

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

TUESDAY, MAY 31, 2011

PRESENT WERE:

COMMISSIONERS

Mr. Charles Ross
Mr. Warrick Bogle

COUNSEL FOR THE COMMISSION

Hon. Justice Henderson Downer (Retired)

SECRETARY TO THE COMMISSION

Mr. Fernando DePeralto

ATTORNEY MARSHALING EVIDENCE FOR THE COMMISSION

Miss Judith Clarke- Attorney-at-Law

REPRESENTING RICHARD DOWNER AND PRICEWATERHOUSECOOPERS

Mr. Stephen Shelton

REPRESENTING FINSAC LIMITED

Mr. Bryan Moodie - Attorney-at-Law

Ms Daniel Chai - Attorney-at-Law

REPRESENTING DEBTOR1

Mr. Anthony Levy -- Attorney-at-Law

GIVING EVIDENCE

Mr. Richard Downer

1 **Tuesday, May 31, 2011**

2 **Commencement: 9:45 a.m.**

3 COMM BOGLE: Good morning ladies and gentlemen, this
4 Enquiry is now in session and I wish to
5 apologise for the late start. We should
6 have started at 9:30 but unfortunately
7 due to the problem that one of the
8 Commissioners had we are just starting,
9 so our apologies.

10 This morning we are going to continue
11 the examination of Mr. Downer by
12 Mr. Levy. Just before we start may I
13 have the names of attorneys present for
14 the record, please.

15 MR. SHELTON: Stephen Shelton and I represent -- I am
16 the attorney for Mr. Richard Downer and
17 PriceWaterHouseCoopers and I bring an
18 apology for Mrs. Minott-Phillips and
19 Mr. Gavin Goffe, they are in a matter in
20 the court and depending on how that goes
21 they will be here if not, they have
22 asked me to tender an apology.

23 MR. MOODIE: Brian Moodie and Danielle Chai
24 instructed by Samuda and Johnson,
25 representing FINSAC.

1 MR. LEVY: Anthony Levy representing DEBTOR1,
2 DEBTOR1COMPANY.
3 COMM BOGLE: Okay can we have Mr. Downer sworn?
4 (Witness sworn)
5 Thank you. Mr. Levy?
6 MR. LEVY: Thank you, Mr. Chairman.
7 Mr. Downer, yesterday we were dealing
8 with paragraph 13 of your Witness
9 Statement, placing emphasis on showing
10 moneys owing to other financial
11 institutions and security given to those
12 institutions.
13 COMM BOGLE: Mr. Levy, can you use the mike for me
14 please, I am not hearing you clearly.
15 Q: The security given to those
16 institutions, were they given prior to
17 the NCB security?
18 A: Some were.
19 Q: Okay. Which means they were secured on
20 their assets that they were outside of
21 your purview or NCB's purview?
22 A: No, NCB had a fixed and floating charge
23 on all the assets but there were some
24 prior charges by other institutions as
25 set out in my report.

1 Q: So if the other institutions disposed of
2 those assets whether or not that was in
3 excess of what is owing to them where
4 NCB would be?

5 A: NCB would be behind them.

6 Q: And if nothing was left?

7 A: NCB would get nothing.

8 Q: Mr. Downer, you said in the report...

9 COMM BOGLE: Mr. Levy, I am sorry, I am not hearing
10 what you are saying.

11 MR. LEVY: I can't kiss it, sir.

12 COMM BOGLE: If we can't hear we cannot continue.

13 MR. LEVY: I know, but maybe we can ask the
14 Engineers to turn up the volume.
15 You said in your report that they,
16 DEBTOR1COMPANY owed preferential...

17 COMM BOGLE: Gentlemen at the back, can you please be
18 quiet.

19 A: You mean in my first report?

20 Q: In your first report.

21 A: Yes. That what?

22 Q: In your statement, illustrated in your
23 first report that DEBTOR1COMPANY owed
24 preferential creditors at that time
25 \$XXX MILLION; DEBTOR1COMPANY2, \$XMILLION

1 A: Yes.

2 Q: Would you look at your first report and
3 tell us how much of that you attributed
4 to redundancy paying that was owing?

5 A: In section 10 of the report Redundancy,
6 \$XX million.

7 Q: For redundancy?

8 A: Yes.

9 Q: At the time of that report?

10 A: Yes.

11 Q: Mr. Downer, I put it to you that, that
12 was a projection of what you would owe
13 if you paid out the entire staff
14 redundancy and that was not the amount
15 on the book owing at that time.

16 A: You might be right.

17 Q: And the same thing applies to \$X,000,000
18 for DEBTOR1COMPANY2.

19 A: Yes.

20 Q: You said yesterday, Mr. Downer...

21 A: I am not sure about that, I am just
22 saying you might be right, the heading
23 for that table in the report says the
24 preferential creditors for the companies
25 based on the records available and

1 claims received to date totaled that
2 amount. So it didn't sound like it was
3 and estimate. You see, there is a
4 statement of estimate of the final
5 outcome in the appendices.

6 Q: So that was an estimate of final owe
7 outcome?

8 A: No, what I am saying is, separate and
9 apart from the tabulations supporting
10 XXX,000,000 there is an estimated final
11 outcome statement,

12 Q: And how much for redundancy in that
13 amount?

14 A: Well, some technicalities as to whether
15 or not receivers really have to pay
16 redundancies. But I am not sure I have
17 to look at it and see preferential
18 creditors -- we had estimated that we
19 were going to negotiate with the
20 preferential creditors, there is only
21 one number for the preferential
22 creditors stated in the estimated final
23 outcome statement and it's less than the
24 amount shown, it's about half but the
25 reason is, that we expect we would be

1 able to negotiate with the Tax
2 Authorities and reduce the amount that
3 we had to pay.

4 Q: So you project that based on the
5 expectation that Tax Authority would
6 forgive the debt?

7 A: Well, we said so and based on our
8 experience in the past it was possible.

9 Q: Mr. Downer, you said yesterday also that
10 the only person you terminated in
11 management was the Human Resource
12 Manager.

13 A: Yes.

14 Q: Because you thought her loyalty was to
15 DEBTOR1?

16 A: I didn't say that, I said the opposite.

17 Q: Pardon me?

18 A: I said the opposite. I said that I
19 found her component and I don't think I
20 have any problem with her loyalty.

21 Q: Then why you did you terminate her?

22 A: Because we didn't need that person and
23 she was too expensive to keep. We had a
24 reduced staff, we didn't have the
25 typical HR needs of a company who was

1 not in receivership. And that's the only
2 reason why I terminated her because
3 otherwise she is a person I would like
4 to have kept.

5 Q: Maybe an unfortunate termination,
6 because she might have been able to tell
7 you, advise you that what DEBTOR1
8 had been doing before you took over the
9 company, was laying off people for
10 six-month periods and rehiring them so
11 as to eliminate the necessity for paying
12 redundancy. Had you taken that advice
13 that you would have been given, you
14 would have eliminated the problems and
15 some of those persons that were laid off
16 for six months could go and get
17 employment elsewhere.

18 A: Well, I am not sure if her advice would
19 have in fact made any in difference to
20 what we did. And I mean, whatever we did
21 in the receivership was .

22 Q: Mismanaging.

23 A: No, what we thought was necessary.

24 Q: I put it to you that \$XX million was not
25 owing for redundancy at the time of

1 your taking over, that was a projection.

2 A: Well, I cannot say exactly so. I mean,
3 to me it doesn't look like it, based on
4 what is written here and I think it
5 would inconsistent to put in an estimate
6 here. So I am not sure, if you have some
7 evidence I am willing to look at it and
8 accept it because I am not sure.

9 Q: I am challenging the evidence because it
10 is inconsistent with the facts. \$ 60
11 million for redundancy owing at the time
12 you took over Mr. Downer? Let us be
13 honest this.

14 A: Let us be honest about it, sure.

15 Q: Why don't you move on. Same thing like
16 DEBTOR1COMPANY2, a small company, \$XX
17 million owing for redundancy, is that what
18 you took over?

19 A: Well, show me something to the contrary
20 because this is based on the best
21 information we had at the time.

22 Q: But this information you are giving to
23 the Commission now...

24 A: Well, I never knew this Commission was
25 going to exist when this was done.

1 Q: Pardon me?

2 A: I never knew this Commission was going
3 to exist when this was done.

4 Q: No, but you brought the statement to the
5 Commission now. When did the hiving
6 down take place, Mr. Downer?

7 A: Probably before the Liquidation Order
8 which was December '98 so it would have
9 been before that.

10 Q: And at what price did you hive down to
11 assets?

12 A: Well, I don't think there were a price
13 set deliberately, this is how it works
14 in hived-down agreements.

15 Q: Works by you?

16 A: Works by text books, I mean you can use
17 textbooks if you like. I don't think
18 you creditor informs who you think you
19 are, this the classic way of doing it.
20 It gives the receiver flexibility later
21 on.

