

~~HC~~
~~GG162~~

Judgment
3, 1964

IN THE PRIVY COUNCIL

No. 32 of 1962

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF THE FEDERATION
OF RHODESIA AND NYASALAND

B E T W E E N

THE COMMISSIONER OF TAXES (Respondent) Appellant

- and -

NCHANGA CONSOLIDATED COPPER MINES
LIMITED (Appellant) Respondent

R E C O R D O F P R O C E E D I N G .

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

78517

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Solicitors for the Respondent.

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF THE FEDERATION
OF RHODESIA AND NYASALAND

B E T W E E N

THE COMMISSIONER OF TAXES (Respondent) Appellant

- and -

NCHANGA CONSOLIDATED COPPER MINES
LIMITED (Appellant) Respondent

RECORD OF PROCEEDINGS

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Exhibit Mark	Description of Document	Date
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ON APPEAL
FROM THE FEDERAL SUPREME COURT OF THE FEDERATION
OF RHODESIA AND NYASALAND

B E T W E E N

THE COMMISSIONER OF TAXES (Respondent) Appellant

- and -

NCHANGA CONSOLIDATED COPPER MINES LIMITED (Appellant) Respondent

10

RECORD OF PROCEEDINGS

No. 1

No. 1

NOTICE OF ASSESSMENT

(Annexure "A" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia)

Notice of Assessment. (Annexure "A" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia)

"A"

Please produce this notice when making payment.

FEDERATION OF RHODESIA AND NYASALAND

DEPARTMENT OF TAXES

25th January, 1960.

20

Company Assessment Notice for Income Tax, Territorial Surcharges and Undistributed Profits Tax.

E.R. Denman Esq., SC/3715/58
Public Officer: Nchanga Consolidated Copper Mines Ltd.

P.O. Box 1108, Salisbury.

The following assessments have been made upon you as Representative taxpayer of: Nchanga Consolidated Copper Mines Ltd. of the Undermentioned income for the year ended 31st March 1959

No. 1	Nature of Income	Code No.	Amount Returned for assessment £	Amount Assessed £	Remarks	
Notice of Assessment. (Annexure "A" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia)	Copper Mining	CF 23	8,363,136	9,747,705	Profit return- ed £8,363,136	
				<u>Add:</u>		
				Payments to Bancroft Mines Ltd.	<u>1,384,569</u>	
				Profit Assessed	<u>9,747,705</u>	10
25th January, 1960. - continued.				N. Rhodesia territorial surcharge adjusted accordingly.		
				INCOME	9,747,705	

Date of Issue and
Assessment Office
25.1.1960
Salisbury.

TAXES PAYABLE - For Rates, Etc. see Statement enclosed.					20
INCOME TAX	TERRITORIAL SURCHARGES	Total Amount Payable			
	S. RHODESIA	N. WHODESIA			
Tax: £3,046,157.16.3	£67,957.1.3	£9419741. 1.3			
	£4,247.6.3	£588733.16.3			
Taxes Payable: £3,046,157.16.3	£4,247.6.3	£588733.16.3	£3639138.18.9		

The Taxes are payable on or before the due date to
The Collector of Taxes,
Post Office Building, Inez Terrace,
P.O. Box 8154, Causeway,
SALISBURY. Payment due on
24.2.1960.

HJP/SII

Assessment
No.1 SC/2371/59.

G. GRAY
Inspector of Taxes

For interest, objections, etc: See Notes overleaf.

No. 2

No. 2

LETTER, Respondent to Appellant objecting to Assessment. (Annexure "B" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia)

Letter, Respondent to Appellant objecting to Assessment. (Annexure "B" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia)

"B"

NCCM C.4.

1st February, 1960.

1st February, 1960.

10 The Commissioner of Taxes,
P.O. Box 8126,
SALISBURY.

Dear Sir,

NCHANGA CONSOLIDATED COPPER MINES LIMITED
Assessment No. 1 SC/2371/59 for the year
ended 31st March, 1959

20 I, the undersigned, as Public Officer of Nchanga Consolidated Copper Mines Limited (hereinafter called "the said Company") hereby object, on its behalf, to the above assessment insofar as the disallowance of the amount of £1,384,569 described in the above assessment as "Payments to Bancroft Mines Ltd" is concerned. The said amount is expenditure, not of a capital nature, wholly and exclusively incurred by the said company for the purposes of its trade and the production of the income and the said amount is a deduction allowed under section 13 (2) (a) of the Income Tax Act, 1954. The taxable income of the said company for the said year of assessment has by reason of the said disallowance been incorrectly determined.
30 For the purposes of determining the taxable income of the said company for the said year of assessment, the said amount must be deducted.

40 The said amount was paid by the said Company to Bancroft Mines Limited in pursuance of a contract made between the said company and Rhokana Corporation Limited on the one hand and Bancroft Mines Limited on the other hand whereunder in consideration of Bancroft Mines Limited ceasing production for one year the said company and Rhokana Corporation Limited undertook jointly to pay Bancroft Mines Limited the sum of £2,165,000 during the year that Bancroft Mines Limited would not have been in production.

No. 2

Letter,
Respondent to
Appellant
objecting to
Assessment.
(Annexure "B"
to Case of
Nchanga
Consolidated
Copper Mines
Limited in the
High Court of
Southern
Rhodesia)

1st February,
1960

- continued.

The object of the payment was to make it unnecessary for the said Company and Rhokana Corporation Limited to cut production, to enable the said Company and Rhokana Corporation Limited to increase production and to maintain and if possible to increase the profits of the said Company and Rhokana Corporation Limited for the period of one year. The payment was made in the course of business to deal with a difficulty that had arisen and to enable the said company and Rhokana Corporation Limited not only each to maintain but to increase its production and its profits for the period of one year.

10

Yours faithfully,

(Sgd.) E.R. DENMAN

PUBLIC OFFICER.

AJ/MH.

No. 3

Letter,
Appellant to
Respondent,
disallowing
objection.

25th February,
1960.

LETTER, Appellant to Respondent, disallowing objection.

No. 3

COM.3111/F.Obj 0/SI/5/60

25th February, 1960.

20

E.R. Denman, Esq.,
Public Officer of
Nchanga Consolidated Copper Mines Ltd.,
Box 1108,
SALISBURY

Dear Sir,

Nchanga Consolidated Copper Mines Ltd:
Objection : Notice of Assessment
No. I.S.C. 2371/59

30

Your letter dated 1st February in which you lodge objection on behalf of the above mentioned company to the assessment made upon it for the year ended 31st March 1959 has been referred to me.

The ground of the objection is that the amount of £1,384,569 described in the assessment as "Payments to Bancroft Mines Ltd." should not have been disallowed, as the amount in question represents expenditure, not of a capital nature, wholly and exclusively incurred by the company for the purposes of its trade and the production of the income.

No. 3

Letter, Appellant to Respondent, disallowing objection.

I regret that I am unable to agree with your contention and the objection is accordingly disallowed.

25th February, 1960

- continued.

10

The company has the right in terms of section 58 of the Income Tax Act, 1954, as amended, to appeal against my decision to either the Special Court or the High Court. Notice of appeal must be in writing stating to which Court the company wishes to appeal and must be lodged with me within 21 days of the date of this notification failing which the objection will be deemed to be determined.

Yours faithfully,

20

(Sgd.)

for COMMISSIONER OF TAXES.

No. 4

No. 4

LETTER, Respondent's Solicitors to Appellant giving Notice of Appeal

Letter, Respondent's Solicitors to Appellant giving Notice of Appeal.

SCANLEN & HOLDERNESS
Attorneys, Notaries
& Conveyancers

P.O. Box 188,
Barclays Bank Building,
Manica Road & Inez Terrace,
SALISBURY
SOUTHERN RHODESIA

7th March, 1960.

30

Your Ref: COM : 3111/F. Obj 0/S1.5/60.

7th March, 1960.

The Commissioner of Taxes,
P.O. Box 8126, Causeway,
Salisbury.

Dear Sir,

Re: Nchanga Consolidated Copper Mines Ltd.
Objection : Notice of Assessment
No. I.S.C. 2371/59

40

We have to advise that we have been consulted

No. 4
Letter,
Respondent's
Solicitors to
Appellant
giving Notice
of Appeal.
7th March,
1960.
- continued.

by our above-named clients in connection with the disallowance of their objection as set out in your letter to the Company of the 25th February, 1960.

We have been instructed to note an appeal in this matter to the High Court against your decision in terms of section 58 of the Act.

Yours faithfully,

SCANLEN & HOLDERNESS.

In the
High Court of
Southern
Rhodesia

No. 5

APPELLANT'S CASE

10

No. 5
Appellant's
Case.
13th July, 1960.

1. The Appellant is NCHANGA CONSOLIDATED COPPER MINES LIMITED, a company duly incorporated with limited liability in accordance with the laws of Northern Rhodesia and having its head office at 70, Jameson Avenue Central, Salisbury, Southern Rhodesia.

2. The Respondent is THE COMMISSIONER OF TAXES for the Federation of Rhodesia and Nyasaland.

3. On the 25th day of January, 1960, the Respondent made an assessment upon the Appellant for the year ended 31st March 1959 (No.1 SC/2371/59), in which the Respondent disallowed certain expenditure amounting to £1,384,569 (one million three hundred and eighty-four thousand five hundred and sixty-nine pounds) described in the said assessment as "Payments to Bancroft Mines Ltd." A copy of the said assessment is hereunto annexed marked "A".

20

4. On the 1st day of February, 1960, the Appellant objected to the said assessment on the grounds set out in its notice of objection, a copy whereof is hereunto annexed marked "B".

30

5. On the 25th day of February, 1960, the Respondent disallowed the said objection.

6. On the 7th day of March, 1960, the Appellant duly noted an Appeal to the above Honourable Court against the disallowance of the said objection by the Respondent.

In the
High Court of
Southern
Rhodesia

No. 5

Appellant's
Case.

13th July, 1960.

- continued.

7. The said amount of £1,384,569 (one million, three hundred and eighty-four thousand five hundred and sixty-nine pounds) was paid by the Appellant to Bancroft Mines Limited in pursuance of a contract between the Appellant and Rhokana Corporation Limited on the one hand and Bancroft Mines Limited on the other hand whereunder in consideration of Bancroft Mines Limited ceasing the production of copper for one year the Appellant and Rhokana Corporation Limited undertook jointly to pay Bancroft Mines Limited the sum of £2,165,000 (two million, one hundred and sixty-five thousand pounds) during the year that Bancroft Mines Limited would not be in production. The terms of the said contract are more fully set out in a letter dated the 27th day of January, 1958, from the Appellant to Bancroft Mines Limited, a copy whereof is hereunto annexed marked "C", which terms were accepted by Bancroft Mines Limited in a letter of the same date to the Appellant, a copy whereof is hereunto annexed marked "D". Identical letters were exchanged at the same time between Rhokana Corporation Limited and Bancroft Mines Limited.

8. The object of the said payment was to make it unnecessary for the appellant and Rhokana Corporation Limited to cut their production of copper, to enable the Appellant and Rhokana Corporation Limited to increase their production of copper and to maintain and if possible increase the profits of the Appellant and Rhokana Corporation Limited for the period of one year.

9. The said payment was made in the course of business to deal with a difficulty which had arisen and to enable the Appellant and Rhokana Corporation Limited each not only to maintain but to increase its production and its profits for the period of one year.

10. In the premises the Appellant contends that:

(a) The said amount of £1,384,569 (one million, three hundred and eighty-four thousand five hundred and sixty-nine pounds) is expenditure, not of a capital nature, wholly and exclusively incurred by the Appellant for the purposes of

In the
High Court of
Southern
Rhodesia

No. 5

Appellant's
Case.

13th July, 1960.
- continued.

its trade and/or in the production of the
income and is accordingly a deduction allowed
under Section 13 (2) (a) of the Income Tax
Act 1954;

- (b) The taxable income of the Appellant for the
said year of assessment has by reason of the
said disallowance been incorrectly determined;
and
- (c) For the purposes of determining the taxable
income of the Appellant for the said year of
assessment the said amount must be deducted
in terms of Section 13 (2) (a). 10

WHEREFORE the Appellant prays for an order:

- (1) Declaring that the assessment made by the
Respondent upon the Appellant for the year
ended 31st March, 1959 (No. 1 SC/2371/59) is
invalid;
- (2) Directing that the said assessment be amended
by allowing as a deduction the said amount of
£1,384,569 (one million, three hundred and
eighty-four thousand five hundred and sixty-
nine pounds); 20
- (3) Directing that the said assessment be amended
by determining the taxable income of the
Appellant for the year ended 31st March, 1959,
at the amount of £8,363,136 (eight million
three hundred and sixty-three thousand one
hundred and thirty-six pounds) instead of
£9,747,705 (nine million, seven hundred and
forty-seven thousand seven hundred and five
pounds). 30

DATED at Salisbury this 13th day of July, 1960.

(signed) E.R. Denman

PUBLIC OFFICER

NCHANGA CONSOLIDATED COPPER MINES LIMITED

(Signed) John McGraw
SCANLEN & HOLDERNESS,
Appellant's Attorneys,
Barclays Bank Building,
Manica Road,
SALISBURY.

4

NOTE Annexures to Appellant's Case

Annexure "A" is printed at page 1.
Annexure "B" is printed at page 3.
Annexures "C" and "D" are the same as the Exhibits
15 and 16 in the High Court of Southern Rhodesia
and are printed at pages 196-199 of the Record.

No. 6

COMMISSIONER'S CASE

In the
High Court of
Southern
Rhodesia

 No. 6

1. The Respondent admits paragraphs 1, 2, 3, 4, 5 and 6.

2. paragraph 7, the Commissioner says as follows:-

Commissioner's
Case.

25th October,
1960.

- 10 (a) In or about January, 1958, the Appellant and Rhokana Corporation Limited on the one hand and Bancroft Mines Limited on the other hand, entered into an agreement whereby the Appellant and Rhokana Corporation Limited undertook jointly to pay Bancroft Mines Limited the sum of £2,165,000 in twelve monthly instalments.
- 20 (b) The sole reason or, alternatively, the dominant reason for the said payment was the desire and intention of the appellant and Rhokana Corporation Limited to provide the said Bancroft Mines Limited with the said funds to enable the latter to overcome its technical and financial difficulties and, in particular, to enable Bancroft to finance certain underground development work and to cover the interest on its loans.
- (c) Alternatively, the said payments were ~~made~~ solely and exclusively for the purpose of eliminating competition in the production and sale of copper and or, of securing or creating conditions favourable to and for the enduring benefit of their trade.
- 30 (d) There has been at all relevant times and continues to exist a close financial, administrative and technical association between Bancroft on the one hand and the Appellant and Rhokana Corporation on the other hand.
- (e) The Respondent admits that it was a term of the said agreement that Bancroft undertook to cease production of copper for about one year.
- 40 (f) The Respondent admits that letters Annexures "C" and "D" were written by Appellant and Rhokana Corporation Limited to Bancroft Mines Limited.

In the
High Court of
Southern
Rhodesia

No. 6

Commissioner's
Case.

25th October,
1960

- continued.

(g) Save as above and save for admissions, the Respondent has no knowledge of the remaining allegations contained therein, but does not admit them and puts the Appellant to the proof thereof.

3. The Respondent denies paragraphs 8 and 9 and repeats the allegations contained in paragraph 2 hereof.

4. The Respondent denies paragraph 10 and says as follows:-

(a) The said payment to Bancroft Mines Limited is not an expense wholly and exclusively incurred by Appellant for the purpose of its trade or in the production of its income.

(b) Alternatively, the Respondent says that it is an expenditure of a capital nature.

(c) The Respondent denies that the Appellant is entitled to a deduction of the said sum in terms of section 13 (2) (a) of the Income Tax Act, 1954.

WHEREFORE Respondent prays that Appellant's case may be dismissed.

DATED at Salisbury this 25th day of October, 1960.

(Signed) A. SCHATTLE.

COMMISSIONER OF TAXES.

10

20

No. 7

No. 7

Appellant's
Evidence

APPELLANT'S EVIDENCE

IN THE HIGH COURT OF SOUTHERN RHODESIA

Keith Courtney
Acutt.

SALISBURY CIVIL TERM. MONDAY, APRIL 10, 1961

Examination.

BEFORE THE HONOURABLE MR. JUSTICE YOUNG

10th April,
1961.

IN THE MATTER of the INCOME TAX APPEAL of
NCHANGA CONSOLIDATED COPPER MINES LIMITED

Appellant

-- and --

COMMISSIONER OF TAXES

Respondent

30

Mr. R. Welsh, Q.C., with Mr. Christie of counsel
for the appellant.

Mr. Gould, Q.C., with Mr. Goldin, Q.C. for the respondent.

In the
High Court of
Southern
Rhodesia

Mr. Welsh outlined the case for the appellant and called the following evidence:

No. 7

KEITH COURTNEY ACUTT, duly sworn and examined.

Appellant's
Evidence

By MR. WELSH: You are a joint deputy chairman of the Anglo-American Corporation of South Africa, Limited? - Yes.

Keith Courtney
Acutt.

10 You are also resident director of the Corporation for the Federation? - Yes.

Examination

You are sole resident director, in fact? - Yes.

10th April,
1961

What work does Anglo-American Corporation do for the three mining companies which are involved in this case? - My Lord, it acts as secretaries and consulting engineers to the copper mining companies, Nchanga, Rhokana and Bancroft.

- continued.

You have been a director of each of these companies since 1953? - Yes.

20 In 1958 were you deputy chairman of the Board of Directors of each of these companies? - Yes.

And are you still deputy chairman? - Yes.

I want to get the dates of incorporation. Rhokana was incorporated in England in 1923? - Yes.

And re-incorporated in Northern Rhodesia in 1954? - Yes.

30 It was re-incorporated in this country in pursuance of an Act of the United Kingdom Parliament which was called, I think, the Rho-Anglo Mines Group Act? - Yes.

The purpose of which was to permit these companies to transfer their domicile to Africa? - Yes.

Similarly, Nchanga was incorporated in England in 1937? - Yes.

And re-incorporated in Northern Rhodesia in 1954? - Yes.

In the
High Court of
Southern
Rhodesia

No. 7

Appellant's
Evidence

Keith Courtney
Acutt.

Examination.

10th April,
1961

- continued.

Bancroft was incorporated in Northern Rhodesia for the first time on 21st of May, 1953? - Yes.

Its initial capital was 20 million 5/- shares? Yes.

I want to show you Exhibit 1, which is the prospectus of Bancroft? - Yes.

Prospectus put in, Exhibit 1)

Exhibit 1 shows how the initial share capital of Bancroft was subscribed, does it not? - Yes.

Has Nchanga ever held any shares in Bancroft? It never held any shares until April, 1959, when it accepted preference shares in lieu of the repayment of a loan which was the notes. 10

Now I want you to produce the first annual report and accounts of Bancroft, that is, for the year ended 30th June, 1954, Exhibit 2? - That's right.

(Report and accounts put in, Exhibit 2)

Bancroft was incorporated for the primary purpose of acquiring certain mining property from Rhokana? - Yes. 20

I want to show you an agreement dated the 18th of June, 1953, between Bancroft and Rhokana. That will be Exhibit 3. Is that a true copy of the agreement? - Yes.

