

1 DEBTOR1COMPANY2 and the property for  
2 A: DEBTOR1COMPANY's valuation was for some  
3 XX million and when it was transferred  
4 and presented to him it was for some  
5 X,000,000 and -- what was the question?

6 Q: The question was, did he recall that?  
7 But the statement he has made now is  
8 simply that he valued the assets or a  
9 portion of the assets of DEBTOR1COMPANY2 for  
10 XX million, that is based on no  
11 valuation which he received, the Stamp  
12 Commissioner has valued the factory and  
13 real estate for XX million.  
14 That evidence is before you,  
15 Mr. Chairman.

16 MR. SHELTON: I don't recall any such evidence being  
17 before you, I don't recall that  
18 evidence. If there is, my friend can  
19 lead us to it because the document that  
20 Mr. Downer is referring to, the report  
21 is attached to I think, the Agreement  
22 for Sale and the Agreement for Sale to  
23 NIBJ, it does not have real estate owned  
24 by DEBTOR1COMPANY2, all the real estate was  
25 owned by DEBTOR1COMPANY and that was sold

1 for XX million not DEBTOR1COMPANY2. I don't  
2 recall what Mr. Levy is speaking about and  
3 what evidence he says is before you. I was  
4 here when DEBTOR1 gave evidence and I have  
5 all the exhibits and I don't recall any such  
6 evidence before you.

7 I remind the Commission and my friend sir,  
8 MR. LEVY: that the evidence was presented by DEBTOR1,  
9 a copy of the Stamp Commissioner's Transfer  
10 Tax for the property which he valued for XX  
11 million and the transfer for  
12 DEBTOR1COMPANY2 was for X,000,000. Now, Mr.  
13 Downer has said he never got a valuation of  
14 that real estate. I am asking him, did he  
15 remember the valuation he talked about in  
16 his evidence, collecting Transfer Tax from  
17 the Stamp Commissioner which he wasn't able  
18 to do because his appointment was terminated  
19 before he could do that. But the question  
20 was, did he recall the amount for which the  
21 Stamp Commissioner valued the property  
22 referred to as DEBTOR1COMPANY2 Factory but  
23 at  
24  
25

1 no time DEBTOR1COMPANY2 owned that factory,  
2 it was DEBTOR1COMPANY who owned that real  
3 estate but DEBTOR1COMPANY2 operated out of  
4 it. I am sure if he looks back at the  
5 evidence he will see that there was in  
6 evidence the certificate of the Stamp  
7 Commissioner showing the amount he  
8 assessed the property for and the value  
9 on which he collected Transfer Tax.

10 MR. SHELTON: Yes, but he says DEBTOR1COMPANY2.

11 MRS. PHILLIPS: Let me try and assist. Upon reflection I  
12 seem to recall Mr. Patrick Hylton  
13 speaking on the issue of the Stamp  
14 Commissioner's assessment and he was  
15 saying that he really didn't know  
16 whether any valuation had been done, he  
17 was trying to understand whether the  
18 Stamp Commissioner had reached to the  
19 assessment aspect of it or whether it  
20 was just a figure put forward by the  
21 Stamp Commissioner.

22 COMM. BOGLE: All right Mr. Levy, have you got that  
23 exhibit with you? If not can we try  
24 to...

25 MR. LEVY: I have so many now I can't stop. I would

1 be happy to furnish the Commission with  
2 a copy but we would be wasting time.  
3 COMM BOGLE: Because you are leading the examination

4 so I thought you had the exhibit.

5 MR. LEVY: I will bring it back tomorrow morning,  
6 sir.

7 CHAIRMAN: All right, can we move on then on that  
8 basis.

9 Q: On what day you did actually leave from  
10 Price Waterhouse.

11 A: June 2005.

12 Q: You were the senior partner weren't you?

13 A: It took me two years before I retired.

14 Q: Pardon me?

15 A: I was not the senior partner when I  
16 retired.

17 Q: Oh, you were demoted?

18 A: No.

19 MR. SHELTON: I am going to ask that when he is asked

20 a first question Mr. Levy allows him to  
21 answer. In fact I do not see there is  
22 any relevance and I am objecting that  
23 this is absolutely irrelevant.

24 COMM. BOGLE: I agree totally. Mr. Levy, that is not  
25 relevant to the information we are

1                                   trying to get.

2       MR. LEVY:                   Mr. Downer, you said you weren't aware  
3                                   of any negotiation or offer made to  
4                                   settle the matter, is that correct?

5            A:                     Correct.

6            Q:                     If I were to tell you that your evidence  
7                                   before this Commission is that...

8       COMM. BOGLE:               Speak in the mike.

9       MR. LEVY:                   If I were to tell that your evidence  
10                                   before this Commission is an offer that  
11                                   was made and communicated to Mr. Douglas  
12                                   Chambers on the 7th of July, seven days  
13                                   after you retired from the firm, how  
14                                   would you respond?

15          A:                     Not aware of it.

16          Q:                     Not aware of it?

17          A:                     Not aware of it.

18          Q:                     Not aware of it?

19          A:                     No.

20          Q:                     I will come back to that at a later  
21                                   date. Did you have any other  
22                                   receiverships which were this long or  
23                                   with all your vast experience which were  
24                                   successful?

25          A:                     Not operating the assets, all my

1 receiverships were much shorter but this  
2 dragged on for a protracted period.  
3 After that you try to collect from the  
4 Stamp Commissioner back tax and tidy up  
5 some other things that had to be tidied  
6 up. They may have gone that long but  
7 certainly I did not have to operate the  
8 assets that long before they were sold.

9 Q: So this was an unusual receivership?

10 A: Yes.

11 Q: I should say these were unusual  
12 receiverships to be more correct?

13 A: Correct.

14 Q: You said in your statement that:

15 **"My understanding of the law and**  
16 **practice of receivership is that the**  
17 **duties of a Receiver and Manager in**  
18 **relation to carrying on the business of**  
19 **a company in receivership are as**  
20 **follows:**

21 **(a) In carrying on the business the**  
22 **receiver and the manager has to bear in**  
23 **mind his primary responsibilities to his**  
24 **appointers.**

25 **His agency for the company does not**

1 place him under the usual duties of  
2 compliance with his principal's  
3 requirements. Indeed the very reverse  
4 applies.

5 "A receiver is appointed 'not to  
6 receive directions from the directors  
7 but to give directions'.

8 What you mean by that, to whom would you  
9 be giving directions?

10 A: Give directions to the employees.

11 Q: Oh, not to the directors?

12 A: I don't think that was what it means,  
13 no.

14 Q: Was it a conflict of interest between  
15 the company of which you were an agent?  
16 This is prior to 1998, December, 1998  
17 and the debenture holders.

18 A: Say again, sir.

19 Q: Was there a conflict of interest between  
20 the debenture holders and the company  
21 for whom you have responsibility having  
22 been appointed as agent of the company,  
23 whose interests do you put first?

24 A: I don't know that is my...

25 Q: Pardon me?



1 is a conflict which one do you choose,  
2 that is the only relevance to this  
3 Enquiry not what he is doing there.

4 MR. LEVY: The conflict is between the debenture  
5 holders and Recon Trust who had an  
6 interest in continuing this company's  
7 operations not because of the financial  
8 side but because of the political side.  
9 Now, given that situation on whose  
10 interest were you acting when you had to  
11 postpone the sale of the business and  
12 the assets of the company to seek  
13 approval each time an offer was  
14 presented to you?

15 A: I am not sure there was a political  
16 interest driving Recon Trust.

17 Q: Was there any political interest in  
18 DEBTOR1COMPANY's situation?

19 A: Political interest? There was a feud in  
20 the family.

21 Q: That is not what I am talking about, the  
22 politics I am asking about you about is  
23 political interest.

24 A: There was interest on the part of the  
25 politicians yes, in that there was a

1 meeting where it was expressed to me  
2 that they wanted to maintain the  
3 employment of people there, they wanted  
4 to maintain the employment of the people  
5 at DEBTOR1COMPANY.

6 Q: And who was at that meeting when that  
7 was expressed?

8 A: The politicians who were there.

9 Q: This is actually in the Witness  
10 Statement, I can't remember the names.  
11 Go ahead, Mr. Downer, please go ahead.  
12 I know Horace Clarke is one of them, I  
13 remember that. Okay, it is paragraph 32  
14 of my statement, 21st January 2005.  
15 Oh your court statement?

16 A: Uh-huh, yes. Court statement, Paul  
17 Robertson and Horace Clarke were the  
18 politicians who were there and also  
19 there were two people from the union,  
20 Dennis Morrison and Mr. Sanderson from  
21 NWU. They wanted to know how the  
22 progress of the sale was going. And as  
23 you put to me, because they had the  
24 workers in mind.

