

VERBATIM NOTES
OF
COMMISSION OF ENQUIRY INTO CIRCUMSTANCES
THAT LED TO THE COLLAPSE OF THE FINANCIAL INSTITUTIONS
IN THE 1990s

HELD AT
THE JAMAICA PEGASUS HOTEL
81 KNUTSFORD BOULEVARD, KINGSTON 5

ON
MONDAY, MAY 30, 2011

PRESENT WERE:

COMMISSIONERS

Mr. Charles Ross
Mr. Worrick Bogle

COUNSEL FOR THE COMMISSION

Hon. Justice Henderson Downer (Retired)

SECRETARY TO THE COMMISSION

Mr, Fernando DePer alto

ATTORNEY MARSHALING EVIDENCE FOR THE COMMISSION

Miss Judith Clarke - Attorney-at-Law

REPRESENTING JAMAICAN REDEVELOPMENT FOUNDATION

Mrs. Sandra Minott-Phillips - Attorney-at-law
Mr. Gavin Golfe - Attorney-at-law

REPRESENTING RICHARD DOWNER AND PRICEWATERHOUSECOOPERS

Mr. Stephen Shelton

REPRESENTING FINSAC LIMITED

Mr. Bryan Moodie - Attorney-at-Law
Miss Danielle Chai - Attorney-at Law

REPRESENTING MR. DEBTOR1

Mr. Anthony Levy - Attorney-at-Law

GIVING EVIDENCE

Mr. Richard Downer

1 **Monday 30th May, 2011 2**

3 COMM. BOGLE: Good morning ladies and gentlemen. This
4 enquiry is now in session. And may I
5 apologize for the late start this
6 morning. Today we are supposed to be
7 having evidence from Mr. Richard Downer,
8 but before we go into that, may we have
9 the names of the attorneys present.

10 MR. SHELTON: Stephen Shelton, representing Richard
11 Downer and Pricewaterhouse.

12 MRS. PHILLIPS: Sandra Minott-Phillips and Gavin Goffe,
13 representing Jamaican Redevelopment
14 Foundation Inc, and we are instructed by
15 Myers Fletcher & Gordon.

16 MR. MOODIE: Brian Moodie, instructed by Messrs.
17 Samuda and Johnson, representing FINSAC
18 and later to be joined by Miss Danielle
19 Chai.

20 MR. LEVY: Anthony Levy, instructed by G Anthony
21 Levy and Company, representing
22 DEBTOR1, DEBTOR1COMPANY and
23 Donovan Crawford.

24 COMM. BOGLE: And?

25 MR. LEVY: Donovan Crawford.

1 COMM. BOGLE: Okay, thank you very much.

2 Mr. Shelton?

3 MR. SHELTON: Thank you very much, Mr. Chairman.

4 Mr. Downer, please take the stand.

5 COMM. BOGLE: Can you swear him for me please.

6 MR. DEPERALTO: Richard, could you please stand and

7 place your right hand on the Bible and

8 read the oath or affirmation.

9 **MR. RICHARD DOWNER CALLED AND SWORN**

10 Thank you very much.

11 MR. SHELTON: Your name is Richard Downer?

12 MR. DOWNER: Yes.

13 Q: And you presently reside at

14 Montego Bay in the parish of St. James?

15 A: Yes.

16 Q: You are a Chartered Accountant since

17 1967, Mr. Downer?

18 A: Yes.

19 Q: And you attended school at DeCarteret

20 and Munro Colleges in Jamaica,

21 Eastbourne College in the United Kingdom

22 and McGill College in Montreal, Quebec,

23 Canada?

24 A: Yes, sir.

25 Q: And you had been a member of the

1 Institute of Chartered Accountants of
2 Quebec and Nova Scotia since 1967 and
3 1995 respectively?

4 A: Yes.

5 Q: Both of which you resigned from when you
6 retired from public practice?

7 A: Yes.

8 Q: You are a fellow of the Institute of
9 Chartered Accountants in Jamaica since
10 1973, is that correct?

11 A: Yes, sir.

12 Q: And during the time in relation to this
13 matter you were a Partner of
14 PricewaterhouseCoopers from which you
15 retired in June 2005?

16 A: Correct.

17 Q: You prepared, Mr. Downer, a written
18 statement in relation to the issues
19 which have been raised in this enquiry?

20 A: Yes.

21 Q: Is that correct?

22 A: Correct.

23 Q: And do you have that statement with you?

24 A: Yes.

25 Q: And that statement as far as you know

1 has been circulated to the Commission
2 before today?

3 A: Correct.

4 Q: Now, sir, could you look at that
5 statement for me please? I am going to
6 ask you mainly, I am not going to stop
7 you a lot, to basically read the
8 statement into the evidence for me and I
9 will direct you from time to time in
10 relation to some issues which I need
11 expansion on.

12 A: Starting with paragraph 3.

13 Q: Right. Before you start, the statement
14 you have before you, is it the statement
15 which is signed by you?

16 A: Yes.

17 And you see your signature there?

18 A: I do.

19 Q: And what's the date?

20 A: 19th of May 2011, sir.

21 Q: Okay, starting at paragraph 3.

22 A: Prior to March 1998 when I was appointed
23 the Receiver of DEBTOR1COMPANY
24 and DEBTOR1COMPANY2
25 on behalf of PwC, I had immense public

1 and private sector experience both
2 internationally and locally in audits,
3 financial and corporate restructuring,
4 privatizations and corporatizations,
5 acquisitions, mergers, take-overs,
6 corporate management, listings on the
7 stock exchange private placements,
8 business valuations, raising debt
9 finance, corporate negotiations,
10 corporate advice, corporate
11 strategizing, establishment of...
12 COMM. BOGLE: Excuse me, Mr. Downer, could you lift

13 your voice a little bit.

14 A: Okay sir. Establishment of businesses,
15 business closures, tax reform,
16 investments, and insolvency including
17 receiverships, liquidations and
18 temporary management.

19 MR. SHELTON: These Mr. Downer, are, you say
20 experiences which you have in relation
21 to your job as a Chartered Accountant?

22 A: Yes.

23 Q: Okay, during your time at
24 Pricewaterhouse between 1962 and 2005
25 you did numerous receiverships?

1 A: Yes.

2 Q: And *what* about you?

3 A: Well, I was appointed the Receiver and
4 Manager by commercial banks for several
5 companies which owed the banks money in
6 different industries. For example, the
7 Henderson. Group of Companies, Kem
8 Products Limited, West Indies Publishing
9 Limited consisting of three companies
10 DEBTOR1COMPANY and DEBTOR1COMPANY2.

11 Q: Now, in relation to your practice as a
12 Receiver, could you tell us just a broad
13 outline of your understanding of the law
14 in relation to that practice?

15 A: Well, in carrying out the business the
16 Receiver and Manager has to bear in mind
17 his primary responsibilities to his
18 appointors.

19 Q: And who would be the appointors in this
20 case?

21 A: The debenture holders in the case of
22 DEBTOR1COMPANY and DEBTOR1COMPANY2. The
23 start of Receivership was NCB, it was NCB
24 basically who appointed me. The agency
25 in relation to the company that the

1 receiver has does not place him under
2 the usual duties of compliance with his
3 principal's requirements. Indeed the
4 very reverse applies.

5 Q: Yes?

6 A: A receiver is appointed not to receive
7 directions from the directors but to
8 give directions.

9 Q: Yes.

10 A: And in relation to management, the
11 Receiver and Manager must at every stage
12 have close regard to the purpose for
13 which he has been appointed and must not
14 exercise his powers of management for a
15 collateral purpose or one alien to the
16 purpose for which he was appointed.
17 The receiver and manager must firstly
18 act in the interest of the debenture
19 holders; but must however act in the
20 interest of the company as well.
21 The Receiver and Manager is not obliged
22 to carry on the business of the company
23 at the expense of the debenture holders
24 to whom he owes his primary
25 responsibility, but he must exercise

1 good faith in his administrative
2 decisions or in relation to a sale. It
3 says that the agency relationship in
4 relation to the company only applies if
5 the companies are not put into
6 liquidation as it was in this case.
7 Now, if that is happening to the
8 company, the Receiver becomes solely the
9 agent of the debenture holder, even
10 though he still has an agency
11 relationship thereafter with the
12 company.

13 Q: That is after an Order of liquidation
14 has been made?

15 A: As far I understand, yes.

16 Q: Continue, sir.

17 A: In March 1998 NCB approached
18 Pricewaterhouse to provide receivership
19 services in respect to DEBTOR1COMPANY
20 and DEBTOR1COMPANY2.
21 The reason being, these companies were
22 deeply indebted to the bank and were not
23 servicing their obligations and were
24 insolvent and unable to viably continue
25 the business of the operations. It was

1 agreed that I would be appointed as the
2 Receiver/Manager.