(Agreement put in, Exhibit 3)

Then for the sake of completeness, I want you to produce the second, third, fourth, fifth and sixth annual report and accounts of Bancroft. These will be Exhibits 4, 5, 6, 7 and 8 respectively and they run from 1955 to 1959? - Yes. 30

(Reports and accounts put in, Exhibits 4, 5, 6, 7 and 8)

Now, in 1958, that is at the time of the agreement to which we are going to refer presently, I would like you to tell his Lordship what interests Rhokana and Nchanga respectively had in Bancroft - Rhokana had 9,543,509 Bancroft Mines Limited stock units of 5/- each.

This was ordinary stock? - Ordinary stock. 40

Amounting in all to two million? - To £2,385,877. They also held one and a half million pounds of five per cent notes which were redeemable on the 1st of April, 1959. Those were at par, making a total monetary investment of £3,885,877 and Nchanga had one and a half million pounds of the five per cent notes redeemable on the 1st of April, 1959.

In the
High Court of
Southern
Rhodesia

No. 7

Appellant's
Evidence

10 Were these notes guaranteed in any way? -
They were guaranteed by Rhokana.

Keith Courtney
Acutt.

Now, Mr. Acutt, when did Bancroft come into production? - In about January, 1957.

Examination.

20 Did it encounter certain difficulties at first? - Yes, it encountered large volumes of water and bad ground and Bancroft had difficulty in achieving its planned rate of development which, in turn, made it difficult to feed the plant with sufficient ore to attain target production and its production costs per ton were, therefore, high.

10th April,
1961

- continued.

By the end of 1957 and the beginning of 1958, were its production costs per ton higher than those of Rhokana and Nchanga? - Materially, yes.

30 Now, I want to ask you about the copper prices and it might be convenient if you turn to Exhibit 7, which is the annual report and accounts of Bancroft for the year to 30th of June, 1958. Would you look at Exhibit 7, which is the annual report and accounts for Bancroft for the year ending 30th of June, 1958. At page 4 you will see a reference in the Chairman's review to the price of copper and the Chairman refers there to copper prices having been forced up to summit levels of 1956 and thereafter there was a rapid and sharp decline in the price of the metal. Is that correct? - Yes.

Do you remember what the peak copper price was in 1956? - It was £436.10.0d per long ton on the 19th of March, 1956.

40 And after that, was there a decline in the price of the metal? - Yes, there was a rapid and sharp decline in the price of the metal which reached its lowest level to that date on the 11th of December, 1957, at a price of £176. 5. 0d.

What was the price in February, 1958? -
It was £160.

In the
High Court of
Southern
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Did other copper producers do anything to try to correct this situation? - By that time most of the leading producers of copper in the world had decided to reduce output in an endeavour to correct the situation.

Have you prepared a schedule showing the announcements of cuts which were made by other producers in 1957 and 1958? - Yes.

I show you Exhibit 9, which is such a schedule. Perhaps you would be kind enough to read that to his Lordship? - (Schedule read and put in, Exhibit 9).

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Do Roan Antelope and Mufilira belong to the same group? - They are both in the Rhodesian Selection Trust group, the two Arizonas and Phelps Dodge.

Are those three mines connected in any way? - I do not know that they are. I think the two Arizona ones are, but Phelps Dodge is a smelter company.

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Kennecott is also an American producer? - It is a producer with several mines.

In America? - In America.

Would you tell his Lordship what L.M.E. price is? - The London Metal Exchange, the price at which copper is normally sold.

On the 26th of January, 1958, was a meeting held at your home in Salisbury? - Yes.

Who was present at that meeting? - Mr. H.F. Oppenheimer, who is chairman at Rhokana, Nchanga and Bancroft, myself, the deputy chairman of the three companies, Rhokana, Nchanga and Bancroft; Mr. H.H. Taylor, a director of Rhokana, Nchanga and Bancroft and the manager of Anglo-American Corporation, Mr. D.A. Etheredge who was alternate director of Rhokana, Nchanga and Bancroft and assistant manager of Anglo-American. Mr. H.M. Forrest consulting engineer to the Anglo-American Corporation, Mr. K.C.G. Heath, who was assistant consulting engineer to the Anglo-American Corporation, and Mr. E.R. Denman, the company secretary of the Anglo-American Corporation.

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Was the purpose of this meeting to discuss copper prices? - Yes.

Now, I would like you to give his Lordship an outline of what was discussed at this meeting? - My Lord, it is difficult to give a full outline, but I will cover the major points. The overall target production of the three mines for 1958 was approximately 270,000 long tons of copper, of which about 240,000 long tons had been committed for firm sales.

10 You mean you had firm contracts? - Firm contracts for those, the balance being available for ad hoc sales. It was agreed by cutting the three companies" production by about ten per cent it would be possible to fulfil sales contracts and to withhold from the market copper what would otherwise have been available on an ad hoc basis. It was clearly essential that the copper to the market should be cut. It remained at the dis-
20 cussions to decide in what way this could be achieved least detrimentally to each of the three companies.

Before you go on with what happened at this meeting, I want you to tell his Lordship something about the costs of producing copper. Do you have certain fixed costs which remain the same however much copper you produce? - Yes, my Lord.

Would you just explain that to his Lordship?
- Well the fixed maintenance costs are there.

30 By YOUNG, J: Fixed overheads, you mean? - Fixed overheads you might call it, the fixed costs of maintaining the machinery, pumping, ventilation of a mining organisation of that sort, housing, the medical and township expenses which are provided by the copper mining companies and such costs as those.

By MR. WELSH: Do these costs remain the same, broadly speaking, however much copper is produced?
- Broadly speaking, yes.

40 Therefore, what is the effect on production costs where you have a large proportion of your costs consisting of fixed costs? - They increase the costs per ton of copper.

A cut increases the costs per ton? - Yes, a reduction in output.

At this meeting, what view was taken of the consequences of a cut in the production of the three mines? - It was clear that a cut would have serious consequences to Rhokana, Nchanga and Bancroft.

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You have said that the consulting engineers were present at this meeting? - Yes.

Had they worked out certain figures? - Yes, they had worked out a series of figures or worked them out previously and further figures at the time.

I want to show you a schedule which you have prepared, Exhibit 10, and this deals with the effect which a ten per cent cut in Nchanga's production would have had upon its profits, on the assumption that the price did not rise above the then figure, which was £162 per ton? - Yes.

10

Now, you have given the figures in these schedules I do not think you need go through them at this stage, but if you look at the last line in the schedule, the loss before tax was £1,272,000? - Yes.

Was that an estimate produced at this meeting in January, 1958? - Yes.

So that that would have been the effect of cutting Nchanga's production by ten per cent? - Yes.

20

Now, Bancroft you have said, was undergoing certain difficulties in its operations? - Yes.

And, as a result of those, what were its costs in comparison with those of Nchanga and Rhokana? - Well, its costs of production were very much higher than Nchanga's and Rhokana's.

Was it felt that Bancroft could reduce its output at all? - No.

30

What would the effect have been? - Well, it was having difficulty in maintaining its output at that particular price and it could not afford to reduce its output at all without ceasing operations.

At this meeting, did you consider whether the whole cut could be borne by Nchanga Rhokana? - Yes.

Leaving Bancroft to produce its target as before? - Yes.

40

Have you prepared another schedule, Exhibit 11, which shows what this would have involved for Nchanga? - Yes.

Again, there are some calculations here which I think we need not go through, but the net result is that the loss which Nchanga would have suffered would have been £1,469,000? - Yes.

Which is about £200,000 more than the loss reflected on Exhibit 10? - Yes.

What was Bancroft's target for the year 1958?
- Forty thousand long tons.

10 And you have said that the total cut which was envisaged for the three mines was ten per cent of 270,000 tons? - Yes.

That is 27,000? - Yes.

Did these figures lead to any conclusions? - Well, it was realised that if Bancroft Mine ceased production entirely for one year, Nchanga and Rhokana between them could increase their production by 13,000 long tons and could produce this additional tonnage of copper at very low costs.

20 Thirteen being the difference between 14 and 27? - Yes.

Was that really the germ of the agreement which was ultimately arrived at? - That prompted the idea.

What was the scheme? - Well, in the circumstances it was felt that it was in the best interests of the three companies for Bancroft to cease production for one year and Nchanga and Rhokana to increase their production sufficiently to meet the total sales commitments of 245,000 long tons.

30 I think you said 240 before. Was it 240 or 245? - Two hundred and forty five. I think I said 245.

Anyway, it was 245? - Yes.

So that, in other words, Nchanga and Rhokana would between them produce the overall target to meet the sales commitments for the three mines? - Yes, and the overall effect would be a reduction of about 27,000 long tons.

40 But what was to happen to Bancroft as a result of this, if Bancroft was to cease production? - Well, that was the difficulty. If Bancroft was to cease production, there was no question of it just stopping production at the mine in the interests of both the shareholders and the employees unless Bancroft were enabled to keep the mine open to continue development and to meet its current commitments.

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A number of detailed figures were produced at this meeting? - Yes.

And on the next morning was a graph produced of which a copy has already been furnished to the revenue authorities? - Yes.

(Graph put in Exhibit 12)

The graph looks a little formidable, but I think it will be easier to explain it in a somewhat clearer graph which has since been prepared. For the purposes of this case, you have prepared a second graph? - Yes.

10

(Graph put in, Exhibit 13)

Would you explain this graph briefly to his Lordship? - The purpose of the graph is to compare the results at Rhokana and Nchanga of increasing production and paying compensation to Bancroft and the alternative of reducing their production by ten per cent. The graph, I think, sets out fairly clearly the effect.

Let's deal with the Nchanga position. Have you got Exhibit 13? - Yes, 13 is perhaps a clearer statement than 12, but it contains exactly the same information. The red line is Rhokana, so we shall deal with the blue line.

20

First of all, will you tell his Lordship what the references in the left hand vertical column are? - This is the "0" line, the level at which profit on increased production equals compensation to Bancroft. If you go down, it shows the loss. If you carry on down from that, which I think is the only important one, it shows the loss per month in hundreds of thousands of pounds.

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Is it in thousands of pounds? - In thousands of pounds, I am sorry.

By YOUNG, J: I am not quite sure that I follow this. Where are you reading from? - The left hand side, if you carry on, there is a minus figure of 20, 30, 40, 50, 60, 70 and 80 and down below there is the copper price in pounds per long ton.

By MR. WELSH: My Lord, there is a legend on the left hand side which says: "Net profit or loss per month in thousand pounds?" - On increasing production after deducting compensation to Bancroft

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and the dotted line shows the estimated loss resulting from a ten per cent cut in output of those two mines.

So that what one has to compare is the unbroken blue line with the dotted blue line? - Yes.

Now, those two lines meet at a point which is £130 per ton? - Yes.

10 What is the significance of that? - It shows that the scheme which was adopted would be more advantageous to Nchanga than cutting its production, if the price remained above £130 per long ton. No one believed that the price would drop as low as that at the time.

So at any price above that it would be advantageous to Nchanga to pay money to Bancroft on ceasing production rather than to cut its own production by ten per cent? - Yes.

20 That is really the effect of this graph? - Yes.

Now, there are certain letters which were written. On the 28th of December, 1959, a letter was written to the Inspector of Taxes. This will be Exhibit 14, in which certain information was placed before the Revenue Department? - Yes.

(Letter read and put in, Exhibit 14)

The graph referred to in this letter is Exhibit 12, is it not? - Yes.

30 Is that borne out by the figures? - Yes, by the graph.

By "break even" is meant the point on the graph at which the unbroken line and the dotted line meet? - Yes.

The interest referred to, I take it, was interest on these notes? - Yes.

40 So, Mr. Acutt, what were the final decisions which were reached at this meeting in January, 1958? - It was decided that Bancroft should cease production for one year and that Nchanga and Rhokana would increase their production in order to fulfil existing sales commitments, and that Bancroft should be paid a sum of money sufficient to meet the interest payments which Bancroft had to make on its loans and to enable Bancroft to continue pumping and carry on development and thus to

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meet its production target when production was re-
sumed.

Mr. Acutt, by carrying out these various
operations, would Bancroft have been able to resume
production more or less immediately on the expiry
of the agreement? - Yes, that was the thought.

By YOUNG, J.: Just tell me shortly how was the
figure of 2,165,000 arrived at? - Mentioned in
the letter?

Yes, just how was the figure arrived at?

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By MR. WELSH: You have given the various things.
Just repeat them slowly, the various things that
Bancroft had to be enabled to do? - Oh, I see.

By YOUNG, J.: You said the valuation of these
benefits which you have just mentioned, how was
this figure arrived at? Was it based on copper?
- No, it was considered that Bancroft would have
to meet its interest payments on its notes and
loans.

Yes, I have that? - And its pumping and
carry on development so as to be in a position to
resume production, and this was the figure which
Bancroft stated it required.

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This was the figure worked out as the mean?
- Yes.

By MR. WELSH: Who worked out the figures? -
The consulting engineers.

I take it they did detailed calculations? -
Yes.

Tea adjournment

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Before the adjournment, you had said that this
figure of £2,000,000 odd was produced by the con-
sulting engineers? - Yes.

And you had also said that as long as the
price of copper remained above £130 this scheme
was to the benefit of Rhokana and Nchanga? - Yes.

What about Bancroft? Was it considered to be
a fair and reasonable scheme from Bancroft's point
of view? - Yes.

Would you elaborate on that? Was it expected
that Bancroft would make any profit during the 1958
financial year? - No, it was not expected that

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Bancroft would make any profit in the year 1958 unless there was a change in the situation and the payments would enable Bancroft to meet its current commitments during 1958 and to resume production at an increased rate in 1959. On the basis of the figures produced by the consulting engineers, this would cost a little over £2,000,000, which it was considered would be economic for Nchanga and Rhokana to pay in relation to the benefits which would accrue to them.

10

How was the total sum of £2,165,000 money to be apportioned as between Nchanga and Rhokana? - In proportion to their respective production tonnage during the year.

You have told us who was at the meeting. There were three of you who were directors of all three companies? - Yes.

Did you take into account the interests of all three companies? - Yes.

20

What was your view about arrangements from that point of view? - That it was fair and reasonable for the three companies.

Now, were these proposals put to the boards of the three companies? - They were put to the boards of all three companies.

Were they put informally straight away? - Informally, on the telephone in some cases, and by personal discussions in others.

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Was there any dissent among the boards of the three companies? - No.

Incidentally, do the boards of the three companies consist of the same persons? - There are a number of people who coincide, but there are differences.

Now, were detailed calculations made before the agreement was finally concluded? - Yes.

40

What conclusions did they lead you to come to? - That the figures which had been put forward at the earlier discussions were confirmed by the detailed figures and that the conclusions were correct on that basis.

On the 27th of January, 1958, was the agreement entered into by correspondence? I show you, first of all, Exhibit 15 which is a letter from Nchanga to Bancroft dated 27th January, 1958? - Yes.

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(Letter read and put in, Exhibit 15)

The reply is Exhibit 16, which is also attached to the case. That is a reply from Bancroft agreeing to the proposals contained in Exhibit 15? - Yes.

Then, on the following day, was an announcement issued to the press? I show you Exhibit 17? - Yes, my Lord.

This announcement was made jointly by the three companies concerned? - Yes.

Was it issued to the press and to the public? - It was issued to the press and to the public and to shareholders.

To shareholders of all three companies? - Yes.

Then formal confirmation was obtained at three board meetings which were held on the 5th of March, 1958? - Yes.

I show you exhibits 18, 19 and 20. These are extracts from the minutes of the three boards of directors respectively? - Yes.

Exhibit 18 is the minutes of Bancroft where the arrangements with Rhokana and Nchanga were confirmed. Exhibit 19 is the minutes of Nchanga and Exhibit 20 is the minutes of Rhokana? - Yes.

You will notice that in Exhibit 19 it is said that Nchanga's production would have to be increased to an average of 12,620 long tons per month and Exhibit 20, Rhokana's production would have to be increased to an average of 7,775 long tons per month? - Yes.

I suppose those figures had been worked out in detail by the engineers? - Yes.

The next exhibit I want to show you is Exhibit 21 which is the annual report and accounts of Nchanga for the year ended 31st March, 1958 and this document likewise contains a reference to this transaction on pages 5 and 6. If you will look at the Chairman's review on pages 5 and 6 under the heading "Group output policy," on page 5 and going over the page to the top of page 6, there is a reference to "voluntary and unconcerted cuts by producers in many parts of the world which have

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been successful in correcting the imbalance between supply and demand? - Yes.

The next exhibit is Exhibit 22, which is the annual report and accounts of Nchanga for the year ended 31st March, 1959? - Yes.

10 I want you to look at the accounts contents here because this is the year during which the agreement operated. If you look at pages 20 and 21 you will find the operating account and the profit and loss account. If your Lordship would look at the top of page 21, which is the right hand side of the operating account, you will see there "Sales of metals and concentrates £26,000,000 roughly?" - Yes.

"Less: Payments to Bancroft Mines Limited £1,384,569?" - Yes.

Giving a net figure of £24,906,418? - Yes.

20 If you look on the left hand side of the operating account, the last item is "Balance to profit and loss account £7,266,585" Is that correct? - Yes.

If your Lordship would look at the profit and loss account, the first figure on the right hand side.....

By YOUNG, J.: You wrote Nchanga's share off in one year, in the first year? - No, the expenditure involved during that year, yes.

By MR. WELSH: Because the agreement only operated for one year? - Yes, this falls into the year.

30 And it fell squarely within this year? - Yes.

So the agreement was concluded at the end of March, 1959? - Yes.

By YOUNG, J.: Just one moment. I want to follow this. That £1,384,569 was Nchanga's share of the claim? - Yes.

That means Nchanga paid a greater proportion than Rhokana? - It was proportionate to the tonnage, my Lord, to the output.

40 By MR. WELSH: Rhokana's proportion must have been about three quarter of a million pounds? - Yes.

So that the effect of this, Mr. Acutt, is that this expenditure was treated in the accounts as revenue expenditure? - Yes.

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Not as capital expenditure? - No, those are working costs.

And these accounts, of course, were audited accounts? - Yes.

Would you look at Exhibit 7, which is the annual report and accounts of Bancroft for the year ended 30th June, 1958, page 17. This is the profit and loss account for the year ended 30th June, 1958, by which time this agreement had been in operation for about three months? - Yes.

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If you look on the right hand side of page 17, the right hand side of the profit and loss account, you will see an item, the fourth item, "Amounts provided by Nchanga Consolidated Copper Mines Limited and Rhokana Corporation Limited, see directors' report, £662,533" - Yes.

That represents the payments which had been made up to June, 1958, and here they are credited to profit and loss account, in other words, treated as revenue receipts? - Yes.

Similarly, in Exhibit 8, which is the accounts of Bancroft for the next year, page 15, the balance of the payments made by Nchanga and Rhokana are reflected in the fourth item on the right hand side of the profit and loss account, the total amount of £1,502,467, and again treated as revenue receipts in the hands of Bancroft? - Yes.

20

Would you turn back to Exhibit 22, that is, the Nchanga accounts for 1959 and would you look at page 6. This is the Chairman's review under the heading in the right hand column, "Production and prices". The Chairman says there: "In my statement last year, I said that we had developed the property in such a way that great flexibility both in plant and mining operations was possible. The value of this flexibility was proved during the year. In accordance with the combined programme of output agreed with Rhokana Corporation and Bancroft Mines, Nchanga was scheduled to produce approximately 12,500 long tons of copper a month, equivalent to 150,000 tons for the year. Nearly two months' output was lost because of the prolonged strike of European daily paid employees towards the end of 1958, and furthermore, at the time of the strike, production was already slightly behind the scheduled rate for the year. It was nevertheless possible to make up this shortfall, and much of the lost production, by increasing output for the last four months of the financial year

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to 15,500 long tons a month. Production for the year was 139,442 long tons of copper, which is a record for the mine. The high level of production achieved after the strike, and the length of time taken for copper to reach overseas markets, resulted in stocks on hand at the year-end being higher than at 31st March, 1958. However, we sold a record tonnage of 129,024 long tons at an average realised price of £204 per ton, compared with £196 last year. The profit for the year, after providing for depreciation and tax, amounted to £4,704,000, which is £334,000 more than last year. After the substantial reductions in profits over the previous two years, the reversal of the trend is very satisfactory, particularly in view of the considerable loss of profits caused by the strike." Are the facts stated there correct? - Yes.

