well substantiated from what happened at number 155 where the purchase price was \$31,000 and they spent \$4,000 or \$5,000 on renovations taking that to say \$35,000 and the income they got out of it was \$60 a week which would show something round about seven per cent return.

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Q. You have, in respect of both approaches, made a deduction, have you not? A. Yes.

Q. You set out on p.4 of the valuation your understanding about the council's attitude to number 237, is that right?

A. Yes.

Q. And you make a deduction of is it \$4,000 to allow for that problem? A. Yes.

Q. And would you just tell his Honour in general terms how you got the 4,000? A. In general terms I imagine the purchaser would say, "I have to go to the appeals tribunal, it will cost me a thousand dollars in legal costs, I will have to spend a thousand dollars to finish off incomplete work, that is \$2,000, and I will have a certain amount of inconvenience, I will double that and that is \$4,000". It is not very scientific but it is the only way I could think of to arrive at a figure.

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Q. You end up with the final view that the value is somewhere in the range of \$126,000 to \$131,000 and you adopt \$128,000? A. Yes.

CROSS-EXAMINATION

MR. CLARKE: Q. I suppose as a general principle it is the armslength bargain with no particular relationship between buyer and seller or no need to consolidate that is the best comparable evidence? A. Yes.

Q. If there is a need, if there is a sale which is for the purpose of consolidation it is a suspect sale from the point of view of comparable evidence, is it not? A. Yes, it would have to be checked against other evidence. 10

Q. Well, on its own you just cannot assess how much the person wanted to consolidate, can you? A. No, you do not know.

Q. So we can say leaving aside the checking the sale to Giles Bourke Holdings in 1973 of 237 Glebe Point Road on its own is not a very safe guide as a comparable? A. Not on its own, no.

Q. The second thing is that each of your comparables was a shop and dwelling, was it not? A. Yes. 20

Q. And these premises in March 1973 were a shop and office? A. Yes.

Q. And there was no - is this right - no true comparable to work on in relation to a shop and offices in that area? A. No there was not.

Q. And a shop and dwelling broadly speaking caters for two markets; one the owner occupier who wants to live in the premises and operate the shop and secondly the investor? A. Yes.

Q. And a shop and offices you have put forward as being primarily of interest to an owner occupier, is that right? A. No, I said that I believe there would have been an owner occupier to purchase this particular property in 1973. 30

Q. Well primarily though one would be looking generally at an investor buying this block, wouldn't one? A. Certainly not.

Q. Why is that? A. Because it was ideally - it was actually built and designed for use as an estate agents office and developer's office and in fact for somebody seeking that sort of accommodation to do that he would have to buy three single shops and start all over again so I say that the basis of value on the highest and best use would be for owner occupation and I know most valuations should be done on the highest and best 40

use approach.

Q. That assumes a developer not just an estate agent, doesn't it? A. No, it assumes an estate agent and/or developer who might have associated architectural or surveying companies or whatever.

Q. So what you are really talking about is an association of companies, is it? A. No, I am talking about what I said, an estate agent and/or developer who might have professional consultants who may or may not pay him the rent to occupy part of the premises but that is the type of thing I am thinking of. 10

Q. You see, an estate agent would have no need in a place like Glebe for other than the ground floor, would he? A. No, not a straight out estate agent.

Q. So that what you are looking at is some other type of occupation for the upper floor? A. Yes, an associated use.

Q. And if one is talking about one owner, an owner occupier, then one is talking about more than simply an estate agent? A. On a purely estate agency basis, yes.

HIS HONOUR: Q. The converse of what Mr. Clarke is putting to you in relation to a developer is that he would not need the ground floor? A. Your Honour, there are companies that combine the two but I agree with what you say. 20

MR. CLARKE: Q. So really one is talking about a business such as estate agency and other businesses upstairs? A. Well yes but not necessarily separately owned.

* Q. If we talk about them being singly owned we are talking about a very limited market, aren't we or we were in 1973? A. I do not know about that. No, I do not agree with that.

Q. Do you say that is wrong or right? A. I say that there would have been consultants that would have been willing to pay rent for the first floor space. 30

(Question marked asterisk read by court reporter.)

WITNESS: Are you talking about three separate shops being singly owned?

MR. CLARKE: Q. So that you understand, if we talk about an owner occupier being one entity would be the likely purchaser of the trio of shops and the offices above we are talking about a very limited market, are we not? A. No, not in 1973.

Q. Did you know of any such, apart from the occupation of perhaps these premises any premises in Glebe Road nearby that were occupied by estate agency down below and offices upstairs or such like within the company of the estate agency upstairs?
A. No I did not. There were not any premises like that available. I suppose that might explain it. I did not know of any.

Q. But really what you have done is you thought well, this property from its appearance looked ideal for a developing company with an estate agency and its associated organisations to operate upstairs? A. I did. 10

Q. And then looking at this as being a great site for such an organisation you then looked around at sales comparables which are shops and dwellings? A. Yes.

Q. And you looked around at rental accommodation which again was shops and dwellings? A. Well, I analysed the rentals to say shop rental.

Q. But nowhere did you find a comparable to guide you as to this particular market of a developer, for instance, who would own and occupy the whole thing? A. No. 20

Q. That is right, isn't it? A. That is right.

Q. Tell me this, on the basis comparables - incidentally, you read Mr. Cossack's report, I take it? A. I did.

Q. Did you read it before you prepared your report? A. I did.

Q. So it would be fair to say, would it, that you were aware of his viewpoint before you even started to write your report?
A. Yes.

Q. Did you read Mr. Gilbert's report? A. I was given a copy of that. I might say - 30

Q. Did you read it or not? A. I did.

Q. Before or after you prepared your report? A. Before

Q. Did you read it apart from reading the schedules or the - ?
A. That was what I was going to say, the main purpose of reading them was to go through the sales and rental evidence so that in the time available I could get to it quickly.

Q. Would a sale of a block of fifteen shops in the area of 153 to 179, would the sale price of those shops in close time proximity to the sale in question be of any assistance to you as a comparable? A. No. 40

Q. None at all? A. No.

Q. It is a totally different market, I take it, is it? A. Yes.

Q. It would not be of help why, because of being a bulk sale, as it were, the price might be much lower than for a new shop?

A. Well, you would not know the answer to that. The point is that there could be special reasons why a group of people could get together and buy it for themselves and they might pay the market value. On the other hand, if they are competing with an investor he would pay a price to show a margin so you would not really know the answer to that question I don't think.

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Q. I suppose looking at it broadly, the main market would be the investor market? A. Well, knowing what happened I would have to say the main market would have been co-operation of the various owners.

HIS HONOUR: Q. Tenants? A. Yes tenants, I'm sorry.

MR. CLARKE: Q. You did not tell us anything about a co-operative in your evidence in chief? A. All right, a company formed by.

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Q. You see, in any event, the price paid by that company for the number of buildings does not provide any real guidance or assistance as a comparable in looking at a single or double building? A. I do not think you could rely on it, no.

Q. And if in fact for instance 159 was simply purchased by the tenant through the agency of this company or co-operative then 159's price is not a safe guide as to what it would have brought on the market as a separate entity? A. It may not be.

Q. If you look at Mr. Cossack's schedule which you have relied on - have you got a copy of it there? A. I do have one, yes.

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Q. You read to his Honour the per centage per month rise of 175, 165 and 155, did you not? A. Yes I did.

Q. On the schedule there were in fact two other properties shown which had dual sales, did they not? A. Yes.

Q. And as to 90 Glebe Point Road the monthly rise was 3.33 per cent? A. Yes.

Q. And that was between - it is there almost impossible to tell, well it is impossible to tell what dates that was between? A. Well, there are two transfer dates given but you would not know exactly what the contract dates were.

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Q. I see, it is really not just 90 Glebe Point Road it is 96-98 and 90, is it not? A. Yes, so that you cannot deduce much from that.

Q. That was, in any event, the transfer dates were October 1973 and July 1974? A. But they were different properties. One was sold to Col Joye Holdings - I might say I have not investigated these, it is not my evidence.

Q. That one looks a dubious guide in any sense because it is unclear as a schedule? A. I do not think you can use those in any way because they are separate properties. 10

Q. If you look at 35 Glebe Point Road there we have transfers June 1972 and May 1973. The latter purchaser being Group Unity Securities and the per centage monthly rise was 4.37? A. Yes, I see that.

Q. In relation to each of the other three the difference in price between the sale from Yathom to the tenant and then the sale shortly thereafter by the tenant to another purchaser? A. Yes, that is correct. It appears to be correct.

Q. In point of fact with Yathom, as you have said, it was simply 20 a co-operative formed of all the tenants who occupy premises from 153 to 181 Glebe Point Road, was it not? A. Well, that is what I ascertained from my enquiries, yes.

Q. What the position was was that they got together and tried to buy their places individually from the Glebe Administration Board? A. I was told so.

Q. And Glebe Administration Board would not sell to them individually but insisted on selling the whole block as a block for \$325,000? A. Yes, I was told so.

Q. And the tenants then got together and worked out how they would apportion the cost of each unit and formed the co-operative and bought the block of premises. A. Well, I do not know who was involved other than what I told you, what I said earlier, was that two people were involved, as I understand it, and they formed a company but there was a prior arrangement that they would be sub-divided and sold to the various occupiers. 30

Q. I do not want to take your time but have you ever seen this deed of trust? (Shown) A. No.

Q. Or have you ever had a company search carried out in respect of Yathom? A. No. 40

Q. If in fact the purchase price paid by each purchaser in the three properties 175, 165, 155, simply represented a proportion

of \$325,000 it would be an unsafe guide, would it not, as to what the purchase price might have been had there been a separate sale? A. Yes, it would create problems. It could be checked.

HIS HONOUR: Q. When you say it could be checked the problem is that you are running out of things to check it against?

A. If I might say so, I do not think so because the sale price on those co-operative figures were about twenty-one to twenty-eight I think was the range.

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MR. CLARKE: Q. They varied from 17 up to 27, something like that? A. From 17 to 27 and taking into account the premises and the other sales that we know of they do not appear that far away from the market rental.

Q. Mr. Woodley, you say that but you have used this schedule of Mr. Cossack's as your basis of lifting prices, haven't you?

A. I have formed an opinion based on that, yes.

Q. And that is the only material on which you have had, apart from your own general knowledge, as to the extent of a lift in prices back in 1972/73? A. Well, we do have the sale of the restaurant at the same time which showed \$22,000 and that sale would support those prices. That was paid by the tenants up on the hill there so I do not know I agree with what you say.

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Q. You have the evidence of the sale of 237. Is that the one you call the restaurant? A. Yes, the restaurant.

Q. Which is, on its own, an unreliable guide? A. On its own unreliable.

Q. You have the three sales of 155, 165, 175 and assuming the facts I gave you that they were simply an apportionment on a bulk transfer, assuming that, those on their own are unreliable also? A. Yes, I would have to agree with that.

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Q. And so what you do you are checking one unreliable against another unreliable, is that right? A. If you put it that way you are.

Q. The result could never be reliable, could it? A. Well, the result may not be 100 per cent accurate but I think I have made and adjusted it to seven per cent, I believe that reflects the market as I understand it generally apart from this. I did not adopt Mr. Cossack's per centage. I looked at that evidence and I, from my own knowledge of the market, I concluded that seven per cent per annum would be a reasonable amount. I did not adopt twelve per cent; I did not adopt four per cent, I formed my own opinion.

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HIS HONOUR: Q. You may remember I asked you initially when you were answering Mr. Morling's question where you got the seven per cent from my recollection is that you told me that you got it from Mr. Cossack's schedule and that is how we came to get that out together with 237? A. I do not know exactly what I said, your Honour.

Q. I may be wrong in my recollection? A. I thought I also said that that would be in line with what I understood the general real estate trends were. I may not have said that; I thought I did but I may not have. 10

MR. CLARKE: Q. Are you saying that from say August 1972 through to March 1973 your recollection is good enough to say that the rise in prices was about seven per cent per month on shops and dwellings in the Glebe area?

HIS HONOUR: Q. Could you reframe that, Mr. Clarke? Is your recollection sufficiently good as to the extent of the rises in the period nominated by Mr. Clarke? A. Well naturally one does not think of it in terms of per month when you look at the sales but the relationship of say \$22,000, \$25,000 to \$35,000 would be my recollection of the market in that period of time. 20

MR. CLARKE: Q. You see, one of the factors that comes clear from the contract, for instance, the contract for the purchase by Yathom, was in fact two months before this is stated on the schedule so that has an effect on the per centage rise itself? A. On the ones Mr. Cossack produced?

Q. Yes? A. Yes.

Q. You would not say, would you, that your recollection is good enough to enable you to say that in that period from August 1972 to March 1973 the prices were regularly rising seven per cent? A. No, I explained that. You would not think in terms of monthly per centages, you would just think in terms of the rental values. When you analysed it it would come back to something like seven per cent. 30

Q. What you are saying though is that your memory is good enough to tell you that nearly eight years ago prices rose in line with seven per cent per month in the Glebe area between August 1972 and say March/April 1973? A. Well, I think I was talking generally about the metropolitan area rather than Glebe and I would say in respect of the metropolitan area generally that that would be my recollection of it. 40

Q. But you have got no recollection of Glebe? A. Not especially of Glebe.

Q. What about in the following twelve months, say from April

1973 to April 1974, what happened to prices over that period?

A. There was a complete crash of the real estate market during 1974.

Q. What happened to prices? Did they drop by fifty per cent?

A. Oh yes. By fifty per cent I would say they would have dropped by, say towards the end of 1974 when it was a buyer's market completely, particularly for investment properties or development properties, I would say there was probably a drop of thirty, forty, fifty per cent in that range.

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Q. Thirty to fifty per cent? A. Yes.

Q. Was the end of 1974 the bottom? A. No, I don't think it was the bottom.

Q. What happened in the next twelve months? A. It climbed up again, it climbed up about the end of 1975/76 from my recollection.

Q. What happened between the end of 1974 and the end of 1975?

A. I think it went down a bit further. You know I am talking from memory now entirely.

Q. But this is closer than 1972? A. Yes it is.

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Q. Well, what happened between 1974 and 1975 in that twelve months? A. Between 1974 and 1975 the market continued to be difficult and some prices would have gone further down towards the middle of 1975.

Q. What about the end of 1975, would there have been a drop between then and the end of 1974 or overall a bit of a rise?

A. At the end of 1975 prices would have started to come back up again.

Q. So the tendency would have to be a bit higher than they would have been at the end of 1974? A. No, I do not think that is right. You went through a trough so you have got to graph the thing to see where you are at. You are asking me to do this from memory, at this point of time I would not like to say.

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Q. But you have given us fairly clear evidence from memory back to 1972, haven't you? A. Yes.

Q. I am asking you when was the trough? Was it mid 1975 or early 1975? A. The bottom of the trough?

Q. Yes? A. Towards the end of 1975.

Q. If you take December 1974 and December 1975 generally was the market about the same at those times or was there a slight

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rise in values at the end of 1975 or a slight drop? A. It started to come out of the trough and move up again.

Q. If you cannot tell me please say so but would you agree that at the end of 1975 prices were overall somewhat better than they had been in December 1974? A. No.

Q. You would not agree? A. No.

Q. Would you say they were about the same? A. Probably about the same.

Q. Incidentally, you have told us that you spoke to a Mr. White? 10
A. Yes I did.

Q. Did he tell you that he had his premises on offer in 1975, that is 231? A. He was going to sell them?

Q. No, that he had them on offer to buy in 1972 as a tenant?
A. Yes, he told me he had bought them.

Q. In 1972? A. Yes, I think it was in 1972. He paid \$23,000.

Q. Did he tell you that prior to paying that he had them on offer to buy at \$15,000 or \$16,000? (Objected to; disallowed).

Q. Incidentally, the Toxteth Road end you have said I think is at least as good a retail section as the subject premises? 20
A. Yes, I think so.

Q. Would you agree that it is probably the strongest part of the whole stretch of Glebe Point Road? A. It is equally as strong I think as where the subject property is. It may be stronger but I would not say for sure that it is.

Q. You could not be sure what it was like in 1973, for instance, whether it was a stronger section then? A. I do not see any reason why it would change but no, I was not doing any enquiries in 1973.

Q. Did you look at any places in that area? A. Yes. 30

Q. Which places did you look at there? A. Well, the one I referred to in the evidence which is now a cake shop and was then a hairdresser.

Q. 333A, yes, anything else? A. Yes, I went through all the ones Mr. Gilbert referred to because I thought I should know what they meant.

Q. 365? A. If you could tell me what is in it?

Q. From recollection it is a shop and four flats? A. Oh yes, it is another cake shop with a passageway at the side of it, yes, I looked at that.

Q. Do you know what the rentals were there? A. I had them in front of me from Mr. Gilbert. That is a very difficult property to analyse. It has got a shop part of the frontage and it has a corridor alongside of the shop which leads up to a three-storey block of flats at the rear which are inter-connected and impossible to sort out and also attached to that shop is an old bakery at the back so I did not find much help out of that one.

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Q. That was just as good a comparable as 155, for instance, wasn't it? A. No, the best comparable I thought that I could use up there was 333A, the one I used.

Q. When you say the best you mean that suited the purpose - ? A. No, that showed \$44 a week for the shop which was in line with those other ones anyway but I just thought it was the most easy to analyse.

Q. We got in a part that is equally as good as the subject premises a return in a lease entered into in August 1973 of \$8.20 per metre per week for the shop in 333A? A. The one I analysed, yes.

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Q. You say, however, it was worth nearly twice that? A. I certainly do, yes, not on location but on the type of premises; the parking area, everything I mentioned in my analysis, that is why it is worth more, not because of location.

Q. But twice as much? A. Twice as much, yes, at least or in that vicinity.

Q. Incidentally, you had been doing this exercise in March 1973 because you were, were you not, trying to see what the position was in March 1973? A. Yes I was.

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Q. If you had been doing it in March 1973 you did not have any comparable rentals, did you, to work on? A. You mean that the leases I have referred to are after the date?

Q. Yes I do? A. That is quite right.

Q. I know you have only had a short time but bearing in mind a valuation as at March 1973 didn't you think it important to look and see what evidence was available for someone carrying out a valuation at that time? A. Well I didn't for this reason, that they were August, April, thereabouts, those leases were negotiated and I did not see that, in fact I think with hindsight it is more reliable than going back to leases in the three years

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before which would have been far too low. I found that the most reliable evidence I could find.

Q. Was there no evidence of leases in the twelve months before March 1973? A. Well, the T.A.B., for instance, next door was leased but that was in 1971 and it was terribly complicated. They did a lot of extensions and renovations and I did not find much help out of that.

Q. For anyone valuing in March 1973 he would have had the T.A.B. as a guide? A. Yes.

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Q. Anything else? A. There were some earlier leases back to 1971 I think. The main ones I had in front of me were those that were referred to in Mr. Gilbert's evidence.

Q. But the only ones you have used of course are the ones you have set out in your schedule? A. I did. I think they are the most relevant.

Q. They are obviously only available to you because you are doing it with the benefit of hindsight? A. Yes. Thank heavens.

Q. It is true, isn't it, that a shop and dwelling does command a different market than a shop and offices? A. Yes.

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Q. And there was no indication of a comparable prior to March 1973 of shops and offices in the area? A. No, not that I have been able to find.

Q. I wanted to come to how you arrived at \$11,000 per foot? and that appears on the schedule after p.6 of your valuation? A. Per lineal metre that one.

Q. I'm sorry, 11,000 per lineal metre. If we look at 237 for the moment it was in May 1972 sold for how much per lineal metre, approximately? A. 5,230.

Q. So you have more than doubled that rate for the whole of the premises? A. No, I have added seventy percent - I'm sorry, you mean applying that to the subject property - yes. What I did, I arrived at a higher figure based on the date adjustment first and then I went from that to this.

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Q. Yes but the effect of it is that the rise, albeit with some alterations, to 237, the rise is over 100 percent per lineal metre in the period of nine months? A. It is, yes, which would be right taking into account the improvements that were made to it.

Q. And let me suggest to you that property generally without improvement for the start did not increase in the Glebe area by 100 per cent in that nine month period? A. No, it increased by seventy per cent, that is what I did, or I think seventy per cent, that is what I thought.

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Q. Your seventy per cent presupposes seventy per cent a month which is based on the period between August and I think January?
A. Yes, that presupposes seventy percent per cent per month.

Q. Incidentally, if you go back to Mr. Cossack's schedule the rise of 4.42 in respect of 165 seems vastly out of line with 155 and 175, doesn't it? A. Yes. I think I know why but it does.

Q. Well, I was going to ask you why do you think it is vastly out of line? A. Because the original transfer was directly from Lawlers and Yathom to Miles, I think they were concurrent contracts of some sort. I think the dates on the contracts do not indicate that. But the transfers anyway seem to indicate that there was a concurrent contract between Yathom and Lawlers and Lawlers and Miles. 10

Q. That would mean there was an instant rise of 4.42 per cent, would not it? A. It would, yes.

Q. So that would be a very strong indication that the purchase by Lawlers was under market value, wouldn't it? A. I do not think you could conclude that necessarily.

Q. Well, if the contracts are entered into on the same basis why not? A. I do not know what Miles' interest was but that would be - if those facts that I have mentioned are right, that is to say they were concurrent contracts, it does indicate a profit was available to Lawlers. 20

Q. And on a purchase price of \$26,960 a profit of just under \$10,000? A. Yes.

HIS HONOUR: Lawlers I take it was the sitting tenant, was it?

MR. CLARKE: Q. Yes, your Honour. That is right, isn't it, Lawlers was the sitting tenant? A. I believe that to be right, yes.

Q. If similar considerations applied to 175 and 155 well then obviously the per centage growth per month is very different than the deduction made by Mr. Cossacks of 12.34 and 10.25, isn't it? A. Well no, you are talking about 175 the first transaction. That was a straight out sale to Dowling and a resale but with regard to 165 the difference could have been that more was sold; the butcher's business. That was a butcher shop and in the butcher shop were certain shop fittings regarded as part of the premises and I understand that Miles bought the premises as a butcher's shop and that Lawlers could have picked up in addition to his purchase price on this profit something for the butcher's business. 40

Q. If Dowling purchased at \$21,290 from Yathom, if his purchase was something like eight or nine thousand under value of course

his profit over the ensuing months is much less on a real basis, much less than \$14,160? A. It would be if you took that approach.

Q. And the same with 155? A. Yes, the same thing applies there if you take that approach.

Q. It may be that 35 Glebe Point Road which was a Lawler sale to Group Unity Securities put the high point of the actual percentage rises at that time which was 4.37 per cent? A. I would not know that. I do not agree with that. I have not investigated that one. 10

Q. If we come to 175 Glebe Point Road, a sale in January 1973, how much was that per lineal metre unadjusted? A. 6,915.

Q. Could I just ask you about that? It is your view that the main market for these blocks 175, 155, and those types of properties would be the owner occupier or the investor? A. I would say the owner occupier would pay the highest price, I will put it that way.

Q. That, leaving aside tenants, depends I suppose on the keenness for owner occupiers to get into that area at that time? A. Yes. 20

Q. Incidentally, did you - and you may not have had time of course - but did you follow through any of those purchases from the tenants of the Glebe Administration Board to see whether they were owner occupiers or in fact investors? A. The ones from the -

Q. Tenants, yes? A. Well, I know about 155 which was purchased by Mrs. Martin in the name of Martin. That was really for owner occupation. Although they nominated Mrs. Martin as the purchaser it was intended to be owner occupied. As for the other ones, there would be the plant shop and the butcher shop - well, the butcher shop was subsequently tenanted so I do not know whether Miles used it first then leased it or what he did with it; at the moment it is tenanted. That leaves the plant shop and I am not sure about that one, I do not know whether that is a tenant or owner. 30

Q. That was a family letting, wasn't it? A. It was, that is what I meant to say.

Q. Are you sure it was the wife not the mother of Mr. Martin? A. Yes. 40

Q. It is the wife? A. Yes. When you say am I sure, I spoke to Greg Norbury who negotiated the transaction and was a partner in Martin, Norbury Middleton and he assured me that it was the wife of Mr. Martin that bought it.

Q. The name of that company has just changed recently, has it? A. It changed twice I think. It was Martin, Norbury and Middleton, then Norbury got out of it and it became Martin, Middleton. I think Martin has now got out and it is now Middleton. That is the sequence as I understand it.

Q. In any event, a letting between husband and wife as it were, or mother and son on the other hand, is not a reliable guide for comparables either, is it? A. If anything it would be low.

Q. Well, that depends on their tax situation, does not it? 10

A. Yes, well there are some question marks against it, yes.

Q. It could be anything, couldn't it? It could be too low; it could be too high? A. Yes.

Q. It could be right spot on, there is no way of knowing?

A. Oh yes there is, what about all the rentals I have got up the road to compare it with.

MR. CLARKE: I will come to that.

(Luncheon adjournment).

HIS HONOUR: Mr. Woodley, you are bound by the oath you took this morning. 20

MR. CLARKE: Q. Mr. Woodley, I just would like to perhaps go back over something. Have you got your valuation, copy of your valuation in front of you? A. Yes.

Q. Could you turn to the schedule of sales? I think you said that the value per lineal metre for the 237 sale that you set out as No. 1 was 5,230, is that right? A. Yes.

Q. Am I correct in thinking that you took 4.6 metres as being a frontage or what is the frontage you adopted? A. 4.3.

Q. Then for 175 Glebe Point Road without adjustment, what figure did you reach for that? A. 6,915. 30

Q. Then 165 Glebe Point Road, again without adjustment?
A. 7,094.

Q. And 155 Glebe Point Road? A. 6,288.

Q. They are the totality, as I understand it, of the comparables you used in arriving at your figure of 11,000 per metre as set out on the schedule just after p.6 of your valuation? A. As to the old premises. I then made adjustments, yes, but that is the basis of it.

Q. So that by using the 7 per cent increase from May 1972 you got the 5,230 figure up to about 8,800 or something around about that? A. Yes.

Q. And that gave you a figure of 105,000 and then you took 25,000 as being the value of improvements? A. No, the added value of the additional improvements.

Q. The renovation and improvement added 25,000 and that was a figure that was very much just an arbitrary figure, was it not? A. Which? 10

Q. 25,000? A. No.

Q. What was the basis of the 25,000? A. I did some calculations.

Q. What calculations? A. I have got them if you want to know them. I valued the premises that are there now including the buildings and the parking area, paved parking area, at a figure of \$40,000, and I valued the premises that were there before anything was done at all, I valued those at \$15,000 which gives me the difference of 25.

Q. But where did you get the figure of 15,000 from? Was that just a sort of -- you are relying on your experience, was it? 20
A. No, I think from the information I had I was able to determine what buildings were there before anything was done as though it was still the original shops. But of course they were much smaller and they were very old and they were in poor condition, same as the sales, and I allowed a rate per square metre of those buildings to arrive at a figure of 15,000 and then I did some calculations taking into account the extensions and the modernisation and the parking area to arrive at a figure current with the improvements done.

Q. Was that based in any way on comparables? A. No, that was based on known costs which I depreciated, or acceptable costs which I depreciated. 30

Q. But you didn't have any idea what had been spent on this, did you? A. No, I didn't work out what had been spent on it. I worked out the value of costing as it was renovated and then I worked out what it would have been had it not been renovated and the difference represents the added value.

HIS HONOUR: Q. The value on costing, what do you mean by that?
A. Based on the quantities that are normally used by valuers. We have a costing, current costing book based on current costs of building known as Cardells Building Costs book, and that gives you a rate per square metre for buildings and then you depreciate it according to its age and the stages that it is at. 40

Q. There would not have been any depreciation involved then?
A. Yes, there was some, because it was as a new building but it still had the old structure. So it would be virtually very small but there would be some.

MR. CLARKE: Q. Did you do the same exercise as to the value of the buildings on the other three properties which were your comparables? A. Yes.

Q. What was the value of the building of 175? A. On 175, \$10,000 and that gives a land value of 25,750, which is \$5,000 a metre. 10

Q. And 165? A. Yes, \$10,000 again and 26,500 on the land which is in excess of \$5,000 a metre.

Q. And 155? A. 8,023.

Q. What you are saying though is this: that the purchaser coming along would have been prepared to pay an extra 25,000 because this was in nice condition? A. Yes, and extended.

Q. But there was nowhere you found a comparable anything like the price of \$130,000, did you, in this area? A. No.

HIS HONOUR: What do you mean by that? 20

MR. CLARKE: Q. That was no comparable sale of 1, 2 or 3 shops together at a figure of around about \$130,000 in 1973? A. There was nothing comparable with this. They were old, just about --

Q. And what you had to do to get a sale at the figure you have got was to find someone who was prepared to outlay \$130,000? A. That is right.

Q. And there was no indication from any sales you had seen that any one person was prepared to do that in that area? A. Pro rata there was, but not for three shops. 30

Q. If we take the Glebe Administration Board sale, that was a sale I think of some shops in the hill section, shops and dwellings in the hill section, in June 1972 of 15 premises for \$325,000? A. Yes.

Q. If you use that as a form of guide, it would suggest that \$130,000 for three shops, albeit done up, is vastly excessive? A. Oh no. You could use that sale to deduce a land value which would support what I have done.

Q. Now, if for instance we attribute to 237 Glebe Point a growth factor of 3 per cent per month, one arrives at a figure 40

of somewhere around about 7,000 per metre approximately, you would agree with that? A. Have you done the sums? It would reduce it, of course, yes.

Q. If 5,230 goes to 8,990 at 7 per cent, you can tell us the exact figure? A. I can tell you if you will bear with me; 6,799.

Q. So that to get to your figure of 105,000 the increase at 7 per cent per month is essential, is it not? A. It is one approach that I have taken. It is only one approach which I checked. 10

Q. But if you take a figure of something like 6,700 which would be a 3 per cent increase? A. Yes.

Q. One gets to a figure of about 80,000 instead of 105,000? A. Yes, it does, but that is completely out of line with the sales up the road.

Q. You say that but the sale at 175 Glebe Point Road was 69 in January, correct? A. Yes.

Q. 165 was 7,000 in January, just over 7,000? A. Yes.

Q. And 155 at the critical time was 62? A. Yes. 20

Q. So that it would be much more in line to take a figure of 7 to 7,500 wouldn't it? A. No it would be out of line because the subject location and accessibility at the rear gives it a loading over and above those ones.

Q. But you add that loading on there, do you? A. No, I load that on what I get to the 11,000.

Q. The point I am suggesting to you is that you arrive at your figure of 105,000 by taking your 8,900? A. Yes.

Q. And then adding 25,000? A. That is right.

Q. And then working back, that works out at 11,000 per metre? A. That is right. 30

Q. What I am suggesting to you is that leaving out the alterations at the moment, the figure of 7, to 7,500 would be much more appropriate than a figure of 8,900? A. No.

Q. Much more appropriate to the other sales? A. No, I don't agree. If you disregard the 7 per cent approach to it and you simply take the sales that took place in '73 and adjust them for location, you will still get 8,800. That would still give you the same answer because you add a per centage on.

Q. But that is just not the way you did it, is it? A. That is not the way I have done it here but that is an alternative.

Q. So that the simple change in location is worth something between 2,600 -- 18 or 2,600? A. Yes.

Q. The simple change of location? A. Yes, it is; in my opinion it is, and it would work out this way. If you forget the 7 per cent --

Q. You have answered the question. In your opinion, it is. I want to ask you this question: was there any comparable in that area, that is the 237 Glebe Point area, that you could use to support that view? A. Only the ones of 237 and 231 which both sold at 22-23,000 in 1972 at which time they were selling from 17 to 21 down the road which indicates a differential. 10

Q. But they were selling at 17 down the road as particular sales, weren't they, Yathom sales. A. They were Yathom sales, yes.

HIS HONOUR: Q. Mr. Woodley, can you just enlighten me on this? I can see how a difference in location may be very important for a butcher or a cake shop or something like that. Would it be as important for somebody who is intending to use the property as a real estate cum developer? A. It wouldn't be as important, but it is the most important -- location is most important for a real estate agent. In that location, they are close to where all the activity is and the traffic coming up and down Pymont Bridge Road. They would be able to see it. It is on display there and in addition it has this advantage of the rear, the very good rear access, which means it has an advantage over those other sites for a real estate agent. 20

Q. Having regard to this great premium that will be paid for a location, would the best use really be a real estate development; because certainly to a developer and other ancillary services, location would not really be that important, I would have thought? A. I agree with what you say to a point, though a cake shop must be where the people are and a real estate agent can be a little bit away from there. But I still believe this location in that section north of Pymont Bridge Road is far more advantageous even for an estate agent. 30

Q. But you see the problem that I am grappling with is accepting to the full what you say about a real estate agent. That would only be using part of the premises for that purpose. The other purpose that you are envisaging would not be affected by location nearly as much and therefore they would be paying a high premium for location on the view that you adopt for an inessential purpose or for no good reason. Am I making myself clear? A. Yes, I understand entirely, your Honour. But we 40

are looking at the ground floor space as the premium space in which I have placed most of the value. I only put \$1.50 a square foot on the first floor space because I realise it doesn't have as much value as the ground floor space. But I agree with you. Though you get \$1.50 a square foot for that first floor space in many other locations as well, but not for the ground floor space.

Q. Were you envisaging in this best user concept that the whole of the ground floor would be used for the estate agency? A. Yes. 10

MR.CLARKE: Q. On your view, the change in location justifies an increase of up to 2,600 per metre in the value? A. Yes.

Q. Apart from the ones you have spoken of, 231 and 237, both of which were special sales, were they not? A. Yes.

Q. There is no comparable to assist you in that conclusion? A. No.

Q. Could I come then to the rents. If we look at your analysis it is, I take it, on the capitalisation of rents basis critical to your figure that there was readily available a market comprising 20 an estate agent/developer, someone like that, who would want to buy it to be an owner/occupier. That is critical to your analysis, isn't it? A. It is basic to it. I don't know whether it is critical.

Q. You have said that was the highest and best use? A. I believe so, yes.

Q. But you do agree that that narrows the market quite markedly? A. Well, it is what I have assumed to be a purchaser for it but another purchaser could well pay the same rental for it, another use. 30

Q. If it is not an owner/occupier? A. An insurance company. There are other uses, not just an estate agent.

Q. Do you know of any insurance companies that occupy premises like that out there? A. I know plenty of building societies would have taken it over, probably some insurance companies.

Q. Again, it is the owner/occupier, isn't it, that you are talking about? A. I am looking at an occupier/buyer. There is no two ways about it.

Q. What I want to look at now is the way in which that lifts your value because it lifts it in two ways. It limits vacancies? A. No, I have allowed a vacancy factor for the first floor. 40

Q. But it makes the vacancy factor much smaller, does it not?
A. Yes.

Q. And it also enables you to use a much lower capitalisation rate? A. It does that.

Q. You would agree, would you not, that looking at an owner/occupier, the capitalisation rate is likely to be less than looking at an investor? A. Yes, I agree.

Q. And an appropriate rate for an investor would be somewhere in the order of about 10 per cent, would it not? A. Nine to ten. 10

Q. So looking at owner/occupier in two ways, you lift the value, you lift the value by lowering the capitalisation rate and also minimising the vacancy factor? A. Yes.

Q. Again, and perhaps this is repetitious, but let me ask you, again, in respect of comparables you just have no comparable in that area of shop and offices, have you? A. No.

Q. So you go for your comparables to shops and dwellings?
A. Yes.

Q. Which in large measure attract both investors or owner/occupiers? A. Yes. 20

Q. And you look at that and you come up with the conclusion that 155, the office part alone, was leased for \$40 per week?
A. Yes.

Q. For 177 the whole premises leased for \$60 per week? A. Yes.

Q. But you refer to a dilapidated dwelling, is that right?
A. That is the inaccessible one, is it? A. Which one?
177?

Q. Yes. A. Yes, that was a dwelling you couldn't get into. 30

Q. You mean except through the shop? A. No, there was no stairs at all, I was told.

Q. You were told? A. By the newsagent that is there.

Q. What was the position at '73? A. It was the same.

Q. You allowed \$60 a week and then for 333A which is in a good area you allow \$45 a week for rentals? A. Yes.

Q. So with these premises, the frontage of which was perhaps a bit more than double the frontage of 333A, you do not allow double the \$45 a week. You allow nearly four times. You quadruple the rent to \$178? A. No, I worked that out at a rate of \$15 a lineal metre. That is not double. That is only 7/8ths.

Q. But what you are saying is at a rent of \$45 a week for 333A, which is nearly half the size, someone for double the size in another good part of Glebe would be prepared to pay four times the rent? A. But that is not comparable in any way. That is an old shop. This one has been competely rebuilt. 10

Q. Understanding that, at four times the rent you could effect repairs to cut out the difference in one year? A. Oh I'm sorry, but I can't understand the four times. I have used 7/8ths. I have used \$15 a metre as against \$8 a metre. I don't understand where four times --

Q. If you look at your figure on the schedule after p.6 it is \$178 a week? A. Yes, you will note that I say ground floor offices, parking included. That includes --

Q. I understand that, but it is about four times what 333A is, isn't it? A. Yes, if you look at it that way. 20

HIS HONOUR: Q. What do you want to add, Mr. Woodley? A. The \$15 doesn't represent four times the rental at all. It is a different depth of shop. There have been additions done at the rear. There is parking included which was not included in the front shop which was the hairdresser at the time; and that you, given all those benefits, included in the premises, you would expect it to be at least \$15 a metre frontage. That is all.

MR. CLARKE: Q. Was there anywhere in Glebe at that time offices bringing \$180 a week; not offices, shop premises? A. A shop? 30

Q. Yes. A. No.

Q. Or two shops together? A. Two shops together would bring about 90. Three shops together would bring about -- ordinary shops -- about 120. But this is three shops plus, plus, plus.

Q. If it is owner/occupier, the capitalisation of net rent is an inappropriate method, is it not? A. No.

Q. Would not the capitalisation of net rent be appropriate primarily for investment properties? A. No. 40

Q. Why not? A. The thinking behind the 7 per cent and the 9 per cent is this: the purchaser, the owner/occupier purchaser,

would in effect be paying himself. To that extent, he would have no risks at all. It would be an internal arrangement and he would be prepared to accept 7 per cent return on such an investment; whereas the investor would not be in that position. He would have all sorts of risks associated with it and he looks to 9 or 10. It is a different approach.

Q. The investor in your view just would not have been in the hunt buying this place? He would not have been able to compete?

A. No, the investor would have paid something less.

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Q. But not only something less; he would have paid greatly less, wouldn't he? A. I suppose you could work it out if you are limited to an investor only.

Q. Something like 95,000?

HIS HONOUR: Q. What are you doing? Using the same figures just with the 9 per cent multiplier? A. Yes.

Q. I think you have already agreed you would have to alter the vacancy factor too? A. Yes, that would go up. It would be at least say, 2 weeks at shop rent which would be 178 which would be, say 350. That would reduce net to, 9,150, so that would be 101,000; 101,666.

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Q. Did you take 9 or 10? A. Nine.

Q. What would it be at 10? A. Just multiply by 10. It would be 91,500.

MR. CLARKE: Q. Did you make any allowance for the fact that as at March 1973 some of this work had not been finished?

A. Yes.

Q. How much did you allow for that? A. \$1,000.

Q. Where does that show? A. A total amount of \$4,000 is given somewhere there. It is on the bottom of p.6; cl.3, adjustments for completion and consent, p.6.

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Q. That is \$4,000? A. There is an amount of 4,000. I have given that figure in to Mr. Morling.

Q. That is a fairly arbitrary selection? A. It is somewhat.

Q. Because you did not know how much work remained as at March 1973, for instance? A. I made enquiries and found out that the basement toilet accommodation had not been completed when there was a stopwork order given.

Q. In fact, you don't know one way or the other whether it

was more than that or not, I take it? A. No, I don't really know that.

Q. Coming back to one point: if you had been asked to value this in March 1973, yourself, from the rental point of view, you would have been unaided or you would have had no aid at all from other rentals in the area? A. I would have had to do something like I did in this case. I would have had to have gone back to the old rents which was 1971/1972 vintage, and have to make some adjustments of those upwards to come to a conclusion.10 But in this case, it was safer and better to use hindsight and go the other way.

Q. But you have not done the exercise? A. No, I have not. I didn't think it was necessary.

Q. I want to ask you then about 175. You mentioned the stairway or stair entrance on the road would lessen the value of the shop to a degree because it narrows the shop. A. Yes.

Q. But by the same token, it may well increase the value of the residence upstairs? A. I doubt that.

Q. One of the problems about having separate tenancies upstairs in 233-237 would have been that the occupants of the bottom floor would have the upstairs occupants trooping through the shop? A. Yes. 20

Q. And that is quite a detracting factor, is it not? A. Yes.

Q. That is what I am suggesting about the increase in value of a letting if there is a private entrance to the road for the dwelling? A. When you said a detraction, it is more a detraction for the person in the shop than the person going up the stairs, I assume, if it is a detraction, to the person who walks up the stairs, but the person in the shop suffers a little. 30

Q. He suffers even more if someone is going through his shop premises at night when he is not there? A. It would not be practicable to do that in the ones we are valuing.

Q. And a separate entrance of course gives a total entrance for both areas? A. It does.

Q. And for an investor, for instance, that might be a very important factor increasing the value of the premises as a whole? A. Yes, it gives him a chance of 2 separate tenancies. It does that.

Q. And gives him a wider field or wider range of lettings, for instance? A. Yes, but you get less for the shop. The point is how much does it increase the rental value? That is the measure of it and I don't think that would increase it at all. 40

Q. You don't know one way or the other? A. I don't think it would.

Q. But it would not decrease it either? A. Yes, it could decrease it. The shop would be worth less.

Q. Because there is a metre missing? A. Yes.

Q. But the upstairs could be worth more by the same token? A. It could be.

Q. And this 175 is a three storeyed building, is it not.
A. 175?

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Q. Yes. A. No, I don't think it is.

Q. Didn't it have an attic-type upstairs? A. There is an attic roof in all of these, but I wouldn't call it three storeys. There is an attic in them.

Q. Only one room or more than one room? A. Upstairs, I don't know.

Q. And 155, did that have an attic in it too? A. Look, it is a row of very similar places. It probably did have. I can't quite recollect. I didn't go upstairs.

Q. But if in fact, coming to the subject premises, they were two storeys without any attic weren't they? A. Yes, but they had a basement.