22 Q: Doesn't the law require you to stamp the
23 hiving-down agreement?

24 A: I don't know.

25 Q: You don't know?

1 A: No.

2 Q: You didn't take advice on that?

3 A: Yes. As far as I know the agreement was
4 valid.

5 Q: Pardon?

6 A: As far as I know the agreement was
7 valid; certainly took advice on drawing
8 it up and executing it.

9 Q: Stamp Duty as required, contracts to be
10 stamped within 40 or 30 days of...

11 MR. SHELTON: I am objecting, I am objecting
12 Mr. Chairman. I am objecting on the
13 ground of relevance. Whether the law
14 says that the agreement should be
15 stamped and it was or it wasn't, I am
16 really objecting on the ground of the
17 relevance; what's the relevance to these
18 proceedings whether it was stamped or
19 not stamped as the case may be whether
20 the law says it should be stamped,
21 seeking legal advice as to...

22 COMM BOGLE: Mr. Levy, would you like to state the
23 relevance.

24 MR. LEVY: What is relevant is I asked a question,
25 what was the amount which the

1 hiving-down agreement showed as the
2 assets being hived-down and he is
3 waffling, saying it hadn't been
4 determined so the agreement could not
5 have been completed.

6 A: Well, let's look at the agreement and
7 see if...

8 Q: The fact that he may have adopted
9 malpractice for the previous
10 redundancies...

11 COMM BOGLE: Mr. Levy, we will not tolerate your
12 making such statements about the
13 witness, we are dealing with a
14 particular case here now and that is the
15 receivership of DEBTOR1COMPANY.

16 MR. LEVY: The witness did state Mr. Chairman, with
17 due respect, that this is practice that
18 they have been carrying out before with
19 other employees and I am responding to
20 that.

21 A: No, I didn't say we have done hived-down
22 agreement before, I think this was the
23 first one I did.

24 Q: Paragraph 15, Mr. Downer of your
25 statement: *"The receivership lasted for*

1 there was a possibility that the
2 debenture itself was going to be sold,
3 that is what I was told at that time.
4 And I knew the debenture holder, maybe
5 he would have taken a different course--
6 sorry.

7 Q: Why didn't you sell DEBTOR1COMPANY2?
8 Straight question?

9 A: Well, I can't really remember right now,
10 it depends on what I wrote in the
11 receiver's report, I thought it might
12 would have been best to sell them both
13 as a package and if you had just a
14 single offer for DEBTOR1COMPANY2 which I
15 don't remember if we did--I can't remember
16 if we did. I think Musson was interested in
17 DEBTOR1COMPANY2 and then said, no.

18 Q: Were you part of a conspiracy Mr.
19 Downer?

20 A: No.

21 Q: Let me finish the question before you
22 answer my question. Between NIBJ and
23 Finsac for the assets to be given away
24 at a low price by FINSAC?

25 A: No.

1 Q: A low price to NIBJ as well I should
2 say.

3 A: No, there was no conspiracy involving
4 me.

5 Q: You certainly cooperated didn't you?
6 A: I didn't cooperate with any conspiracy
7 as far as I know.

8 Q: Mr. Downer, yesterday you told the
9 Commission that when Bryan Young was
10 appointed receiver that he sold assets
11 and paid off the debts to Citibank.

12 A: That's my understanding and what I heard
13 from him.

14 Q: Would it surprise you Mr. Downer, that
15 Citibank was not doing business with
16 them in January of 2003?

17 A: 2000 and?

18 Q: 2003. That the company was still doing
19 business with them up to shortly before
20 that?

21 A: Well, they could have still been doing
22 business and they could have renewed the
23 debt, they could have made a payment as
24 a result of the sale and brought it back
25 into regularity for payment, it doesn't

1 mean anything that you just said to
2 contradict what I said.

3 Q: What you say doesn't mean anything.
4 What you have before you Mr. Downer, is
5 a Memorandum of Satisfaction of amount
6 being charged dated the 16th of January
7 2002.

8 A: Dated what?

9 Q: 16th of January 2002.

10 A: Yes, okay.

11 Q: Actually, the discharge of 1996...

12 COMM BOGLE: Mr Levy again, I am going to ask
13 you again, I am sure the mike can get a
14 little closer to you.

15 MR. LEVY: Mr. Chairman, if I do like this Mr.
16 Chairman, I can't read.

17 COMM BOGLE: Yes, just like that, right.

18 Q: Yes, Discharged in 1996, that was when
19 it was signed by Citibank, it was not
20 filed for some reason until January
21 2002, but it was not right after
22 Mr. Young as you said, hearsay because
23 you don't know, you said that, you don't
24 know who sold the assets.

25 A: When was that receivership? When was

1 that receivership? You said it's long
2 after, 1996 was long after, I don't know
3 what.
4 DEBTOR1: 1977.
5 Q: The receivership I am told is 1977.
6 A: Well, I don't know what is the point
7 that you are trying to make.
8 Q: Trying to get to the truth, Mr. Downer.
9 The truth.
10 A: The truth is that it was discharged in
11 1996. The truth is there was a
12 receivership in 1977, I don't know when
13 it was that was terminated.
14 Q: The statement was that Bryan Young sold
15 assets which paid off the debt of
16 Citibank, that's not true, is it?
17 A: I don't know.
18 Q: Then why do you say it?
19 A: It could be true, I don't know that it's
20 not true, I was told he paid off the
21 debt and the receivership ended. It
22 could be that they lent again on the
23 same security.
24 Q: So we have to discount that part of your
25 evidence because you don't know.

1 A: I don't think so.

2 Q: But you don't know. You had said
3 something about you were told but you
4 don't know. Mr. Downer, you said that
5 you retired from the firm on the 30th of
6 June 2002?

7 COMM BOGLE: Just a minute Mr. Levy, are you
8 tendering the document that you
9 mentioned...

10 MR. LEVY: Yes, Mr. Chairman please number it.

11 MR. SHELTON: Well, before it's tendered sir, I have
12 all sorts of issues with this document,
13 all sorts of issues. It doesn't state
14 the strangest of things that it is
15 signed by Citibank, by Peter Moses on
16 the 25th of August 1992, in relation to
17 a debt which was discharged in 2002.
18 You tell me about that document and
19 what's the veracity of it, the
20 genuineness of it and I am objecting to
21 it, this is not a document I think which
22 bears a factual situation. It can't be
23 genuine, it's a Discharge Satisfaction
24 dated the 16th of January 2002, but
25 signed on the 25th of August 1992, how

1 are you going to put that in evidence?
2 MR. LEVY: If you look at the back of the documents
3 you will see.
4 MR. SHELTON: I am not reading the back of anything, I
5 am looking at the face of it, Mr. Levy.
6 COMM BOGLE: Mr. Shelton?
7 MR. SHELTON: Yes, sir.
8 COMM BOGLE: 1992 is the date of the power of
9 attorney, that is the date of the power
10 of attorney.
11 MR. SHELTON: Signed by or on behalf of Peter Moses.
12 COMM BOGLE: Duly appointed under the powers of
13 attorney dated the 25th of August, 1992.
14 So he was signing on the 16th...
15 MR. SHELTON: Based on that power of attorney.
16 CHAIRMAN: Right, based on the power of attorney.
17 MR. LEVY: Thank you very much, Mr. Chairman.
18 MR. SHELTON: Thank you, Mr. Chairman.
19 COMM BOGLE: So we will -- is there any other
20 objection?
21 MR. SHELTON: No.
22 COMM BOGLE: So this one will be entered as RD 10/11.
23 A: I don't know sir, if it is the same debt
24 that we are talking about.
25 DEBTOR1: So go and find out.

1 CHAIRMAN: DEBTOR1, please do not interrupt the
2 proceedings.

3 MR. LEVY: Mr Chairman, it might be convenient for
4 me at this time to undertake to provide
5 the Commission with a document.

6 Mr. Downer, what you have in your hand,
7 can you read it to us.

8 A: It is a letter from the Companies Office
9 to the Registrar of the Supreme Court
10 Dear *sir/Madam*:

11 DEBTOR1COMPANY -- with

12 the company incorporation number I

13 think.

14 *Please be informed* that the *Memorandum*

15 *of Complete Satisfaction in respect of*

16 the debenture dated *the 19th day of*
17 *July 1997, has been handed down to the*

18 *Registrar of Companies* as at the 16th

19 *day of August 2002.*

20 Q: What you don't understand that document
21 to be -- let me just show you that you
22 know, its under the seal of the
23 Registrar.

24 A: Yes.

25 Q: What do you understand this document to

1 mean, Mr. Downer?

2 A: That they had received a Memorandum of
3 Complete Satisfaction on a particular
4 date regarding DEBTOR1COMPANY.

5 Q: Is it the first time you are seeing
6 evidence of that for discharge?

7 A: I can't remember if I had seen this
8 before or not.

9 Q: Can I take this opportunity to refresh
10 your memory, Mr. Downer? You swore under
11 oath at the Supreme Court that it was
12 not a Complete Satisfaction?

13 A: I couldn't swear to that, I don't think.

14 Q: Pardon me?

15 A: I couldn't swear that something relating
16 to this was not a Complete Satisfaction.

17 Q: Yes, against the Registrar of Companies
18 and DEBTOR1COMPANY.

19 A: I don't have the ability to swear
20 against something of that nature. I
21 could not have sworn that, that was the
22 case. I have don't have that
23 competence.