And on page 8 there is a summary of operations which gives a comparison between 1958 and 1959 financial years showing, to begin with, the very first item showing an increase in the operating profit of about £1,000,000 over the previous year, an increase in production, an increase in sales of about 9,000 tons. I think those are the relevant items? - Yes.

The next exhibit I want to put in is Exhibit 23, which is the annual report and accounts of Nchanga for the year ended 31st March, 1960? - Yes.

(Report and accounts put in, Exhibit 23)

Would you look at page 17, which is the operating account and profit and loss account? - Yes.

The first figure is the top item on the right hand side, sales of metals and concentrates £42,623,265, compared with £26,290,987 in the previous year. Is that correct? - Yes.

If you look lower down in the profit and loss account on the right hand side, "Profit before taxation, brought down £21,423,764" as compared with £7,834,535 in the previous year. Is that correct? - Yes.

Showing a very substantial increase both in the sales and in profits before tax in that year. I think there was some change in the taxation laws during that year, was there not? - Yes.

So that it is better to have regard to the profit before tax than the profit after tax? - Yes.

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Then, if you look at page 4 of the same exhibit, number 23, you will find the summary of operations again. This is the Chairman's review at the very beginning. The Chairman says: "The results of our operations during the year ended 31st March, 1960, were very satisfactory. Production at 178,045 long tons was some 38,000 long tons higher than the previous year which was itself a record. This high rate of production, most of which was sold at an average price of £240 per ton, compared with £204 per ton last year, resulted in a net profit for the year after taxation of £13.64 million." So the year ended 31st March, 1960 was a much better year for Nchanga than the previous year? - Yes.

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Now, Mr. Acutt, is it possible to attribute this improvement in 1960 over 1959 in any way to the agreement which was entered into January, 1958? - No, I don't think so.

Would you like to give his Lordship reasons for that opinion? - Well, in April, 1959 Bancroft resumed production with a target of 50,000 long tons and it did, in fact, achieve this target. The improvement was due to the increased output and the increased price as described by the Chairman.

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The average price rose slightly from 1958 to 1959? - Yes.

It was £196 in 1958, £204 in 1959 and £240 in 1960? - Yes.

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Now, would you attribute these rises in price in any way to the agreement entered into in January, 1958? - No.

Can you tell his Lordship what the reason was for the change? It was an upward change of about £40 per ton as between 1959 and 1960? - Well, I think the first improvement in the price occurred when it was clear that there was to be labour trouble in the Northern Rhodesian mines. Thereafter, there was a long strike on the copper belt mines and the price improved slightly. There were labour disputes in the mining industry in other parts of the world and it was clearly a certain amount of apprehension on the part of the consumers that the total requirements of copper would not be available.

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By YOUNG, J: I suppose the policy of cutting production had its impact? - I think not at that

time at all. Any cuts in production had been fully restored.

By that time? - By that time.

When were the cuts restored then? - At varying times, my Lord, from the middle of 1958 by some of the producers in other parts of the world. It is difficult to state that definitely because, although production cuts are announced, the restoration of that tonnage is not necessarily announced at the time.

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By MR. WELSH: Now, you referred to the fact that Bancroft did resume its production in April, 1959 and reached its target for that year? - Yes.

I want to show you the Bancroft report and accounts for the year ended 30th June, 1960, Exhibit 24? - Yes.

(Report and accounts put in, Exhibit 24)

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If your Lordship would look at page 4, first of all, you will see an operating profit of £3,693,000 compared with £106,248 in the previous year? - Yes.

Production is 51,121 tons in 1960. I think you said the target was 50,000 tons, did you not? - Yes.

And sales proceeds £11,292,178 as compared with £886,480, so that Bancroft did now come back into full production, did they not? - Yes.

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In that year? - The comparative figure, my Lord, is, of course, for three months. This is the period when they came back to the 30th June, 1959. The first figure is for three months.

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Now, would you look back at Exhibit 23, page 4, which is the Chairman's review in the second column under the heading, "copper price," the Chairman says: "For the first three months of the new year, the price for copper has remained relatively steady at satisfactory levels. There is evidence of an increase in consumption of the metal, particularly in the United Kingdom and on the European Continent, which are our main markets, and the general outlook is, therefore, encouraging. While consumption at the moment appears to be keeping pace with increasing production, the dual risks of interruption of supplies and falling off in demand are always present. The former risk is one

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against which consumers can insure themselves by a rational stock holding policy, and the manner in which the copper fabricating industry weathered the prolonged strikes in America last year indicates that this is being done. It is "for the copper producers to protect themselves against the latter risk and to prevent the recurrence of price recessions such as that of 1956/57 by regulating supplies to meet demand. We have indicated that if such a situation arises again we are prepared to play our part by joining with other major producers in either reducing production or withdrawing copper from the market". This document is Nchanga's accounts for the year ended 31st March, 1960. Within a few months, did a change occur again in the copper market? - Yes.

10

What happened? - The position changed very rapidly at a time that there was a recession in America and the consumption of copper dropped very much. The market was again over-supplied.

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Was any action taken in regard to this? - Yes, the boards of the various companies decided that they would

Do you mean the Anglo-American companies? - Yes, the three companies which are Rhokana, Nchanga and Bancroft, that they would join with other producers in Northern Rhodesia in about October, 1960, in withholding a certain amount of copper from the market. Bancroft has, in fact, cut its production as by that time they were in a position to do so and the other mining companies have taken various steps, either stock-piling or cutting.

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That fact is referred to in Exhibit 24, which is the Bancroft report for 1960, a few months after Exhibit 23? - Yes.

On page 5 of the Chairman's review in the left hand column, the second paragraph under the heading, "Reduction in supply?" - Yes.

It reads: "In normal times the amount of copper produced and sold by the mine would be the maximum obtainable from mining and milling operations. At present, however, the market appears "to be over-supplied, and it was decided at the beginning of October to join with the other copper producers in Northern Rhodesia in withholding a certain amount of copper from the market. This reduction in supply will be achieved either by

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cutting production, or by stocking copper until the market is able to absorb it". In which way was it achieved? Did the market stock or was it cut?
 - Up to date it is cut.

These last two reports seem to suggest that the copper price does fluctuate? - Very frequently.

10 What would you say about the history of copper prices generally? - Well, it has been a history of violent fluctuations over short periods of time.

Caused by one factor or various factors? - No, a variety of factors. I would refer to the authoritative work entitled "Babylon to Birmingham" published in London in 1960 and compiled and edited by H.G. Corvero and L.H. Tarring, who are joint editors of the Metal Bulletin, which is the most authoritative journal in its field in Europe.

20 Despite its somewhat journalistic title, is this a work of authority? - Oh, yes, the title I think is entirely due to the fact of the period it covers.

Chapter 20 of this book deals with fluctuations in the price of copper? - Yes, in particular.

30 My Lord, for the convenience of your Lordship, I have had chapter 20, which is a short chapter, copied and I will hand it in as Exhibit 25. The graph which is attached to it forms portion of the book and is a photostatic copy.

(Chapter 20 put in, Exhibit 25)

40 Now, would you summarise this in your own words? - Yes, it sets out a great deal of detail here which I think really can be summed up by saying that the price of copper has generally been highest during periods of great demand, especially during times of war. They are affected by restriction schemes, output restriction schemes and I think you will find on page 2 the author gives the reasons for various other influences on the price of copper.

If you look at the graph, I think you will see that most of the high points appear to correspond with times of war or revolution? - Yes, or crises.

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This graph is a double graph showing the highest and lowest prices in one year? - Yes.

Have you any comment to make upon that? - I think it does illustrate the fluctuations which can occur in any one year, let alone any period.

If you look, for example, at that part of the graph which deals with the first Great War, 1914 to 1918, one notices very great discrepancies between the highest and lowest at any one time? - Yes, there are other examples right throughout 1930 to 1939. 10

What would you say about output restriction schemes which are referred to in the book? Would you say it is possible to achieve any long term stability in the price of copper by such schemes? - I should say definitely not.

Dealing with the agreement in the present case, this involved a reduction of 27,000 tons per year? - Yes.

Was it intended or contemplated by the directors who approved this agreement that it would have any long term effect upon copper prices? - No definitely not. 20

What was, in fact contemplated? - It was contemplated that this scheme as put forward would enable Nchanga to increase its profits, or at the worst, minimise any losses which might occur.

For how long? - Over a period of one year, which was the agreed period. Nobody could say what would happen after that. 30

Was it ever thought it would have any effect on prices after the one year had expired? - No, it was doubtful whether it would have an effect on prices even during the one year.

I want to show you the last exhibit which I am going to put in, Exhibit 26. This is a series of tables which you have caused to be compiled relating to the tonnages of copper produced in the various copper producing countries in the world during the three years, the years 1948, 1957 and 1960, the total figures indicate a consistent increase? - Yes. 40

Nineteen forty eight was two and a half million tons roughly, 1957 three and a half million and 1960 just over four million? - Yes.

Nineteen fifty seven was the year immediately preceding this agreement and the total world copper production is three and a half million tons, so that the 27,000 tons by which the three Northern Rhodesia mines were going to reduce would have been considerably less than one per cent of world production? - Yes, it was very small.

Now, I want you to look at the Commissioner's case in this matter which you have already seen. Have you got a copy of it there? - I don't know, it is somewhere.

Would you look at paragraph 2(b) of the Commissioner's case. Here it is said: "The sole reason or, alternatively, the dominant reason for the said payment was the desire and intention of the appellant and Rhokana Corporation Limited to provide the said Bancroft Mines Limited with the said funds to enable the latter to overcome its technical and financial difficulties and, in particular, to enable Bancroft to finance certain underground development work and to cover the interest on its loans." What do you say about that? That is not correct. Nchanga had no share holding in Bancroft.

Nchanga did have these loans. Was it intended to protect repayment of the loans or payment of interest on the loans? - The loan, if it can be even considered to come into account, or the notes, were guaranteed by Rhokana.

Was this, in fact, a factor which entered into the minds of the directors when they entered into this agreement? - No.

What, then, was the purpose of the directors in entering into the agreement? - The purpose of the Nchanga directors was to benefit Nchanga.

In the way in which you have already described?
- In the way in which I have already described.

Would you next look at paragraph 2(c) of the Commissioner's case. This is an alternative contention. Firstly, he says: "The said payments were made solely and exclusively for the purpose of eliminating competition in the production and sale of copper and, or, of securing or creating conditions favourable to and for the enduring benefit of their trade." Let us deal, first of all, with the elimination of copper competition. Is that statement true, that the payments were made solely and exclusively for the purpose of eliminating

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competition in the production and sale of copper?

- No.

Was that the purpose at all? - No, the true position is that the directors of all the three companies were of the opinion that their overall production must be cut. The problem with which we were confronted at our meeting in January, 1958, was how to achieve this cut in production in a manner which would be least detrimental to all three companies. The reason why it was decided that Bancroft should cease production for one year was not that Nchanga and Rhokana wished to eliminate competition on the part of Bancroft, but its costs of production were much higher than those of Nchanga and Rhokana.

10

But for that fact, Mr. Acutt, would it have been decided to suspend Bancroft's entire production for that one year? - No.

But because of that fact, it was so decided and, therefore, payment had to be made to Bancroft? - Well, Bancroft was obviously not prepared to consider such a proposal without a payment.

20

And then there is this second statement which comes actually from one of the English cases, that the payments were made solely and exclusively for the purpose of securing or creating conditions favourable to and for the enduring benefit of that trade. Now, what do you say about that? - I think that is incorrect. The purpose of Nchanga was to avoid a cut in its production and to increase its own production and thus maintain and if possible increase its profits. Having regard to the fact that there had to be an overall cut in production, Nchanga could not have achieved its purpose had Bancroft not agreed to suspend production.

30

They talk here about conditions favourable to and for the enduring benefit of trade. I think you have dealt with that already. Could this agreement have been of any enduring benefit? - I don't think so. The agreement was to operate for a period of one year only and it was to attempt to rectify the temporary excessive supply over demand at the time, which was one of the causes of the decline in prices. It was a short term problem which was aimed, as far as Nchanga was concerned, as I said before, at maintaining and if possible increasing Nchanga's profits during the period of one year, during which the agreement was to operate.

40

Was there any kind of agreement or understanding between the Anglo-American copper producers and other copper producers either in this country or abroad? - No, there was no such understanding at all.

How are cuts in production regarded, generally speaking, by copper mining companies or any mining company? - Well, as temporary expedients. Experience has shown they are temporary expedients.

10 His Lordship asked you a little earlier when these cuts were restored and you said producers didn't make announcements when they restored their cuts, but do you know when some of these cuts were restored? - Yes, although they didn't make an announcement of their cuts being restored, from the very fact of their tonnage being published and their figures given to date, it is clear to see what the production of a property is and the cuts began to be restored about the middle of 1958.

20 Now, we have referred already to Bancroft's projected production of 40,000 tons and you have pointed out that that was less than one per cent of the world production in the previous year? - Yes.

Could the suspension of production of Bancroft for one year have had any effect upon world copper prices? - No.

30 Any enduring effects anyway? - No, I think not, nor did anybody concerned think that they could have.

The agreement, you have said, was for one year? - The agreement was for one year and when it was agreed to do this scheme, it was never contemplated there would be any enduring effect upon the copper market, particularly as the directors of Bancroft were determined to resume production in April, 1959, and, in fact, did do so.

Cross-examined by Mr. Gould:

40 Mr. Acutt, you realise that a lot of the information which has been placed before his Lordship is quite new to me and I have not had an opportunity of reading all the exhibits handed in, so I hope his Lordship and you will bear with me if I take a little longer in my cross-examination than might otherwise be the case. Mr. Acutt, you have told his Lordship that Rhokana was the first

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of the three companies. It was incorporated in 1923? - Yes.

And it commenced copper mining operations when? - I think some three or four years after that.

It is also Rhokana, I think, which explored the property which is at present mined by Bancroft, is that right? - No. Here I speak without the book completely, but the initial exploration of the copper belt was done by a company called Rhodesia Congo Border Concessions and Bwana Makuba was already in production at the time. 10

But didn't Rhokana acquire the two particular properties in this case? - Yes, but they did not explore them, the initial term is the word.

But they did spend something like £400,000. Was that in prospecting? - They expanded work on prospecting the property.

It does appear on the documents Dr. Bancroft and a team of about 160 geologists, so we are told, explored that particular area for Rhokana? - That and other areas. 20

For about 13 years and I don't remember the exact names of the two properties, perhaps you could help me, the two mining areas to which you sank shafts for Bancroft? - Oh, Kirila Bomwe and Konkola Dome the Konkola ore body.

You say it was Rhokana who financed the prospecting of those two areas? - Well, it belonged to Rhokana. 30

And it belonged to Rhokana? - Yes.

Then Rhokana actually sold these mineral properties to Bancroft and actually sponsored the formation of Bancroft as a separate company to mine these two areas? - Yes.

Those are the only mining properties that Bancroft acquired? - Well, Bancroft acquired an area. Those were two ore bodies which it intended to mine at the time, but it acquired much bigger areas than is being mined at the moment. 40

But whatever mining property Bancroft acquired, the whole area was acquired from Rhokana? - Yes.

And from Rhokana only? - Yes.

Now, in Exhibit 2, we see the first annual report of Bancroft Mines, the share capital of Bancroft was £5,000,000? - Yes.

But the Bancroft shares were issued at a premium of 1/--? - Yes.

So that the initial subscribed capital of Bancroft was £5,000,000 and it had a share premium of £1,000,000 from which certain preliminary expenses were deducted? - Yes.

10 All these shares were subscribed by associate companies, strictly companies in the Anglo-American group and shareholders of those companies. Is that right? - I am not quite clear about that.

The proportions are given on page 3 of the report of the directors of Exhibit 2, the initial shares were taken up by Rhokana? - Yes.

There were 9,546,983 out of a total issue of 20,000,000. These are stock units of 5/- each? - Yes.

So at this stage Rhokana owned almost 50% of the share capital of Bancroft? - Yes.

20 Would I be correct in suggesting that the reason why Rhokana did not take more is that it did not want Bancroft Mines to be a subsidiary company? - No, I don't think that entered into it. If you will notice further down you will see that certain shares were offered to the members of Rhokana and to Rhodesia Anglo-American Limited.

30 But if Bancroft had been a subsidiary of Rhokana, you would have had all the complications of consolidated accounts and other company law difficulties and things of that description? - Yes, but I don't think that was the reason.

The British South Africa Company subscribed for 3,000,000 shares? - Yes.

Rhodesian Anglo-American Limited for 207,000 shares? - Yes.

Now, there seems to be some tie up between Rhodesia Anglo-American, Rhokana and Nchanga and Bancroft, some relationship? - Well, they are all separate public companies.

40 But they are all within the same group? - They all fall within the same group.

They have a lot of tie ups, general interests, general share holding in different companies and matters of that sort? - There probably are cases of that, but I would not generalise on that at all.

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Could we really call them fairly associated companies? - Leaving out the British South Africa Company, yes.

The British South Africa Company, in fact, of course, had the original grant or the original concession of mineral rights in Northern Rhodesia? - Yes.

And the British South Africa Company has an indirect stake in all the copper mines which are operated by the Anglo-American group in Northern Rhodesia? - Yes. 10

It derives royalties? - Yes, if I may put this, it owned the mineral rights and in granting the right to mine those mineral rights, it retained to itself the right to subscribe some of the capital. The subscription by them of capital came from their right to subscribe for equity capital in any mining lease that was granted.

And, in addition to that, it derives royalty from production or sale of copper? - Yes. 20

The next shareholders were members of the Rhokana Corporation Limited other than Rhodesia Anglo-American Limited. Now, I do not want you to go into great detail, but the members of the Rhokana Corporation I take it, would not only be members of the public but they would also be companies in the Anglo-American group? - And other companies.

But there would be companies in the Anglo-American group who were shareholders in Rhokana Corporation? - Rhodesian Anglo-American notably. 30

Yes, Rhodesian Anglo-American would hold shares in Rhokana Corporation? - Yes.

Would Anglo-American South Africa hold shares? - I cannot speak with any certainty, but at the time I should have said No.

Any other companies in the South African group? - No, the majority of the copper mining shares at the time were held by Rhodesian Anglo-American Limited. 40

Then again, members of Rhodesian Anglo-American Limited held 3,722,000 shares in Bancroft? - Yes.

Now, who would the shareholders be in Rhodesian Anglo-American Limited? - The public.

Only the public? - No, a large number of trusts, the various companies.

All that I am really concerned about at the moment is to know from you whether any other companies in the Anglo-American group as a whole held shares in Rhodesian Anglo-American Limited? - Yes.

10 So that by and large the interests of the Anglo-American group in the initial issued capital of Bancroft Mines could quite easily have been something in the region of 60, 70 or possibly even 80% of the share capital? - I think it is very doubtful indeed.

Let's look. You have almost 50% owned by Rhokana? - Yes.