3 At the commencement of the receivership
4 on 9th of March 1998, I discussed with
5 NCB's representatives, the proposed
6 activities I intended to undertake as
7 the Receiver, which included discussions
8 about certain specific functions that
9 would be performed by various personnel
10 that PwC, Pricewaterhouse, would
11 provide, including Mr. Vernon Meikle,
12 and what services would be utilized for
13 what purposes from other suppliers
14 including law firms and other
15 organisations.

16 Q: Now sir, you say you met with
17 representatives of NCB, could you recall.
18 who those representatives were?

19 A: Theo Golding, Chester Giddarie, Mitch
20 Stephenson, Dunbar McFarlane.

21 Q: And in fact, there was a letter which
22 was written from PwC to Dunbar McFarlane
23 dealing with the appointment of the
24 receiver and what the receiver's role
25 would be?

1 A: Yes.

2 Q: That letter was appended to your
3 statement, sir?

4 A: Yes.

5 Q: It is a letter dated the 6th of March,
6 1998?

7 A: Yes.

8 Q: And that letter I am asking for it to be
9 numbered RD 1/11. You have that letter
10 before you, Mr. Downer?

11 A: I do.
12 COMM. BOGLE: Mr. Shelton, the letter that we have

13 attached to those should be included as
14 one document?

15 MR. SHELTON: Yes, sir, those that are attached.

16 COMM. BOGLE: Right.

17 MR. SHELTON: And I was about to ask you, Mr. Downer,
18 that letter was a cover letter to
19 several attachments which were appended
20 to the letter?

21 A: Yes, sir.

22 Q: Could you just briefly, sir, look at
23 that letter for me please. Could you
24 read the cover letter and then let us
25 look at the specific...

1 A: **Addressed to Dunbar McFarlane, Managing**
2 **Director, NCB Group Limited, 6th of**
3 **March, 1998.**

4 **Dear Dunbar,**

5 **I am enclosing three documents which**
6 **have also been faxed to your office.**

7 **1. Description of the activities at the**
8 **beginning of the Receivership and the**
9 **staff who will be there at the**
10 **commencement.**

11 **2. the press release which I have asked**
12 **Winnie Hunter to review and discuss with**
13 **you.**

14 **3. A discussion of the 'hiving down'**
15 **issues (mainly tax) which will be**
16 **considered as soon as possible after**
17 **commencement.**

18 Signed by me.

19 Q: And attached to that, Mr. Downer, right
20 behind it you have duties of the team?

21 A: Correct. This letter was on a
22 Pricewaterhouse Associates letterhead.

23 Q: Yes.

24 A: Duties of the Receivers' team, yes.

1 Q: And you have basically listed everyone
2 who you thought at that time would have
3 been relevant in relation to the
4 activities of the Receivership, and that
5 included Vernon Meikle, other partners
6 of Pricewaterhouse or other employees of
7 Pricewaterhouse at that time, law firms?

8 A: Various Pricewaterhouse people like
9 Rhonda Adams, Tony Lewars, Vernon
10 Meikle, Mark Mitchell and then the IT
11 Specialist, Computer Audit specialist
12 from the firm, Karl Johnson, Ray Binnie
13 from Pricewaterhouse and then the audit
14 staff in general because we didn't know
15 the actual names of the people
16 necessarily who would be on this
17 assignment.

18 Q: And right behind that you had the press
19 release?

20 A: Draft press release.

21 Q: Yes. It was approved by?

22 A: I can't remember if this was the actual
23 press release that went out.

24 Q: I see. But that was the proposed press
25 release that was attached?

1 A: Yes. We thought it was very important
2 to indicate to the public that the
3 operations would continue so that the
4 employees could show up for work.

5 Q: And the second paragraph of that letter
6 I think makes that statement, right?

7 A: Right.

8 Q: Could you read that for me please?

9 A: **The Receiver, Richard Downer of**
10 **Pricewaterhouse, intends to keep the**
11 **company in operation. He stated that**
12 **operations can be more profitable under**
13 **a receivership as it will provide the**
14 **company with the breathing space from**
15 **its creditors to be better able to**
16 **capitalize on its strengths and be in a**
17 **better position to experience a**
18 **turnaround. For example, he says he**
19 **will be able to use the cash generated**
20 **from sales to first put an end to**
21 **stockouts, where production has to stop**
22 **because an essential material has run**
23 **out, which is reportedly one of the main**
24 **operational problems. It is also**
25 **reported that the company has not been**

1 outlined the 'hiving down' if that
2 became necessary.

3 A: Correct.

4 Q: Okay, sir, let's move on to paragraph 8.

5 A: NCB was a long standing client of PwC
6 and on several occasions leading up to
7 the appointment, PwC had continued to do
8 work for NCB. And they were fully aware
9 of PwC's billing rates and charges and
10 they raised no objections to these rates
11 and charges in these receiverships.

12 I was appointed Receiver by a Notice of
13 Appointment dated 9th March, 1998 under
14 Deeds of Debenture dated 28th of
15 June 1995 and 19th of July 1997. And
16 these are attached to my statement as RD
17 2a/11 and 2b/11.

18 Q: You have those there?

19 A: Yes, sir.

20 Q: And those are the appointments of
21 Receiver/Manager Alas Pak 2a/11 and the
22 appointment Receiver/Manager in relation
23 to DEBTOR1COMPANY Jamaica Limited RD
24 2b/11, I ask that those two be admitted
25 as numbered.

1 COMM. BOGLE: Yes, we will so do.

2 MR. SHELTON: I am grateful. And the dates of those,

3 **Mr. Downer**, coincide with your evidence,

4 the 9th of March 1998?

5 A: Correct.

6 Q: And I noticed that they are signed by

7 Recon Trust/National Commercial Bank and

8 Mutual Security Bank Limited, I think,

9 in relation to DEBTOR1COMPANY2 and in

10 relation to DEBTOR1COMPANY, signed by Recon

11 and National Commercial Bank, is that

12 correct?

13 A: Correct.

14 Q: What was Recon's role in it at that time

15 when this appointment was made?

16 A: That time it was known that they were in

17 negotiations with NCB **for** the

18 acquisition of bad loans.

19 Q: I see.

20 A: Including these. That was thought to be

21 the case and just as a precaution we had

22 Recon signing in case that transaction

23 went through.

24 Q: Now, sir, you were provided with an

25 Indemnity by the **holders of record of**

1 the relevant DEBTOR1COMPANY and DEBTOR1-
2 COMPANY2 debentures?
3 A: Yes.
4 Q: And that is attached to your statement? RD
5 A: 3a/11 and RD 3b/11.
6 Q: That's 3a/11 is in relation to an
7 Indemnity for DEBTOR1COMPANY2?
8 A: DEBTOR1COMPANY2 and 3b/11 is
9 DEBTOR1COMPANY, Indemnity related to
10 Q: DEBTOR1COMPANY. And those were dated
11 respectively RD 3a/11, dated the 28th of
12 A: June 1995. No.
13 Q: No, that is the debenture, my apologies. 9th
14 A: of March, 1998.
15 Q: 9th of March. And the other Indemnity in
16 relation to DEBTOR1COMPANY is dated the 9th
17 of March 1998?
18 A: Yes, sir.
19 Q: What are those Indemnities for?
20 A: Well, Receiverships entail a lot of
21 financial risks for a Receiver. For example,
22 one of the biggest one is environmental
23 clean up. For example you might go in there
24 and find that - well, you are in possession
25 of a property,

1 under the law you have to clean it up if
2 there is an environmental problem. And
3 the other one is product liability
4 issue. For example, you could be selling
5 things for which you could get sued
6 because the product injured people.

7 Q: Sorry?

8 A: Professionals like Pricewaterhouse do
9 not have limited liability and so it is
10 usual for Indemnities to be obtained in
11 case of Receiverships.

12 Q: Okay, sir, let's move on. When
13 DEBTOR1COMPANY was wound up in the
14 sense that a Winding up Order was served
15 on you in relation to DEBTOR1COMPANY,
16 did you receive a further Indemnity?

17 A: Yes.

18 Q: What was the reason for that one?

19 A: Because the nature of the relationship
20 changed with the debenture holder. I was
21 then the sole agent of the debenture
22 holder and so we needed a fresh
23 Indemnity to cover the new relationship.

24 Q: And that fresh Indemnity is appended to
25 your statement as RD 4/11?

1 A: Yes, sir.

2 Q: And it's dated - this copy it is signed

3 by everybody, right?

4 A: Yes.

5 Q: Now, Mr. Downer, you saw a copy of a

6 Winding up Order. Could he be shown

7 TP52/11. You have that there? It was

8 introduced in evidence by - I am going

9 to show it to you. That's TP52/11 which

10 was already in.

11 (Document shown to Mr. Downer)

12 A: Yes, I have seen this before, I

13 recognize the document.

14 Q: As the Winding up Order?

15 A: Right.

16 Q: And that Indemnity came after this

17 Order?

18 A: It might have come just before because

19 we were anticipating this happening.

20 Q: But this is in relation to this Order?

21 A: Correct.

22 MR. SHELTON: Do you have a copy of that, Mr.

23 Chairman?

24 COMM. BOGLE: No, not presently.

25 MR. SHELTON: I am going to pass it up to you, Mr.

Commissioner. That is my copy and so I would like it back.