25 Q: Did you have any correspondence with or

1 did you receive any correspondence from  
2 Omar Davies?  
3 A: From Omar Davies.  
4 Q: Yes.  
5 A: I can't remember.  
6 Q: I don't think so. Mr. Downer, I am  
7 going to hand the Secretary copies of  
8 certain e-mails that might have been  
9 sent to the principal, Richard Downer.  
10 MR. SHELTON: Are they exhibits?  
11 MR. LEVY: These are the copies the office mail.  
12 MR. SHELTON: Are they exhibits in the proceedings so  
13 far? Because if they are maybe I can  
14 find them. What, he is answering to?  
15 COMM. BOGLE: Mr. Levy, are you submitting these?  
16 MR. LEVY: I am going to submit it, it is the  
17 witness' email from him, these were  
18 handed over by his attorney to  
19 Mr. Douglas Chambers at the time of the  
20 change of receivership.  
21 COMM BOGLE: Mr. Shelton needs an answer to your  
22 question, these are not now exhibits.  
23 MR. LEVY: Pardon me, sir?  
24 COMM BOGLE: No, I was telling Mr. Shelton these are  
25 not exhibits so far, they were not put

1 in evidence before.

2 MR. LEVY: No, but I am putting them to Mr. Downer.

3 COMM BOGLE: Okay, fine.

4 MR. LEVY: Because they are involving him sending,  
5 receiving and responding.

6 COMM BOGLE: That is fine.

7 Q: You recognise that document, Mr. Downer?

8 A: I don't now recognise it but I don't  
9 dispute it, I remember the matter which  
10 it refers to.

11 Q: On this page it shows that the  
12 principal, meaning DEBTOR1 - I am  
13 assuming what it means was Richard  
14 Downer and recipient was Michael Hylton?

15 A: That is what he says.

16 Q: Could you read the body of the letter.

17 A: Yes.

18 Q: With Mike.

19 A: I don't know if I should start from the  
20 top and go in the reverse order, I don't  
21 know whether I should -- do you want me  
22 to do it this way?

23 Q: Yes.

24 A: **"Mike, you asked in that letter whether**  
25 **you should go ahead with the bailiff in**

1 view of the assertion of the matter  
2 being up in the lofty realm of the  
3 political directorate".

4 Stop there. What Mr. Hylton was telling  
5 you, what do you understand him to be  
6 telling you about when you made that  
7 statement?

8 A: Well, I am saying something which I  
9 heard I presume from them, I don't know.

10 Q: **The lofty realm**, what does that mean,  
11 high up?

12 A: Yes, it is a jocular way of expressing  
13 something I suppose.

14 Q: Okay, carry on Mr. Downer.

15 A: **So it is said by DEBTOR1.1, and this is**  
16 **bolstered by the fact that NIBJ (in the**  
17 **person of Rex James has told me that**  
18 **they want to buy, as part of the assets**  
19 **to be sold, our rights to any benefits**  
20 **from claim money and the house, as part**  
21 **of the purchase of the business**  
22 **transaction. They would not buy those**  
23 **rights separately i.e., not unless they**  
24 **are getting the business.**  
25 **We have another offer which we hope will**

1 result in a transaction since  
2 consideration is far greater than  
3 offered by NIBJ, but it is too early to  
4 tell whether they can complete -- and in  
5 the case of that offer the rights to  
6 the claim would not be transferred.  
7 letter to of the claim.  
8 I would like to wait a week or two  
9 before making the decision if that will  
10 not somehow jeopardise something or  
11 another.

12 Q: And the Yvan that you are referring to,  
13 who is that?

14 A: Sorry?

15 Q: The second sentence, you said "DEBTOR1.1"

16 A: DEBTOR1.1.

17 Q: Okay. And who is he?

18 A: He is the half brother of DEBTOR1.

19 Q: So you were in contact with DEBTOR1.1?

20 A: Yes, he called me from time to time.

21 Q: On a number of occasions?

22 A: Yes.

23 Q: Okay. Let's carry on down further.

24 There is a response which appears to be  
25 coming from Michael Hylton to you.





1 JOHN DOE's son in  
2 University.  
3 A: No, I didn't.  
4 Q: Pardon me?  
5 A: Can you say that again for me?  
6 Q: Yes. That part of the funds for which  
7 you sued DEBTOR1 represented  
8 payments made by DEBTOR1COMPANAY to  
9 assist JOHN DOE  
10 to educate his son at University abroad.  
11 A: News to me.  
12 Q: News to you?  
13 A: Yes.  
14 MR. SHELTON: No, can I ask one: Is there any  
15 evidence? Two: What is the relevance to  
16 Mr. Downer's conduct of receivership?  
17 this is just a matter -- I have no brief  
18 for JOHN DOE.  
19 What is this about?  
20 Is there any evidence of  
21 Mr. Downer's conduct of the  
22 receiverships to that particular bit of  
23 evidence given by Mr. Levy? What is it  
24 in respect of?  
25 COMM BOGLE: Mr. Levy, can you explain where that is

1 coming from?

2 MR. LEVY: Yes, Mr. Chairman, this is an e-mail  
3 correspondence with Mr. Downer then  
4 receiver and his then attorney. And I  
5 didn't write it.

6 The question he posed was, did you  
7 receive my letter in relation to  
8 political issues raised by Levy?  
9 Political issue was mentioned in what  
10 Mr. Downer read and it was then referred  
11 to as...

12 COMM BOGLE: So your statement that you have made  
13 regarding use of funds, have you got any  
14 evidence, anything to...

15 MR. LEVY: I am not hearing you.

16 COMM BOGLE: The statement you made regarding use of  
17 funds do you have any evidence to  
18 support that?

19 MR. LEVY: I could have DEBTOR1 come back and  
20 give the evidence but it has arisen.

21 COMM BOGLE: Mr. Chairman, because of this e-mail.  
22 Mr. Levy, do you have any written  
23 evidence of the statement you made a  
24 while ago regarding the use of funds?

25 MR. LEVY: I will repeat, Mr Chairman, I am willing

1 and happy to have DEBTOR1 write the  
2 letter and put it in.

3 COMM BOGLE: In other words, there is no evidence  
4 available at this time of that?

5 MR. LEVY: Not before the Commission, sir.

6 COMM BOGLE: Go ahead, Mr. Levy. Continue reading,  
7 Mr. Downer.

8 A: Okay.

9 MR. LEVY: Responding to Dear Mike.

10 A: This is the last page:

11 **Dear Mike:**

12 **Thanks for sending that copy of the**

13 **letter from Gresford Jones...**

14 MR. SHELTON: Can you just stop? This is going wrong  
15 way, e-mail reading from back, he keeps  
16 saying in response to e-mail, it is the  
17 other way around. It is making no sense  
18 dealing with it in that context, it is  
19 going in the wrong direction. He  
20 doesn't even know that.

21 MR. LEVY: I am just looking at the document as it  
22 appears before me, sir. Mr. Downer's  
23 e-mail is out of the stream of his  
24 e-mails provided by him through his  
25 attorneys to the companies subsequent to

1 him being receiver which was provided  
2 for the record.

3 COMM BOGLE: I don't think that there is anyone  
4 refuting, no one is refuting the  
5 authenticity of it. What we are saying  
6 is that we are taking it from the back  
7 to the front rather than the front down.

8 MR. LEVY: Well, I stand corrected. Could we start  
9 over again, sir?

10 COMM BOGLE: Now let us...

11 MR. LEVY: Mr. Downer, can you take it from the  
12 front to the back or from the back to  
13 the front?

14 COMM BOGLE: Let us proceed Mr. Downer, the back page  
15 as we have it hereunder.

16 A: Without reading it again? So this was  
17 initiating a message.

18 **Dear Mike:**

19 **Thanks for sending me a copy of the**  
20 **letter from recognise Gresford Jones.**  
21 **So DEBTOR1 is in hiding, eh. I'm sure that**  
22 **DEBTOR1.1 has been in touch with him**  
23 **recently. Be that as it may, they are**  
24 **claiming that the two matters, the debts**  
25 **to the company and the purloined**

1 dwelling house, are inextricably linked  
2 to the extent they can't be tried  
3 separately? Even if they can be, it is  
4 being asserted that there must be  
5 criminal charges which require the body  
6 to be here, and that we can't proceed as  
7 a civil matter? Seems to me that  
8 whether or not here was provable fraud,  
9 the fact is that the house is in the  
10 wrong hands and that should be  
11 redressed. Surely the system provides  
12 for that? In saying the above, I  
13 realise that you have not agreed with  
14 Gresford. From the letter I'm not clear  
15 what Gresford's role is.  
16 Best regards.

17 Q: Where did you get the idea Mr. Downer to  
18 put into this letter that DEBTOR1  
19 was hiding in Haiti?

20 A: I was responding to something else  
21 likely to have been forwarded to me,  
22 from Gresford Jones, that must have been  
23 it. As I said before, I have no idea  
24 exactly what the source was, but it  
25 ought to be something reported to me.

1 Q: What made you sure that DEBTOR1.1 would have  
2 been in touch with him recently?

3 A: It could be, I have no idea, I don't  
4 know why I said that.

5 Q: Let me move on.

6 COMM. BOGLE: Are you tendering this?

7 MR. LEVY: This would be RD9/11.  
8 Going back to your witness statement  
9 before the Commission, in paragraph  
10 number 4, you say that your firm PwC  
11 members did numerous receiverships and  
12 you were appointed the Receiver and  
13 Manager by commercial banks of companies  
14 in several industries. I acted as  
15 Receiver/Manager of the Henderson Group  
16 of Companies consisting of ten  
17 companies, Kern Products Limited, West  
18 Indies Publishing Limited, and you list  
19 a few companies and DEBTOR1COMPANY.  
20 How many of those companies survived  
21 your receivership?