You have a shortfall perhaps made up by Rhodesian Anglo-American? - Two hundred and seven thousand.

That makes it about 9,800,000, that is just about 50%? - Yes.

20 Then you have Rhokana? - No, my Lord, can I make this position clear? Rhokana offered the shares to its shareholders. As a result of Rhodesian Anglo-American offering a very large shareholding in Rhokana, by arrangement it was arranged so as to get a sufficient distribution of these shares to the public, that Rhodesian Anglo-American should make an offer of these shares direct to its shareholders as well and if you notice from this original capitalisation, Rhodesian Anglo-American retained 207,000, the balance of the shares which were available to it were offered to its shareholders.

30 But amongst those shareholders were also companies in the Anglo-American group? - But not to the extent which, I suggest, you are trying to infer.

40 Would you give me some indication of the extent? - I should say possibly 20% at the maximum of the shares offered by Rhodesian Anglo-American went to companies of what you describe as the Anglo-American group.

So then, would it be fair to say that the remaining 7,200,000 shares - I am bracketing the last two items together - would as to 20% be held by companies in the Anglo-American group? - Yes, I think possibly.

Now, when Bancroft was formed, it was then

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controlled to the extent of about 60 or 65% at least by members of the Anglo-American group? - Yes, I suppose possibly 50%, something like that.

And many of the other shares were held by members of the public or other institutions who themselves were shareholders in Rhokana and Rhodesian Anglo-American Limited and so on? They subscribed. I cannot say whether they were held.

Well, they subscribed. But the fact remains that the rights to acquire the shares or subscribe for the shares came to them by virtue of their shareholding in either Rhokana Corporation Limited or by virtue of their shareholding in Rhodesian Anglo-American? - Yes.

So there was a tie up there?

By YOUNG, J: Could you put that shortly, what this amounts to?

By MR. GOULD: Yes, my Lord. It really amounts to that all the shares were held by the Anglo-American group or by shareholders in the Anglo-American group? - No, the B.S.A. Company.

I beg your pardon, except for the B.S.A. Company which held three million out of twenty million. Now, this calculation shown on page 3, do I understand that, except for the British South Africa Company, all these companies are controlled by the Anglo-American Corporation? - Administered, my Lord.

By YOUNG, J: Is that your point?

By MR. GOULD: And companies in the Anglo-American group are shareholders in Rhokana Corporation and in Rhodesian Anglo-American and the other persons who subscribed for shares, individuals, were in turn shareholders of Rhokana Corporation and Rhodesian Anglo-American, so that they got their rights by virtue of their shareholding or the indirect connexion with the Anglo-American group as shareholders.

YOUNG, J: I just do not quite follow what the result of all this is. What is the point you are making?

MR. GOULD: The point I am making is that right from the commencement the companies in the Anglo-American group and shareholders in the companies

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in the Anglo-American group had a very considerable stake in the well-being of Bancroft.

By YOUNG? J: Would you agree to that, Mr. Acutt?
- Yes. A very considerable stake.

By MR. GOULD: A very considerable stake. Now, when Bancroft was formed, this stake was held by the interests we have just mentioned and I take it the position, apart from slight fluctuations, remained unchanged throughout the year, that is to say we can go over to the figures if you like in 1957/58, Rhokana Corporation still held about 43 or 46% of the shares in Bancroft? - Yes.

That's right? - Yes.

The British South Africa Company retained its shareholding of three million and actually increased it? - I am not aware of whether they retained them. I know at one point they increased them.

Rhodesian Anglo-American retained a shareholding in Bancroft? - A very small shareholding.

Members of the Rhokana Corporation Limited held shares in Bancroft? - There I think, my Lord, the position was extremely flexible. The shareholding obviously changed very considerably as far as the public were concerned.

But by and large we could say that Anglo-American interests held something in excess of 50% of the equity share capital of Bancroft? - I think not very much, if any at all, at that stage. I should have thought that by Anglo-American interests

I mean companies in the Anglo-American group?
- Probably around 50%.

Around 50% or more?

By YOUNG, J: What is the point?

By MR. GOULD: Rhokana Limited throughout retained about 43 to 46%.

By YOUNG, J: Just tell me the result of your discussion.

By MR. GOULD: Companies in the Anglo-American group

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have always held about or a little more than 50% in Bancroft, or more. That is the lowest figure. In addition to that, for purposes of development companies in the Anglo-American group - we shall specify them later - lent considerable sum of money to Bancroft. Is that right? - I think the only companies - well, Rhokana Corporation lent money. That was the first loan and was made to the company.

Well, let's start off on another basis. The company started with £6,000,000 in its coffers, being share capital and share premium account? - Yes. 10

On page 4 of Exhibit 2 it is indicated that the company would require £12,000,000. Is that right? - Yes.

To go into full production? - Yes.

It already had made arrangements that, in addition to the £6,000,000 which it had, notes to a total amount of £3,000,000 were to be subscribed by either Rhokana Corporation or by persons whom they would find would be willing to subscribe for those notes. Isn't that right? - Yes. 20

So that £3,000,000 would be subscribed either by Rhokana or by subscribers? - They undertook to find £3,000,000.

That is correct. The remaining £3,000,000 to reach a total of £12,000,000 was left in the air for the time being? - Yes.

Arrangements would be made to find that money as and when required? - Yes. 30

By YOUNG, J: What is the position now? In addition to the £6,000,000 share capital, there was £3,000,000 loan capital provided by your group? - By Rhokana Corporation.

By MR. GOULD: Rhokana Corporation undertook to provide a further £3,000,000 in the form of notes. If I may then invite your attention to Exhibit 6, if you look at the balance sheet on page 18, we find that as at the 30th of June, 1957 the share capital has increased from £5,000,000 to £5,500,000? - Yes. 40

Could you tell us off hand who subscribed for the additional half million.

By YOUNG, J: Does it make much difference in the overall scheme of things?

By MR. GOULD: I only want to show again in the group? - I think it was taken up half by the Anglo-American Corporation and half by the British South Africa Company.

On the exercise of options? - On the exercise of options.

10 To provide Bancroft with further money required? - Yes. I must come back to the point that the British South Africa Company was not within what is called the group.

We accept that. Now, we look at the balance sheet again and we find this additional capital was subscribed and then we find that the full £3,000,000 notes that we had referred to earlier in looking at the situation in 1954, had been issued? - Agreed.

20 Notes at 5% 1958-61, £3,000,000, that is the £3,000,000 which Rhokana had undertaken to subscribe or to find subscriptions for? - Yes.

In addition to that, we find that there was a further £6,500,000 owing by Bancroft on apparently unsecured loans at 6% - Yes.

Can you tell us offhand who the lenders were? - Anglo-American Corporation and the British South Africa Company.

30 Can you tell us how much each of those two companies had lent? - Of the first five, £3,000,000 was from the British South Africa Company and two from Anglo-American and the other £1,250,000 was from Anglo-American.

So Anglo-American had lent another £3,250,000 and the B.S.A. Company had lent another £3,000,000? - Yes.

By YOUNG, J: When we talk about Anglo-American, we do not mean the group? - No, he means the specific company.

When you are referring to the corporation, you call it the company and when you refer to all these companies, you call it the group.

40 By MR. GOULD: Yes, my Lord. At this stage we find the company had further current liabilities including creditors amounting to £1,196,905. Is that right. That is referring to the balance sheet at the bottom of page 18? - Yes.

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Could you tell us who those creditors were?
- Offhand, I couldn't.

Is it probable that a considerable number of those creditors were companies in the Anglo-American group? - No, if you are trying to imply that this was a further additional loan, no.

Not a loan, no? - No, a form of indebtedness from the group, no. I think this is purely normal trading investments. The previous year it was £1,419,000. That was ordinary normal trading.

10

Just pausing here, we find a situation that as at the 30th of June, 1957 the company's liabilities including its share capital amounted to a little over £20,000,000? - Yes.

Which was £8,000,000 in excess of the initial £12,000,000 which it thought it would require to bring itself to the stage of full production? - Yes.

Is that not right? - Yes.

And I think it is fair to say that at this stage the Bancroft mine had exhausted its share capital completely. It had utilised it all, is that not right, and these loans in the development of the mine and the commencement of production. Is that not right? - It had utilised that, yes.

20

It had no other funds available to it? - I think it had. It had stocks of copper and it had copper which was being currently produced and which at the time I think it was already able to raise money on, what is known as pipe line finance.

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But not very much. If you look at the operating account, its sales of copper amounted to £204,000 and its stock of copper and concentrates as at 30th June amounted to a mere £476,000? - A fairly considerable amount of money.

I agree? - Particularly as the mine at that particular stage, the output was increasing and the amount of copper available in any particular month exceeded the copper in stock at the 30th of June. A mine which is opening up cannot just be stopped at a particular point. The company was able to borrow quite considerable sums on pipe line finance.

40

We will come to the question of the production of the mine in a moment. That is quite a separate point. At this stage the company had exhausted all its loan facilities? - Yes.

Except for about a quarter of a million pounds, I think. We have it in the documents. It was looking for further loan facilities. We shall come to the purposes in a moment? - I think the company had exhausted its capital, but it was in production.

Excuse me, the company had exhausted its capital and the substantial loans? - Yes.

10 That is to say, it had exhausted the £5,500,000 plus the share premium account, plus the £3,000,000 notes, plus £3,250,000 loans, it had exhausted all that? - It had used most of that up, yes.

And it was looking for the borrowing of further money. If you look at the directors' report, page 8, you will see that this was the picture of its financial position? - Yes.

20 "The balance of £3.5 million available to the company under the £5 million loan facilities granted by Anglo-American Corporation of South Africa Limited and the British South Africa Company was fully drawn by the end of 1956 and short-term loan facilities of £1.5 million were then made available by Anglo-American Corp. to meet the anticipated temporary short-fall. When these facilities were exhausted as a result of the difficulties referred to above, arrangements were entered into with Anglo-American Corporation and The British South Africa Company whereby those companies agreed to take up by 1st March, 1957, instead of by 1st July, 1958, the balance of 1,599,650 shares on which an option of 37/6d. a share had been granted and proceeds amounting to approximately £3,000,000 accrued to the company. In consideration, therefor, the rate of interest on the loan of £5,000,000 made available by those companies was increased from three and a half per cent to 6% per annum. The short term loan of £1.5 million from Anglo-American Corporation was repaid, but the unfavourable circumstances continued and by April, 1957, it was again necessary to call on this source." That means additional
30 temporary loans from Anglo-American. Is that not
40 right? - Yes.

"At the 30th June, 1957, drawings of £1.25 million had been made and the remaining £0.25 million was drawn in July?" - Yes.

"Advantage was also taken of credit facilities available against stocks of copper in transit and £0.75 million had been drawn by September?" -
Yes.

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I think it is fair to say that at that stage the cost of developing Bancroft mine far exceeded original estimates. Is that right? - Yes.

And that the company was not in a very prosperous financial plight? - No.

That's right.

By YOUNG, J: Does all this mean that you were very short of working capital? - Yes.

By MR. GOULD: Now, I think it was round about this time that some thought was given to the question of capitalising these amounts so as to provide Bancroft with permanent capital? - Yes.

10

Instead of making it beg and borrow working capital as and when it required the money. Is that not right? - Yes, you will find mention of that on page 9 of the Bancroft report for 30th June, 1957, the one which you referred to.

I am coming to that. The whole basis is set out, that: "It is, however, advisable to arrange permanent finance and it is proposed to seek members' sanction at the forthcoming annual general meeting to the increase of the authorised capital of the company from £5.5 million to £6.25 million by the creation of 3,000,000 new shares of 5/- each and to the placing of these shares at the disposal of the directors?" - Yes.

20

That is an increase of ordinary capital? - Yes.

Ultimately there was a further idea of issuing preference shares? - That came later.

30

The following year, issuing 7½% preference shares? - Yes.

Which would take up all these loans? - Yes.

And I think we might as well, while we are on that, go over to the issue of these shares and I think you will find it in Exhibit 7, or is it Exhibit 8? In Exhibit 7 on page 5 in the Chairman's review, the Chairman informs the meeting for the year ended 30th June, 1958 that: "Members will

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recall receiving a circular dated 26th February, 1958, in which they were informed that Anglo-American Corporation of South Africa Limited, Rhodesian Anglo-American Limited, Rhokana Corporation Limited and Mchanga Consolidated Copper Mines Limited had put forward proposals to our company to replace, by finance of a permanent nature, the existing short-term notes and temporary loans of £6,500,000 and to provide the £1,000,000 required by our company to carry out its revised programme and to be in a position to resume production at the full rated capacity of the plant at short notice at any time after 31st March, 1959. The discussions which followed resulted in an agreement being concluded in terms of which our company will on 1st April, 1959, repay to the lenders £7,500,000 by the issue of 7,500,000 fully paid 6½% redeemable participating preference shares of £1 each at par. In consideration for these arrangements, the four lending companies have been granted an option to subscribe at any time up to and including 31st March, 1963, for 3,000,000 5/- reserved shares in our company at the price of 20/- per share." Just to complete the picture, later, of course, Bancroft acquired money again, I think in the 1960 year. These options were exercised, but at a reduced price of 17/6d each? - They have not yet been exercised.

30 Were not some of them exercised? - An arrangement was concluded whereby they would be exercised if Bancroft called on the company to do so.

So that when we look in Exhibit 8 we find in the balance sheet, that is to say the 1959 balance sheet, the financial position of Bancroft has been cleaned up by an issue of 7,500,000 preference shares plus some additional ordinary shares. Is that right? - No, that is the authorised. The issued has not changed.

40 I beg your pardon, the issued has not changed. At that stage, at the end of June, 1959, it still had loans of £5,000,000 at 6%. Those loans, you say, were by the B.S.A. Company and the Anglo-American? - That was a long term loan.

By YOUNG: J: Why do you say long term loans? I see they were repayable on 31st December, 1960? - Repayable, but at the same time Bancroft had the right to call upon the company to subscribe for a long term debenture.

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By MR. GOULD: In respect of these particular loans?
- Yes, of that £5,000,000. They had the right to
convert it into a long term loan.

Now, Mr. Acutt, we then find, going over to
another point, that Bancroft when it was formed in
1953 thought that its development programme would
take a matter of five years and that it would
commence production in about 1958. Is that right?
- Yes.

But in actual fact it commenced production 10
one year earlier? - Yes.

I think the correct date is January, 1957? -
Yes.

What was the reason for starting one year
earlier? Was that because the copper price was
high in 1956 and the beginning of 1957? -
Modern trends where capital is enormous, as in this
case it was, and due to the high copper price when
they were developing, the cost was inflated for
Bancroft and the higher copper bonus which affected 20
all their costs. It was ordinary business prudence
to try to get the mine into production as soon as
possible so as to get a return as quickly as poss-
ible on the amount invested.

You have given us two reasons. You say,
firstly, because of the high price of copper
generally employers had to pay employees very sub-
stantial bonuses? - Which inflated the capital.

So that a non-producing mine like Bancroft 30
had these additional expenses in the way of pro-
duction? - Yes.

Furthermore, they had to pay very substantial
amounts of interest because of this tremendous
amount of capital that had become involved in the
undertaking? - Yes.

Would it be fair to suggest that another
reason which actuated the minds of the directors
of Bancroft was that in 1956 and the beginning of
1957 the price of copper itself was very high and
if it accelerated the date at which it would com- 40
mence production it would come in at this boom
period and be able to operate fairly profitably?
- I don't think you can deny that the price of

copper obviously has a bearing. The main inducement obviously is to try to give a return on your capital invested as quickly as possible in any mining venture.

Let me put it to you another way. If the copper price had been down to £160 in 1956, would the Bancroft directors have done very much about accelerating the proposed date of commencing production? - Had that resulted in profitable operations, yes.

10

Now, I will just put the question to you generally: Isn't it a fact that Bancroft really opened the mine prematurely. They really commenced production prematurely? - From the point of view of not having available tonnage underground?

I will give you the points, yes. From the point of view, firstly, of not having had sufficient development underground. Is that right? - In the event, yes.

20

It would have been much better if Bancroft had continued its development programme for another year before commencing operations, continued its underground development? - From a purely operating point of view, probably yes. From a financial point of view, I should say No.

30

Let's deal first with the operating point of view. From the operating point of view, you say there was inadequate development really to justify the commencement of production? - No, I didn't say that at all. The consulting engineers were of the belief that there was sufficient underground development, but when they began to do the stoping, it was found that the ore body was more folded. There was more water than had been anticipated under the stopes and, therefore, it was not as easy to remove tonnage as had been hoped. This was discovered only after the mine had been in production, because the water in Bancroft is isolated in certain areas and it was only when they started stoping in the high water bearing area that they realised it was difficult to achieve the tonnages which they wished to achieve.

40

By YOUNG, J: You wouldn't say this was insufficient development. It was an unforeseen contingency or unforeseen circumstances? - It was difficult ground and high water had made it very difficult to carry out the development originally contemplated.

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Does that come under the category of in-
sufficient development? - It could, if you
wish.

I thought that was the point, premature pro-
duction because first insufficient development
from an operating point of view, is that not
correct? - Not insufficient development, but
the development was found to be more difficult
than originally contemplated.

By MR. GOULD: We might look perhaps just to start
off with at Exhibit 6 and if we look at the engi-
neers' report at page 13 you will find that at the
30th of June, 1957, in the middle of the page,
stope preparation covered a footage of 20,128 feet.
Is that right? - Yes.

10

Now, that was the position as at the 30th
June, 1957? - Yes.

I think that represents the area which you
could actually excavate or extract ore? -
Immediately, yes.

20

That is the stope facing? - Yes.

As you commence stoping the ore in this
portion of the mine, so the development would have
to continue to expose further stoping faces for
future operations, is that not correct? - Yes,
it is a continuous process on a mine.

Because you cannot exhaust the channels you
have, the little chambers or compartments. You
have to keep on developing, otherwise the mining
operations would stop? - Yes.

30

Now, when you said to his Lordship that
development was found more difficult than you
anticipated, did you mean further development from
these stope faces or the mine in these particular
stope faces themselves? - Nearly all the work
carried on underground which is not purely the
extraction of the ore, is development work.

So that further development of the mine be-
yond this 20,128 feet of stope preparation was the
difficulty that you encountered. Is that right?
- Can I just go on there? You will see the
average daily volume of water pumped from number
one shaft increased from 7.7 million gallons in

40

1956 to 11.6 million gallons in June, 1957 and that all adds to the difficulties of development.

Does it also add to the difficulty of extracting the ore from the developed areas? - Generally, because you have a greater tonnage of ore to be carried up the shaft.

I don't want you to tell me from memory. Perhaps it is not fair to you to ask you....

10 By YOUNG, J: I did not follow that, a greater tonnage? Why do you say that? - They find today from development one has to take the development tonnage as well as the stope tonnage up the shaft to get it out and it does create an added burden to the mine.

I am not quite clear that I follow the point. What is the point?

By MR. GOULD: Would you mind elaborating that? - I am sorry, could you repeat the question.

20 Perhaps we had better start right at the beginning. What were the difficulties actually that Bancroft experienced when it commenced its production? - More water than it anticipated, increased

Wait a minute. Now, more water. This water came through fissures underground, did it not? - Yes.

In the areas that you were developing? - Yes.

30 And had to be pumped out in order to enable you to proceed with the development? - Yes.

Consequently, I understand there was friable earth in there and that when the water got mixed with this sand or layer a certain amount of mud developed. Is that not right? - Yes.

That mud could not be pumped out in the same way as water could be pumped out and interfered with the development and mining operations? - Yes.