2

You will get it back.

3 COMM. BOGLE:

Now, sir, let's get back to when you took possession.

4 MR. SHELTON:

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A: Well, I took possession of the assets of the companies...

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Q: One second, Mr. Downer.

9

COMM. BOGLE: You may go ahead.

10 MR. SHELTON:

Go ahead, sir.

11

A: I took possession of the assets of the companies on being appointed Receiver as I am duly required to do. And like all other receiverships I didn't really know what we would find when we went in there, but my objective was to find a buyer as soon as possible, reason being long receiverships bring about vastly more risks than short ones and the cost is substantially more. And having undertaken the receivership and having started I prepared reports for the debenture holders as to the financial status of the companies and other matters from time to time. The first

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1 receivership Report showed the status
2 of the companies at the commencement of
3 Receivership, Report dated the 23rd of
4 April 1998 and its Appendix 4. And in
5 Appendix 4 indicated to the debenture
6 holder of DEBTOR1COMPANY
7 total secured indebtedness at
8 the time, financial...

9 Q: Before you go on to that sir, the first
10 receiver's report was appended to your
11 statement?

12 A: RD5/11.

13 Q: Yes, could you tell us something about
14 that report now.

15 A: Well, it shows the secured indebtedness
16 at the time of the start of the
17 receiverships to financial institutions
18 in the region of \$340 million which was
19 owed to Caldon Merchant Bank, Citizens
20 Bank, CIBC, Eagle Merchant Bank, Horizon
21 Merchant Bank, International Trust and
22 Merchant Bank, Ex-Im Bank, NIBJ, Mutual
23 Facility, Trafalgar Development Bank,
24 NCB Trust and Merchant Bank, and
25 National Commercial Bank.

1 And in 4.1 the same report, that is
2 appendix 4.1, the DEBTOR1COMPANY2
3 indebtedness to financial institutions
4 stood at one hundred million seven hundred
5 and seventy-eight thousand dollars and this
6 was owed to Caldon Merchant Bank,
7 International Trust and Merchant Bank,
8 and National Commercial Bank. So
9 included in those amounts owed to
10 secured creditors: NCB was owed
11 \$XXX MILLION by DEBTOR1COMPANY and
12 \$XX MILLION by DEBTOR1COMPANY2.

13 Q: Was that all the indebtedness, all of
14 the secured indebtedness?

15 A: Well, in relation to preferential
16 creditors, and that would be the tax
17 authorities where amounts due would have
18 arisen in the last 12 months. Those
19 sorts of creditors were owed
20 \$XXX MILLION by DEBTOR1COMPANY,
21 \$X MILLION by DEBTOR1COMPANY2 and that is in
22 section 10 of the Receiver's Report.
23 These are for GCT, Income Tax, NIS,
24 HEART contributions, NHT, Education Tax,
25 Property Tax and redundancies that had

1 taken place prior to the receivership
2 starting. But the redundancy payments
3 had not been made yet. There were also
4 overdue trade creditors such as: IBM
5 Geon, which was owed about US\$XXX,000,
6 Schoeller International and a further
7 \$XX million owed to GCT that fell
8 outside of the twelve months
9 preferential period. So that document I
10 think is 5/11.

11 Q: Right. So in total, total indebtedness
12 to preferred, secured, trade creditors
13 and so on was in the region of about
14 \$XXX million, sir? Let me add them up
15 myself and see.

16 A: I am not sure if that was just the
17 financial institutions.

18 Q: Okay, I see. But there were substantial
19 debts owed to banks, to the government,
20 for redundancies, for GCT, for Education
21 Tax.

22 A: That could have been the financial
23 institutions and the preferential
24 creditors.

25 Q: And preferential creditors?

1 A: Yes.

2 Q: Okay, sir. Having found that and
3 reported to the debenture holders that
4 position, what was the next step?

5 A: Well, we had to decide whether to shut
6 down or continue the business in
7 operation and we discussed it with the
8 debenture holders and decided to
9 continue with the business so that we
10 would be able to sell them as going
11 concerns. This was decided to maintain
12 the value of the business. You could
13 imagine if the business closes, the
14 customers stop paying and your employees
15 don't show up for work anymore; it is
16 very hard to start back again once you
17 stop. The receivership actually lasted
18 for three-and-a-half years and it
19 wouldn't have lasted so long if the
20 secured creditors had accepted to sell
21 to the bidders what I had submitted.
22 notified them of all who expressed
23 interests and enquiries and these offers
24 started coming in just after the start
25 of receivership in April 1998.

1 Q: How did you notify them, sir?

2 A: Orally an in the Receivership Reports
3 ultimately and I mean, there were always
4 and the audited Receivership's Report
5 containing written information but we
6 would also have discussions on the
7 telephone when they arose.

8 Q: And there were some correspondence in
9 relation to Ebenezer International,
10 wasn't there?

11 A: And many others, yes.

12 Q: Yes. Okay. Now, you say the
13 receivership lasted three-and-a-half
14 years, correct?

15 A: Yes, correct.

16 Q: That's while you were the Receiver?

17 A: Yes.

18 Q: Continue, sir. And the length of the
19 receivership you say it was?

20 A: Three-and-a-half years and - I mean, it
21 was prolonged because the then debenture
22 holder whether it's FINSAC or whatever
23 it was, instructed me on several
24 occasions to facilitate the various
25 efforts of National Investment Bank of

1 Jamaica, NIBJ that is, in the first
2 instance, to buy the debentures or the
3 businesses and also not to entertain any
4 other of the various clients that were
5 coincident with those efforts, which
6 required me to continue the receivership
7 instead of selling the businesses as I could
8 have at various times to ABC LIMITED.

9 When the several take-over efforts on the
10 table by NIBJ were to be by way of the
11 purchase of the debenture I was not involved
12 in those protracted and unfruitful
13 negotiations, because in the case of that
14 mechanism, it was a matter solely between
15 FINSAC and NIBJ as the debenture holders and
16 the potential purchaser of the debentures
17 respectively.

18 In the meantime we had to keep the
19 businesses operating as going concerns as
20 we wanted to get the best possible price in
21 a sale. It was not until some time in 2001,
22 I got a clear instruction from the secured
23 creditors to sell the
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1 businesses to NIBJ.

2 During this time obviously I had to pay
3 the managers and staff supplied by PwC.
4 These fees were based on charges at
5 rates which were consistent with PwC's
6 rates charged for the various levels of
7 staff that the firm supplied to clients.
8 The Receivership's fees including only
9 such items and there were now padded
10 bills as alleged by DEBTOR1 or as is
11 alleged otherwise.

12 Q: Go ahead, Mr. Downer.

13 A: Any amounts paid to Price Waterhouse or
14 PricewaterhouseCoopers from the funds of
15 the receivership were to pay Receiver's
16 fees pursuant to the appointment of the
17 Receivers and Managers by the debenture
18 holders in accordance with custom and
19 practice in Jamaica. No other payment
20 was made for the benefit of the firm,
21 its partners or myself whatsoever.
22 Now, I have seen the verbatim
23 transcripts relating to the
24 presentations to the FINSAC Commission
25 by DEBTOR1 concerning the

1 receiverships of DEBTOR1COMPANY
2 and DEBTOR1COMPANY2 and in relation to
3 what he says about Price Waterhouse and
4 myself, even though he put it forward in
5 a repetitive and sensational manner they
6 were just not factual.

7 And I start by saying that I was not, as
8 alleged by DEBTOR1 on several occasions,
9 armed when I went to the gate of
10 DEBTOR1COMPANY when he requested me to meet
11 him.

12 I didn't allow him entry to the premises as
13 such denial of free access to directors and
14 shareholders is textbook standard practice
15 in receiverships that are not voluntarily
16 arranged. This is because the employees
17 could become confused as to who is in charge
18 of the operations and the owners of the
19 company in receivership are prone to
20 undermine the authority of the Receiver if
21 they are allowed free access to the premises
22 because they are emotional and resent the
23 presence of the receiver. This
24
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1 element of taking control might only seem
2 'curious' or 'discourteous' to someone who
3 has not had experience with receiverships.
4 But when I met DEBTOR1 at the gate at
5 DEBTOR1COMPANY I deny that there was any
6 discussions of medication as he alleged. But
7 some days after the receivership commenced
8 I arranged to meet him at the Terra Nova
9 Hotel and handed him some personal effects
10 found in his office. I had never met DEBTOR1
11 before this and would have no reason to and
12 did not treat him in any unbusinesslike or
13 unsympathetic manner as has been alleged.
14 When I met him at Terra Nova I did not tell
15 him that liquidation was the intent of the
16 receivership as he alleged. It was still too
17 early at that time to determine the strategy.
18 Certainly I consistently favoured keeping
19 the operation going so that its value could
20 be that of a going-concern instead of
21 liquidating the assets peace meal and

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1 we had suppliers of raw materials crying
2 for payment and other sorts of essential
3 suppliers like JPS et cetera, et cetera,
4 to pay. So if the assets were sold a
5 new owner wouldn't have the burden of
6 debt that the companies have and they
7 might be able to make a go if they
8 bought it at a price to be able to make
9 a profit and they didn't have this debt
10 burden on them.