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Q. I understand, but they didn't have an upstairs attic, did they? A. No, they didn't.

Q. (Approached) I just want to show you these photographs. As presently let, there are three shops I think; an estate agent, records and a ladies frock shop. Where is the entrance to the ladies frock shop? A. If you turn to my valuation, I will show it to you.

Q. Please just show me on the photograph? You go through between the estate agency and the frock shop. There is a little lobby, and you go through an archway to either side. It is shown on here.

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HIS HONOUR: You are pointing to --

MR. CLARKE: Q. To the floor plans which are annexed to the valuation.

WITNESS: You come in the central entrance and go that way to the frock shop and that way to the estate agent. (indicated)

MR. CLARKE: Q. You are indicating the middle of the two sketches; on the right hand side the word "front" and there is an entry on which is shown "real estate office" on the right and "real estate offices" on the left shown on the sketch? A. Yes.

Q. On the right, however, there is now a frock shop.

A. Right.

Q. The left is a real estate office? A. Right.

Q. Where is the record place? A. Where the stairs are shown on that sketch is a counter built and there is a doorway through behind the stairs into the quarry tiled area which has now been carpeted and that is leased out as a shop. 10

Q. So there are two shops fronting, actually fronting the road; you go through the entrance and behind the stairs into a quarry tiled area and see the record shop, is that right?

A. Not quite. As well as having the rear area, they have a counter at the front so the entry area is part of the shop.

Q. And it is also the access to both other shops? A. That is right. 20

Q. On the right of the photograph is the butcher's shop which was there previously? A. Yes.

Q. At the rear, the parking space, and also there is parking space for the butcher's shop as well? A. Yes, that is best illustrated here (indicated).

Q. If you look at the rear of 175, you will see clearly an attic but if you look at the front are you able to say whether in fact there was more than one room upstairs? A. Not from inspection.

Q. In valuing for mortgage purposes, do you understand what I am talking about? A. Yes. 30

Q. You prepare a valuation for and on behalf of an intending mortgagee? A. Yes.

Q. It is necessary, is it not, to be conservative in your valuation. A. ~~Personally, I don't believe, I believe you should put the market value of the property.~~

(Objected to; question withdrawn; answer struck out)

Q. You would agree, would you not, that it is sound practice to value for mortgage purposes conservatively? A. Yes. 40

Q. For instance, if the market is very buoyant, you would not as a matter of practice, value upon the basis that the market was going to continue to rise indefinitely? A. No, no.

Q. You would in your valuation have regard to the risks of the market dropping, prices falling? A. No, I would not do that. I would interpret the market and one would think the market would take those things into account. But the valuer's only job is to interpret the market, not to have a crystal ball and say what is going to happen. 10

Q. I am not suggesting that you have a crystal ball but the market traditionally has moved upwards and often moved downwards? A. Yes, but at a given date it has a market value which it is the valuer's job to find.

Q. As a matter of practice, when you are valuing for a mortgagee who is going to lend money for a period of the strength of your valuation, do you not adopt a conservative approach to guard against the possibility of drops in the market? A. I don't do it for that reason, but if I have any doubts, I would be conservative. 20

Q. Would you always go to the best use of the property as your value there? A. Yes, I think I should as a valuer. That is the highest and best use.

Q. In a period of boom, did you not think in 1973 that any such figure resulting from the best use should be pruned to take account of risks in the future? A. No, my practice would be to advise the mortgagor that it should be 50, 60, 70 per cent of the amount of valuation according to the risks that I saw. But the market value should be one figure.

Q. So you would build the risk factor into your advice as to the amount or per centage of loan? A. Yes. 30

RE-EXAMINATION

MR. MORLING: Q. My friend asked you about a property and you said of it that it was very difficult to analyse and you said also of it that an old bakery was part of it? A. Yes.

Q. Which property was that? A. No. 365 from memory. It was beyond the peak area. If you give me a moment, I will give you that. Yes, that is the cake shop, No. 365.

Q. My friend asked you whether you had seen Mr. Cossack's report and you said that you had. What use did you make of Mr. Cossack's report? A. I mainly had regard to the sales information that was given in it. That was the main purpose of looking at it. 40

Q. Did you make your own deductions from the sales evidence?
A. I certainly did.

Q. My friend asked you a number of questions about the state of the market in '75? A. Yes.

MR. MORLING: Your Honour, I only wish to ask this question, if those questions were directed to the value of the subject land; because I think on the evidence of damage, this property was in fact sold at a certain price I think towards the end of 1975. The question I wish to ask is this:

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* Q. Did the sale price of the land at the end of 1975 give you any indication of the value of the land in March 1973, and I do not wish to ask that question unless my friend's questions were directed to that alleged link?

MR. CLARKE: There would be certainly no direct link, but I would not be discarding it as something that I would wish to rely on to a degree; on his approach, might I say --

HIS HONOUR: That you can relate back just as well as you can relate forward?

MR. CLARKE: Yes.

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HIS HONOUR: Mr. Morling, I will allow the question to be asked and answered and we can debate it.

MR. MORLING: Q. Did you investigate the circumstances of the sale of the subject land?

MR. CLARKE: That is another question.

(Question marked * read)

WITNESS: My answer would be no.

MR. MORLING: Q. Why was that? A. Because of the condition in which the premises were then in and the fact that the market had collapsed.

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MR. MORLING: Q. Did you speak to the person who actually purchased the land in 1975? A. Yes.

Q. Did you ascertain the circumstances in which he came to buy it? A. Yes. (Objected to; not pressed)

Q. You told my learned friend, Mr. Clarke, that I think you said perhaps insurance companies and perhaps building societies might have found the subject land suitable for their needs?
A. As an alternative.

Q. As an alternative to a real estate-type purchaser? A. Yes.

Q. From the building society-type purchaser. How would the location of the subject land compare in attraction with land say at 155, 165 or 175 Glebe Point Road? A. It would be far more attractive in my opinion.

Q. And the insurance company-type purchase? A. The same.

Q. My friend asked you a number of questions related to the circumstances that No. 237 was sold to an adjoining owner?
A. Yes.

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Q. Where the highest and best use of a parcel of land as a consolidated parcel, such as properties put together; where you are valuing a consolidated parcel as having as its highest and best use as in one line, does the price paid by a person to consolidate the site give any guide as to the values after consolidation? A. I think it does.

(Witness ret'd)

(Mr. Morling by consent tendered a list of interrogatories. By consent, this hand-written list of interrogatories was read onto the notes as follows: 1(a) and (b); 2; 7; 11-14 inclusive; 16, 17, 18-24 inclusive; 30-33 inclusive; 35; 36; 38(a); 45; 46; 47; 51; 52; 94; 95; 97; 98; 103-105 inclusive; 121; 124-125; 127; 137; 138; 139; 163; 164; 173; 176; 180; 190; 191(a); 192 and 193; 212; 213; 222; 228; 229; 233-236 inclusive; 245; and 246; 252-254; 257)

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(All of above-mentioned interrogatories by consent admitted as Ex. 15)

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(Copy ledger dated 18th November 1974 referring to fees for inspection and reporting on subject property by consent admitted as Ex. 16)

(Mr. Clarke informed his Honour that subject to certain matters, including tenders, the case for the defendant was closed).

CASE IN REPLY

(Mr. Clarke stated the Schedule of Loss had been virtually agreed upon)

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(Balance of defendant's file regarding the investigation for Giles Bourke group of companies, being the balance of m.f.i.9, admitted as Ex.BE)

(Mr. Clarke indicated that the company Yathom Investments Pty. Limited purchased the premises at 153-181 Glebe Road on 1st June 1972 for \$325,000; and there had previously been entered into a deed of trust of the 4th May 1972, which recited that the tenants of the various premises wished to purchase their particular shop and dwelling, but were unable to do so because the Glebe Administration Board would only sell in one line; and therefore they entered into a deed of trust with Yathom for that company to purchase on their behalf; the prices being paid in respect of each building set out in the deed and totalling \$325,000. They were prices on behalf of each and were subsequently paid by the tenants to Yathom Investments Pty. Limited, Mr. Clarke informed his Honour.)

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HIS HONOUR: I will have it noted that is agreed to between the parties, Mr. Morling?

MR. MORLING: Yes, your Honour.

(Short adjournment)

(Upon resumption, Mr. Morling submitted his Honour would be assisted by a quick view of the Glebe Point lands only at some convenient time to his Honour, with or without Counsel. Mr. Morling asked his Honour to consider the matter saying Counsel would be available should his Honour wish them to be there. His Honour said he thought it would be best if Counsel could tell him what he would be looking for or at. Mr. Morling suggested the view be had fairly soon. Following discussion his Honour arranged to have a view of the Glebe Point lands at 8.45 am on Thursday, 19th June 1980. His Honour asked Counsel to decide what they wanted in regard to how he should treat the view and let him know.)

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(Mr. Clarke said subject to an admission he had been asked to make by Mr. Rolfe, and would happily make, he now handed his Honour a schedule of loss in respect of each property. Handed to his Honour. Mr. Morling said the arithmetic was admitted; there was a

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good deal of disagreement as to the principles of law applicable, and he did not concede those documents carried into effect the relevant principles of law. However, Mr. Morling stated, the arithmetic was conceded as correct)

(By consent calculations regarding Glebe property admitted as Ex.BF)

(By consent, calculations regarding the McMahon's Point property admitted as Ex.BG)

(Mr. Morling told his Honour he would make a list of admissions, with the qualification that the interest calculated had been computed in accordance with cl.3 of the memorandum of mortgage on the basis of the mortgagor's default)

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MR. CLARKE: I hand up two documents, not complete and not checked by me. One is, broadly, submissions and in substance on the question of employment, although it does deal with Hedley and Byrne. The other document is on authorities. It refers to the authorities on which I will be relying and refers to particular passages which might be of assistance.

20

Before I come to submissions could I deal with this. Your Honour, some days ago, referred to some problem of circularity and the problem occurred to your Honour - in a sense it was unfortunate I referred your Honour to *Morris v. Martin*, a case of major import in this part of the law. *Morris v. Martin* is in fact a particular type of case that bears only a fairly remote importance in this case because, as will appear, there are two separate ways that a principal, a master, can become liable for the acts of his servants. One is in the course of employment and that covers clearly authorised acts and also the acts deemed to be within the course of employment. The second way is there is a duty to take care of goods and that duty is delegated by a master to a servant and he dishonestly steals or takes them away. *Morris v. Martin* is a prime example of the second type of offence and that is all it is when it is analysed and the analysis has taken place - in a case called *McCarthy's* (?) and secondly *Mahoney J. in Crocker's case*. There is a passage in that judgment where his Honour deals with the dichotomy or distinction.

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If one looks at the analysis one draws from that if the act is in the course of employment the principal is liable and our argument would endeavour to analyse the facts of this case in the light of the authorities on employment and seek to persuade your Honour the end result is what was done by Rathborne in this case is either within his authority or deemed to be within his authority in the course of employment.

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It is because, I suppose, of the difficulties always thrown up by cases where there are, on the surface, two parties who have suffered because of the acts of someone else because these cases pose the Courts a great deal of problem. One tends to find sometimes in the authorities a blurring between driving cases, fraud of the servant case and the stealing by the servant.

HIS HONOUR: When I said I found some problem of circularity I suppose I start with the problem of where does one begin? Do I look to see if there is a duty of care which brings me to the question of what is the relationship between you and Rathborne and when the only person you have dealt with is Rathborne - do I look at Rathborne's position to get to the other?

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MR. CLARKE: Our approach is that it is proper to start from the consideration of the question of whether Richardson & Wrench are responsible in the circumstances for Rathborne's activities. If we do not persuade your Honour to that that is really the end of the case.

On the other hand if we do persuade your Honour that Richardson & Wrench are responsible for Rathborne's activities whether one looks at it as vicarious liability or some other basis, the principal thing is the act of the principal and when one looks at it that everything Rathborne did was authorised, the principal is responsible - I do not know whether there will be any fundamental issue between us on this point that the really fundamental point in this case is the point of Richardson & Wrench is responsible for what Rathborne did on these two occasions.

20

HIS HONOUR: Did Rathborne's actions create a special relationship between Richardson & Wrench and Kooragang or is there another way?

30

MR. CLARKE: That is a way of phrasing it. The fundamental question was what Rathborne did was in the course of employment. I do not think I am giving anything away by saying it is not an easy question and the only case in which Hedley v. Byrne and the principal's authority and the principal responsible for acts of agents has been considered is very little help. It is really of no assistance.

Our submission is put two ways. It may be one is not correct and that way placed more reliance on the second way but firstly we would say, in accordance with the evidence, that what Rathborne did was precisely what he was authorised to do but if that is not right that in the circumstances of this case he will be deemed, according to the authorities to have acted in the course of his employment.

40

Mr. Clarke

HIS HONOUR: You will remember the statement of claim was founded on two alternative bases. Are you pressing those?

MR. CLARKE: I still press fraud your Honour. To a degree I suppose it depends on the view your Honour takes of what Rathborne did, which is one argument, what he did could be suggested to be a forgery. It depends what consequence flow from that.

HIS HONOUR: Your first alternative is what Rathborne did was what he was authorised to do and alternately what he did was deemed to be in the course of employment? 10

MR. CLARKE: In the submissions I have taken out initially I pointed out what is material to our case. It is probably not contentious but there are references to the pages.

One to four deal with his general authority. Five deals with the evidence of Mrs. Clarke and there perhaps ought to be added there for the purposes of later discussion that they were according to the evidence typed on the day which the valuation bears. Then there is reference to the officers of Group Unity and the reference is to page 156 - I will clear that up later. That point comes out on page 4. 20

HIS HONOUR: B 2 is not right, is it, only on one of the valuations appears the note of the identity of the valuer.

MR. CLARKE: If your Honour looks at the original valuation, Exhibits B and C, your Honour will see on the front page there is listed the name of the valuer. If your Honour would look at the originals.

HIS HONOUR: The Glebe valuation?

MR. CLARKE: Both.

HIS HONOUR: The Glebe one is the one that seems to suffer from the deficiency. 30

MR. CLARKE: The initials?

HIS HONOUR: Yes.

MR. CLARKE: Your Honour will recall I am dealing with the valuations as they were typed. On the left hand side there is the valuation and the names of the valuers. That should appear on both originals. On the copies that were submitted to the plaintiff there was no indication as there was on the original.

Three is of course a point Mr. Morling relies on. Four, I have dealt with. In relation to five I will note to refer your 40

Mr. Clarke

Honour to the pages. I took Mr. Hodgson through the valuation which appeared in the latest exhibit and what appears and its significance is not very clear but what appears is that Rathborne during 1972 prepared valuations which were authorised valuations and the last of those was December 1972. They do not appear in valuations for July or August 1973 so that there is an interregnum in the early part of 1973 - it appears all the other valuations for one reason or another - what you Honour can infer from it is not clear but for one reason or another they do not go through Richardson & Wrench in this period, they are not authorised. 10

Then six, despite the memorandum of 1972 the valuation prepared by Rathborne.....the defendant - that is really December 1972 and those that followed thereafter. I will take your Honour through the evidence of those tomorrow. Seven deals with the first one, December 1972 and eight, I refer to the evidence of Mr. Hodgson subject to Exhibit X which was the account rendered the next August - of the probability most of those bills were paid, if not all except one and the December 1972 ones were not paid either, at the time of...payment, and the pages are referred to. 20

Ten is a matter that is simply that it is a busy time and 11 deals with complaints about secretarial facilities.

Could I interpolate there that Mr. Hodgson was giving evidence of what went on in the defendant's organisation but there has been no evidence from the secretaries nor - it would appear to be critical - from my cross-examination it would appear that there was no surprise that there might be thought to be comment about the absence of a secretary. The relevance of this is if there was - and your Honour will no doubt be invited to draw an inference as to why Rathborne did this away from the office. We are left with the fact that neither Rathborne nor the secretaries who did his typing were called to give evidence to explain why he did it away from the office. 30

HIS HONOUR: How could the secretaries have said anything about that?

MR. CLARKE: You could have drawn that she was so busy or she was not busy and she could have attended to his work at all times.

HIS HONOUR: The inference that she was so busy would not be something the defendant would be anxious to have me draw. 40

MR. CLARKE: The other inference he would. It is also relevant in the other aspect which may arise as to what was the practice when enquiries were made - the practice followed by the people who answered the telephone and attended to enquiries.

HIS HONOUR: Of course there was Mr. Hudson's evidence that if secretaries were overloaded they could have called in a temporary -

Mr. Clarke

MR. CLARKE: His evidence was that there were complaints.

HIS HONOUR: Not calling the secretary does not seem to get the matter much further forward. Do you want to say anything about that?

MR. CLARKE: It is relevant on a number of issues.

HIS HONOUR: You put it when it is convenient to you. C2(i) could you give me the reference to that?

MR. CLARKE: Yes I will give your Honour the reference, it is Mr. Hodgson's evidence. I come to the basic submissions.

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HIS HONOUR: Mr. Morling will want to put in a number of additional things, that Rathborne was not authorised to do at some convenient stage. In relation to the method of handling these valuations.

MR. CLARKE: Yes your Honour, he may well. For the purpose of my submissions I do not mind.

HIS HONOUR: You just address yourself to those in reply.

MR. CLARKE: Yes. The view we put forward is that I will set out broadly the main factors on which this question might be decided.

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HIS HONOUR: It seems to be a fairly major item.

MR. CLARKE: We would be saying - some of the material I have already put is in the same category - simply it is an unauthorised way of doing an unauthorised act.

HIS HONOUR: I thought some of this material was directed towards putting the first alternative.

MR. CLARKE: Yes your Honour. I want to hear what Mr. Morling has to say about that. Recognising he did not follow the procedure laid down we will wish to argue that that was not a question of authority going to the preparation of valuations or otherwise, it was simply following a procedure. In other words, it does not go to the authority to prepare a valuation.

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HIS HONOUR: I think it is more in the semantic - put it at its broadest you say Rathborne was allowed to go out into the field, survey a property, using the word "survey" in a loose sense, prepare an assessment of what he considered the property to be worth and sign the corporate name to it. For either refinement in the work he carried out did not go to the authority, it was to the question of office procedure.

Mr. Clarke

MR. CLARKE: That is the way I put it in relation to the first matter, yes, your Honour.

HIS HONOUR: That means had Rathborne been told "You can do it but only if your instructions are given to you by a fellow with red hair weighing at least 16 stone," that would only be procedure or curbs on his authority. One has to apply tests to each of the valuations he did.

MR. CLARKE: I do not seek to get away from the evidence of Mr. Hodgson, although in my submission it should not be accepted in its entirety but one goes to see what was required to the manual. One sees nowhere there, nor in any other document, any limitation of power to prepare and present valuations. All one has is that Hodgson says this was in effect the procedure that was followed and he would have it further there was no express authority for Rathborne to depart from that procedure. (Exhibit 8 handed to his Honour). 10

HIS HONOUR: Does it purport to deal with his authority, to put the corporate name on the material?

MR. CLARKE: No your Honour. My recollection is it deals very little with what a valuer should or should not do. 20

HIS HONOUR: So really there is little point from the way you are approaching your case and referring to the manual because you say this authority is to be found outside the manual.

MR. CLARKE: Yes your Honour.

HIS HONOUR: And prima facie one would expect to find the restrictions also outside the manual, which deals with other internal procedures.

MR. CLARKE: I argue the first part but I do not accept the second part that there is to be a limitation in the way he exercised his authority. It would be quite extraordinary if it did not find its way into a manual and the reason would be that a valuer is a senior man. These questions are left to his discretion. He might, for instance get very busy and fall down on following the procedure for a period. It could not be said then he was not authorised to issue valuations. 30

The only indication of any restriction on the way he went about valuations, as Mr. Hodgson's evidence - one does not find any direction except in reply, nor does it find its genesis in any written instruction. The limitation we find is the one of credit. 40

I included the claim of actual authority which we put in effect rather simplistically simply when a third party receives

Mr. Clarke

a valuation signed by a man who is entitled to accept instructions, give valuations, sign the valuations with the corporate name and hand them to a person who asks for them, it is not open to an employer to say that was not authorised because, whilst all those acts were authorised it did not follow the procedure that was established in the office. We rely, of course, by analogy assuming one was prepared in the office and simply it has been forgotten to enter it in the register and send a bill, it could not make it an authorised valuation of Rathborne or whoever the valuer was.

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HIS HONOUR: Take the extreme case, let us assume Bourke never gave Rathborne instructions to prepare this at all - you buy that and I will give you a valuation for \$300,000 - that would, on your approach, still be an unauthorised valuation?

MR. CLARKE: To the third party, yes your Honour. It may be that I am merging into the second point. Yes your Honour. I know your Honour is directing your attention to the first one but if it ceases to be the valuation that it purports by or on behalf of the defendant, because of a circumstance whereby it is not a valuation at all, it is just his name put to some scheme, that may be another question. I am not sure how far I can take that but there will be no material before your Honour from which your Honour could draw anything adverse to the plaintiff here.

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HIS HONOUR: There is no material either way as to how these came into existence. There is no room for the presumption of irregularity. All I know is it is a piece of paper which we know was dictated to Mrs. Clarke by Rathborne and which he signed but whether he did that off his own bat or at his own instigation and then put it in front of whoever was the guiding spirit in Bourke Holdings or whether at the instructions of Bourke Holdings we know not.

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MR. CLARKE: No your Honour but in my submission one could not draw the inference your Honour put forward as an example but one could draw the inference that it was prepared in the absence of any other evidence at the request of the company and this primarily because buildings or lands were not purchased subsequent to the valuations but in effect in the Glebe one it was to support a refinance and the McMahon's Point one to enter into a contract. When the valuations were prepared - taken in effect by the borrowing company and submitted to the solicitors for the purpose of facilitating and obtaining a loan.

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(Further hearing adjourned to 10 a.m. on Wednesday
18th June 1980.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)
) No. 3568 of 1976
COMMON LAW DIVISION)
)
COMMERCIAL LIST)

CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED

v.

RICHARDSON & WRENCH LIMITED

NINTH DAY - WEDNESDAY, 18TH JUNE, 1980

(Mr. Morling handed up typed list of agreed admissions which his Honour ordered be incorporated in the transcript.) 10

AGREED ADMISSIONS

1. That Group Unity Securities Pty. Limited was wound up by the Supreme Court of New South Wales on 4 November, 1974, and that there are no prospects of any surplus becoming available to ordinary unsecured creditors.
2. That Giles Bourke Holdings Pty. Limited was wound up on 23 August, 1976 and that a first and final dividend of 2.85 cents in the dollar was paid to unsecured creditors on 25 October, 1978. 20
3. That John Giles Bourke was at all material times a director of Group Unity Securities Pty. Limited, Giles Bourke Holdings Pty. Limited, Fidelity Acceptance Pty. Limited and Group Unity Syndications Pty. Limited.
4. That T.G. Rathborne agreed to become a director of Group Unity Syndications Pty. Limited in November 1972 and a return of directors showing him as a director was filed in February 1973.
5. That the interest claimed has been computed in accordance with Clause 3 of the Memorandum of Mortgage, on the basis of the mortgagor's default. 30
6. That there is no record noted of John Giles Bourke having been made bankrupt.

HIS HONOUR: What is the position with regard to your possible witness?

MR. CLARKE: Could I interrupt my address to call one witness, Mr. Moses.

NEVILLE JAMES MOSES
Sworn and examined:

MR. CLARKE: Q. Your full name is Neville James Moses. A. Yes.

Q. You reside at 5 Bay Parade, Malabar? A. Yes.

Q. And you are a solicitor of the Supreme Court? A. Yes.

Q. And you, I think, graduated B.A., L.L.B. with first class Honours in 1963? A. Yes.

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Q. And you were admitted as a solicitor on 8th March 1963? A. Yes.

Q. A partner in the firm of Murphy and Moloney since 1970? A. Yes.

Q. And a member of the Law Society Conveyancing Committee and have been since 1972? A. Yes.

Q. You were a Challis lecturer in conveyancing at the Sydney University 1969 to 1975? A. Yes.

Q. And you are also co-author of the text on Strata Titles? A. Yes.

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Q. Published by the Law Book Company in 1978? A. It was.

Q. Now Mr. Moses, in the course of your practice as a solicitor have you, since 1963, acted on many occasions for lenders who proposed to have lent money on first mortgage security? A. I have.

Q. And does that include loans on commercial premises and residential premises? A. Yes - mainly residential but some commercial.

Q. And in acting for lenders have you from time to time advised them fully from the start of the transaction to the completion of the transaction? A. Well yes but the function of a solicitor normally is to present applications to his clients. Our practice is not to necessarily make decisions for clients if you know what I mean. Some solicitors do make decisions for their clients in these areas.

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Q. And I take it that valuations one way and another - valuations are usually submitted by you to your client for his consideration? A. Yes. In the normal case that is. There are three normal ways, we receive applications, one of our own clients

may wish to borrow moneys and we act for a reasonable number of lenders and we would then ourselves arrange for a valuation to be obtained and submit that to the client who is lending. Sometimes the applications come from another solicitor who would ring up and find out if we have any people who wish to lend and if so we submit those and applications. There are a large number of mortgage brokers who would know we have money from time to time and they would submit applications.

Q. I take it on occasions you, on behalf of your lenders, would arrange for the obtaining of valuations? A. On behalf of the borrower client. 10

Q. For use by the lender? A. Yes. For the information of the lender.

Q. Have there been other occasions when borrowers have come to you from a mortgage broker or other solicitor to seek loans from a client of yours and have produced to you a valuation or copy valuation? A. Almost every application comes in that form. There is a covering letter setting out details of the borrower and his assets and financial position. There is a description of the property and there is an accompanying valuation or copy valuation. 20

Q. Have you, assuming for the moment, the valuation on its face does not raise any queries or matters that require queries such as zoning or anything of that nature - have you ever followed the practice of checking with the valuer as to that valuation, whether he prepared it or not? (Question objected to: withdrawn).

Q. You said that the decision is, of course, left to the lender himself? A. Yes. 30

Q. And primarily - I am not saying exclusively, but primarily the decision is whether to lend or not to lend? A. Indeed.

Q. But so far as decisions as to the procedure to be followed and valuations to be obtained, have lenders relied on you for advice? (Question objected to: withdrawn).

Q. Have you in fact conducted all the procedural steps on many occasions for lenders?

MR. MORLING: I object unless my friend indicates what he means by procedural.

HIS HONOUR: Mr. Clarke, I will admit the question if it elicits the sort of answer you are contemplating. If it is another answer I will have it struck out. 40

MR. CLARKE: Q. Mr. Moses, in 1973 presuming the borrower came to you from another source such as a broker or solicitor, with a copy valuation, did you follow any practice of advising your client whether or not to check with the valuer on that valuation? A. Not on the valuation as such although from time to time one does if there is something in the valuation which obviously requires checking, for example, if the valuation said something like, "repairs should be carried out to the kitchen of the premises" and this was not very clear, when you are submitting it to the client you may draw his attention to this and seek instructions to clarify the matter with the valuer. I have, on occasions, taken it on myself with certain clients to do that before I submitted the property. 10

Q. But if there is no matter such as that requiring, in your view, clarification, did you advise a checking with the valuer? A. No I did not.

Q. Have you over the years since 1973 acted for clients who have left total control of the matter in your hands except for the final decision making as to whether to advance the money or not? A. I have been thinking about that - I think it is fair to say on occasions ~~things-very-close-to-that have-happened.--We-act-for-a-number-of-Catholic-orders.~~ (Answer objected to: struck out at his Honour's direction.) 20

MR. MORLING: The evidence, even if admissible is put on a basis of a client who left total control of the matter to you.

HIS HONOUR: That is why I have had it struck out.

MR. CLARKE: Your Honour struck out the last bit of the answer?

HIS HONOUR: I have struck the answer out that indicates something "very close to that" has happened. 30

Q. Mr. Moses, have there been any cases where you were acting for a lender and you concerned yourself with the adequacy of the valuation supplied? A. In terms of actual value as opposed to details in the matter?

Q. First of all as to actual value? A. I don't believe I have ever gone, for example, and inspected a property myself. I know there are solicitors who do but our firm never has.

Q. Has there ever been any cases when you concerned yourself with the question whether a valuation should be accepted having regard to the identity of the body furnishing the valuation or the form of valuation? A. There may have been one or two occasions when it was a little known firm or valuer. I am trying to think back. I think there was once when I said, "I have never heard of these people, I wonder who they are" and I have made some sort of check then. 40

Q. On the hypothesis that it is a valuation from a well-known firm have you ever taken any action to inform any client of yours that the valuation comes from a well-known firm and therefore it was unnecessary to pursue any further inquiry?

A. Not specifically although it may have been implicit on occasions. A Stanley Thompson valuation is accepted by lenders, for example, very readily.

Q. You sent on to your respective clients the proposals together with accompanying documents? A. That is so.

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Q. Do you know what checks, if any, were made in relation to documents that you submitted by the client himself? Can you answer that yes or no? A. I only know by virtue of what he has told me your Honour. I feel I do know because people have rung me up and said We have gone and had a look at the place, would you ask them to get a bank reference or We have gone and had a look at the place, we are doubtful about the area, would you get back the valuer and check that.

Q. And it is only from the absence of any such inquiry that you deduce whether an action was taken? A. On occasions clients do ring and say We had a look at that, we are happy, it is 50% of the value, we know the area, we have not bothered to inspect, - I am disturbed at times and make that comment, they are lending the money. We have some Catholic orders who tend to leave a lot of things to solicitors despite the fact we try to get them to make decisions on their own and in those cases I am fairly confident and did not look at the valuation even though I encouraged them to do so.

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MR. CLARKE: Q. Are you aware of any practice in the legal profession among solicitors to advise clients to check on valuations submitted to them by a borrower (Question objected to: rejected.)

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HIS HONOUR: Perhaps this gentleman, being a lecturer in conveyancing or having been, it is part of his learning on the subject as to what should be done.

MR. CLARKE: Q. There are two areas I want to direct your attention to. One is the lecturer and the other is the membership of the conveyancing committee. Does the advising of lenders on mortgage securities for any part of the learning which you instructed in lecturing in conveyancing? A. No.

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Q. In the conveyancing committee does the advising of lenders on a mortgage security form any part of the work of that committee? A. I can't think of any occasion when it has been before us.

HIS HONOUR: Q. Have there been any articles or books or learning on the subject of what is the appropriate course to be followed

by a solicitor? A. No your Honour because I believe the practice varies to a certain extent from office to office. If I could explain briefly, there are some solicitors who undertake all the functions and there are some who do what we do and there are probably degrees between. There are some solicitors who make their own valuations - there is no uniform practice in that regard.

MR. CLARKE: Q. One other area I want to ask you about, in advising lending clients, is there any practice that you follow as to advising them to have an updating of a somewhat out of date valuation? A. Well would you mind specifying what is somewhat out of date.

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Q. A valuation five months old - I want you to deal with a different situation - A. I don't think you would accept a valuation more than six months old for a start. And I put that as an extreme limit. With a valuation of less than three months old one would normally take it unless there was a particular reason for not taking it in relation to the property market. For example in 1974 there was a sudden fall in commercial properties particularly and at that time it was advisable, and I think most people asserted that lenders were getting valuations updated fairly readily. At the present time there has been a slowing in the residential market anyway and perhaps a fall in values so at the present time I would be reluctant to accept a January valuation anyway. (Answer objected to on the basis of relevancy).

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HIS HONOUR: I do not think I can let him continue. Do you want what he has been saying struck out?

MR. MORLING: No your Honour.

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MR. CLARKE: He has given one side of the coin. He is exemplifying the practice followed in the movements of market. I do not rely on what happened in 1980 other than how he would advise in the situation.

HIS HONOUR: As an example of what has been done I will let it in.

WITNESS: For example, last December there had been in the previous six months a dramatic increase in property values generally so unless you were dealing with a property in a remote area you may well accept a valuation four or five months old - in normal circumstances it was probably conservative. I think in the property market that generally in the area of three to six months I would personally not have advised a client to accept a valuation more than six months old. I would normally advise him to accept one no more than three months old and the intervening period I think would have depended on the market and my experience of it at the particular time.

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CROSS-EXAMINATION

MR. MORLING: Q. Mr. Moses, the critical time, whether three months or five months or six months which would be relevant would be the time which had elapsed between the making of the valuation and the advancement of the money by the mortgagee?

A. Yes that is so but mortgagees normally regard themselves as bound to advance once they have made a commitment unless there is something untoward occurring in the meantime because normally purchasers have entered into contracts and bound themselves legally on the faith of the mortgagee's promise to make a loan. There is a practice throughout the lending industry that mortgagees do not renege from promises to lend without very good reason.

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Q. (Approaching with letter dated 27th August, 1973, from the plaintiff to Cameron & Associates). Supposing a mortgagee when advising the intending mortgagor of its willingness to make the advance says, "This offer will remain open until 7th September 1973"? A. Yes.

Q. You would regard, in those circumstances, the mortgagor as being committed until 7th September, 1973? A. Mortgagee?

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Q. Yes, the mortgagee as being committed until 7th September, 1973, to make a loan? A. That is so, yes.

Q. If, before that time the loan had not been taken up then you would regard the mortgagee as being at liberty to reconsider?

A. Yes, at liberty certainly, although there would still be a firm moral persuasion on him to go ahead unless there was good reason.

Q. But supposing it was over nine months before the mortgagee was called upon to make the advance - nine months after the valuation had been made.

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MR. CLARKE: I ask that the whole of that be put, not part of it. (Question withdrawn.)

MR. MORLING: Q. Supposing the valuation was made on 26th March, 1973, and the advance was actually made on 2nd January, 1974, which is a period just over nine months. Under those circumstances there is no way that you would have omitted the running of some check on the March valuation, is there?

MR. CLARKE: I ask the whole proposition be put.

MR. MORLING: Q. Supposing real estate is valued on 26th March, 1973 and thereafter in June 1973 an application is made to the mortgagee by a mortgage broker for a loan on the security of that real estate? A. Yes.

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Q. Assume that in July and August 1973 the mortgagee gives consideration to the question of whether or not it will make the advance requested? A. Yes.

Q. And on 27th August, 1973, it writes to the broker in the terms of the letter I am now showing you? A. Yes.

Q. Stating inter alia that the offer will remain open until 7th September, 1973? A. Yes.

Q. Assume that offer is taken up by the intending mortgagor in terms of the letter of 3rd September, 1973 - which you might like to read. You have seen that? A. Yes I have now. 10

Q. Assume that because of delays and difficulties experienced by the mortgagor in perfecting his title the loan is not in fact made immediately after the offer is taken up? A. Yes.

Q. On 3rd September, 1973? A. Yes.

Q. I want you to further assume on 18th December, 1973, at a meeting of the Board of Directors of the mortgagee it was noted that the relevant loan had not been settled due to delays on the borrower's part in not being able to provide clear title to the property? A. Yes. 20

Q. And that later in December 1973 the title problem is cleared up and in fact the advance is then made sometime in the first week of January 1974? A. Yes.

Q. So that a period had by then - a period of some nine months and a week - had elapsed since the date of the valuation of 26th March, 1973? A. Yes.

Q. Under those circumstances you would not have advised one of your clients to act on the valuation without some checking or updating of it, would you? A. I would certainly have considered giving the advice you have mentioned. I am not prepared to say I would necessarily have done so, it would depend on the property, what had happened in the meantime, what I knew of the mortgage and other factors but I think it would be the cautious thing to do. 30

Q. The wise thing to do? A. The prudent thing to do.

Q. What was the expression you used in relation to the period of six months, did you say the outer limit or some such expression? A. Well I think I probably used some expression like that. What I meant was when an application is submitted, if the valuation that accompanies it is more than six months old I would want an up to date valuation before I would submit it to my client. 40

Q. I show you Ex. 1 which is the plaintiff's file in respect of a property - a loan on a property owned by Associated Management Pty. Limited situated at 65 Alexandria Street, Crows Nest?
A. Yes.

Q. And you may assume that a proposal was made in regular form to the mortgagee by an intending mortgagor that the mortgagee agreed to make the loan and did so and passed the matter over to its solicitors, Messrs. Minter Simpson & Co. to act for it in respect of that matter? A. Yes.

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Q. That would be a situation which regularly happens to your knowledge? A. Yes it does.

Q. And the property was an improved property at Crows Nest. I think it was a restaurant? A. Yes.

Q. Now I draw your attention to the circumstances that Minter Simpson & Co. sought and obtained from the North Sydney Council a certificate of compliance under the Local Government Act?
A. Yes.

Q. Would that be the standard thing for a solicitor to do in those circumstances? A. If the survey certificate disclosed a breach of the Ordinance, yes, not otherwise. It is not the usual practice to get such a certificate unless a breach is known or was suspected. The reason is it takes so long. It is generally felt that enquiry need not be made although there is some law and opinion of Mr. Officer, Q.C. to the effect you should get one on every property erected after 1957, I think it is.

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Q. So far as the mortgagees for whom you act are concerned, if such a certificate were obtained, the solicitor decided whether to get it or not? A. Oh indeed.

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Q. I want to ask you some questions about the circumstances in which you found yourself when you were acting for a client such as a Catholic Order who really left things in your hands?
A. Well, I am not prepared to say they totally left things in my hands but substantially so, yes.

Q. In such cases did you take the view that you should have independent advice as to the value of real estate offered as security for loans? A. Independent from the existing valuation that is proffered to you?

Q. Yes. A. No.

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Q. Did you ever have the experience of having a check run on a valuation provided by the mortgagor? A. Well the only occasion I can think of I mentioned is when I was not sure of

the valuer - if he is some relatively obscure valuer of whom we have not heard. I think I did say something in that case. I think the property was somewhere like Thirroul and we sent someone else to have a look at it.

Q. If the client was a company, if the borrower was a company and you were concerned to know the financial stability and strength of the company would you seek information on that?

A. As to its balance sheet and so on, yes.

Q. Would you get a certified balance sheet and profit and loss account? A. Yes, on occasions, of course you always obtain personal guarantees on advances to companies.

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Q. And if it appeared that the assets of the guarantor consisted of shareholdings in companies you would want a profit and loss account and balance sheets of those companies?

A. If the borrowers had assets in companies, well, depending on what their other assets were - you are lending at about 60% to 66.2/3% of valuation. The borrowers normally, if they are individuals, have other assets like their homes. You have a situation where you need to push that to be reasonably satisfied.

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Q. You would reasonably satisfy yourself what the actual assets of the guarantor were? A. By Bank reference and things like this, yes, certainly.

Q. In cases in which the mortgagee substantially left the matter in your hands you would be interested to know the purpose for which the loan was being sought? A. Not really.

Q. Supposing a property was being purchased you would want to know, would you not, how the purchase price compared with the amount of the loan? A. When you go to the settlement you check it on the transfer - if you don't get a copy of the contract to purchase you always do that.

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Q. You would be very suspicious of a valuation which appeared to be considerably higher than the purchase price of the property? A. Certainly, because the best evidence of value is the sale price.

Q. And indeed, in cases in which you were not substantially left in control of the transaction by the mortgagee or of acting in a less managerial capacity, you would bring to the attention of your client's mortgagee, if it were the situation, that the purchase price of the property being offered as security was considerably less than the value attributed to it by them?

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A. You always receive in the application information as to whether the property is being purchased and if so what the purchase price is and you check it. That is standard if a property is being purchased.

Q. So that in those cases which came to you from mortgagees handling their own affairs it was always very clear that if the property was being purchased by the mortgagor some consideration was given to the purchase price as compared to the amount of the loan? A. Yes.

Q. (Approaching) I want you to assume you were in the position in 1973 of substantially having the carriage of a lending transaction for - such as a Catholic Order - and I want you to assume that the prospective borrower was a proprietary company? A. Yes. 10

Q. And that the property being offered as security were Nos. 233, 235, 237 Glebe Point Road, Glebe? A. Yes.

Q. And that you had been furnished with a valuation dated as at March 1973 of those three properties in the sum of \$160,000? A. Yes.

Q. And that you had sought from the intending mortgagor or its mortgage broker further information about the financial stability, both of the intending mortgagor and other companies in the mortgagor's group? A. Yes.

Q. And that in response to such inquiry you had been told that one of those three properties being purchased as at May the previous year was the subject of a contract of purchase in respect of which a deposit of \$2,350 had been paid. Do you follow that? A. Yes. 20

Q. In your experience in those days the fact that a deposit of \$2,350 had been paid was a very likely pointer to the fact that the purchase price was \$23,500? A. No, I am afraid I would have assumed in those circumstances it was a 5% deposit rather than 10%.

Q. Why? A. It is not unusual for the smaller deposits to be paid and if you are talking about such a vast difference in property I would have assumed it had been bought for \$50,000. That is what I mentally had done. 30

Q. You would have directed your mind to that question and you made that assumption? A. If I looked at the matter closely - I may well have asked and said I wonder why that is such a low deposit. My first reaction would have been it was a 5% deposit because that does happen.

Q. Did any of your clients in 1973 have a policy of requiring the income from rented property to be sufficient to service the interest charges on a loan? A. Some of them may well have, yes, certainly, not all of them but some may well. 40

Q. In respect of those clients who did have such a policy,

if a valuation were presented which gave no indication of what the nett rental of the property was, that would be a circumstance which would lead you to, either yourself check with the valuer or advise your client to do so? A. I think check with the person submitting the loan, you would probably get copies of the leases in your enquiries.

Q. Enquiries from whom? A. The mortgagor.

Q. In such a case you would not be relying on what the valuer was telling you? A. In relation to the rental? If the valuation contains a statement that the rentals are such and such on the property that is a matter that is normally checked out in the general checking that a mortgagee's solicitor does. If the valuation makes no statement you enquire in your requisitions about the leases of the property and the rentals and get evidence of it and if they are low you bring that to the client's attention. If they are substantially low it might be why you did not go ahead with the advance. 10

Q. In respect of a client whose policy it was only to advance moneys on the security of leased property where the nett rentals exceeded the interest charges and where the valuation said nothing about the nett rentals, the decision whether or not to make the loan would be made without reference to the valuation. (Question objected to.) 20

Q. In the type of situation in which you were left by your client substantially in control of the lending transaction?
A. Yes.