22 MR. SHELTON: Objecting?

23 A: I think the companies are probably still  
24 in existence, I don't know.

25 COMM. BOGLE: Mr. Shelton, is there an objection?

1 MR. SHELTON: I am objecting, I am saying again that  
2 has nothing to do with the  
3 DEBTOR1COMPANY receivership. I mean I  
4 don't even know the answer, you know,  
5 Mr. Chairman, but the point is, the  
6 question of relevance, what is the  
7 relevance if those other receiverships  
8 survived his management, that is not  
9 relevant to the particular proceedings,  
10 and so I am objecting again. I don't  
11 even know the answer but I don't think  
12 there is any relevance to these  
13 proceedings; it is against the personal  
14 issue which we continue to have.

15 A: In all cases the assets were sold to  
16 purchasers.

17 Q: In paragraph 5d, the statement of the  
18 Commission, you say one of the  
19 responsibilities as a receivership --  
20 would you read it?

21 A: **In relation to the management the**  
22 **receiver and manager must at every stage**  
23 **have close regard to the purpose for**  
24 **which he has been appointed, and must**  
25 **not exercise his powers of management**

**1** **for a collateral purpose or one alien to**  
**2** **the purpose for which he was appointed.**

3 Q: Mr. Downer, do you consider the 'on  
4 again off again' sale practiced by your  
5 appointor to be a collateral purpose to  
6 keep the company open, to employ labour,  
7 was that collateral or that was the  
8 primary purpose for which you were  
9 appointed?

10 A: I think what you mean by collateral in  
11 the sense of corruption where you deal  
12 with somebody in a self-serving way or  
13 favour a crony or something of that  
14 nature.

15 Q: In dealing in a corrupt way would -- if  
16 I were to put it to you that the  
17 constant involvement by Recon Trust and  
18 Mr. Patrick Hylton as the Managing  
19 Director in particular, and you were  
20 being told to sell and hold off selling  
21 to allow NIBJ to present offers, was  
22 that the collateral purpose, those are  
23 two connected parties.

24 A: I didn't look at it that way, I just saw  
25 it as raw interference. But they were

1 unilateral hold-offs and the Receiver was  
2 not doing anything wrong vis-a-vis the  
3 debenture holder because I was very  
interested ..

5 Q: So they were not doing anything wrong to  
6 tell you to hold off.

7 A: No.

8 Q: That is not collateral, that is not your  
9 objective?

10 A: It is their money.

11 Q: Were you aware that they were connected  
12 companies, Recon Trust and NIBJ?

13 A: Connected through common ownership of  
14 the Accountant General maybe.

15 Q: That is one of them and that they had  
16 common directors?

17 A: I think I knew that, that was not in the  
18 forefront of my consciousness but I knew  
19 that.

20 Q: Were you aware that David Coore QC was  
21 Chairman of NIBJ and Director of Recon  
22 Trust?

23 A: Yes.

24 Q: Were you aware that the then Financial  
25 Secretary was a director of both

1 companies?

2 A: That is usually so in government  
3 agencies.

4 Q: Mr. Downer...

5 A: I don't know as a fact.

6 Q: Were you aware that David Coore QC  
7 represented DEBTOR1.1 in court even  
8 though he has been retired?

9 A: No, I didn't know that.

10 Q: Now in paragraph 5 you conclude:

11 **However, if the company is put into**  
12 **liquidation then any agency relationship**  
13 **with the company is terminated and the**  
14 **Receiver/Manager is then only the agent**  
15 **of the debenture holder.**

16 I take it that you were addressing that  
17 in relation to DEBTOR1COMPANY?

18 A: Yes, sir.

19 Q: How did that, your conduct in relation  
20 to DEBTOR1COMPANY differ in relation to  
21 the receivership of DEBTOR1COMPANY2 which  
22 did not have a Winding-down Order.

23 A: In the substance there is no difference  
24 to the conduct, just pointing it out as  
25 a fine point because you have said to

1 the Commission on several occasions that  
2 I say I would be...

3 Q: You are mumbling, speak up.

4 A: You said I was behaving as the agent to  
5 the company as if I was employed  
6 throughout and I am employed to  
7 DEBTOR1COMPANY so I am simply  
8 correcting that, that after December  
9 1998 I was not the agent of the company.

10 Q: Moving on to Paragraph 6 of your  
11 statement. You state in March 1998 NCB  
12 approached Price Waterhouse to provide  
13 receivership services in respect of  
14 DEBTOR1COMPANY and DEBTOR1COMPANY2, as  
15 these companies were deeply indebted to the  
16 bank and were not servicing their  
17 indebtedness and were insolvent. What  
18 knowledge did you have when they  
19 approached you as to how deeply they  
20 were indebted and whether they were  
21 servicing their debt or not?

22 A: I didn't know until I got there but this  
23 is the impression conveyed to me by the  
24 bank, this was their impression that  
25 they conveyed to me.

1 Q: Were you aware that in January -- that  
2 in December DEBTOR1COMPANY had  
3 approached NCB to lend it half a million  
4 US dollars for working capital?  
5 A: That was just before I was appointed  
6 Receiver, so I wasn't aware of it.  
7 Q: I have to continue. Were you aware that  
8 at that time NCB told DEBTOR1COMPANY  
9 they didn't have the money ..  
10 COMM. BOGLE: December of what year?  
11 MR. LEVY: December of 1997.  
12 A: No, sir, not aware.  
13 Q: Were you aware that in January through  
14 the instrumentality and on the advice of  
15 NCB, DEBTOR1COMPANY made an application  
16 to NIBJ for a half a million dollar  
17 financing order for it to clear twelve  
18 containers of raw material off the  
19 wharf?  
20 A: When I went in, there was a deal with  
21 NIBJ...  
22 Q: Pardon me?  
23 A: When I went in I found out there was  
24 some deal NIBJ Ex-Im whereby some raw  
25 material was acquired, this is before I



- 1           A:           I must have been aware because I refer  
2                           to it in the Receiver's Report.
- 3           Q:           And what is the terms of the  
4                           arrangement?
- 5           A:           I can't remember, I am not sure of the  
6                           terms of the agreement necessarily. Will  
7                           I get time to look it up? If it is  
8                           there I will look it up.
- 9           Q:           Go ahead, it is important, because you  
10                          have discounted it.
- 11          A:           I am talking about the facility that was  
12                          awarded, a facility that came into  
13                          effect, it was in effect when I went in.  
14                          I am not sure if you are talking about  
15                          the same facility.
- 16          Q:           I am talking about a facility of a half  
17                          a million US dollars made available to  
18                          DEBTOR1COMPANY by NIBJ with the full  
19                          cooperation and certain releases by NCB  
20                          holder of the debenture.
- 21          A:           Right, in the Receiver's Report I refer  
22                          to that agreement. Shall I read it?
- 23          Q:           Please.
- 24          A:           Under Letter of Agreement between NCB...
- 25          Q:           Under what type of agreement?

1           A:           **Under Letter of Agreement between NCB,**  
2                           **the other secured creditors and NIBJ,**  
3                           **NIBJ has guaranteed the indebtedness to**  
4                           **Ex-Im bank for the financing of raw**  
5                           **material supplies and the secured**  
6                           **creditors have agreed that NIBJ could**  
7                           **secure its positions. As supplemented**  
8                           **by oral agreement, NIBJ secured its**  
9                           **position by DEBTOR1COMPANY agreeing to**  
10                          **a procedure whereby the customers who**  
11                          **are supplied with goods made from the**  
12                          **raw materials imported under the**  
13                          **revolving facility pay NIBJ the invoiced**  
14                          **amounts and NIBJ would retain 25%**  
15                          **thereof, out of which prior indebtedness**  
16                          **and the revolving facility would be**  
17                          **serviced. No formal assignment of the**  
18                          **accounts was given.**  
19                          **Those were the terms.**  
20           Q:           Yes. Can you tell us what the terms of  
21                           repayment of that loan were?  
22           A:           Well as it says here, it's a revolving  
23                           facility, so they would pay back out of  
24                           sale and then they could borrow it  
25                           again.



1 2 money, suggested that NIBJ could do it and  
3 4 they actually released their debenture in  
5 6 relation to millions of dollars of debts  
7 8 which were assigned which the raw material  
9 would be  
10 producing a product for. That evidence is  
11 before the Commission, maybe the Secretary  
12 can find it because I can't find it right now,  
13 but it was before the Commission, I am sure  
14 you all remember. And the terms, just to  
15 continue, the terms were that NIBJ, the debt,  
16 substantial debt, specific Rate A customers  
17 were assigned with the consent of NCB to NIBJ  
18 and that the proceeds of those orders  
19 produced by the company would be collected  
20 by NIBJ, and 40% would be retained by NIBJ to  
21 repay, which was projected to repay the half  
22 a million US to them with interest within six  
23 months. NIBJ would pay over to NCB, forty  
24 percent of those debts collected which one  
25 can conclude would be repaying NCB a half  
million within six months and the twenty  
percent was going to be used

1 for the working capital of the company  
2 to produce the goods. I am asking  
3 Mr. Downer if that ..  
4 MR. SHELTON: I am objecting, because Mr. Downer  
5 earlier stated Mr. Chairman, and  
6 Mr. Commissioner Ross, that the report  
7 that he is speaking about was in  
8 relation to a facility which existed  
9 when he went into the business as the  
10 Receiver. What I remember the evidence  
11 from DEBTOR1 to be was that a  
12 facility was negotiated that would have  
13 been able to assist the company in its  
14 production and the receivership took  
15 place negativinG all of that, that is  
16 my understanding of the evidence which  
17 was given that all of this was in place  
18 and yet a receivership was put in. My  
19 understanding from Mr. Downer is that  
20 when I went in, this I saw from the  
21 books, a revolving loan to NIBJ, that is  
22 my understanding.  
23 MR. LEVY: And I am trying to correct Mr. Downer's  
24 memory because there was no revolving  
25 loan and the evidence before the

1 Commission is that there is no revolving  
2 loan.

3 COMM. BOGLE: Let's see if we can get some  
4 understanding. Mr. Downer, when you  
5 took over the receivership, you are  
6 saying that there was a facility in  
7 place?