40 And truly the position was one which gave rise to real concern and apprehension on the part of the

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directors and consulting engineerings because you were faced with unforeseen difficulties which involved a lot of expense and a lot of retardation of your development potential. Is that not right?

- I think that is right to some extent. Obviously, the directors, the consulting engineers, would have been failing in their duty had they not taken due cognisance of these facts, but I think learned counsel has demonstrated that the consulting engineers and the directors and also what he chooses to call the Anglo-American group, had complete confidence in the outcome of the mine by the investment which they continued to make in the property.

10

I am afraid with great respect I cannot let you off as easily as that. I am afraid I will have to put to his Lordship the full detailed troubles which you people experienced underground?

- I think they are in the report.

Lunch adjournment.

20

Cross-examination by Mr. Gould continued:

Mr. Acutt, when the Court adjourned we had started talking about the technical difficulties that Bancroft had struck in its mining programme?

- Yes.

We had come to the stage where I think you had admitted that, as events ultimately showed, Bancroft mine had opened prematurely. Is that right? - Well, I think the point, if I may say so, was that I didn't say it had been prematurely, but that the development work and the conditions which they found at the time were such that the mine was having considerable difficulties.

30

Had those difficulties been foreseen, production operations would not have commenced in January, 1957? - I wouldn't like to say that.

I understood you - I hope I misunderstood you - to have said categorically that events proved that the mine had commenced production prematurely? - I don't think I did quite. However, I think the point is a minor one.

40

By YOUNG, J: I think it was mainly a question of what was meant by premature production, because he went on to say: "Premature production in the sense

that development had proved more difficult than contemplated".

By MR. GOULD: As your Lordship pleases. Mr. Acutt, we will, with your kind permission, my Lord, proceed to deal in some detail with the actual difficulties that Bancroft encountered both in mining the area and in developing the area. I refer, first of all, if I may, to the Chairman's review in relation to the year ended the 30th of June, 1957, Exhibit 6, that is Bancroft's. That is at page 5. The review starts as follows: "Members will know that Bancroft commenced production in January." That is January, 1957, is it not? - Yes.

"..... and they must also be aware that the early months of production have not been smooth. We have been faced with, and are still facing, a number of unforeseen difficulties, with which I propose to deal briefly in this statement. I should like, however, in view of the anxieties which must have arisen in your minds, to preface my review by stating my confidence in the future prospects of our mine. When we first considered opening up the mine, we estimated that it would take five years to reach initial production but, in view of the very large tie-up of capital, we re-organised the programme with the aim of starting production one year earlier, that is, in January of 1957. This target we achieved but we are not going to be able to build up to full production as rapidly as we had hoped." Pausing there, "In view of the very large tie-up of capital," that means the £20,000,000 to which you have referred? - The capital of the company, yes.

The amount of capital which had been absorbed in expenditure on development. Then the Chairman proceeds: "Development problems. I am confident that our present difficulties will be overcome and I must give you an explanation of how these difficulties have arisen so that, by understanding them, you will understand my confidence. Our two great problems that have added considerably to the cost and have greatly retarded the speed of development, are the presence of large volumes of water in the strata through which the underground workings have to be carried, and the existence both in the foot-wall beds and in the orebody of muddy seams that, in combination with the water, disintegrate to form

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"running and extremely treacherous ground." Now, pausing there, I am given to understand that it means that the underground developed ore showed there was a lot of friable deposit and that when water mixed with that formed mud, that mud would run into the workings. Isn't that right, into the open channels underground, that is what you would call the mud rush, is that correct? - I am not a technical expert, my Lord, and I would like just to make that clear. I think the Chairman here was referring to the difficulties in getting the ore from one level to another, not in what you describe as the mud running into the channels. It may be ore very difficult to handle. The ore comes down from one level to another in boxes and due to this build up of mud, it very often jams and when you break it away you get a rush of the mud coming down to the point at which it is collected to go up in the skip.

10

And, of course, there could be a collapse of the workings completely? - I don't think entirely due to that.

20

I have not a very clear picture of underground workings, but I understand what happens is you sink your shaft first? - Yes.

The n you start lateral development, which means you build underground channels so to speak, and from those channels you extend sideways? - And in depth.

And in depth, and you ultimately develop what could be called either compartments ? - For what purpose?

30

I mean of ore? - Stoped out ore.

That is where you start excavating. Those are your stoping places? - Yes.

Then you start excavating and you drop from the top levels to the bottom levels and you carry the ore up through the shaft to the surface? - Yes.

Let us assume in any one of these levels you have a lot of these deposits of a friable nature and water mixed with that and it washes away as friable stuff and the orebody could, of course, collapse, could it not? - No, I don't think so. The orebody couldn't collapse due to that particularly. It

40

could happen, of course, that an orebody could collapse, but I think that was never envisaged in this particular case.

Could any of this mud that is formed run into the particular channels. I don't know whether that is the right word? - The drives.

The drives, and make it difficult for the underground people to work at all? - Oh, yes.

10 They could be washed away completely in this mud. You cannot swim in mud, can you? - No, it couldn't be quite like that again. It wasn't a danger to life or a danger to the underground workers that any one was contemplating at all.

It was just a matter of degree. It could have been? - I am not denying that. Anything can happen in mining.

20 When they do refer in later reports to mud rushes, what do they really mean? - A mud rush was what I described previously, the cause of this ore coming through as a finely mixed integrated sludge, tying itself up in the boxes and then, when that is released, breaking away under the pressure and rushing down.

Rushing down where? - Down to a lower level at which it was intended to pick up that ore for hoisting.

What is the effect of running down to that lower level? - It depends on the duration and the quantity of material that comes down.

30 The quantity and duration would, of course, in every case be, as I say, one of degree and unpredictable. Is that not right? - Yes.

40 It would depend on the amount of water and friable soil. Now, if it comes down in very large quantities, what would be the effect? - There is a limitation to how much comes down, limited by the size of the box through which it can run. If it catches somebody unaware and standing at a point where he was not expecting the rush, it could be crippling, but again I must stress I am not a technical man, but I would say it could not result in anything more than a partial disablement of the workings of the mine for a short time.

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Then, you would have to clear all that sludge out first and go back to where you were? - Yes.

How would you meet this type of mud rush from this type of disintegration that forms this running, treacherous ground? By cementation? - No, not particularly. Cementation would play some part, but again without being able to describe exactly what happens in practice, the management of the mine, by a redesign of the grizzly bars which are at the top and arranging that the whole movement is kept going, have avoided any mud rushes since the ones described in the one report. 10

Would that not involve a temporary cessation of work in order to take these underground precautionary steps to combat the mud? - In that area, yes.

And if these were to become universalised over the mine, or even at odd places, then it would be over many areas that these precautionary steps would have to be taken before continuing extraction? 20

- May I go back again? I think one must make it clear that mining was not all at one level. The shaft was sunk and at various levels the orebody was penetrated and the likelihood of that occurring would be easily and very quickly picked up by the technical people, and I think steps would be taken very much earlier to avoid any major disaster of that type occurring.

Yes, but the steps would involve the cessation of the extraction of ore and a concentration on taking these precautionary measures to prevent interference with mining operations that would be caused? - In the area alone, but you would still continue to hoist ore from the other parts all round. 30

Let me ask you one thing in parenthesis. You have been in mining in a very elevated executive position for quite a number of years. Did I correctly understand you to say that, notwithstanding all those years experience in mining, you cannot really talk about the technical side? - No, I made it clear that I was not a technically trained person. I have been concerned with mining probably all my life and I have had mining in various aspects, but I would not describe myself as a technically qualified mining man. 40

10 All I wanted to ask you is if in these annual reports we find a discrepancy between the consulting engineer's report and, let us say, the Chairman's report, then is it fair to say that the consulting engineer's report should prevail? Don't worry about this one? - I merely make the point that the Chairman's review normally deals with the matter as a Chairman but the consulting engineer goes into detail of a technical nature written for technical people and for shareholders too.

So if there is a discrepancy between what the consulting engineer says and what the Chairman says, then his Lordship should place greater reliance on what the consulting engineer says? - Except that the Chairman's review is not allowed out until the consulting engineer has examined it, so I think there must be some reconciliation.

20 But where, for example, there might be direct conflicts, what would you say should prevail? Because there are some such examples to which I will draw his Lordship's attention just now? - I would rather be in a position of examining the exact ones, in which case I would give an opinion as to whether the consulting engineer or the Chairman was correct.

30 Let's carry on with this. Say he says that in the orebody there are muddy seams that in conjunction with the water disintegrate and form running and extremely treacherous ground. "You will know that in the early stages of production, rapid lateral development is essential in order to make more ore available for extraction and it is the curbing of the speed of this development that has reduced the rate at which we can increase to full production?" - Yes.

40 Now, pausing there, you have already told his Lordship - we will give it to him in greater detail later --- that there was only about 20,000 feet stoping face at the end of June, 1957. The stoping development had only covered about 20,000 feet. You will find it at page 13 of this exhibit? - Yes.

That would be a relatively small footage, would it not? - I find that a difficult one to answer, but it depends entirely on what was done the previous year and what is demanded of a mine.

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I will help you to this extent and say that after your development in the 1959 year you had reached a stoping preparation area of about 83,000 feet. We shall come to those figures later? - Which I think, my Lord, includes this figure.

It probably does include that figure. I beg your pardon, I want to make it clear I am dealing only with number one shaft, because number two shaft was closed. I am not concerned about that? - Yes.

10

I want to make it quite clear I am only dealing with number one shaft. The Chairman says in the early stages of production rapid lateral development is essential to make more ore available for extraction? - Yes.

So that, as you start mining near the shaft, so you have to get further and further away from the shaft by rapid lateral development in order to prevent what I have been given to understand is called over mining, that is to say, you are not allowed to mine too much round the shaft area? - The expression is an expression which does not describe what you are talking about. "Over mining" is mining beyond the grade of the mine. You cannot mine for safety under mining regulations within the shaft pillar area, but over mining is mining beyond the calculated ore reserves of the mine.

20

Yes; beyond the calculated ore reserves of the mine? - As expressed by payability.

What does the Chairman mean by: "Rapid lateral development is essential to make more ore available for extraction?" He emphasis that? - Well, my Lord, the whole mine is equipped to do some 150,000 to 160,000 tons of ore per month and, therefore, in order to extract that from a shaft system, everything is desired in order to get the ore out. The important thing is to get the ore and, therefore, lateral development or any development is essential in order to make that ore available for mining.

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40

By YOUNG, J: May I interrupt you a moment, Mr. Gould, so that I know how much attention I have really to pay to all these details. It would not embarrass you, would it, to tell me what is the proposition you are contending for by this cross-examination?

10 MR. GOULD: No, my Lord, in this case it would not embarrass me. The point we are making is Bancroft inevitably would have had to close down for a period which was estimated at about a year until it corrected its underground troubles. It could not have carried on producing copper in any event during that year at the rate of output of 4,000 tons a month or 40,000 tons for the year, even if it did not have to close down and, thirdly, that in any event, if it could have continued mining, it could only have done so at a phenomenal rate of loss, having regard to the price of copper then prevailing. There are further points which perhaps it would not be advisable for me, with your Lordship's permission, to disclose at the present stage, but I think I have indicated to your Lordship and to my friend, Mr. Acutt, exactly what this cross-examination aims at.

20 YOUNG, J: Now, next, could we ascertain from the witness to what extent he contests these propositions? I am not clear that he has ever stated this.

30 By MR. GOULD: I was coming to that afterwards, but I will put it to him now. Mr. Acutt, you have heard the points we are striving to establish. What do you say to them? Let's put it to you fairly. When these underground troubles, the nature of which we will examine just now, were encountered in Bancroft, Bancroft's mining operations and development operations were severely impeded, were they not? - Yes.

Was it at that stage at any time contemplated that the mine should cease production for a period in order to be able to work uninterruptedly on underground development and to take all the precautions necessary to eliminate these unforeseen difficulties? - No, my Lord.

40 By YOUNG, J: It was not contemplated that the mine would have to close unless you mean, of course, this financial assistance was forthcoming?

By MR. GOULD: I am dealing now only with the technical difficulties. It was never contemplated by the directorate of Bancroft that Bancroft might have to close down on account of the technical difficulties? - No.

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I am talking now about 1957, is that right?
You say it wasn't contemplated at any time between
January, 1957 and January, 1958? - Yes.

At no time contemplated? - No.

Mr. Acutt, do you want to make that as a
categorical statement that it was definitely at no
time contemplated or that you cannot remember? -
No, it was not contemplated.

At all? - No.

Secondly, Mr. Acutt, was it contemplated that
Bancroft would be able to produce 4,000 tons a
month of blister copper? - It was contemplated,
in fact, the tonnage was growing at the mine at
the time that this agreement was entered into.

10

Please let's go back. I am talking from
January, 1957 until January, 1958? - May I
make one other point clear, that when a mine opens
up the rated capacity of this plant was not 40,000
it was 60,000 tons, but on any mine, unless a
great deal of development work is done of a pre-
liminary nature - and on that point we touched
this morning when I was asked whether we were not
trying to speed up the opening up of the mine
beyond the capacity of the mine - the tonnage must
grow. In fact, the first month normally you have
a stock pile of development ore and, therefore,
that is mixed ore and the grade is not as high, so
you start with a smaller tonnage, building up, and
if you will go through what has actually happened
at this mine, leaving out the particular year in
which they were closed, monthly there was a pro-
gressive increase in copper produced. The target
at that time was 40,000. The next target was
50,000 and, in fact, this year if it had not been
for a cut the mine would probably have achieved
60,000. This is in the ordinary nature of running
in a plant and getting your ore up.

20

30

I am coming to all that in detail, but at this
stage the question is, in view of the unforeseen
difficulties that were encountered underground, was
it sanguinely expected by the directors of Bancroft
that it could hope to achieve a production rate of
40,000 tons of copper in the 1958 year? - Yes.

40

It was? - Yes.

And if the engineers and the Chairman say that it was obvious that could not be done, what would you say? - I should be very surprised if they said it was obvious it could not be done.

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10 That is in January, let us say between the 1st of July 1957 until January, 1958 when this arrangement was entered into, you say it was at no time contemplated that Bancroft would not be able to reach its target of 40,000 tons a year. Is that right?

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By YOUNG, J: For which year?

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By MR. GOULD: For the 1959 year? - From June?

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20 From June to June, if you like? - When one says at no time contemplated, everyone was aware of the difficulties, but on the other hand there was no good reason technically if those difficulties could be overcome why the mine should not produce that amount of copper and the copper sales which were entered into for the year were on the basis of that amount of copper being produced.

- continued.

That is only a preliminary answer. We are coming to the details shortly. I think you would agree that for the six months from January, 1957 until June, 1957 a very substantial operating loss was sustained by Bancroft. Is that right? - Yes.

30 Consequently, over the period 1st July, 1957 until the 31st December, 1957, further very substantial operating losses were sustained by Bancroft - May I just look at my figures?

Would you look at your 1957 profit and loss account and operating account. In Exhibit 6 on page 21 this represents your mining results for the period January, 1957. Is that right, until the 30th of June, 1957? - For the six months, yes.

There you show a net loss on operating of £1,003,271? - Yes.

40 To that for the year you would have to add your head office administrative expenses of £30,042 seen in the profit and loss account? - Yes.

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You would also have to add the other two items, interest payable and directors' fees. Is that right, because those would be losses? - For the calendar year?

For the calendar year, that's right, is it not? - No, my Lord, it is not right. I would refer to the consulting engineer's report where it deals with the build up of damages or in one of the director's reports. "The production of concentrates began on a limited scale in January, 1957, after a three-weeks strike by European daily paid employees in December, 1956. The smelting of the concentrates commenced at Nkana in February and the first sales proceeds were received in April." Now, your sales of copper are not your output of copper, because for the first two months all your output goes into pipe line stocks. If your operating scale is on an increasing scale, which happens at any new mine, you are all the time increasing your pipe line and I would not like to say off hand but I am convinced that the amount of profit or loss shown here is in effect covered six months, but the copper produced in that six months only related to three months in operation. 10 20

That is all right, but there was a substantial loss? - Yes, but you cannot relate it to a year.

Let's look at the 1958 balance sheet, Exhibit 7, at page 17? - Yes.

Here you have had nine months of copper production, from the 1st of July, 1957 until the 31st of March, 1958. Is that right? - Yes. 30

Plus the little overflow in April, 1958 when you were still producing copper during the final stage of closing down, that was about 141 tons? - Yes.

Here you had sold all your copper that you carried over from the previous year? - Yes.

And all the copper that you had produced during those nine months? - Yes.

That's right? - Yes. 40

And you showed a loss on operating account for those nine months of £1,132,699? - Yes.

Is that right? - Yes.

Now, on this basis, even assuming that the Bancroft mine would have been capable of continuing its mining operations as seen by you gentlemen in January, 1958, it would have continued and assuming further that it could have produced 40,000 tons of copper in the 1959 year from the 1st of April, 1958 to the 31st of March, 1959, isn't it a reasonable inference that, having regard to all the difficulties underground and the low price of copper then obtaining, it could only have produced the 40,000 tons of copper allocated to it at a very substantial loss? - I think that is probably true, but had the prices remained as they were, the losses would have continued to pile up. Against that, the company had to continue to pay interest. This would have to accumulate anyhow. You cannot just close down a mine.

We are not really on that point yet. I have only given his Lordship three points? - My Lord, I was asked a direct question.

I was asking just on the operating gains or losses. When it comes to the interest part, I will add that? - May I go to the operating? You would have had to continue pumping or otherwise abandon the mine and the £20,000,000 investment for a considerable period and for a long time the pumping would have had to continue. The ordinary overheads of the mine probably would have had to continue and any copper which could be produced - because it is not the production, it is not the milling of the copper which is the costly element in mining - could only help to improve the situation and, therefore, although this was never contemplated, I should have said that had it been raised it would have been and major efforts would have been undertaken by the directors to keep Bancroft in operation rather than to close it down.

That's all right. I will give you the fullest opportunity to develop all your themes on that. I just want to talk, if I may, to you through the mouths of your directors, through the mouth of your Chairman and through the mouth of your consulting engineers as to the picture that they portrayed about Bancroft mine, its difficulties and its disabilities round about the 1957 year up to the date when this arrangement was made, and get your concurrence or any explanation you can give of the

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gloomy picture that all these gentlemen portrayed to shareholders in respect of the company. It is on that first point that I say Bancroft mine was in any event going to close down in proceeding with its underground development, and the other two will come, its production potential and the question of whether it could do it at a profit. Now, Mr. Acutt, be fair. Before we even proceed further, the ultimate submission to his Lordship is also going to contain, I might as well be completely frank with you, the submission that Bancroft would have had to be financed by at least another £2,000,000 to carry on mining operations or more in the 1959 year and, further, that this whole question of the arrangement is going to be assailed on behalf of the Crown as not being what it is portrayed to his Lordship to be. There is no suggestion of dishonesty, but in essence on an investigation of the true circumstances, this was an arrangement of convenience where Bancroft really had a Hobson's choice in the matter. It was going to close down in any event. It could not operate. It could not produce this 40,000 tons and the arrangement was merely one for the group to meet its forward sales and to finance Bancroft to proceed with its underground development. That is going to be the Crown's case. Perhaps from there we can proceed point by point? - May I just say right at the beginning that Bancroft is a company which is owned by one block of shareholders and all the companies are owned by other shareholders, and if this is the case it may cut it short if I could just point out that the directors of Nchanga and of Rhokana who were present at this would not obviously have asked Nchanga to pay an amount if they knew that Bancroft had no right to ask for that amount.