Q. Did you adopt for yourself from time to time any criterion that you would only advance moneys on the security of leased property if the rentals from that property were sufficient to service the interest on a loan? A. I can only say that in respect of some of those clients I know that is one of their requirements. I have never had a situation where that was their only requirement and I don't think I ever would. 30

Q. But one where that was a requirement? A. Yes.

HIS HONOUR: Q. What Mr. Morling wants to know in those circumstances did you always require to see the leases before you -
A. Your Honour I would need to have some evidence of what the rentals were and that the leases were 5As and in commercial premises it would need to be some evidence of the rental and that the mortgagee was in a position to obtain vacant possession in a reasonable period if the mortgagor defaulted. 40

Q. In those circumstances the only function of the valuation in that regard was to alert you to the possibilities and you proceeded to make your own independent enquiries? A. Yes that is so.

MR. MORLING: Q. Did you yourself as a solicitor who was sometimes left in substantial charge of lending transactions by clients have one or more valuers with whom you had some continuing professional relationship in 1972/73? A. No.

Q. Did I understand you to say to Mr. Clarke that most of the loans transactions in which you were involved were in respect of homes or properties being purchased? A. I would say we do about 75% residential, 25% commercial.

Q. And were nearly all of the 75% and nearly all of the 25% cases of loans being sought to facilitate the purchase? A. I would not say that. No, I would say it is about 60/40 - a lot of the time it is refinancing, particularly in commercial purchases because people tend to turn over their mortgages, get a better interest rate or the value has gone up - I would not say it was all purchases.

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(Witness retired and excused.)

(Mr. Clarke to check documents in agreed bundle of documents Exhibit A.)

(Subject to above checking close of case in reply.)

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MR. CLARKE: I was down to the bottom of p.4, I will come to this in more detail but on the question of express authority, we simply say that where a senior employee such as a valuer - with areas of discretion and with power to prepare a valuation and accept instructions and sign valuations for Richardson & Wrench - he prepares a document and submits it which purports to be fulfilling his authorised function, then it is a case of an authorised act and in the state of the evidence here, submitting as we do that a valuer did follow a procedure, does not go to the basic authority to do the act or not. In the case here there is no material from which one could draw the inference he was not simply fulfilling that function albeit it strictly in accordance with the procedure.

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I thank your Honour for directing my attention to the internal management cases - Ruben's case, which is the case which will probably be recorded against me - was rejected. How much of Ruben's case remains is another matter.

I wish to deal with the case and I propose to deal with Ruben's case. It might be convenient to refer to the discussion in McGower on this question. Assuming we are wrong and it was not an express authority case it is a case of the course of employment and we make a number of points, some of which I probably made, that there is a distinction between reliance cases. In point A, having not interpolated I will interpolate. The

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authorities seem to speak of reliance cases in the context of fraud. That is where most have been involved. Bearing in mind misrepresentation had to be - there are expressions in the judgments which makes it plain that judges did not consider there was any difference whether the act was honest or dishonest. I will have to come later to look at the question of whether it was honest or dishonest in this case but the way we put it at this stage is that there is no evidence in favour of the defendant that what Rathborne did was in any way other than carrying out his duty. The question whether he was doing something of his own volition or following a request is, in my submission, capable on the state of the evidence of one answer only. One has to look at the circumstances in which the document came into existence as best it has been established and the document itself. 10

One sees what happens is that that girl was asked to type the valuation for Richardson & Wrench, typed the valuation which purported to be on behalf of particular clients and to be Richardson & Wrench's valuation. Unless there is some material in the evidence to answer what flows from the document itself and that evidence, the proper inference to be drawn is that Bourke asked Rathborne on behalf of one or other of the companies to prepare these valuations. One cannot take it any further than that in the sense that there is no material on which your Honour could draw the inference he was doing otherwise than for Richardson & Wrench - that he was doing it for any personal gain. There is no material on which that could be based at all. 20

HIS HONOUR: The fact that he took the stationery and he dictated it to Mrs. Clarke -- is consistent with the devoted servant who works away doing the work but when you also couple that with the fact that he neglects to make a charge in respect of the valuation or incorporate it in any shape or form - a difference arises. 30

MR. CLARKE: That is explicable, him taking the view that it was convenient and secondly he simply had not got around to doing what he should have in relation to office procedure. We know not only Rathborne but a large number were not following office procedure.

HIS HONOUR: There is something more than office procedure - 40

MR. CLARKE: There are inferences open that it was done gratis because they had become friendly but there is the other inference that he may not have got around to it. In the state of the evidence as it is left it is open, in my submission.

The basis on which I push is on the failure to call Rathborne - to leave the matter from the defendant's point of view totally up in the air.

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The view we advance is that if Rathborne gave evidence which was questionable it may well be open to Richardson & Wrench to cross-examine - in the absence of Rathborne's attendance here no inference should be drawn that is favourable against my client, if evidence from him might have established a favourable matter - one has to look at it from a distance.

Perhaps it is true to say that Rathborne may have given evidence contrary on this point but what we do say is in the absence of any evidence, apart from a fact that he dictated it in circumstances which, with respect, do not suggest any secretiveness unless one looks at the initials - and I will come to that in a moment - there is no reason for drawing an inference of dishonesty in opposition to Richardson & Wrench's interests as one of simple oversight. 10

What we would primarily say is that what happened here - it does not matter that we did not deal ourselves in a physical sense with Rathborne. It does not matter we were not a client of Richardson & Wrench. We relied on a valuation which was prepared by a man who was entitled to prepare it and that is the way we put our case in this point of the argument. Your Honour has probably read the notes but it might be convenient if I take your Honour to the cases. 20

I will start with the basic case which is Barwell's case, L.R. 11 Exchequer 1867 p.259. This was a case of a fraudulent bank manager who was actually seeking to advance the interests of the bank. He, in effect, by omission gave misleading information which was held to be fraud. The two basics on which I rely are the finding that the employer was liable for that fraud and secondly that in the old system of pleading his fraud was properly pleaded and was in substance the fraud of the defendant. The judgement of the court was delivered by Wills, J. p. 263. I refer your Honour to p.265 .4 (read). 30

Could I refer your Honour to Cheshire v. Bailey only to say this, this was a case - 1905 1 K.B. p.237 - it was held there that the theft by the employee or his participation in the theft was something for which the employer was not responsible. It was a delegation of care case and has since been expressly overruled as your Honour would know.

MR. CLARKE: (Refers to headnote in Barwick v. English Joint Stock Bank). 40

This case is certainly not quoted because it is a case in my favour, but we would adopt the distinction between Ruben's case and Lloyd's case, to which I will come, quoted by Diplock, L.J. In essence there is no other way really that Ruben's case can stand with Lloyd's case. What Lord Davey has to say about this case, about Wills, J. judgment does not follow, and this

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appears at p.446 (reads commencing p.445) And that has been interpreted, as I read the latter authority, as stating that that other passage of that part of the judgment is important, including for the master's benefit, and for that reason where a servant is acting for his own purposes, he cannot find his employer.

Could I refer your Honour to Mr. Gower in the third edition of his current Company Law, and it deals with the rule at p.150, and at p.166 he states his rule in the case of a forgery -
"If the document purporting to be sealed or signed on behalf of the company ... or committed a forgery"; and whilst Mr. Gower refers to some other cases, the major cases in support of his proposition would appear to be the case of Rubens, Lloyd v. Grace, Smith & Company, Slingsbury and Uxbridge, and we would submit that here he was acting in his usual authority.

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If I might go to Lloyd v. Grace, Smith and Company, 1912 A.C. 716, in this case, together with the Uxbridge case, which expounded a doctrine similar, are really the foundations of the arguments we put, and this case established liability for the fraud of the agent acting within the scope of his authority, where the fraud was, as it had been in Parker's case, for the benefit of the principal, or simply for his own benefit. The dicta of Lord Cohen in the Charmwood Forest case was overruled. The defendant was a firm of solicitors, the fraudulent person was a managing clerk. He conducted a conveyancing business without supervision - (continues to read from headnote).

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Turning to the judgment at p.724, "It is clear to my mind, upon the simple facts ..."; and then there is reference to the question put-(continues reading). I refer then in the next passage to the reliance by the Earl of Halsbury upon the principle that there has to be a loser by the deceit of one person, and that is at p.722.

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HIS HONOUR: In Lloyd v. Grace, Smith they were principally occupied with the question of -

MR. CLARKE: Benefit, yes your Honour. And they throw out the window once and for all the principle that it must have benefited, as per Lord Barwick; and the Earl of Halsbury really rests it on this principle, and he refers back to Herne v. Nichols, and one might have hesitated to call the statement that someone must be a loser a principle, but it is referred to in the authorities as a principle, two or three times; and could I just say on this point that no doubt suggestions can be put both ways, that it was the defendant who authorised that Rathborne, it was the defendant who introduced a system of authority and a system which allowed Rathborne to produce to the world as a Richardson & Wrench valuation a valuation signed by him, as Richardson & Wrench, and the ability to control that and to curtail that was at all times in Richardson & Wrench's hands, and they took steps

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after that to see that it did not occur, by requiring the seal to be affixed.

HIS HONOUR: You say that this is a situation to which Ruben's case would apply if the seal had to be affixed, but it was not a part of his duty to affix it, but he affixed it; but here he was entitled to and authorised to sign, but he signed it for some ulterior purpose of his own.

MR. CLARKE: Yes your Honour, and I have probably referred to this on the first day, to distinguish the first impression that might be had, that anyone could get hold of Richardson & Wrench paper and forge it, probably the typists could - but that is the Ruben type of case. Lord McNaughten at p.721 deals with Barwick's case, and your Honour referred to Mr. Atigah's statement at p.239, but to the extent that he propounds the sort of distinction that I seek to make I would accept what he says at p.273, but I do not think I could accept all that he says there; but at p.273 there is reference to Cornfoot v. Foofke, and that case is discussed by Lord McNaughten, and he says at p.764 (reads) and at p.734 there is a reference to Holdsworth's case and Barwick's case and other cases (reads), and at p.735, "Whichever expression is used, it must be construed liberally... in these passages I think the true principle is to be found"; and it is also Lord McNaughten who is credited with overruling what Lord Davey said in Ruben's case and what Lord Darnley said in Barwick's case.

HIS HONOUR: Do you remember the passage in the judgment of Asprey, J. in Presser v. Caldwell (reads). That is a distinction that does not really seem to be strongly pursued in the earlier case, it seems to me.

MR. CLARKE: With respect, that is right but Ruben's case and Lloyd v. Gross, Smith, and I think in Barwick's case there is in fact a reference to that distinction, where there is a statement in reference to another case where there was no general authority, as in the case of the manager of a bank, and this is Barwick's case (reads from p.265).

HIS HONOUR: But then he says that the general rule is that the Master is answerable for every such wrong of his servant or agent; so he glides into the two areas without drawing this distinction which, it would seem, would require to be drawn.

MR. CLARKE: But that principle of whether the principal is liable for the part of an independent contractor would apply equally here.

HIS HONOUR: Perhaps if you just look at Atigah at p.275, where he is discussing the principle of authority; and then he refers to Lloyd v. Grace, Smith (reads). Assuming that to be right

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for the moment, I suppose it should be said that Richardson & Wrench do not hold Rathborne out as having authority to issue bills of lading for properties which have not been valued by him. There is no suggestion that he has ever done more than to propound and serve what is termed a community course.

MR. CLARKE: I would adopt that line of reasoning, with respect, and I would further say that applied to the case at the present, the latter, case, Grant v. Norway, did not apply to the principals.

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HIS HONOUR: You say that it should have been overruled, when applied to those later cases.

MR. CLARKE: He does say at p.206 that it was followed by the House of Lords 1902, in another company case; but again my understanding or Lord Diplock's analysis would apply to what is called secretary cases, although I find it a bit more difficult with Whitechurch's case than I do in Ruben's case.

HIS HONOUR: It does seem to have been completely overlooked by everybody.

MR. CLARKE: Except to this respect, that what was the law has been replaced in effect by what was the ruling in Rubens; but I will have a closer look at Grant v. Norway, or the George Whitechurch cases.

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HIS HONOUR: Because it is disadvantageous to you on the analysis that he makes at p.236 (reads).

MR. CLARKE: With respect, that cannot sit with Lloyd and Grace, Smith, and at the time this decision was handed down, and Ruben's case, the view as I understand it was that a forgery could never bind the master, and that notion was not set at rest until Lloyd and Grace, Smith, and I think it is fair to say it was developed a bit in Uxbridge's case.

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HIS HONOUR: Then you have the proposition that when somebody comes to grapple with the same sort of situation that I am in, you have to choose between two decisions of the House of Lords, and then try to draw a distinction which does not really work (reads).

MR. CLARKE: Except to the extent that they conflict with Lloyd and Grace, Smith; but one could not extend it to the general proposition which was applied in Whitechurch, that with the express duty, including the power to certify shares - and in fact looking at it, it is very hard to see how it can shift at all with Grace, Smith an express duty, and it is very hard to see how such broad principles could come back together, and I do not think that Whitechurch's case was referred to. Perhaps

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I could say that what does seem to have happened is that there has been a large amount of dissent amongst the authorities before 1912, as the judges tried to grapple with the best way or the just way of accommodating the loss in a case of a loss caused to one or to two innocent people by a dishonest person.

HIS HONOUR: I am interested to see what Professor Flemming says about it - (reads from p.272). So he puts it on the quality of the act rather than whether it was in the course of actual or ostensible authority.

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MR. CLARKE: If I could now come to the Uxbridge case (1932) 2 K.B. 248; and if I can refer to another judgment in that volume, 1931 2 K.B. 271, there is the judgment there of the Court of Appeal which I rely on on the question of damages; but at p.248 - this case is important your Honour because there was for a time an endeavour to explain Lloyd and Grace, Smith on the basis that it was simply a contract case, and this was a case where there was no contract or solicitor client relationship, and extend it to a third party. (Reads headnote). The judgment is that of Sir Wilfred Green M.R., at p.252 (reads). Your Honour, in this particular case it might be of benefit if the argument put forward by the appellant - he sought to present this type of argument which is, I would apprehend, the same sort of argument which is to be put here. Then he propounds the proposition that the transaction, involving a forgery - but he does not apparently refer to George Whitechurch, which seems not to have been discussed in detail in any of those cases. (Reads from p.252).

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The last case to which I refer is Morris v. Martin (1966) 1 Q.B. 716, at p.737 (reads) - and reads the remarks of Salmon, L.J. at p.741). There are two other cases which explain Morris v. Martin - Mookatoff v. British Overseas Airways Corporation 1967 1 Lloyd's List Law Reports at 396, a judgment of Brown, J., and at p.417 he says (reads), and in essence it deals with it as a bailment case, and a delegation of duty case; and the final case is Graham Crockett, a judgment delivered on 6th May 1980 by the N.S.W. Court of Appeal, and I only refer to it as defining Morris v. Martin as a delegation case. (Reads from judgment of Mahoney, J.A.)

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Finally could I come to Bugge v. Brown (1919) 26 C.L.R. 110, and this is a case in which Isaacs, J. discussed what he took to be the law in relations to a master's responsibilities for his employees or agents and at p.116 (reads). Then there is reference to some cases which do not seem to bear very much on the present problem; and then at p.121 he says that one should bear in mind the observation of Lord McNaughten in Lloyd's case, that the phrase "must be construed liberally." Then Higgins, J. at p.131 refers to Will, J. judgment, and at p.132 says (reads).

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Your Honour, that is the last of the cases to which I would wish to refer, and it leaves it in this position, we would submit that if the act which the employee did, on the faith of which other persons would be led to rely, was an act within the employee's usual or actual authority, in the sense that that was a type of act he was authorised to perform, then it was his liability; and on that analysis question of actual physical holding out do not matter - that would become relevant, we would submit if, consistent with what Isaacs, J. said, it can be relevant at all, only where one reads Lloyd v. Grace, Smith, and what was said later in Morris's case, the ostensible authority extended beyond the employee's usual or actual authority, and the ostensible authority has often been used as a form of estoppel. And it is fundamental to our case, because no doubt the argument to be mounted against us will be - everything we have said is very nice, but there is no evidence here as to whether or not Rathborne was a valuer who held express authority, or was held out to us by Mr. Hodgson as having express authority to issue valuations, and we recognise that there was no such evidence. But the critical distinction in my submission which follows from Lloyd v. Grace, Smith, is that the person who is just in a position to take advantage of a fraud, and unless in that case there is some form of ostensible authority, there just cannot be liability, in the case for instance of forgery by a secretary in the office of Richardson & Wrench, or anything of that nature. But this case is not a case of simple fraud, it is a case of a man doing what he is employed to do, albeit not in accordance with what might be thought to be fundamental procedures laid down by the company; and in reading the cases I have not found very much assistance on any distinction, although in point of principle if one takes the fraud cases, with a person doing precisely what he is employed to do, and fraudulently does it for his own purposes, and does it all by way of corresponding rather than by actual physical contact, or being in the position where he is the only person in the branch running the business, there should be no distinction in my submission between the wrong propositions and the action of the agent himself.

HIS HONOUR: Do you say that, contrary to your submissions it has to be a case of ostensible authority, then there is no evidence.

MR. CLARKE: I have to recognise that there is no evidence.

(Luncheon adjournment)

AT 2 P.M.

HIS HONOUR: Mr. Clarke, I have read that article in the Canadian Bar Review over lunch, and Mr. Wright says there that those two

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decisions are completely irreconcilable. But I would like to say that I really do not see that I can go wrong if I use what Dixon, J. said in Deakin's case, and what he says in relation to Lloyd, Grace, Smith & Co. (Reads). But you might have to tell me what is your choice of position -

MR. CLARKE: My choice position is 3 (1) (ii) your Honour.

HIS HONOUR: Well, that seems to me to be the most positive ground for somebody in this Court to occupy, and to say - well, that is the law here.

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MR. CLARKE: (Refers to Lloyd v. Grace, Smith & Co.) One view of ostensibly would be to equate the two, and this leads to something I was proposing to say something about, and that is, what is "ostensibly", where that word is used. And whilst I have said that in a sense there is no evidence that we were told that Rathborne was held out to us as having authority, but Rathborne was held out to the world as having authority to prepare valuations; but I have looked at Grant v. Norway, and it would seem very difficult to align that with Lloyd v. Grace, Smith, but it does seem to have been authority by the High Court - it was followed by the High Court here, in the case of Rosenfeld Hillis & Co. v. the ship Port Laramie, 32 C.L.R. 25. I have the feeling that it won't be a very helpful case to either side, because from what little I have read of it it does seem to propound the proposition that a bill of lading is not conclusive evidence - (reads headnote).

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In the judgment of Isaacs, J. at p.31 he says, "I am not able to agree with any of these views..." but he does say at p.32, "Grant and Norway...so far as it rests on implication...". Of course Grant and Norway itself was not a master and servant case.

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HIS HONOUR: Well, they point out in the House of Lords that Grant and Norway was a stronger case; but I think it comes down to the proposition, as Mr. Wright says, that you just cannot reconcile the two.

MR. CLARKE: Perhaps I could just say this about this question of ostensible. Ostensible authority is a doctrine of the law of contract, and one has only to look at Mr. Atigah's book to see what he says about it, in his opening; but it is part of the law of Contract, and it has not applied as a general principle to the law of torts, except insofar as one finds creeping into these cases the words "ostensible"; and what the courts would seem to mean in using the word "ostensible" would be for instance, given the situation where the clerk in Lloyd v. Grace, Smith, or the clerk in Uxbridge's case, where the plaintiff cannot prove that he had authority to sign an invoice, or something of that nature, but it fell to someone in that position, so the courts have extended it by reference to this word

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"ostensible" - in other words he is really carrying out the usual duties of a person put in that position. In either case of course there was no holding out, in the sense that he was there to perform the acts of a solicitor, but what there was in Lloyd's case was his employment, in conducting business in the office, albeit perhaps conducting the business as though he was a partner of the solicitor; and in Uxbridge's case it is not clear what all of the dealings were, until completion, or merely documentary dealings; but he was put in the position of running the office, and that carried with it ostensibly or in reality to do all things necessary for the running of the office.

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But could I refer your Honour to an article in the 1965 Cambridge Law Journal, p.200, and it is headed, "Vicarious liability - servants - theft", and at p.203 the author says, "This was in no doubt due to the stumbling block of Cheshire v. Bailey..."; and "It has no doubt often been said that for the purpose of vicarious liability there is no difference between fraud and any other wrong...". But whilst it is true and recognised the same that neither Mr. Satchell nor Mr. Simpson nor Mr. Little, or Mr. Minks there is no evidence that any of them were told of Rathborne's precise position and his powers; what one does know is that the plaintiff company had received from time to time valuations on the company's letter-head, some of which will be in evidence, some of which are copies, in Mr. Rathborne's name and there was an entry in the box indicating the initials of the valuer and the company had certainly already acknowledged to the world at large and to those persons that the company had prepared the valuations, and nominated the person; and we would submit that none of the authorities make it a requirement that there should be any specific act on the part of the employer, more than placing him in a position where he can act in accordance with his usual authority and so lead people to rely on and change their position.

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That is all I really wish to say on the first point but if our submissions are correct it would follow that the act is in the course of employment, for all purposes, so that the principle applicable to any default of Mr. Rathborne, and coming to consider the element of the cause of action in negligence relied upon, one does so upon the basis, in my submission, that what Rathborne was doing was part of his normal work.

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Your Honour, in this part of the argument I did not propose to deal at this stage at great length with the case of Hedley-Byrne, although I will go into it, because in essence the arguments that seem to be put at the forefront are the arguments arising out of the amended defence which has been pleaded, and the disclaimer; and I am not suggesting that that does not mean that the onus is upon me, but if I can deal with it generally at this stage, and then perhaps in reply seek to deal with the way Mr. Morling puts it.

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At p.10 I deal with the question of this duty of care, and I refer initially to Cann v. Wilson, which was a case which was overruled, but which was restored to totality by Hedley-Byrne (reads from headnote). And then there is the equation which perhaps has not been treated so kindly with manufacturers liability cases, and then at the bottom of that paragraph there is the summary of the position - "Being under an obligation of duty towards him".

Chandler's case (1951) 2 K.B. 164, is another example of the judgment, being a dissenting judgment, being revived; the judgment of Lord Denning, and at p.179 there is a classic statement which was referred to, and again one sees valuers - but at that passage Lord Denning would apparently restrict the ambit of duty to those persons for whom the valuation was prepared.

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HIS HONOUR: At the bottom of p.180 it says "he owes the duty to him employer or client ... of whom they heard nothing".

MR. CLARKE: Yes your Honour, and at p.183 he says, "Without going too far ... I should have thought he might be", and it is of course important, your Honour to bear in mind when looking at that passage that he was dealing with an accountant who, I think in the ultra vires case simply prepared an account for a company.

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There is an article in the Law Society Journal 1979 by Mr. David Baker, who is the lecturer in Law at the Australian National University - Liability of Auditor to Third Party in Negligence; and there is another article in the Australian Accountant of November 1979, Auditor's Liability, the Significance of Scott Group Ltd. v. McFarlan.

In Hedley-Byrne, in relation to the holding out of skill, there could be no argument in this case, on the evidence, in my respectful submission. In the preparation of the valuation one is immediately distinguishing this case and putting it really on a plane with Cann's case, against the problems with which their Lordships were dealing in Hedley-Byrne, the statements of the banker in giving out general information.

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It is our submission that the formal valuation, not only does one find prima facie the holding-out of a skill, but there has been the exercise of that skill in a formal sense directed to, in this case, a person with the knowledge by the valuer that it may well be disseminated amongst a number of unknown persons in a specific part. Subject to any particular facet of the relationship between the final recipient and the valuer in the nature of the arguments being advanced by Mr. Morling in this case, there would in my submission be owed the duty to take care of the numbers of that class of which the valuer knew or ought to have known would act and rely on the valuation so as to change their position even if the valuer

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did not know the names of the particular persons to whom the article or valuation was going to be disseminated and did not know the name of the person who finally relied upon it.

I may say, your Honour, putting this part of it somewhat shorter than I would otherwise - I have discussed it with Mr. Morling and he will no doubt amplify anything he wants but I think the argument is going to be more in relation to special circumstances here. I should refer your Honour to a New Zealand case but before that there is the Canadian case which is a judgment of nine Judges of the Supreme Court of Canada and which was applied by at least one of the New Zealand Judges in the Scott Group case and that is Haig and Bamford. It is reported at 72 D.L.R. (3(d)) 68. 10

HIS HONOUR: I don't want to trouble you reading through it all. Is there some particular passage you wish me to look at? What do you get out of it?

MR. CLARKE: I get out of it that proposition that the liability can be owed to persons of whose existence the person, the representator, or the person who made the statement, was aware. The passage at p.80, after consideration of Chandler v. Crane, Hedley-Byrne v. Heller and The MLC v. Evatt - (the Accountants were aware ... (read.)" 20

HIS HONOUR: The stress is on limited class?

MR. CLARKE: Yes, your Honour.

HIS HONOUR: Just jumping forward for a moment, you say it was a limited class in this case?

MR. CLARKE: Yes, your Honour.

HIS HONOUR: And the limited class is in order to accommodate the ultra vires principle? 30

MR. CLARKE: Yes, your Honour, and can I say this about a valuation for a mortgage purpose, again we would say it is a classic case for the application of the doctrine because the relyee, the person who relies, must of necessity be of one or two, perhaps of three people. One would not be talking about a liability to an indeterminate class of persons which is what ultra vires was talking about.

HIS HONOUR: So this distinction is, say, between the doing of the annual accounts which may become part of the public register on the one hand and preparing accounts to be sent to the shareholders on the other? 40

MR. CLARKE: Or accounts in the stock group case for the persons considering the purchase of shares. There is another Canadian

case - because it is a valuation case in which the plaintiff won on the law and lost on the facts. It is a single judgment in the British Columbia Supreme Court - Car-E-Van Hotel v. Globe Estates, Stewart & Berry, 74 6 WWR. 707. I will read the headnotes, (read). Then he goes on to deal with negligence. In that case the negligence alleged was not setting out something in the valuation. At p.716 "The evidence of Mr. Barnes ... (read) ... appraisal". In the Scott group case which I think your Honour has read, Woodhouse, and Cook, JJ. extend the duty to the limits of the general foreseeable ambit. If it was foreseeable that a person read it or rely on it then the duty is owed to that person. Richmond, J. the learned President as I read his judgment, does not quite extend the bans that far. He does at p.566 say this, which amounts to an extension almost to that extent, "All the speeches ... (read) ... type of trans-action". Whether that is the law or whether it extends -

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HIS HONOUR: The other two Judges rely on what Lord Wilberforce said in ... Lodong Borough and has that not been an opinion that has been rejected by the Court of Appeal here?

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MR. CLARKE: Is your Honour referring to Shaddock's case? I was going to come to that.

HIS HONOUR: Is that not right - my recollection on that one?

MR. CLARKE: Mahoney, JA. as I understand it was the only one who expressed it. Moffitt, P. dissented. As I read Moffitt, P. at p.596 he will not accept Donoghue v. Stevenson duty can be extended but my point of view is that it does not matter whether one has to go to the extent of Cook, J. and Woodhouse, J. and I am content with what Richmond, J. says which seems to be in accordance with the doctrine and is not affected by what Moffitt, P. says.

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HIS HONOUR: So really insofar as learning here is concerned, I am not sure that it goes as far - Moffitt, P. does deal with Donoghue v. Stevenson and Dorset Yacht Club to some extent in his judgment and seems to be suggesting at p.572 that that sort of reasoning is applicable, if you look at p.572 under "D", "There is no basis ... (read) ..." I think he is talking about the question in issue, isn't he?

MR. CLARKE: Yes, your Honour.

HIS HONOUR: So he seems to grow the same way as the two members of the New Zealand Court

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MR CLARKE: Moffitt, P., of course, dissented and I have not given his judgment the same consideration but the point I wish to make is that I don't need to go that far in this case. Because if one adopts and has the correct principle of law that the duty is owed to a specific class of persons of whom some persons may form members of whom the valuer knew or ought to have known, the valuation

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would be given for the purpose of reliance for a specific purpose ... Then the test in my submission is satisfied here.

HIS HONOUR: Just to follow the principle through - if what Hutley, J.A. extracts from Hedley Byrne is correctly extracted at p.585 in the last paragraph, he suggests that Lord Reid himself in Hedley Byrne said that the Donoghue v. Stevenson approach is inappropriate.

MR. CLARKE: Lord Reid in fact did say that.

HIS HONOUR: You may well be right that it does not matter for your purpose but if one is looking at the principle - 10

MR. CLARKE: I am not sure of the precise passage but Lord Reid drew a distinction between manufacturer's liability which, of course, Donoghue v. Stevenson is a good example of the problems ... and yet with words they can be banded all over the world.

HIS HONOUR: It is at p.482 and p.483, I think. I don't want you to spend time on something that is not essential to your argument.

MR. CLARKE: If there has to be any attack Mr. Morling may have some submissions about it, but we would say, your Honour, to put the principle no more widely as I said duties owed to those persons who form, although unknown, part of a specific class of persons of whom the valuer knew or ought to have known the valuation would be given and relied upon. 20

HIS HONOUR: You put it this way - that liability extends to at least that class of person, as it suffices for your purpose?

MR. CLARKE: Before I leave what Lord Reid says, of course, is the word in many ways, except in The MLC v. Evatt but Cann v. Wilson is perhaps more compelling in relation to this distinction if there is one between manufacturers and the spoken word. The page at which Moffitt, P. deals with it is p.596 and following. 30

HIS HONOUR: What is the current state of Shaddocks' case in the High Court, do you know?

MR. CLARKE: I will find out overnight. I am not sure whether it has even been prosecuted. I think that is all I wish to say. (9) I raise. As I said I raise it in a general sense at this stage. The arguments of the defendant, because of the existing commercial relationship between the plaintiff and the defendant, there is to be found implicit assertion by the defendant or a position taken by the defendant that any valuation issued by it coming to the hands of the plaintiff which did not conform with the arrangement that was discussed between the parties would not. 40

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be taken as a binding expression of opinion or something upon which the plaintiff could rely. I understand that is how the argument boils down. What we say about that is once this duty is owed to the class and there is no limitation on the face of the valuation at all then any member of that class can, unless there is a clear - either a statement to that member, unless there can be found inferentially a clear statement by the valuer in words or conduct to the person relying that he cannot rely, will operate to bring into bearing the duty to all of those members of the class and in particular that member of a class who acts upon it.

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HIS HONOUR: Why do you say the evidence finished up on that? Because you remember Mr. Hodgson started off with the proposition that there was only one original and one copy - they were both valuations and they were both supplied to whoever ordered them and that was the extent of the limited class. Then I think there was some discussion about this. Then I asked him some questions and you asked him some questions. How do you say that has all finished now?

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MR. CLARKE: He was reluctant to make any admission about the photostat copies but leaving that aside, I will take your Honour to the evidence. What we say is that he knew - he did not like my word "disseminated" and he was happy to accept your Honour's phraseology that all it meant in the end that he knew that it would be given to a potential mortgagee. If he didn't like it it would go to another one and so on. It would still be in the market, he would still be after the loan so that he knew it would be handed to either the original or the copy at least - to those persons other than one mortgagor or one mortgagee who may or may not be named in this document. It is p.207 and p.247 and I think 263. What we say in relation to the evidence of the arrangement is that what happened in 1972 and through to 1973 was that Kooragang was formed as a subsidiary to AFL to lend moneys, both on the commercial money market and in the mortgage arena. Because this was a new venture Kooragang went to both Richardson & Wrench and its solicitor and used to a degree its own knowledge of commercial activities to prepare guidelines. Guidelines were in fact prepared, as Mr. Simpson says, and the relevant pages of the evidence that I have taken out are Mr. Satchwell at 17.8 and 192, Mr. Simpson at 62.3 and 68.9. These guidelines were prepared for the benefit and use of Kooragang in establishing, as it were, a format of procedure. At p.178 Mr. Hodgson recognises that Kooragang were relying in the early stages on Richardson & Wrench, the long-term AFL valuers, for advice.

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What was proposed and what was the format followed particularly in the early days was that - and your Honour, I should say this that in every case of a loan up to the last of these loans a Richardson & Wrench valuation was obtained in some form or other,

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but what was decided by Kooragang is that they did not, in order to save the potential mortgagor money - that if the mortgagor arrived with some other valuation from some other valuer or no valuation at all - and the documents are silent in this so one would assume there would be no valuation at all the first would be a Richardson & Wrench "quickie" on the one hand and a footpath valuation for \$25, then the matter will be taken further between mortgagor and mortgagee and in due course the mortgagor would ask for a valuation. That was the guide proposed in the early stages. 10

MR. CLARKE: I think in answer to two questions your Honour asked, the witnesses I think Mr. Simpson and Mr. Hodgson, no discussion ever took place and there is nothing in the documents to cover the situation where the borrower came along with the Richardson & Wrench valuation. Mr. Morling was at some pains to cross-examine Mr. Satchwell and try and suggest that why a Richardson & Wrench valuation was wanted was because of the independence of the borrower and Mr. Satchwell was at pains to reject that notion and the evidence of what transpired supports Mr. Satchwell's viewpoint, what they wanted at all times was a Richardson & Wrench valuation. 20

If one looks at the procedure actually followed - and I will confirm this overnight by looking at them again - that spot check valuations or "quickies" or "footpaths" were carried out in something less than half the loans exercised by Kooragang. In each case there was a valuation obtained from Richardson & Wrench but that valuation did not and in most instances did not conform with the set-up set forth in the guidelines. 30

HIS HONOUR: In the format.

MR. CLARKE: In the format, the letter of 21st February. Obviously no point is being or was being taken by my client about that and Mr. Hodgson gives some evidence upon which Mr. Simpson was not cross-examined. He spoke about the lack of need for separate valuations, but be that as it may it is quite clear that the guidelines were simple guidelines and Kooragang, as it continued in operation, started to develop - started to become concerned at cost pressures that led to the main memo when Kooragang started seeing whether they could accept valuations from other borrowers and they really wanted Richardson & Wrench to confirm them and they would not, for very proper reasons, simply confirm but said that you can act safely on valuations from other valuers. In particular, although one does not find an agreement or an indication or a statement that if you get a valuation from the borrower, a Richardson & Wrench valuation from the borrower, you cannot rely upon it and, indeed, there were a number of cases when Richardson & Wrench valuations were obtained and had been obtained by the borrower. The ... case is an example, the Lorita case is an example and Utility Finance 40 50

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was an example. There are others, but there was nowhere to be found an indication that a valuation obtained by Richardson & Wrench to which there had not been on the one hand a spot check first or which did not cover every particular item in the guidelines could not be relied on. If some such action or some such position is to be relied on as cutting down the duty which must be owed to all the other people who might have been in this limited class or who may never have dealt with Richardson & Wrench before because one has got to, as a matter of principle, approach the duty as being owed to this limited class of whom unknown people can form members, if it is owed to them there is no reason in principle why it is not owed to other people of that class unless there is under a contract or something of that nature between the valuer and the person ultimately relying.

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HIS HONOUR: It does not require a contract, we agree on that.

MR. CLARKE: That's right.

HIS HONOUR: It has got to be some exclusion.

MR. CLARKE: I am dealing not so much with the disclaimer - it has got to be some circumstance which brings home to the relyee that the valuer is not putting it forward as a document to be relied on by that relyee.

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HIS HONOUR: Well, you are the one because relyee has only this relevance, that if there is some reason for exclusion he never ever becomes a member of that class. Take the most obvious example, if it is a statement "This is for the information only of tall ladies above 6 feet" or whatever, well, the 5 foot tall ones will never become part of the class.

MR. CLARKE: I accept what your Honour says there.

HIS HONOUR: That, of course would be the extreme instance. Another instance would be if I say to somebody "Look, I am going to publish these market reports but you don't pay any attention to it yourself, they are for the mugs" or whatever, you never ever become a member of the class there. Now, really, it is ultimately a question of what construction one places on the existence of some doubted arrangement between Richardson & Wrench and your strongest point is that neither party ever gave any thought to the possibility which occurred here and therefore it is a bit difficult for Mr. Morling, you say, I assume, to say that in the absence of any conscious thought by either party there was an exclusion of Kooragang from falling within the class.

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MR. CLARKE: I think that would be the primary way I would put it, but I would also put it another way, which perhaps is not so compelling, that in the context of this arrangement one

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can find nothing to clearly put forward the proposition that certain things had to be done before Richardson & Wrench would accept liability for their valuation and if I could, for instance, take your Honour to the Lorita example where a valuation was obtained by the mortgagor and submitted to my client so far as records go there never was contact between the plaintiff and the defendant and, in so far as Mr. Hodgson has some faint recollection I would submit it simply cannot be relied upon in the absence of any indication and, in any event it was not a recollection of the particular time or whether it related to this matter.

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In the case of the Lorita report, in my submission, as it could not be said simply because we didn't get an early check, simply that we didn't check it up with them to say that this is a particular type of valuation, the question would be raised "What is it we didn't do we should have done to get the reliance?" and in the area where it is so unclear there can be no case ... (inaudible) ... but I did want to draw this analogy: Accepting that perhaps because the duty - although there may be some overlap between duty and disclaimer in trying to find what type of arrangement or what clarity of evidence one would need to set up some evidence which might defeat what would otherwise be a prima facie duty of care, I looked at a fairly - it is not so recent, but a statement in relation to the question of volens. Volens perhaps is different, although on one view of volens it may be said in some circumstances ... (inaudible) ... it is a very short passage and I just refer your Honour to it. Morrison v. U.S.S. Co. 1964 N.Z.L.R. 468; Turner, J., and I understand it was followed by the other judges:

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"For the reasons which ... (read) ... volens".

HIS HONOUR: I don't think that can apply, because surely it cannot require the assent of the other person to exclude him from the class to which you say they are willing to accept obligation.

MR. CLARKE: What has got to be looked at on one side is the making clear that something you cannot rely on, and there is no need for assent to that. On the other hand it perhaps would be sufficient if the recipient said "I appreciate - as the spot check is here I appreciate, but you are not bound by that". In that form assent might be relevant but what I was really seeking to draw from that case ... (inaudible) ...

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In relation to disclaimer much the same comments would be relevant and I would only add to that that, of course, the benefit of knowledge of what happened here one found it is demonstrated in the Sankey valuation a dramatic change to these valuations, apart from the change of procedure one found a clear statement of limitation. If there is not enough in the evidence

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to support a lack of putting the valuation forward to my client as a statement to be relied on, well, it could not possibly support a disclaimer. I suppose they run hand in hand. That is all that I wish to say on that area and I have got now to go to negligence.

Perhaps I ought to say this: it was addressed to Cobden one of them as an intending mortgagee that Mr. Hodgson knew from the evidence to which I have previously referred your Honour, I think it might have been assent in so far as the questions meant 10 that if Cobden did not advance money the document would be transmitted probably to other potential mortgagees. In my submission, the inclusion of that name upon the document does not cut down the class, but it does emphasise or force the duty owed to Cobden.

HIS HONOUR: Where is the evidence on that Cobden situation?

MR. CLARKE: Page 264:

"Equally, as I think you have ... (read) ... lender".

In my submission, whether the evidence be restricted to Mr. Hodgson's evidence or whether one, bearing in mind the normal 20 course of commerce in the community, could come to any other conclusion that the valuation may be used by persons other than Cobden so that other persons formed part of that limited class does not really matter for my purpose. In my submission, either way the test is satisfied.

Could I then come to negligence. In respect of negligence the case is made, of course, in respect of both properties that for reasons which remain unexplained these valuations were vastly excessive. At the outset of the submissions on negligence we rely heavily on the failure to call Mr. Rathborne. 30 There is no attempt by the defendant to justify a valuation by evidence or by showing the process of reasoning, if any, by which the final figure was arrived at. I would rely, essentially, for my submission on the failure to call Mr. Rathborne, on this point, on what the High Court has said, but one cannot draw the inference he would not have supported their case on this point.

Could I deal firstly, because it is the clearest case, with McMahon's Point. There was uncontradicted evidence that the valuation of the valuer at the relevant time was \$180,000. 40 Your Honour can more readily accept that that evidence is right because of the failure to call Mr. Feltham, who was a valuer who had seen the property on behalf of the defendant or valued the property on behalf of the defendant, and that appears from Mr. Leafe's evidence and the differentiation between 180, the real value, and the 250 is somewhere about 40 to 45 per cent -

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70,000 on 180, it might be about 40 per cent and far exceeds the difference one might expect between valuations for mortgage purposes attested to by Mr. Leafe of 5 per cent, which evidence was not in substance contested by any witness, although no doubt Mr. Morling would rely on the differences between his valuer and the valuer for the purposes of this case in Glebe and my valuer who valued for two purposes also in Glebe, but I will come to deal with that later.

Mr. Hodgson, your Honour may recall, had previously given 10
evidence that in properties of this nature one should never find more than 5 to 10 per cent difference. It may be that the evidence is talking about one thing and what has happened here is another thing, that valuations prepared for the purposes of court proceedings habitually - well, they follow the same pattern as a lot of expert evidence, honestly given, they seem to follow very much the path that the particular party calling wishes them to follow.

HIS HONOUR: You say that should not happen when it has been 20
valued for mortgage purposes. That seems a difficult concept to me. One assumes honesty in both instances, one assumes skill in both instances. Well, then, why should it be that there is a wide range in one and not in the other?

MR. CLARKE: I suppose it is a bit like writing an advice, you are trying to find the way that your client can succeed, you see lights which you might not otherwise see. It may be quite wrong, of course, and can lead to optimistic advice.

HIS HONOUR: But it is still not negligent. Really, all that 30
you are saying, with all due respect, is that without any negligence you can slant it either way.

MR. CLARKE: Viewed objectively as a mortgage valuation there may be half a dozen valuers who would come in and say one or other of these valuations was negligent from a mortgage point of view. I am taking now not the Glebe Point one but what Mr. Hodgson said - I will have to turn that evidence up, but my recollection went further than just that it would only be 5 to 10 per cent, you should not ever expect more than that. There seemed to be on the evidence quite strong unanimity in that area, but in so far as McMahon's Point is concerned when one gets one 70,000 out and there is no attempt to even suggest 40
that it could be even higher than that, except by some hypotheses not proved in evidence, in my submission such a difference on the evidence your Honour should make a finding of negligence, coupled with the absence of Mr. Rathborne to support any basis for his valuation.

If the other viewpoint is right you can have vast differences and the case will never succeed against a valuer, I suppose people are wasting their time, but here we have uncontradicted evidence of value. There is no contradiction

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except Rathborne's unexplained, unjustified 250,000. If your Honour is disposed to draw inference your Honour was indicating this morning -

HIS HONOUR: That is why I said to you you were on the horns of a dilemma there, your position would become much stronger on this arm of the case.