24 COMM BOGLE: This is been entered, Mr. Levy?

25 MR. LEVY: Yes, Mr. Chairman.

1 COMM BOGLE: RD 12/11.

2 Q: Mr. Downer?

3 A: Yes.

4 Q: This document is dated 20th of June

5 2002, it says: *Discharge of Mortgage*

6 *Under the Registration of Titles Act*

7 *executed by ReFin Trust Limited, saying*

8 that mortgage from DEBTOR1COMPANY and

9 its number, the last two lines. "All

10 *moneys secured under the said Mortgage*

11 *have been fully paid and satisfied and*

12 *DO HEREBY DISCHARGE the said land from*

13 *the said Mortgage". You are familiar*

14 with this document?

15 A: I have heard about it, I can't say I

16 recognise it but I have taken it to be a

17 true document.

18 Q: So you can't say this is a final

19 satisfaction, a final discharge of the

20 mortgage, fully satisfactory?

21 A: This is what it says it is.

22 Q: That's what the document says but you

23 can't say.

24 COMM BOGLE: That's the document with Refin Trust

25 Limited?

1 MR. LEVY: Yes, sir. Let's move on Mr. Downer. How
2 did you know you would get the best
3 possible price -- paragraph 17 ...we had
4 *to keep the business going as going*
5 *concerns so as to get the best possible*
6 *price in a sale. It was not until*
7 *sometime in 2001 that the secured*
8 *creditor instructed me to accept an*
9 *offer from NIBJ".*

10 A: How did I know that?

11 Q: That this was the way to get the best
12 possible price?

13 A: To sell the going concern is what I
14 meant, the best way to get the best
15 possible price.

16 Q: But your obligation was to get the best
17 possible price for benefit of the
18 secured creditors?

19 A: (No answer)

20 Q: You never had the assets fully valued by
21 a professional valuator during the
22 three-and--a-half years receivership.
23 How would you know that by keeping it as
24 going concerns so as to get the best
25 possible price?

1 A: Because the market conditions at the
2 time were such that the valuations were
3 virtually meaningless, of real estate
4 and it was a waste of time and money to
5 even get -- we had someone on the books
6 for valuation of machinery in the
7 offices, Delano Reid, I had talked with
8 some valuers about the possible value
9 of the land and he told me \$75 million.
10 Q: \$75 million?
11 A: That's what I was told informally by
12 valuators at the time. But they can
13 tell you anything. The fact is, the
14 acid test is what somebody is going to
15 pay for it.
16 Q: But you never tried to get a sale of the
17 land at the time, did you?
18 A: I tried to sell anything that was there
19 but nobody offered to purchase the land.
20 Q: You never offered the land for sale by
21 itself, did you Mr. Downer?
22 A: I didn't have to.
23 Q: You were responsible to, the question I
24 asked you, Mr. Downer?
25 A: Well, I offered the assets for sale, the

1 assets include the land, people would
2 have offered to buy the land...

3 Q: Let's not continue these frivolous
4 arrogant answers.

5 Paragraph 18: *During this time I, as
6 Receiver had to pay managers and staff
7 supplied by PwC. These fees were based*

8 *on time charges at rates which were
9 consistent with PwC's rates charged for*

10 *various levels of staff that the firm
11 supplied to clients.*

12 *The receivership fees included only such
13 items and there were no padded bills as
14 is alleged by DEBTOR1 or is alleged*

15 *otherwise.*

16 And that included the fees paid to
17 Mr. Desmond Creary?

18 A: It included the cost of ---- Mr. Desmond
19 Creary's time is included in our fees,
20 yes.

21 MR. LEVY: Chairman, I have to come back to some of
22 the things I need to put to Mr. Downer.

23 Q: What receivership textbook did you use
24 and inform those textbook standard
25 practices in receivership that are not

1 voluntarily arranged, denied free access
2 or denied any access.

3 A: Well, in that context when I say
4 "textbook standard practice" I mean
5 its---I can't remember which particular
6 textbook or anything but...

7 Q: Okay, that's not true.

8 A: It is standard practice and I used the
9 word "textbook" just to emphasize.

10 Q: Don't emphasize malpractice. Practice
11 is not always good; sometimes it is
12 malpractice, isn't it Mr. Downer?

13 A: I have no idea what you are talking
14 about.

15 Q: So you don't know what's right or what's
16 wrong, I understand that, Mr. Downer.
17 You intentionally left out in your
18 paragraph 23 the attache case, you refer
19 to DEBTOR1's statement which he said
20 that you denied him to get his attache
21 case in which his medication was.

22 A:: I did not deliberately omit anything, I
23 said I had given him his personal
24 effects in which it could have included
25 his attache case, there is no need to

1 list it separately.

2 Q: Personal effects found around the
3 officer.

4 A: Yes.

5 Q: A man with high blood pressure does not
6 forget his blood pressure medication, he
7 carries it with him and has it near at
8 hand. He asked you to provide it for
9 him, it was in his briefcase in his
10 office and you refused to do that.

11 A: Listen, nobody would ever have refused
12 to do that.

13 Q: Who is anybody, Mr. Downer?

14 A: I certainly would never have refused
15 that had he asked me, which he didn't.

16 Q: You certainly did refuse it.

17 A: I did not.

18 Q: You opened an account with Bank of Nova
19 Scotia?

20 A: Yes.

21 Q: For which company?

22 A: I think it was DEBTOR1COMPANY
23 Acquisition, I think so.

24 Q: 1998?

25 A: Yes.

- 1 Q: And you made all the deposits in that
2 account from the sale?
- 3 A: After a point in time I made all the
4 deposits to that account.
- 5 Q: Even when you had an overdraft operating
6 with NCB?
- 7 A: Because I had an overdraft with NCB.
- 8 Q: And you were paying interest on that
9 overdraft, Mr. Downer?
- 10 A: No, because I was trying to get FINSAC
11 to extend the facility or guarantee it
12 so that we could continue operating
13 through that bank account. At the same
14 time they told me to keep the business
15 operating and without the approval, to
16 continue to have the overdraft facility
17 at NCB the only way to keep it operating
18 was to open another account at a
19 different bank that wouldn't offset the
20 funds against the overdraft.
- 21 Q: So you happily went along with an
22 overdraft when the combined sales of the
23 company could have cleared the overdraft
24 and kept you in credit?
- 25 A: We could avoid the interest cost had the

1 approval been given, FINSAC says, by BoJ
2 for them to guarantee the contingency of
3 the overdraft.

4 Q: So the economic situation affected your
5 operations of your receivership?

6 A: The high interest rates certainly
7 affected the outcome, yes.

8 Q: Would it surprise you Mr. Downer to hear
9 that the former Prime Minister said that
10 that didn't affect anything, that it was
11 the failed banks that caused the
12 problem?

13 A: It wouldn't surprise me to hear anything
14 from anybody, I can't answer that
15 question.

16 Q: Mr. Downer, what you have before you is
17 the Witness Statement of Desmond Creary
18 filed in the Supreme Court in the year
19 2002, T092 in which Mr. Creary, from the
20 books, his remuneration was \$2,500 per
21 hour and that is the rate you told me
22 that you paid his predecessors?

23 COMM. BOGLE: Mr. Levy you had the mike in a very good
24 position awhile ago and you moved it,
25 when you were looking for your papers

1 you removed it. Thank you sir.

2 MR. LEVY: On the third page Mr. Downer, Mr. Creary
3 said I am not aware of anyone who had
4 charged seven thousand dollars per hour.

5 A: Well as an individual you don't charge
6 as much as if you are from a firm and I
7 mean right now, for example, any
8 consulting I do is at a far lower rate
9 than it would have been if I were with
10 PricewaterhouseCoopers.

11 Q: You think the mark-up of four thousand
12 five hundred dollars per hour on the
13 charge of an employee is a reasonable
14 mark-up, when it is not costing you
15 anything, the man is being paid by the
16 company?

17 A: Well, the rates for people of this
18 calibre that we supply were of that
19 order, magnitude, seven thousand dollars
20 per hour, you had several people working
21 in that area who were charging rates at
22 that level. This was a short term
23 arrangement, he was a contractor, he was
24 contracted to PricewaterhouseCoopers and
25 paid as such.

1 Q: Contracted to PricewaterhouseCoopers or
2 to Richard Downer as the receiver?

3 A: No, to PricewaterhouseCoopers and his
4 invoices were paid by
5 PricewaterhouseCoopers and he put in
6 time reports which we apply our billing
7 rates to him and charged the time.

8 Q: So a mark-up of four thousand five
9 hundred percent, almost two hundred
10 percent mark-up, you find that quite
11 ordinary?

12 A: Well, as I said earlier on when
13 Mr. Shelton was examining me that the
14 mark-up of the staff was on the payroll,
15 on the permanent payroll of
16 Pricewaterhouse as opposed to a
17 contractor which is more than that on
18 their base salary because of the extra
19 cost. The mark-up on Creary, Meikle and
20 Francis was less.