11 There was a previous receivership at
12 DEBTOR1COMPANY that was referred to in
13 the evidence I think, of DEBTOR1 and
14 it was the sort of friendly receivership
15 in that there was a clear path to work
16 the companies out of their financial
17 problems. At the time Citibank was the
18 creditor and there were some superfluous
19 assets that could be easily sold to
20 cover the debt of Citibank in the
21 receivership and allow the company to
22 continue operating with the directors in
23 charge.

24 Q: **It is not true that**
25 **PricewaterhouseCoopers made a secret**

1 receivership being conducted by the firm
2 he recommended Creary because he knew
3 him and worked with him. So anyway. You
4 asked me...

5 Q: No, I just ask you who these people
6 were, to outline to the Commission in
7 other words, who Meikle, Francis and
8 Creary were, what was their role, these
9 persons were employed by whom?

10 A: Employed as contractors by
11 PricewaterhouseCoopers.

12 Q: I see. Now, sir...

13 A: I mean, technically as Receiver I was
14 using them but the firm employed them.

15 Q: Now, it is alleged that you made a
16 secret profit by engaging these people.
17 I am not sure what that exactly means
18 but that is the allegation, is that
19 correct?

20 A: Yes, we made a profit but there is
21 nothing secret about it. I mean, NCB was
22 aware that we were using Meikle, NCB was
23 aware of all the business models and
24 they were aware of rates that we were
25 charging for these people from the

1 receivership started and at no point in
2 time did anybody object to the rates to
3 the level of staff and other people.

4 Q: Now sir, that's an allegation which was
5 made in another proceedings and which
6 you had responded to and that in fact is
7 your statement in those proceedings
8 which was exhibited here earlier when
9 DEBTOR1 was giving his evidence and
10 that was TP2/11, that was your statement
11 in the litigation. Do you have TP2/11?

12 A: Yes.

13 Q: You have a copy of that exhibit, Mr.
14 Downer?

15 A: Yes.

16 Q: And in fact sir, in that Witness
17 Statement you had dealt with that issue
18 as well, in paragraphs 13 and 14. Could
19 you just read those paragraphs for me.
20 Mr. Commissioner, do you have that?

21 COMM BOGLE: Yes.

22 MR. LEVY: Do you have that document?

23 COMM BOGLE: Yes.

24 A: **"There was a long history of dealings**
25 **between NCB, PwC and myself from which**

1 there was a familiarity with the rates
2 structure of the firm. The history of
3 dealings included prior receiverships,
4 external audits of NCB, consultancy
5 services, and tax advice for NCB. PW/PwC has
6 conducted the audits of NCB for over 20
7 years with the fees being negotiated
8 annually, and the firm has conducted
9 valuation assignments for which I
10 personally have been responsible,
11 Information Technology consultancy, and
12 change management services. Messrs.
13 Meikle, Creary and Francis were all
14 engaged by me at points in the
15 receivership to assist with the
16 production side, and records of their
17 time spent on the receivership were
18 available to the debenture holder upon
19 request and in fact were readily and
20 voluntarily provided to the new debenture
21 holder prior to any claim being made in
22 respect of the conduct of the
23 receivership.

24 14. PwC charged the receivership for the
25 services of Messrs. Meikle, Francis &

1 Creary in the same manner as the
2 services of other personnel of PwC
3 including myself, which is that the
4 charges are not limited to the direct
5 compensation paid to those members of
6 staff but is set at a rate that allows
7 for the recovery of all costs of
8 employment, overheads including costs of
9 general office management, risk
10 management, technology, insurance and
11 other costs and for the making of a
12 profit by PwC. The figures charged for
13 Messrs. Meikle, Francis and Creary were
14 within the rates in the market place and
15 consistent with rates used for other
16 firms staff of similar seniority and
17 experience. Mr. Meikle was employed by
18 Price Waterhouse just prior to my
19 appointment as receiver of these
20 companies and the firm was liable to pay
21 him for his time spent prior to the
22 appointment even if the appointment had
23 not been made.

24 Q: Well, thank you very much **Mr.** Downer.
25 And that statement was signed by you

1 from the 21st of January 2005, is that
2 correct?

3 A: I would like to make a point that the
4 actual uplift of the cost of
5 Messrs. Meikle, Creary and Francis was
6 less than the markup that we would make
7 to staff on the regular payroll of Price
8 Waterhouse.

9 Q: Yes.

10 A: Because some of the costs that I
11 mentioned there did not apply to them.

12 Q: Now, let's continue your statement, Mr.
13 Downer. I think we are at paragraph 27
14 finishing 28 actually.

15 COMM BOGLE: 26, you didn't cover 26.

16 MR. LEVY: You didn't cover 26 but you are ahead
17 like myself, we are at 27, that is it?
18 Yes. We are at 28, Mr. Chairman.

19 A: Should I continue?

20 Q: Yes, Mr. Downer.

21 A: It has been alleged that we overstated
22 Mr. Meikle's hours because in one
23 particular month in an analysis that was
24 done, it has shown a huge amount of
25 hours charged for Mr. Meikle. The

1 reason for this is quite simple. Though
2 he would invoice us every month for his
3 hours our system couldn't record those
4 hours on the basis of his invoice, it
5 had to be on our time sheets and
6 Mr. Meikle was a bit tardy in putting in
7 his time sheets so at one point he put
8 in for several months and if you look at
9 it you will see that the total time
10 charged by Mr. Meikle was 1456 hours,
11 that's part of the period from the
12 appointment of the Receiver in March
13 until Mr. Meikle left in December 1998.
14 There was an illness in his family that
15 took him away from the assignment for
16 about six weeks. So that when 1456 hours
17 divided by the eight-and-a-half months
18 that he worked is 182 hours per month
19 which is quite reasonable and as I think
20 I have explained why it appeared that he
21 charged a lot more time than one month.
22 It is also not true that the -- sorry,
23 did somebody say something?

24 COMM BOGLE: Mr. Levy, please allow the witness.

25 MR. SHELTON: I did not say a word, sir.

1 under managers...

2 Before you start...

3 A: Okay.

4 MR. SHELTON: Just so as to assist. I am sorry, sir I

5 only have -- it is one document.

6 COMM BOGLE: One document?

7 MR. SHELTON: One document. And I am sorry, I only

8 have one copy available because it was a

9 part of Exhibit TP 7/11 which has been

10 produced which I don't know if today has

11 been produced. You have that document,

12 Mr. Downer?

13 A: Yes.

14 Q: That is the document from which the

15 analysis was done?

16 A: This is the analysis.

17 Q: That is the analysis?

18 A: There is a source document that gave

19 rise to this analysis also in the

20 evidence, but it shows in the second

21 group of people under the word

22 'Managers' you will see Vernon Meikle.

23 Well, we know he started the assignment

24 back in March and we see no time for

25 March, no time for April, no time for

1 May, no time for June.

2 MR. SHELTON: Just a minute *Mr.* Commissioner, you are
3 at page 33, at the top page, page 33?
4 COMM BOGLE: A33.
5 MR. SHELTON: And then A 33.1 and I am not sure if you
6 have it, I am just making sure you have
7 it.

8 COMM BOGLE: Page 1.
9 MR. SHELTON: Go to A.33, it's there, A.33 there, that
10 refers to page A. 33, Mr. Downer?
11 A: A. 33 is - well, A.33 is a summary
12 by year. No sorry, I am wrong. That's
13 2002. A. 33.1 is month by month summary
14 for 1998.

15 Q: So A 33.1 is the month by month summary?
16 A: Correct.
17 Q: And it shows for Vernon Meikle nothing
18 *for* January?

19 A: Well no, the receivership started in
20 March.
21 Q: Right, go ahead.
22 A: So nothing in March, April, May or June.
23 Right, okay. In July it starts and then
24 upon pressing him to put in his time
25 reports that he had not put in, he put

1 in a bunch of them in August and Z think
2 even two of them in September as well.
3 So There was nothing spurious and secret
4 whatsoever.

5 Q: Mr. Douglas Chambers in his statement
6 also alleged that receivership fees were
7 paid to the wrong company.

8 A: This is not correct. A consequence of
9 the hiving down process in the newly
10 formed subsidiary would be indebted to
11 the respective parents, (those are the
12 companies in receivership) for the value
13 of the undertakings transferred to the
14 new company, so if the subsidiaries paid
15 expenses on behalf of their parents,
16 such as Receiver's fees, such payments
17 would in the final analysis, be applied
18 in reduction of such indebtedness. So
19 in affect the payments were being made
20 by the companies in receivership, in
21 this case DEBTOR1COMPANY.