MR. CLARKE: That was when I was putting the argument that there is no evidence because of lack of evidence, but one could draw an inference of dishonesty or perhaps that he was putting Richardson & Wrench's name on documents knowing that he was doing so wrongly. That is one viewpoint; the other viewpoint is he was doing it quite wrongly but, for my purposes, on my argument on the second leg, it does not matter to me one way or the other. For negligence I have to cover both viewpoints depending which one your Honour puts up. If one is simply left with no evidence of dishonesty one is left here with an unexplained valuation which exceeded the contract price for unexplained reasons by \$65,000 and the valuation was dated June 1973 and the contract was, I think, May 1973.

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HIS HONOUR: The steps you take are that, as I was reminded, the contract price is the best evidence of value so you get that in May, so unless I come to a conclusion that somebody could bona fide believe and without negligence believe that the market had risen that much ...

MR. CLARKE: In a month and Mr. Leafe, indeed - and this is not contradicted - for reasons he gave wrote down the value by 5,000. So that there is no indication on the expert evidence that any rise of the nature spoken about could be justified.

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In Glebe a valuation appeared as at March 1973 with the benefit of comparables or rental values at that date has been, apart from absence of Rathborne, again, subjected to some scrutiny in the form of competing valuations by the plaintiff's and the defendant's valuers.

MR. CLARKE: There are a number of conclusions that can arise from an analysis of the evidence of two valuers but the first point I make is that and I think this is freely conceded - if one came to a value in 1975, a value of two years previously, which was Mr. Gilbert's valuation, one has a number of difficulties although one has hindsight - when one comes to 1979 the difficulty of recollection as to what happened in the market place generally is very difficult indeed as witnessed from Mr. Woodley's difficulties with the years after 1973.

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But accepting that, the starting point would be an analysis to the extent one could, of Mr. Rathborne's valuation, then endeavour to arrive at what was an appropriate valuation or

(Mr. Clarke)

value of the property at March 1973. It is quite clear one would not be 130 and another 70 because one is talking about one value and the basis of the analysis may be, if your Honour accepts one value fully and comes to 130 - or the other and comes to 70 - one takes the view that - in the process of looking at what the investor would pay would lead to about 100,000 - that would be the appropriate view but before the question can be answered one needs to take an appropriate view - if your Honour took the view the real estate was 160 quite clearly I could never succeed.

And so it is a critical matter to know the difference between 10 the value your Honour finds and the value arrived at. Now with the best and honest endeavours, the closest Mr. Morling can get to the valuation that is issued and not in any way justified by explanation is 30,000 which is something like 25%, 20 to 25% above the highest value, in my submission unless some reason is advanced to explain the departure from the range laid down by the parameters of the evidence there is prima facie negligence and in this case - and I want to make the same point again - in this case despite Mr. Hodgson's evidence as to the lack of need for a valuer to deal with problems of illegal works, one finds he has really been put on a limb on that assertion because the independent valuers both deal with that and treat it as relevant for the purposes of the valuation of 26th March. One allows only 4,000 and one allows 7,000. 20

There is not the slightest indication except perhaps the words, "the property is well located for a commercial purpose" upon a basis for valuation, there is no indication as to whether any account had been taken of illegal works nor whether, as both valuers had done, any allowance is made for the incomplete internal works. There was, as at the date of the valuation, a stop work order so that we would submit before I come to look at the separate valuer's evidence, we would submit that upon the arrival at a proper value and bearing in mind that the closest one can arrive at a justification of an unexplained value of 30,000 - that there is evidence which, in the absence of Rathborne, should be accepted that he prepared this valuation in an unknown but negligent manner. 30

HIS HONOUR: Where do you get the evidence that Rathborne, doing his work properly, should have become aware of the existence of the stop work order? 40

MR. CLARKE: Two ways, your Honour, the use by the valuers - and I think also (Mr. Gilbert's evidence). I will give you a reference to that. Mr. Gilbert's evidence which Mr. Hodgson disagreed with - and also implicitly in Mr. Woodley's evidence. He is dealing with in detail. There is allowance made for it. Secondly evidence relating to the circumstances in which the valuation came into being. This was dictated in the premises.

(Mr. Clarke)

HIS HONOUR: He should have realised there was some work going on in the absence of anything -

MR. CLARKE: In the absence of anything - one would infer particulars if one had regard to the other valuations extending over a period of two or three months that he had close contact with Mr. Bourke and the other inference to be drawn - that he had full knowledge of the condition of 233/237.

HIS HONOUR: Mr. Bourke could have told him Mr. Rathborne was acting honestly.

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MR. CLARKE: Of course there were proceedings on foot. I don't know I need to go this far, perhaps the inference could be drawn Bourke was being advised in relation to his appeal.

HIS HONOUR: That would be guesswork.

MR. CLARKE: It might be. It depends on the view your Honour took of the other evidence as to the proximity in the relationship between Bourke and Rathborne. The evidence tendered against me on Rathborne's involvement in the company with Mr. Bourke would tend to support the inference they were commercially involved beyond the simple real estate transactions. He has inspected or he gives the appearance of having inspected the building and he sets out the completion of renovations and for reasons, again, which are totally unexplained, he makes no reference to the lack of completion - in fact the whole picture painted is, in that sense, false. The work was not finished.

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HIS HONOUR: Judge Ford told me he was involved in a case involving Mr. Rathborne and Mr. Bourke. I stopped him but he told me that much. It is one of those accidents you cannot stop.

MR. CLARKE: I thought we told you there had been other proceedings.

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HIS HONOUR: Obviously there had been appeals court proceedings.

MR. CLARKE: There is no objection from our point of view. Now your Honour the next task I need to undertake would be to seek to analyse the evidence of the two valuers and if I could say this, I think I would be more use to your Honour in that area if I deferred that part to the morning mainly because of the length of the meeting last night. If I could come back to that tomorrow morning and continue shortly in any event by saying first of all that contributory negligence - I prefer to hear what is said against me.

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On damages we still have a task to undertake which will be done overnight. 1939 2 K.B. Do you want to hear me on that.

(Mr. Clarke)

HIS HONOUR: Yes.

MR. CLARKE: It is a case of Baxter v. Gapp & Co. 1939 2 K.B. p.271 (reads).

The contrary view point has been taken by Yeldham, J. in a case -

HIS HONOUR: Where is the judgment reported?

MR. ROLFE: 1938 vol. 4 of the A.E.R.

MR. CLARKE: I have quickly looked at this judgment. It was an action against a solicitor in which his Honour found judgment for the plaintiff, which judgment was, I think, last week or the week before, overruled. What the Court of Appeal speak of is simply liability. Yeldham, J. took the viewpoint which we submit is erroneous in principle apart from being contrary to Baxter v. Gapp that in a case such as this where the evidence is that the lender would lend 65% of a valuation of Richardson & Wrench the loss would be limited to the difference between what you would have lent if you got the correct valuation and what you did lend.

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HIS HONOUR: Your loss which you actually suffer, you would never, ever have incurred but for the fact that you leant on an incorrect valuation and the rest flows from it.

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MR. CLARKE: If it is said we would have leant less -

HIS HONOUR: No, that is not the point.

MR. CLARKE: Laughton and Boyd v. Maloney, Yeldham, J. 8th June, 1979.

HIS HONOUR: I take it the appeal was both against liability and -

MR. CLARKE: I will ascertain that overnight. I will deal with that tomorrow.

Could I perhaps deal with the Court of Appeal judgment Justice McKinnon (p.272 read). (1956 1 W.L.R. p.471). It was distinguished in a case of Phillips v. Ward on the basis not that Gapp's case is wrong but that Gapp's case was valuing another loss. It is dealt with in 1 W.L.R. and it is dealt with by Lord Justice Morris (p.476 read). It is a different case.

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(Further hearing adjourned to 10.30 a.m. Thursday 19th June, 1980.)

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES) No. 3568 of 1976
)
COMMON LAW DIVISION)
)
COMMERCIAL LIST) CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED

v.

RICHARDSON & WRENCH LIMITED

TENTH DAY - THURSDAY, 19TH JUNE, 1980

MR CLARKE: As to the 5%, Mr. Leafe, page 137.4, 139.1 and particularly 146.2. As to Mr. Hodgson having previously adopted a range of 5% to 10% and being stuck with it, pp.200 and 201. 10

It remains for me to say something about the Glebe valuations, fraud, and very shortly damages. I do not think that the question of whether the claim in substance is greater than the amount of the loans arises. The loans were \$160,000 and \$104,000 the other and properties, the Glebe one, gets close. The answer to the question of negligence, particularly in respect of the Glebe one may well depend on your Honour's approach to the question as to the quality of Mr. Rathborne's conduct in relation to the earlier questions. 20
 If your Honour took the view that these 40-odd valuations depict the conduct of a man doing something either for his own benefit or the benefit of his friend or whatever one likes - Mr. Bourke - this is affixing the Richardson & Wrench signature and the whole document amounted to a forgery - his conduct would be an offence to anyone, his employer or the person to whom the valuation was given - if one draws the inference of dishonesty against him - we submit in the state of the evidence there is lack of factual support for his valuation and one would draw the inference if it is a valuation at all - I think in Cann's case it was not a valuation at all, it was at best a negligently prepared one. We have no basis or support for it at all in the method of competition and nowhere in the evidence does one see a justification or support for arriving at a result as high as his. 30

(Mr. Clarke)

Coupled with that is the other evidence that in some instances his valuations - and I am talking about the valuations in the critical period which were done and typed at Glebe - were simply copies of earlier made valuations with the exception of the amount. Your Honour, I will have a precise number of these identified. Pages 165, 166, 167 in Mrs. Clarke's evidence when she was cross-examined as to valuations. I think three or four did - 18 Bland Avenue, Waverley and 23 Glebe Point Road were two of them.

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She said he dictated them to her but one sees the earlier apparently authorised valuations are identical - the copies are identical with Mr. Rathborne's valuation except the amount is changed.

HIS HONOUR: Is that a pointer to anything Mr. Woodley was saying, generally speaking it is right to say prices in the Metropolitan market were rising by 7% a month. So, assuming that to be correct, or whatever the multiplier is, that is a legitimate approach if you added the increase on to the earlier valuations and there you are.

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MR CLARKE: I take this as part of the whole evidence, not as one factor and coupled with the other material the inference to draw from it is that in fact it was not a proper valuation at all. Now the other significant factor - and your Honour, I am in doubt as to one valuation. Could I have Ex.9 for a moment. It would appear that all the valuations typed by Mrs. Clarke were typed between 6th March 1973 and 3rd August 1973.

In Ex.9 there are 32 valuations, 31 of which comprise Clarke typed valuations and the 32nd is a valuation of 3rd April 1973 which was not typed by Mrs. Clarke. What I said yesterday, that there were valuations prepared by the office for these two clients, both before and after the relevant dates - subject to one thing, there were valuations prepared by Rathborne or Rowan for the office between 30th March, 1972 and 12th December, 1972 and again between 19th October, 1973 and November, 1973, and there is one in December, 1974. Not quite fitting into any particular category, is valuation No.32 Ex.9 which bears on the outside the date 3rd April, 1974 has the initials TGRYF, the date changed in the inside to 3rd April, 1973 and has with it a letter from Richardson & Wrench dated 27th March, 1974 referring to the valuation report 3rd April, 1973.

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Now it may be that it was prepared in 1974 or it may be that - which would appear to be an inference - someone has typed in the date 3rd April, 1973. The letter talks about 27th March, 1974, talks about it being 3rd April, 1973. On one view it means for the period when he was typing at Glebe

(Mr. Clarke)

He also did another one in the office although it might be that it came into existence in 1974. I do not think either side can get much reliance on that.

Leaving that aside there are approximately 40 valuations typed in the offices of Group Unity in the period of something like 5 months. They are either proper valuations or they are not. If there are 40 proper valuations done in 5 months it is hard to draw the inference that they were proper ones if one assumes as one could on the evidence, that Mr. Rathborne was still attending to his duties at Richardson & Wrench - one knows in this case the difficulties in the short time Mr. Woodley was preparing the valuations, albeit many years ago but 40 in a period of 20 weeks and continuing your work as well is, with respect, indicative of the fact these are really valuations in form and nothing more. 10

The valuation in the instant case at Glebe is clearly incorrect as to the completion of the condition of the premises. The renovations - and that is not a matter where there is any room for doubt as to whether he should have been aware of the correct situation. Furthermore he apparently went, or he states that he went or got information from someone as to the zoning and it was not difficult to get information as to the illegality of the work, one would assume. 20

We would submit, and with the best that can be done by valuation given in evidence it is \$32,000 less than the valuation given by him when there is no evidence of the basis on which he gave his valuation - there is blatant error shown as to the works and the other circumstances to which I have just alluded in my submission. When one sees the range the valuations go - in a range to a much lower figure in my submission, the valuation is prima facie negligent. 30

It is just totally unsupported by any evidence or by any basis justifying it. That is my primary submission.

Can I come to deal with the values. In supporting, or endeavouring to support the valuation, Mr. Woodley was called and we would make the following comments in relation to his valuation and his evidence. His valuation was prepared, seven years after the relevant event, with the attendant memory of difficulties which were clearly evidenced. Secondly, insofar it reached a figure of \$135,000 before he took \$4,000 off and whilst he arrived at a figure of \$128,000 by comprising on a capitalisation basis and comparable sales basis he relied primarily on a comparable sales basis but insofar as he reached a figure of \$135,000 he did so by reference to material upon which the valuation in March, 1973 would not have been able to rely. 40

(Mr. Clarke)

HIS HONOUR: I think it is probably important - if you look at the comparable sales they were prior to the relevant date.

MR CLARKE: I am sorry if I did not make it clear, I am dealing with the capitalisation basis only.

HIS HONOUR: Is it not legitimate for him to do this exercise - he says my preferred method is comparable sales and that throws up this figure. As a double-check I also approached it on a capitalisation basis and it is important that he is using that only as a double-check because then he can use the advantages of hindsight merely as a check. If you look at the death duty cases in relation to shares in relation to that, they set out the principles on which you can use subsequent events not to put a valuation out but in order to check what you think is a correct valuation.

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MR CLARKE: Whilst he said that, there are two points. Whilst he said that he in fact uses the capitalisation method not simply as a check but to upgrade his valuation, when one comes to look at Mr. Rathborne's valuation it could not be justified by Rathborne on the basis of these later figures. One would have to see what was available to Rathborne to allow him to arrive at this figure.

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HIS HONOUR: I am not sure that is right. The question is not whether Rathborne utilised that method of working, the question is whether the figures that were thrown up by Rathborne, whatever way he followed, was right or wrong in that regard. I think within a restricted range you can use hindsight. The share valuation case. It is all referred to in Mr. Hill's book.

MR CLARKE: What I am seeking to do is to show that by no available material to Rathborne at the time could he have arrived at the figure of \$160,000. I appreciate in looking at rentals of previous years he would be making some allowance upwards and it is perhaps justifiable in seeking to support it by reference to what happens later but when one looks at the primary material, what was there available for him, one finds no support for an increase of this amount.

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HIS HONOUR: What you are saying is that although subsequent events might have justified Rathborne in throwing up an increase in rentals of the kind which occurred, there was no basis on which he could forecast it at the time he was carrying out the exercise.

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MR CLARKE: It goes further than that. He might have justified the increase that occurred but not - what has happened what Mr. Woodley has done, he has gone up and up even though significantly later than the relevant date but

(Mr. Clarke)

there was no material before Rathborne to enable him to come to what I submit were very high figures for rentals. Mr. Woodley seeks to draw something from as late as August 1973.

HIS HONOUR: What you say is he was using it as primary material rather than a measure against which he could confirm his assumptions or forecast, is that right?

MR CLARKE: Yes. He upgrades the sales and said I don't want to work on things before 1973, they might be out of date, but he does not make the contrary allowance when he adds a rent factor into five months after the event, he draws on them as not being comparable in the sense of equal or higher in a way but being substantially lower for the reasons he gave.

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The two basic comparables from Gilbert were existing at the time which had to be graded to an extent for the date and they were the T.A.B. next door which was not of course mentioned by Mr. Woodley and that was - it was not mentioned in the schedule of shop rentals, the rental there which was older was \$235 per lineal foot or somewhere in the order of \$8 per metre, the rental for 331 which was not mentioned by Mr. Woodley (p.101) was \$177 per foot or something about \$7 per metre. What happens two years later, as late as August 1973, is one gets rentals of what Mr. Woodley describes as inferior buildings at \$8.11 per metre, which, in my submission, when one looks at 71, was comparable premises in late 1973 for these other premises - it does not get a real basis for concluding as at March, 1973 Mr. Rathborne could have legitimately come to the view that these particular premises were not worth 8, 9, 10, 11, 12 a metre and not even \$15 that Mr. Woodley takes but something like \$20 and he would have to because the capitalisation exercise by Mr. Woodley was really the lowest permissible rate, 7%.

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HIS HONOUR: He made his capitalisation on an assumption that is either right or wrong as to basis used.

MR CLARKE: It is a liability - in point of value - it is a factor of the valuation that by selecting a particular class that he says is the best use, he obviously limits the range of purchaser, but he selects what will be much, much more on the investors - whether right or wrong it is for your Honour to decide. It conflicts with the approach of Mr. Gilbert but he notes down management and puts a high figure on rental and gives a low capitalisation figure. Assuming that particular person to the benefit of Mr. Rathborne, one has not to justify his \$15 but one has to go much higher, one has to get to about \$20 a metre. What we really in essence are putting is, even though he seeks to pull himself up it might be legally admissible by reference to what happens thereafter and

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(Mr. Clarke)

analysing what happens at the time for Mr. Rathborne to think about the material indicated a greatly lower figure than the figure that would be needed to justify to come to a valuation such as his, presuming he took this approach.

It is interesting there are only the three areas in which, on this approach, Gilbert and Woodley differ and that is on the ground letting area where Mr. Woodley's approach would give it a tenant prepared to pay four times what anyone else was paying in the area, a vacancy factor which is relatively smaller than the capitalisation rate.

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When it is seen that Mr. Woodley's approach suggested this limited identity - he said in general terms he was interested in the premises - the restriction on the market must have had some real effect and particularly when there is no evidence in 1973 any of the people he was talking about had shown any interest in this sort of development. There was no indication of any interest thereafter.

On the question of comparable sales there is diversion to the 7% Mr. Woodley put that on the basis of a schedule which had on it only one non-suspect comparable. I will deal with that later. It had a figure of about 4% growth. Seven per cent, even if the comparables were not suspect, was based upon, I think, between August as an assumed date of contract and the relevant dates about eight months - when in point of fact there were ten months - so that the monthly rise, even according to the schedule, came down to about 5% but if one takes account of the fact that the initial sales - the 7% on that basis disappears.

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Now, that being thrown in, Mr. Woodley sought to justify a greater rise - I am sorry, the same rise by reference to his memory. We submit his memory back to 1973, 75 was not sufficient to enable the court to draw the inference he was right as to that. We accept there was a rise as everyone says the market was rising but we would accept no more than probably at the maximum it would be somewhere - even the non-suspect comparable was a Group Unity purchase and its activities are not completely clear in the sense that more or less borrowing more than it is paying - it may have been prepared to pay much more than anyone else and it clearly borrowed more than it paid for McMahan's Point. Even that one was a 4% rise. We submit the proper view would be a rise should be somewhere about the 3% which, after all, over a period of a year is an increase of 36% which is quite significant in any real estate market.

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(Mr. Clarke)

There is nothing in the evidence to suggest it rose any more than that. Now the comparables were shops and dwellings. Mr. Gilbert, the primary difference, as Mr. Gilbert says - "Well that attracts Market A, the shop, and commerce attracts a different market, therefore the shop and dwelling is not a reliable comparable". Mr. Woodley says, "Yes, I have valued on the basis of total different markets for the shop and dwelling but I used them as comparables". As I understand comparables it would necessarily relate or provide a reasonable guide on the basis that one was talking about similar markets. If one is talking shop and dwelling it is different to the person who wants shop and office premises. It is hard to see how it could be other than a very vague guide.

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We would submit that the capitalisation approach here is a much safer means, much as Mr. Leafe said in McMahon's Point where he ran into similar problems - then the other approach. But even taking that the two valuers come up with very different figures on the comparables.

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Could I then, looking at Mr. Woodley's valuation, and his annexure, one sees that the value per metre of 237 ten months before the relevant date was 5230, 175 two months before the relevant date was 6914, 165 assumed to be two months before the relevant date, 7094 and 155 at the relevant date 6288.

Now if one attributes to 237, because it was said it was a better area than the other places - a rising factor of about 3½% over the period one arrives at a figure of about 7 to 7500 as at the relevant date which would, in my submission, be a sound working point rather than the unjustified rise to 8,890. Then of course there is the addition which Mr. Woodley puts on for the extension or the alterations. He put 25% on.

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Now there are two things we say about that. The first is clearly Mr. Gilbert takes a different view. Secondly that to talk about the value of the extensions when you are looking at the premises albeit people saying it is substantially in the same condition 7 years ago when you do not know the extent of the incomplete work, it is necessary to talk in very broad terms. Mr. Gilbert saw it in March, 1975 two years after the event and would have not only the undoubted advantage of seeing it more close to its condition, he had the advantage of seeing it when it was incomplete, and when work had not been done at all and he had the advantage of a much closer time proximity to the events, in other words his recollection in March, 1975 as to what was going on in the market in 1973 would be prima facie much clearer than it is now when he has his attention drawn to it for the first time.

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(Mr. Clarke)

The other thing we would press is Mr. Gilbert swore this, that there was not in fact an effective decrease in value and Mr. Woodley when pressed, said there was. Mr. Gilbert, when he gave his valuation, was giving in part a valuation which had to stand a test, it had to stand up, he was giving - and it is the critical thing - a valuation as to the real estate which was to be tested by sale and which, when tested by sale, proved to be pretty accurate. In my submission this dual role of his valuation, albeit the other part was with a view to future litigation, gives it extra credibility quite apart from the question of time and no doubt when he came to look at the valuation date back to 1973 he had to pay careful attention to the change in the two years. He was in a better position to have seen at that time the situation of the premises and of the effect the alterations had had on its saleability.

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HIS HONOUR: Are you saying this in essence that because he was fairly right as proved by the sale on what the then current value was, he would be pretty right in his valuation in 1973.

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MR CLARKE: I can't put it as high as that.

HIS HONOUR: But you are seeking to derive some support from that?

MR CLARKE: Yes.

HIS HONOUR: Is that really logical, just because I drive safely today I probably drove safely yesterday or I am a skilful driver.

MR CLARKE: That is one thing but if he is taking his mind to value one property at the one time - doing them at the one time - they are not separate times, he is applying his mind to value this property at two separate dates - it is hard to imagine he does not get a flow-on. He would be ridiculously wrong in one and right on the ball in the other. He had to test it through. Your Honour will see he went back, so he said, to 1970, 1971 and also to 1974. He would have to, in 1973 and 1975, by using to a degree the same primary material.

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What I do say is if you come to court to give a valuation it is in a sense an academic exercise. No one could say you are right or wrong because no one will test your valuation on the market but this man had to give a valuation that had to stand the test. He gave one to do that at the same time as he gave another one.

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The other aspect is nowhere can support be drawn in the sense of a comparable of any mention to a price of 11,000 a metre.

(Mr. Clarke)

HIS HONOUR: If you look at part of Ex.N, the letter he wrote in his capacity with Hardie and Gorman, he is in very stark conflict with Mr. Woodley because he says in March 70,000 and August 70,000 and January the following year it is worth 70,000, so he, in essence, is saying there was no market movement at all, either up or down.

MR CLARKE: In that period, yes. Your Honour says contrast to Mr. Woodley - his evidence was indeed that it might not have been discernible about mid, I think, April, May.

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HIS HONOUR: He said the market reached its crest.

MR CLARKE: And it started to give signs of slowing down.

HIS HONOUR: If it was slowing down you would think prices would go down.

MR CLARKE: I don't know if this was given in detail in the evidence, but as I understand what he was saying it was that something dropped out of the market, he was fairly clear in his evidence at no time was there a discernible drop. He said properties were harder to sell and if you got a forced quick sale he said there would be a drop but in general prices stayed the same.

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HIS HONOUR: I don't know whether he said that, you added that, but I don't know if there is any evidence which goes to that, that prices stayed the same. It is seldom you would reach a crest and stay there. I do not necessarily want you to spend time on it, Mr. Clarke.

MR CLARKE: I suppose in the extent of - in the price range of 1970 he obviously took the view, negligent movement.

HIS HONOUR: Over a period, not quite a year, ten months.

MR CLARKE: He did, in relation to the state of the market he did find some support from Mr. Hodgson who said previously when he gave his evidence at the Committal - he said then there were indications of the market slowing down in April, May. Mr. Hodgson said he read things but that was his evidence, at a much closer point of time, at a time when he perhaps did not have the same interests.

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Appreciating your Honour's point, the reason for that letter is that the original valuation of Mr. Gilbert's was based upon the works being illegal, and we were asked to assume they were. That was January - originally the report was April and he adverted to it in August, 1975. These are the valuations that people like Kooragang - Kooragang had to rely on then at a later stage. A lay person like me does not

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practise in valuations. It makes you wonder what the point of getting a valuation for a mortgage is.

UPON RESUMPTION

MR CLARKE: Could I turn to the question of fraud. Again it depends very much on the primary view your Honour takes but can I make this submission that the valuations made in our respectful submission were relevant statements, one of them by implication. The first relevant statement is that the premises have been renovated and the omission of any reference to non concluded internal work, the second statement of fact is that he held an opinion as to the value being \$160,000 and the third statement that the valuation makes is probably more accurately an implicit statement but that the valuer had reasonable grounds or a reasonable basis for his opinion. Now one was wrong in its omission and two and three we would invite your Honour in the state of the evidence to find them also wrong. He does not come forward and say that it was his opinion and in our submission from his course of conduct the proper inference is it was a convenient figure. The submission we would make then is that these statements amount to a misrepresentation of fact and that they are made recklessly indifferent to the truth or otherwise of the statements for the purpose of inducing the vendors to act upon the statements. 10 20

The aspect of course of forgery looms high, if they are in fact forged documents well, it supports, in my submission, a general inference of fraud. I do not think I have given your Honour any references in respect of fraud but could I say that the passage dealing with this is in Clerk 4 Lindsell, 13th ed. appearing in par. 16/16: "With intention ... all relevant to the issue". 30

The same subject matter is dealt with in the third edition of Spencer, Bauer and Turner, Action on Misrepresentation, at page 53, matters of fact represented as opinion or as information. Perhaps I will lead two portions of it, your Honour, it might shorten another authority I was going to read. At 754 there was reference to another case which is an 1841 case: "The defendant having stated ... justify his opinion." That dicta of Bowen, J.L. is relied on very much in a decision of the court of Appeal in England in Brown v. Raphael and the relevant parts "One of the lots to be offered ... no aggregable estate". Now Lord Evershed said, "It is very often said ... is in the affirmative." His Lordship points to three or four factors. The judgment in Brown v. Raphael is in (1958) 1 Ch. and the relevant passage is at p.641 and there is a long recitation of Lord Justice Bowen's Judgment in the Smith case. The essence really is that one has to look at the particular representation to form the position of the parties in determining whether there arises 40 50

(Mr. Clarke)

from the statement the implied statement that he is saying he has reasonable grounds for his opinion. In our submission a valuation is a classic case where he is saying just that. He is putting forward that he has arrived at a valuation particularly in the form of this valuation, after a consideration of the question, he has brought to mind his expertise upon it and on reasonable grounds arrived at the conclusion that its value or estimated market value is \$160,000. In our submission it is not that part but the difficult part is the question whether one can infer the fraudulent intent or necessary recklessness here and we would draw that from his other conduct, your Honour.

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HIS HONOUR: Assuming I take the view that it was a representation of fact in the sense in which you put it and that you had the appropriate intention or state of mind, we can put aside all the learning in Hedley Byrne, can we?

MR CLARKE: Yes, your Honour.

HIS HONOUR: You are much more than in the Lloyd v. Grace Smith type of country.

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MR CLARKE: Yes, your Honour.

HIS HONOUR: Well, you are right in it, really.

MR CLARKE: I suppose from both points of view on both sides one of the difficult features of this case was these alternative claims. That is really all I wish to say on Ford. We base our computation of damages and we would say in principle that the loss ultimately is greater than the amount outlaid or even the valuation, there is no reason why damages do not spill over from the wrongful act.

HIS HONOUR: On what we were discussing yesterday about whether you can apply the Donoghue v. Stevenson proximity test to the Hedley Byrne situation. There is a very elaborate discussion on that in a paper which Glass, J., gave to the Law Convention before last on economic loss. There is quite a substantial section of it devoted to that and he comes to a conclusion that you cannot apply the Hedley Byrne test but I was having another look at Shaddock, the President certainly seems to be applying it so you have got the two New Zealanders plus some of the Court of Appeal here.

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MR CLARKE: I might be inaccurate in this and I perhaps gave away too much yesterday but on another look the President certainly takes that view, Mahoney J.A. rejects that view and I do not think, because it was not strictly relevant in that case, I do not think Hutley, J.A. dealt with it.

(Mr. Clarke)

HIS HONOUR: He did, as a matter of fact.

MR CLARKE: The approach I suppose, your Honour would be that there is -

HIS HONOUR: I do not see how they can say that consistently with what the House of Lords and the Privy Council decided. I do not know where that puts one but hopefully -

MR CLARKE: Lord Reid was certainly in Hedley Byrne against that point of view. The state of the position would appear to be that it is questionable whether the Canadian case which sat an enormously large bench went quite that far although they import the nature of ought to.

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HIS HONOUR: Thank you, Mr. Clarke, Yes, Mr. Morling?

MR MORLING: I have had prepared some notes which I shall hand up and which I will supplement after lunch with some further typing which is being done this morning.

MR CLARKE: I did tell your Honour - I mentioned this case of Yeldham, J. - it is pages 20 and 21 he deals with the question of damages; he took the view in the facts of that case the man would have lent and the loan would have been accepted, as I understand it, \$30,000 instead of \$45,000, the second paragraph on page 20, and restricted the damages accordingly. There is no reference to the case on which I rely and it was not, as I understand it referred to by Yeldham, J., it was not referred to him in the Court of Appeal damages were not discussed at all.

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MR MORLING: The first and threshold point which my friend must make good of course is whether the two valuations which are in effect sued upon were valuations which in law were made by the defendant. I do not wish to take your Honour to the basic authority which is referred to in the first two pages of these notes. We would say at the end of the day my friend does need to convince your Honour that the making of these two valuations was either authorised by the defendant or they were made by Rathborne as a wrongful and unauthorised way of carrying out a task which was authorised, and your Honour, the only reason I refer to the cases on page 2 is that they give particular support for the statements of the text writers and in the Beans Express case, which I may say was a very strong Court of Appeal bench of Lord Green, Lord Justice Morton and Tucker as they then were, used the expression in that case of doing two things at once which seems to us to be a quite useful way sometimes of looking at what a servant is doing and it is our submission that when all the evidence is looked at as to Rathborne's conduct he was virtually doing two things at the one time. Just as a tailor at David Jones may make suits and he may make them for me, your Honour, during

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(Mr. Clarke)

(Mr. Morling)

(Mr. Morling)

the course of his employment by David Jones, he may also make me a suit at home; he is doing two things at once and if he takes some David Jones labels with him and sews them into the breast pocket of my coat he is still doing two things at once. It is a confusion of thought, in our submission, to regard him as going about the David Jones business wrongfully when he is making a suit for me at home under those circumstances. It does not matter for twenty years I have had all my suits made by David Jones, if I have an arrangement with my tailor that on one or two occasions I were to depart from my practice of doing business with the company - 10

HIS HONOUR: Don't you have to take the analogy further? The hypothesis would be that he would be entitled to put David Jones' labels on suits but he is entitled to accept orders on behalf of David Jones and it is really a question of whether he is.

MR MORLING: Clearly he is entitled to put David Jones' labels in suits for customers he makes for David Jones.

HIS HONOUR: And he is entitled to accept orders on behalf of David Jones. 20

MR MORLING: Yes, your Honour. Then page 3 we merely note what Evatt, J. said in Colonial Mutual Life v. Producers and Citizens and that is the case of the insurance representative slandering another company and there his Honour said it was permissible and necessary to look at all the surrounding circumstances in which the servant's action is called in question and where thereafter in the notes we give reference to a great deal of the evidence on this matter and I will not weary your Honour with a recitation of it but the evidence we submit is quite compelling. There are in many situations confusing situations where a man might be moving a truck around a factory when strictly speaking his job is not to drive trucks and there are other cases of a forklift truck which is blocking the movement of a truck and you can have a nice argument as to whether it is a wrongful mode of doing something he is authorised to do but, your Honour, in our submission a reading of all the evidence does disclose that it is not possible to categorise Rathborne's actions in respect of these two valuations as being a wrongful way of going about performing the business of Richardson & Wrench. 30 40

It is said against us that we did not call Rathborne. May I just analyse that? My friend has to prove initially that these are Richardson & Wrench's valuations, that is to say, for relevant purposes he has to show that they were produced in circumstances which make them in law valuations of the defendant. All he is able to do is to prove that a

(Mr. Morling)

document which was apparently produced on the defendant's letter head bore a corporate signature, put there by the hand of a Richardson & Wrench employee.

HIS HONOUR: Authorised to.

MR MORLING: Authorised to sign valuations and I would feel disposed to agree that without any evidence in reply that could well give rise to a prima facie case. Now, your Honour, in response to that meagre evidence the defendant has done in broad terms, two things on this aspect of the case; it has called evidence to show that there was, as one would expect, a regular and settled method of producing Richardson & Wrench valuations, that is to say, pursuant to instructions received, processed in a certain way, typed in the office, registered in a certain way, sent to a client, fees rendered and so on, and we on that aspect of the case have called evidence as to which there has been no challenge, nor could there be, that these valuations are simply unknown. If the matter had stopped there we would submit that would have answered the claim but we go further, your Honour, we prove positively the circumstances in which the valuations were produced; we proved that they were not only produced not pursuant to any instructions but we proved that they are produced in circumstances which explains the non receipt of instructions; they were not produced in the office at all and, your Honour we would submit that where you have the totality of the evidence as we have encapsulated it in these few pages of transcript references, your Honour is left with the irresistible conclusion that these valuations were not produced for a person who in respect of the relevant transactions was a client of Richardson & Wrench.

HIS HONOUR: Is there a legitimate distinction between your position and the decided cases relied upon by Mr. Clarke to this effect that the servants there under consideration were engaged to do some task as part of an office organisation of the defendant, albeit they carried it out in a manner which redounded to their own personal profit say, in other words, Mr. Rathborne here was never asked by Group Unity as part of the Richardson & Wrench organisation to provide these valuations, as the man in Lloyd v. Grace Smith, someone went to him -

MR MORLING: That is the case.

HIS HONOUR: I do not think there is any case, is there, where the servant is approached outside the organisation which is being sued in respect of his actions where it is understood between them that the work is to be done outside the organisation or structure and yet the organisation has been held responsible for its actions?

(Mr. Morling)

MR MORLING: There is one little case to which we refer - I say a little case with due respect - we looked for what one might call foreign order cases and there is a case which is in our notes later, decided by a New Zealand Judge in 1906, and I will come to it later. The case is for me but there is no case that we have been able to find in which the circumstances of which your Honour puts to me have been found to lead to liability of the master.

HIS HONOUR: That is a basal distinction, is it not?

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MR MORLING: Yes it is indeed, your Honour. The case I shall refer to your Honour is Hardie Shaw v. Tomlinson (1906) N.Z. L.R. 612 and I will come to it later.

If I might perhaps add a note to somewhere on page 4 of these transcript references to 163.3 and 168.2 where Mrs. Clarke gave evidence that she did not do more than make an original and I think one photostat copy of the valuations, that is to say, it is quite clear they were not being produced at Glebe for the Richardson & Wrench organisation otherwise the file would have been preserved and the other matters which I refer to in the notes, that is to say, registration in the Registry and rendering of accounts and so on would have been put in train. We would submit that quite apart from any questions as to the effect of what I shall call the black list, Ex.7, put it on one side altogether, that you have here a picture of a man whose employment was to make valuations for his master. He was employed to do work of a certain kind. It is not possible to regard his course of employment as extending to doing work for people who were not clients of the firm but I mean people who in respect of the relevant transactions had not given instructions to the defendant.

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If I may just take five minutes or less to advert to this question of the black list and the question of the extension of credit because one way or another a good deal of time was taken up on it. The facts appear to be this, you have Ex.7, the list of 20th November, 1972, going out to all valuers including Rathborne; he signs it; you have listed on that black list a number of companies who were then in the default of fees to a greater or lesser extent. Indubitably some three weeks later three valuations issue, and legitimate valuations issue from the defendant's offices. Hodgson's evidence is as we would expect it to be, well, he knows now they were issued and probably had known for some time. At the time they were issued he was unaware that they had issued. In terms of the defendant's knowledge of what thereafter happened you have a number of valuations of which the two relevant ones are two apparently being produced elsewhere but,

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(Mr. Morling)

as I think my friend Mr. Clarke said this morning, it was not only I think six October, it does not matter, it was certainly August that any subsequent valuations issued from the Richardson & Wrench premises to the Bourke group so if I may just backtrack a little, 20th November blacklist saying no more credit; unknown to Hodgson three valuations go out, then the evidence is I think at the end of July or end of June another letter goes from Richardson & Wrench to the Bourke group or somebody in it asking for payment; Ex.12, is three files one of which relates to premises 64 Wellington Street which have been valued before the blacklist came into existence and in respect of which the fees have never been paid, the invoice card is annexed. So that the total picture was this, that as at March and June 1973, Rathborne had been told that the company would not extend credit; the company admittedly had issued three valuations in December but had never been paid all of the outstanding fees and Hodgson said - there is a reference in my notes - that he never countermanded himself the black list so that as at March and June so far as the company was concerned then it was still on the black list. Now, your Honour, in my submission nothing turns on this because on no conceivable basis on the evidence could your Honour, with respect, even with my friend's boldest submissions could my friend with any expectation of success ask your Honour to find that these valuations were issued by Rathborne pursuant to power which he had to grant credit on behalf of his employer because, your Honour, if he had been doing that -

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HIS HONOUR: I do not think the evidence allows that and I do not think Mr. Clarke really put it that way.

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MR MORLING: So that your Honour all that the black list does is to put even further outside the cover of acting in the course of his employment the issuing of the two valuations by Rathborne.

HIS HONOUR: Yes, well it divorces the activity from the organisation.

MR MORLING: Your Honour, if there had been a case, which as at this point of time, could have been made out that Rathborne and other valuers were from time to time in the course of their ordinary employment permitted or asked to make valuations at customers' premises and so on then a different situation might have arisen but there is nothing of that. So that what it comes down to is really that Rathborne had authority indubitably to sign valuations in the corporate name but in respect of work done in the course of his employment and he had no more authority to sign valuations in respect of real estate valued outside the course of employment than he would have, for instance, to value shares or anything else or to just do work for Richard Stanton & Company.

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(Mr. Morling)

HIS HONOUR: Yes, well that of course is really getting into the field of Lloyd v. Grace Smith, he did not have the authority to forge things but nonetheless he was performing something in the field of legitimate activity.

MR MORLING: The only basis upon which my friend could have made a claim in this case on this first threshold point is to really in the absence of any ostensible authority argument, he then really has to say well, it was in the course of Rathborne's duty more or less to do anything in the valuations department putting him in the position of a clerk running a solicitor's branch office because unless he does that having no ostensible authority to rely upon he has got no authority argument to fall back upon. When he finished his submissions on this part of his case he used words something like this, "It was a critical distinction flowing from Lloyd v. Grace Smith ... What he was employed to do." That is where I join issue with my friend. If he can make that submission good then if he is doing wrongly precisely what he is employed to do, I am out. But I am very much in if he is not doing precisely what he is employed to do.

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HIS HONOUR: If the situation had been that somebody from Group Unity had walked into Richardson & Wrench, met up with Rathborne, seduced him from his duty in the sense of saying to him, "Look, don't bother going out to Glebe, just sign a valuation in Richardson & Wrench's name that it is worth \$250,000", that would have been a situation in which he would have been doing wrongfully what he was employed to do, would he not? In one sense you could say he never valued it, all he did was what this man told him to do but you would still be in trouble, wouldn't you?

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MR MORLING: I would submit I do not have to support that answer in this case. I would submit if it is proper to categorise Rathborne's course of employment as to making valuations for clients of the firm I would answer that case by saying that in respect of that transaction Bourke was not a client of the firm.

HIS HONOUR: Let us assume against you for the moment in the example that he put it through the registry and collected money of it and so on.

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MR MORLING: I would start to be in real difficulty there perhaps although I would still in that case say that it was not a wrongful way of going about an authorised task because the task he was engaged in was not at all to do with client's business.

(Mr. Morling)

HIS HONOUR: Well, what would you say as a wrongful way of going about an authorised task where one verges on the intention of wrong doing?

MR MORLING: If, to take that example, if Bourke writes to Richardson & Wrench and says, "Will you value Glebe Point Road for me?" or rings up and says this, "Hodgson says Yes we will in writing or orally, I will get Rathborne to do the job for me". At that stage Bourke says to Rathborne "Look, what about so-and-so?" and Rathborne succumbs, then Rathborne is engaged in doing a task or is wrongfully going about doing a task for a person who is a client of the firm. 10

HIS HONOUR: The only difference between that situation and the one that I was positing is that it went through Mr. Hodgson.