8 A: Correct.

9 COMM. BOGLE: With NIBJ. After you took over the  
10 receivership, was there any further loan  
11 or advances by NIBJ, was there a five  
12 hundred thousand US loan or advance from  
13 NIBJ?

14 A: No.

15 COMM. BOGLE: Therefore, what you are saying is the  
16 only facility that you know of was one  
17 that was there before you took over?

18 A: Correct.

19 COMM. BOGLE: Are we clear on that? In other words,  
20 the facility that you are talking about,  
21 that five hundred thousand facility, was  
22 it actually crystallized? Was the money  
23 paid over by NIBJ.

24 MR. LEVY: It was done?

25 COMM. BOGLE: When was this done.

1 MR. LEVY: It was paid over in January to clear the  
2 goods off the wharf.

3 COMM. BOGLE: Well, that is what Mr. Downer is saying  
4 that it would have been what he came in  
5 and saw because he went in March.

6 MR. LEVY: Not so, sir. Mr. Downer stated it was a  
7 revolving loan and I understand a  
8 revolving loan to be one that rolls  
9 over, it was a specific loan to clear  
10 twelve containers off the wharf?

11 COMM. BOGLE: Have you got the terms of that loan?

12 MR. LEVY: The evidence is before the Commission  
13 already Mr. Chairman, Mr. Downer has the  
14 terms.

15 COMM. BOGLE: Well...

16 MR. LEVY: Let me put another question to Mr.  
17 Downer to continue on this.

18 COMM. BOGLE: Continue.

19 Q: Mr. Downer, did you not refuse to allow  
20 NIBJ to collect this money? Didn't you  
21 have a conflict with them which almost  
22 resulted in a lawsuit.

23 A: I will explain that, that is truth. It  
24 says here:  
25 **Since this arrangement would constitute**

1 the distribution of proceeds to a  
2 creditor outside of the order of  
3 preferences in the law, I informed the  
4 customers, Ex-Im Bank and NIBJ that such  
5 an arrangement could not continue. The  
6 customers have agreed to co-operate and  
7 in one case even stopped payment on a  
8 cheque that had been sent to NIBJ. This  
9 is a matter to be sorted out between NCB  
10 and NIBJ/Exim and in the schedule  
11 showing the Estimated Final Outcome I  
12 have shown NIBJ/Exim as unsecured.

13 Q: Were you provided with evidence by NCB  
14 that they as the first debenture holder  
15 had consented to the assignment of those  
16 debtors to NIBJ to pay that debt and had  
17 given that assurance?

18 A: I said that this is a Letter of  
19 Agreement between NCB and the other  
20 secured creditors and NIBJ for allowing  
21 this to happen and agreed that NIBJ  
22 could secure its position.

23 Q: NIBJ could what?

24 A: Secure its position. As supplemented by  
25 oral agreement, NIBJ secured its

1 position by DEBTOR1COMPANY agreeing to  
2 a procedure whereby certain things  
3 happened and I ended by saying no formal  
4 assignment of the accounts was given.  
5 That is when the Receiver would go in,  
6 if you give preference to the wrong  
7 person.

8 Q: Mr. Downer how does a company have oral  
9 agreement?

10 A: By speaking.

11 Q: I thought it was a hit and it was moot.

12 A: Well you lost me there.

13 Q: We are talking about a half a million  
14 dollars, a deal between three banks,  
15 Ex-Im Bank, NIBJ and NCB, that is oral,  
16 you expect the Commission to believe  
17 that?

18 A: I said there was a Letter of Agreement  
19 supplemented by an oral agreement.

20 Q: What was the Letter of Agreement?

21 A: As reported to me, this is all what I  
22 was told, as I said I was not part of  
23 it.

24 Q: What was the Letter of Agreement?

25 A: I will read it again.

1 Q: No, no, I am asking you, not what you  
2 read, what was the Letter of Agreement.

3 A: NIBJ would guarantee the indebtedness to  
4 Ex-Im Bank for the financing of raw  
5 material and the secured creditors have  
6 agreed, NIBJ could secure its position.  
7 Doesn't mean that they ....

8 Q: I am sorry, Mr. Downer, you are kind of  
9 mumbling, I am not hearing, I am hearing  
10 impaired but I do have in my hearing aid  
11 but when you mumble like that I am not  
12 hearing.

13 A: I am sorry, I didn't realize at all. It  
14 was agreed, according to this, I have  
15 not got the document and the best  
16 information is what is in my report, I  
17 have no option but to rely on this. It  
18 says that NIBJ has guaranteed the  
19 indebtedness to Ex-Im and the secured  
20 creditors have agreed....

21 Q: Meaning?

22 A: NCB.

23 Q: Which is called a creditor?

24 A: There were two NCBs involved, there was  
25 unsecured creditors as well. I was not a

1 party to this, I am not sure, all I am  
2 telling you is what I read here now  
3 because I cannot remember, because I  
4 don't have the documents any more. The  
5 secured creditors have agreed that NIBJ  
6 could secure its position as  
7 supplemented by oral agreement; NIBJ  
8 secured its position by DEBTOR1COMPANY  
9 agreeing to a procedure and I explained  
10 the procedure.

11 Q: What was the procedure?

12 A: The procedures whereby the customers who  
13 were supplied by goods made from the raw  
14 materials imported under the revolving  
15 facility pay NIBJ the invoiced amounts  
16 and NIBJ would retain 25% thereof, out  
17 of which prior indebtedness and the  
18 revolving facility would be serviced.  
19 No formal assignment of the accounts was  
20 given.

21 Q: Prior indebtedness?

22 A: I am just reading what I see here.

23 Q: But you put it there, what you mean?

24 A: I can't remember, now sir, the prior  
25 indebtedness would mean that it was

1                   incurred before this event.

2           Q:           The indebtedness you are talking is half  
3                   a million indebtedness?

4           A:           I don't know, I am not sure, that  
5                   doesn't necessarily mean that.

6           Q:           Mr. Downer you almost went to court with  
7                   NLBJ over this, NIBJ almost took you to  
8                   court on this and you don't remember?

9           A:           Well, in fact, although I said no formal  
10                   assignment of the accounts was given,  
11                   the fact is that they had a de facto  
12                   assignment and I needed to honour that.

13          Q:           What about the question of how - we have  
14                   a little difference of opinion on  
15                   recollection of what the percentage was,  
16                   but if it were 25 percent, it would mean  
17                   based on the evidence before this  
18                   Commission that twenty-five percent of  
19                   the debts assigned would repay half a  
20                   million with interest, yes, with  
21                   interest within six months?

22          A:           I don't know, I have to work it out.  
23                   Can we take it step by step with numbers  
24                   to show me, I have not done that sum  
25                   before, maybe you can show me how you

1 got it.

2 Q: The arrangement between DEBTOR1COMPANY,  
3 National Commercial Bank Jamaica  
4 Limited and NIBJ was that  
5 since NCB did not have the half a  
6 million dollars to lend to  
7 DEBTOR1COMPANY, that NIBJ would make  
8 the necessary arrangement and grant a  
9 facility albeit by guarantee to Ex-Im  
10 Bank. This would be secured by an  
11 assignment of debts to which NCB  
12 consented was specific listed debts?

13 A: Possibly true.

14 Q: Number of millions of Jamaican dollars.  
15 NIBJ would collect the entire amount of  
16 those assigned debts, they would keep, I  
17 say forty, you say twenty-five percent,  
18 but what they kept would repay the loan  
19 within six months with interest.

20 A: I don't know about the six months, that  
21 is news to me, maybe they just pay the  
22 interest, but the thing is, with the  
23 level of turn over, how fast the turn  
24 over of the stock was and whether they  
25 could replenish it ..



1 retained could buy more raw material and  
2 do the same thing again over and over  
3 again as long as they could.

4 Q: What? Repeat in slow English.

5 A: The funds they retained could be used to  
6 buy more raw material.

7 Q: That is not the arrangement, Mr. Downer.

8 A: Well, this is our understanding of it  
9 and based on the documents we must have  
10 seen there and what was reported to us  
11 as being the oral supplemental agreement  
12 this is all we knew, so our  
13 understanding was it was a revolving  
14 facility. I can't help you any more than  
15 that.

16 Q: You sound confused, but anyway.

17 A: I am, believe me.

18 Q: As long as we know that.

19 You were trying to suggest, Mr. Downer  
20 that when you took over there was little  
21 raw material - further on in the  
22 Witness Statement very little raw  
23 material was in the company and you were  
24 worried about stockouts.