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That we shall come to. The point is made by my learned friend, I have really been asking just to try to illustrate what I have been driving at, and perhaps we can proceed from that point onwards. Now, let us proceed with the Chairman's review of 1957. He says there had to be rapid lateral development. That is on page 5 of Exhibit 6 and the speed of development was being curbed as the result of these unfortunate underground difficulties that were encountered. He then proceeds and says: "However, muddy seams in themselves are no great hazard, provided that the water is eliminated. The lowering of the water table is responding to the

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increased pumping capacity that has just been brought into commission. Thus, although we are passing through a difficult period, we can say now that conditions are improving and that we can see the way out of our present difficulties. In addition to these troubles, work in general and underground development in particular, were interrupted in December, 1956 for a period of about three weeks by a strike of European daily-paid employees arising from a dispute affecting an underground official. The loss in production resulting from these difficulties and delays was considerable, and the revenue accruing from the sale of the smaller tonnage was itself seriously affected by the fall in the copper price. In consequence of all these factors, we sustained a loss of £1,255,608 during the first six months of production. The plant has been designed to treat something over 150,000 tons of ore per month from which 4,000 short tons of copper may be expected. Until this position is achieved, it is obviously fruitless to attempt to relate costs at the mine to the tonnage produced. The consulting engineers believe that when the mine becomes fully operational, its costs per ton will compare with those of the other mines of the copper belt. The surface plant has operated satisfactorily. This has been an encouraging feature as it was not until a few months before the commencement of production that sufficient "tonnages were available for full metallurgical tests and adjustments to the plant had to be made concurrently with operations." I am going to detain his Lordship by dealing with the question of capital expenditure. We know the financial position as it appeared in November. That is right, is it not? - Yes.

Now, I would now like to draw your attention to the consulting engineer's report at page 12. Under "General", we start off with the sorry picture. The consulting engineers of this mine were Anglo-American Corporation of South Africa Limited. They supplied the technicians? - Agreed.

"The mine was officially opened by Sir Ernest Oppenheimer on 29th March, 1957." That was after production had commenced. "The concentrator started treating ore from development storage dumps on 2nd January, 1957, stoping ore from number one shaft in February and from number two shaft in March, 1957. These dates were later than anticipated through delays caused by strikes of both European and African employees as well as the

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abnormally difficult conditions encountered underground. Unfortunately, these difficulties have not as yet been satisfactorily overcome, and as a result it has not been possible to increase the monthly tonnage treated as rapidly as had been planned. From all the information available, it would appear that the milling rate of 150,000 tons per month will not be attained until early in the second half of 1958". That is right? - Yes.

"The intersection of heavy water-bearing zones and areas of weak strata requiring support have severely handicapped the development programme. In the stoping area large quantities of water have been encountered, which has made the mining and handling of the ore extremely difficult. Because of these conditions it was decided at the end of 1956 to stop the sinking of number three shaft, after the collar had been installed, and concentrate all efforts on completing numbers one and two shafts. The restarting of number three shaft will be reviewed in relation to the progress made in opening up stopes at the other two shafts as well as the copper price. Copper from the mine was first cast at the Nkana Smelter in February, 1957, and the total production to 30th June, 1957 amounted to 3,806 short tons of blister copper". How many long tons would that be? You actually deal only in long tons? - For sales we deal in long tons.

When you deal with 40,000 tons? - That would be long tons.

I will show you that the 3,806 short tons equalled 3,398 long tons. That would be right? - Yes.

Now, Mr. Acutt, you have no quarrel with that, have you, the probability being that you couldn't hope to attain a milling rate of 150,000 tons a month until some time in the second half of 1958? - The words used, if you are quoting from here, were: "It appears that the milling rate of 150,000 tons a month will not be attained until early in the second half of 1958".

That is what was envisaged then. Now, this report was dated the 11th October, 1957, as appears from page 17? - Yes.

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So, is it correct to say that you must read this report as at the date at which it was issued by the consulting engineers? - Well, I think the reports are all dated October, because that is the date of issue.

So they are talking about conditions as they see them as at the date of issue? - At the date of writing the report.

10 So it would be round about October, 1957? -
Probably a little earlier.

20 Now, let's concentrate, if we may, on number one shaft. On the same page, on page 12: "Mining. During the year and waste pass systems were completed, the grizzly and finger controls were installed on the main levels and the underground crusher was commissioned. Stopping commenced in February, 1957, but progress was hampered by the friable nature of the ground which, on contact with water, disintegrated rapidly into mud. This mud was not only difficult to handle on the levels, but also caused mud rushes from the ore passes. Every effort has been made to seal off all water leaking into the passes, but unfortunately it was not possible to make a complete seal and this additional water mixing with the ore and waste in the passes increased the difficulties. A renewed Cementation treatment improved conditions to some extent, but it is not anticipated that this problem will be overcome until the water table has been lowered." Now, this was not a very happy picture at that stage, was it, I mean, from the point of view of you gentlemen as directors of the mine. You had quite a lot of cause for concern. There were difficulties which had not yet been solved. They might increase in intensity? - Or diminish.

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You were hoping that they would diminish, but they might increase? - Yes.

40 And, nothing had yet been solved, but the prospect was a bit dismal, both from the development point of view and the mining point of view. I mean, the immediate prospect at that time in October, 1957? - I think it is set out very clearly here that the position was by no means a very happy one.

That is all I need from you. This is October,

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1957. We are approaching January, 1958. Now, the anticipation was that you would not be able to go into full production of about 150,000 tons a month for milling purposes until the second half of 1958. Is it correct to say as time went on the possibility of milling that tonnage receded, just from memory first? - I should have thought not, because if you read on further in the consulting engineer's report, they deal with the installation of additional pumps to deal with the water and so far as I recollect, those pumps were actually by the end of the year operating at some 20,000,000 gallons a day and the water table had been very much lowered.

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Perhaps I could refresh your memory a bit by proceeding to Exhibit 7. That is the Bancroft report of 1958 at page 4. Here, my Lord, if I may save trouble referring back, I would like to start off with the copper price. "Members will know that after the many years of scarcity which had forced copper prices up to the summit levels of 1956, a comparatively small excess of world production over demand brought about a rapid and sharp decline in the price of the metal; by 1st July, 1957 - the beginning of the financial year under review - it had fallen to £215 a ton. A further deterioration was, however, still to follow and by the time the price reached £160 per ton in February, 1958, most of the world's leading producers had decided to reduce output in an endeavour to correct the situation. In the case of our company and the other two producing copper mining companies of the Anglo-American group, a joint decision was taken to fall in line with other African producers and to effect a 10% cut in the combined planned production of the three mines for the year from 1st April of 270,000 tons of which your mine was to have contributed 40,000 tons. It was considered that such a cut-back should be aimed not only at restoring the balance between production and demand, but also at "Eliminating expensive production, thereby ensuring the minimum margin of profitability allowed by the low market price. As a result of the difficult mining conditions, to which detailed reference was made in last year's review, production costs at our mine were considerably higher than at Rhokana Corporation Limited and Nchanga Consolidated Copper Mines Limited." That is fair enough? - Agreed.

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Now we come to cessation of production. "I was pleased, therefore, that we were able to join

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in a scheme which involved ceasing production at the mine for approximately one year from 1st April, 1958, and confining operations during that period to underground development at number one shaft, the cost of this work being financed by payments to our company by Rhokana and Nchanga who, in turn, undertook to increase their production slightly in order to fulfil the group's revised programme. Whilst it appeared from the mine's production in January that the 1958 target of 40,000 tons per year could be achieved, it was equally clear that production at the full rated capacity of the plant would be difficult to attain as long as rapid lateral development was being curbed by the combination of large volumes of water and bad ground. The cessation of production was undeniably a set-back to the company, but nevertheless I regard it as not unmixed with advantages. Unhampered by the problem of maintaining production, the mine has been presented with a unique opportunity to concentrate attention on studying and overcoming the root causes of the difficulties which beset the mine and to speed up development. In a circular dated 30th January, 1958, members were informed of these arrangements which are regarded as beneficial to all three mines. As soon as production ceased, pumping operations were intensified and the tapping of underground sources of water extended; I am happy to report that this has already had the effect of appreciably lowering the water table and considerably improving mining conditions. At the same time rapid lateral development was started on several levels at number one shaft so as to expose the ore over a wide area. Certain minor modifications are also being made to the surface plant in order to increase its recovery capacity and its general efficiency. All this work is progressing according to schedule and the consulting engineers consider that the mining problems have been largely overcome. This gives cause for satisfaction." That was signed by Mr. H.F. Oppenheimer in October, 1958? - Yes.

Here I want you to assist his lordship if you could. Would you be good enough to go back to page 4. The explanation that the Chairman gives is this. He says it appeared from the mine's production in the one month, that is to say January, 1958, that the 1958 target - that would probably mean the calendar year of 40,000 a year - could be achieved, but it was equally clear that production at the full rated capacity of the plant would be difficult

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to attain as long as rapid lateral development was being curbed by combination of large volumes of water and bad ground. I, as a layman, find it difficult to reconcile this statement with the statement of the engineers. Would you be good enough to look at page 10. This is the consulting engineer's report in June. I think it sets out in plain English that this target could never be reached. It said: "The abnormally difficult underground conditions referred to in our report for the previous year continued to be encountered throughout the nine months' period." That is the 1st July, 1957 to 31st March, 1958, "during which mining operations were undertaken." That is right, is it not? - Yes.

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"The intersection of water and mud bearing fissures retarded both stoping and development operations and caused severe handling and treatment difficulties. The mine was unable, under these conditions, to achieve the scheduled output and, as a result, production costs were abnormally high when the world price of copper was continually declining and had, in fact, fallen below the level at which the company could operate at a profit." Now, pausing there, the engineers know what they are talking about and they say categorically that because of the continuance of these very troubles which we all hoped last year would disappear by the middle of 1958, for the last nine months of operation, that is from July, 1957 until March, 1958, we kept on encountering these difficulties throughout the nine months as a result of which both stoping and development were retarded, difficulties were occasioned with regard to handling and treatment and the mine was unable, under these conditions, to achieve the scheduled output. Does that not mean in plain English that Bancroft could not produce 48,000 to 50,000 tons a year? - No.

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What does it mean? - I think it means that during the year - and actually the Chairman refers to the rate of 40,000 tons could be achieved, the January, 1958 target, but during the year on average the target was not achieved. I am not quite clear there whether the consulting engineers refer to the scheduled output in the particular period we are talking about.

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Oh, yes. Surely? - But at this time was proposed.....

What did they mean by "scheduled output?" I do not want to interrupt your line of thought.

10 By YOUNG, J: We have not had his reply yet. What were you going to say, Mr. Acutt? - I was trying to say that on the scheduled output, quite clearly during a long period during the period of the consulting engineer's report, which I think was for nine months of operation, they probably did not achieve the scheduled output right throughout that period, if you were taking it at 40,000 tons per annum. The Chairman, on the other hand, does say that in January, 1958 it appeared that the mine production of 40,000 tons per year could be achieved and again, purely from memory, I think the production in that month of January was higher.

By MR. GOULD: For that month? - Yes.

20 Actually, I think you will bear with me if I give you the figure and we will check it. The total output for the nine months, 1st July, 1957 to 31st March, 1958, was only 17,973 short tons? - I don't know where that comes from.

30 If you will be good enough to let me continue, the consulting engineer's report: "As announced in January, 1958, the company entered into an agreement with Rhokana Corporation Limited and Nchanga Consolidated Copper Mines Limited to effect a 10% reduction in the combined planned outputs of all three companies for 1958, in terms of which your company, as the highest cost producer, ceased production for approximately one year from 1st April, 1958, in return for certain payments by Rhokana and Nchanga to finance development and pumping operations at the mine and the payment of interest on outstanding loans. It was decided that development operations should be confined to number one shaft and arrangements were, therefore, put in hand for the closing down of number two shaft and the plant. The temporary cessation of operations resulted in reductions in the European and African labour forces; most of the Europeans were found employment on the copper belt and in South Africa and the majority of the redundant Africans, with their families, were repatriated to their villages. During the period under review, 40 63,036 short tons of copper concentrate were produced on the mine, from which 17,973 short tons of blister copper were cast at the Smelter of the Rhokana Corporation Limited at Nkana." So, in nine months you produced 17,973 short tons of blister

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copper and that is the total output, is that right. for these nine months? - A further 141 short tons of concentrate were produced during cleaning up operations in April.

That is concentrates, not of blister copper. Now, so here we have a picture of the mine having produced with all its teething troubles, those we understand and sympathise with, for the first six months from January, 1957 to the 30th June, 1957, 3,398 short tons and then in the next nine months of its operations, with all its troubles, it produced 17,973 short tons. Now, on an estimated tonnage of 4,000 per month.....? Of 3,600.

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I beg your pardon, you are quite right. In nine months you should have produced 27,000, is that right? - My Lord, if one is working on the basis, but I think the whole of the consulting engineer's report and the Chairman's statement pointed out that there were difficulties in reaching the tonnage which was going up and, in fact, he makes the statement that in January, 1958 3,600 tons were produced.

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In that one month? - In the month of January. It is shown that the mine production could be achieved. It was building up in the months before that and, although the production was hoped to be 40,000 tons for the year, it simply could not have been on the production.

Could I explain the Chairman's speech as follows then: What the Chairman meant is that, looking at January, 1958 only? - My Lord, I think some difficulty arises in people's minds from the full rated capacity of the plant.

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First of all, if you will just bear with me for a moment, he says: "While it appeared from the mine's production in January," that would be January, 1958? - Yes.

That is to say, for the one month in isolation? - No.

The 1958 target of 40,000 tons per year could be achieved. It was equally clear that production at the full rated capacity of the plant would be difficult to attain as long as rapid lateral development was being curbed by the combination of

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large volumes of water and bad ground, so what the Chairman really means is this: You cannot look to January alone. Taking the overall picture, you cannot get the full rated production because the mining engineers tell us the mine could not get the full rated production? - My Lord, the full rated production is 60,000 tons.

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10 By YOUNG, J: Doesn't it mean this, that on the basis of 3,600 in January that in a year you could produce 40,000, but it would be very difficult because of the difficulties? - No, my Lord, he doesn't. He means, although you can produce 3,600 a month and 40,000 a year can be achieved, it is equally clear that production at the full rate of 60,000 for which the plant is designed would be difficult to attain as long as rapid development was being curbed by a combination of water and bad ground. The tonnage which goes into that plant which is rated to take 150 to 170 tons of ore does depend on where that ore comes from. If 100% of that ore was possibly through stoping, the rated capacity of that plant on the grade at Bancroft as defined by boreholes and by underground development work is roughly a little over 60.

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20 By MR. GOULD: You never worked to full capacity? - We were certainly hoping to.

30 Surely, all you were talking about is an output of 4,000 a month, which to me is 48,000 a year and then your quota for the proposed plant output of 270,000 was only going to be 40,000 tons. Nobody is thinking of 60,000? - I can only say what I read here, and that is the full rated capacity of the plant is 60,000.

That is from the Chairman's speech, but if you will be good enough to go back to the engineer's report, they talk about the scheduled output? - The scheduled output is the annual tonnage.

40 The scheduled output is surely the 40,000 tons we are talking about? - I think they probably do talk about the scheduled output as being the 40,000.

Quite, they say all we managed to achieve in the nine months is 17,973 short tons because of all these difficulties, and we are rather lucky to get out of it. Let's now concentrate on developing and get on with the job. That's right, isn't it? -

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What's right? I don't understand the question.

What the consulting engineer and the Chairman really convey is that our production has fallen short of our target of 40,000 tons. We have only been able in these nine months in retrospect been able to produce 17,973 tons and it is rather a good thing that, instead of producing under these difficult conditions and falling short of our scheduled rate, that we are now confining ourselves to overcoming our difficulties first and that we shall then proceed to mine. Isn't that what it all conveys? - My Lord, we have heard exactly what the Chairman said.

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Look what he does say? "The cessation of production was undeniably a set-back to the company, but nevertheless I regard it as not unmixed with advantage. Unhampered by the problems of maintaining production, the mine has been presented with a unique opportunity to concentrate attention on studying and overcoming the root causes of the difficulties which beset the mine and to speed up development." The way I, as a shareholder, would read it is it is useless mining under these conditions. We are now stopping and we are going to deal first with our difficulties and, when we have got over those difficulties of water and mud rushes and friable ground and got our pumping difficulties fixed up, then we shall be able to mine properly and effectively, but meanwhile this is the time for us to come back and fix up the underground workings first, increase the available ore reserves or tonnages, and we will then reach what we cannot achieve under these difficult conditions. Isn't that right? - My Lord, the Chairman goes on to say: "In a circular dated 30th January, 1958, members were informed of these arrangements, which are regarded as beneficial to all three mines." He is not denying that in this case Bancroft through the arrangement that is made receives some benefits, but I do not think he implies what Mr. Gould says.

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These were reports to shareholders of Bancroft, were they not? - Yes.

I would just like to show you the same Chairman's speech to shareholders of other companies and let us first go to Rhokana's, which is not yet before his Lordship and which we shall place before him.

By YOUNG, J: Are we going on to some other aspect?
What have we decided now?

MR. GOULD: We have decided they have drawn a gloomy picture of the mining possibilities of Bancroft.

YOUNG, J: Is it now agreed that the Chairman and the mining engineer were at one in regard to this target being 40,000.

10 MR. GOULD: No, the witness, as I understood it, said the Chairman was talking about.....

By YOUNG, J: Let him answer? - (Witness) My Lord, the target for 1958 was 40,000 tons per year, but when the Chairman talks about the full rated capacity of the plant, it is not 40,000 but is nearer 60,000.

By MR. GOULD: But when the engineer talks of the schedules rate? - He is talking about 40,000.

20 For the calendar year 1958? - I do not think there is any question of calendar or not, every year.

It just means any 12 months' period? - No, it is normally from the sales point of view, I think, for a calendar year.

YOUNG, J: Now, I am not quite clear what is the effect of all this evidence. The engineer is talking about 40,000 tons as the target for the year.

MR. GOULD: Yes, and he says he is absolutely unable to achieve that.

30 By YOUNG, J: And the Chairman, when he said at the rate of 3,600 for January, he did not mean we could attain 40,000, but for the difficulties earlier? - (Witness) I do not think that is largely what the Chairman said. The Chairman said that on the figures attained in January by which time the tonnage had built up, on the figures attained in January a target production of 40,000 tons appeared to be possible, but nevertheless this was not up to the rated production. When this company was first
40 formed, the shareholders had been told all the time that the output from this company was about 60,000

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tons, so when one talks about the full rated capacity, that is the rated capacity.

Does the Chairman say that the rated capacity of approximately 60,000 tons could be attained? - There would be difficulty in attaining it as long as rapid development was being carried out. He makes the point that 40,000 tons could be achieved from the evidence given in January, but 60,000 tons, which was the rated development of the mine, would be difficult to achieve until there was rapid lateral development.

It would be difficult to achieve under the conditions? - Yes.

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Do you all agree on that?

MR. GOULD: Subject to what they say to shareholders at other meetings.

By MR. GOULD: May I hand in through you the Rhokana annual accounts for the years 1957, 1958 and 1959, exhibits 27, 28 and 29? - Yes.

Before we go any further, I would like to start off with this point. You say it was never contemplated by anybody that the mine Bancroft would have to close down because of its difficulties in order to overcome these difficulties and, having overcome them, proceed to mine again. It was never in the contemplation of anybody? - Not as far as I am aware. As I say, I never heard of it.