MR MORLING: Yes, your Honour, but I would submit that is a fairly critical circumstance because in the first example your Honour put to me I would say that in agreeing to what he was being asked to do Rathborne would not be purporting to accept Bourke as a firm client in the respect of that matter. Now I would accept that it would be wrong to so regard that exchange between them, that is to say if the correct interpretation of what passed between the two was that Rathborne would indeed accept Bourke's instructions on behalf of the firm then the situation might be different. 20

HIS HONOUR: I see some real difficulty in the sense that didn't Mr. Hodgson agree that Rathborne must have accepted or that valuers were entitled to deal with clients direct where they were their regular --

MR MORLING: I think he said you could not stop people ringing up. 30

HIS HONOUR: So the fact of Mr. Hodgson speaking to Bourke cannot be the criteria for distinction because we assume that there could have been occasions when Bourke rang Rathborne direct, it must be, mustn't it, the nature of the contact that is made? When he rings Mr. Hodgson he wanted Richardson & Wrench; when he engages Rathborne he engages Richardson and Wrench and then it is a wrongful performance of the obligation but your case is that he did not purport to engage Richardson & Wrench, all he wanted was Rathborne, the seduced one, using the Richardson & Wrench name. 40

MR MORLING: That is so, your Honour, but without getting too far down that track which I think does get into questions of fine distinction, when you look at Hodgson's evidence I am sure it would amount to this, that if a person rang up a valuer and gave the firm through him instructions to do something then the valuer had authority to accept instructions and all I am really saying is that on one construction of the hypothetical case your Honour put to me the "Instructions" would not be instructions at all.

(Mr. Morling)

HIS HONOUR: I take that. That is the crucial distinction?

MR. MORLING: Yes, your Honour.

HIS HONOUR: It turns on a fairly fine point.

MR MORLING: It would in that situation, your Honour. We would submit when you come to the facts of this case -

HIS HONOUR: On the facts of this case you say that is precisely what happened and you are calling in aid, are you not, the fact that he dictated the valuation to Mrs. Clarke, that he did it outside the offices and so on as aiding the inference that is to be drawn that he was engaging Rathborne as Rathborne and not as Richardson & Wrench?

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MR MORLING: Yes, your Honour, and that is the reason for the admission about the association between Rathborne and Bourke in relation to admittedly other business interests. So that, your Honour, we, without referring further to the evidence which goes up to page 6, we would say as we say at the top of page 7, and I do not wish to refer to the cases there which are driver cases, that in terms of the text writers and the authorities quoted by the text writers particularly that principle propounded by Salmond is so enshrined in the case that one can solely upon formulation is that Rathborne was not acting in furtherance of any tasks assigned to him by his master nor were his actions so connected with acts which the defendant authorised him to do but they could be regarded, although improper, modes of doing them.

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Having given the transcript references thereafter on the next couple of passages we say what they lead to, they lead to the result no instructions were given to the defendant to make the valuations. If it was necessary, they are saying it was not. Point 2 on paragraph 8 points out that there was no room for an argument in the case which might have been otherwise raised that this was perhaps just taking home a job for the weekend or something like that which was incidental to doing the real work in the office and I refer to this Hardie Shaw case. I may just briefly read it to your Honour. It was a case in which a photographer had a business and he had a servant. The photographer came into possession of a photograph of the New Zealand Rugby Union team which was subject to copyright. He was asked to run off some copies and I think he declined to do so and a third party suggested his servant to get hold of a printing block or whatever it was and make some copies using the master's premises to do so. It is a decision of Cooper, J., in the Banco Court. The Master was sued as and for breach of copyright and his evidence was, "Well, my servant did it, I agree, but not in the course of his employment", and at page 616,

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"The test is not whether ... his own personal benefit."
We would say if Rathborne had come back at the weekends and typed these out it would not have been profit in the circumstances, "It was not for his master's ... ten shillings as payment". Your Honour will recall, and we will come back to it later, that in Martin v. Morris both Lord Salmond and Lord Diplock making the point that the fact that servant's employment gives him the opportunity of doing things outside his employment signifies nothing as to the master's liability and that really, with respect, is what Cooper, J. is saying there. 10

We found a dearth of any cases, despite the fact we had a diligent search - in which it has ever been asserted that facts of this kind led to the master's responsibility. Of course, it is in a number of cases where you have either as in the driving cases that situation or where you have as in the Lloyd v. Grace Smith and Pickard cases a person who has both actual and ostensible authority, actual because his job is to manage a business or to run a practice or ostensible because he is placed in such a position. 20

Finally if I may add a reference on page 9 without going to the rest of the text as supporting, as we would put it, the compelling inference that Bourke was not giving and Rathborne was not accepting any instructions on behalf of the defendant. If your Honour looks at Ex.B3, with it is a large bundle of documents in which the Bourke group did indeed seek valuations from the defendant and if your Honour goes to the first one and your Honour has a sample test, either there is some times there is a letter - I think one or two from Peter Craig saying "Will you please value this land", or there is a blue instruction sheet at the back of the file which indicates instructions having been arising from the bank group, as one would expect business is not done, clients not accepted, instructions are not given, otherwise than in circumstances which show that the Master is being approached and we would point to the difference which appears from all these cases tendered by my friend and the two cases which led to the making of these valuations. 30

I think on pages 10 and 11, we have dealt with this question, the extension of credit to and by Rathborne and I need not go over that again and then on pages 12 and 13 we give some reference to authority as to the effect of the black list on the quality of Rathborne's authority. If I may just refer to par. 239 in Clerk and Lindsell, "The question whether a wrongful act ... activities". Then reference is given to some of the authorities. Your Honour will recall that in Lockhart's case in 1942 A.C. the relevant prohibition was to a servant who was engaged to drive the vehicles of his master's business though he was not to drive 40

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uninsured vehicles and that was held to be a restriction on the mode in which he performed his authorised work of driving, hence the master was not able to escape liability.

Store v. Taffe was the case of the licensee who was under a limitation from a freeholder as to the hours as at which he should require people to leave the premises in the evening, I think it was 10.30 p.m., and that again was held to be, as I recall, a restriction on the mode in which he exercised his authority to manage the hotel. On the other hand Rand v. Craig is a case we would submit rather closer to our situation. That was a case in which a builder or contractor of some kind employed employees to cart rubbish from his place of work to a dump and instead of doing that they carted the rubbish to other premises for their own purposes and under those circumstances the master was held not to be liable. It is difficult of course, if not impossible, to apply the facts of any of those three cases to our present circumstances but in our submission if one were looking only at the effect of the black list it would be more properly categorised as a restriction on the class of acts which Rathborne was authorised and employed to perform rather than a restriction on the manner in which he was to go about doing his authorised work. So that although I do not need to found upon the black list we do submit that it provides the additional support for the other factual material.

Faced with that situation my friend used the expression that this was a reliance case. He did not ever use the expression this was an ostensible authority case because he could not but he used the expression it was a reliance case and quite apart from the concessions which my friend made in argument as to what his client said there are quite specific answers to the interrogatories which indicate that the plaintiff first became aware of Mr. Rathborne's existence when they read about him in the newspapers. It is perhaps, and I do not wish to answer an argument not presented against me, but at the foot of page 14, we give reference to authority to support the proposition that the essence of ostensible authority is that the party dealing with the servant is entitled to act upon appearances. It is trite law, and I would not trouble your Honour to develop it.

Cases such as Lloyd v. Grace Smith are based upon the proposition, as we say, the master is liable for the acts of his servant and he holds out the act in a certain way. In that case of course there was not only a holding out but on the facts the dishonest servant was in fact employed to do the work of taking instructions from clients, being instructions of a kind which the unfortunate lady gave to the firm and we would submit, as we do in the B part, p.15, that

(Mr. Morling)

this just is not anywhere near a Lloyd v. Grace Smith or, I should ask your Honour to insert after Grace Smith or an Uxbridge v. Pickard type of case. Those two cases are of the same genus, the only distinction sought to be proven by counsel for the unsuccessful solicitor in Uxbridge being that the building society was not a client of the firm but in both cases you have servants who turned out to be dishonest being (a) actually employed to conduct the business of the solicitor, which business included dealing with clients and non-clients in that case of Pickard and (b) being held out ostensibly to the respective plaintiffs as having that authority. If one is to look for a type of case such as we have here, and I do not suggest these two cases are exactly in our field, but the sort of cases which we are concerned with are the Slingsby v. District Bank case and the Farquhason Bros., v. King. Slingsby's case was the case which is overlaid with quite difficult and, for our purposes, extraneous questions concerning the law relating to Bills of Exchange and cheques but it was a case in which executors of an estate maintained a bank account with a bank; the executors employed a solicitor; the executors signed cheques drawn on the executors account; the solicitor who was acting for them altered the cheques after they had been signed by the trustees or the executors; the bank paid out and the bank was successfully sued by the executors for having wrongfully debited their account and the bank sought in some way to defeat the executors demand by saying, "Well, it was your solicitor who altered the cheque", and the question was raised as to the ostensible authority of the solicitor to do something for which the executors so to speak as his master were responsible and, your Honour, the court of Appeal would have nothing of that. It is the foot of page 563, Greer, L.J. said, "The only remaining point ... written them." It is not part of a valuer's task employed to write a valuation for clients of the firm to write a valuation for people who are not part of the firm. "Everytime a solicitor ...". Then his Honour goes on to make the point but it was a case in which the bank could not rely upon the action of the person who was the servant, albeit professional servant of the executors because there was simply no holding out by the executors that their solicitor was authorised to do that sort of act. Your Honour, after lunch a brief reference to Farquhason's case.

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HIS HONOUR: I do not know that you need much more than this expression by Lord Rayner at 506 of Slingsby, "I do not myself see ... exerts."

(Luncheon Adjournment)

ON RESUMPTION

MR MORLING: I do not wish to take any time about Farquhason's case but as it is relevant to answer a submission which my friend put about the innocent party of two people being entitled to preferential treatment in the law I should deal with it just briefly now. It was a case in which the Master owned some goods which he kept at a warehouse - it is 1902 A.C. - the Master owned goods which he kept at a warehouse and he had an arrangement with the owner of the warehouse that his servant was authorised to give notices for delivery of the goods from the warehouse. That is to say, the servant was authorised to sign delivery dockets which the warehouse man would act on. The servant dishonestly signed a delivery docket to a fictitious person, got possession of the goods and sold them to the plaintiff. The plaintiff sued the master and in some way sought to rely upon the fact that the servant had authority to have the goods removed from the warehouse but the fact that the servant who had sold the goods to the innocent plaintiff was a servant of the master was quite unknown to the plaintiff, just as Rathborne was unknown here, and under and under those circumstances the House of Lords said that the plaintiff could derive no assistance from the circumstances that the servant was indeed the servant of the master. At page 331, for instance, top of the page, Lord Halsbury refers to Capon, the servant being unknown, "Nobody here ... upon authority."

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As we have the report out now may I just for another purpose to save coming to it later point out that on the next page the Earl of Halsbury refers to this so-called rule that, "When one of two innocent persons ... commit the fraud,". He refers to those words about point 3 on p.332. He says it depends what you mean by any indiscretion that one of the parties may have committed. He says there is no indiscretion in acting properly in the course of your business. Now there can be no indiscretion urged against Richardson & Wrench in employing Rathborne. There is no evidence upon which it could be suggested that Richardson & Wrench had any reason to suspect that its servant would write valuations otherwise than in the proper course of his employment.

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If I may quite briefly just make an observation or two, on most of the cases which my friend Mr. Clarke took your Honour to, and I trust your Honour my brevity is not too much but in the notes which follow the next few pages we have endeavoured to shortly note what we see to be the point of the cases for the purpose really of saying they are of no assistance in the facts of this case. In Barwick's case you have the bank manager being put forward by the bank to do the sort of acts which he performed. In Rubens' case on the

(Mr. Morling)

other hand the directors of the company had done nothing to represent or lead to the belief that the document issued by the servant, that is the false share certificate in that case, was one issued by the company. The greater importance of Rubens' case is the way it was dealt with in Morris v. Martin and if one goes to Morris v. Martin at the passages we have noted on page B of these cases - and may I say that the pages do not run in consecutive numerical order - but if one goes to Morris v. Martin (1976) 1 Q.B., it can be seen that both Diplock, L.J. and Salmond, L.J. dealt with Rubens' case and if I may firstly take your Honour to the foot of page 736 in the judgment of Diplock, L.J. - and your Honour will of course recall that here his Lordship found that as the fur had been put into the servant's hands to clean or dye it he was performing his duty, albeit wrongly, when he misappropriated it but at the foot of page 736 his Lordship says this, "If the principle laid down ... for his tortious act."

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MR MORLING: Then at about half way down the page: "The mere fact that his employment ... place to do". To the same effect, Salmond, L.J. (as he then was) says at p.741.3: "The mere fact that the ... in employing him". So that Rubens' case is recorded on high authority as being good law and it establishes that the positioning of the servant in such a position as enables him to facilitate the doing of things outside the course of his employment is to be distinguished from giving him tasks to do which then become part of the course of his employment.

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HIS HONOUR: But, of course, what Diplock, L.J. there says is the crucial distinction between Lloyd v. Grace Smith and Rubens is that in the latter case the servant was not either actually or ostensibly employed. In this case Rathborne was indeed actually and ostensibly employed to give valuations on behalf of Richardson & Wrench so that the distinction you have to draw is of a rather different nature; namely, that he was not employed to go and do valuations in his own time for his own benefit for persons -

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MR MORLING: I accept that.

HIS HONOUR: The proposition which you cite I understand and I do not know that I really need to be convinced about that.

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MR MORLING: I suppose no servant is engaged in one sense to defraud the master or to do work - no servant of the Rathborne kind who is engaged to do work for people who might be called customers or clients can be said to be engaged to do work not for customers or clients. In Lloyd v. Grace Smith I apologise for the use of the reference to what I called the hard luck rule.

(Mr. Morling)

Pickard's case was again a full authority to conduct the business case, as was set out at p.253. The only question was whether the full authority could be limited, as it was said it could not be limited, to dealing with clients. So it assists the plaintiff's case not at all, we submit.

In respect of Morris's case, I had a feeling that somewhere it was said in that case that if the fur had been stolen by a clerical worker and not by the servant whose task it was to dye it, the master would not have been found liable. It is at p.741: "A theft by any servant ... make the master liable". 10

Grant v. Norway is a case which has had a long history of being approved. I found that reference to Coleman v. Riches from one of the text writers but it is referred to in Whitechurch v. Kavanough as having been held in Coleman v. Riches in which the principle of Grant v. Norway is said to be a mere illustration of a well known rule of law. All I wish to say about Grant v. Norway, if I need to support it - because it is not only a case of considerable longevity but it is a case which has been approved subsequently - that the criticism there, certainly as it was put in Whitechurch v. Kavanough was based on two bases. It was said that it was may be wrong because of the law attaching to bills of lading, which have no relevance to our situation and it was also said if one looks at Whitechurch v. Kavanough, 102 A.C. at 125 it was said it may have been wrongly decided because the master of a vessel has unlimited authority to sign bills of lading for goods received and that circumstance again ought to have led to a different result in that case. When I say it was said to be wrongly based - 20 30

HIS HONOUR: They all say it was rightly decided.

MR MORLING: Yes, but I am referring your Honour to the argument put to the House of Lords that the case perhaps should have been decided differently. My purpose in referring to what Lord Morton says at p.125.7 is that the basis of the attack would have no relevance to the sort of case we are dealing with here. We leave the cases, saying that the ones cited by my learned friend do us no harm.

We submit on the threshold point of whether these valuations were in law those of the defendant we ought to succeed. 40

If I may pass to other matters on the basis I am not right in that submission, that brings us first to the general question of duty of care. We have given this matter a great

(Mr. Morling)

deal of thought and we have come to the view that we would not be able to persuade your Honour on the authorities that but for the course of dealing between the plaintiff and the defendant, and in the case of McMahon's Point, but for the circumstance that the valuation was of Cobban Pty. Limited (?) there was otherwise no duty of care. In other words, the necessary expertise that has been shown, the occasion being shown not to be an informal one, and I expect I have to agree with my learned friend Mr. Clarke that the limitation placed by Lord Denning in Cann's case limiting him almost to the representee has been lifted in subsequent cases - both in Evatt's case, which in that respect was not the subject of criticism by the Privy Council, and in Hedley Byrne. All the judgments seem to acknowledge other representation may be made to a class of whom the representor ought to have been aware or was aware. 10

HIS HONOUR: You accept the proposition that Kooragang was within that class?

MR MORLING: They would have been but for the course of dealing. I hand up to your Honour some further notes of what we are putting. 20

It is trite, in view of the laws of Hedley Byrne, but it needs to be borne in mind that the essence of the Hedley Byrne document is a two-way relationship. You must - and I use Lord Reid's words as being as succinct as any others - firstly have a situation where it is plain that the plaintiff was trusting the defendant and that it was reasonable for him to do that. That is from the representee's point of view. From the representor's point of view it must be that he gave the information or advice when he knew or ought to have known that the plaintiff was relying on it. Of course, both those statements of the relevant criteria involve an examination of all the circumstances in which the parties found themselves at the relevant time. 30

The position here that we now seek to develop is that, leaving aside any questions of nicety, leaving aside the fact that unquestionably these parties started off in February 1972 having in mind that they would be more formal than they ended up being in their advice relationship, nevertheless we submit that the evidence establishes that there was a settled course of dealing between the plaintiff and the defendant which can be shown to have been adopted by the plaintiff to a greater or less extent almost without exception. 40

HIS HONOUR: It is equally clear on the evidence that there was one possibility to which neither party adverted in coming to the settled arrangement.

(Mr. Morling)

MR MORLING: That is so. We would rely upon that. We would say that it did not occur to the parties because they envisaged it as being a situation which would not arise. It did not arise. It may have arisen and in respect of one other property in Tallara Road, as to which 7 years after the event all that Mr. Hodgson could do and all he could possibly do was to say, "Although we have over the years" - and I will take your Honour to the evidence about how these discussions were going on within days in respect of other legitimate matters and the plaintiff, acting on these valuations as to which it was keeping silent to the defendant - so that all Mr. Hodgson or the defendant could assume was this: "We have an arrangement. Whenever the plaintiff is going to make a loan, up until May 1973 they would always come to us and we will have some contact with them. Perhaps after May they will not come to us. They will go perhaps to Stantons. But our relationship is such that there will be some bringing home to us in a direct fashion - direct meaning either oral, voice to voice, or letter to letter - the effect of a valuer/client relationship. It matters not that the client, the person who is paying the bill, might be an intending mortgagor". That relationship goes on contemporaneously. For no explained reason on the part of the plaintiff, it simply abandons that course of business and we submit, under those circumstances it is not possible to evaluate the two sides of the coin as stated by Lord Reid and adopted in one form or another in most of the judgments since. You cannot evaluate those two sides of the coin without examining what course of dealing the parties had adopted for themselves.

HIS HONOUR: How does this approach appeal to you, as putting a point of view that you may or may not embrace. Richardson & Wrench, being in the business of putting out valuations, would expect in the normal course of events that if they produced a valuation it would be shown to intending mortgagees and reliance would be placed upon it. But in this particular case they went a step beyond that.

There was an intending mortgagee who was only minded to lend 60% of the value of the property. Richardson & Wrench took it upon themselves to suggest to these people that in the particular circumstances of their dealing they ought to lend 65%. The very fact that they suggested that invites the corollary that these people should follow the procedure and procure the valuation in accordance with this grand design. Is that within the notion that you are embracing or not?

MR MORLING: In answer to that, that part of the history of their relationship would point up the reasonableness of Richardson & Wrench believing that their valuations would not be acted upon save in circumstances where there was reference to them.

(Mr. Morling)

HIS HONOUR: I think there is justification for saying that they assumed unto themselves a fairly high degree of responsibility in persuading Kooragang that they should advance 65% of the valuation and therefore they might say, "We expected them to act in accordance with our arrangement", but is there not this difficulty about that approach: nobody has said that. Mr. Hodgson did not say - and perhaps he could not say - "I never expect that any of our valuations would be acted on, except those prepared in accordance with this design", or have I missed something in the evidence? 10

MR MORLING: It did not occur to him, your Honour. Did he not say that?

HIS HONOUR: As we already discussed the possibility of there being some other Richardson & Wrench valuation had not occurred to him - we agreed on that. If it had been necessary for him to say, "We, Richardson & Wrench acted throughout on the basis that the only valuation of ours which would be acted on would be the one conformable to this arrangement", or do I get that as a pure inference from the fact that the other thing did not occur to him? 20

MR MORLING: I submit the latter. This is the important thing, not only the making of the arrangement but two further things. Firstly, the observance of it, so far as the defendant was concerned in every case, because if it be assumed that in the case of 34 Tallara Road there was no reference to the defendant it would have been totally irrelevant. So that, so far as Richardson & Wrench and Mr. Hodgson are concerned, he made an arrangement and then, as the file shows, all of the time it has pursued - and Mr. Hodgson cannot do any more than remember some conversation which may have been with a valuer and not with somebody from the plaintiff - but in that case if he did not have a conversation with the plaintiff's side he is blissfully ignorant. Worse than that - from the sense of the unfairness from the defendant's point of view - he is kept blissfully ignorant from week to week when at the very time that the August decisions were being taken by the plaintiff qua the Bourke group somebody from Kooragang is in touch with Mr. Hodgson or his company about other matters. In an area in which action by the defendant is going to make it as legally liable as signing its name on a contract, in the sense of bringing itself under the trust relationship, in those circumstances it was surely reasonable for Mr. Hodgson to believe that the course of dealing was the extent of their relationship. 30 40

(Mr. Morling)

HIS HONOUR: The obverse side of the coin and one which does on the face of it look rather odd, if I may say so, is this: Richardson & Wrench, on the hypothesis that you are now making that Rathborne was acting in the course of his employment and could make the company liable, would be publishing or bringing into the system valuations which if shown to any other intending mortgagee would make the company liable, but not to Kooragang.

MR MORLING: There is nothing unusual about that. Take the example your Honour put to my friend earlier. If I issue a commercial hardsell newsletter saying, "Buy B.H.P. Their assets are \$100 a share and they are going to do so and so" and I say to Mr. Clarke, "You can forget about that; that's for the mugs", it is the same situation. I am liable to the mugs and not to Mr. Clarke.

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HIS HONOUR: But the difference between that situation is that it never occurs to you to tell Mr. Clarke, "They can rely on that". To make the analogy complete you have to have a situation in which you agreed to supply a newsletter to Mr. Clarke under certain conditions and he did not get the particular newsletter conformable with that condition.

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MR MORLING: He could have the same advice being at the one time actionable and not actionable depending on the person. Suppose the managing director of Lend Lease Corporation said to Mr. Hodgson, "We have a settled policy, for reasons of high corporate policy, that we don't think we should act on Richardson & Wrench's valuations in respect of our own affairs. It is much better to go to somebody outside the organisation, like Stantons". Then he says to Mr. Hodgson, "If any of the staff ask you to make valuations on matters affecting Lend Lease, don't do it. It is not on. It is corporate policy not to do it," but a valuation issues. It is just a valuation which fixes the fair market value. That may well give rise to a cause of action if it got into the hands of X, but if Lend Lease or one of its companies got into liquidation and the liquidators decided to sue on them, surely Mr. Hodgson could say, "The one thing that was clearly in my mind was in no way was it to be relied upon by Lend Lease". Their course of dealing with what was their document is one case and the other case might not found what I should call a duty situation.

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HIS HONOUR: I accept the point and it is a good example. The only difficulty that I am grappling with is in the situation that you have put there is the explicit exclusion or disclaimer or prohibition, however you like to term it, whereas here the parties just did not turn their minds to it.

(Mr. Morling)

MR MORLING: I must accept that. When I come to deal with this matter later I will endeavour to say something about what Mr. Hodgson says at p.64 about that. When it is looked at it is altogether taken too much by my learned friend.

This is not an ad misericordiam argument but it is one fairly based on the policy of cases such as Hedley Byrne. This new cause of action, if I could call it that, is one to be looked at carefully as not being a beast that will get too out of hand. If you cannot bring yourself within the four corners of the judgment then you have not the cause of action.

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But where words are used such as "It is plain that the duty situation was recognised on both sides", that is, we submit, a direction to fact-finding tribunals that that plainness of proof of the trust relationship, the duty relationship, is to be looked for and if a plaintiff wishes to put himself in a position where he has an actionable cause of action then he has to do more than is done in this case - that is to say, suggest more than a relationship with the defendant pursuant not to the defendant chasing him than, so to speak, catching him.

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HIS HONOUR: If there was no duty apart from the arrangement between the parties then what you say is undoubtedly right to plead in the sense it is an exclusion of a duty which would otherwise arise -

MR MORLING: I would not accept that as a pleading point. It is the plaintiff who has to, in Lord Reid's terms, bring about a plain situation of trust. It is not a position of us excluding.

HIS HONOUR: He brings that about by pointing to the fact that you hold yourself out as skilled in this particular enterprise and then you publish the valuation, and that is the evidence.

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MR MORLING: I accept that, but what he has to do is to come to your Honour when all the evidence is in. It is not a question of him excluding something. He says, "Here are the ten facts. Let us look at the ten facts and could I convince the court it should have been plain to the defendant he was being trusted by me". It is not a question of looking at it this way. He proves three facts - that I am an expert, it was a formal valuation and it was careless. He has to say, "Here are four facts. (a) You are an expert; (b) it was a formal valuation; (c) it was careless; and (d) we have a separate relationship".

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(Mr. Morling)

HIS HONOUR: I have not read Hedley Byrne. As I recollect, these facts ground the duty but then there is a disclaimer.

MR MORLING: There is a duty and having found the duty I would have thought you could at least look at it this way -

HIS HONOUR: You will get into an onus situation, which lands you in difficulty.

MR MORLING: That is why in these notes we really do not put disclaimers in differently.

HIS HONOUR: I can see it working much more easily in your favour if before the duty ever arises you import into the matrix of facts the arrangement as distinct from saying there is a general duty, and then you get - 10

MR MORLING: May I put it this way. The duty only arises if the relationship between the parties, be it social or business or adviser and client, and so on, is one from which the duty can spring. I will not get caught on a kerb-side opinion or one given in the pub, but I might, if the circumstances make the occasion more formal in a sense, which only means I should have appreciated I was being trusted. We would say that the course of dealing between the parties categorises their relationship as much as in another situation the social relationship between the parties might categorise theirs. In other words, you must look at the circumstances in which the parties found themselves - whether as neighbours over the back fence, drinking friends in the hotel, or business people more solemnly discussing business affairs - in order to make their initial and perhaps ultimate decision as to whether at the given time the parties were in such a relationship as to fairly impose on the defendant the duty. 20 30

HIS HONOUR: I take your point. I have got a great deal of sympathy for it. I do not think you would ever hold it if somebody took you on appeal.

MR MORLING: With respect, I would like to hear what authority your Honour feels would negate that situation. It is essentially a valid proposition flowing from the fountainhead of Hedley Byrne.

HIS HONOUR: I do not think one can get away from it that we are striking out to some extent, albeit it is a different fact situation, but ultimately it is a question of judicial policy when you get down to that position. I am in sympathy with the view that you put, but I can see how it might be put the other way. 40

(Mr. Morling)

MR MORLING: I do not think I could put it any differently.

HIS HONOUR: One of the questions of policy you are putting is that in order to get into a different situation one would have to envisage every distinct possibility which could arise and make provision for that in striking a separate arrangement with X in order to ensure an absence of duty. That would be the corollary to you being wrong, which is really imposing a hardship.

MR MORLING: At the top of p.2 of the notes on duty of care I refer to some references in the transcript. The time which was then taken of about an hour in evidence was, I hope, worthwhile. 10

And following, one can just, by doing a little exercise, do the exercise which is partially done on p.3 of these notes. What I did was to pick out August and December as being fairly critical times because, without being specific, what happened in relation to Glebe was that the application for the loan came in on 28th June by Mr. Gridiger's (?) letter. Inquiries went out from the plaintiff to the group or its brokers for more information. The board was meeting in August. In fact it approved the loan on 25th August and clearly the second half of August was a pretty critical time for making the Glebe loan. Later in deciding to make the loan your Honour will recall what happened. 20

Then the cross-examination throws up these dates. I would not have any doubt that they refer to the actual files which may well throw up more bits of material but looking in August you have got within a fortnight, before 27th August, a letter about Coogee Bay Road, a telephone call about Bay Street, the reference to the telex is a bit equivocal but reading it one rather assumes that shortly before that they telexed Melbourne. Then on 25th August another letter regarding Bay Street and then the same sort of thing in December. So that at the very time at which those sorts of - not daily but twice or four times a fortnight - communications were going off, the plaintiff, without any explanation afforded to the Court, simply says "We won't tell our advisers about this one. We will work it ourselves", apparently. One can only assume - and it is that sort of situation there which it is said we ought to have known, this defendant ought to have known in respect of this plaintiff, that a valuation of this which bore no initials, which did not have the information in which it was basic to the plaintiff's requirements in respect of leased property would, contrary to their understanding, be used. We would with respect submit that viewed in that light it just takes the relationship between this defendant and this plaintiff outside that which might have been found to exist between this defendant and any other plaintiff not a party to such a course of dealing. It is not as if, in respect of Tallara Road, for instance, the evidence from 30 40 50

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Mr. Hodgson or Mr. Little or somebody was, "We took the view about that one that for whatever reason we would not require any check valuation or anything at all and at some state in our discussions we told Hodgson that there would be occasions when we would not be referring to it". As we will see later, in respect of the other aspects of this argument, there were about eight or nine occasions when valuations from reputable valuers, not Richardson & Wrench, were furnished to the plaintiff and on every occasion without exception they were referred to Richardson & Wrench for confirmation.

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So my friend can't say such is the expertise of Richardson & Wrench that they should have appreciated that, as was not not the case with other reputable valuers, there would be no need to even lift the telephone or write them a letter about a valuation. It was done in every case as far as Richardson & Wrench were concerned. So that we would with respect submit that the existence of the duty has to be determined against what is said on pp.3 and 4. My friend has said, and correctly, "When our clients commenced this relationship, if you look at the letter of 21st February there were to be separate land values on this, that and the other", and that is true. But it is quite clear that the essential relationship and consultation was maintained on all occasions so far as the defendant was concerned and on all occasions but one up to the end of the relevant period in 1973 so far as the plaintiff itself was concerned.

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Really what my friend has to invite your Honour to find against the background of that information is that although Hodgson did not turn his mind to the situation which happened, that is to say, in terms of the authorities he didn't know he was being trusted, he ought to have known.

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HIS HONOUR: I think that is putting it too favourably from your point of view. The way Mr. Clarke is putting it is that Mr. Hodgson knew he was going to be trusted by intending auditors. He did not turn his mind to Kooragang in particular. He had turned his mind to an amorphous class of intending members and it did not occur to him whether or not he should include Kooragang in that class.

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MR MORLING: Perhaps that is a more correct statement of it, your Honour, and this may be a convenient time to say what he did say on 264 and it seems to me it would be a bit equivocal in any case. At .6 "Equally as I think ... (read) ... by Y". stopping there, it does not necessarily flow from that that the loan which may be ultimately made by Y will be made by Y on a Richardson & Wrench valuation which has not been the subject of some communication. The next question, "And the

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same statement ... (read) ... lender". That answer is difficult to follow. "They" I suppose is referable to X, the person who is named in the report so you cannot tell from that whether he is saying "No, I don't agree that there would not be a restriction on using it" or he says "Yes, I do agree there would be no such restriction". In any case, he is saying that I had in mind that the person to whom it is addressed is still the intending borrower. Again, non constat there may come a time when the person can't get his loan from X. He might go to Y but again it does not flow from that that there will not be some communication. Going on, "I think it was ... (read) ... quite". If I can read it again, "A person might ... (read) ... for a loan" and that would not apply to, for instance, the Cogdon valuation because the form of the question is such that the purpose of the valuation report is not known to the valuer. Next question, "In those circumstances ... (read) ... another valuation". Again, non constat, require some observance of their settled relationship and consultation and he says, no, most lenders would require a retyping of the valuation. He has had experience of that kind. So, your Honour, there is nothing at all there to found an argument that Mr. Hodgson anticipated that any valuation by him would be acted on by Hodgson outside the course of their dealing. 10 20

HIS HONOUR: I don't think it matters a great deal but probably to get a fair appreciation of what Mr. Hodgson says at 264, you would probably have to start at the bottom of 263 where I asked him "There is no doubt ... (read)". All I was going to say was that is in more general terms.

MR MORLING: And what follows is in that broad general position. And, your Honour, nowhere, if Mr. Clarke had wished to obtain from Mr. Hodgson a concession that he, Mr. Hodgson, in respect of the McMahons Point valuation anticipated that a valuation directed to a named mortgagee might be used by another mortgagee, being this plaintiff - I stress that, being this plaintiff - without reference to the defendant, he should have put that question and the answer I would have thought would have been a resounding negative. Again, if Mr. Clarke had wished to obtain an admission from Mr. Hodgson, say, in respect of the McMahons Point valuation, that valuation issued by his company to a named mortgagee not being Kooragang, might have subsequently come into Kooragang's hands and been acted on by Kooragang without reference to him, I would submit he should have put that to him and it does not at all follow from what Mr. Hodgson has said that he would have expected Kooragang to have acted on such a valuation without reference to him. 30 40

HIS HONOUR: As distinct, perhaps, from someone else?

(Mr. Morling)

MR MORLING: Yes, your Honour. Then, if I can pick up on p.4 and go on to less contentious ground - both the valuations of Glebe Point and McMahons Point made no reference to the plaintiff's next requirements so far as rentals were concerned where leased property was being mortgaged. What we have to consider here - I think I am right in putting this in law - is that it was reasonable, looking at it from the plaintiff's point of view, for it to be holding Richardson & Wrench responsible at the time it acted on the valuation, not merely when it received it because it didn't act on it in June. We have to find that it was reasonable for Kooragang - if I can just talk about Glebe for a moment - as we would say both five months and nine months after 26th March, 1973, to act on the valuation and in respect of McMahons Point you have to find that it was reasonable for them to act I think 114 days after 14th June when the loan was made on 5th October.

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HIS HONOUR: Can I take you back for a second? You are now on the point of lapse of time. You were not intending to say anything more about the absence of rental information?

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MR MORLING: I was going to say lapse of time, lack of rental information, absence of zoning information in McMahons Point, photostat copy - a matter on its own of insignificant interest but when wrapped into the total picture your Honour has to find that under all those circumstances it was reasonable for the plaintiff to act on the valuations at the time it did.

HIS HONOUR: Can you put it another way? and feel free to reject it, of course, that skilled valuers as they were, Richardson & Wrench, should be taken as publishing these valuations for all intending borrowers to rely upon - the category of intending borrowers to whom these valuations were intending to be published and who were entitled to rely on it did not include those who wanted rental information. In other words, you restrict your class in that way. Do you think it may be a more acceptable way of putting it rather than the way we were discussing earlier?

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MR MORLING: Yes, certainly that is at least as acceptable.

HIS HONOUR: Because then it seems to me that any specific arrangement that you make takes its place more readily in the approach that the law seems to make to the class of persons to whom you owe your duty. Tell me which way you yourself would couch it?

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(Mr. Morling)

MR MORLING: I would adopt that for this reason, it does not become again immediately apparent as being as strong as it is until you wade through some of these files. You see that in the early stages there is in the valuations, as I recall them, a recitation of the rental position. Then later the properties offered for mortgage are not leased. There are clearly some convalescent hospitals leased for business and not subject to rental arrangement so there is obviously nothing nor could there be an evaluation about rentals so that it adds point to what your Honour is putting to me that the sort of person whom Richardson & Wrench -

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HIS HONOUR: To whom these valuations could be said to be directed to those who were not interested in land or did not require rental information?

MR MORLING: That is so, your Honour.

HIS HONOUR: The substrata in that assumption is that in all the other ones where it would have been relevant, the rental information - I have not been through the files so I would not know one way or the other.

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MR MORLING: I am not saying it is the case in every case because the properties vary. For instance, in Wentworth Avenue it is apparently a car park. It is an old building which is said to be for development so you cannot be dogmatic about it. I realise perhaps I too easily slip from one argument to the other but it is perhaps convenient to raise it now - the plaintiff has to show that it indeed did act on the strength of these valuations. I know that the witnesses - one would expect them to say "Yes, we relied upon the valuation" and those words in the transcript have to be judged in the light of what happened and this goes to the rental question again. What in fact happened was that they had to take Glebe Point - they had this self-imposed and no doubt prudent ruling that they did not advance money on the security of leased property unless the rental was very sufficient to service the loan. When they made that loan they made it in the sense of advancing the money nine months after the valuation which did not give them that necessary information, having obtained that information as they thought themselves. In McMahons Point they made the loan on the valuation which was three months old. Again, not having the information which their own code of conduct required them to have before they could do this, that is to say, the rental information. These valuations were such that the plaintiff could not, abiding by its own criterion, say that they could for their purposes act on them as valuations of a kind which were sufficient to base their lending decisions. With great respect, your Honour, the facts we submit speak very eloquently of a moneylender who has departed from his own course of conduct set by himself

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(Mr. Morling)

for himself, departed from his settled procedure of getting advice, departed from the ordinary prudence of checking on the information which was given to him behind the valuer's back, come a cropper and looked for somebody to attach blame to. With respect, that is a fair categorisation particularly of what happened in Glebe and we submit it is so far from the situation - and Barwick C.J. refers to this - it is so far from the situation in Hedley Byrne, where you have a precise credit inquiry which is so much the trigger of action by the representee as not to be a comparison and so far from the case where the auditor certifies accounts with precision which can be believed to be of such a precise kind to be acted upon that, again, it does not bear comparison.

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We would submit that whether you look at those facts as we would say they should be looked at as being relevant to the question of the existence of the duty or whether one finds not only the duty and looks upon them to examine whether the inference can be drawn from that, that the defendant was only accepting responsibility in those cases in which the course of duty was being followed, the result is the same and we would submit that the plaintiff would not succeed and therefore has not either made out the duty or, if it has, loses the benefit of it in this claim.

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If I can now come to more pedestrian ground, whether the valuation was too high. With respect, my friend very carefully argued on valuation and I submit he has not really addressed himself to the problem of McMahons Point. If the evidence in this case had been this - McMahons Point was sold in May 1973 for \$185,000 that that evidence would be taken by any valuer putting the best approach to the valuation and there is no evidence to put against it, then he would have a good case because under those circumstances you can say without explanation from the other side, how could you get from 185 to 250 and I would not I think have enough ingenuity to answer that argument. But we have to turn to the evidence and it is quite clear Mr. Leafe said in terms of these three pages referred to on p.7 that he valued the land on the basis of capitalisation of rentals and, of course, he said he agreed you could have a sale which is out of line and he said "I have no sale to compare this sale against". So the correct thing to do is to take capitalised rentals, so my friend gets little comfort from the sale price of land where his own valuer does not take it as a preferred approach. Then once you get into a valuation based on capitalisation of rentals we would submit that it becomes an exceedingly difficult task to prove, as we can show Mr. Leafe's evidence, to prove that a valuation thirty to forty per cent above another valuation is not merely too high but negligent. On p.8 we make the point that with all the fuss and bother about this case, that

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(Mr. Morling)

a valuer, knowing he has got to present himself in the witness-box and be cross-examined and compare that situation with the valuer going about making valuations in the ordinary course of a business, with all that he still had to revise his rental figures on the day of the hearing and did so. That points out a very important point when one approaches the valuation evidence in this case and applies it to the allegation of negligence. Every valuer in this case has, quite properly, resorted, as valuers always do, to information which they get from various sources. It might be said that first there is no evidence of what information Rathborne had as to rentals. That is a fair comment but it is clear that Mr. Leafe himself would have varied his figures according to what the rental position was. When you look at his evidence the rental figures he took were based on rental figures written some time before the relevant date, he not knowing when the next re-appraisal date was. So that another valuer could take the view, as indeed Mr. Woodley took on Glebe, that often rentals were not a sure guide to future sustainable rentals.

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But Mr. Leafe said at the foot of p.8 and p.9 that competent valuers could disagree between themselves about virtually all the ingredients of a categorised rental approach. With respect, how can Mr. Clarke say that valuers could only differ by five per cent when Mr. Leafe says you can certainly go one percent up or down from eight per cent? That is twenty five per cent in one hit. From eight to ten percent is twenty-five per cent assuming the valuers are in entire agreement about every other dot on the calculation. Then, your Honour, the two calculations on p.9 are straight from the transcript. I have thrown in the one on top of p.10 because if one looks at the transcript one sees that Mr. Leafedisagreed with me and he made me equally right when he had agreed that there could be a ten per cent variation in outgoings and therefore to be on the safe side I have done the calculation in the range of five per cent although without splitting straws about it I think I was closer to being correct about it than he was because I was putting to him that he had allowed \$100 per flat for repairs. Another valuer might well have allowed \$80 and there were twenty flats in this building and that is \$400 difference alone.

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HIS HONOUR: The problem really is, is it not, that if I take the view Mr. Clarke is inviting me to take I would be saying to myself for the moment, "Well, here is Rathborne who, outside his usual duties and for reasons we know not but can suspect, is producing a valuation away from Richardson & Wrench and by good luck and good management he manages to hit on -

(Mr. Morling)

MR MORLING: I would submit all my friend can get out of Rathborne's conduct is he made a valuation of \$250,000 and (a) it was to use a collaquiallisma foreign order -

HIS HONOUR: So you say it is perfectly consistent with Rathborne exercising the highest skills of the valuer and pocketing the money for the valuation.

MR MORLING: Yes.

HIS HONOUR: That is inconsistent with his sitting there dictating valuations to Mrs. Clarke. 10

MR MORLING: No, it shows him to be dishonest qua his employer, dishonest use of time and I accept that but it does not go to his credit as a valuer.

HIS HONOUR: The evidence is indubitably speaking with one voice that he is sitting reading to Mrs. Clarke and she typing the text of previous valuations on which he puts different figures. Why does not that lead me to the inference he was not valuing at all, he was just putting nice high figures.

MR MORLING: I would have thought your Honour's remark to my learned friend was sufficient answer. I have forgotten what that particular property was. 20

There were three or four of them. If he were valuing, let me take first of all a cottage and secondly, a property, say 23 Glebe Point Road. If there had been no change in the zoning, as there well might not have been and no change in the improvements, all that would call for would be a re-writing of the figure. One cannot deduce from that that the valuation was not proper. Indeed, except in the case of a leased property, a valuation of a leased property, which valuation specified rentals which would require revision, it might be difficult to think of a reason why you would change the text. It is not like giving a legal opinion where the facts differ. If you were asked in 1973 without reference to any set of facts, what you thought section something of an Act - what a word meant - you might give it without changing it one bit unless there were different facts when you gave the same advice 2 years later. 30

What my friend has to do is say the valuation was \$250,000 and \$160,000, here is evidence of value from which the court can infer negligence. 40

HIS HONOUR: There are those facets of inaccuracy in the valuation which I think Mr. Clarke says themselves cast doubt.

(Mr. Morling)

MR MORLING: In respect of McMahon's Point.