25 A: Yes.

1           Q:           But shortly before you took over on the  
2                           9th of March 1998, twelve containers of  
3                           raw material were supplied to the  
4                           company.

5           A:           (No answer)

6           Q:           You are trying to suggest that the  
7                           company was in default of its  
8                           obligations to NCB.

9           A:           I am saying that they had \$14,000 in the  
10                          bank. It is one thing to have raw  
11                          material in the warehouse but it needs  
12                          to be converted into finished goods to  
13                          sell. You need working capital for  
14                          that. You need cash to pay the workers  
15                          for one thing.

16          Q:           This is where the percentage that came  
17                          back to DEBTOR1COMPANY came from, out  
18                          of the sale, out of the million dollars  
19                          of sale they received 20 percent back  
20                          which would cover their working capital.

21          A:           But they never got the cash at the same  
22                          time. The invoice was a document for  
23                          payment, they need working capital to  
24                          support that.

25          Q:           But there was as six-month period within

1                   which that could be paid. Maybe it could  
2                   take seven months from day one but it is  
3                   a six-month period. Are you suggesting  
4                   to this Commission that there were no  
5                   good debts?

6           A:           No, obviously not.

7           Q:           Or very little good debts?

8           A:           No, there were good debts.

9           Q:           In your statement you stated, the  
10                   statement dealt with -- were you aware  
11                   of any prior correspondence or demands  
12                   by NCB within the three-month period  
13                   prior to your Receivership for repayment  
14                   of any of the loans or obligations?

15          A:           No.

16          Q:           Were you aware of any demand made by  
17                   NCB?

18          A:           Just prior to the Receivership starting.

19          Q:           Tell us about that demand, Mr. Downer,  
20                   the date of the demand and the time it  
21                   was presented.

22          A:           My recollection is it was presented by  
23                   the attorneys.

24          Q:           Which attorneys?

25          A:           Myers, Fletcher and Gordon. I wasn't

1                   there when it was done.

2           Q:           They represented NCB?

3           A:           Yes.

4           Q:           Okay.  What was the demand for?

5           A:           The amounts owed under the, some

6                   debentures, not all of them.

7           Q:           And what time, what day was that demand

8                   presented?

9           A:           Well it must have been the same day that

10                   I went in.

11          Q:           I don't want nuh 'must be'.

12          A:           It could only have been.  I would not

13                   answer any other way.

14          Q:           So it was?

15          A:           I would not have let a day go by ..

16          Q:           Please stop mumbling and speak into the

17                   mike.

18          A:           When you stop mocking I'll stop

19                   mumbling.  How is that?  I could only

20                   have gone in simultaneously with the

21                   demand or just after the demand.

22          Q:           Were you aware of any prior demands?

23          A:           No, I wasn't aware.

24          Q:           But you were in close contact with the

25                   bank in the weeks preceding your

1 appointment?

2 A: Yes.

3 Q: And the demand made on the 9th of March,  
4 1998?

5 A: Correct.

6 Q: At what time?

7 A: During the afternoon, I think.

8 Q: About 3 o'clock?

9 A: Sounds about right.

10 Q: Was the demand made of the Managing  
11 Director?

12 A: I wasn't there when it was made.

13 Q: Oh, you weren't. I thought you all went  
14 out together.

15 A: I was in the car but I wasn't there when  
16 the demand was made.

17 Q: Okay, let's stop there then, Mr. Downer.  
18 Were you aware that the Managing  
19 Director of DEBTOR1COMPANY at that time  
20 was in a meeting with Mr. Jeffrey  
21 Cobham, the Managing Director of NCB.

22 A: I read that in the oral testimony.  
23 That's the only reason I know.

24 Q: You weren't part of the manipulation to  
25 get him out of the factory before the

1 demand was presented?

2 A: No. My understanding is that  
3 DEBTOR1 had asked for a meeting with  
4 NCB, not the other way around.

5 Q: Hadn't it been your practice, Mr.  
6 Downer, to advise your bank clients to  
7 make the demand after banking hours so  
8 the demand cannot be met even if it  
9 wanted to meet it?

10 A: No. I don't make the demands, the bank  
11 makes the demands.

12 Q: But you organize it, you make the  
13 arrangements.

14 A: I do not.

15 Q: Can I remind you of others when the  
16 exact procedure was followed where you  
17 walk in with gendarme and your lawyer  
18 making a demand at a time when the bank  
19 is closed and the demands cannot  
20 possibly be met?

21 A: I don't make the demand, the bank makes  
22 the demand and I don't plot with them.  
23 The banks tell me what to do. They say  
24 you have got an indemnity lined up when  
25 the demand is made I go in.

1 Q: So it's the practice of the bank, not  
2 your practice to make the demand after  
3 banking hours?

4 A: Correct.

5 Q: You have nothing to do with advising  
6 them on those demands?

7 A: Correct.

8 MR. LEVY: I am going to hand the witness letter  
9 which is TP8/11.  
10 (Document handed to witness)  
11 Will you read this letter to the  
12 Commission, Mr. Downer.

13 A: It is to DEBTOR1.

14 Q: From?

15 A: From NCB, National Commercial Bank. And  
16 it says:  
17 **Dear DEBTOR1....**

18 MR. SHELTON: I am objecting, Mr. Chairman. This has  
19 nothing to do with Mr. Downer. It's  
20 already an exhibit. It's a letter from  
21 NCB to DEBTOR1. It's not even copied  
22 to Mr. Downer. I am objecting to him  
23 having anything to do with this exhibit.

24 COMM. BOGLE: Relevance, Mr. Levy.

25 MR. LEVY: Mr. Chairman, this letter is in evidence

1 already. It is in exhibit, TP 8/11. It is  
2 a letter from Mrs. Valda Facey, the  
3 Assistant General Manager of NCB, not a  
4 bank, talking about a guarantee by National  
5 Investment Bank of Jamaica Limited (NIBJ) to  
6 EXIM Bank for \$US500,000 --- J\$18.6 million  
7 at the time which is what we will be talking  
8 about. The letter says:

9 **Our letter of December 18, 1997 and**  
10 **subsequent discussion/correspondence**  
11 **ending with yours of January 5, 1998**  
12 **refer.**

13 **We confirm agreement for the remittance of**  
14 **receivables to us by NIBJ on the basis**  
15 **outlined in their letter dated December 15,**  
16 **1997.**

17 **We have provided NIBJ with the release of the**  
18 **relevant receivables from our debenture and**  
19 **now await the anticipated inflows in**  
20 **accordance with arrangements.** This talks  
21 specifically about the release of the  
22 relevant receivables from the debenture of  
23 NCB and it concludes: **We await the**  
24 **anticipated inflows in**  
25



1 Does that letter indicate that they were  
2 not servicing their indebtedness?

3 A: No.

4 Q: It makes it look like things were  
5 running well.

6 A: No. It means that the bank was not  
7 willing to extend credit to  
8 DEBTOR1COMPANY and they had to go  
9 somewhere else.

10 Q: And the bank guaranteed it?

11 A: NIBJ guaranteed it.

12 Q: Right, but the bank released it?

13 A: Yes, the bank had a fixed and floating  
14 charge and in the floating charge is  
15 always receivables so they could simply  
16 have said these particular receivables  
17 we exclude from the floating charge.

18 Q: Mr. Downer, our Commissioners are  
19 intelligent people, they know this.

20 A: Okay.

21 MR. SHELTON: Would you ask the question.

22 MR. LEVY: Let us go Mr. Downer, to paragraph 7.  
23 You talked about letter from PwC to  
24 Dunbar McFarlane. Lets look more  
25 closely at that letter. Letter dated

1 6th March, 1998 from Richard Downer on  
2 Price Waterhouse letterhead to Dunbar  
3 McFarlane, Managing Director, NCB. in  
4 this letter you said:

5 **I am enclosing 3 documents which have**  
6 **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 Let's look at the press release which I  
19 take it you or your firm prepared and  
20 you have to take responsibility for it.  
21 The thing is headed XYZ placed in  
22 receivership by NCB?

23 A: This was a draft.

24 Q: Draft by whom?

25 A: Me.

1 Q: You are the author?

2 A: Yes.

3 Q: Tell us about the previous willingness  
4 on the part of the bank of the secured  
5 creditor to restructure the company to  
6 which you refer?

7 A: Where is this?

8 Q: Second line and continue:

9 **Previous willingness on the part of the**  
10 **secured creditors to financially**  
11 **restructure the company.'**

12 Tells about those.

13 A: Can't say where it is.

14 Q: 'previous' - second line, right hand  
15 side.

16 A: Which paragraph?

17 Q: XYZ PLACED IN RECEIVERSHIP BY NCB.

18 First paragraph:

19 **This afternoon XYZ Ltd was placed in**  
20 **receivership by National Commercial**  
21 **Bank. The company owes the bank and**  
22 **other secured creditors some \$x00**  
23 **million. Previous willingness on the**  
24 **part of the secured creditors to**  
25 **financially restructure the company..."**



1 half a million US Dollars; were they in  
2 a position to restructure anything?

3 FINSAC was in there hovering their tail.

4 A: If the bank said that they could  
5 restructure it I guess they could. They  
6 said it was contingent on harmony within  
7 the shareholders, so I took it to mean  
8 they could have written off some debts,  
9 they could have found a way to restore  
10 it but it was contingent upon the  
11 shareholders settling their differences.  
12 That is how I understood it.