21 Q: Thank God.

22 A: And that is in the industry, these rates
23 were quite in line and their salaries
24 were quite in line.

25 MR. LEVY: Mark this as an exhibit.

1 MR. BOGLE: Exhibit 13/11.

2 MR. LEVY: Mr. Chairman, after the break I will
3 come back to Mr. Creary, I need some
4 copies, I am not sure if I have them or
5 they are at the office.
6 Would you or would you not agree
7 Mr. Downer that the excessive mark-up of
8 your own charges to the receivership
9 amounted to something tantamount to
10 rape?
11 A: I would not agree since you ask it that
12 way.
13 Q: Because consented, it was not rape.
14 Mr. Downer you told us that in excess of
15 \$5 million was owing at the commencement
16 of the receivership, in the first month
17 of the receivership which included fees
18 which you charged prior to the
19 receivership?
20 A: When did I say that? Is that in the
21 first report?
22 Q: We will get to it shortly, I will locate
23 it. Instead of wasting time let me ask
24 you a question. If the bank consulted
25 you on an issue prior to the

1 receivership, are those charges for that
2 time spent prior to the receivership
3 properly charged to the receivership or
4 to the bank?

5 A: Well, never thought of it but in
6 practice we would have charged it to the
7 receivership because it is in relation
8 to the receivership.

9 Q: But the receivership, you never retained
10 yourself, you were not receiver yet, you
11 provided the services prior to the
12 receivership, who did you provide them
13 to?

14 A: To the bank, but I mean that it was
15 going to be allocated against the cost
16 of collecting the debt and therefore
17 receivership charge.

18 Q: You wrote all the journal entries in
19 just one entry, charged to the
20 receivership, not charged to the bank to
21 charge the receivership, you just did
22 everything. That is proper accounting
23 practice, is it Mr. Downer?

24 A: It seems logical if we do that, I mean
25 it is in relation to that assignment.

1 If we never got that assignment I guess
2 we would have written off that time, we
3 would have charged nothing for it. It
4 would be like preparing for it and if it
5 didn't happen, we would have written it
6 off.

7 Q: But the fact is that you did charge the
8 receivership?

9 A: Yes, we did.

10 MR. SHELTON: Is there any evidence of this? Where in
11 the report or anywhere there is evidence
12 of this? I am just asking Mr. Chairman,
13 if there is any evidence of this, I mean
14 I don't see it, maybe it is there, I
15 don't know, he spoke as if it was a
16 statement given and he read from a
17 document.

18 A: I had said somewhere that, that time
19 spent by Mr. Meikle, for example, had we
20 not gotten the receivership we would
21 have had to absorb it, so the logic from
22 that must follow that we charge the
23 receivership.

24 MR. SHELTON: Okay, we will re-examine.

25 MR. LEVY: I will locate the evidence during the

1 break. Paragraph 29 of your Witness
2 Statement?

3 A: Yes.

4 Q: You said the receivership fees were \$111
5 million over some three-and-half years
6 of which approximately \$5.5 million
7 which was due at the end of the
8 involvement of PricewaterhouseCoopers
9 which, though invoiced, claimed, has not
10 been paid. By whom?

11 A: Pardon me?

12 Q: Has not been paid, by whom?

13 A: The understanding was when Douglas
14 Chambers took it over that he would
15 settle that, but he changed his mind.

16 Q: Well, he decided to sue you. Let's move
17 on to paragraph 30. In the case of
18 DEBTOR1's pension refund entitlement
19 the funds were retained by the
20 receivership and passed over to
21 Mr. Chambers when he was purportedly,
22 and I say purportedly, since it appears
23 that the debentures relating to
24 DEBTOR1COMPANY had been totally
25 discharged prior to the relevant

1 appointed receiver, who wrote to the
2 insurance company and collected the
3 pension fund of DEBTOR1's employee
4 contribution to the pension fund.

5 A: Must have been the receiver, they the
6 agents or me as the receiver, one of us.

7 Q: Either you or one of your agents. You
8 were a trustee of the pension fund?

9 A: Listen and I admitted that it was not
10 the correct practice to commingle with
11 the funds and to have withheld his
12 contribution from him. As I explained I
13 did it as a negotiating tool hoping it
14 would have some influence on the debt
15 that he owed the company for two things,
16 one, money for many things like bounced
17 cheques and petty cash which added up to
18 a substantial sum, and two, a house
19 disappeared from the company and
20 mysteriously got into DEBTOR1's name
21 so the three million dollars of pension
22 fund that was held on to...

23 Q: Pardon me, how much?

24 A: \$3.4 million, I think was the amount.

25 Q: You received \$1.2 million in round

1 figure as trustee of the pension fund
2 when you notified the pension fund that
3 DEBTOR1 had been terminated. This
4 would have been paid to you as trustee?

5 A: You are correct.

6 Q: And you commingled it with the receiver
7 fund?

8 A: I did and it was not correct to do that
9 but I did it, for the purpose of trying
10 to...

11 Q: Notwithstanding that your attorney had
12 advised you against doing that?

13 A: Absolutely right, that is the wrong
14 thing to do.

15 Q: Confession is good for the soul Mr.
16 Downer, after all these years and maybe
17 you should apologise to DEBTOR1 at
18 some point.

19 A: I apologize to DEBTOR1.

20 Q: And the court ordered you to pay 19%
21 interest compounded monthly for the
22 period of time since you had it until it
23 was paid?

24 A: Correct.

25 Q: You don't seem to be too aware of things

1 that happened in your firm Mr. Downer.
2 Judgment was entered against you and
3 your partner on a Friday morning at 10
4 o'clock, and would it surprise you if I
5 told you that the cheque was in
6 DEBTOR1's attorney's hand by 12
7 o'clock the Monday?

8 A: I wouldn't be surprised.

9 Q: But it would surprise you -- would it
10 surprise you that your firm, within
11 seven days of your departure took a
12 decision to make an offer to settle the
13 case against you and the firm?

14 A: Very surprised.

15 Q: You knew nothing about that?

16 A: No, nothing.

17 Q: You said it was Pricewaterhouse which
18 was ordered to pay the refund amounting
19 to \$X MILLION to DEBTOR1's
20 attorney-at-law on his behalf?

21 A: Yes, that is what I said.

22 Q: Wasn't it you and your partner John Lee
23 who were ordered to make the payments as
24 trustees?

25 A: Yes, the firm made the payments,

1 literally it was John Lee and myself and
2 the firm, since it was a firm assignment
3 involved, it was the firm's expense so
4 they paid it.

5 Q: Paragraph 31. You stated that as was
6 alleged by DEBTOR1 in his witness
7 statement that \$XXX million
8 approximately...

9 A: Not in his witness statement.

10 Q: Oral evidence?

11 A: Yes.

12 Q: You were talking about his indebtedness
13 to NCB and NCB Trust, remember. You
14 want to embellish this by saying over
15 \$XXX million was owed to multiple
16 partners outside of this, we are talking
17 about comparing apples with apples and
18 oranges with oranges and not trying to
19 confuse the Commission?

20 A: I say here it is not true that the
21 indebtedness of the companies was either
22 only about \$XX MILLION, or \$XXX Million.
23 As can be seen from my Receiver's Report
24 the debt was over \$XXX million of which
25 \$XXX million was owed to NCB and NCB

1 Trust and Merchant Bank. So either way
2 these figures, even if the records show
3 that they were owing to NCB they were
4 wrong.

5 Q: But you are trying to confuse the issue
6 by adding \$XXX million, most of which
7 were owing to other parties.

8 A: DEBTOR1 was addressing the
9 indebtedness to NCB and NCB Trust.

10 MR. SHELTON: I am objecting. This bit of evidence
11 here is in relation to oral evidence of
12 which we have transcripts of. My friend
13 is saying that he has misquoted the
14 evidence and therefore is relating \$XXX
15 million to the \$XXX or the \$XXX, he must
16 show us where he is doing this or where
17 he has done that because we have the
18 transcripts, he has the transcripts,
19 this is cross-examining, you say to him,
20 here is the evidence which was before
21 the Commission where he said so and so,
22 how come now you are giving this
23 statement. He can't just say it was in
24 relation to NCB, we don't know that; if
25 it is so, if the transcripts show that

1 he said the debt was two hundred and
2 thirty million to NCB, then clearly he
3 can make that type of statement but my
4 point is that Mr. Downer said in the
5 oral evidence, he said the debt was \$230
6 million, he might have meant to NCB but
7 what we are saying that in the
8 transcripts, you have to show us that he
9 said it was the debt to NCB and
10 Mr. Downer is saying, even if that was
11 the case, because he said the total debt
12 was \$XXX million and even if that was
13 the case \$XXX Million was the amount
14 owed to NCB in any event. I don't know
15 but what my friend is doing is to say
16 that Mr. Downer is trying to mislead the
17 Commission by saying that the
18 indebtedness is \$XXX million. The
19 statement is very, very clear in
20 paragraph 31, what he is saying and I am
21 saying if he is saying that he is mis-
22 quoting the evidence, I ask if he could
23 show us where this misquote of evidence
24 is taking place.

25 Q: I am saying what is verily clear in

1 paragraph 31 of the witness statement,
2 Mr. Downer is trying to confuse the
3 evidence by talking about \$XXX million
4 owing to various people when the
5 evidence is talking about \$XXX million,
6 he corrected it as \$XXX million owing to
7 NCB and NCB Trust and Merchant Bank?

8 A: I am not trying to confuse the
9 Commission, I just talked of the seven
10 hundred million and not spoken about the
11 two hundred and sixty nine.