HIS HONOUR: There was one where the renovations were not complete.

MR MORLING: That is Glebe Point. I don't think he made a similar attack on McMahon's Point. I will come to that.

Before I leave McMahon's Point, Mr. Leafe's valuation of \$185,000 involves the approach of not allowing anything in that value for future re-development value and that is a matter which (p.142.9) he agreed was a matter upon which valuers could disagree. Indeed, one would readily think that; so that we would submit we have from Mr. Leafe's own evidence a factual situation from which negligence cannot be inferred.

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May I come to an analogy on that. Supposing it is a case of medical negligence and supposing the negligence alleged is that the plaintiff was prescribed 10 mgms of some drug and that was the negligence. The plaintiff called a doctor who says "In my opinion the proper dosage" - and let me assume also to make the case against me that there is a lot of evidence that the defendant medical practitioner was drunk or affected by liquor at the time he gave the prescription so that it might be said in prescribing 10 mgms he did it out of drunkenness and not out of a sense of judgment. The plaintiff's expert evidence to the effect I would have prescribed 7 mgms and I calculate that in this fashion from these criteria. I agree as between competent doctors we could disagree up to a certain figure which would include ten - and essentially that is the problem here. We submit in that situation there would not be sufficient to found a case of negligence. That is all my friend has done in respect of McMahon's Point.

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HIS HONOUR: You say there is no substance in the complaint which Mr. Clarke makes but you don't know how Rathborne arrived at his figure. Do you say it does not matter even if he plucked it out of thin air if the figure is within the permissible range?

MR MORLING: I certainly would, I would say if a valuer feels sufficiently confident of the value based on his experience to express an opinion of value, it is not negligent to simply express the opinion if of course he is solidly astray, shown to be solidly astray, he could be in trouble but it is not negligence in expressing an opinion. It could not be the case otherwise a doctor who correctly diagnoses from his wealth of experience without an X-ray would be negligent in his diagnosis if he did not have an X-ray.

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(Mr. Morling)

Then your Honour I will leave McMahon's Point, but before I do if, when your Honour moves the Glebe Point valuation evidence your Honour leaves that with the understanding that two competent valuers can vary as to one hundred per cent between themselves and that is the case in 16, 128 in Glebe - that evidence comes to my aid in a case where in McMahon's Point the valuation is nowhere near that much above the plaintiff's value.

In respect of McMahon's Point if one goes to the valuation you will see that Mr. Rathborne values the land as having two components. He talks about its holding value and its future development value. The expression he uses is, "Our valuation given under has been made having regard to the earning capacity of the property in its existing use and its future potential for multi-storey re-development".

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HIS HONOUR: I take your point as to the future development but the trouble I have is this, if I go back to your case, X,Y,Z, there is no room for three cases in a situation where you are looking at the one property which definitely has one gross rental and one outgoing.

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MR MORLING: No, with respect your Honour it has not. Valuer X might do, as apparently Mr. Leafe did. He might say Show me the rent statement and I will work it out from that and he says I won't ask whether those rentals were fixed two years nine months ago and I will re-appraise in three months. I will take that value.

HIS HONOUR: You are saying the property might not have been let at the best rentals?

MR MORLING: They may have been - well it may have been that in the valuing the land there could be a difference of opinion between the valuers as to the likely future sustainable rents in the evidence. Mr. Leafe agrees it is that which governs valuation and in the transcript notes I think there is a reference to that. Mr. Leafe said, and it is worth referring to, I think it is 15%.

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HIS HONOUR: I looked at the reference.

MR MORLING: 137.5. He said competent valuers could disagree as to 15%, "Might disclose a discrepancy of up to 15% ... yes"

HIS HONOUR: The stress is on the word sustainable as to rentals. 40

(Mr. Morling)

MR MORLING: I have taken a 5% variation. I got to a variation from 220 to 270 on 5%. By taking a 10% the variations are extraordinary. That is the basis of that evidence. In respect of Glebe Point - and I apologise that the notes on this matter are quite incomplete and may be if I could briefly supplement them so far as Mr. woodley's evidence overnight.

If I could talk generally about those two valuations, it would be common ground, and I think Mr. Gilbert concedes it, that comparable sales is the conventional preferred basis of valuations. As Mr. Woodley said it shows you what the market will be. Mr. Gilbert says, "Mr. Gilbert does not give a valuation at all on comparable sales". Mr. Clarke yesterday afternoon tended to suggest really there was some basis for Gilbert's evidence on comparable sales. There was - there just isn't. As to Mr. Gilbert I say quite uncritically in one sense - but he wrote his valuation at a time your Honour would find it was a time when he did not have the notes which refer to 1976 sales. I do not put this point otherwise than to say that he, so far as his valuation was concerned, in 1975 picked the figure of \$60,000 without giving any reasons at a time which must then have been in the most despairing part of the bust following the boom.

There are no sales, no evidence in the valuation then made to justify the figure and his notes, which refer to transactions subsequent to April, 1975 when his valuation is dated, would seem to indicate that he is mistaken and I do not say anything other than honestly mistaken about when those notes came into existence.

But your Honour the fact is that there is as good a basis for comparable sales valuation of the Glebe Point property as you would wish to have. The sales are not only proximate in point of time, which is often critical in a rising market, there were four sales referred to, three in 1973 I think within a couple of months of valuation date. They are proximate in terms of improvements when your Honour sees them, one two-storey, an old type of building in Glebe Point Road and proximate in terms of location.

With great respect to Mr. Gilbert it is astonishing that he could make a valuation of that land in Glebe upon the basis that there were simply no comparable sales evidence, so that we would submit that your Honour -

HIS HONOUR: Are you going to deal with the problem that those sales were, to some extent, to sitting tenants who re-sold?

(Mr. Morling)

MR. MORLING: I will do that but if I could make this point, I think it almost removes from the area of serious debate the question of a rising market. Mr. Woodley's valuation founded upon four sales, three sales of which took place, 175, 12th January, 1973 - and stopping there - we are talking about an element of two months escalation in his valuation. Your Honour recalls this morning Mr. Clarke said seven was too high. Perhaps 3 would be appropriate. I will be able to demonstrate from Mr. Gilbert's evidence he would assume up to 6%, the only area for debate about 175 for the moment is whether Woodley was right to upgrade by 7% for a two month period - 3% - the period means little.

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The next page he assumes January 1973 so the same applies to 155, it does not require adjustment at all. So the 7% figure only becomes relevant when you go back to the sale of 237 which is by no means on its own as an isolated piece of evidence. If I could make good my observation about what I get from Mr. Gilbert's evidence on a rising market. Page 109.6 He is being asked questions about 237 the subject of the sale in May 1972. The burden of what appears on the half-page, the first half-page of 109, it is being put to him 237 brought what, so much ten months before valuation date, what do you think it would have brought at valuation date and about mid-page he says, and it is being talked about in isolation, that is to say if it had not been incorporated into the combined premises he says, "Between 30 and 35 thousand dollars". So that he is prepared to accept the ten months rise for the same property taken in isolation from 22½ to the upper limit of 35. That works out at something slightly under 60% in ten months, which is 6%. That is his evidence that has nothing to do with the Glebe sitting tenants. That is his opinion of what that might be. This question of escalation of values has minimal effect on Mr. Woodley's valuation. It may be useful to say this, as your Honour is having a view tomorrow, put altogether on one side any question of a rising market. Look at Woodley's valuation and look at a property such as 155 Glebe Point Road as to which Mr. Gilbert says, "It is down the fag end, the tail end of the shopping centre" and there can be no disagreement about that. It is in a poor area, the immediate junction of the two main roads, no need to worry about escalation of price, the contract date is 4 days off valuation date, \$41,000 and only look at the comparative position. I ask your Honour to look at the evidence and also have regard to the physical re-building or renovation of the subject premises. Then ask yourself the question how could you possibly get to \$60,000, Mr. Gilbert's figure, for a single shop next to the T.A.B. or thereabouts, for a property that sold the same day, whether for the same purpose of real estate agent for \$31,000. It is absurd, with respect. You can test Mr. Woodley's valuation in that layman's way.

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(Mr. Morling)

We submit your Honour would have little doubt in accepting (a) the comparable sales approach was open and (b) that Mr. Woodley's approach to it is sound.

HIS HONOUR: Let me take that, say 31,000 times 3 is 90,000 odd and it has been renovated and consolidated.

MR MORLING: And a car park.

HIS HONOUR: And it is still pretty short of 160,000.

MR MORLING: 130,000 - short of 130,000.

HIS HONOUR: Three times 31, plus renovations, plus car park.

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MR MORLING: You have to allow for adjustments - 93 and add to that the better location. You are up to \$110,000 and add the improvements and car park, up to 130,000. This question of valuation is very important too, not only on negligence but also on damages.

(Further hearing adjourned to 10 a.m. Friday
20th June, 1980.)

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION) NO. 3568 of 1976
COMMERCIAL LIST) CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED V. RICHARDSON & WRENCH
LIMITED

ELEVENTH DAY: FRIDAY, 20TH JUNE, 1980

(Mr Morling stated he had asked Mr Clarke whether he could agree, to save the tedious task of checking, that every valuation issued by Richardson & Wrench to Kooragang bore the initials of a valuer in the box on the front page and in those few cases in which formal valuations were not given but written communication was had on matters, then somebody's initials appeared on the letters) 10

MR MORLING: If I could turn back to the question of liability to deal with one question your Honour put to me yesterday. Your Honour said that I did not call evidence because I was not able to call evidence from Hodgson to the effect that he, back in 1973, did not think that the plaintiff would act on a defendant's valuation without some consultation. 20

It may be I took too much out of your Honour's question but if I may deal with that as a proposition in any case. What I think the evidence is, and I would think fairly understandably, that he did not turn his mind to the situation. Could I remind your Honour in the letter of 21st February which, so to speak, was the fruit of these discussions, the paragraph which reads, "We confirm that in all applications which appear suitable to us we will ask you....." And the second thing, so far as Hodgson was concerned, that was happening, that is to say if there were an exception in 34 Tallara Road, he was unaware of it. 30

Supposing the evidence had been as it is not - supposing he said, "It did occur to me back in 1973 and I thought about it and I thought that they would not, because of our correspondence and discussion, act on a valuation without reference to me". I would not have thought that would help me, it would be an objective test as to whether he ought to have foreseen it and the fact he did not would not have helped me much. I would concede it would be an objective test and you would have thought the passage of time, coupled with the reference to all valuations, would be well sufficient to afford him an answer to say, I ought not to have thought of it". 40

P. 11 of the notes on evidence. I will make one or two additional observations. At the foot of p.11 he recognises, and we don't criticise him for this, the variability in rentals. In respect of office rentals he accepts it could be \$1.50 to \$2 per square foot and when one points up to unreliability of rentals as an approach, if you have sales evidence available - secondly the area for legitimate, certainly non-legitimate and even more certainly non-fraudulent differences where that is a possible method of valuation. It would seem fairly clear on the evidence that Mr Gilbert - and again I am sure honestly - 10 had an honest faulty recollection of market conditions as at March 1973. He said it was becoming tight at the point of time and that would, on the balance of evidence, seem to be a rather premature time to fix the market as becoming tight.

HIS HONOUR: He put it in a curious way, he said in retrospect the crest had been reached, if I remember the phrase correctly.

MR MORLING: The middle of p.12. If I could point up the effect of his evidence as to the rising market. This is just in elaboration of my submission yesterday. Really in this case the precise degree to which the market was rising is of almost no consequence in the ultimate when you come to look at Woodley's valuation. At p.109.6 Mr Gilbert talks about the increase in value which would have occurred to No. 237 if it had been sold as a single shop in 1973. My friend cannot have it two ways and nor can Mr Gilbert. The rise is about 60% - probably about 58% in that 10 month period - if you go from \$22,500 to \$35,000 but if \$22,500 - it was high because it was purchased by an adjoining owner and the market price to anybody but the adjoining owner was something else - then the rise becomes greater so that something like 6%, and it only has to rise 1% until you are in the Woodley opinion area. 20 30

Then may I refresh your Honour's recollection from this morning's view about some of the difficulties in the rental approach. There is not any doubt that the rear of the subject premises has a different potential from any of the premises which were generating rentals and which were used. It could be said that is the same when the sales are compared but it is a matter which very much goes to utility of use and what people will pay for rental space. 40

The other thing is this, that some of the rentals and transactions referred to by Mr Gilbert are in a position fairly remote from the subject land, up in the 300's on Glebe Point Road, the task, for instance, of analysing the rentals in a property up in the 300's which consists of a shop front which seems has to only trade actively and as to the rest a sub standard rental accommodation and to seek to apply criteria derived from such transaction to the subject land is a difficult one. The task, as Mr. Woodley said, of trying to make applicable to the valuation that subject 50

land the lease of the TAB premises with obligations to carry out structural repairs and so on is very much complicated and more so than a relatively simple ordinary task of taking rentals for shops such as 127 and making your appropriate allowances for differences in the area and differences in the finish of the structure and so on. Therefore we submit Mr Gilbert set himself a difficult task when he went about seeking to value the premises in the way in which he did.

If I could now turn to Mr Dillon's approach. I will recapitulate what I said yesterday. If one puts entirely on one side the sale of 237 Glebe Point Road and goes to his three other sales and work backwards. We have 155 Glebe Point Road which is \$31,000 and no need to complicate the comparing exercise by reference to time. It is agreed between the valuers to be an inferior location which was purchased for a real estate office and it brought \$31,000. Nothing could be done with it, it was so narrow. You could only ever park one vehicle. The second sale coming up the hill is the butcher's shop, still an inferior location which is agreed between the valuers and again sold at a point of time which does not require any major adjustment - 3, 4, up to 7%, it would not matter which figure you took.

We submit on the evidence Woodley's figure is to be preferred. You come further up the hill and you again have almost no need to complicate the exercise by reason of difference in time. So that you do not approach the 237 sale in a vacuum. This is what Woodley said. He said he knows all about the problems of a sale to an adjoining owner. He said there were plusses and minuses in this situation which had to be taken into account and he did take them into account. He does not find that the price paid when escalated is at all out of line with the prices paid for comparable properties but was that taken in totality. He has a very firm basis for comparable sales valuation. Could I say this about the notion that the sale of 237 should be discarded as it was in its entirety by Mr Gilbert - not that he dealt with it or said "I will adjust it" and referred to it in any way. It was not considered. It is a misapprehension to say that because a certain price is paid for an adjoining sale the whole of the site cannot, as a matter of valuation, valid practice be valued by reference to that sale because if the highest and best use of the consolidated sale is as a consolidated sale then the price you have to pay, so to speak, the consolidation value price you have to pay is the evidence of what it is worth as a consolidated sale.

Supposing four adjoining parcels of land each 25 foot frontage sold singly will bring \$25,000 each. Supposing I own three of them and I buy the fourth, the reason being,

let us say, that I am a publican to have a car park or to extend my car park makes that parcel worth to me not \$25,000 but \$35,000 so I end up with four sites which to me, as a publican, are worth \$110,000 and to anybody else wanting to use them as four separate sites they may only be worth \$100,000. But, if I was a publican and offered those four sales in the market in the trade then if I am right in my assessment it was worth to me as a publican \$35,000 to add that parcel to my holding. I then go into the market with an aggregated parcel which, to a person wishing to use the premises for the same purposes as I apply them, is worth that sum of money. In other words there are various reasons why a person, an adjoining owner, may pay more. 10

It may be, and there are other cases where you could show that an adjoining owner pays more just because he is wealthy and does not like his neighbours and does not like to have neighbours and is happy to buy a parcel of land and keep it, if vacant and pay a ransom price for it. He could never recover in the market. I accept in that situation there would be valid reasons for discarding a comparable sale of that kind. 20

The illustration is obvious. One could think of a grazier who is prepared to pay \$1,000 an acre for 5 acres of land to give him a river frontage, an access point to the river. Whilst that would not be evidence of the value of other lands, it should be very good evidence of what his parcel would be worth if he was offering his own parcel in the market with a water-frontage because it has added to the value of his whole holding. So that all we say is, when we look at the 237 sale, it has been intelligently used by Woodley, not in isolation but by comparison with the other non-adjoining owner sites. 30

The only difficulty about its use is that it is old in point of time of sale. That is a clear difficulty. There is no question about that but that is the only difficulty of any consequence. If you can form an opinion about what that land would have been worth in 1973 then it is a useful guide.

Could I ask you to look at the rental evidence, Mr Gilbert's rental evidence. We saw it graphically this morning. We saw, for instance, that premises - the first item on Mr Gilbert's rental evidence, 329 Glebe Point Road. I concede it is May 1974.

It is 4.44 per lineal foot which, on my rough calculations is near to \$15 per lineal metre which is the figure Woodley takes for the subject land, the subject building. I have made a rough conversion but the take-away food bar we had a look at converts to about \$13.50 per lineal metre - \$4 per foot. makes it 3½ times that - that is about \$13.30 per lineal foot. 177 Glebe Point Road, which is coming down to the area where Woodley - on my calculation about \$12.80 per lineal foot. 40

There are two things to say about that. Firstly Woodley was given \$60 and the explanation may be he was using an assumed rental and the figure given by Mr Gilbert is \$65 as at August 1973 so they both could be right but in any event if they were taken at the same time Woodley was lower than Gilbert. The position there - and this surely is - it has to be the best measure of the value of the shop front and part of the subject premises - there you have an arm's length, presumably arm's length transaction in which a person is prepared to pay that amount of the money for the use of the newsagency. The place is not only disused, according to Woodley it cannot be used so it is clear evidence that at an inferior location and in a building one would think not as well restored as the subject land, rentals were of the order of \$12 to \$12.80 per lineal foot at about the time. Woodley's figure was \$15. My recollection of the evidence is that he said upstairs rentals, which he gave in dollars per metre equated to about \$1.40 per square foot - I think I put that to him. I am not sure about that. Perhaps I should not put that but in any event the major rental value was obviously in the Glebe Road Level frontage.

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So that there is nothing at all in the rental evidence which cuts down the effect of the sales evidence. I would have put that even if there had been it would not have mattered much because, as Mr. Woodley said, land is worth what you can get for it and if the market says you can get X dollars because that is what land sells for, the fact rental values - does not negative what the market shows but in fact, using the only criticism which might be - which could be adopted against Woodley's rental approach - is 7%. The capitalisation rate is too low. In that respect it is interesting that in respect of the properties which we inspected this morning, No. 327 I think it was, which was the one which Mr Gilbert took - when I started to cross-examine him about the unsuitability of that property as a comparable rental approach he said, "I did not use it for that purpose, I used it to get a capitalisation rate" and he said at the top of p.121 - the bottom of 120 first - he is talking about 365 I think it is, "You agree the shop gives a run down appearance.....net yield". It does not seem that Woodley's 7% is necessarily far out.

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So that we would submit your Honour would much prefer the evidence of Mr. Woodley on that matter to that of Mr Gilbert. What flows from that, we would submit, if it be correct, that the value of the subject premises was of the order of \$130,000 and that such a figure can be properly arrived at both by capitalising rentals and by analysing sales it is simply not possible to say that to value that land at \$160,000 is negligent.

I think the percentage over is about 23%, 24%. There are so many matters on judgment, we would submit, which could lead the figure to be escalated, not the least of which, of course, is a matter which probably escapes us all now. A man who has not got the benefit, as Rathborne did not have, of being able to stand back with the benefit of years and look at the matter in the analytical way which hindsight enables you to do might well have thought that such was the market at that time, that the value was rather higher than people - than the view expressed by people who know what happened subsequently.

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We would therefore submit, you Honour, would not be able to find at all from the fact of the valuation being \$160,000 that it was negligent as distinct from being too high. I would be the first to concede that on the evidence it was too high. It is obvious my friend is in a position of saying, and surely would, that Mr Gilbert was neither negligent nor reckless but came up with a figure less than 50% of the figure, which your Honour could be well entitled to find on the evidence and yet to have to say in the following breath that another valuer who was less than 25% above the other valuer's figure was both reckless and negligent.

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My friend then seeks - although he put this, I think more on the basis of fraud, but which could be on the basis of negligence - seeks to say well the building was incomplete physically in terms of the structure. He also says that the work was not authorised. The evidence here on that matter, the totality of what valuers do as to checking the legality of the work, is I think this, that in some cases the solicitors, as can be seen from the file and one of which I showed to Mr Moses, themselves got 317A certificates. Mr Moses I think said usually.

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MR. CLARKE: Does not usually.

HIS HONOUR: I think that is right.

MR. MORLING: Mr. Hodgson certainly said his view was a valuer valued what was there. Did not Mr Moses say there was sometimes great difficulty in getting certificates in terms of time. If you look at the reality of the situation, here you have a running row of shops, that is to say you are not looking at a building which is situated at a residential area de facto in which the carrying out of renovations to an office was at all likely to be the subject of any illegality. If one walked into a shop in a high street of a suburban city you would not, one would think, think there would be any opposition by the council to converting a greengrocer to a grocer or certainly a trading operation to an office type operation.

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Now if Rathborne did not check to see that appropriate approval had been given, bearing in mind the two adjoining offices had already been renovated, it is only 237 we are talking about as I understand it.

MR CLARKE: I am not sure.

MR MORLING: Bearing in mind that council had already approved, as I think appears from the Board's decision, what had happened at 233/5 and they immediately did approve 237, it was a pretty technical breach going on and if it finds a valid negligence because he did not pick up what was apparently thought to be a fairly technical breach is altogether too harsh a judgment to pass upon him - the failure to pick up that sort of informality in the execution of the work.

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We submit there is nothing in that and as to that of course the fact is the work had been well and truly approved before the loan was made. The loan was not made until the end of the year and was not agreed to be made until - I think the Board's decision was about mid-August. That is all I can say on the question of negligence in the sense of the amount of the valuations.

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To pass to a brief matter, assuming that everything else is found in the cause of action - the question arises whether, to use the words of the Chief Justice in Evatt's case - and I will give your Honour the page in a moment - whether the loss suffered came from an independent exercise of judgment. This passage is of particular application to the facts of this case. What the Chief Justice says, and it is interesting to see what he says, he says, "It is no doubt easier to conclude advice caused loss.....more difficult".

If I may just look at what happened, firstly in Glebe. The valuation made in March, the actual advance made 9 months later, all this information about the great wealth and solidity, none of it checked, about the Bourke group, personal inspection by the directors or officers of Kooragang of the subject land, reference to the amendments, presumed knowledge of what part of the premises had been purchased because that was in the information given by the accountant and we submit when you add to that the fact - or whilst in one sense the valuation evidence is taken advice, it is still advice of a kind which gives room for such difference of opinion - that the plaintiff will not have established here in respect of the Glebe valuation that its losses did not flow from an independent exercise of its own judgment on the matter and more importantly because the valuation did not give any evidence about rentals. That evidence was obtained from the mortgagor through, I think, the brokers or solicitors but certainly not from the valuer.

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HIS HONOUR: The stress in the present case in the passage of the Chief Judge would be the word "entirely" so that was wrong, as Mr Clarke can show, that substantial reliance was placed on the valuation, the fact they went and made other inquiries and so on.

MR MORLING: I agree with that. It is on the age of the valuation.

HIS HONOUR: What you have to do is chop away on the alleged relations to the incident -

MR MORLING: Yes your Honour. I suppose my strongest point there 10 is to take the plaintiff's own stipulation for lending, that is to say that the income would be sufficient to service the loan and they did not get that from the valuation.

HIS HONOUR: How did you formulate it, Mr Morling, what is the degree of reliance that has to be placed - any sort of reliance at all is enough?

MR MORLING: I would say the effective cause.

HIS HONOUR: That is inconsistent with "entirely". If you take this literally it would be a 5% reliance.

MR MORLING: In using "effective" I don't know I could attempt 20 in a different way to "substantial". Whether one used the term "the real cause" that would seem to be consonant with the nature of the cause of action. You are held liable because you appreciate or ought to appreciate that somebody is going to act on your advice to his detriment. If he is going to get advice from other causes then - and he is going to rely on the advice from other causes - then that is that other reliance would negative the duty.

HIS HONOUR: I don't think it is as easy as that. Let us 30 assume someone is minded to enter into a transaction and gets a lawyer to advise him on certain aspects and his banker on other aspects but they all inter-relate in the final result. He must be entitled to sue there if he gets negligent banking advice.

MR MORLING: This passage may not assist me but in reference to the fraud requirement in Halsbury's third edition, par.1583 he said if the representation is an effective endorsement it need not be the sole endorsement on which the plaintiff changes position.

I would found my submission here, as I would in McMahons 40 point primarily on the absence of the (?) information it was necessary to have before the loan was made and additionally

in Glebe on the age of the valuation. The matter which determined the lender to lend the money was compliance with its own guidelines. It is of little comfort to a mortgagee to lend money at interest over a period of years if he is not going to get it back. He would not enter into the transaction at all. It would not enter into these arrangements. In the initial letter of 20th February it said, "Either in the valuation or in an accompanying letter" - "we want this information".

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HIS HONOUR: He could say against you if you conceive of it as being between the valuers and one of the valuers was 65% of valuation that is a prime requirement so it is self-supported out of rentals - getting valuations which allows a renting at 65% is just as important as the other.

MR MORLING: Much of what I have said already, put in another way, supports our next argument which is one upon which we concede we carry the onus and that is to say contributory negligence. With respect we submit that any problems we have in matters such as we have been discussing, that is being relevant, disappear on this issue. You have here a picture where you are entitled to see what the plaintiff did for itself fell short of a reasonable standard of care.

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HIS HONOUR: Am I right the plaintiff contended contributory negligence was not available in this case?

MR MORLING: In fraud. I have to concede that. If this had been a case put in fraud it would have been a much shorter case. None of this would have arisen. No doubt my friend will say well, true, we are a money lender, we relied upon Richardson & Wrench. May I just look at what this plaintiff was.

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It was not merely a money lender, it was a money lender staffed by people who were accountants and who had a financial analyst. They were a very large company. There is no evidence about what their connections are.

HIS HONOUR: Anybody with 5 million dollars to lend out is a reasonable size.

MR MORLING: This was a money lender on a large scale. Its lendings totalled nearly \$3 million in the relatively brief period between the start of operations in February 1972 and the end of 1973. Interrogatory 14 shows it advanced unsecured loans of millions of dollars. It was a money lender on a very large scale. By the end of 1973 it had entered into a large number of transactions. If I may put it against my friend, had entered into large, loans in conformity with an arrangement which, whenever adopted did not lead to loss. The losses they claim are when they depart from their own, admittedly loose, practice. So far as the evidence in this case goes, that is the position.

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HIS HONOUR: If I could go back to the substantial reliance. I don't know whether Mr Clarke will put this or not but when one looks at the telexes that are sent to Melbourne one may be entitled in Mr Clarke's position to put - now look at what is put before the ultimate decider - to coin a phrase - what are the factors drawn to his attention as founding the basis on which his assent is sought. If you look at the telex it is the amount sought, the interest rate -

MR MORLING: The Glebe one?

HIS HONOUR: The telex of 9th August - the net income and the amounts of interest in relation to Group Unity - that is the McMahons Point property. In relation to the Glebe Point Road he can't give the rental information because it is no longer occupied. Could not Mr Clarke use that against you?

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MR MORLING: I suppose he could your Honour. If that is the telex of 9th August - it had been preceded by a Board meeting of 27th July.

HIS HONOUR: That is where I think it is important to have regard to the fact that the Board is the Board of the plaintiff which have got to look to Mr Hamer or his deputy for approval - if one is looking at the ultimate deciding authority all that Mr Hamer has are the telexes are they not, and they would never have gone ahead unless Mr Hamer or his deputy had approved.

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MR MORLING: Yes your Honour. That assumes that Melbourne was not kept informed otherwise than by telex.

HIS HONOUR: It does but it seems odd that they sent a telex which set out the crux of the information - if that is already in Melbourne in some other shape or form.

MR MORLING: I was not suggesting the telex would not set out the substance of what is being put, I was putting before the telex is sent, "at a Board meeting of 27th July it was resolved to seek confirmation of the assets and to obtain profitability to support the commitments. That is to say before the telex is sent at least the Sydney Board is, in effect, saying to itself - we won't send off the telex until we....."

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HIS HONOUR: That is right.

MR MORLING: And might not Melbourne reasonably assume that before Sydney puts a proposition to it it has observed, firstly, the initial client which has got over the first hurdle.

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HIS HONOUR: Yes.

MR MORLING: I was saying this was an experienced man. If the plaintiff in any event entered the money lending business it surely must observe ordinary standards of prudence in carrying on that business.

I get no benefit if I become a lawyer because I have only been there 6 months and not 6 years. I do not understand that that could be a viable argument against the liability of this plaintiff to observe ordinary standards of care in conducting its business. We have called three witnesses from the money lending industry. Two, admittedly, from organisations whose lending budgets were considerably greater than the plaintiffs and one very similar but there was no significant difference in the evidence which came from them.

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Apart from that evidence, this is really my strongest point, the evidence of the money lenders coincides with the plaintiff's own practice because in substance what they said was - you have your own valuers, you may well get other people to pay for their fees but you always check, you always have a relationship with the valuer even in those cases where a mortgagor has, unknown to you, initially gone off on (?). Your Honour, one might think Mr Clarke's failure, being the failure of counsel appearing for a money lender, to call another money lender to say that what Messrs Matthews, Liddell and Wiggins said was not the practice - that failure itself is of some significance because it is all one way and it, as I said, is merely confirmatory of the plaintiff's own practice.

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So that what happened, if one can look here in terms of the Glebe land is that first the plaintiff abandons his own practice, did not check with Richardson & Wrench - it acted on a valuation which bore no initials which, on its own might not be all that significant - but it is all thrown into the scales. It is contemporaneously, as we have seen earlier, having discussion with its advisers about other matters. It decides in August when the valuation is 5 months old to act on it, which is - 6 months is the extreme limit from Mr Moses' point of view and the money lender witnesses say as it is a shorter period, I think 2 to 3 months. It waits a further 4 months, not being contractually committed to lend money before it lends the money. When one compares that sort of circumstance with the ease with which the plaintiff could have checked the situation, then it is careless, as exemplified.

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Now your Honour, that submission finds only upon their negligence in acting on the valuation itself but that was compounded by the way they otherwise went about by making this loan.

They obtained what were worthless bits of paper, not balance sheets or profit & loss accounts, certified by anybody, which, if somebody said that impressed them very much as to the financial stability of the plaintiff - they did not check to see if Mr. Bourke owned a share in any of these grandiose companies.

The evidence is there and is referred to in one of the interrogatories, they just assumed that - absolutely nothing was done. They sought rental information which apparently they did not - either they did not check and did not refer to Richardson & Wrench. If they thought it should be referred - and moreover they departed from their own practice in getting independent advice in the sense that if they were treating Richardson & Wrench as solely the mortgagor's valuer, as they were, they were not bringing them into their area of influence, they were on this occasion, and as far as I can see from the files, on this occasion only, relying entirely on the mortgagor's valuation.

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In the files there was reference to a number of cases, 8 in which valuation by indubitably reputable people were put forward by mortgagors and in every case some confirmation - and I do not suggest a complete valuation - they varied but at least it was referred to their own advisers, non-mortgagor advisers, for confirmation.

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HIS HONOUR: Does evidence say that the reason for referring to Richardson & Wrench was because the others were seen as acting for the mortgagor and they wanted to rely exclusively on the mortgagor. I don't think it does.

MR MORLING: I would have thought it was reasonable basis. They say, "We got a valuation from Hookers but let us see what our own people say".

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HIS HONOUR: You may be right on that. Of course they were obligated to do that by the terms of the resolution which said you can only lend 65% of the Richardson & Wrench valuation.

MR MORLING: The circumstances vary. It is fair to say that some of the valuations forwarded by the mortgagors might have been slightly out of date. Some particularly - I think one or two where the property being offered as security had recently been purchased and where there was a mortgagor's valuation which was about the purchase price, was simply referred to Richardson & Wrench and they would say it had been sold for \$600,000, we have seen the valuation and we think that is about right - something like that. So that I am not putting on this that there was any special reason assigned in the files as to why the mortgagor's valuation was not accepted nor am I putting, far from it, that in every case Richardson & Wrench were asked to make a formal valuation.

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HIS HONOUR: Accepting that it is perfectly consistent with Mr Liddell or Mr Satchwell saying I am obligated by the resolution to advance only 65% of Richardson & Wrench so I have to get some confirmation of this Hooker's valuation from Richardson & Wrench so that I am complying with the directions which, of course, would not apply in the two cases.

MR MORLING: I would not accept that merely because the AFL Board had said something that what Mr Liddell does thereafter is done solely to comply with that direction. He is an experienced business man, and he could be presumed to know the money lending practices - if one wanted evidence one had it - that you do not act on the advice - no money lender acts on the advice of the mortgagor's valuer. There may be a Board direction that you get Richardson & Wrench's advice.

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HIS HONOUR: I have a feeling that the evidence you speak of is untrue in history - nobody ever thought to change that whereas these people erected an operation in more recent times when this problem of getting into a contractual relationship with a valuer does not loom so large. What I am saying is there are inferences open on the evidence in a number of ways but nobody has come along and asked - I don't think anybody from the plaintiff - did you go to Richardson & Wrench to check on the Hooker's valuation because of the AFL minute.

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MR MORLING: No but there is this evidence and it is, I think, more than once, but it was said by one of the plaintiff's witnesses, Richardson & Wrench were our valuers - what they gained by that was - what they thought they gained and it clearly could not have been right - that they will be our valuers and nobody else's valuers. They will be our valuers even in cases in which we give them no inkling we have an interest so that that is a partial answer to what your Honour is saying.

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HIS HONOUR: I wonder how that sits - I will look at the evidence - how that sits with the approach that they should enlarge their stable, so to speak, by the inclusion of Stantons and three or four other people. Were they also going to be the company's valuers or was not the performance of that exercise so that if someone came with a Hooker's valuation obtained before the arrival at the premises of the plaintiff, it could be treated as Richardson & Wrench.

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MR MORLING: Yes. I would have thought what probably happened - I don't think there is any evidence that the other one or two valuers were ever in fact involved but what happened was this, that the plaintiff did properly regard Richardson & Wrench as their valuers in respect of any matter on which they gave them instructions of a formal or informal kind.

The reason they wanted people who they could call their
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valuers was they would not be the other person's valuers and when there was a valuation from the other person then their valuer would advise them. That is both a business-like approach and a proper one and one which the evidence would refer to as being the case but the difficulty of this conclusion, the unfortunate series of events arose out of this position, that treating Richardson & Wrench as their valuers they thought they could do that in cases in which they did not let Richardson & Wrench know they were their valuers and contrary to their understanding with them.

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P.20.5 Mr Satchwell, when he said, "In these cases we were not.....to make valuations". He recognised as he had to at that stage that - at 1980 - had to recognise they were not their valuers although later in the evidence they keep on saying, "They were our valuers".

The other thing of significance in these cases is the fairly considerable delay which occurred in the making - in the fact it is the same date but let me hasten to say without going back to the files I could not get the dates of the letters sent to the several mortgagors indicating that the Company had made a decision to grant the loan. The dates that I have taken for the dates of the loans are the dates which appear on the left column, I think it is, of the plaintiff's answers to interrogatories, attachment A.

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It certainly, your Honour, bears out what all the witnesses say that the prudent thing is not to act on a valuation after a certain number of days. Somebody said 6 weeks, somebody said 2 to 3 months. In the case of both these valuations, either they were very much in the grey area or well beyond any possible reasonable length of time; so that we submit that your Honour would, if you Honour otherwise finds the defendant liable - would find the plaintiff - there would be contributory negligence. I can see it is not the fraud count.

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Mr Clarke puts the valuation - at least the Glebe one - as making three representations, that the premises have been renovated, and he referred to the omission of the non-concluded work; the second was it was a representation that Rathborne held the opinion that the value was \$160,000; thirdly implicitly that he had reasonable grounds for holding that opinion.

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Now your Honour, our first point is that the course of dealing between the parties, which would have led both of them properly - we say, because of the course of dealing between the parties - anything that was said in valuations addressed, not to the plaintiff, was not a representation to the plaintiff. That is to say, the plaintiff could only fairly regard what was confirmed by Richardson & Wrench as being a representation of value.

They have a standing arrangement with them that they would get their advice in that way and therefore, although we would concede as a matter of law you can make a representation to a class, and you can sue on that if you can bring yourself within the class but for relevant places the plaintiff was not a representee here, especially in regard to McMahan's Point.

The valuation addressed to Cogden Pty. Ltd. was a representation to Kooragang. We submit that is a very difficult task indeed, to assume that. It is difficult to see how Richardson & Wrench could ever contemplate or intend, by addressing a valuation to a particular named company to make a representation not merely to another company but to another company which it knew, as it thought or believed, would not act on it save under (?) arrangement.

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The first statement is that the premises, I think my friend said had been renovated. I take it my friend put that submission accurately and carefully because he would not want it put the submission that the work was initially illegal because that was - he could not show a loan flowing from that that was cured before he made the loan. He put it that the premises had been renovated. The fact is that the premises had been 99% renovated, I think the work was said to be work in a toilet, the unfinished work. When one sees the building as completed and looks at the totality of the premises from the back parking yard to the front street alignment and sees what work was apparently done, it is, we submit, a fair statement to say that the premises have been renovated. It might have been an oversight to say there was a bit of work to be done in the toilet but to treat that as fraudulent is not sustainable. At the most it might have been a careless omission of a matter of description.

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Of course my friend's real claim on fraud is on account of \$160,000 and \$250,000 and his second and third representations really, both of them have to stand or fall, on him being able to establish that the mere amounts of the valuation are such that fraud can be inferred.

Well your Honour, I do not want to repeat the valuation argument and will not do so. In our submission it is not only not possible to adduce negligence from the amount, it is not possible to deduce fraud from the quantum. I need no more than advert to the onus, certainly civil but by reason of the gravity of the charge of the person who alleges fraud, my friend had endeavoured to gild the over-value argument by reference to the circumstance in which the valuations were made.

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I am in no embarrassment at all here so far as our arguments are concerned. The fact that we prove and prove to the hilt that Rathborne was acting outside the course of his employment speaks nothing of a fraud as against the representee. He may well have been (?) to his duty as a faithful employee and in saying it was worth \$160,000 he was acting recklessly in making that valuation or making a valuation of \$250,000 at McMahons Point - we would submit there is simply not a sustainable argument on the basis of fraud which has been left in the case but my friend is not able to advance any factual basis for findings of such seriousness on the fraud counts.

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I have already given your Honour the sentences by which these valuers depart from each other. Your Honour will recall in respect of McMahon's Point, although the over-valuation, on the evidence, is higher than at Glebe, the absence of sales evidence drives the valuer to adopt a difficult basis of valuation which he himself said admitted of significant variations.

If one varied Mr. Leafe's capitalisation rate by 1%, that is to say from 9 to 8 leaving all other assessments the same, his valuation rises to just over \$208,000. Of course we have seen what happens if you vary within his permissible 15%. We would submit my friend does not have any case on which your Honour could establish it on the question of fraud.

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That leaves the question of damages Mr. Rolfe would follow.

MR ROLFE: Your Honour, firstly we would submit that the evidence here establishes that the plaintiff would have lent up to 65% of a proper valuation of both properties, and that appears from the evidence of Mr. Satchwell at p.20.7 in respect of the Glebe Point Road property and at p.21.2 in respect of the McMahon's Point property. We will be relying upon that in seeking to distinguish Baxter v. Gapp and a number of other cases. The fact is, as your Honour knows, that 64% of the valuation of the McMahon's Point property was lent and 65% of the valuation of the Glebe property was lent.

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Secondly, we would submit it is clear from the evidence that the parlous financial position of each of the mortgagors, which appears from the admission (1) and (2) in the agreed documents, leads to the irresistible conclusion that the only way the plaintiff could seek to recover the money lent was by enforcing the mortgages. In the case of Group Unity Securities Pty. Limited, it was wound up on 4th November 1974

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and the principal sum, leaving aside any question of earlier repayment for default, was not payable until 5th October 1976. In the case of Giles Bourke Holdings Pty Limited, it was wound up on 23rd August 1976 and once again leaving aside early repayment for default, the principal sum was not payable until 18th January 1977.

Just against the contingencies that it is put against us in reply that, if proper valuations had been made, the rents would have been sufficient to service the interest on the debts, we would remind your Honour that in respect of each property the plaintiff consented to the giving of a second mortgage. That appears in respect of the Glebe property from interrogatory 95(a) and in respect of the McMahon's Point property from Interrogatory 213(a). So not only did the plaintiff's mortgages have to be serviced but, by giving its consent, the additional mortgages had to be serviced.

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We would nextly submit that there is no suggestion in the evidence that the prices of \$65,000 obtained for the Glebe property and of \$160,000 for the McMahon's Point property were not the maximum prices which could be obtained for the properties on sale at the date of sale. The plaintiff; your Honour, has led no evidence that, because the sales were mortgagees' sales, they failed to reflect the proper market value of those properties. Therefore, your Honour, insofar as the sales figures fall short of the true value as found at the date of the respective valuations, it is submitted that they accurately reflect the fall in the market of real estate.

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HIS HONOUR: Just on that, Mr Rolfe, I think the evidence is quite silent whether it is explicable on the basis that there has been a substantial fall in the market or not. I do not have any evidence one way or the other.

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MR ROLFE: We would be content to put it on this basis: That there is no suggestion that a better price could have been obtained and that these prices were not the proper market prices. I do not have to go as far as saying there was a fall in the market, but for the purposes of my submissions.

There are three basic submissions which we would seek to make as to the relevant legal principles to be applied. Might I say that our researches have only disclosed one case where an action has been brought by a mortgagee after the sale of a property, and that is Baxter v. Gapp. Firstly, we would submit that the defendant cannot be liable for any difference between a proper valuation as at the date it is made and any loss occasioned through a different market price at the time of the mortgagee's sale, because any such fall could not, certainly on the evidence in this case, be attributed to any fault on the part of the defendant. While we would submit

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that is a fairly, if I might say so with respect, self-evident proposition, authority for it is to be found in an old Canadian case of Lowenburg Harris & Company v. Wolley (1895) Reports of the Supreme Court of Canada Vol.25 p.51 at pp.56-57. That was a court of five sitting on appeal from a court of three.

HIS HONOUR: The Supreme Court of Canada.