13 Q: Who runs a company, Mr. Downer, the  
14 Directors or the shareholders?

15 A: Directors.

16 Q: Who were the shareholders of  
17 DEBTOR1COMPANY in  
18 March, 1998?

19 A: I can't remember. If my recollections  
20 serves me, I know that DEBTOR1.1 had  
21 shares, DEBTOR1 had shares  
22 and perhaps other family members as  
23 well. I can't remember. The thing is I  
24 wasn't that concerned with the  
25 shareholders.

1 Q: So you were not aware of who the  
2 shareholders were?

3 A: During a Receivership I don't need to  
4 be, I relate to the assets.

5 Q: And you knew who the directors were?

6 A: Even then it wouldn't have mattered to  
7 me. I probably did. I had a meeting with  
8 them after the Receivership started so I  
9 must have known who they were.

10 Q: If I told you that ninety percent of the  
11 shares were registered in the name of  
12 DEBTOR1 and Jeffery Pattinson  
13 as the trustees under a trust set up by  
14 THOMAS DOE at the time they took  
15 over, would you accept that or you would  
16 still dispute it?

17 A: I don't know. It was a big dispute in  
18 the court.

19 Q: I am not talking about that.

20 A: I am not sure where it ended up. Several  
21 disputes were around.

22 Q: If I tell you that the shareholders on  
23 record today are ninety percent the  
24 trustees of the trust of THOMAS DOE  
25 - DBETOR1.1 owns three

1 percent in his own right.

2 A: Well, you could inform me but it is not  
3 relevant to anything to do with me so I  
4 don't know and I don't really care.

5 Q: You, in this press release which you  
6 prepared after consultation with the  
7 bank spoke of willingness to restructure  
8 the credit.

9 **Previous willingness on the part of the**  
10 **secured creditors to financially**  
11 **restructure the company were contingent**  
12 **on the restoration of harmony within the**  
13 **ranks of the shareholders and their**  
14 **respective role in management.**

15 A: That is what I was told.

16 Q: What role do shareholders have in  
17 management, Mr. Downer? You have been  
18 involved with many public companies.

19 A: Well the first thing was that I think  
20 the shareholdings themselves were still  
21 in dispute.

22 Q: What?

23 A: I think from recollection the  
24 shareholdings themselves were still in  
25 dispute so that could have been a

1 reason.

2 Q: You are skirting the question, sir.

3 A: No, I am not. Every case is different.

4 Generally the shareholders wouldn't

5 really be relevant as you suggest. In

6 the case of the dispute as to who the

7 shareholder's actually are, there could

8 be a difference.

9 Q: But in this case one shareholder owns 90

10 percent and the one who you say is in

11 dispute owns three percent, what is the

12 relevance of that shareholders dispute

13 to the major shareholder in relation to

14 the management of the company at that

15 time?

16 A: In the case of a hypothetical company...

17 Q: In this company.

18 A: I can't accept necessarily the three

19 percent either.

20 Q: Okay.

21 A: Even if I do accept it's just disruptive

22 on the operations of the company when

23 you have squabbling of the shareholders.

24 But, I don't know what NCB's reasons

25 were for making that condition; it's not

1 my condition.

2 Q: Okay. You are quoting Mr. Dunbar  
3 McFarlane, could you go down the line.

4 A: Well, he hadn't actually said those  
5 words. When you write a press release  
6 you put words in quote and the person  
7 has to approve the words.

8 Q: Okay, Mr. Downer. You were appointed to  
9 take over the management of the company?

10 A: Yes, sir.

11 Q: What did you do to recapitalize the  
12 operations of the company? What did you  
13 do to try to recapitalize the company?

14 A: I wouldn't even try to recapitalize the  
15 company, it would be good money after  
16 bad. That company was so indebted that  
17 there is no way I could attract share  
18 capital to it. In any case I had no  
19 power to issue shares, only directors  
20 could do that.

21 Q: You had no what?

22 A: Powers to issue shares.

23 Q: You had no power to issue shares?

24 A: Not in the company, no.

25 Q: So this whole talk about putting it into

1 receivership and trying to recapitalize  
2 is a farce.

3 A: Recapitalize? Restructure; meaning  
4 restructure the debts.

5 Q: **"The only way to improve the prospects**  
6 **of the company now is to take over its**  
7 **management by putting it into**  
8 **receivership and trying to recapitalize**  
9 **the operation".**

10 I am quoting what you wrote in this  
11 press release.

12 A: Well the only way that it could be done  
13 is to sell it and it would not be the  
14 company being recapitalized.

15 Q: Mr. Downer, you said you had no control  
16 over the issue of shares?

17 A: Correct.

18 Q: Do you have that control in any  
19 receivership?

20 A: I don't think so.

21 Q: So what is the relevance of that  
22 statement - **putting it into receivership**  
23 **and trying to recapitalize the**  
24 **operations.**

25 A: Well, it could be to get forgiveness of



1 to be more profitable?

2 A: All of them, after the receivership  
3 started than they were before.

4 Q: What?

5 A: All of them?

6 Q: This one?

7 A: Yes. This one was making a gross loss  
8 in the six months before I went in  
9 there; I made a gross profit.

10 Q: What were the rates of interest being  
11 charged by the bank at that time?

12 A: I don't remember.

13 Q: But they were in high in 1998,  
14 March/April?

15 A: Everything was high.

16 Q: Selective memory.

17 A: They were high, sorry.

18 Q: I continue.

19 **The Receiver, Richard Downer of Price**  
20 **Waterhouse, intends to keep the company**  
21 **in operation. He stated that operations**  
22 **can be more profitable under a**  
23 **receivership as it will provide the**  
24 **company with a breathing space from its**  
25 **creditors to be better able to**

1                   **capitalise on its strengths and in a**  
2                   **better position to experience a**  
3                   **turnaround.**

4                   Mr. Downer, do you recall what  
5                   DEBTOR1's salary was at the time you took  
                  over?

7           A:           No.

8           Q:           Thirty- five million a year?

9           A:           No.

10          Q:           Let's have an estimate of what you  
11                    thought it was.

12          A:           I don't know what it was.

13          Q:           Do you think the cost of the  
14                    receivership which increased the  
15                    management cost exponentially would  
16                    allow it to turn around?

17          A:           Well, all I can say is that after we  
18                    went in it had a positive cash flow,  
19                    before that it didn't.

20          Q:           Then why was it you needed all this  
21                    overdraft money which we will come to at  
22                    a later stage?

23          A:           To start up, to give it a kick start.

24          Q:           But you kept demanding more overdraft to  
25                    be guaranteed by the bank and FINSAC.



1 A: That's your opinion, not mine.

2 Q: It continues; 'for example, he says' and

3 they are talking about you - 'he will be

4 able to use the cash generated from sales

5 to first put an end to stockouts'.

6 Yes.

7 A: Now on the 9th of March 1998, what did you

8 Q: know about stockouts of this company?

9

10 A: I had been told before I went in that this

11 was one of the problems that they were

12 experiencing. They had demand from

13 customers but they couldn't fulfill the

14 orders because they didn't have the raw

15 materials to make the products.

16 Q: Did you verify that with anybody in the

17 company?

18 A: No.

19 Q: You met with DEBTOR1 some days after

20 A: the receivership?

21 Correct.

22 Q: Did you ask him about that?

23 A: No.

24 Q: No. Nowhere in your witness statement,

25

1 Mr. Downer, did you say that you gave  
2 back DEBTOR1 his briefcase when you  
3 met with him at the Terra Nova hotel?

4 A: I did give him his briefcase back.

5 Q: But you don't say that here in your  
6 statement.

7 A: Well, I gave him back his personal  
8 effects.

9 Q: Were you trying to conceal the fact that  
10 DEBTOR1 had asked you at the gate of  
11 DEBTOR1COMPANY on the 9th of March,  
12 would you let him have his briefcase  
13 with his medication in it, or were  
14 trying to stay clear of that?

15 A: He never mentioned medication at all and  
16 I was certainly not going to give him  
17 his briefcase before I went through it.  
18 But if he had told me medication was in  
19 it, I would certainly have given it to  
20 him.

21 Q: Weren't you invading his privacy to do  
22 that?

23 A: No, I was not invading his privacy.  
24 There could have been documents in there  
25 pertinent to the company.

1 Q: You are out of order, Mr. Downer. And,  
2 Mr. Chairman, you can rule me out of  
3 order but he was out of order for saying  
4 he would not give him back his own  
5 briefcase.

6 COMM. BOGLE: Thank you very much for reminding me

7 that I should rule you out of order for  
8 that outburst.

9 MR. LEVY: I am not worried about that, Mr.

10 Chairman. There are times when it is  
11 good to be out of order.

12 COMM. BOGLE: No, but the thing is that if you have  
13 asked the witness a question and he has  
14 answered and he has given you his reason  
15 then I don't think that the outburst was  
16 necessary.

17 MR. LEVY: Okay, Mr. Downer.

18 **"During the breathing space, the**  
19 **Receiver will also put together a**  
20 **refinancing proposal at an early date**  
21 **and seek capital from other sources,**  
22 **repay the secured creditors and end the**  
23 **receivership."**

24 A: That was the wish.

25 Q: Pardon me?

1           A:           That would have been the ideal outcome.

2           Q:           Did you ever have any discussion with

3                           the majority shareholder about your

4                           recapitalizing the company and involving

5                           other parties in share capital?