12 Q: Seven hundred million never came into
13 the factor before?

14 A: I am not sure about that.

15 COMM. BOGLE: Mr. Levy, I think the point by
16 Mr. Shelton is well made in that if you
17 are saying that two hundred and thirty
18 relate to NCB and NCB alone in which
19 case the quotation would be correct,
20 then that is fine, so he can have proof
21 of that, but the two hundred and thirty
22 thousand could have meant total debts.

23 Q: I don't have the transcripts before me.
24 COMM. BOGLE: Therefore Mr. Downer's statement here
25 cannot be said to be misleading.

1 MR. SHELTON: If I may, sir, one other final point on
2 that. The total indebtedness of a
3 company must affect its ability to
4 service its indebtedness to whichever
5 other bank it may be; what we are saying
6 that the indebtedness of the company in
7 total was seven hundred million dollars
8 and I remember in my cross-examination
9 it was a very big issue and in fact
10 Mr. Garcia who brought the actual figure
11 was the one who made the point most
12 eloquently where he said, here it is the
13 company had an indebtedness for much
14 more than DEBTOR1 has given in his
15 evidence. Mr. Garcia illustrated it
16 very eloquently by going through step
17 and by step every solitary bank he owed
18 money to. It can't be that the seven
19 hundred million is of no consequence
20 whatsoever, a company's ability to pay
21 is dependent on its total indebtedness
22 to its creditors so it must be of some
23 relevance even if it means that its
24 debts, that that was in relation to NCB,
25 there is nothing wrong in mentioning

1 seven hundred million, because that is
2 the total indebtedness of the company
3 which affects the company's ability to
4 Pay-

5 A: From my recollection, reading through
6 the transcripts, you said was there any
7 other indebtedness to NCB, and
8 DEBTOR1 more or less said a million
9 here, and a million there.

10 MR. LEVY: We can move on Mr. Chairman. Paragraph
11 33?

12 COMM. ROSS: Before we move, I think it would be
13 instructive for us to confirm that this
14 figure of seven hundred million is
15 correct, it's somewhere in the evidence
16 that is documented.

17 MR. SHELTON: I think if you look at Paragraph 13 of
18 the Witness Statement, sir, it sets out
19 a series of numbers, I think I just did
20 a finger run and it came very close to
21 that figure.

22 MR. LEVY: Including \$XX million of redundancy
23 payment which was not so.

24 MR. SHELTON: I don't see that here.

25 COMM. ROSS: We have Plan X4 which shows total debts

1 due to financial institutions of \$XXX
2 million for
3 DEBTOR1COMPANY and \$XXX million
4 for DEBTOR1COMPANY2, that is \$XXX
5 million.

6 MR. SHELTON: Preferred creditors.

7 COMM. ROSS: Four hundred million as opposed to seven
8 hundred million.

9 MR. SHELTON: One hundred and fourteen plus eight,
10 that is one hundred and twenty two and
11 then there is also the additional GCT of
12 seventy-seven, and then there are trade
13 creditors, way in excess of seven
14 hundred million.

15 COMM. BOGLE: Okay, can we move on.

16 MR. LEVY: Paragraph 33 of your witness statement
17 Mr. Downer, second sentence, I became
18 solely an agent of the debenture holder,
19 you are talking about DEBTOR1COMPANY
20 only?

21 A: Yes.

22 Q: But throughout the entire thing you
23 combined both DEBTOR1COMPANY and
24 DEBTOR1COMPANY2, how you managed the
25 receivership?

1 A: Sorry?
2 Q: DEBTOR1COMPANY2 was never -- there was no
3 winding up order in respect to DEBTOR1-
4 COMPANY? A: I didn't say there was.
5 Q: It ought to have been treated
6 differently?
7 A: It was.
8 Q: Okay, you say it was. You say at the
9 bottom of paragraph 38...
10 A: Thirty what.
11 38 of your statement, the quantum of the
12 receivership fees in and of itself had
13 no adverse consequences whatsoever on
14 DEBTOR1COMPANY. How
15 can xxx million
16 dollars of charges not have a
17 consequence on the company?
18 A: The secured indebtedness at the start of
19 the receivership was \$XXX
20 million to NCB, they had
21 received \$XX million, or \$XX MILLION,
22 sorry, that leaves a
23 balance of \$XXX MILLION; the
24 receiver fees in total was \$XXX MILLION,
25 right. If there had

1 been no receiver fees the balance would have
2 been reduced to \$XXX million and that would
3 have been on the books of the company, all
4 other things equal. What would have been if
5 the \$XXX million of receivership fees had
6 been applied, the balance in the books of the
7 company would have been \$XXX million owing
8 to NCB, then the
9 receiver's fees could have had that
10 consequence, there would have been a
11 higher debt as a result of the
12 receiver's fee, but the debentures were
13 totally discharged, that means that zero was
14 owing to NCB, whether there was any
15 receivership fee or all of the receivership
16 fees, the outcome of the company would have
17 been the same, zero would have been owing.
18 I take it, Mr. Downer, from what you are
19 telling us is that the loans, the
20 indebtedness of DEBTOR1COMPANY and DEBTOR1-
21 Q: COMPANY2 since the time you were appointed
22 Receiver ceased accruing
23
24
25

1 interest.

2 A: That even makes it more...

3 Q: I am asking you a question. Did it
4 cease accruing interest?

5 A: You know this is a question which has
6 been debated up and down. It is said
7 that the debt crystalizes at the time
8 the receivership starts. There are
9 arguments that interest continues to
10 accrue. I am taking it on the basis of
11 no interest accruing beyond the start of
12 the receivership.

13 Q: So would your appointees have been
14 better off if you had advertised the
15 properties and sold them within the
16 first six months?

17 A: Would they have been better off if I
18 did?

19 Q: Advertised the real estate for sale.

20 A: I could not have advertised the sale of
21 the assets of the company and not
22 included real estate. Anybody who
23 wanted to could - the sale of the real
24 estate, I had several people singled
25 out. They wanted to know the inventory,

1 are competent. I question your
2 competence as a Receiver.

3 A: Well in any event we were told to put
4 selling efforts on hold. Who knows what
5 might have been done, but I don't think
6 I would have been of a mind to spend
7 vast amounts of money advertising in the
8 remote expectation of somebody overseas
9 would have been interested in buying
10 into a company, obsolete company selling
11 to a depressed market.

12 Q: Was the market internationally
13 depressed?

14 A: In 1998, sir.

15 Q: Or was it depressed by the high interest
16 rates of the government of the day?

17 A: The market in Jamaica was depressed for
18 whatever reason and that's what the
19 investor would be looking at. This is
20 not mostly export contracts it was the
21 local market that gave it bread and
22 butter.

23 COMM. BOGLE: Mr. Levy, I'll allow ten minutes so you
24 can calm down. I see your pressure going
25 up so we will have our ten minute break

1 at this time.

2 MR. LEVY: Thank you, Mr. Chairman.

3

4 BREAK

5

6 On resumption

7

8 COMM. BOGLE: Ladies and gentlemen, this Enquiry is
9 now reconvened. Mr. Downer, just
10 reminding you that you are still under
11 oath.

12 Mr. Levy?

13 MR. LEVY: Yes sir. Mr. Chairman, I presented
14 copies to the Commission and to
15 Mr. Downer and to the lawyers a bundle
16 of correspondence.

17 COMM. BOGLE: Just to say that the steno-writers are
18 complaining that they are still not
19 hearing. Mr. Downer they are asking you
20 to speak up a little for them, and
21 Mr. Levy as usual.

22 MR. LEVY: And to you, sir. (Laughter)

23 COMM. BOGLE: Okay.

24 Mr. Downer, you have before you bundle
25 of correspondence between yourself and

1 Mr. Desmond Creary.

2 A: Yes, sir.

3 Q: Dated 13th August, 2001, and 13th
4 November, 2001. The first letter in the
5 bundle is one dated 13th of August 2001
6 from you to Mr. Desmond Creary. I take
7 you to the third paragraph at the same
8 time.

9 **You were paid by me, the *Receiver*,**
10 **solely on the basis of hours worked with**
11 **the expressed understanding that**
12 **whenever the receivership ended the**
13 **assignment would be over, whether in**
14 **weeks, months or years.**

15 Mr. Creary wasn't paid by you the
16 receiver?

17 A: Yes, but me Richard Downer or Price
18 Waterhouse?

19 Q: Price Waterhouse were the Receiver?

20 A: Richard Downer or Price Waterhouse was
21 the Receiver.

22 Q: That was your the address?

23 A: That's what appointment says.

24 Q: The law only allows a bank or whoever to
25 appoint an individual, not a company, as

1 Receiver.

2 A: Correct, but in substance it was a man
3 supplied by PricewaterhouseCoopers.

4 Q: So this is not a true statement then,
5 what's in the letter.

6 A: Well it may not be exact.

7 MR. SHELTON: I am objecting, sir. The relevance of a
8 dispute between Mr. Downer and
9 Mr. Creary over Mr. Creary's alleged
10 redundancy, I am at a loss to understand
11 what that has to do with these
12 proceedings and how it assists you in
13 anyway in relation to the Terms of
14 Reference of this Commission. I have
15 read the entire document and if it is
16 designed to try and deal with credit...