22 **The main advantage of the hiving down**
23 **process are that (1) A purchaser could**
24 **buy shares in an established company**
25 **instead of the assets, which would not**

1 otherwise be the case since I, as
2 Receiver could not sell the shares of
3 the company in receivership or issue new
4 shares for that company. The new
5 company would have none of the
6 actual contingent liabilities (including
7 redundancy) which the parent had, (2) it
8 serves to prevent the exposure of the
9 debenture holder if the company in
10 receivership is put into liquidation.

11 MR. SHELTON:

Now sir, DEBTOR1COMPANY

12 Acquisition (1998) Limited was a company
13 which was incorporated as part of the
14 hiving down process?

15 A: Correct.

16 Q: Could you just briefly outline what the
17 hiving down process is and what was the
18 need for it. Remember you said
19 originally that if it arose you would
20 have used that process but it wasn't
21 established when your appointment was
22 made that you would have proceeded in
23 that way. Could you step by step tell

24 us.

25 A: The Chairman of the Bank recommended

1 hiving down the company. It wasn't
2 actually done until we thought that
3 DEBTOR1COMPANY was going to be put into
4 liquidation. A company in liquidation
5 can't trade so the only way to continue
6 trading would be to put all the assets
7 of that company into a subsidiary
8 company which was not in liquidation and
9 thereby continue trading. So that was
10 the sort of immediate reason for doing
11 the hiving down.

12 Q: So DEBTOR1COMPANY Acquisition
13 was formed and the assets transferred to
14 that company?

15 A: Which gave rise to DEBTOR1COMPANY
16 Acquisition owing DEBTOR1COMPANY a
17 substantial sum of money for the assets
18 transferred, which receivership fees
19 worked off to an extent.

20 Q: Now sir, Douglas Chambers also made - in
21 his statement allegations were made
22 about the overdraft and the interest
23 charged upon those overdrafts and you
24 dealt with that I think in paragraphs 19
25 to 29 of exhibit TP2/11.

1 A: Yes.

2 Q: You have that there?

3 A: Yes.

4 Well the overdraft was created with the
5 permission, well, it was more than a
6 permission, it was actually made
7 available by the debenture holder at the
8 time the receivership started, which I
9 mentioned earlier, we only had \$14,000
10 in the bank and we needed working
11 capital so an overdraft was given to us
12 by the debenture holder.

13 Q: Paragraph 19 according to you, when the
14 Receivership started NCB specifically
15 approved the overdraft facilities?

16 A: Right.

17 Q: And the facilities were requested and
18 granted until September 1998, is this
19 correct?

20 A: Yes, because that was the date we
21 expected it would all have been over,
22 six months from the start, so we only
23 asked for the facility for that six-
24 months period.

25 The overdraft was used for critical

1 purposes; we wouldn't have been able to
2 operate unless we had the overdraft. The
3 only purpose of the overdraft was to
4 keep the company in operation.

5 Q: You have said that. In your November,
6 1998 Report you had discussed the
7 strategy, best strategy at the time to
8 maximize the sums to the debenture
9 holder?

10 A: Yes. Which meant, keep the operation in
11 continuation.

12 Q: Keep the operation going?

13 A: Yes.

14 Q: And you had reported or indicated the
15 state of the overdraft in your various
16 reports?

17 A: Yes, all the Receivership reports showed
18 what the expenses were, including
19 interest and the fact of the overdraft
20 to the bank; that is my recollection.

21 Q: Now sir, all of these matters are the
22 subject of a Supreme Court suit, is that
23 correct?

24 A: Correct.

25 Q: in fact your statement that we have been

1
2 looking at is the witness statement
3 A: which was filed in that matter?
4 Correct.
5 Q: And Mr. Chambers' statement was the
6 witness statement which was filed in
7 that matter?
8 A: Correct.
9 Q: That matter is still outstanding?
10 A: Correct.
11 Q: And there are Claims and Defenses and
12 replies which have occupied numerous
13 bundles, more than presently exist in front
14 of me, and those issues relate to
15 allegations by the debenture holder
16 against yourself and Price Waterhouse?
17 A: Correct.
18 Q: And really...
19 A: This was the debenture holder that
20 appointed Mr. Chambers.
21 Q: Indeed. And are not specifically issues
22 which are the subject of this enquiry,
23 is that so?
24 A: Correct.
25 Q: Now sir, you were replaced by
Mr. Chambers on June 7, I think you said

1 2002?

2 A: Correct.

3 Q: There was in fact a termination of your
4 Receivership and I think that document
5 is already exhibited in these
6 proceedings. I am trying to remember
7 the number. Could I crave your
8 indulgence one second sir? I think it
9 was TP3/11. You have that one? Just
10 for completeness Mr. Downer, I would
11 just like to show you that document?

12 (Document shown to witness)

13 That was TP3/11 in the proceedings, is
14 that the document in relation to your
15 termination?

16 A: Yes, sir.

17 Q: What is the date of that?

18 A: The date? 7th June, 2002.

19 Q: Indeed sir, thank you very much. Now
20 sir, after you were, your employment was
21 terminated, do you know anything else
22 about the Receivership after the date of
23 7th June, 2001?

24 A: Only that a sum of money was paid over
25 to the debenture holder of 47.5 million,

1 I understand. That is all I know.

2 Q: And since that have you had anything to
3 do with the receivership at all?

4 A: No.

5 Q: Receiverships?

6 A: No.

7 Q: And just to complete your evidence
8 Mr. Downer, were you a part of any
9 settlement offers made by anyone in
10 respect of the law suits?

11 A: No.

12 Q: Do you have any details of any
13 negotiations which took place?

14 A: None.

15 Q: Thank you very much Mr. Downer, that is
16 your evidence-in-chief. I am sure at
17 least one attorney would like to ask you
18 some questions.

19 COMM. BOGLE: Okay, thank you very much. Just before
20 the attorneys ask questions Mr. Downer,
21 could you go back a bit regarding the
22 hope - I will use that word 'hope' of
23 completing the Receivership in six
24 months however this went on for quite a
25 bit longer than that. Could you say

1 DEBTOR1COMPANY?

2 A: Well DEBTOR1COMPANY or the debenture
3 holder, I am not sure which, but
4 DEBTOR1COMPANY's debt was fully
5 discharged so perhaps not, but it
6 certainly wasn't anything positive; if
7 anything it was negative.

8 COMM. ROSS: Mr. Downer, you mentioned several times
9 that the company was insolvent, were any
10 financial statements produced to
11 indicate this because I haven't seen any
12 in a brief perusal of the document.

13 A: We have financial statements but from
14 the mere fact that we accumulated so
15 many arrears of critical payments
16 including to the government and to our
17 critical suppliers, was evidence of
18 insolvency, the broad definition of it
19 being unable to pay your bills when due.
20 I am certain they have financial
21 statements.

22 (outburst by DEBTOR1)

23 COMM. BOGLE: DEBTOR1, will you please try and
24 control your utterances, thank you. Go
25 ahead, Mr. Downer.

1 we did not have to pay interest on bank
2 loans; so that is the difference between
3 being in receivership and not; you have
4 an escape basically, if not literally an
5 escape from creditors.

6 COMM. BOGLE: You said that the debenture holder on
7 many occasions asked you to stay your
8 action or negotiations with potential
9 purchasers.

10 A: Yes.

11 COMM. BOGLE: This debenture holder would have been
12 FINSAC/Refin?

13 A: Well literally it started earlier than
14 that before the debt was actually
15 transferred to them but they were in the
16 picture and NCB knew that they were
17 selling the debenture to FINSAC so in
18 substance it was under FINSAC's
19 stewardship.

20 COMM. BOGLE: And most of these instructions that you
21 would have gotten would have been in
22 writing or verbally?

23 A: I got some in writing and some on the
24 telephone but I refer to the ones on the
25 phone in my written statement and the

1 there is other instruction in writing
2 that is in evidence.

3 COMM. BOGLE: Those would have in evidence from, put
4 in evidence by DEBTOR1COMPANY,
5 DEBTOR1?

6 A: Technically they are in evidence or not,
7 I am not sure; all I know is that they
8 were referred to.

9 COMM. BOGLE: Who eventually discharged the debenture,
10 do you know?

11 A: I don't know whether it was FINSAC or
12 its subsidiary or whether it was Joslin.
13 I was under the impression that Joslin
14 was going to do it but if Jamaica
15 Redevelopment Foundation - I think it
16 turned out that FINSAC actually had done
17 it before that. But that is technical.

18 COMM. BOGLE: All right. Based on what you have said
19 one could therefore conclude that the
20 length of time that the Receivership
21 took was by and large not the fault of
22 the Receiver but the fault of debenture
23 holder?

24 A: Definitely so.

25 COMM. BOGLE: Because as far as the Receiver is

1 concerned the Receivership could have
2 ended much, much earlier than that?

3 A: I think so.
4 COMM. BOGLE: Okay, thank you.

5 MR. SHELTON: May I? Just to make sure, clarify that
6 the fact that the discharge
7 satisfaction, the Memorandum of Complete
8 Satisfaction, that didn't happen while
9 you were the Receiver, Mr. Downer?