MR ROLFE: Yes. It is important in our respectful submission from two points of view so that whilst your Honour has the report available it may be appropriate to deal with both aspects. Firstly it supports what I have been so bold as to submit is the self-evident proposition that one could not be liable for a fall in the price. But secondly it deals with the way in which one computes damages where a person has money to invest and is induced by either a negligent or a fraudulent representation to invest that money in a situation where, but for the representation as to value, the money would not have been invested at all.

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Certain of the facts are set forth after the headnote and if I could go down to the paragraph just about halfway down p.51, "The plaintiff Wolley having money to invest... giltedged and first class". So this gentleman had money to invest. On the following page it appears that he lent \$5,500. "He received some money and then he brought an action...". There are a number of grounds of appeal which are set forth in the first paragraph of the judgment of the Chief Justice, the relevant question being did the respondent by reason of such negligence suffer loss and to what amount?

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It is perhaps unnecessary to go through the questions as to negligence and other such matters. If I might go to p.56 where the Chief Justice commences to deal with question of damages and the paragraph halfway down the page, "There remains another objection ... acted on by them". Then his Honour went on to say that damages should have been assessed in the regular way. Unfortunately from our point of view he does not describe what the regular way might be.

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There were two dissenting judgments, one of Taschereau J. at p.58. It is quite short although clearly he approves of the method of computing damages. There is a more lengthy dissenting judgment of Gwynne, J. which is also on the same page. He dealt with damages at p.60. In the final paragraph on that page his Honour said, "As to the amount of the judgment of the Court below ... repudiated a mortgage".

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HIS HONOUR: He seems to accept the approach of the majority. What he is saying in essence is, "Because it is inconvenient to do it this way, let us do it the other way". He says, "Whatever may be the real value of the security can only with certainty be ascertained upon the sale of the premises". So he accepts that assumption which underlies the majority judgment, as you pointed out. 544.

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MR ROLFE: Yes. Also I read this as saying that in all probability this particular mortgagee would not have lent any money but for the valuation, and that appears perhaps more clearly in the final paragraph of his Honour's judgment, "The defendants having procured the plaintiff to advance his money ... for their indemnity".

The other two judges of the court concurred in the judgment of the Chief Justice. So perhaps from that starting point we would submit that we go some way - certainly we make good the first submission which we have put to your Honour - and go some way to making good the submission that it was only because of this representation that the money was advanced and that some lesser sum would not have been advanced if a different value had been given. But on that I do not suggest that it is the strongest case but there are indicia which we would submit are relevant and helpful.

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Secondly, we would submit that as the plaintiff would have entered into these transactions in any event, although it would have lent a lesser amount, the only amount which it can recover in these proceedings is the additional principal which it lent by reason of the wrongful valuations and interest thereon. Thirdly, we would submit that the defendant cannot be made liable for the consequences of breach by the mortgagors of their obligations under the mortgage if the evidence establishes, as it does in the present case, that the plaintiff would have lent up to 65% of a proper valuation on the security of a first mortgage.

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In our submission the defendant's only liability is for breach in making a negligent valuation, and because the plaintiff, whatever sum it lent, would have been forced to exercise the power of sale in this case because of the mortgagor's default, matters such as the costs and expenses of selling the property, increased interest rates, penalties, and expenses in holding the property such as land tax, are consequences of the mortgagor's default which would have occurred in any event if a loan of 64% or 65% of the proper value had been made, and are not in those circumstances a consequence of the defendant's breach.

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HIS HONOUR: Unless one takes an assumption in favour of the mortgagor that it was only this excess that pushed it over the brink, in the sense that having borrowed, say, an extra \$20,000 and having incurred the liability for that additional interest, it thereupon was unable to service it and fell into default.

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MR ROLFE: That was why, with respect, we were anxious to have admissions (1) and (2). Admission (1) makes it clear that there was no possibility of there being any surplus for unsecured creditors. That was in respect of Group Unity Securities.

HIS HONOUR: But, Mr Rolfe, as you would know yourself, once you get into a statement of affairs situation, everything is written down and you present an entirely different picture of a financial position from that which obtained whilst it was a going concern.

MR ROLFE: One can readily accept that could happen some time later. That, with respect, though is why I was at some pains to point out that both of these liquidations had taken place before the principal amount was due firstly.

HIS HONOUR: I accept that. But of course, and correct me if I am wrong, was there not default anteriorly to the liquidation date?

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MR ROLFE: Certainly.

HIS HONOUR: So that made the principal repayable at that point of time?

MR ROLFE: Right.

HIS HONOUR: In a sense, I suppose, you could say that one can then disregard liquidation beyond taking this point. If Mr. Clarke's clients quickly had exercised their powers of sale as mortgagees and the property is being sold before liquidation, assuming that to have been hypothetically possible, he could have then looked for the balance of his money to the mortgagee which, on the mortgagee's financial position at that point, may or may not have been realisable. This is all prior to liquidation. So in a sense could it be said against you that we are working in the realms of inference or supposition rather than in the field of actual reality because all we know for a fact is that at a later point of time, i.e. at the date of liquidation, when assets are valued on a different basis, namely realisable assets, there is a deficiency?

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MR ROLFE: No, we know, with respect, a little bit more than that.

HIS HONOUR: What is admission (2)?

MR ROLFE: Admission (2) relates to Giles Bourke.

HIS HONOUR: It is a corollary?

MR ROLFE: Admission (1) relates to Group Unity Securities being wound up ... (reads). Admission (2) relates to Giles Bourke being wound up ... (reads).

HIS HONOUR: So certainly, so far as that is concerned, there is a very substantial lapse of time between default and liquidation?

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MR ROLFE: Yes, but your Honour was asking do we know of anything else. There are at least two matters which we do know. Firstly, we know that default occurred in respect of Glebe on 15th July 1974 which was a matter of some six months after the loan was made. In respect of McMahon's Point default occurred on 6th May 1974 which I think was some nine months after the loan was made. Secondly, we know that second mortgages were taken out over these properties.

If the policy of the plaintiff had been to ensure that the mortgages were sufficient to service the loans, then one would not have anticipated, unless there was a view taken that also the second mortgages could be serviced, that that consent could have been forthcoming, those matters, in our submission, would make good the proposition that, even viewed in 1974 when default took place, what had to be looked to for the repayment of this amount was the security. I am sorry, the third matter is this: that each of these valuations we now know to have emanated from the Bourke office.

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So while there may be an inference open that the additional amount of interest was sufficient to push the company over the financial brink, nonetheless the method of the issue of the valuation with those amounts on them would indicate an inference the other way, namely an expectation that the mortgages could be serviced. Finally, of course, we have the evidence of the rentals of McMahon's Point which at 9.75% would have been sufficient to service even the loan of \$160,000.

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HIS HONOUR: They had to use it in payment of something else, hence the default.

MR ROLFE: Of course there was Carpenter's second mortgage put there with the consent of the plaintiff. But I was seeking to answer your Honour's specific question qua the properties and of course the evidence which was given of the rentals at Glebe, which were some \$410 per week I think, would have been adequate to service that loan.

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HIS HONOUR: What are we ultimately going to look to as the test? Forseeability?

MR ROLFE: Certainly in one respect, namely if an improper valuation was made it would be foreseeable that there could well be a short fall. As I understand my submission, it conceded liability for that.

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HIS HONOUR: But you say then we come to measure.

MR ROLFE: Then we come to measure it conformably with Chapman v. Herse and that line of country; causation ceases and the measure of damages takes over. It is for this reason that we have sought to stress that here was a company in the business of lending money, not a "one off" situation. Because if your Honour accepts that, and one would think

there would be little doubt about that submission being made good, one can then look at the decision of Yeldham, J. which falls within the same category and set aside from consideration the cases where the mortgage would never have been entered into; not only the mortgage but no mortgage in all probability would ever have been entered into but for the negligent valuation.

That, we would submit with respect, is a clear distinguishing feature between the type of case which was before his Honour, the type of case which is before your Honour and the cases upon which my learned friend founds. I accept, and I think I said at the same time as your Honour, that the first authority to which I referred is somewhat equivocal. But *Baxter v. Gapp*, we would submit with respect, is in no way equivocal and that is what might be described as "one off" case. Might I take your Honour firstly to *Goddard L.J. (1938) 4 A.E.R. 457*.

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MR. ROLFE: His Lordship dealt with the question of damages at 465 and just above line B his Lordship said "I now turn to the question.....transaction at all". I appreciate the ambiguity in the word "this". His Lordship, in our respectful submission, makes it clear that the plaintiff was saying "I would not have entered this transaction whereby I lent £1200 and I do not know because I have never directed my attention to it whether I would have lent any less a sum of money".

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HIS HONOUR: You say that is different from a situation of a money lender who would have lent money on proper security even though it may have been a lesser sum?

MR ROLFE: Certainly because the money lender has said here "We would have loaned on a proper valuation in respect of both properties". Now, your Honour, once that factual situation is established there is no real problem in *Baxter v. Gapp* in following through the measure of damages.

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HIS HONOUR: But if one reads this quote which Lord Goddard puts into the mouth of the plaintiff he then goes on, "I therefore entered i.e. because of your negligence, I entered into a transaction, i.e. into this precise transaction, into which I would never have entered therefore if I show that I have a cause of action my damage is the damage I have sustained by entering into this transaction seemle I may have suffered some damage had I lent the lower amount of money, but the point of the matter is", he says, "I did enter into this transaction through your default and now you are unable to reimburse me".

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MR ROLFE: Quite. "But I do not know if I would have entered into any other transaction".

HIS HONOUR: And perhaps suffered damage thereby is he not discarding it then?

MR ROLFE: That is not, with respect, quite the way the Court of Appeal viewed all his findings were and I take this to be part of his Lordship's findings. One appreciates there may be some room for equivocation there but there is no room for equivocation in this case and there was no room for equivocation in the case before Yeldham J.

HIS HONOUR: But I am not quite sure why it is not open even in this case for the plaintiff to say, "Well look, I accept for the purposes of discussion that had another and lower valuation been put before me I would have lent 65% of that. I accept for the purpose of argument", he said, "That if I had done that I may or may not have suffered some of that same damage. But the fact of the matter is that I suffered damage because I entered into this transaction on your advice. The mere fact that I entered into this transaction and through that I have been saved from suffering perhaps some of the self same damage in another transaction is not relevant".

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MR ROLFE: Well, your Honour, the submission is, with respect, that it is relevant in quantifying the measure of damages because there is an unequivocal statement that in respect of each property mortgage transactions would have been entered into. If I can make good then the submission that those mortgage transactions having been entered into the only way in which the money could have been recovered was by enforcing the security on the facts of this case. Then, your Honour, it is submitted the measure of damages is the difference between what was lent for the purposes of this argument, on a wrong valuation and what would have been lent on a correct valuation.

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HIS HONOUR: You said to me a little while ago that once we get to this point, causation, disappears. Wouldn't you be better off in a sense if causation stayed because then you would be able to say the only damage which was incurred in the totality of the factual matters which had been laid at my door as a causal result of what I did, namely furnishing a valuation which was \$20,000 too high, was the additional loss of \$20,000, is that not a permissible way of looking at it

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MR ROLFE: Yes it may be, your Honour.

HIS HONOUR: I do not want to put you in a position where you accept something which -

MR ROLFE: I was not rejecting it but I just wanted to ponder upon it for a moment, your Honour. However, one characterises in legal terms the point. This is the submission, and could I just leave the question of causation just for a moment, your Honour, that was what Goddard L.J. said, one places one's interpretation upon it and I have made the submissions that as to what we would submit is the proper interpretation to be placed upon it and it seemed to find some favour, we would submit, with the way in which the Court of Appeal dealt with the matter in (1939)2 K.B.p.271. McKinnon L.J. at p.273 deals with the matter in the second line having disposed of the question of negligence: "There remains the question of the damages..... but for the valuation". I suppose one can say well, he may have left some other amount of money or he may not but in our respectful submission on a fair reading of what his Lordship was saying he was treating this as a one-off type of transaction. His Lordship then approved the decision of Goddard L.J. and referred back to Scholes v. Brook to which I would wish to take your Honour in a moment which was a similar claim for negligence. At p.274 his Lordship referred to the fact that Lowenberg, Harris and Co. had been referred to and he quotes from the headnote which may or may not accurately reflect what was in the judgments. For my own part I have some doubt as to whether it does, it is said it does not really matter because you come up with the same result any way you apply it. Lord Justices McParke and McNaughten agreed. 10 20

As I say, once again there is the semantic difficulty of "this" appearing but could I just take your Honour back to Scholes v. Brook. Before Romer J. it is reported in vol.63 of the Law Times new series p.837. At the foot of the right hand column his Lordship said, "No sufficient case has been made against.....did their duty", etc. About 6 lines further down, "In my judgment knowing..... discharged their duty". Then his Lordship went on to deal with the Brook v. Transfield valuation but might I take your Honour to the right hand column about a quarter of the way down, "Mr Brook was informed.....if any money was advanced", and with respect we would place some emphasis on "any", "was advanced by the plaintiff.....as her adviser". So this would seem to be a somewhat clearer case of any money at all being advanced and I do not think there is anything that cuts down that in the rest of the judgment apart from the fact that one then comes to the end in the hopeful expectation there will be some guidance as to how the measure of damages should be carried out merely to find his Lordship gave judgment against them for damages. 30 40

The Court of Appeal in Vol. 64 of the Law Times at p.674, there it was put by Mr Haldane that the measure of damages had to be the difference between the value of the estate as stated by the Valuer and real valuer at that time and once again the judgment of Lindley L.J. is singularly unhelpful because it refers back to adopting a mode which nobody has really disclosed but, as I indicated earlier, the reason for referring to that authority was for the purpose of seeking to make good the submission that these were all instances where the lender would not have lent any money or at least on a fair reading would not have lent any money. A case somewhat similar to that which is before your Honour - and we have been only able to find it reported in "The Valuer" and I have taken the liberty of having photostat copies made - it is a case of Singer v. Freidlander Limited and John D. Wood & Co. and it is a decision of Mr Justice Watkins delivered on 3rd June 1977 and it is at p.560. Your Honour, it is a long and complicated case and perhaps I can seek briefly to summarise the facts. What happened was that the Lion group of companies was anxious to borrow a large sum of money on security of some land. The defendants valued it at \$2,000,000 and the Lion Group of Companies, which was a developer, then went into liquidation and the plaintiff, the merchant bank, then sought to recover from the valuers or surveyors but, your Honour, it is interesting to note at the foot of the right hand column on p.560 his Lordship said, "In 1972 the plaintiffs in common..... various other reasons", but the burden of what his Lordship was saying was that here was a company prepared to lend money and indeed anxious to lend money. Perhaps I should say there are various other aspects which do not concern the issue of damages referred to in this case, for example, on p.561 in the right hand column your Honour will see certain references to the practice of some, if not all finance houses about communicating with the valuer and things like that and there is some suggestion of this 5 to 10% restriction. Precisely how that could be applied to a prospective housing development in Gloucester it is a little difficult to understand but in anyevent for the purposes of my submissions the situation was that a firm of valuers, Lalondy Bros. had issued certain valuations which were lower by far than the Valuation issued by the defendant's valuation being \$2,000,000 and the second valuation of Lalondy Bros. being \$1,525,000. Might I go to the conclusion of the judgment at p.574? In the penultimate paragraph his Lordship says, and perhaps the opening words take some force away from the submission, "The parties agree ... the plaintiff".

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HIS HONOUR: Did they incur all these additional and other sorts of expenses that Mr. Clarke's clients have?

MR. ROLFE: It is not clear because your Honour will then see that his Lordship says the exact figure is 491,000 so it would seem the answer to your Honour's question is probably no because his Honour then entered judgment for that amount and the only question he left outstanding was the quantum of interest. It does set a background, albeit by agreement, the agreement which his Lordship seems to have been prepared to adopt for the type of submission which we are seeking to put to your Honour.

HIS HONOUR: I was not making myself clear. It may have been perfectly understandable if the only damage it could state to have suffered was that difference and they did not incur those sorts of problems Mr Clarke's clients suffered.

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MR ROLFE: At least it gets me some of the way in the direction I seek to move as to the quantum and principle. That then brings us to the decision of Yeldham J. Might I go to Laughton Boyd v. Moloney, an unreported decision of Yeldham J. His Honour's judgment commences that the plaintiff is a money lender. Having disposed of the Hedley Byrne v. Heller count his Honour then went on to consider questions of breach of retainer and the first passage to which I would wish to refer your Honour just briefly is at p.17 where after some evidence was quoted his Honour went on, "I am satisfied that because the defendant... he would otherwise have done". Then his Honour refers to certain correspondence and instructions and expert evidence and at p.19 he says in the first line, "On this occasion.....his costs of subdivision".

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HIS HONOUR: I do not know whether he is using "causal" there in the sense you and I have been talking about it.

MR ROLFE: I did not concede his Honour to be so doing. His Honour then went on to consider certain valuation evidence and if I might take your Honour to p.20 in the paragraph at about point 4 "The consequences of the foregoing.....is \$15,000". It is our respectful submission that so far as principle is concerned one starts with the difference between what would have been lent on a proper valuation and what was lent. His Honour then considered various values and he also considered the question of interest; there was a claim for interest of 23% - well, that does not trouble us here - and his Honour observed there was no evidence the money could have been lent out of that amount. His Honour then considered questions of delay in bringing the proceedings, how the interest should be reduced accordingly. Then having computed the interest at \$5,250 his Honour went on to say, "The plaintiff claimed also..... under the mortgage". Precisely what was to happen there - after I have had some difficulty working out, whether there was to be some form of charge so far as the defendant was concerned, if he paid the amount of damages, "It should be

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made plain.....he is entitled". As I say, your Honour, precisely how that would have worked but for the Court of Appeal's intervention on the primary question I have not really quite worked out.

That, we would submit, sets out principles not in any way inconsistent with any of the previous authorities, certainly insofar as Singer v. Freidlander assists me consistent with that principle applicable to a person who would have lent on a proper valuation.

Perhaps before leaving the authorities I could just return to Philips v. Ward reported in (1956) All E.R.p.874. Denning L.J. at p.875 - your Honour has been taken, I think to these passages - line I (read) Here we say of course well, if the valuation had been properly fulfilled X dollars less would have been lent and it is only the excess which is necessary to bring about that result. His Lordship did not refer to Gapp v. Baxter but Morris L.J. did. At line H of P.878 the issue here being whether the plaintiff was entitled to receive the difference between \$21,000 and \$25,000 or the actual cost of repairs of \$7,000 and his Lordship said, "If the plaintiff had received sustained by the plaintiff". So that there again we would submit his Lordship was looking at really the fraud type of approach to the measure of damages but in a negligence case. Romer L.J. took the same view.

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Those are the basic authorities to which we would wish to refer and it is then a matter, with respect, of going to the facts of these two valuations. Perhaps I could just preface that before lunch by saying that McMahons Point, the view might well be taken there is less difficulty in arriving at a proper valuation figure for the purposes of this argument than with Glebe and we will be submitting for the purpose of this argument that one could take \$185,000 at McMahons Point as the sale price and Mr. Woodley's valuation of Glebe.

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HIS HONOUR: Have you put down on a piece of paper, how you feel the figures stack up?

MR ROLFE: Yes, I have put them down on two pieces of paper and what I would prefer to do, if this is a course acceptable to your Honour, is to make the submissions and then hand to your Honour not submissions as such but the calculations as formulated but I won't be in a position to do that at 2 o'clock.

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(Luncheon adjournment)

MR ROLFE: Could I next go to the question of interest which should be applied. Before I do that, could I hand up the amended defence. On the question of interest we would submit that the proper amount is 9.75 per cent simple interest for the following reasons: firstly, this is the amount provided in each of the mortgages in the event of prompt payment. If, you Honour, the higher amount of 10.75 per cent becomes payable it is because of the default of the mortgagors not because of any breach by the defendant in the manner alleged in these proceedings.

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Secondly, there is no evidence from the plaintiff that if it had the money on the due date it would have lent it out at any greater rate than 9.75 per cent. Thirdly, the evidence is that the plaintiff ceased lending money on the security of first mortgage over real estate in 1974 although as your Honour will recall from interrogatory 14 it continued lending large amounts of money on an unsecured basis and there is no evidence before your Honour as to the interest rate charge for the unsecured loans.

Fourthly, if your Honour goes to the mortgages which constitute part of the agreed bundle of documents your Honour will find that in cl. 3, there is provision for unpaid interest to be treated as principal, so that we would submit in relation to that the compounding of interest results not from any breach on the part of the defendant but rather the failure on the part of the mortgagor to comply with the covenants in the mortgage.

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Against these submissions might I be permitted to take your Honour to two exhibits, BG and BF. Under the heading "General Items" - there is no particular dispute as to the figures and your Honour will notice certain figures and dates. We, of course, concede that the proceeds of sale in the hands of the plaintiff were \$155,000-odd and your Honour will see that that is derived in the next couple of lines by the deduction of the cost of realising the security. As to that it would be our respectful submission that that cannot properly be charged against the present defendant.

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MR. ROLFE: On the basis that that would have been a cost incurred by the plaintiff in any event.

Your Honour, the next item is interest due. That, in our respectful submission, suffers from the same difficulty, namely, what the defendant is being required to do is to pay interest at a rate only caused by the mortgagor's default and because of the failure of the mortgagee to comply. Further, your Honour, as to the expenditure on the property, we would submit with respect that falls within the same category as the item within the Laughton Boyd case and would again be an amount payable in any event by the plaintiff, it being forced to exercise its power as a mortgagee.

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Your Honour, the rentals received are taken into account as a credit. In truth, the rentals would be a substitute for the interest in part which would otherwise have been received.

Then, your Honour, having achieved the total of \$63,000-odd which includes a compound interest factor amongst other things, the interest as we understand it is further compounded under the heading "Loss 24th April, 1979 to 2nd June 1980". And it is our respectful submission there is no way that would be a loss attributable to the defendant or indeed one in which the defendant in making a valuation could reasonably have foreseen, and it probably goes without saying but perhaps the submission should be put, that these valuations were not valuations predicated but in particular lending rates or terms. Admittedly the defendant had recommended 65% but certainly the valuations did not suggest terms of the mortgage or matters of that sort nor indeed, as I understand the evidence, is there any evidence that the defendant was aware of the terms of either of those mortgages, or for that matter the general form of mortgage utilised by the plaintiff.

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Now, your Honour, in those circumstances might I with respect submit to your Honour that if one accepts \$185,000 as what I have called the true and proper value of McMahons Point, 64% of that amount - and I have had certain figures typed but on reflection I would like to have them done again over the weekend - is \$118,400. The sale price was \$164,000. For the reasons submitted we would submit that that amount should not be deducted. In those circumstances the plaintiff qua the defendant recovered back the totality of the principal.

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However, it is necessary to concede that the plaintiff had paid out some \$41,600 more than it otherwise would have done and on that amount it would be entitled to interest in our submission at the rate of 9.75 for a period of five years and it is just over five years and that picks up the period from the date of default almost to the date of hearing. We have not sought to differentiate between those two periods nor do we take any point that the period of sale was excessive in respect of McMahons Point so your Honour does not have to be troubled about whether interest should be in any way down graded qua time. But of course a rough calculation of that amount of interest would be \$20,280 and against that amount one would have to off-set the rentals received of some \$56,000 and the consequence of that in our submission is there is no loss incurred to McMahons Point referable to any conduct on the part of the defendants.

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As far as Glebe Point is concerned on the basis that the true value or proper value of Glebe Point is \$128,000,

65% of that sum is \$83,200. So that the difference between the amount of \$104,000 which was lent and the \$83,200 is \$20,800. The sale price was \$65,000 so there was a depreciation in value within that two year period or approximately two year period of \$63,000. We would submit that that clearly is not attributable to the defendant and but for them suffering depreciation in value there would not have been any loss at all on principal. However, it is necessary once again to bear in mind that the \$20,800 was out and interest at 9.75% on that figure is approximately \$3,346. I say approximately because that is my mathematics, I will have it checked by people who are better than that than I am. But that is approximately right. Then, your Honour, there was recovered in the liquidation \$1,641 which would have to be deducted from that amount.

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HIS HONOUR: I do not think it is worth spending time on it but it strikes me as odd, Mr Rolfe, that should accrue to your credit where everything else is to the mortgagee's default.

MR ROLFE: That is probably not worth arguing about but of course the rentals would be certainly worth arguing about because they would be a direct amount flowing from the property and the rentals would be another form of interest.

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One has to, I suppose, even on Friday afternoon look at things a little pessimistically from time to time. But on the assumption your Honour accepted something less than \$150,000, and in answer Mr Woodley gave to your Honour yesterday, that it was \$91,000, which we do not embrace -

HIS HONOUR: Let me suggest this to you as a course which might commend itself to you, if I find the plaintiff does succeed I will set out what I consider to be rightly or wrongly, the appropriate damages.

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MR ROLFE: But those are the principles with respect we would submit are applicable to the quantification of damages in a case such as this.

In the 13th edition of McGregor on Damages the author deals with the problems of surveyors in pars. 929 and 930, and we would submit that those paragraphs provide support for the submission that the general measure of damages as laid down in such cases as Baxter and Gapp applies to the one-off transaction type situation. Both paragraphs and with sentences which would indicate that that was present in the author's mind. The final sentence of par. 929 and the penultimate sentence of 930, I thought I should draw your Honour's attention to them.

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MR CLARKE: Your Honour, at some stage in my address in chief I put the position of a plaintiff that the contract doctrine of holding out ostensible authority which is referred to in Mr Morling's notes is not a relevant doctrine in relation to the answering of a question as to whether an act was in the course of employment or not. With the

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greatest of respect to the argument to the contrary, in my submission the cases do not support the proposition that one needs to have the type of holding out that is envisaged in what I have described as the contract doctrine. It is important always to distinguish between those cases dealing with course of employment and those cases which are not dealing with course of employment but are dealing with principal and agent and arguments advanced.

HIS HONOUR: When I said to you erroneously that Beam's case was referred to in Cantler & Grain Crispers, in fact it was referred to in Conway and if my recollection serves me right that was a torts case but I think either in the course of the appeal in Beam or in Conway the members of the court seemed to deal with this theory of ostensible authority. They use "course of employment" and "ostensible authority" in, it can only be called, an alternative way.

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MR CLARKE: I will deal with those cases but we have taken the stand that the driving-type case, we have taken the case which I think was expressed in Uxbridge, but it does not apply in the reliance type of case. It is hard to imagine a pedestrian knocked over being misled by ostensible authority.

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HIS HONOUR: I think in Beam what the Court was saying there in reference to the argument that somebody was running, that the driver might have had ostensible authority to pick people up which would have made it a kind of reliance case.

MR CLARKE: I understand what your Honour is putting but the concept - and I will read Beam's case again - but the concept you rely in a sense on getting in a car, the driver is not only driving you carefully but is driving you carefully as the agent of someone else who will be liable if you are injured, I find it difficult to understand that in the context of these cases, but I will deal with those cases. Really this afternoon I wanted to outline what I wanted to say and take your Honour to Slingsby's case but the position we took and we take is simply this: Where the authorities talk about apparent authority or the ostensible authority of the servant they are covering the situation brought about by the arguments developed over the years, but whilst you give a servant precise and particular authority to perform a particular act and whilst he is doing that act in the performance of his normal duties they are normally liable it could not be said that they are given express authority to do that act of forging documents against the interests of the employer or any act, acting fraudulently against the employer and therefore to talk about express authority there was not apt. No one is authorised to commit a forgery but what reports were directing attention to is that in doing the class of act which he was expressly authorised to do, albeit in a situation where he could not be expressly authorised, he was doing it apparently in the authority he had. I will take your

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Honour to some Privy Council cases which support this, and there is no need to rely on X as a particular individual in performing that act on behalf of the principal as there is in the contract doctrine. All there is a need for is he does the act which is in his express authority, if done properly and with someone relying on that as being done properly, it being a document of the company, and relies on it. There is no need, in my submission, for physical contact or personal contact and there is only need - as there was in these cases - for these factors: an express authority to accept instructions and prepare the valuations on behalf of the company; a purporting of the valuer to do so; it is within his apparent authority, and then a reliance by someone on the document as a genuine document of the employer. That sets out the essential elements of the case.

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Before going to Slingsby could I have access to the 32 valuations? Exhibit 9, is it? (Produced).

MR CLARKE: To deal with a distinction that Mr Morling drew from the cases and a distinction which appears clearly from Morris's case and one which we accept, that to simply have someone in your employ who is in a position where he can avail himself of the documents and go away and commit a forgery, is not enough. That is clear beyond doubt. That is why one has to find the real underlying authority to do the act legally. Slingsby was not a "in the course of employment" case. That of course was one of the factors in Slingsby There was never authority to do what this man did.

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If one contemplates for a moment this operation that was going on out at Glebe, it was fundamental to this operation, and one has only got to look at these documents to see it, that the valuations upon which other people were going to act and were being invited to act - your Honour will remember the evidence. As soon as the thing was done it was sent to the solicitors, almost like a sausage machine. It was essential to that operation that the valuation be in fact done by someone authorised to carry out valuations and to deal with customers. Because it was one, perhaps one or two; when you are dealing with thirty or forty it would be fundamental that there may well be inquiry made at the head office of Richardson & Wrench. In this case we have really only dealt with two and of course the evidence is in a hiatus state and must have been in relation to this other 38. But it would have been fundamental that there may well be an inquiry of Richardson & Wrench so that the person who prepares these would have to be in a position to justify the stand, to answer the inquiry and to deal with the matter. His position was a necessary part of the whole operation. One only needs to go to the actual valuation that he prepared. If one looks at genuine valuations one will see that the handwriting is absolutely normal handwriting. There was no endeavour to disguise it in any way at all.

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Then omitting the first few valuations when perhaps the matter had not been thought through, he insists that his initials and S.C., the girl in the office, be put on the documents. The purpose of that is clear; so that not only was he a man who, because of his position, was able to take the papers but he was the man to whom inquiries would be referred. If you rang up and asked for T.G.R., that is to whom you would be referred. He would be in a position; and it may well be in a number of these other matters that inquiries were so directed and he dealt with them.

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But it was not a case of a man being simply put in a position where he could steal the documents and forge signatures. He had to be a man authorised to prepare documents and deal with customers who rang up the valuation department. I think virtually, apart from the earlier ones and one or two odd ones afterwards, all of these have got the initials T.G.R./S.C. and all of them are signed with a signature which is Richardson & Wrench Limited but which is clearly Mr Rathborne. So we would submit the essential elements of placing him in a position to do valuations, his acting on behalf or purporting to act on behalf of the company, and his issuance of the valuations, has been satisfied, and that satisfies the test.

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HIS HONOUR: Mr Clarke, it is only because I had to delay you because I was doing this case with the bank that it made me think of it. You take the situation of a bank manager; day after day in exercise of his authority as bank manager he gives credit references, reports, might even sign bills of exchange and so on and so forth. One of them goes bad and every night he takes material home and gives totally fictitious credit references, forges bills of exchange; but a real fly-by-the-night operation has got a total parallel business running at home in his basement. On your argument, because he can do that legitimately during the day, he can conduct himself from dusk till dawn forging away to his heart's delight in a sense that it would not really be forgery. He is signing his own name on the bank's paper which between the hours of 9 and 5 he is authorised to do; the bank would be bound to all that?

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MR CLARKE: Yes, that is precisely the point. He would be in there between 9 and 5 and any inquiries about these matters he would be in a position to handle.

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HIS HONOUR: And you say that that is not a situation in which his activities during the day merely put him in the position of being able to do what he does at night. It is just performing improperly what he is authorised to do directly?

MR CLARKE: Yes, his act or purporting to act on behalf of the bank, which is the essential part of the fraud of course, is what removes the concept that he is acting as a stranger to the bank.

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HIS HONOUR: If you take that to its outermost limits then everybody can within the limits of his day-to-day authority act outside office hours to his heart's delight, involving his employer in all sorts of liabilities, and there is nothing whatsoever that his employer can do to avoid liability.

MR CLARKE: Your Honour, it would make absolutely no difference if he does them at home at night or does them in the office, because third parties could never interfere.

HIS HONOUR: The difference is not in the location; the difference is in the sense that he has really erected a whole business. I, the bank manager, as in the business of forging bills of lading, credit references and what have you. 10

MR CLARKE: That follows from the authorities. The view has been taken on the authorities that the wheels of commerce must run on. There is no way, take you Honour's example, that anyone receiving these documents would have the slightest chance of knowing whether it was right or wrong. So you act on the basis that he is doing what he is authorised to do and therefore the bank is bound.

HIS HONOUR: But there is no way the employer could do it or police it either. Unbeknownst to the employer this could be going on with a thousand bank managers. 20

MR CLARKE: That has been the underlying problem with a lot of these cases. For instance, Lloyd v. Gray-Smith - how would he have known? How would the master have known that?

HIS HONOUR: The distinction that is pointed to, and you may say that this is the only relevant distinction, is that there the customer comes in. He sees Bloggs, the fraudulent man, as a representative of the firm. All your dealings are with that man as a representative of the firm. Here your clients never had any connection with Rathborne as a representative of the firm, and that is a fundamental distinction which Mr. Morling draws. 30

MR CLARKE: I understand that and he raises it as a question of the ostensible aspect. There are two things: the Uxbridge case, whilst the ultimate meeting might have been a physical meeting is not quite clear, but the Uxbridge case is an example which would support my submission. There are two other cases in the Privy Council and they are referred to. One was Montague Smith, J. Neither of them, so far as we can see, had any of the physical or personal contact or necessarily business contact that Mr Morling relies on as being essential. The major one which I rely on is a case of Swire v. Francis 3 A.C. 106 at p.115. 40

HIS HONOUR: What does Swire say in your submission?

MR CLARKE: Swire is an interesting case because it is before Lloyd v. Gray-Smith. It is a case where the employee took moneys for his own benefit. The employer was held liable. It is a case in which, so far as one can see, the document on which he perpetrated this fraud appeared to come from the office but could have, we say, come from anywhere. (Headnote read). It is a case which was in the colonies in Shanghai and it would appear that, so far as one can see, it was done in documents and could have emanated really from anywhere.

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The other case to which I was referring was McKay v. Commercial Bank of New Brunswick L.R. 5 p.c.412. This is the judgment or speech of Sir Montague Smith which has been quoted in a number of other cases. This was a bank official operating from the bank but having brought into him, by the brother of an insolvent person, some document from a plaintiff, or a person who became the plaintiff, who sent off a telex to this plaintiff. But I will deal with that. In that case there was no connection. The plaintiff had not even written.

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(Adjourned for further hearing to 9.30a.m. on Monday, 23rd June, 1980).

IN THE SUPREME COURT)
OF NEW SOUTH WALES) NO. 3568 of 1976
COMMON LAW DIVISION)
COMMERCIAL LIST) CORAM: ROGERS, J.

KOORAGANG INVESTMENTS PTY. LIMITED v. RICHARDSON & WRENCH
LIMITED

TWELFTH DAY: MONDAY, 23RD JUNE, 1980.

MR CLARKE: If I could turn to Farquarson's case, it was a title to goods case. It was a case in which an employee simply sold his employer's goods and sold them to a third party. Those cases of simple theft -. The difficulties there raised, or the action, was based on a form of estoppel and again it was not in the course of employment in that case because one was setting up a case in which one could not establish estoppel, a case which prevented the employer from raising the question of title. Farquarson also relied on the hard luck principle. We rely on it, we say that in a case which is perhaps close to the borderline that will be the factor, but it may well be that there is a statement in Farquarson which is against it but in cases much more in point in this case there has been said in numerous cases since Farquarson that that is the principle in doctrine.

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I did want to return to Uxbridge and deal with these other two cases. Uxbridge and the statement of principle by Lord Green is really the fundamental way we put our case. Going to the older of the cases, if I could go to McKay's case which is reported in 5 Privy Council, Appeal Cases -

HIS HONOUR: I have read it.

MR CLARKE: The particular passages to which I would refer your Honour on p.410 and proceeds to the passage to the reference to Barwick's case and the application of principles at p.415 to the facts of the case. It was a case, of course, in which a bank manager signed a telegram "Lingley". What we, of course, say about that case, once it was found that the bank manager had authority to carry out the type of act which he was doing, then the bank manager was liable. It did not matter that the recipient did not know the bank manager's authority or whatever.

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HIS HONOUR: 412 is part of the quotation from Barwick's case and in line 3 it says, "The general rule is for

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the Master's benefit". We now know the requirement for the Master's benefit. It still has to be in the course of the service and that really seems to be the issue ultimately.

As I understand the division between you it is this: You say this man had the authority to do this type of work. Mr Morling concedes that but he said it is just as though this fellow had set up another business and was doing it in the dead of night. He was signing Richardson & Wrench's name, doing the same sort of work but it was outside the course of service.

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MR CLARKE: I will come to that. I will seek to do that in this way, to take up Mr Morling's analogy of the tailor. What the ultimate point will be found really is on what Lord Green says and it does not matter if he does it once, twice, three or ten times. There are questions of fact and law mixed up. The only point I am seeking to make with these cases is that when the courts talk about apparent authority they are not talking in the context of a doctrine but exercising his real authority but in a dishonest way. I don't think they are quoting Swire and Francis and I refer your Honour to p.113. I take it your Honour has read this one?

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HIS HONOUR: Yes, I have.

MR CLARKE: It is again a case where one cannot find any holding out in a contractual sense, before 1912 it is a case where the Master got no benefit at all. The analysis of p.113 in my submission supports the proposition that there is no holding out in a contractual sense.

Could I take your Honour to the decision at first instance in that case in Uxbridge, 1939, 1 K.B., 267. The facts are more clearly set out. This judgment is important for the manner in which it distinguishes Lingley's case and Atkinson, J. does that at 267. Also the Ruben's case and Credit Bank case and there is the example in 267 which is again on the point I have been talking about of apparent authority. At 267, the second paragraph, it is said, "One is bound to agree to sign cheques". Transposing it to the examples here - it has been known in this community there was a person high in the Rural Bank, I think, who did this sort of activity for a period. The mere fact it was done more than once or done for one's own benefit does not remove the principle. If you are placed in that position if you do it once or ten times the innocent person defrauded is entitled to claim.

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Could I come to the dicta of Lord Green in the Court of Appeal in Uxbridge's case where the point I seek to put is put more clearly than I could put it. If I start at p.253, "That is exactly what happened in the present case for his employer's purposes".

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"..... for his own purposes or for his employer's purposes". Having quoted that, can I then move to deal with the situation that he may be doing that as part of a continuing scheme for personal gain to himself, for his own business, or he may do it on one occasion, but the principle in my submission is still the same; and when one comes to consider the scope of employment was the course of employment, really it could never be said in the narrow sense of the word that anyone doing the act there spoken of was acting within the real scope of his employment as the law deems it, for the purposes of the enabling or recovery for the defrauded third party.

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If I can then move to the analogy about the tailor, it is interesting, because in a sense one gets the same sort of duality of positions one gets in another sense in the Morris v. Martin case, that the employer would be liable to the valuer but not to the third party. Mr Morling gives the example of the tailor who goes to his home on a Friday night, puts the label on the suit, and could he ever be liable for saying that the employer was liable as acting for David Jones'. Well, when Mr Morling said it could never be said, because he has acted outside of the authority that tailors have to act for David Jones', but he knows the full facts; and that is really like the position of Mr Bourke in this case. If one assumed that Mr Bourke had asked for a valuation because he was considering buying the property, and got a valuation which was negligent from Mr Rathborne, in the circumstances in which the evidence discloses these valuations were written, typed out in his own office, if one assumes that, and Mr Bourke said, "Well, I bought this property because I relied on your negligent valuation, and I am going to sue Richardson & Wrench", his position would be impossible.

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HIS HONOUR: Now let us analyse why: Is it because it was not done in the course of Rathborne's actual employment?

MR CLARKE: Yes your Honour.

HIS HONOUR: All right; this is where we get into trouble. Once you concede that in those hypothetical circumstances it is not in his actual employment, then the only way that anybody can succeed is on the basis of ostensible, and I understood your submissions in-chief to say you cannot point to anything which indicates ostensible; am I mistaken?

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MR CLARKE: No, your Honour is correct in this sense, that I cannot make a case of ostensible authority in accordance with the doctrine, but the whole basis of it is this, that if a man is doing what he is authorised to do, that is his actual employment; but if he is doing exactly what he is authorised to do, but defrauding his employer, then that is ostensible authority, and that is what this case in my submission referred to.

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HIS HONOUR: Just reverting back for a moment to what you were saying, you say that this ostensible authority does not fail because Bourke knows the full facts?

MR CLARKE: Yes your Honour.

HIS HONOUR: With somebody else, you say it does not matter?

MR CLARKE: No your Honour.

HIS HONOUR: So that the logical conclusion to be drawn from what you are saying is this, "Let us assume that this fellow had set up a clandestine operation at night, using the name Richardson & Wrench Limited, without any authority from Richardson & Wrench. Bourke goes to him and says, "Look, I would like you to make some valuations for me". He does it at night. Let us even assume he does a perfectly proper job of making the valuations, and he signs it, "Richardson & Wrench Limited". Now it has got no more to do with Richardson & Wrench's activities that he carries on during the day than if he broke into Richardson & Wrench's premises and stole some of the letterhead and the writing paper. Yet you say that because during the day he can do this properly, it does not matter to the third parties if he does it at night, for his own benefit?

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MR CLARKE: Your Honour, can I put this, that I would recognise that that would be, even on my own argument, a somewhat difficult case; but I would say I do not need to go that far and I do not need to answer that, because that is not the facts of this case or anything like the facts of this case, and I wanted to make this quite clear. What we know in this case is of course fairly limited, but we do know that two valuations were issued. We do not know whether there was anything achieved by persons who might have been members in respect of those two valuations, with Rathborne at Richardson & Wrench. We don't know in fact whether they were involved in the sense of business discussions within the precincts of Richardson & Wrench or during business hours.

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We do know, however, that my clients had no contacts with them. Now that is all we really know about two valuations; they were issued, typed, outside the office. The preparation, if there was any preparation - we do not know whether it took place in the office or outside. We know also that they were valuations that were prepared for someone who was a client of Richardson & Wrench in this sense, that he had, prior to any of this, been a fairly regular client of Richardson & Wrench, and inferring that is where he met Rathborne in the course of the business. So that we know, as to the two, that they were typed and signed away from the office, one without anything in the box, the other with one wrong initial.