6           A:           When I entered the company it is

7                           always...

8           Q:           Answer my question?

9           A:           I am answering the question but if you

10                          want a shorter answer, the answer is no.

11          Q:           You are giving a speech. I am not asking

12                          you to do that, I am asking you to

13                          answer.

14          COMM. BOGLE:       Mr. Levy, while I understand you want

15                          yes or no but the Commission doesn't

16                          mind getting the explanation. What we

17                          are trying to do is get information and

18                          I know sometimes we allow for the

19                          explanations because what we trying to

20                          get is information and if the no is

21                          followed by some additional information

22                          we are always happy to have it.

23          MR. LEVY:         Let's hear the no first.

24          COMM. BOGLE:       We are always happy to get the

25                          explanation. Mr. Levy, whilst I

1 understand you want yes or no, but the  
2 Commission doesn't mind getting  
3 explanation. What we are trying to do  
4 is to get information and the no is  
5 followed by some additional information.  
6 We are always happy to get the  
7 explanation.

8 MR. LEVY: Let's us move on. The question was, did  
9 you ever have any discussions with  
10 DEBTOR1, DEBTOR1 - not  
11 DEBTOR1.1 because he seemed to have many -  
12 about recapitalizing the company?

13 A: No, because when I got in sir, and the  
14 receivership started I realized it was a  
15 hopeless case and recapitalization was  
16 not even put on the table in terms of  
17 equity. There was nowhere we could get  
18 equity from in that company.

19 Q: Could that have also involved  
20 restructuring the loans of the bank?

21 A: Yes, as I said earlier.

22 Q: Was that addressed by you to NCB?

23 A: It was always probably on the table, but  
24 I mean, we had to start somewhere, no I  
25 didn't. At the end of the day of

1 course, they never got paid back and so  
2 I suppose you could say...

3 Q: You never got what?

4 A: At the end of the day they never got  
5 paid back all their money and so I  
6 suppose you could say that did happen.

7 Q: Over One Hundred and odd Million  
8 Dollars.

9 A: And the other secured persons also I  
10 think some of them didn't get fully paid  
11 back.

12 Q: In the last paragraph of your Press  
13 Release it says:

14 **This is the second time that XYZ has**  
15 **been placed in receivership under the**  
16 **stewardship of a team from**  
17 **Pricewaterhouse.**

18 Receiverships are teams or individuals?

19 A: I think he was appointed the receiver,  
20 he was named as a receiver, but he  
21 doesn't do it alone, he does it with a  
22 team.

23 Q: **On the other occasion in 19xx a**  
24 **refinancing package....**

25 COMM. BOGLE: Speak into the mike, Mr. Levy.

1MR. LEVY:

2 On the other occasion in 19xx a  
3 refinancing package was put together  
4 with Citibank and the receivership was  
5 terminated after x months when the  
6 company was returned to the directors.

7 A: Yes.

8 Q: You know that as a fact?

9 A: Yes.

10 Q: You do?

11 A: Yes.

12 Q: Would it surprise you, Mr. Downer, if I  
13 told you that your former partner, Brian  
14 Young was that Receiver?

15 A: It wouldn't surprise me at all.

16 Q: It was a fact?

17 A: It was a fact.

18 Q: Would it surprise you if I told you his  
19 appointment as a Receiver was done by  
20 Citibank in the presence of DEBTOR1  
21 and his father?

22 A: It wouldn't surprise me at all.

23 Q: And that DEBTOR1 drove his father  
24 and BRIAN DOE to the factory, would  
25 that surprise you?

A: No, sir.

1 Q: And he didn't take control of the assets  
2 as he was legally required to do as you  
3 state?

4 A: That I don't know, if he had actually  
5 come back to take control.

6 Q: He might have died and gone to heaven  
7 too, is that so?

8 A: It wouldn't surprise me too.

9 Q: Because he is a nice person. Would it  
10 surprise you if I told you that BRIAN  
11 DOE assured THOMAS DOE, and  
12 his son DEBTOR1 that they were to continue  
13 to manage the company, he was there to  
14 put in systems and reorganize the  
15 operations of the company?

16 A: Correct. But the main thing is that  
17 there were some superfluous assets that  
18 the company had on the North Coast which  
19 - I was not in the firm at the time and  
20 I only knew this from being told, but my  
21 understanding is that there were some  
22 assets on the North Coast that were  
23 easily saleable. They were sold, the  
24 bank was paid back and he was out. So  
25 there was no need for him to take over

1 production and all that. It was a clear  
2 path to getting out of the situation of  
3 Citibank and it was done in a short  
4 time.

5 Q: Have you ever conducted a receivership,  
6 Mr. Downer, without moving in with an  
7 army of security guards and taking over  
8 the company as you were legally required  
9 to, according to your words?

10 A: I don't know about any army of security  
11 guards, no, but I have never been  
12 fortunate enough to have an easy  
13 receivership like it was on a prior  
14 occasion.

15 Q: Do you know - you saw one, Mr. Downer?

16 A: I think so.

17 Q: Would it surprise you if I told you

18 BRIAN DOE was a gentlemen?

19 COMM. BOGLE: Mr. Levy, how does the answer to that

20 affect the gathering of information in  
21 this Commission? It doesn't.

22 A: It wouldn't surprise me if he was a  
23 gentlemen.

24 MR. LEVY: I have to come back to that letter.  
25 Let's move on to paragraph 7 of your

1 witness statement, the statement to the  
2 Commission, no, paragraph 9 where you  
3 say you were provided with an Indemnity  
4 by the holders of record of the relevant  
5 DEBTOR1COMPANY and DEBTOR1COMPANY2  
6 debentures and Recon Trust Limited (a  
7 subsidiary of FINSAC with which NCB was then  
8 known to me in the negotiations concerning  
9 the acquisition of the debentures) dated 9th  
10 March, 1998 in relation to both DEBTOR1-  
11 COMPANY and DEBTOR1COMPANY2.

12 To your knowledge, did the sale of that  
13 loan to Recon go through?

14 A: Yes.

15 Q: It did?

16 A: Yes.

17 Q: And so the security was sold with the  
18 loan?

19 A: Well, along with the loan went the  
20 security.

21 Q: Along with the security went the loan?

22 A: I don't know if it went in that order.  
23 They bought the loan and therefore  
24 automatically have the security.

25 Q: Why therefore, Mr. Downer, that being

1 the fact as you state was that the  
2 securities were transferred to Refin  
3 Trust Limited?

4 A: I don't know.

5 Q: You don't know?

6 A: No.

7 Q: And you don't know a lot of other  
8 things, is that correct?

9 A: No.

10 Q: Let's move on. The last sentence, **you**  
11 **said, I was given a further Indemnity by**  
12 **the same parties in or about April 1999,**  
13 an Indemnity in respect of what?

14 A: This is to do with DEBTOR1COMPANY after  
15 it was put in receivership. Because I  
16 then became an agent of the debenture  
17 holder, so the relationship had changed  
18 so we needed a new Indemnity.

19 Q: Let's move on to paragraph 10. Could you  
20 read it for us?

21 A: **When I undertook the receivership I took**  
22 **possession and secured the companies'**  
23 **properties and assets, as I am legally**  
24 **required as the Receiver to take control**  
25 **of all the companies' assets.**

1 Q: Was the law changed after BRIAN DOE was  
2 appointed Receiver?  
3 A: No.  
4 Q: And he was legally required to take  
5 possession of the assets?  
6 A: He probably did.  
7 Q: But you don't know if he did?  
8 A: Well, he possibly did.  
9 Q: He must have.  
10 A: He was appointed the Receiver and he had that  
11 legal power and he controlled the business  
12 as was appropriate at the time. He had the  
13 Q: power, but he wasn't legally required?  
14 A: Yes, he was. He had the power.  
15 Q: What's the basis of your statement that you  
16 were legally required to take control of the  
17 companies' assets, required by virtue of  
18 what documents or statute?  
19 A: Well, you are in control of those assets and  
20 responsible for them so you have got to take  
21 control of them. You have to insure  
22 everything else as soon as you are appointed  
23 receiver.  
24  
25

1 Q: Paragraph 11. **When I started these**  
2 **receiverships, as in the case of other**  
3 **receiverships, I had no certain**  
4 **knowledge of what I would find or how**  
5 **long the receivership would take. My**  
6 **objective was to find a buyer as soon as**  
7 **possible, because long receiverships**  
8 **bring about vastly more risks than short**  
9 **ones and cost substantially more.**

10 A: Yes.

11 Q: That being the case, you being in  
12 charge, you taking control of  
13 DEBTOR1COMPANY2 and being their agent and  
14 manager, why didn't you sell the business  
15 instead of relying on the instructions of  
16 FINSAC? A: We tried to get the best deal that  
17 we could.

18 Q: Did you advertise it overseas?

19 A: No.

20 Q: It was advertised in the local papers?

21 A: It was, yes.

22 Q: I put it to you, Mr. Downer, you went  
23 there and acted like a lackey of FINSAC  
24 in the operations of your receivership.