10 A: I think the date indicate that it did
11 happen but I wasn't aware of it, nobody
12 told me.

13 COMM. BOGLE: Thank you.

14 COMM. ROSS: Mr. Downer, could you just tell us
15 whether the company was sold under your
16 Receivership?

17 A: May I just clarify one thing, Chairman,
18 sorry. The terms of the agreement with
19 NIBJ is that there would be a partial
20 satisfaction of the debenture, not
21 complete, so I expected - but it turned
22 out somebody may have completed it.
23 Sorry, sir.

24 COMM. ROSS: I was just asking whether there was a
25 resolution to the disposal of the assets

1 of the company while you were the
2 receiver or whether this took place
3 after?

4 A: The transfer of the assets to NIBJ took
5 place when, the final completion was
6 when the Memorandum of Satisfaction was
7 delivered by the terms of the agreement
8 which as I say expected to be partial
9 satisfaction. So the actual completion
10 as I understand it, did not take place
11 until that had happened and the money
12 paid over by the Receiver.

13 COMM. ROSS: Do you have any idea why the deal with
14 NIBJ took so long to come to fruition?

15 A: I don't know, they seemed to be trying
16 to make their minds up as to which way
17 to do it and I guess the two government
18 agencies were negotiating the price at
19 which this could happen.

20 COMM. BOGLE: Okay. thank you. Mr. Levy?

21 MR. LEVY: Yes, sir.

22 COMM. BOGLE: You seem to be very anxious.

23 MR. LEVY: I am just trying to get out the truth,
24 the whole truth and nothing but the
25 truth.

1 COMM. BOGLE: Okay, so we will stick with that and I
2 am going to ask DEBTOR1 to allow
3 Mr. Levy to do the examination.

4 MR. LEVY: Right off where you left off. You said
5 two government agencies were
6 negotiating, which of these agencies,
7 which government agencies are you
8 referring to?

9 A: NIBJ and FINSAC or its subsidiary.

10 Q: And whom in particular at FINSAC were
11 you dealing with?

12 A: Mostly with Patrick Hylton.

13 Q: Mostly with Patrick Hylton, and it is
14 Mr. Hylton who told from time to time to
15 hold off or move on as the case may be?

16 A: Yes.

17 Q: I just want to establish that clearly.
18 Mr. Downer, did you advertise DEBTOR1-
19 COMPANY and DEBTOR1COMPANY2 for sale?

20 A: Yes.

21 Q: What did you advertise?

22 A: The assets, sale of assets.

23 Q: Sale of the assets?

24 A: Yes, well sale of the business which
25 consists of assets.

1 Q: Where did you advertise this?

2 A: In the press.

3 Q: Which press?

4 A: Local.

5 Q: You recall receiving a letter from me in

6 which I advised you or informed you that

7 the sale of a business of this size and

8 this type of thing needed to be

9 advertised in trade journals and

10 overseas because of the poor economic

11 and financial situation that existed in

12 Jamaica at the time?

13 A: You might have sent me such a letter, we

14 did have solicitations from Trinidad and

15 Florida.

16 Q: That is not on the question. You never

17 advertised in any overseas press or

18 trade journals dealing with plastics?

19 A: Not that I recall, sir.

20 Q: You think that was a very wise thing to

21 do given the marketing situation in

22 Jamaica?

23 A: If I think it was right. I think it

24 might not have been worth the money. I

25 think it was right to advertise locally

1 to see what interests we could generate
2 here first. The foreign solicitations
3 that we got were mostly for the scrap
4 value; they wanted to scrap the
5 machinery and sell it out as scrap.

6 Q: Just deal with the question and don't
7 dance around it.

8 Why did you -- you have a very fluffy
9 introduction in your Witness Statement.
10 With all that experience that you have
11 why didn't you see fit to the take
12 advice if you were not expert on
13 advertising or marketing? Why did you
14 not see fit to advertise overseas when
15 the economic and financial situation in
16 Jamaica was in a crash.

17 A: I don't know, I can't remember the
18 reasons *why*. I think we must have
19 thought about it but first of all it
20 costs money and secondly if the market
21 in Jamaica had crashed it was not that
22 attractive anyway because most of our
23 customers were in Jamaica.

24 Q: I am just trying to illustrate your
25 competence as a Receiver based on this

1 looking at the receivership and the
2 outcome, final outcome of the
3 Receivership.
4 MR. LEVY: The Receivership was a three--and--a-half
5 year process, sir. Part of that time
6 was involved with playing around with
7 the instructions given by FINSAC and not
8 acting as a Receiver. I'll move on Mr.
9 Chairman.
10 COMM. BOGLE: Please do and let's see if we can get
11 questions and answers rather than
12 commentaries.
13 MR. LEVY: Mr. Downer, there are several suits
14 brought against you and your firm by
15 DEBTOR1COMPANY, DEBTOR1COMPANY2 and
16 DEBTOR1COMPANY 1998 Limited which I
17 will refer to as 1998 Limited, is that
18 correct?
19 A: Yes, sir.
20 Q: Three of these were consolidated into
21 one. You were appointed Receiver of
22 which companies?
23 A: DEBTOR1COMPANY and DEBTOR1COMPANY2
24
25 Q: Were you Receiver of 1998 Limited?

1 A:
2 Q: No.
3 A: How did that company function?
4 It bought and sold goods, it converted raw
5 material into finished goods and sold
6 them.
7 Q: Who were the Directors of the company?
8 A: Myself and I think John Lee.
9 Q: Who is John Lee?
10 A: He is a partner at Pricewaterhouse. So
11 Q: you managed that company?
12 A: Yes.
13 Q: That company was never in Receivership? No.
14 A: Let's deal with the question of appraisals
15 or valuations. Did you as Receiver see fit
16 to obtain a valuation of the real estate
17 owned by DEBTOR1COMPANY?
18 Well everything to do with Receivership has
19 a cost and you have to decide whether or not
20 it is worthwhile doing it. We knew that the
21 only way, the only sort of price you could
22 sell the business for would be as the
23 products it could generate, it is dependent
24 upon the
25

1 profits it could generate and the
2 theoretical value of the plant and
3 machinery and the lands was really not
4 that helpful when dealing with people
5 who want to acquire the business.

6 Q: Mr. Downer, let's deal with the
7 Receiverships of DEBTOR1COMPANY and
8 DEBTOR1COMPANY2 up until December of 1998.
9 You were the agent of whom during that
10 period of time?

11 A: Sorry, say that again.

12 Q: The Receiverships from March 8, 1998 up
13 until December 1998, you as receiver
14 were agent of whom?

15 A: The debenture holder primarily and also
16 to the company.

17 Q: Mr. Downer! Let me repeat the question
18 because obviously you didn't understand
19 it. The Receiver and Manager is
20 appointed the agent of whom when there
21 is no liquidation proceedings?

22 A: The primary duty is to the debenture
23 holder and also...

24 Q: Answer my question please, Mr. Downer
25 and stop skirting around it.

1 MR. SHELTON: It is a legal question and he is getting
2 an answer.

3 A: I think he is an agent to the company.

4 MR. LEVY: That is the answer to the question?

5 A: But my understanding is he has superior
6 responsibility to the debenture holder.

7 Q: You have responsibility to the debenture
8 holder, but you have greater
9 responsibility to act fairly and in good
10 faith to the company?

11 MR. SHELTON: One second sir. That's Mr. Levy's
12 concept of the law. He has asked a
13 question, Mr. Downer is giving him his
14 view as a Receiver of the law in
15 relation to receiverships. It may be a
16 difference. At least apparently there is
17 a difference, but Mr. Levy can't insist
18 that Mr. Downer answers him as he thinks
19 the law on Receivership is. As a matter
20 of fact, I not sure if he is even right.
21 Mr. Downer has answered, with respect,
22 Mr. Commissioner. He may be wrong, but
23 that is the answer. He can't insist that
24 he tells him that is the way it is. He
25 is saying he is an agent of the company,

1 but he has a superior responsibility to
2 the debenture holder. That is his view;
3 he may be absolutely wrong. If we were
4 in a court of law that would be a major
5 legal argument, I am sure, but this is a
6 commission of enquiry and that is the
7 view that he has.

8 MR. LEVY: Mr. Chairman, my question was, who was
9 he agent of and he skirted around the
10 question and he has not given me an
11 answer to my question. And Mr.
12 Chairman, I have been practicing law for
13 49 years and Company Law is one of my
14 specialties, so let my junior go his
15 way.

16 COMM BOGLE: The question was answered, Mr. Levy.

17 MR. LEVY: After a big fight.

18 COMM BOGLE: He has answered, can we move on please.

19 MR. LEVY: Mr. Downer, as a person in effect in the
20 management of these companies, why
21 didn't you obtain professional advice as
22 to the value of the real estate? A
23 Straight answer.

24 A: It would have cost a lot of money and it
25 wasn't going to make any difference to

1 the amount of proceeds that we would
2 receive from the people interested in
3 buying the businesses.