17 MR. LEVY: To what?

18 MR. SHELTON: It could only be designed to deal with
19 credit of Mr. Downer.

20 MR. LEVY: But that's very important isn't it?

21 MR. SHELTON: It is very important but would be much
22 more relevant if it related to issues
23 which are the substance of this Enquiry.
24 This is a matter between Mr. Downer and
25 Mr. Creary who was employed by him,

1 a temporary one, to last as long as the
2 companies operated in Receivership.

3 (i.e. weeks, months, years).

4 The companies were operated until July
5 13, 2001, when operations were closed,
6 and all temporary, casual and permanent
7 employees were made redundant and paid
8 accordingly.

9 This statement "**I was contracted by Mr.**
10 **Downer to serve as his agent at the**
11 **group of companies.**" Is that correct,
12 Mr. Downer?

13 A: I interviewed him. He was found for us.
14 In fact the recruiting services of Price
15 Waterhouse were engaged to find somebody
16 to put on the assignment. That
17 procedure was gone through. In
18 receivership the cost of the Recruiting
19 were not borne by the Receivership,
20 they were borne by Price Waterhouse and
21 he was taken on. I interviewed him
22 because the assignment which we wanted
23 him to be on was my assignment, so to
24 that extent. I didn't contract him, the
25 contract as far as I was concerned was

1 with Price Waterhouse.

2 Q: Was he your agent when he was acting as
3 Plant Manager?

4 A: Well as he said, he was really engaged
5 to manage the companies, that's his
6 functional capacity, and he was my agent
7 as far as I recall, just as Meikle and
8 Francis were, so to that extent. I
9 didn't contract him. As I did with
10 Meikle and Francis, I would meet with
11 him as far as I could.

12 Q: You said sometime earlier in your
13 evidence Mr. Downer, that Creary, Meikle
14 and the other guys were people who
15 worked for you from time to time?

16 A: Correct. I didn't say Creary, I said
17 Meikle and Francis were.

18 Q: So Creary was engaged for this
19 assignment?

20 A: Well there is always a first time.
21 There was even a first time for Meikle
22 and Francis.

23 Q: I asked the question...

24 A: This was the first time for Creary.

25 Q: ...was Creary engaged for this

1 assignment by you as Receiver?

2 A: Yes. And we hoped that we would have
3 had a continuing relationship with him
4 as I said before.

5 Q: That's really not the question.
6 COMM. BOGLE: The question was answered. He said yes,

7 Mr. Levy.
8 MR. LEVY: Lets move on to the letter of the 12th

9 of August 2001 from Desmond Creary to
10 Richard Downer.

11 **"You will recall that I was retained to**
12 **assist the Receiver in the management of**
13 **DEBTOR1COMPANY in**
14 **Receivership. The company was being run**
15 **as a going concern.**

16 **During the period, among other things,**
17 **the following applied.**

18 **(1) I managed the business on behalf of**
19 **the Receiver under his direction and**
20 **control.**

21 Anything wrong with those statements,
22 Mr. Downer?

23 A: No.

24 Q: They are correct?

25 A: I can't actually see some of it but what

- 1 you read out to me sounded correct.
- 2 Q: Are you able to read it yourself,
- 3 Mr. Downer?
- 4 A: 12th of August?
- 5 Q: Letter from Desmond Creary to Richard
- 6 Downer.
- 7 **You will recall that I was retained to**
- 8 **assist the Receiver in the management of**
- 9 **DEBTOR1COMPANY, in**
- 10 **Receivership.**
- 11 A: That was the purpose of retaining him by
- 12 the firm, yes.
- 13 Q: **The company was being run as a going**
- 14 **concern.**
- 15 A: Right.
- 16 Q: **I managed *the* business on behalf of the**
- 17 **Receiver under his direction and**
- 18 **control.**
- 19 A: Correct.
- 20 Q: So you as Receiver retained, or
- 21 employed, engaged Creary to act as Plan
- 22 Manager?
- 23 A: Well as a General Manager.
- 24 Q: Okay.
- 25 A: He was involved in many more functions

1 other than just plant manager.

2 Q: During the period of your Receivership,
3 Mr. Downer, did you employ anybody in
4 any capacity right down to sweeping the
5 floor, any capacity of DEBTOR1COMPANY?

6 A: The production staff were employed by
7 DEBTOR1COMPANY before I got there.
8 Could you ask the question again. Did I
9 employ anybody?

10 Q: In any capacity during your receivership
11 at DEBTOR1COMPANY to work with
12 DEBTOR1COMPANY.

13 A: I can't remember. Maybe, possibly to
14 fill a casual vacancy in the production
15 ranks I might have substituted somebody.

16 Q: And were those employed by Price
17 Waterhouse?

18 A: No.

19 Q: What difference were they? They were
20 both performing duties of the
21 Receivership at Price Waterhouse, how
22 can you distinguish the both?

23 A: Because these three people represented
24 me as my agents.

25 Q: We are talking about Mr. Creary, we are

1 not talking about anybody else.

2 A: Mr. Creary was committing me to
3 agreement, he was taking people around
4 the plant, negotiating. We were at the
5 Industrial Disputes Tribunal, he was
6 representing us at that. The other sort
7 of rank and file people were not in the
8 same position whatsoever.

9 Q: So you found it convenient to put Mr.
10 Creary on Price Waterhouse pay roll in
11 order to 'uplift it' as you say, nice
12 fancy term, \$2,500 an hour which the
13 company ought to be paying him to \$7,000
14 an hour but you didn't find it
15 convenient to employ the other employees
16 that you employed from time to time by
17 Price Waterhouse?

18 A: No I didn't, it was not as I say,
19 convenient, it was rational. These
20 people were people who were taking
21 decisions that involved a risk to myself
22 and the firm, unlike the other people
23 you are speaking about.

24 Q: Mr. Downer, was it one of your duties as
25 Receiver and Manager to try to control

1 and contain the cost of the
2 Receivership?

3 A: Certainly it was, I should have sought
4 to contain the cost to the Receivership
5 but not to a point where the firm did
6 not make a profit.

7 Q: Paramount?

8 A: Otherwise no one would take on the
9 Receiverships.

10 Q: What expenses did the firm have in
11 relation to Mr. Creary's employment?

12 A: Apart from his salary, none.

13 Q: And who paid the firm the amount of his
14 salary?

15 A: Who paid the firm the amount of his
16 salary? Nobody paid the firm the amount
17 of his salary.

18 Q: Salary and uplift.

19 A: DEBTOR1COMPANY.

20 Q: Wouldn't it be fair to say that the
21 proper responsibility of the Receiver is
22 to contain the cost of operations for
23 three and a half years would be to
24 ensure that you got, the company got the
25 best deals from its employees?

- 1 A: Right, and the thing is that I could
2 perhaps have involved myself more at
3 substantially more cost so I delegated
4 to people who didn't cost as much.
- 5 Q: We are not dealing with the company, we
6 are dealing with specifics. Mr. Creary
7 was employed as General Manager of the
8 company at \$2,500 per hour, is that
9 correct?
- 10 A: Correct.
- 11 Q: But you charged the company \$7,000 an
12 hour.
- 13 A: As it did for any other staff member
14 supplied by Price Waterhouse.
- 15 Q: But you didn't bother to employ the
16 others by Price Waterhouse. What was
17 the difference, because the salaries
18 were small?
- 19 A: I think I already explained that to you.
20 Those people were not committing to the
21 receivership, we were not taking the
22 same risks with those other people as we
23 were doing with those higher level
24 people.
- 25 Q: If Mr. Creary was put on the payroll of

1 DEBTOR1COMPANY as an employee of
2 DEBTOR1COMPANY in Receivership when you
3 were the Receiver, what liabilities
4 would you have had if any, you
5 personally as Receiver, for any action
6 taken by him in the Receivership?

7 A: If he had been employed by
8 DEBTOR1COMPANY would I have been
9 responsible? Well I would have
10 responsibility for the risk of him had
11 he been employed on the payroll of
12 DEBTOR1COMPANY but I would be taking a
13 risk without any rewards, if that was the
14 case.

15 Q: Ah! Rewards comes in again, \$4,500 an
16 hour. That's a tremendous reward, wasn't
17 it, Mr. Downer?

18 A: Not in the scheme of things, the way
19 things are done. If you take your car
20 to a mechanic or to a garage and you see
21 the labour cost charged there, do you
22 think that is what they pay the
23 mechanic?

24 Q: I put it to you, Mr. Downer, that the
25 uplift as you call it, was a fraudulent

1 charge made by you and your firm against
2 DEBTOR1COMPANY, fraudulent to the extent
3 of \$4,500 per hour for a total of over
4 \$29 million.

5 A: I deny that sir, it is not a fraudulent
6 action whatsoever.

7 Q: Lets move on to the next letter,
8 Mr. Downer, the Commission can draw
9 their own conclusions.
10 November 13 -- is that your signature?