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If you would be good enough to follow me through the Chairman's speech, that is, the late Sir Ernest Oppenheimer's speech in 1957, Exhibit 27, I would like you to look at the bottom of page 6 under the heading "Group Output Policy." This is the same Chairman as the Chairman of Bancroft, that's right, Sir Ernest Oppenheimer? - Yes.

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In 1957 Sir Ernest Oppenheimer was also the Chairman of Bancroft? - Yes.

We have already heard what he informed the shareholders of Bancroft. Let's see what he informed the shareholders of Rhokana, if you will be good enough to follow the address, he says:

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"Group Output Policy. In the meanwhile, enforced reduction of copper production, coupled with voluntary measures of a similar kind, may eventually result in bringing greater stability to the market. Various producers have, in fact, announced cuts in production. The copper companies of the Rhodesian Anglo-American group, of which Rhokana Corporation is one, have announced no such cuts in production; but, in fact, circumstances will result in an involuntary and transitory reduction in planned output for the group of over 10% for the current year." Sir Ernest takes a very gloomy view here and he says this is involuntary and transitory in the planned output of the group. I am not going to take up very much more time on this, but if you would look at Exhibit 28, that is for 1958, Mr. Harry Oppenheimer now has to explain to the Rhokana shareholders what the production policy of the group is. He says this on page 5 in the Chairman's review; "Curtailement of production throughout the world has contributed greatly to the marked improvement in the price of copper in recent months. As far as our Company is concerned, we entered into an arrangement with Nchanga Consolidated Copper Mines Limited and Bancroft Mines Limited, to effect a reduction of about 10% in the combined planned outputs of the three companies for one year from 1st April, 1958. It was agreed that Bancroft, the new mine experiencing difficulties and, therefore, the highest cost producer, should cease production on 31st March, but as this would have resulted in an overall reduction of more than 10%, our company and Nchanga increased their production slightly. In consideration for its part in this arrangement, we agreed, together with Nchanga, to pay Bancroft a sum sufficient to finance certain underground development work and to cover the interest on its loans. Apart from the obvious advantage of avoiding a cut in the rate of production, we have a very large interest in Bancroft Mines Limited, and it was clearly to our advantage to assist that company to overcome its difficulties." That's right? - It says so, yes.

If you will be good enough to follow me then to the directors' report, also for 1958, Exhibit 28, on page 12, here the whole board, not the Chairman, is addressing Rhokana shareholders and telling them about this whole arrangement. It says this on page 12: "Investments in associated companies. Bancroft Minies Limited. The company's

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"holding in Bancroft remained unchanged at £2,385,877 stock in 9,543,509 stock units of 5s. each, representing 43.38% of the capital in issue. The difficult underground conditions referred to in last year's report continued to be encountered at the mine, which was unable to achieve the rated output." What did "rated output" mean there? - I should think the rated output again means the rated output of the plant.

Forty thousand, 60,000? - Sixty thousand. 10

"The resultant high production costs coincided with a considerable decline in the price of copper, and a loss on operations of £1.68 million was incurred. Production amounted to 16,046 long tons of blister copper." I perhaps exaggerated when I spoke about 17,000. "Reference is made earlier in this report under the heading 'Profits' to the cessation of mining operations on 31st March, 1958, for approximately one year. Good progress has been made with the development operations undertaken since 1st April. In consideration for the provision of capital of a permanent nature for Bancroft, which is referred to under the heading 'Fixed assets', Anglo-American Corporation of South Africa Limited, Rhodesian Anglo-American Limited, Nchanga Consolidated Copper Mines Limited and the company have been granted the right exercisable at any time up to and including 31st March, 1963, to subscribe at the price of 20s. per share for 3,000,000 Bancroft ordinary shares of 5s. each, the company's entitlement being 600,000 shares." Now, Mr. Acutt, there are two things which I should like to put to you here. To the Rhokana shareholders, the Chairman stresses how much it was to the advantage of Rhokana because of its big investment in Bancroft to pay Bancroft a sum sufficient to finance certain underground development work and to cover the interest on its loans. The Chairman says: "It was clearly to our advantage to assist the company to overcome this difficulty because of our large interest in the company," and here he explains to the Rhokana shareholders, or rather, the directors explain to the Rhokana shareholders, the difficulty that Bancroft mines have and the reason for this payment. It was to enable Bancroft from Rhokana's point of view to stop this futile production, facing all these difficulties that it had to face, to get its house in order by means of this development and then to proceed to mine? - My Lord, I

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cannot agree with that. You seem to be missing out portions of the Chairman's speech.

I am sorry? - And stressing others. They were read out, but the operative words in referring to this were the Chairman stated: "Apart from the obvious advantage of avoiding a cut in the rate of production we have a very large interest" This is a subsidiary point. His main point is the obvious advantage of avoiding a cut.

10 I beg your pardon. This is a subsidiary consideration? - Yes.

But it was a consideration? - It is stated so, yes, by Rhokana.

Similar statements, of course, are made to the Nchanga shareholders? - Not similar.

20 I mean this whole arrangement is referred to in one of the Nchanga speeches? - It is explained. I think there is no possible reference in the Nchanga's Chairman's statement to a similar statement to the one in Rhokana because, as I said in my evidence earlier, Nchanga was not in a position even to contemplate assisting.

Let's come to Nchanga now. If you look at March, 1958, Exhibit 21, Nchanga's financial year finishes on the 31st March of each year, whereas the other two companies, Bancroft and Rhokana, have a financial year for the 12 months ending 30th of June? - Yes.

30 In Exhibit 21 at page 5 of the Chairman's report, "Group Output Policy," this is the Chairman of Nchanga who in that year was Mr. H.F. Oppenheimer. He says: "During the year many of the major producers cut their production in varying degrees in an attempt to correct a condition of over-supply of copper which had developed with such serious effects on the price of the metal. We decided that we would fall into line and join with the other copper producers administered by the Anglo-American Corporation in effecting a reduction of about 10% in the aggregate planned output of the three companies. In discussion with Bancroft Mines Limited, a new mine and on that account a high cost producer, it was decided that, rather than apply a 10% cut in production by each of the three producers, Bancroft

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"should from the 1st April of this year cease producing for a year, and your company and Rhokana Corporation Limited should increase their output slightly, so that the overall production for the year would be about 10% less than had been planned by the three companies together. Rhokana Corporation and your company agreed as part of this arrangement to pay Bancroft a sum calculated to be sufficient to cover the cost of the interest on loan capital and of the underground development on that property for the year of shutdown. I am sure this arrangement is in the interests of the three companies concerned and of the copper-producing industry as a whole. The indications are that the voluntary and unconcerted cuts by producers in many parts of the world have been successful in correcting the im-balance between supply and demand. Your company was able to enter into this arrangement involving, as it did, an immediate increase in the planned production, because the property has now been developed to a stage where great flexibility both in regard to plant capacity and mining operations has been achieved." Now, arising out of all this, the position is this: It is perfectly clear, is it not, that throughout the whole of 1957 from January, 1957 until December, 1957 Bancroft mine was facing the same difficulties, water, mud, difficulty curbing underground development and stopping. That's right, is it not? - Yes.

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It is also perfectly clear that it had already spent, as you correctly said, about £20,000,000 on development up to that stage? - I don't know what is meant by development, but on development and plant. Service plant was the major expenditure.

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And it had sunk £20,000,000 into the mine in development in opening up the mine and in providing the plant and equipment and everything else? - Plant, housing and everything else.

Its production for the calendar year, 1957, was far below 4,000 tons a month? - Yes.

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For the whole of that 12 months' period now? - It was never planned to have 4,000.

Or 3,600, it was below either? - Yes.

Below 40,000 a year? - Yes.

And the difficulties were still there at the end of December, 1957, the water and the mud and

everything that curbed operations and made them very expensive? - Yes, but nevertheless in January, 1958....

I am still on 1957. I am only dealing with 1957? - Well, I don't think they could have been there, because in January, 1958, the mine did, in fact, produce at the rated amount of 40,000.

10 But we are told throughout in the 1958 report of Bancroft that those difficulties were always there? - But they had presumably improved from the efforts which were made and I can only go on the reports which have been overwhelmingly quoted and that is, the Chairman said in January, 1958 the mine was producing at the rate of 40,000 tons.

For that one month? - So I presume by December 31st the position had improved so that on the 1st of January a new state of affairs could take place.

20 Let me take you up on what you have said. You cannot add to what is contained in the consulting engineer's report and the Chairman's report. They speak for themselves, is that right? - Yes.

So it is for his Lordship to decide on what the meaning of these documents is. The next point was this that, as a result of its mining operations, just its ordinary mining operations, Bancroft were sustaining very heavy losses, is that right? - Agreed.

30 For the whole of the 1957 calendar year? - Yes,

That state of affairs could not continue, could it?

YOUNG, J: Wait a minute, Mr. Gould. You were giving us two points of divergence, if any, between you and the witness and I have four, three of which he has agreed to and one he has not agreed to.

By MR. GOULD: Which one do you not agree to?

40 YOUNG, J: About the difficulties in January, 1958. I just want to know what are the points of distinction between you now.

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MR. GOULD: I don't know. I understand the consulting engineers to say that the difficulties continued and also the Chairman to say that. The Chairman's report is no rosy picture, is it? -
No.

In Exhibit 7 the Chairman tells us: "While it appeared from the mine's production in January?" - My Lord, I think I can clear this up.

"Whilst it appeared from the mine's production in January that the 1958 target of 40,000 tons per year could be achieved, it was equally clear that production at the full rated capacity of the plant would be difficult to attain as long as rapid lateral development was being curbed by the combination of large volumes of water and bad ground. The cessation of production was undeniably a set back to the company, but nevertheless I regard it as not unmixd with advantages. Unhampered by the problems of maintaining production, the mine has been presented with a unique opportunity to concentrate attention on studying and overcoming the root causes of the difficulties which beset the mine and to speed up development." So apparently those difficulties still clearly continued, even on the Chairman's showing? - My Lord, I accept that the difficulties were there. I was asked whether the same difficulties were there throughout the year. I maintained that on the Chairman's review it did not appear that the same difficulties were there because in January, 1958 the mine did produce at the rate of 40,000 tons per year and the Chairman states that, while it appears that this can be achieved, nevertheless it is going to be some time before one gets to the longer thing. I can only assume that, if that tonnage was as it was, achieved in 1958 the mine must have been improving and conditions towards the end of 1957 because there is not a magic waving of a wand on which day the whole thing comes right.

I think, with respect, you are trying to bring us to the magic wand of the 27th of January. I don't want to get near that one yet.

By YOUNG, J: What do you contend for, Mr. Gould, that the difficulties had not abated at all by January, 1958?

MR. GOULD: No, they were there all the time.

YOUNG, J: Yes, the witness has agreed there were difficulties, but the situation must have

improved, as evidenced by the improvement in production.

10 MR. GOULD: My Lord, I do not know how the production improved in that month and I am sure Mr. Acutt couldn't tell us, It wasn't because water disappeared and it wasn't because the mud disappeared and it wasn't because they overcame their difficulty of friable soil. It is quite clear, I can take your Lordship through all the other exhibits, that these difficulties were there.

YOUNG, J: Anyway, your contention is you are putting it to this witness that the difficulties remained unabated in January, 1958?

MR. GOULD: Yes, the whole way through until April, 1958 when the mine closed down and the conditions were just as bad until the end of March.

YOUNG, J: There had been no improvement 'till January, 1958.

MR. GOULD: No.

20 YOUNG, J: He does not agree.

MR. GOULD: He has admitted that he cannot add anything or subtract anything from what is contained in the documents.

YOUNG, J: I think the company is probably bound by the reports, but I am just trying to get at the issues between you two gentlemen.

30 MR. GOULD: Mr. Acutt, as I understand his evidence, says that because in January, 1958, there happened to be a high peak of production in that one month, he infers that the difficulties had abated and from then onwards the company might have been expected to continue production at that rate.

MR. YOUNG: He has not said so, but anyway, he does say by January on the information before him the difficulties must have abated? - (Witness) Yes, sir.

40 By MR. GOULD: Perhaps we could test the situation out in the following way. The mine did close down on the 31st of March, 1958, and its production was still fairly low in February and March, 1958.

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By YOUNG, J: When you say "The mine closed down," what do you mean?

By MR. GOULD: Mining operations ceased? - No, my Lord.

By YOUNG, J: Do you mean the production of copper ceased?

By MR. GOULD: All right, is that right? - The surface plant stopped.

And the extraction of ore stopped, did it not?

By YOUNG, J: One shaft continued, according to the report? - Certain ore was brought up to the surface and stock piled. The concentrator and the copper producing plant were stopped. 10

And one shaft, apparently? - And one shaft, yes.

By MR. GOULD: And what did you do underground? You started development to increase your ore reserves, is that not right? - No, not to increase the ore reserves, but to increase the ore for stop- ing. 20

You started, what do you call it? - General development work, opening up the mine.

Is that what is referred to as rapid lateral development? - Partly, yes; general develop- ment underground.

With a view to future mining? - Yes.

That is to say, extraction of ore? - Yes.

Now, here I would like to draw inferences. When active copper production stopped on 31st March, 1958, I take it that the first big purpose of Bancroft was to try and eliminate these difficulties that we have heard about, to devise a composite scheme for dealing with the underground water and the mud and so forth. Is that right? - Well, mostly. They were continuously dealing with this. All that really happened was, they continued to deal with it but they dealt with it perhaps a little bit more vigorously, as they were not in any way concerned with producing any set tonnage 30

for that particular period.

That is correct. I am just visualising now what took place. Unexpectedly from January, 1957 onwards underground these difficulties were found and they continued. Is that right? - Yes.

Now, you stopped copper production and you say: "Well, we are closing down on that aspect. Now, the big thing to do is to get down and make a proper survey underneath to find out what the real problem is all about, embark on a composite scheme of how to deal with this trouble and we can take our time. We have a year and this Rhokana and Nchanga money to plug up these difficulties and proceed with this lateral development with a view to future mining." Is that the type of approach? - My Lord, it is a fairly omnibus question, if I may say so.

What was the first step taken by the Bancroft directors or by the consulting engineers?

20 By YOUNG, J: You can put it this way, can't you? Although advantages obviously occurred to both sides by this agreement, or so they thought at any rate, wherein did the advantage lie to Bancroft because of this arrangement? - The advantage lay to Bancroft in from their point of view they were being able at the time, as stated in the Chairman's address, to concentrate their efforts on overcoming some of these difficulties underground and placing themselves in the position to renew production, as I think I state in my evidence, at the end of the year's time at the full rated capacity which, as I say, was 60,000 tons.

30 So, to put it in more concrete terms, they would devote their energies or their capital to overcoming the underground difficulties, to stock-piling, to development work so that when they started up they could start at a much higher rate of production? - Yes.

Is that what the advantage was? - Yes, sir.

40 By MR. GOULD: In addition to what his Lordship said, wasn't it also to devote their attention to overcoming the difficulties? - I think his Lordship mentioned that.

Wasn't that what they concentrated on first,

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overcoming those difficulties? - The main thing in practice was closing down the plant and getting the employees off, which took a little longer than they anticipated and caused some upheaval. It is not very easy to close down plant and move people about, but as soon as that was out of the way, they concentrated upon the underground aspects of the mine. There were no surface aspects.

The first big thing was to study and overcome these difficulties, water? - It was mainly physical. 10

I don't understand that? - They knew the difficulties.

Did they know how to deal with the difficulties? - I think so, yes.

What did they first have to do, to make a bit of a survey? - By the time the mine had been running, I think they were fully aware of the difficulties.

Did they also know the remedy? - Well, they appear to have applied it during the period. 20

So they may have known all that before January, 1958 and advised that the best thing to do would be to stop producing copper and to get right down to a comprehensive scheme of dealing with these difficulties? - They could have, but they didn't.

Are you sure they didn't? - Yes.

I notice from the 1958 report which is Exhibit 7 that the only footage or stopping preparation or whatever you call it in number one shaft for the three months to 1st April, 1958 'till June, 1958, was 1,860 feet? - Yes. 30

Is that right? - Yes, it says so there.

It says so on page 11? - Yes.

That is stopping preparation? - Yes.

So that really in three months that is only number one shaft, it is given as 1,803? - Yes.

So there could not have been much effort in those three months on stopping preparation? - 40

I think one has to read the whole report: "Stoping operations continued in the central block between 650 and 400 levels until March, 1958. Stope development was commenced between the 900 and 650 levels. Weak ground in the vicinity of the grizzley development slowed down the rate of draw of broken ore from the stopes, the delay in turn causing some premature caving of the stopes. Handling of the ground through the ore and waste passes continued to cause major difficulties, owing to water making in the pass system. After production ceased, the opportunity was taken to improve conditions by cementation. Tonnage hoisted was 400,134 short tons, of which development accounted for 67,724 tons. A 12 foot diameter ventilation shaft to serve the southern area has been commenced and has advanced 38 feet. Main haulage development was seriously impeded by water and sand filled fissures, delaying the establishment of additional stope faces. To overcome this difficulty, the haulages have been turned into the dry beds underlying the water bearing conglomerate and have since advanced rapidly southwards. Crosscuts are being driven to the orebody at 1,000 foot intervals, from which the normal footwall haulages will be started and the area drained. Drainage from the lower levels has lowered the water table below the 650 level in the central section." I think it is no good from whatever point it is produced to try to produce one figure from the underground work. The work carried on at full pace and the consulting engineers state what was done underground at that time. at the end of the year, development was ahead of schedule.

Mr. Acutt, could any of this work that you have just read about have been done while the men were still producing copper? - It would have had to have been.

What advantage then was derived from closing down? I mean it could have carried on because otherwise only the plant, the plant would have enjoyed itself very merrily producing copper from the ore. If you say everything else continued exactly the same way, I don't understand the advantage? - The mine was being asked to cut its production by 10% and, even if it achieved 40,000 tons, it was being asked to cut further to an uneconomic position, and it couldn't do so.

I am taking purely as a layman? - I don't understand the question.

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Second Day. Tuesday, April 11th, 1961

KEITH COURTNEY ACUTT, still under oath,

Cross-examination by Mr. Gould (continued):

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When the Court adjourned yesterday we were dealing with the question of what Bancroft did in the way of developing the mine during the twelve months period 1st April, 1958, to the 31st March, 1959. Could you perhaps tell us what Bancroft did? - I think it is set out actually in the Consulting Engineer's report, my Lord, for the period under Mining. That is in Exhibit 7 on page 10: "Stope operations continued in the central block between 650 and 400 levels until March, 1958. Stope development was commenced between the 900 and 650 levels. Weak ground in the vicinity of the grizzley developments slowed down the rate of draw of broken ore from the stopes...." - that was only up to the end of March - "...the delay in turn causing some premature caving of the stopes. Handling of the ground through the ore and waste passes continued to cause major difficulties, owing to water making in the pass system. After production ceased the opportunity was taken to improve conditions by cementation. Tonnage hoisted was 400,134 short tons, of which development accounted for 67,724 tons. A 12 ft. diameter ventilation shaft to serve the southern area has been commenced and has advanced 38 feet." That was at the 30th June, 1958, a period of three months. "Main haulage development was seriously impeded by water and sand-filled fissures, delaying the establishment of additional stope faces. To overcome this difficulty, the haulages have been turned into the dry beds underlining the water-bearing conglomerate and have since advanced rapidly southward. Cross-cuts are being driven to the orebody, at 1,000-ft. intervals, from which the normal foot-wall haulages will be started and the area drained. Drainage from the lower levels has lowered the water table below the 650 level in the central section. To the south, less water has been encountered. Details of the development footages accomplished during the year are as follows:" - and they are set out.