4 Q: Did you ever intend to sell the real
5 estate?

6 A: No, we didn't intend to sell it
7 separately.

8 Q: Did you ever consider that the break-up
9 of the companies and the sale of one of
10 the largest factories in Jamaica could
11 have resulted, if properly advertised,
12 in a greater return to the debenture
13 holder than your extracting over a \$100
14 Million out of the company in the
15 three-and-a-half years?

16 A: I wouldn't affect the selling price of
17 the company, those are business
18 decisions.

19 Q: No, I am talking about your fees.

20 A: Oh, I see.

21 COMM BOGLE: Is there a question in all of that,
22 Mr. Levy?

23 MR. LEVY: Yes, sir.

24 COMM BOGLE: For the benefit of the Commission can
25 you repeat the question.

1 MR. LEVY: Did you ever consider that the sale of
2 the assets, had you got a proper value
3 or valuation, might have been greater
4 than trying to run the company for
5 three-and-a-half years at great cost to
6 the company, One Hundred and odd Million
7 Dollars, or were your instructions not
8 to sell the real estate?

9 A: No, I didn't receive any such
10 instructions but on a commonsense basis,
11 you will get more for having kept the
12 business as a going concern, this was
13 the premise from the start. Now, the
14 break-up value of the assets I can
15 assure you based on the offers that we
16 received was miniscule and what we had
17 to do was to scrap the assets. No
18 matter what valuations you get, it
19 doesn't mean you are going to get that
20 money.

21 Q: Mr. Downer, I am trying to keep my cool.
22 But if you didn't get a valuation, how
23 can you as an accountant speculate as to
24 what the value is and what you got?

25 A: I know the value of the business.

1 Q: You don't know?
2 A: I do.
3 Q: The value of the real estate I am
4 talking about.
5 A: No, but I was selling a business and I know
6 what the value of business is.
7 Q: You talked about the offers you got, you
8 never advertised the place overseas or in
9 the journals, so how did you expect to get
10 proper offers? You were looking for a closed
11 contract inter-government offer, weren't
12 you?
13 A: No, I wasn't.
14 Q: But that's what you got and that's what you
15 played along with all along, isn't it?
16
17 A: Not so, sir.
18 Q: Not so?
19 A: Not so.
20 Q: Did you get a valuation of the molds that
21 DEBTOR1COMPANY had?
22 A: Not specifically, I don't think. I know that
23 there was one supplier of molds who claimed
24 the company owed them a certain amount of
25 money if they broke the

1 contract and didn't pay them the
2 royalties. Whether that indicates the
3 value of the molds or not I don't know,
4 but we didn't value the molds
5 specifically.

6 Q: Now, Mr. Downer, each product produced
7 by the company had a mold?

8 A: Not each and every product, some did and
9 some didn't.

10 Q: So how were they formed if they didn't
11 have a mold?

12 A: You are talking about DEBTOR1COMPANY2. Some
13 of them were extrusion.

14 Q: Extrusion in what, a mold? Or you got
15 ignorant of the business after
16 three-and-a-half years, Mr. Downer?

17 A: Well, maybe you can educate me, but I
18 thought the extrusion process was a bit
19 different. That's when you stretch
20 something out rather than a mold.

21 Q: We are all intelligent people here Mr.
22 Downer, stop playing games with our
23 brains.

24 Mr. Downer, you have said that one mold
25 in your statement, a mold having a price

1 of over US\$100,000?

2 A: You know I can't recall that detail but
3 it is probably to do with the German
4 supplier who had a mold there indicated
5 the cost in the contract which was in
6 that order in magnitude or instead of
7 paying the royalties you should get it
8 for that price, I don't know.

9 Q: I soon start calling you Mr. Fred
10 Astaire and not Mr. Downer because you
11 are dancing.

12 COMM BOGLE: Mr. Levy, please, we need to move along
13 and the commentary is going to have us
14 staying here longer and longer.

15 MR. LEVY: Why didn't you get appraisal of molds
16 since molds were so valuable?

17 A: It didn't matter what valuations we got
18 with individual assets, we were selling
19 the business as a whole. That value
20 depended on what profits it could
21 generate, which would then depend on
22 projections which we did. So we had an
23 idea as to what the present value of the
24 properties would warrant as the purchase
25 price.

- 1 Q: Simply because you had a fixation on
2 selling the business as a going concern
3 to NIBJ?
- 4 A: No, not to NIBJ but selling the business
5 as a concern, yes.
- 6 Q: But not selling it at the best available
7 price by advertising it internationally.
- 8 A: Well, maybe we could argue about
9 certainly whether it was a wise decision
10 or not. I think that we took that
11 decision based on considerations at the
12 time.
- 13 Q: Let us deal with 1998 Limited. You said
14 that you and John Lee, your partner,
15 were Directors?
- 16 A: Yes, the shareholder was Thermo-
17 Plastics.
- 18 Q: Your duties to the company as Directors
19 were different to that of Receivers?
- 20 A: Yes.
- 21 Q: Now, there were two companies in
22 receivership, you married them all
23 along, treated them as one?
- 24 A: What's your question? Did we do that?
- 25 Q: Did you marry them as one?

1 anything. The outburst is not going to
2 provide this enquiry with any information
3 whatsoever.

4 MR. LEVY: Did you think it necessary, Mr. Downer, to
5 have audits done on the company's
6 operations?

7 A: No.

8 Q: How did you know whether some employees
9 of the company were not defrauding the
10 company?

11 A: Audits don't tell you that.

12 Q: Pardon me?

13 A: An audit does not tell you that; an
14 external audit does not tell you that.
15 You have to have good systems and
16 procedures in place to give you
17 assurance on that particular matter. An
18 audit is not going to find fraud
19 necessarily.

20 Q: An audit what?

21 A: Not going to find fraud necessarily.

22 Q: If there is fraud ought not an audit an
23 audit to find it?

24 A: Not necessarily. You are giving your
25 opinion on the financial statement as a

1 whole.

2 Q: I am glad I don't have your firm as an
3 auditor.

4 MR. SHELTON: You know, sir...

5 MR. LEVY: No valuation, no international
6 advertisement...

7 MR. SHELTON: One second, I am speaking. Mr. Levy
8 continues - this is a public enquiry,
9 this is being aired to all of Jamaica.
10 He is using the privilege of counsel to
11 make all sorts of inflammatory
12 statements about my client. And I am
13 going to say this, Mr. Commissioner,
14 that I am going to request that you
15 reign Mr. Levy in because I cannot in
16 protection of my client allow him to be
17 making these spurious statements which
18 have no basis whatsoever, by way of
19 these side comments. He is a lawyer, he
20 knows the way he ought to examine in-
21 chief, he knows the way he ought to
22 cross-examine. He has forty-odd years at
23 the Bar and I think part of the job that
24 I have been retained to do is to protect
25 the client from statements like those

1 being made by Mr. Levy. I am going to ask
2 you, since I can't do it in this enquiry,
3 sir, I am going to ask yourself and your
4 fellow commissioner if you could restrain
5 Mr. Levy from any of the libelous and
6 spurious statements that he continues to
7 make. This is a public enquiry, it is not a
8 private enquiry and the danger of that is
9 that the whole public is hearing, and this
10 is exactly what he is seeking to do. No
11 evidence, no basis for it; he just makes
12 these comments. And I don't think it is fair
13 to anybody who has voluntarily come to this
14 Commission for that sort of treatment to be
15 meted out to them, and Mr. Levy has been
16 doing it from before. I had suspected it you
17 know, sir, and I had asked therefore that
18 these
19 particular hearings, because I know how
20 volatile they were, because we have been in
21 court, could have been in camera for that
22 reason and I didn't know how you were going
23 to protect anybody from Mr. Levy. I am asking
24 you again that if

1 this continues that you think seriously
2 Mr. Commissioner, as to how you would
3 like to proceed because I will have to
4 continue to raise it as a public
5 comment. He is libeling my client
6 without restraint and I ask that he not
7 be allowed to continue. Thank you very
8 much, sir.

9 COMM BOGLE: Mr. Levy, I think that is a reasonable
10 request. I think if you are
11 cross-examining, then you should do so.
12 I do not really think it is necessary
13 for a lot of the comments that you make
14 and the remarks that you make about the
15 person under examination. This is an
16 enquiry and what we are trying to do is
17 to get information and your outbursts
18 are not providing this enquiry with any
19 information. So I am going to ask you to
20 conduct an examination by asking
21 questions to which I will ask Mr. Downer
22 to provide the best answer that he has
23 under oath. So can we please proceed
24 along those lines?

25 MR. LEVY: I will proceed, sir.

1 COMM BOGLE: All right, thank you.

2 MR. LEVY: Mr. Downer, why did you treat the
3 receiverships of DEBTOR1COMPANY and
4 DEBTOR1COMPANY2 as if they were one
5 receivership?