11 A: Yes.

12 Q: That's your signature?

13 A: Yes.

14 Q: **"Dear Desmond.**
15 **You were a contractor, not an employee,**
16 **as you well know. Please stop the**
17 **nonsense.**

18 Contractor to the whom?

19 A: To PricewaterhouseCoopers.

20 Q: PriceWaterhouseCoopers did not employ
21 him. It is agreed before that you
22 employed him as Receiver.

23 A: I didn't agree that, I said that I
24 interviewed him. He was employed as a
25 contractor by Price Waterhouse.

1 Q: Semantics is nothing less, Mr. Downer,
2 and the Commissioners are not fools.

3 COMM. BOGLE: Excuse me, Mr. Levy, what letter you are
4 referring to? Okay go ahead.

5 A: It is on the Pricewaterhouse letterhead.
6 Even though they were employed for the
7 Receivership, there is a separate
8 letterhead which we had for the
9 Receivership.

10 Q: Go back to the letter of 13th August,
11 Mr. Downer, signed by you. Is that your
12 signature?

13 A: Yes.

14 Q: And the third paragraph: **You were paid**
15 **by me the Receiver.**

16 A: Yes.

17 Q: That is a true statement?

18 A: I authorized the invoices to
19 Pricewaterhouse; that's true, yes.

20 Q: But you didn't mind uplifting \$29
21 million on that account?

22 A: No.

23 COMM. BOGLE: Are we moving on? And these letters are
24 you tendering them?

25 MR. LEVY: Yes, tendering the batch of letters.

1 That would be 14?

2 COMM. BOGLE: Yes, it would be 14. Go ahead, Mr.

3 Levy.

4 MR. LEVY: Mr. Downer, yesterday you were asked a
5 question about involvement of
6 politicians in this Receivership. You
7 told the meeting that you had a meeting
8 with Paul Robertson, Horace Clarke, and
9 two people from the Union. I would like
10 to produce to you exhibit, Statement of
11 Mr. Richard Downer in the Supreme Court,
12 exhibited already as TP2/11 and ask you
13 to read paragraph 32. You have it?

14 A: Yes sir.

15 Q: I'll read it for you.

16 A: Thank you very much.

17 Q: This is a statement given in the Supreme
18 Court case, Witness Statement:

19 On January 12, 1999, I was called to a
20 meeting at the Prime Minister's office,
21 which was attended by Mr. Patrick Hylton
22 of Finsac, Ministers Paul Robertson and
23 Horace Clarke, Mr. Nathan Richards, Mr.
24 Dennis Morrison and Mr. Anderson of the
25 National Workers' Union. I informed the

1 meeting that there was then a deadline
2 of January 15, 1999 for the submission
3 of bids to purchase the enterprises and
4 we had not heard whether NIBJ was going
5 to purchase the debenture from FINSAC.
6 When was this meeting held?

7 A: 12th of January.

8 Q: Where?

9 A: At the Prime Minister's Office.

10 Q: This is almost a year after?

11 A: Yes, nine months after Receivership
12 started.

13 Q: Was there a political involvement in
14 your receivership, Mr. Downer?

15 A: That is a matter of opinion.

16 Q: I don't want an opinion, I want the
17 truth.

18 A: I think there was political interest in
19 it for sure.

20 Q: So a meeting convened - who convened the
21 meeting?

22 A: I think it was Patrick Hylton.

23 Q: We will note that it was Mr. Hylton. So
24 there was no political involvement or
25 interference in your receivership?

1 A: Well the interference I had, and I have
2 no problem in calling it that, was from
3 FINSAC.

4 Q: When FINSAC called you to a meeting
5 attended by ministers of government,
6 that is not interference?

7 A: I don't think necessarily interference.
8 I mean people have all sorts of inputs
9 that they wanted to try and influence me
10 in different ways. This was to do with
11 the way to keep the people employed. It
12 is outlined to me at in a meeting. That
13 was the purpose of that meeting and they
14 wanted to know what were the prospects
15 for that to happen and I said we had a
16 deadline for offers and my understanding
17 was if NIBJ bought the debenture, then
18 they would run DEBTOR1COMPANY in their
19 own way after that.

20 Q: Let's go to paragraph, page 39 of your
21 witness statement.

22 COMM. BOGLE: Paragraph what?

23 MR. LEVY: Paragraph 39 (c) on page 13.

24 A: Yes.

25 Q: **In the statement of Douglas Chambers the**

1 from \$XX million to \$XX million.

2 MR. SHELTON: Can I just say sir, TP 25/11 is the
3 document dated April 1999. This other
4 one I am looking at has nothing to do
5 with TP 25/11. DEBTOR1 showed me
6 this, I am just trying to get it right
7 because I thought it was two pages of TP
8 25/11, that is not correct.

9 MR. LEVY: That's what I thought it was, I am
10 sorry; that's not the case. There are
11 two separate documents, if you care to
12 admit them separately, sir. I will have
13 no problem. All it is here to show and
14 to clarify is that interest was being
15 accrued by the debenture holder at
16 fairly substantial rates, quite an
17 expense to the debenture holder since
18 they were not fully paid because of the
19 protracted delay in the receivership.
20 That's the sole purpose of my presenting
21 these to the Commission, to have
22 Mr. Downer clarify his own evidence
23 which he was made of.

24 COMM. BOGLE: Okay, can we, for the benefit of the
25 record then, the one that is dated April

1 1999 TP 25 we re-enter that as a single
2 exhibit RD 15/11 and for the other one
3 which has near the top 'liabilities as
4 of December 31, 2000', that one we will
5 have as RD 16/11.

6 MR. LEVY: Mr. Downer, does this help you to
7 refresh your memory that interest was
8 being accrued against the company of
9 which you were Receiver during this
10 period?

11 A: Yes. I don't know what the legal reality
12 is. What I am saying, it has never been
13 quite clear to me, I have never been
14 actually in a position where it's made
15 a difference at the end of the day
16 whether interest accrued or not.

17 Q: Simple question.

18 A: I have heard that interest; the debt is
19 crystalized upon the start of the
20 receiverships and I take it that...

21 Q: That is a legal opinion, that does not
22 answer the question. I just want to
23 know.

24 A: The debenture holder clearly was seeking
25 to accrue interest.

1 Pardon me?

2 A: The debenture holder certainly from
3 this, was seeking to continue to accrue
4 interest.

5 Q: The debenture holder from this continued
6 to accrue interest?

7 A: Yes, seeks to, whether it was legally
8 right or not.

9 Q: I just asked a question whether they
10 continued to accrue interest, and that
11 **is** obviously what will help us.

12 A: Right but accrue to me means that they
13 were doing it legally or illegally. I
14 am not sure what it is.

15 Q: You were not asked for a legal opinion.

16 A: Okay.

17 MR. SHELTON: This is RD 15 or 16?

18 COMM. BOGLE: 15/11 was the one that has the date
19 April 1999.

20 MR. SHELTON: No, sir, that was TP 25.

21 COMM. BOGLE: I know, but what I am saying for this.

22 MR. SHELTON: We are re-admitting it?

23 COMM. BOGLE: Just the single page.

24 MR. SHELTON: I understand sir. So it is RD 14.

25 COMM. BOGLE: 15.

1 MR. LEVY: Mr. Downer, certain law suits were filed
2 on you, against you and DEBTOR1COMPANY
3 and Pricewaterhouse and your Partner
4 John Lee and you joined Refin Trust in
5 all cases as Ancillary Defendants
6 claiming an Indemnity, is that correct?

7 A: I can't remember the nexus of it, why we
8 did it, but the fact is that it was
9 joined but I can't remember what the
10 reason was now that prompted us to do
11 that.

12 Q: Would there be any other ground on which
13 you would join them other than based on
14 the indemnities which...

15 A: Probably not, probably not.

16 Q: Did they accept your responsibility
17 under the indemnity or did they dispute
18 it?

19 A: I don't think they did either, whether
20 they disputed it, I am not sure. I am
21 pretty sure they didn't accept it in a
22 positive way. I haven't heard anything
23 to that effect. I am not sure whether
24 they disputed it, as I said. I have no
25 evidence that they did.

1 Q: The document which is before you,
2 Mr. Downer, is: **Amended Defence of**
3 **Ancillary Defendant to Ancillary Claim**
4 **of the First Defendant.**

5 You are the First Defendant and then an
6 Ancillary Claim. Time does not permit me
7 to go through all the claims as I wanted
8 to do so as quickly as possible. You
9 have an Ancillary Claim based on the
10 Indemnity. Mr. Errol Campbell on behalf
11 of the Recon Trust Ancillary Defendant
12 signed this, along with the lawyer. I
13 take you to paragraph 8 on page 2 which
14 reads:

15 **Further and in this regard, the**
16 **Ancillary Defendant will state that if**
17 **the First Defendant is adjudged at trial**
18 **to have acted in breach of his fiduciary**
19 **duty to the Claimant as averred in the**
20 **claim, such breach of duty would not**
21 **have been one of the lawful objects**
22 **which he was empowered to achieve.**

23 **Further the Ancillary Defendant will**
24 **state that the said indemnity (the**
25 **(Second Indemnity) was an integral part**

1 of the contract of Agency with the First
2 Defendant and that in accordance with the
3 Principles of law governing Agency, the said
4 Indemnity will not avail the 1st Defendant
5 if there is proven negligence on his part
6 leading to his principal, the Ancillary
7 Defendant, suffering loss. In these
8 circumstances the Ancillary Defendant will
9 state that if the Court finds in favour of
10 the Claimant on the claim herein that the
11 First Defendant can claim no rights or legal
12 remedy from the Deeds of
13 Indemnity.