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Now that does not prove - those two, if I can deal with that for the moment - any more than that on two occasions he acted in defrauding of his employer. Now it is said there are another thirty-eight in respect of which we know that the mechanics were carried out or some of the mechanics were carried out away from the office, and none of which were charged for. Now again these thirty-eight are before your Honour, necessarily; the facts in relation to reliance or otherwise on those are not before your Honour and perhaps will in another case come before your Honour, as to some of them. But the point is, one cannot assume that there was not detailed contact with Rathborne at the office; one cannot assume that there was. In respect of those thirty-eight one just does not know how much activity involved Rathborne in his Richardson & Wrench situation in the office, and for all we know - and this would be simply a totally innocent happening - but someone might have rung up and spoken to Mr Hodgson, they might have been a person who relied on Mr Hodgson in the way that my clients referred to, and said, "I have a valuation by T.G.R.". "That is Rathborne". "Is he the sort of valuer I can rely on?" "Of course he is". "Can I have a chat to him?" Obviously there is no evidence to that effect, but one cannot assume whether or not this sort of thing happened. One cannot conclude from the simple evidence as to thirty-eight valuations that he was conducting totally away from the office a clandestine business in relation to valuation.

HIS HONOUR: But Mr Clarke, my difficulty is this, as you rightly say, we know very little of the objective facts in so far as these two, or for that matter, the thirty-eight valuations, are concerned. But what we do know is that the objective facts all seem to suggest the lack of a contact with Richardson & Wrench, in the sense that Richardson & Wrench never got paid for this, Richardson & Wrench never utilised the office procedures for bringing these into existence or for recording. In so far as it has any value at all - and I do not want to put more weight on it than it will bear - the credit procedures may suggest another reason for removing it from Richardson & Wrench's umbrella. So that what I am trying to say is, few as the objective facts we may be, are they not all pointing away from Richardson & Wrench?

MR CLARKE: Your Honour, they point to him doing these valuations away from the office and not following procedures, so that he was doing it as it were behind Richardson & Wrench's back. Now I could not argue that that would not be a proper inference; he was doing it in fraud of Richardson & Wrench, if one likes to put it that way.

HIS HONOUR: We both agree that that seems to be sufficient to take it outside the range of Richardson & Wrench's liabilities, the mere fact that he was committing a fraud.

MR CLARKE: The point then I take from that - it was, however, and this is the distinction between the thief and the clerk, critical for the operation, for obvious reasons, that it had to be a man who was in his position, and it was his position and his authority which facilitated the whole operation.

HIS HONOUR: Well, that was the occasion, as Salmon L.J. put it, wasn't it, which enabled him to perpetrate this activity?

MR CLARKE: Yes, the occasion, and it enabled him to carry it through; because if one pauses to consider for a moment what would happen if Hodgson was rung about a valuation and he asked and Rathborne was not there, and no one had done it, and he looked and could not find it in the register, and then asked Rathborne when he came in and Rathborne said, "Sure, I did that one, that is my valuation". "Why isn't it entered in?". "I haven't got round to it". Unless he was going to be confronted with a large number of ones, he was in a position to handle any complaint about one, because he is a senior man, relied on and trusted and in a position where one would have expected him to act responsibly. And he would no doubt have said, "Well, I just didn't get round to it, I hadn't followed the procedure actually, but I will attend to it". And in that respect, what Mr Hodgson said at p.197 is important, that there were times that people did not follow procedures, and that is why the rules were changed in October 1973, and that is before he knew anything about this fraud. But what in essence it comes down to, what we know about here is that he perpetrated these two frauds on Richardson & Wrench and probably he was carrying out the others behind their back, although albeit possibly with deal of contact during Richardson & Wrench office hours, on the telephone or in person at Richardson & Wrench.

But we would submit that the principle is that the employer is responsible for the fraud extends, if the employer is unlucky enough, to where a man acts more widely than one, two or ten occasions, but acts over a number of occasions. If I can go to the bank manager - your Honour dealt with a number of different variables - but if one assumed a bank manager approached by a client, who is a good client and also a friend, a client of the bank, who said, "I want to enter into this property transaction, there is a boom coming and I don't want to miss out. Can you give me a credit reference?". "Your credit is not very good." "But I want a good credit reference". So in fraud really of the bank, and as an actual fraud, he says, "Well, I won't type it in the bank because there might be a record of it. I will do it at home". He does it once and a credit reference goes out and someone relies on it.

Then in my submission, on that occasion the principles applied in Uxbridge's case and other cases would apply. Then if the same man came back and said, "I will have another property, I want another credit reference", and he does it again; that is what happened here, and he does it a number of times, even gratuitously or for a bottle of Scotch, he is doing what he is authorised by the bank to do, but he is doing it in his own time, he is not doing it in his employment or in any way related to his employment, but that is the way it appears to the world. Your Honour will remember what Mr Moses said - and I have asked your Honour to accept Mr Moses's evidence - that to his knowledge, solicitors do not question, as to validity, valuations issued by reputable valuers. It is important to the continuance of commercial activity in the community that you can rely on these things and you can rely on them because, if there is anything wrong, in the normal sense, you can recover against the employer. One good reason, and it would be a better reason in today's society, that the hard luck rule, as it is called, is important is that the employer has, whereas the innocent third party invariably has not, power of protecting himself to a degree, and in this case a good example would be the power to insure today, in today's community, which Mr Fleming thinks is very important. But secondly there was a power in this employer to do what he did subsequently with hindsight, and that was to bring in a procedure which could not allow this type of activity. I do not think I can say - I have discussed this with your Honour at some length - but in my submission it boils down to the submission that the statement of principle would apply if it is once, ten times or forty times. In relation to Hardie's case, I simply wanted to say that firstly it is inconsistent with Lloyd's case, and secondly a critical matter was that it was at a time when it was a master's benefit case.

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Then the other aspect I wanted to talk about was the blacklist. Now Mr Morling does not rely on this greatly, because he says it is subsidiary and the act was totally outside the cause. But if one has a blacklist situation, it would be in my submission a classical situation of an unauthorised mode of performing an unauthorised act. It did not mean he could not issue valuations, it simply meant he could not hand them out on credit. Now that is the sort of internal operation which would never be the subject of inquiry by a third party, and the Court would, in my submission, in all cases where a valuation is issued subsequent to the blacklist, then the argument would clearly be taken to be within the course of employment. If one gives an example, the valuations of 12th December are Richardson & Wrench valuations in every sense of the word. Could it be said that Richardson & Wrench would not have been liable on those? In my submission it could not; they were valuations carried out by Richardson & Wrench. The only thing about

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them was that they were handed up on credit when they should not have been, on one view. That cannot be more, on any basis, than simply a restriction on the manner of carrying out your work which has been broken, and does not limit the scope of the work. One is tempted to draw the conclusion which your Honour has, prima facie - and I do not mean this in more than perhaps a provisional sense - drawn, that the blacklist is a good example or a good reason for this operation of Mr Rathborne's. Now that may or may not be right, but it does not, with respect, seem to bear up in relation to the evidence, because immediately after the blacklist valuations going through, there is no suggestion that any time thereafter Rathborne was pulled up in respect of that; in fact the contrary is the position. And Mr Hodgson said I think at p.190 or p.196 that probably what happened was that most of those bills were paid.

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But if it was a continuing blacklist and if that was a fact which stopped him doing it through the office, then it is extraordinary that when one or two bills are still outstanding in September and October of the next year, he goes and does the valuations. I do not know that that distinction could give us very much one way or the other, but on the evidence I would have to concede your Honour would have to find that he was doing it behind Richardson & Wrench's back, in a sense.

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Could I then just come particularly to Conway's case and the earlier Twine's case and make these observations, leaving aside the obvious one that it is not dealing with the same problem, but in Conway's case, and perhaps I ought to just refer to it shortly, the proposition that is dealt with at length, starting on p.273, was the proposition that the plaintiff was a trespasser. So that right down to the end of p.275 where scope of employment is dealt with, his Lordship is dealing with an argument under which the plaintiff sought to assert an invitation or a licence from the defendants, because of the invitation by the driver, and it was said, as I understand it, that he could not invite or give licence on behalf of the employer because not only had he no authority to do it, he had been prohibited from doing it; so that there could be no licence. As Lord Denning says later in relation to this case, this part of the judgment is clearly wrong, because of the law relating to trespassers having been changed.

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Then at the bottom of p.275 his Lordship comes to the scope of employment argument and he says, "The two approaches of course overlap or interlock to some extent not entitled to perform", and he seems to leave the prohibition outside and says that the permission to take those people on was outside the course of employment. Now it is quite contrary, in my submission, to the problem dealt with in

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fraud cases, but in any event it is somewhat doubtful whether the law laid down here in relation to this situation is still good law. It has not been disapproved in terms, but it has since been considered by the Court of Appeal, in a case which I found on Friday night, which I have not given reference to, but it is a case of *Rose v. Plenty*, (1976) 1 W.N. 141. I do not propose to deal with it in detail, but if I can just say this about it, in a majority judgment Denning L.J. and Scarman L.J., who constituted the majority, held that the course of employment did extend where a milkman was prohibited from using young men to assist him on the milk round. "The plaintiff was a young 13-year-old-boy precisely on the milk float", and that was, one might be forgiven for thinking, almost the only conclusion that could be arrived at by the trial Judge, in the light of Conway's case. But their Lordships came to the view here that the prohibition affected only the conduct of the employment and did not define or limit the scope of this duty, whereas in Conway's case the majority considered there was a limitation of the scope of employment.

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The distinctions are somewhat difficult to follow, and it should be pointed out that Lawton L.J., finding himself unable to distinguish Conway's case, was in the minority - he could not find any distinction. Scarman L.J. - and I come back to the hard luck philosophy - went back to Hearne's case and really in effect found on that hard luck doctrine. But Lord Denning managed to distinguish them in a situation, with respect, in which it is very hard to see the distinctions; both were prohibited from being on the vehicle; in no case could permission have been given for either of them to have been there, and in one case he succeeds, and in the other he does not.

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Finally, on the course of employment, where, as here, it might be thought that it is a borderline, a difficult case, because of the activities, in my submission if one looks to the underlying principle that the words "course of employment" must be given a liberal interpretation and that where two innocent parties are affected, then the principle to which I have adverted applies. Could I leave that subject and go to the Hedley Byrne argument.

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HIS HONOUR: Yes, it was just about conceded in your favour that you are right on this point, wasn't it?

MR CLARKE: Hedley Byrne?

HIS HONOUR: Yes. Well, as I understood Mr Morling he said that if I found against him in the course of the employment argument - unless you are talking about negligence?

MR CLARKE: Your Honour, I rather thought I might have misunderstood. He said in general principle it was conceded but he said that the course of conduct -

HIS HONOUR: I am sorry - yes. That is what you are going on to?

MR. CLARKE: Yes, I want to deal with that matter. It is difficult sometimes, when reading Hedley Byrne, to dissociate disclaimer on one hand from the lack of duty initially on the other hand. But in my submission, once the context in which Hedley Byrne was decided and the exercise which the Law Lords had set themselves is understood, in a case such as the present there is no real difficulty, as primarily the issue of a valuation to a limited class of persons or a person for the use of a limited class of persons would prima facie, it being the issue of a formal document in a formal business situation, by persons of the necessary skill, would prima facie give rise to a duty in that that prima facie consequence would only be removed if one could find in the precise relationship of the parties a clear indication that valuations issued by the valuer were not qua that party to be relied on, or there was a disclaimer. And a good example of valuation issued by Richardson & Wrench which was not to be relied on by Kooragang was a footpath valuation - Mr Satchwell said it in so many words; this was something they were not responsible for. There could never have been a duty of care in relation to that. But we do start off, in my submission, with the position, that prima facie there is a duty of care, and the evidentiary onus would be on my learned friend to point to something which would have removed that duty of care. Now I have taken up particular passages of the various speeches and I will just refer your Honour to them without reading them, because no doubt your Honour will want to read Hedley Byrne again, but Hedley Byrne of course was dealing with a particular type of case which was occasioning to courts or had occasioned the English courts some problem of these bankers references which might have been thought to be against client's instructions on occasions. They were reasonably informal references, and not only that, but in Hedley Byrne, because this law was being considered by the House of Lords in the context of overruling the Court of Appeal, the Law Lords went wider than just looking at formal occasions or even bank occasions. They were looking at the social informal chit-chat type of occasion as well and it was necessary to see that the advice was given in situations where a duty of care was created.

In Hedley Byrne one did not have a clear disclaimer situation, because in Robinson's case, information was given as a clear disclaimer. In Hedley Byrne the request had been made upon the basis that there had been no responsibility. So one could not simply say, Well, it was a disclaimer case. It was a case in which, before one even got to the responsibility from the adviser, that it had been made clear that it was a non-responsibility action.

In the circumstances of Hedley Byrne and the discussion there, nothing is to be found, in my submission, which takes away from, and indeed there is one passage which supports the proposition, that informal advices such as valuations given in the business context, that there would be prima facie liability; that the qualification needs to be a clear qualification I draw from what Reid L.J. said at p4x86.8, and that the context was a general discussion of all types of advice appears from a number of passages in Reid L.J.'s judgment, and I have noted pp.483.7, 483.9 and 489.3 and 492 dealing with Robinson's case. Morris L.J., p.494.8 shows the need to qualify the principle to exclude what I have described as friendly gestures. At p.502.9 and 503.2 he states in broad terms the duty principle, which is adopted or agreed with by Hodgson L.J. at p.514.4. Morris L.J. also, at p.504.2 distinguishes between the banker type cases and the valuer type cases; and if I could leave Devlin L.J., because he approached it from a contractual notion which did not seem to find favour and has not seemed to find favour since, and refer only to Pearce L.J. at p.539.7, where he clearly distinguishes the business occasion and the casual social approach, and there is another reference on p.540.2.

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Now what is known here in respect of these parties and what is relied on by my friend as discharging this evidentiary onus of establishing either the disclaimer, which in my respectful submission could not be established on any basis - there was nothing here which amounted to a clear disclaimer to exclude responsibility for a valuation that came to my client's hands in other than the course of business suggested by Mr Morling, to which adherence was very vague indeed, in my submission. But it is also said that the course of dealings showed that no duty arose. Well, there is, with respect - and I do not want to go over all this again, because your Honour has made the clear point about this not being contemplated - but not only is this the position, but contrary to the assertion by the defendant that there was a course of practice that the only valuations that the plaintiff would rely on were valuations of Richardson & Wrench, which were obtained by a mortgagor at the request of the mortgagee, Kooragang; contrary to that submission, that there is clear indication on at least two occasions prior to this occasion, one of which would be well known, the only valuation relied on by my client was one obtained by the mortgagor, and that was Pevsner and Larata; and there was no indication in any document or any understanding that there was to be the type of limitation Mr Morling asserts. What is known is that Kooragang relied very heavily on Richardson & Wrench; they were the valuer whose word they took at all times, and that was clear from the evidence, and it is clear from the historical basis. They took their word and acted on it, whether or not Richardson & Wrench complied with the procedure set out in the letter of 21st February. Now it was not a case, as was sought to be suggested, that what Kooragang wanted was a valuation from a valuer independently of the

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mortgagor; it was simply a case that Kooragang wanted and acted on at all times the valuation of Richardson & Wrench.

Now Mr Burns had prepared a schedule as to various areas of reliance with the letter of 21st February, 1972, and it is correct to say - I did not check this schedule but Mr Morling did and came to the conclusion, apparently for good reasons, that there were inaccuracies. Now what I would like to do is, myself, some time try and prepare a schedule which deals with each one of these matters, so that your Honour will not need to go to them. But what is overlooked when Mr Morling talks about the details of the valuations and whether there was to be issued a valuation with rentals, is that Kooragang did not impose in its letter, with respect, on Richardson & Wrench a duty of including specific things in its valuations. Kooragang asked for the valuations to be issued in the manner that has been shown by the evidence, addressed to the mortgagor, but requesting on each occasion a separate letter to Kooragang with the rental information, the repair information, the insurance, the outgoings, all the details - and your Honour no doubt will have a look at the letter of 21st February - but it concluded by saying, "If you include them in the valuation we do not need separate comment, but if they are not available, please let us know".

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Now that was the guide procedure, and that just was as a matter of practice never followed. It did happen on the early occasions, but later on it is very hard to find a case on which it happened, and there was no doubt good sense in this; Richardson & Wrench were reliable valuers, Kooragang accepted them as such and did not require strict adherence to these guidelines. They were, and remained, nothing more than that - a basis for setting up an operation, which would no doubt develop as the operation proceeded.

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In the whole context of the question of where a duty arose, one in my respectful submissions must not overlook the fact that in setting up this operation - and I will deal with this in more detail, the matter of contributory negligence - Kooragang were relying quite heavily on Richardson & Wrench for advice as to how loan applications should be handled. That appeared from Mr Hodgson's evidence, where he said that Kooragang were relying heavily on Richardson & Wrench for advice in this area. I think also Mr Simpson's evidence and Mr Satchwell's evidence supports that, and more clearly than anything it appears in the letter of 21st February, 1972, when thanks are given for the relevant advice. Now nowhere was it part of the advice, "Don't rely on our valuations unless you check them with us"; nowhere did anyone contemplate fraud, for obviously good reasons, and nowhere was it suggested that you cannot safely rely on one of our valuations if it is three, four or five months old, or it does not include some of the particular items you want.

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So in our submission there is nothing to be found in the evidentiary material to support that there was any such agreement or operation carried out in precise terms that clearly showed that there was not to be a duty to Kooragang in this respect.

There are two other things I wanted to say about that. One is the Pevsner matter, in which it is quite clear that there was an old Richardson & Wrench valuation, I think it was ten months old, and that was simply a form, and I will check this but I think that was perhaps even confirmed orally; and the second aspect is the May 1973 memo. Now what that shows is that at that stage Kooragang were contemplating acting on existing valuations. They were not contemplating obtaining valuations from Hookers or getting valuations from Hookers - I am sorry, Hookers were not mentioned, but the other person. What they were contemplating, and again it goes to this context of saving the borrowers money, was that if they got valuations, given them by the borrower from these other valuers, would Richardson & Wrench simply confirm them as proper valuations. Now in that context they could not really say, in my submission, that as at May 1973 it was outside all contemplation that my clients would act on an existing Richardson & Wrench valuation. The contemplation then was that they might act on existing valuations from other valuers, and Richardson & Wrench in fact gave their okay to that in essence. They said, "Well, we won't confirm them, but you can safely act on these valuations of other people", and it was not new valuations coming about or new persons being added to the panel, as is clear from the minutes of meeting; it was simply the use of existing valuations.

The final thing that Mr Morling construed, in the passages I think on p.264 in relation to the Cobden Pty Limited document in such a manner to suggest that Mr Hodgson was not accepting that if Cobden did not lend the money he knew that the money would be lent by another lender, when he used the phrase "still in his hunt", or "still looking for the loan". If regard is paid to what was said at pp.207.4, 208 and 247.4, it is quite clear in my submission that what Mr Hodgson is saying is that he knew if Cobden did not advance the money, valuations would be used for reliance by other potential lenders. Even, on the other hand, if he did not know that, then in our submission he should be taken, just as in the Canadian case, the evidence would disclose that a person should be taken to know that that would be precisely what would happen.

So in our submission on the question of duty of care and disclaimer, if we are successful in the first point the plaintiff should clearly succeed. There is nothing to cut down the prima facie effect of the issuing of a formal valuation to a known class of person for their reliance.

Could I then deal very shortly with the next question of negligence. I dealt with this in-chief and I do not want to repeat myself, but what we say is that Mr. Morling, in relation to McMahons Point, despite Leafe's valuation, despite the five per cent of Leafe, on the five to ten per cent of Hodgson, despite the non-challenging of Leafe's valuation by a valuer qualified by the defendant, for the purposes of this case, despite the non-appearance of Rathborne, with the obvious consequences of inference, he puts forward speculative figures in a submission designed, with respect, to eliminate the need for evidence, to show how it might have happened. In these circumstances, even if the inference was open - and we do not concede it was open - that Rathborne went about this in a way that was permissible and not necessarily negligent, we would submit that the evidence should be drawn that the contrary inference, that a figure substantially over twenty per cent above the proper valuation just came about as a consequence of his negligence, and that is the inference we submit should be drawn. If Mr. Morling was right in a valuation case in which your valuer might have been performing negligently and made a lot of mistakes, you would win your case by simply sitting back and not calling your valuer and saying how it is an inexact science et cetera.

One other thing, he said they might have had a different view as to rents. Well, we know that there was a contract in existence. He had a duty to inquire as to rents, and there is no explanation as to how he could have arrived at wrong figures. He said "Leafe did not allow for future redevelopment. Well, that is perfectly correct. His viewpoint - and that was not challenged - in this valuation was that it was not proper to allow for future redevelopment. Whether one thinks it is right, as Mr Leafe did, or wrong, as Mr Morling did, there has been opportunity to challenge it if it is wrong. In our submission that does not afford a reason why the prima facie inference should disappear.

Coming to Glebe, let me reiterate the difficulty of seeing how one uses shops and dwellings with the particular market being the shopkeeper who wants to live there, or the investor with a totally different market, being the building society who wants to use shops and offices, or the development company, and we would submit that the inference and approach was clearly the motivation pursuant to which Mr. Gilbert rejected comparable sales; the markets being different, we would submit the rejection is reasonable. No doubt it will then be said, "Well, Mr. Woodley arrived at the same figures by the investment method". Well, that is an assessment of the competing investment methods Mr Morling points to Mr Gilbert's figures and says, "At least in respect of the 1974 ones, they support \$15 per lineal metre". Well, we would simply point out that in the case of Gilbert's 4.44 per metre - I think that was the figure - that related to the whole building and all the others that came close to \$15 related to the whole building, yet Mr Woodley relates it to the ground floor and builds on

it. It may be that relating it to the whole building is a sensible application, but not, in my submission, to relate the ground floor of one to the whole building of the other. I concede that he does so relying specifically on one building which had an unused upstairs, but that overlooks the fact that there is a landlord and tenant, and the landlord would be letting the whole, and if one tenant was prepared to pay the whole rents to use all the building, that would be his business, but the landlord would be looking for the rent for the whole building.

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The other aspect of the evidence is that there is no evidence as to how reliable rents were in 1974 as compared with 1973. It may be that with the slump in the real estate market, rentals went up, but one just does not know one way or the other.

Finally we would submit that if one thinks that Mr Gilbert is low, Woodley is conversely high, and that one gets the extreme approach on the capitalisation on the rents; you get conceivably the lowest figure of seven per cent on the one end and the high figure of ten per cent on the other. We get the rents put high on one hand and put low on the other, and this we would argue could well go to show not the actual value on the rental, and it does not go anywhere, however, in our submission, to supporting by honest error a valuation that exceeds by over \$30,000 the top of the range. Furthermore, even if the honest error approach was available, that inference should not, against the inference of negligence, be drawn in the absence of Rathborne.

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The next point Mr Morling dealt with was reliance, and your Honour will recall he referred to the passage from the judgment of Barwick C.J. We could not, with respect, argue with I think the quotation from Halsbury, which must be a rare reliance; and Mr Fleming deals with it also - I have not looked at the latest volume - and refers to a case of Edgington v. Morris (1885) 29 Ch.D 459. It must be, I think he used the words "a cause", in the sense that cause leads to result, and it is no answer that there is opportunity to verify the plaintiff's negligence, it is simply acting on the cause. But whichever way this is looked at, the evidence in my submission shows that in entering into this precise transaction there was very strong reliance on the valuation. It is borne out by the previous history; it is borne out by Mr Satchwell's evidence at p.22 that security was the important thing, and it is borne out by the policy that loans would not be made of more than sixty-five per cent of Richardson & Wrench's valuations. The proposals put up here, and I am here accepting what Mr Rolfe said, that the loans made were sixty-five and sixty-four per cent of Richardson & Wrench's valuations; they were put forward as proposals and in effect in giving approval, my clients were responding to those propositions and advancing up to sixty-five per cent of a Richardson & Wrench valuation. Your Honour

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pointed to the telex, which made this, in my respectful submission, quite clear; that if there was any doubt remaining after reading the telex, one only needed to look at the telex of I think the same date, coming back from Melbourne, which in effect rejected the notion of lending more than sixty-five per cent or dissuaded the directors of Kooragang from lending more than sixty-five per cent, and therefore they went back and loaned their sixty-five per cent. In my submission, if the other factors are made out, the reliance is clear.

Could I then on contributory negligence make the following submissions to support a submission that here the onus in our submission has been discharged by showing no relevant fault contributing to the loss. Firstly, Kooragang as I have said relied on Richardson & Wrench for advice. I refer to the letter of 21st February to Mr. Hodgson, p.178, and to Mr. Simpson. 10

Secondly they relied to an extent on their solicitor, and that becomes clear from both Hodgson and Simpson's evidence. Whilst it is recognised that the plaintiff is a subsidiary of a large company with substantial assets, and commercially experienced personnel, it is most apt that none of the relevant persons had experience in lending of money on the security of mortgage. Now the important difference between the lending on the company market, which is what they did for the substantial funds, and the first mortgage lending was that when you lend on the company market you in broad terms know the identity and the standing in the community of the borrowers; you know your own situation. When you lend on mortgage you are dealing with persons who never come into contact with the public market, who are not well known commercially, and so you have got to learn as it were a new industry or a new activity. Not knowing or having experience in that, of course, advice was sought. Properly, neither party - that is neither Richardson & Wrench nor Kooragang - suspected fraud, nor did they turn their minds to means to minimise risk, from fraud. This was just not in contemplation, and properly so. In a period of two years they negotiated a total of just over twenty loans. In money terms, reasonably large sums of money were involved, but it could hardly be described as a large-scale operation, in the sense that over a long period of time, as with the other lending witnesses called, there were loans being turned over and a system being developed. It was a short operation involving something like twenty loans, operated in association with the business of the head company. They did receive a money-lender's licence in 1972, but in this field they looked to the experts for advice. 20 30 40

Now it is not suggested anywhere that Richardson & Wrench gave any advice as to checking out valuations more than six months old. Perhaps they should have, but they did not. But it is said that we were negligent because we accepted one five months old at the time we had accepted our offer of a loan. Well, that has got to be looked at in the context of the other 50

evidence, and I will deal with that in a moment. But nowhere was this suggested to be a necessary factor, and indeed when one looks at the market at the time, and there was no suggestion except perhaps the query on zoning of McMahons Point, of any problem in zoning; if one looked at the market at the time, it was a very buoyant market in anyone's viewpoint, although lurking underneath to the experts with hindsight, they would say that some time in 1973 there were the first signs. But to my clients' inexperienced eyes it was a buoyant market. In accordance with the practice in the industry, it would be quite wrong, in my submission, to say that because they accepted one more than five months old they were negligent. They were also advised not to accept photostats. There was never any discussion about photostats, and that was in 1973 a pretty common way of enabling dissemination, with all the signs of authenticity which a duplicate copy does not have, unless it is signed, or on proper letterhead. 10

They were never told not to accept them. It seemed to them to be reasonable to accept them, and indeed if one would analyse it further, what would it matter if they accepted it? If they had wanted the original, they could quite readily have got the original. We know that the original was with Mr. Gridiger, because that was where they were taken for this purpose. They were not given advice to check the Richardson & Wrench valuations, and why, with respect, would they check on the valuations, unless they found something to query. 20

Really what it amounts to on the argument is that because they did not remain alive to the chances of forgery and check against a forgery, they were negligent. But in my submission no one contemplated that sort of activity. As to the checking of valuations being a practice, it is true that three witnesses have given evidence of procedures developed by their companies over many years and as to their practices in operations. In our submission this evidence does not even start to prove an industry practice. It is not suggested that they disseminated their practice widely. That there was any reading material or any learnings put out on this subject. All that is said is that three companies, for their own reasons, as one was to find out, developed their own procedures which involved checking to ensure that their own practices had been fulfilled or their own requirements had been fulfilled in most instances, or in the case I think of one other company, to let it be known that they particularly would be relying on the valuation. And we would of course submit that to call lenders an industry is a total misnomer, and to measure one lender against the standard of another would be again a wrong standard. In my submission, the question has got to be looked at objectively. 30 40

Inferentially Mr. Johnson, because his advice was sought, and one can see from documents in Ex. A that he did not ever suggest the valuations in question here be checked or updated or anything like that; inferentially Mr. Johnson and certainly Mr. Moses said that you do not check or advise checks on valuations, and in circumstances such as operated in 1973, updating would not normally be required under six months; in other circumstances, between three and six months you might. 50

It is also put that it was contrary to the plaintiff's own practice. Well, if it is suggested that it was the plaintiff's practice to check on existing valuations, as I infer it is suggested from the notes Mr Morling put in, then we would say that there was simply no such practice involving Richardson & Wrench valuations. There quite clearly was, not only in practice but a policy that with other valuers they would always be checked against Richardson & Wrench, but never was there a policy that Richardson & Wrench valuations be checked. The two previous instances - Pevsner was checked and confirmed; Tallara was not checked at all. There was simply no occasion given for what would be thought to be an academic exercise of checking of valuations. I do not know whether my clients are supposed to have rung up and said, "is this a good valuation, is it a forgery"?

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Finally on the broad aspect, looking at it causatively, one cannot say on the probabilities, in my submission, what would have happened if there had been a check. If my client had rung up he may well have been satisfied by Rathborne. He may well have been put on to him and been satisfied by him. If that had happened, and this cannot be eliminated on the probabilities in any sense, we just don't know what would have happened. If that had happened, the loan would have gone ahead.

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Could I come then to Glebe. It is said there were no initials. Well, Mr. Satchwell was cross-examined about this and he took the view, and I would suggest it is a proper view, that one does not go to every letter to see if initials are there. It might be treated by the dissenting company as a matter of consequence, although even there it seems to be more a matter for talking or discussion. But it certainly was not put on present notice as to there being something wrong. It is said to be five months out of date. Mr Satchwell dealt with this and I have dealt with this to some degree. There is nothing in my submission why one would not have been able to accept that. It then said it did not contain rental information. As I have pointed out, this was not contained in all valuations given by Richardson & Wrench, and it was not given as an invariable practice, nor was it called for in the letter of 21st February, in the sense of being in the valuation. My clients independently obtained for themselves the valuation evidence from a party who they were entitled to believe was reliable, who was the managing agent. It is then said it was a photostat; I have dealt with that.

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In relation to Glebe also it is said that they should have known the purchase price, and as I understand that submission it is put because there was a purchase or a deposit paid in May 1972 they should have inferred from that or made further inquiries to find the purchase price, and compared that with the valuation. Well Mr. Moses's reaction

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was, "Well, I would have thought with a valuation like that it was a five per cent deposit, and not thought any more about it". But even so, Mr Satchwell makes a claim that what happened in May 1972 was not a matter of real concern to him. If Richardson & Wrench had put the value on it, they would have accepted it. They would not have seen any reason, from their past experience, to question it.

It was put that what the plaintiff was concerned with was advice independently from the mortgagor, and he just did not seek it on this occasion. I think Mr Satchwell has been at pains to point out that he was never advised independently from the mortgagor, it was only one thing, Richardson & Wrench and clients.

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As to the time, I would like to make the point that the time is properly considered, and again I rely partly on what Mr Moses said, as at the time the loans were approved, and then simply pass it over to their solicitors, because then they would, with respect, unless their solicitors gave them some advice to the contrary, simply allow the thing to proceed, and allow the conveyancing transaction to be concluded, and there may come a time after a great delay when they say, "It is now out of date, we will have to re-look at it". But looking at the correspondence between themselves and their solicitor and the borrower's solicitor during that period, one finds nowhere a suggestion that there should be any updating.

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HIS HONOUR: This is what you added?

MR CLARKE: This is what I added. It is requisitions and titles and matters such as that. An interesting aspect is that the solicitors for Kooragang himself in his requisitions asked for the rents, despite the matter that had been sent to my clients, and he got I think a reply back saying they had already been furnished, and he said, "It does not matter whether it has been furnished, I want it", and he got virtually the same advice, I think from probably the same source. So what happened, they made a decision, they were then at least morally if not contractually bound, and the matter was then passed to the conveyancer to handle the transaction.

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Then in relation to - and this is the final thing I wanted to say in relation to this - they said they were grossly negligent in relation to the financial documents. The first thing that needs to be said about that, as Mr Satchwell said, the important thing was the security. Anything else was simply secondary. Whether it is viewed in that light or not, however, if you seek some confirmation and you obtain from a reputable firm of accountants a statement that they have sighted valuations showing a great deal of asset, it would be commercially, in my respectful

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submission, quite reasonable to say, "Well, do we need to go any further than that?" This was just after the end of the 1973 financial year, when it could not have been expected that the financial documents for the 1973 period would have been in existence, and when it might well have been that the financial documents for the 1972 financial year were out of date, but the best information they could get would be some idea of the assets and liabilities from a reliable source. Now of course and with hindsight, probably all those valuations suffered the same defect, but to people, as all people here did, to assume that everything was quite proper was quite a reasonable conclusion, in my submission. One notes, as to suggestions that there were no inquiries made of the company or as to shareholders of companies, that later this was dealt with by the solicitor and he satisfied himself as to various reasons.

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Your Honour, for all those reasons we would submit that there has been no case of contributory negligence made out.

The next issue is the issue of fraud, and we are clearly at issue. Mr Morling's main stand on fraud is that the valuation, if it is out of line at all is not so far out of line that you should infer fraud. We say that in all the other circumstances, coupled with that, your Honour should infer fraud. But he then puts, however, two additional matters. He relies on the course of conduct as somehow answering the fraudulent representation. Could I refer your Honour, without reading it now, to Spencer Bower on Actionable Misrepresentation, I think it is the 3rd ed., at p.224, par.194. "Special Defences. 2. Agreements excluding liability for misrepresentation accepted as a defence for fraudulent misrepresentation". Then the text goes on to consider the Misrepresentation Act of 1967. But there is in the footnotes this notation and reference to a number of cases, "3. Mr Spencer Bower emphasised the difficulty implied agreement". So at best it is a possible answer unsupported by authority. In my submission, at the very highest, from the defendant's point of view there would need to be a very strong clear agreement before one could, in future as it were, exclude one's liability for fraud.

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The other matter to which Mr Morling referred was in relation to McMahons Point, the reference to Cobden in the valuation. We would simply rely on the evidence to which we have already referred in support of our submission that the representation made, on the assumption that was made by Richardson & Wrench, was a representation to Cobden and or unnamed members of a particular class who might act on it, the class being of course the proposed mortgagees.

That brings me lastly to damages, and we would submit that the broad principle in tort is the principle of restitution, to be put in the position you would have been in if the breach had not occurred. And we know as a matter of

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certainty here that the representation was given, and for the purposes of this argument one assumes breach, and we know that as a consequence of the breach my clients entered into the specific transaction which they otherwise would not have entered into. In those circumstances the loss is, in accordance with the principle and authority in our submission, is to be determined by ascertaining what loss flowed from their entry into that transaction, and that those losses included all that as a matter of foreseeability, amount of losses which flowed to them from entering that transaction, and it included in particular interest, penalty interest and costs of sale. We would submit with respect there is nothing to distinguish this case in principle from *Baxter v. Gapp* and we would add that where foreseeability is used in accordance with modern doctrine, it includes foreseeability of even remote possibilities - remoteness is judged on the same test, whether it is looked at from the point of view of damages or breach of duty, and includes as I have said, remote possibilities that are foreseeable. It is not to the point, in my submission, to speculate that if a correct version had been given, my clients might have entered into another transaction.

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HIS HONOUR: But Mr Rolfe says it is not speculation, it is there in the evidence.

MR CLARKE: Yes, but he does not and cannot go that far. He says my clients say they would have lent sixty-five per cent of Richardson & Wrench's proper valuation, and that is right. But to go further and say that they would have entered into a transaction of that nature, with this borrower, is speculation.

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HIS HONOUR: I am sorry, I do not follow that. On the one hand you say your clients agree that they would have lent sixty-five per cent of the valuation, whatever the appropriate figure had been?

MR CLARKE: Yes.

HIS HONOUR: Then where is the speculation?

MR CLARKE: There are two parties to a lending transaction.

HIS HONOUR: But you say they might not have borrowed it?

MR CLARKE: Well, not only they might not have; it would be speculation whether they did or not, but the probability here is they would not have. They were shopping around, as is fairly clear, for a specific amount, which is also fairly clear. That is why I say it is beside the point to assume or to speculate what might otherwise have happened. One has the certainty on one hand, and nothing but speculation on the other hand.

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Now can I, in support of the submission that the probability is that they would not have borrowed the money and if a true valuation had been given, my clients would have never entered this disastrous transaction, can I just remind your Honour that the McMahons Point was in the course of purchase - the contract, as I recall it, was entered into in May 1973. The request for a loan, which had apparently been submitted to Cobden and rejected, was supported by a valuation in June 1973, a valuation of \$250,000, supporting a loan of sixty-five per cent up to \$160,000, or it might have been slightly more; and the purchaser was looking for \$195,000 to buy the property with, and he needed and was after more than the total purchase price, and a loan of \$120,000 would have been or may have been absolutely no good to him. He might have been able, at a very high rate of interest, to have got a second mortgage for \$65,000, but that would have raised the question of the viability of his whole operation, and no doubt the more likely course would have been that he would have gone elsewhere. In respect of Glebe, if one looks at the new documents added to Ex. A, your Honour will see how the loan moneys were disbursed on that occasion, and again all of it went not to the borrower but to various other sources. If one ascribes to this course of valuation a sinister implication, then it was part of a scheme devised to obtain 100 per cent loans or more to enable the building up of vast holdings of property. Loans, proper loans, would not have been very attractive to Mr Giles Bourke. So that it is all, in my respectful submission, either speculation to look at or say on one hand, well, my client would have lent sixty-five per cent for a proper valuation. There is no doubt about that. But whether it would have been accepted, whether the transaction would have ever followed, is impossible to say. And it is that type of thing that perhaps Goddard J. was saying in *Baxter v. Gapp*. "I entered into this transaction; whether I would have entered into a lesser one, I just don't know."

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Another example of the difficulty of following Mr Rolfe's approach is this, that if one approaches the taking of possession and potential re-sale in 1974, from the point of view of trying to minimise one's loss, it is a very different question as to whether one is trying to minimise a loss of \$100,000 - \$120,000 on one hand and \$160,000 on the other. By way of example, Richardson & Wrench in 1974 advised, on a background of a loan of \$160,000, and their view, whether considered or not, was that perhaps \$100,000 would be obtained, deferring sale. Well, deferring the sale has, as your Honour would see from the schedule, built up quite enormously the losses to my client of moneys. Whereas if we were looking at perhaps a loan of \$120,000 and they thought they might get \$100,000 or perhaps even a bit better, they might well have gone ahead with the sale then. The whole concept of approaching it from this speculative point of view affects transactions

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that flow on from there. We would submit that in principle and the most satisfactory approach is clearly the approach adopted by the Court of Appeal, Goddard J., in the case to which I just referred your Honour.

Could I then refer to Laughton-Boyd's case, and having read it again last night, what I wanted to say about it, apart from the obvious things, was that the learned trial Judge was not referred to Baxter's case. Probably it is inconsistent with the principle in Baxter's case. Unless, and I could not find this readily in the evidence, except by reference to one matter, his Honour inferred that if \$30,000 had been loaned or offered by the plaintiff, the borrower would have accepted the \$30,000 and proceed with the loan. We would find nothing, with respect, in the judgment to support that inference, but if such inference was open, that would be the only way in our respectful submission to justify that decision and distinguish it from Baxter's case.

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It may be that implicitly his Honour made that distinction because the approach to the plaintiff was for \$60,000 and the plaintiff rejected \$60,000 and offered what he thought was the proper amount, and that was accepted - that was \$45,000. If that inference was drawn, so that you could say as a matter of probability that the transaction would have proceeded, then one can see force in the argument. But short of that, in my submission, Laughton-Boyd cannot be supported. The Lohenberg Harris case which was not considered by their Lordships in Baxter as being consistent with judgment, involved of course a different area of recovery, and seemed to be an argument as between two measures, neither of which we seek to put forward. We do not seek to recover - apparently the plaintiff sought to recover there the amount of his loan.

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Then could I just make these final points, and they are very short. This being an action in tort, it is unnecessary for the defendant to be aware of the plaintiff's terms of lending for the plaintiff to recover interest in accordance with the terms of the agreement. It was foreseeable in accordance with the authorities that there would be interest claimed at particular rates. The amount of rate does not matter, nor that in actions penalty would be called for. This, contrary to Mr Rolfe's submission, we would submit, is a "but for" type of case - but for the advice, we would never have entered into this transaction.

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Next, there is no indication, in our submission, in Baxter's case that damages should be different on a one-off loan as against a moneylender's loan. The only time one could depart, in my submission, properly from the principle in Baxter's case would be if one could infer a different transaction would have been concluded, and perhaps

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loans related to that. In relation to the power of sale costs, they were allowed in Baxter. In my respectful submission they should be allowed here.

HIS HONOUR: What about this compounding of interest that Mr. Rolfe was speaking of, that you added interest to the principal and then you charged interest on the interest? That you say is justified by the terms of the mortgage?

MR. CLARKE: Yes your Honour, and that falls, we would submit, again within the foreseeability range. It is not suggested that it was unusual - there is no evidence one way or the other whether it was usual or unusual; it is not a foreseeable possibility. 10

That really concludes all I wish to say in reply.

HIS HONOUR: Mr. Rolfe, do you want to say anything about this matter that Mr. Clarke raised, that there is no evidence that the borrower might have taken a lower figure?

MR. ROLFE: Simply this your Honour, that the speculative element is in that statement itself. As my learned friend put it, the mortgagor was shopping around and might not have borrowed. We raised on the evidence, as to what the plaintiff would have done, and that evidence having been listed there, there was just no attempt made to show what my learned friend now contends for; that is the first point. 20

The second point of course is, we know that the plaintiff was prepared to consent to second mortgages, and there was no attempt made to show that any shortfall between what the plaintiff would have lent and the amount the second mortgagee would have lent would not have been sufficient. Just in relation to those new authorities, all we wished to say was they are merely examples of Barwick's case and the application of Barwick's case, and they all depend upon a consideration of something done in the course of employment; and really they do not take the matter, we would submit, any further. 30

HIS HONOUR: Thank you very much. I say with sincerity I am indebted to counsel for their assistance, and I am sorry that the judgment will be but a pale reflection of the excellent arguments.