6 A: I don't think that was done. Well, on
7 what basis?

8 Q: You don't think it was done?

9 A: No, sir.

10 Q: In your evidence you have talked about
11 your becoming the agent of the debenture
12 holder after December 1999.

13 A: I said in respect of DEBTOR1COMPANY.

14 Q: You are talking about both companies.

15 MR. SHELTON: No, he said in respect of DEBTOR1COMPANY.
16 He specifically said that, and
17 we can have the thing re-read to you
18 that it was stated. He said in respect
19 of DEBTOR1COMPANY.

20 MR. LEVY: Mr. Downer, why didn't you have separate
21 reports for each of the receiverships as
22 is the custom?

23 A: We did more than one reports and we have
24 sections relating to each of the
25 companies.

1 tax. That was the only relevance it had
2 to me.

3 The same question I ask you about the
4 DEBTOR1COMPANY2 factory, when the Stamp
5 Commissioner valued DEBTOR1COMPANY2
6 factory in the \$XX Million bracket and you
7 sold it for \$X Million?

8 A: I don't know how it was sold, I don't
9 have the actual thing here. I can't
10 agree with you.

11 Q: We will do so when we have a break, so
12 we can come back to it.

13 A: Yes.

14 Q: And that's in relation to DEBTOR1COMPANY2
15 and DEBTOR1COMPANY, the sale price and the
16 valuation by the Stamp Commissioner.

17 A: Sure.

18 Q: Did you recover the transfer tax you
19 just mentioned?

20 A: Well, the receivership was terminated
21 before I had a chance, so I advised
22 Douglas Chambers that this was one of
23 the pending matters because under the
24 law the authorities have the power to
25 remit the tax if the debenture holder is

- 1 not fully satisfied.
- 2 Q: Mr. Downer, you have opined that during
3 the receiverships it was not necessary
4 to have audited accounts?
- 5 A: Correct.
- 6 Q: What about 1998 Limited, that was not in
7 receivership?
- 8 A: No, that was true, and we could have
9 audited accounts.
- 10 Q: Pardon me?
- 11 A: We could have audited accounts. We
12 would not have been spending money and
13 there was no consequence in realty to
14 not having an audit; there was no need.
15 The Receiver is interested in cash.
- 16 Q: What?
- 17 A: The Receiver is interested in bringing
18 in cash and he pays the debenture.
- 19 Q: But the directors of the company have a
20 different obligation, don't they?
- 21 A: We could have done an audit if we
22 thought that it was a pressing issue but
23 we don't spend any money until we had
24 to.
- 25 Q: In effect 1998 Limited took over the

1 businesses and operations of two large
2 companies?

3 A: Took over the operations, we didn't take
4 over the real estate at that time.

5 Q: I didn't talk about real estate.

6 A: Okay.

7 Q: What were the total sales of those
8 companies at the time that you took over
9 the receiverships?

10 A: It is in the Receiver's Reports what the
11 trend for sales was and in the
12 Receiver's Reports was what the sales
13 were afterwards, but I don't have it at
14 the top of my head.

15 Q: But they were hundreds of Millions?

16 A: I can't remember. I can remember
17 figures like \$17 Million a month for
18 valuation when they are in receivership,
19 at some point in the receivership. So I
20 suppose you have to say hundreds.

21 Q: And a company with that kind of sales
22 and expenses, as a Director now, not as
23 a Receiver, as a Director of 1998
24 Limited, you didn't see it necessary in
25 over two years to have the accounts

1 audited?

2 A: Well, I was not afraid of myself, I
3 didn't think it was necessary.

4 Q: Pardon me?

5 A: I wasn't afraid of myself. I was running
6 the company so I mean, if I was just a
7 passive shareholder then I might have
8 wanted an audit, but being closely in
9 touch with the operations I was not
10 concerned about the veracity of the
11 information we were getting because I
12 was producing it effectively with my
13 staff.

14 Q: You talked about partial discharge,
15 Mr. Downer, you sold three parcels of
16 real estate, am I correct?

17 A: I think so.

18 Q: The DEBTOR1COMPANY factories, could you
19 have conveyed that title to NIBJ or its
20 subsidiary TPL without the total
21 discharge of mortgage?

22 A: Mortgage perhaps, not the debenture, I
23 think.

24 Q: Could you have a partial discharge of a
25 debenture and a total discharge of

1 mortgage?

2 A: I am not a lawyer sir, I am not sure. I
3 mean, they still owed money under the
4 debenture, and the debenture is secured
5 by a mortgage. Perhaps you could
6 discharge a mortgage entirely, but the
7 debenture might remain involved.

8 Q: **The discharges of mortgage makes the**
9 **amount secured having been fully paid**
10 **and satisfied.** Does that ring a bell?
11 You have seen them of course.

12 A: Well, that's concerning the mortgage.

13 Q: Pardon me?

14 A: That's concerning the mortgage.

15 Q: So could you have a partial discharge of
16 the debenture and a total discharge of
17 the mortgage when the discharge says
18 that all monies secured have been fully
19 paid?

20 A: Well, that was in the agreement that was
21 looked at by lawyers, so anything is
22 possible to happen, yes.

23 Q: Do you always follow the advice of your
24 lawyer, Mr. Downer?

25 MR. SHELTON: You know, sir, I hate this. I don't

1 think we will get anywhere by my
2 continuing to object. But before we even
3 get to that I had asked my learned
4 friend that if we were going to be
5 dealing with the issue of the discharge,
6 the Memorandum of Complete Satisfaction,
7 discharging mortgage, if those documents
8 could have been produced because we are
9 speaking about things in a vacuum. I
10 have not seen those documents myself. I
11 had asked, since he raised them, since
12 he put in evidence the fact that there
13 was this Memorandum of Complete
14 Satisfaction, that he present it for the
15 purposes of the Commission. Up to now,
16 sir, I have not seen it. You haven't
17 seen it.

18 MR. LEVY: We will have them here in the morning,
19 sir, certified copies from the Registrar
20 of Companies.

21 MR. SHELTON: Nobody has seen them and you are asking
22 questions about them. Mr. Downer hasn't
23 seen them.

24 MR. LEVY: Mr. Downer has seen them, sir.

25 COMM BOGLE: Well, if I remember right, the

1 Commission did request copies of the
2 Memorandum of Complete Satisfaction, I
3 don't think we have received it. You
4 are now saying that you will produce it
5 tomorrow morning?

6 MR. LEVY: Yes, sir.

7 COMM BOGLE: Therefore, can we move on and then
8 tomorrow morning you will bring those
9 in.

10 MR. LEVY: Yes, sir.

11 COMM BOGLE: And at this time can we have our lunch
12 break, and we will reconvene at 2:00
13 p.m.

14 MR. LEVY: 2:15?

15 COMM BOGLE: 2:00 p.m.

16 Mr. Downer, until 2:00 p.m.

17

18 LUNCHEON BREAK.

19

20 COMM BOGLE: Good afternoon ladies and gentlemen,
21 this Enquiry is now back in session, we
22 have now resumed. Just before I proceed
23 or ask Mr. Levy to proceed, I would just
24 ask Mr. Levy, we have a limited amount
25 of time and as you might have seen on

1 the schedule that Mr. Downer will be out
2 of here, Mr. Downer will be here
3 tomorrow up to 12 o' clock. We have a
4 limited time and therefore I am going to
5 ask you if you could try your best to
6 concentrate on the questions and reduce
7 the commentary. That simply takes up
8 the time and we don't achieve anything
9 as far as the Commission is concerned.
10 So can we move along and ask the
11 questions so that Mr. Downer can answer
12 as best as he can.

13 MR. SHELTON: May it please you, Mr. Chairman. Before
14 we took the break I think Mr. Downer
15 was asked to review and find the
16 documentation in relation to the sale of
17 the property and it was suggested to him
18 that there was an assessment or a
19 valuation by the Commissioner of
20 XX million and yet he sold it for
21 X,000,000 and he said he had no memory
22 of the actual amount but that he will
23 research it during the lunch break. He
24 has now looked at the document and I
25 think he is in a better position to

1 respond.

2 COMM BOGLE: Okay, Mr. Downer.

3 A: Sir, the apportionment of the purchase
4 price of \$XXX,000,000 for the assets of
5 the companies altogether was allocated
6 and the amount allocated to DEBTOR1COMPANY2
7 was in fact \$XX MILLION.

8 COMM BOGLE: Mr. Downer, I omitted to say awhile ago
9 that I want to remind you that you are
10 still under oath. Okay, Mr. Levy.

11 MR. LEVY: I think the problem was the Stamp
12 Commissioner. Real estate DEBTOR1COMPANY2
13 Factory for XX something million that
14 was transferred for X,000,000, so this
15 has not answered it.

16 COMM BOGLE: Well, he has answered. You asked him if
17 he knew what happened and he said that
18 he did not remember and he has now
19 provided the information that he has.

20 A: Yes, there was a valuation for
21 XX million.

22 MR. LEVY: Pardon me, sir.

23 COMM BOGLE: Repeat the question.

24 MR. LEVY: My question dealt with the question of
25 amount the Stamp Commissioner valued