14 And then **it** goes on:

15 As regards paragraph 12 of the Ancillary
16 Particulars of Claim, the Ancillary
17 Defendant will state that the receivership
18 exercise was unduly protracted not by reason
19 of any **fault** or breach of duty on its part.
20 The Ancillary Defendant..."

21 This part being Recon Trust.

22 "The Ancillary Defendant will state that
23 where the receivership became unduly
24

1 protracted because of the delay in selling
2 of the assets of the company, this delay
3 was caused by inability or failure of the
4 First Defendant to
5 attract reasonable and credible bids for the
6 purchase of the company. The Ancillary
7 Defendant will further rely on the matters
8 set out in paragraphs 14 and 15 hereof.

9 Paragraph 10:

10 Save that the Ancillary Defendant admits
11 that there was initial overdraft facility in
12 favour of the companies under the
13 receivership, and that Guarantees were
14 required to secure further overdraft
15 facilities, paragraph 13 of the Ancillary
16 Particles of Claim is denied. The Ancillary
17 Defendant will state that it provided
18 several letters of Undertaking to National
19 Commercial Bank to facilitate several
20 increases in the overdraft facilities
21 available to the claimant company. It will
22 further state that any decision by National
23 Commercial Bank not to grant further
24
25

1 the foreign people who were interested
2 said to me that they thought that this
3 was a wired situation in effect, they
4 would have been a waste of time because
5 there was an outcome that was being
6 pre-ordained somewhere else. That was
7 the impression given.

8 Q: But you, Mr. Downer, were the process,
9 you were the Receiver, you were in
10 control of the process of receiving
11 bids?

12 A: I said I don't know if I was in the
13 process of receiving bids, but I really
14 thought that I was not able to execute
15 the transaction without the assent of
16 the debenture holder, in practice.

17 Q: I put it to you, Mr. Downer, that you
18 were aware of the discussions at all
19 times taking place between the Ministry
20 of Finance, the National Investment Bank
21 of Jamaica and FINSAC for the businesses
22 of DEBTOR1COMPANY and DEBTOR1COMPANY2 to be
23 sold or taken over or given to NIBJ so
24 that they could do what they wanted with
25 it and that you were aware of this and

1 did not try to sell it adequately
2 overseas by wasting money when you knew
3 that you could not accept an overseas
4 bid?

5 A: Well, I don't remember Ministry of
6 Finance being involved. I think pretty
7 well everything else that you said about
8 the involvement of the parties is
9 correct. They wanted it to go to NIBJ
10 because NIBJ thought they could do
11 something with it.

12 Q: 'They' who wanted it?

13 A: Well, NIBJ wanted it. FINSAC was giving
14 them a sympathetic ear.

15 Q: No, you said, 'they wanted it to go to',
16 so it is not talking about - NIBJ wanted
17 it, yes, but who wanted it to go to
18 NIBJ, who is they?

19 A: It would have been FINSAC because if
20 they thought that they were getting
21 nowhere with the receivership then if it
22 was sold to a government agency then
23 they would somehow have the ability to
24 pump some extra resources into it
25 through the Government, maybe, then they

1 would make a better go of it. That's the
2 impression I was given. NIBJ wanted it
3 because they wanted to keep it going, keep
4 the employment going. It is kind of their
5 mandate as the National Investment Bank.
6 That's the way I saw
7 it.

8 Q: And you felt that you had to go with
9 that flow?

10 A: Yes, I thought definitely it would be as
11 a practical matter there was no point me
12 saying look FINSAC, I have a bid for \$XX
13 Million from ABC LIMITED we should take it
14 instead. They would have simply order
15 me not to; fire me and do what they
16 wanted anyway.

17 Q: But this was a contract you didn't want
18 to get fired from because it was very
19 lucrative for your firm, wasn't it
20 Mr. Downer?

21 A: Well no. I just thought it was going to
22 happen earlier, that the whole thing
23 would have been consummated much earlier
24 and I didn't understand why all these
25 delays took place.

1 brought it to 12:00.

2 MR. MOODIE: Will any arrangements be made for
3 Mr. Downer to return before the
4 Commission?

5 COMM. BOGLE: I will not say positive or negative at
6 this time, it is something that the
7 Secretariat will discuss with
8 Mr. Shelton and a decision will be made
9 and all the parties concerned will be
10 informed about that, but at this time,
11 based on - in your estimation, how much
12 time do you need?

13 MR. MOODIE: I certainly require more than the five
14 minutes.

15 COMM. BOGLE: No, not that we will extend it today.

16 MR. MOODIE: There are some issues which arise which
17 I think ought to be addressed by FINSAC
18 and so I wouldn't want to put a time
19 limit on those. It really depends on
20 where we go in terms of those issues.

21 COMM. BOGLE: As I said, the Secretariat will discuss
22 with Mr. Shelton what date is possible
23 and we will of course communicate that
24 to the parties concerned, recognizing
25 your request.

1 MR. MOODIE: I am grateful.

2 COMM. BOGLE: My advice is that should it happen that
3 Mr. Downer cannot for any reason come
4 back, then I ask that you put questions
5 in writing to the Commission and the
6 Commission will pass that to Mr. Downer
7 and request responses to those.

8 MR. MOODIE: I am guided, Mr. Chairman.

9 COMM. BOGLE: Okay.

10 MR. MOODIE: And I think you also indicated that in
11 our submission we will be able to make a
12 relevant statement.

13 COMM. BOGLE: Yes.

14 MR. MOODIE: But certainly should any questions I
15 will pass them through the Commission to
16 Mr. Downer's attorney.

17 COMM. BOGLE: Sure.

18 MR. SHELTON: Thank you very much Mr. Chairman. I was
19 going to say that in trying to find
20 these dates we had really gone through a
21 process as we came up with the only
22 available windows that we had. And I
23 think bearing in mind the deadlines or
24 time frame FINSAC was setting for itself
25 and the difficulty therefore I would

1 face is trying to find a period within
2 my schedule and Mr. Downer's schedule to
3 fit within that time frame, but I was
4 going to suggest that, subject to your
5 approval, sir, if it could be done by
6 question and answer, then I would
7 certainly attempt to have it answered.

8 COMM. BOGLE: Okay, thank you.

9 Mr. Levy, the last document that you
10 gave us, we had not admitted that in
11 evidence, were you putting that in
12 evidence, that's the Amended Defence of
13 Ancillary?

14 MR. LEVY: Yes.

15 COMM. BOGLE: Okay, RD 17/11.

16 MR. LEVY: Mr. Chairman, I don't want to detain
17 Mr. Downer because he has to catch a
18 flight, but there are some other issues
19 that I would like to address the
20 Commission on.

21 COMM. BOGLE: Some other issues that you would like to
22 address the Commission on today?

23 MR. LEVY: Yes, sir, very briefly.

24 COMM. BOGLE: Okay, fine. This will not be directly
25 affecting Mr. Downer?

1 MR. LEVY: Not directly affecting him at all.

2 COMM. BOGLE: Okay, Mr. Downer, you are released.

3 MR. DOWNER: Okay, sir.

4 COMM. BOGLE: We will not adjourn just yet because

5 Mr. Levy would like to address some

6 issues to the Commission. Go ahead.

7 MR. LEVY: Mr. Chairman, members of the Commission,

8 I wrote to the Commission a couple of

9 letters couple weeks ago asking the

10 Commission to subpoena two witnesses,

11 Dr. Karl Blythe and P.J. Patterson.

12 Whilst I haven't got a formal reply from

13 the Secretary, he informed me yesterday

14 afternoon that the Commission has

15 decided not to call Mr. Patterson, is

16 that correct, sir?

17 COMM. BOGLE: That was the decision of the Commission.

18 MR. LEVY: I am asking you sir, to reconsider the

19 decision to call PJ Patterson because of

20 his direct involvement not only in the

21 DEBTOR1COMPANY issue but in the

22 operations of the country during the

23 relevant time as Prime Minister who had

24 primary responsibility, very

25 knowledgeable, and calling Dr. Blythe is

1 just one side of the story. Dr. Blythe
2 appears to be prepared to come and tell
3 the truth. I think that if Mr. PJ
4 Patterson were called he would be
5 obliged to do the same or at least I for
6 sure will test his evidence if he failed
7 to do so. I ask you to reconsider your
8 decision and make it be known at an
9 early stage.

10 COMM. BOGLE: The Commission will so do and will
11 inform you.

12 MR. LEVY: Thank you, sir.

13 COMM. BOGLE: Okay, ladies and gentlemen, this enquiry
14 is adjourned until Tuesday morning,
15 Mr. DePeralto?

16 MR. DEPERALTO: Yes, the 7th.

17 COMM. BOGLE: When it is hoped that we will have
18 Mr. Donovan Crawford via video
19 conferencing. So it will be next week
20 Tuesday the 7th at 9:30 a.m. Thank you
21 very much.

22

23 ADJOURNMENT

24

25