25 A: I don't regard that as being a lackey of

1  
2 FINSAC. I took exceptions to things and told  
3 them on several occasions.  
4 Q  
5 . Oh, several occasions?  
6 A:  
7 Yes.  
8 Q  
9 . Little occasions, big occasions, tell us?  
10 A:  
11 It is all in the report. You can see from  
12 that how many times...  
13 Q:  
14 Why did you get instructions to withdraw the  
15 property from sale, withdraw it from the  
16 market and then go back on the market?  
17 Well, I had to continue to follow their  
18 instructions.  
19 A:  
20 You had to what?  
21 I had to ultimately follow their  
22 instructions.  
23 Q:  
24 What was the basis that you had to  
25 follow their instructions?  
I was their agent, they were responsible for  
my acts.  
A:  
Yes, but their responsibility is if you  
acted wrongly in your performance.  
Q:  
Well, I think they would see it as wrong if  
I had contravened their direct  
A:  
25

1 instructions.

2 Q: Pardon me?

3 A: I think they would see it as wrong if I  
4 had contravened their direct  
5 instructions.

6 Q: What they saw as right or wrong was not  
7 relevant, Mr. Downer?

8 A: That's between me and them, it was, yes.

9 Q: What's that?

10 A: I don't understand the question.

11 Q: Whether FINSAC saw that you were  
12 obedient to their instructions or you  
13 were disobedient to their instructions,  
14 which never happened, if that was right  
15 or wrong, is that relevant in this  
16 situation? You are dealing with a  
17 receivership and you had legal  
18 responsibilities to the company under  
19 the Companies' Act?

20 A: I don't understand. My first duty was to  
21 the debenture holder and I had to have  
22 regard to the fortunes of the company  
23 as well. I was in a situation where  
24 there were negotiations going on between  
25 the debenture holder and a potential

1                   buyer directly. They thought they had  
2                   higher prospects in locating a deal.  
3                   There weren't any good offers on the  
4                   table for a lot of the time.

5           Q:           There weren't any what?

6           A:           There weren't any good offers on the  
7                   table for a lot of the time. I think  
8                   there was one occasion where we could  
9                   have given Omni a couple more days and  
10                  they could probably have come through,  
11                  but when I evaluated that proposed deal  
12                  against NIBJ's deal, the NIBJ deal was  
13                  better. But there was interference, I  
14                  just felt that I had no option but to  
15                  adhere to their instructions because at  
16                  the price that was offered I wouldn't  
17                  have been able to achieve anything by  
18                  refusing to do their bidding in terms of  
19                  the sale of the companies.

20          Q:           Mr. Downer, you said there were very few  
21                   bidders?

22          A:           Yes, very few bidders in the whole  
23                   enterprise, yes, there were piecemeal  
24                   bids for various aspects.

25          Q:           Let us address DEBTOR1COMPANY2.

1           A:           Yes.

2           Q:           You said there were very few bidders?

3           A:           Yes.

4           Q:           Would this have improved if you had  
5                        advertised it in the professional  
6                        journals, business journals and  
7                        overseas?

8           A:           I don't think so.

9           Q:           You don't think so?

10          A:           I do not.

11          Q:           But you were quite happy to carry out  
12                       the instructions of your appointors?

13          A:           Well, we were working on different  
14                       thrusts and they did listen to me when I  
15                       said I have something in the wings which  
16                       may be better than this and they would  
17                       sometime say okay, go ahead. I remember  
18                       distinctly when Musdsen came to DEBTOR1-  
19                       COMPANY2 the words of Ralph Thompson who was  
20                       in charge at that time said, "**This thing**  
21                       **is only running because the operators**  
22                       **and the machines have a love affair,**  
23                       **they understand each other.**"

24          He said they were never going to satisfy  
25                       anybody who is going to operate it

1 unless they have the things put  
2 together.

3 Q: Who said that?

4 A: Ralph Thompson.

5 Q: And he is an experienced plastic company  
6 operator?

7 A: He was in Seprod at the time,

8 Q: He is an attorney?

9 A: Maybe, but he has experience.

10 Q: In running a plastic company?

11 A: Running a manufacturing company.

12 Q: Plastic manufacturing is a specific type  
13 of manufacturing company, as you learned  
14 from Schoeller. Tell us about the  
15 discussions with Mr. Schoeller or his  
16 representatives.

17 A: Mr. Schoeller came to Jamaica, they had  
18 a mold issue, I think you referred to it  
19 earlier. The molds were being used for  
20 the Desnoes and Geddes crates. The two  
21 molds involved were in fact owned by  
22 Desnoes and Geddes and DEBTOR1COMPANY  
23 had a licence to manufacture the crates  
24 with those molds in Jamaica for Desnoes  
25 and Geddes. In my recollection there

1 was a royalty fee to be paid to  
2 Schoeller and I couldn't find anything  
3 in the Accountant's records....

4 Q: That's not part of the question.

5 A: Pardon me?

6 Q: That's not part of the question.

7 A: You said I must tell you the whole thing  
8 with Schoeller.

9 Q: Did Schoeller tell you that plastic  
10 manufacturing was a technical, technical  
11 thing to do and needed somebody who  
12 knows what to do, not just a factory  
13 manager?

14 A: He could have told me that. I don't  
15 know if he even came to the island, I  
16 don't recall meeting him.

17 Q: Did you suggest to the Schoeller  
18 representatives - did the Schoeller  
19 representatives suggest to you that you  
20 should try to re-engage DEBTOR1  
21 to do the manufacturing?

22 A: Well, I am afraid his track record  
23 is....

24 Q: Pardon me?

25 A: His track record was not very good on

1                   that score.

2           Q:           Wasn't what?

3           A:           His track record wasn't very good on

4                   that score. In fact, we had a

5                   manufacturing man in there at the time.

6           Q:           Plastic manufacturing?

7           A:           Yes, DEBTOR1COMPANY really dealt with

8                   plastic manufacturing, so would Creary.

9           Q:           Do these words, "**I don't want any ghost**

10                   **in there**", remind you of anything?

11          A:           No, nothing.

12          Q:           It doesn't remind you that's what you

13                   told them when they suggested...

14          A:           Okay, DEBTOR1 told me. That's part

15                   of it because I didn't want to engage

16                   employees who had different loyalties

17                   and somebody reporting back to people

18                   outside the company things which were

19                   going on and mischief being made of it.

20          Q:           Your interest in securing creditors,

21                   did it extend beyond monies owing to NCB

22                   and NCB Trust and Merchant Bank?

23          A:           The other security did not - you don't

24                   want me to say no, but I will start with

25                   the word 'no'. However, even the

1 unsecured creditors I had to deal with  
2 in the way mandated by the law. So I  
3 couldn't pay out anybody other than the  
4 preferential order for payment. So I  
5 had to take the other secured creditors  
6 out as they needed to be under the law.

7 Q: But you are addressing in your witness  
8 statement, you as Receiver and Manager  
9 appointed by NCB and Recon Trust had  
10 your responsibility to the companies and  
11 to NCB and Recon Trust?

12 A: I had responsibilities to all the  
13 creditors as well, for sure.

14 Q: You suggest in the region that \$XXX  
15 Million was owed to the following:  
16 Caldon Merchant Bank, Citizens Bank,  
17 CIBC, Eagle Merchant Bank, Horizon  
18 Merchant Bank, International Trust &  
19 Merchant Bank, EXIM Bank, NIBJ,  
20 Trafalgar Development Bank, NCB Trust &  
21 Merchant Bank and National Commercial  
22 Bank. I am putting it to you your  
23 concern with these other secured  
24 creditors because they were all  
25 controlled except one, by FINSAC.

1           A:           No, sir. There were secured creditors at  
2                           different entities and we had to deal  
3                           with them exactly on that basis.

4           Q:           You said, **I also informed them in the**  
5                           **said Report at Appendix 4.1 that DEBTOR1-**  
6                           **COMPANY2's indebtedness to financial**  
7                           **institutions stood at \$XXX MILLION and**  
8                           **that this was owed to Caldon Merchant**  
9                           **Bank and International Trust & Merchant**  
10                          **Bank and National Commercial Bank,**

11                           How much was owed to National commercial  
12                           Bank?

13          A:           By DEBTOR1COMPANY2?

14          Q:           Yes.

15          A:           \$XX Million.

16          Q:           So the amount owed to Caldon Merchant  
17                           Bank and International Trust & Merchant  
18                           Bank was relatively small?

19          A:           Yes.

20          Q:           It seemed to have been of great concern  
21                           to you?

22          A:           Sorry.

23          Q:           It seemed to have been of great concern  
24                           to you.

25          A:           What was of great concern to me?

1 Q: Pardon me?

2 A: What was of great concern to me?

3 Q: To see these small amounts were owed to  
4 two other FINSAC banks?

5 A: I don't know what you are talking about;  
6 I don't understand you.

7 COMM. BOGLE: On that note we will have our  
8 adjournment for the day.

9 Mr. Levy, you will be back here tomorrow  
10 morning at 9:30. It will be just for  
11 half a day because Mr. Downer will be  
12 leaving the island as we indicated  
13 earlier. So we will be back here  
14 tomorrow morning at 9:30.

15 MR. LEVY: Yes, sir.

16 COMM. BOGLE: Mr. Downer, we look forward to seeing  
17 you tomorrow morning.

18 A: Yes, sir.

19

20

ADJOURNMENT

21

22

23

24

25