Stope preparations we notice are only 1,803 ft.? - Yes, may I make the point there that the reason for that is in the previous paragraph where

it is pointed out that cross-cuts are being driven to the orebody at 1,000-foot intervals. Those are the cross-cuts to permit stoping to become available later on.

10 Isn't it also possible that one of the reasons for the small footage of stope preparation was due to the fact that a good deal of concentration was centred on pumping the water level, the water table, as a preliminary? - I think some concentration was on that, but I think the Consulting Engineer makes this very important point that the whole emphasis at the mine was to open up more areas. They are driving south rapidly and cross-cuts are being driven to the orebody at 1,000-foot intervals. The whole point of that is to make more ground available for stoping in due course. "At the end of the year development was ahead of schedule." That is the end of the financial year to 30th June.

20 The next paragraph deals with pumping and drainage? - Yes.

30 Would you be good enough to read that? -
 "The average daily volume of water pumped increased from 11.6 million gallons in June, 1957, to 16.7 million gallons in June, 1958. This was largely due to the intensification of the drainage programme on the 900 and 1150 levels." Those are the two levels on which the work was concentrated till March, 1958. "Eight main pumps with a total capacity of 22.4 million gallons per day have been commissioned in the 1210 level pump chamber, and a further two pumps are to be installed, bringing the total capacity to 28 million gallons per day. The 20-inch pump column in the shaft is in commission. A method of desludging by hydrocyclone has been developed on the mine. This allows two of the three mud settlers to be used as clear water sumps. a third clear water sump is being mined. A watertight door has been constructed in the 1150 cross-cut to lode and two more are under construction on this level." I would mention that the watertight doors are put in as a normal precaution in any mine.

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So much for the first three months of the year under consideration. This takes us merely from the 1st April, 1958, to the 30th June, 1958? - Yes.

The next I think you will find in Exhibit 8.

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Looking at the Consulting Engineer's report, on page 9, they tell us what was done with regard to the No. 1 shaft, which is the only one which we are concerned with now? - Yes.

It says that: "Until stoping began in April, mining was confined to main level development and stope preparation in accordance with the agreement concluded with Rhokana Corporation, Ltd., and Nchanga Consolidated Copper Mines, Ltd." - Yes.

"Development southward in the footwall quartzites continued on all main levels, and cross-cuts at 1000-foot intervals were driven to the ore-body. In the last few months before production began it was necessary to increase the rate of sub-level development beyond the planned footage because of heavy folding and variations in dip discovered only as development progressed. Two ventilation shafts were completed during the year at the southern end of the mine. It has been decided that the vertical shaft would not be deepened and that an inclined shaft system should be used to develop the orebody on levels below the 1150. Operating experience has led to the conclusion that, while an extension to the vertical shaft would probably encounter heavily watered ground, it should be possible to develop inclines in relatively impervious beds. In order to keep dewatering as far ahead in depth as possible, and to cut the stations ahead of the advancing shafts, a haulage inclined at 14 degrees was started from the 1150 level, which is the bottom developing level in the mine at present. This layout will enable the 1400 level to be opened up for immediate dewatering without interference from the sinking of the main inclines which will proceed simultaneously." And then coming to the development which was accomplished, you will see: "Stope preparation 83,897 ft." Would that include the 27,000 feet referred to in the 1958 report? - I don't think so.

Would this be additional? - I think this was purely a stoping preparation during that year.

That is considerably more than had taken place from 1954 until 1958? - I think it probably is. I am not quite sure. May I just check on that?

Please do. - I don't think that the stoping

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preparation done before the mine came into commission is dealt with, is it, by the Consulting Engineers? - In every single year they give us some figure of footage of stoping preparations.

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By YOUNG, J: What is your point, Mr. Gould? What is the question?

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By MR. GOULD: The question is whether this 83,000 feet is additional to what had been done before.

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10 By YOUNG, J: That seems to be obvious. It means accomplished during the year.

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By MR. GOULD: Then I say that this amount which was accomplished during the 1959 year was far in excess of the total amount of stope preparations which had taken place from the commencement of development in 1954 up to the time the mine closed in 1958? - My Lord, before I would like to confirm that, I would just like to check the figure, because I cannot find anything in the 1955 report at this stage. There may be something in the 1956, but there is one point which I think one should determine here and that is that the No. 2 shaft was no longer in commission.

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30 I agree. - It is important, my Lord, because therefore the stoping preparation in No.2 shaft was no longer available for tonnage to be drawn from No. 2 shaft, and naturally a certain amount of concentration had to be given to No. 1 shaft to make up ore which was no longer available in No. 2 shaft. May I just take the figures given in 1956? I actually see none given here at all, and I just wonder where Counsel gets his figures from.

40 1957. - I have looked at 1957, but the mine started underground work - development on the 650 level was delayed due to the intersection of water-bearing strata, but was making steady progress by the end of the year under review. The 900 and 1,150-foot levels were developed. They set out the development which took place in the early stages of the mine and here I would like to make one point that obviously in the early stages of the mine you have to sink the shaft and get to the orebody before you can develop it. It is a natural thing that as the life of a mine progresses more work can be given to the actual stoping areas

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than could be given to the other, and you will see in the report that we refer to concentration in the early part of the shutdown period there of getting to the stoping area. It is therefore natural perhaps that more work would be done on stoping than in the previous years.

I just want to get the comparative figures. In the 1957 report it says with regard to No. 1 shaft on page 13 that the stoping preparation totalled 20,128 feet. I think that is right. - 10
That is for the year?

For the year 1957? - Yes.

In 1958, 27,812 feet? - At No. 1 shaft?

Yes, at No. 1 shaft. Is that right? - I think so.

Actually, it is on page 11 of Exhibit 7, 27,812. - That is for the nine months.

And 1,803 for the next three months? - Yes.

And in the 1959 year, we now know that the footage was 83,897? - Yes. 20

What was accomplished in the 1960 year in the way of stoping preparation? I refer you to page 9 of the Consulting Engineer's report, that is Exhibit 24. It says stope preparation 156,450 feet in No. 1 shaft? - Yes.

That's right? - Yes, it is in the Consulting Engineer's report.

Now, yesterday, Mr. Acutt, I addressed a large number of questions to you before I had really had an opportunity of reading the papers which were put in yesterday which I saw for the first time, but I have had the opportunity since. Am I wrong in saying that it was a matter of concern to the Board that because of the unexpected difficulties encountered underground, the underground development was being curbed, retarded and impeded. Am I right or wrong? - No, that is correct. 30

And I put it to you, Mr. Acutt, that the reason why in 1957 the stope preparation was only 40

201,000 ft. was largely because of these conditions, unexpected water and mud rushes and the friable nature of the underground soil and so on.

By YOUNG, J: You mean the lack of stoping preparation?

By MR. GOULD: The lack of stoping preparation. I say stoping preparation was impeded. Is that right? - I think the Consulting Engineers do make the position clear that the concentration was on development to open up more stopes.

10

Yes, that's right, but let's go back before that. In 1957 and 1958 the engineers or underground technicians were impeded in their normal activity of opening up more stopes by the presence of these underground difficulties? - I think it can be said that the underground difficulties added to the complications of opening up the mine.

And it was necessary, as you correctly said yesterday, for the mine to continue this underground development to make more ore available for stoping. Is that not right? - Yes.

20

So that the future prospects of the mining operations of Bancroft were largely dependent upon the extent of the underground stoping preparation. If you could not continue opening up stope faces, the stage would be reached where the mine would not be able to continue mining, is that not right? - That could happen, but it was not visualised.

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Wasn't it a fact, Mr. Acutt, that the underground development had been retarded to a point where one did visualise the possibility that the mine would not be able to produce to its previous capacity because of the lack of underground development? - No, my Lord.

No? Wasn't it necessary for the mine to take a breathing space in order to be able to continue underground development so as to have sufficient ore available for mining in sufficient quantities to produce at the rated capacity? - My Lord, this brings me back to the point which I think I would like to just clear up, which I think perhaps has left some doubt in Counsel's mind. The Consulting Engineer's reports purely cover a period to the 30th June of each year, over the financial

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period. The Chairman's statement, which is a statement in lieu of an address to the shareholders at the meeting, is produced at the latest possible time before the report goes into print and covers a period possibly up to three or four months more than the Consulting Engineer's does. When Counsel refers to this particular point of requiring tonnage, I mentioned the figure of 60,000 yesterday as being the rated capacity of the plant. When the plant is installed in a mine, one has to go over the plant that you think the tonnage can be provided or is safe to handle, the tonnage that can be provided with ore from that mine. The plant at Bancroft has a rated capacity of 150,000 tons a month of ore. What it produces from that 150,000 tons is dependent on the grade of the ore which it mills. In the early stages of a mine, there is a great deal of dilution of that ore through development and as the mine gets more developed a greater proportion of that ore normally comes from stoping, therefore the grade improves and the output of the mine in copper increases. Now, in practice the rated capacity of a plant is the safe capacity which the suppliers of the plant will guarantee for the plant. In experience, and I think this is practically without question anywhere, a plant will produce more than the rated capacity and, to take the Bancroft plant, the Bancroft plant is capable, it has now been found in fact, of taking up to 170,000 tons of ore. The output from that will naturally again depend on the grade of the ore and every endeavour in opening up a new mine is to push forward with the supply of ore to the plant and naturally to try and have the least dilution possible so as to get the trade at the highest point, and that was the endeavour right throughout the history of Bancroft.

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While we are on that point, perhaps you might clear it up. Why do you say that the rated capacity of the plant was 60,000 tons? - Because if all the ore was taken from the highest grade areas, ore from stoping and there was little dilution, the plant should be capable in normal circumstances without pushing it at all of doing 60,000 tons, but the figure comes to my mind because in January of this year the mine produced 5,000 long tons of copper in concentrate.

40

Perhaps you could explain this to His Lordship. In Exhibit 2, which is the balance sheet, the annual

report and accounts of 1954, a reference is made to an initial rate of about 4,000 tons of copper a month? - An initial rate, yes. Can you tell me where that is?

At page 4 in the first paragraph. - Yes.

10 "As stated in the prospectus, the anticipated cost of developing and equipping the mine for production at the initial rate of about 4,000 tons of copper a month is approximately £12 million." - Yes.

In your 1957 Chairman's review, Exhibit 6, the Chairman says at the bottom of the second column on page 5: "The plant has been designed to treat something over 150,000 tons of ore per month from which 4,000 short tons of copper may be expected." That would give a rated capacity of 48,000, is that right? - About 50,000, yes.

Or 48,000 if you multiply 4,000 by 12? - Yes.

20 To go back one year, I have just picked up another document, Bancroft Mines, Ltd., Financial Progress Report to the 31st December, 1956, which I will hand in. The third paragraph reads:
 30 "Operations are at present being financed by means of temporary loans which will soon be fully drawn, and your directors have been considering the best means of providing the funds required to bring the mine to production at the rate of 42,800 tons of copper per annum as planned." That does not really square with the figure of 60,000 tons capacity does it? Unfortunately I have just to go on the written documents. - No, my lord, not if you are trying to square that figure, but in practice quite clearly until the Consulting Engineers are able to define what the plant will do, it is normal to be fairly conservative and this has been the conservative policy followed right throughout.

(Finance and Progress Report put in, Exhibit 30.)

40 I know, but all that we have in the written published documents of the company, conservative or otherwise, is that the capacity of this plant, that is to say taking, I take it, the size of the plant, the tonnage of ore which can be used, and the grade which varies from time to time, has

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varied from 42,000 to an estimate of about 48,000 short tons per year. It would be less long tons?
- Yes.

By YOUNG, J: Is there some confusion about the use of these expressions "the rated capacity may be 60,000 and yet the plant production may be at the rate of 42,000"?

By MR. GOULD: But I understood the witness to say, my Lord, that the rated capacity is the amount of copper that would be produced by dealing with 150,000 or thereabouts of ore. The amount of copper that would come out would depend on the grade of the ore.. - My Lord, can I make this point clear. The rated capacity of the plant is the capacity which is quoted by the suppliers and by the consulting Engineers as being the safe capacity of the plant, and if I may refer to Exhibit 24, page 5, the Chairman's statement makes it clear what I mean by the second point. Right in the first paragraph, a bit more than halfway down: "The tonnage of ore milled increased steadily during the year and is now around 150,000 lb. a month. About 30,000 lb. of this, however, is ore from development work which, because of dilution by waste rock, does not contain as high a grade of copper as ore from stoping. In normal times the amount of copper produced and sold by the mine would be the maximum obtainable from mining and milling operations." The rest goes on to the question of a further cut perhaps being required in 1960, the point there being, if I have not made the point clear, that the rated capacity is the capacity which the Consulting Engineer and the suppliers state to be the safe capacity of the plant. In practice, the capacity of a plant is normally higher. The output of a plant depends upon the grade of ore which can be milled.

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By YOUNG, J: When you say the rated capacity, that surely is a function of the richness or otherwise of the ore? - No, the rated capacity is never calculated by the Consultants on an output of ore, for the simple reason that the suppliers of the mill and concentrate ore are concerned with what quantity of ore is going in. They have to undertake to mill that ore. They have not necessarily had the ore. They do not know the characteristics of the ore or the grade of the ore.

40

When we talk about 60,000 tons, are we talking about ore or copper? - We are talking about copper

50

How can the suppliers rate a machine on the basis of the copper produced? - I never referred to copper production as rated capacity. The rated capacity applies only to the amount of ore which goes into the plant.

Then you said that the 60,000 tons of ore....?
- That is the output of the plant on a proper grade of that plant.

10 It would be 150,000 tons of ore at this grade of copper would produce about 60,000 tons of copper?
- Yes, I think it is very simple. It is a question of the grade of ore that you are putting into your plant. The Chairman makes this point about dilution of ore. He says the plant is milling at the rate of 150,000 tons of ore but due to the fact that 30,000 tons of that ore is from development which is diluted by waste rock the output of copper is not up to the full capacity of the plant.

20 By MR. GOULD: Well, Mr. Acutt, I think we can then perhaps clarify what gave rise to so much confusion yesterday and that is the manner of the Chairman's review in 1958 at page 4 of Exhibit 7. The Chairman said in the second paragraph at the bottom of the second column: "Whilst it appeared from the Mine's production in January that the 1958 target of 40,000 tons per year could be achieved" - that is the target of copper - "it was equally clear that production at the full rated capacity of the plant would be difficult to attain as long as rapid
30 lateral development was being curbed by the combination of large volumes of water and bad ground." - Yes.

So now, if I understood you correctly, Mr. Acutt, the words "the full rated capacity of the plant" referred to the 150,000 tons of ore? - Yes.

40 So now I understand. So what the Chairman said there was this: "Our difficulty is going to be to extract that amount of ore from the mine if we do not attain rapid lateral development by opening up additional orebodies or stope faces." Is that right? - Yes.

"And the difficulty in our way about this rapid lateral development, which means opening up

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the stope faces, is that we are being curbed in doing so underground by the combination of large volumes of water and bad ground." - Yes.

If, therefore, you eliminate these two factors of large volumes of water and bad ground, or the effect of water on the bad ground which makes mud, and you then proceed to stope preparation, there would be nothing to prevent us from proceeding with our production at the full rated capacity, that is to say, to mill out 150,000 tons. Isn't that what the Chairman implies there? - I think the Chairman's statement is perfectly clear. It is exactly what he says. He says the full rated capacity of the plant achieving that is being hampered by these difficulties in development.

10

And then, of course, just to clinch that, the Consulting Engineers you say at page 10, unequivocally say that the mine was unable under these conditions to achieve the scheduled output. - My Lord, there I would like to make the point again that the Consulting Engineer's report deals with the year ended 30th June, 1958. The Chairman's statement that it appeared that the mine's production could reach the 1958 target of 40,000 long tons could be achieved is based on experience over a longer period than the Consulting Engineers have the right to discuss.

20

Oh, but, Mr. Acutt, we are only on the one thing as to whether the plant would work at full rated capacity, that is to say whether it could crush and deal with 150,000 tons of ore. The engineers said it could not. The intersection of water and mud-bearing fissures retarded both stopping and development operations? - Yes.

30

And caused severe handling and treatment difficulties. The mine was unable, under these conditions, to achieve the scheduled output- To the 30th June, 1958?

To the 30th June, 1958, that is perfectly all right. That is up to the 30th June, 1958? - Yes.

40

The agreement which we are going to deal with just now was entered into in January, 1958? - Yes.

So that the big problem with which the Board

of Bancroft was confronted from January, 1957, onwards was that as a result of water and the bad condition of the ground underneath, mining operations and development operations were being hampered. Is that not right? - Yes.

That's right, and if this were to continue you would simply not be able to produce at rated capacity; isn't that right? - Yes.

10 The problem was not getting any easier. We know what the position was in October, 1957, from the Chairman's review in October, 1957. He drew a very gloomy picture. You agreed it was a gloomy picture, is that not right? - Yes, I think so, but what I am not quite clear about is you say the problem was not getting easier. The problem was one which was being tackled and was being overcome.

20 You have told his lordship that there was a very substantial operational loss for the first six months of 1957 from January until June. There was an equally severe loss for the nine months, 1st July, 1957, to the 31st March, 1958. We know that. At the end of October, 1957, when the Chairman gave his review, he drew a gloomy picture of the conditions in the mine underground. Is that no right? - I think that is so. It is not a bright picture.

30 Then we fill in the picture ourselves in October and November and December, 1957. It is quite clear that the mining operations and the development operations were being hampered very much by these underground conditions. Is that not right? - Yes.

Then we come to January, 1958, on which I now wish to concentrate. Now, in January, 1958, you say there was a change for the better. Is that right? - I said, my Lord, that in January, 1958, I wouldn't put it as a change for the better, but that the tonnage being milled was increasing and the output of copper was increasing.

40 What was that due to, the sudden improvement in January, 1958? - My Lord, this was not a sudden improvement. It was a steady improvement due to the fact that the engineers were aware of the problems. On all new mines they have problems, and they were tackling this particular problem as

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vigorously as they could. Naturally, as time went on, even if they were hampered, time was on their side in the sense that they were being able to open up more areas of the mine and more ore was becoming available from stoping.

Well, there wasn't very much more ore becoming available? - I don't think ore and your stope preparation figures mean the same thing. The preparation of the stope is merely making the stope available to take ore out.

10

Was the Board entitled then on the production figures of January, 1958, alone to rub its hands with glee and say: "Well, gentlemen, here we have turned the corner." Was it entitled to do that on the results of one month? - I do not know what is meant by rubbing its hands with glee. I think the Chairman made it clear that he felt happier that the mine did look as though it was now able to produce 40,000 tons.

The Chairman said in retrospect in, I think it was, October, 1958, that in January it seemed as if the mine might produce 40,000 tons, isn't that right? - He says: "Although from the January figure it appears"

20

"....that the 1958 target could be achieved"?
- Yes.

He limits himself to January? - Because he is only going on the figures which are factual evidence which was available to him.

I think you gave your figures for January, you said something 3,600 tons? - Did I? I think the figure of 3,600 came from a very bad sum I did, when you said it was 4,000. I would like to correct an arithmetical mistake, because 12 into 40 does not give you 3,600. I realised that as soon as I had said it. It, of course, gives you 3,300.

30

Could you perhaps tell us what was produced in January, 1958, in the way of copper? What was produced in just that one month? - In January, 1958, alone?

40

That is so, actually produced? - 2,381 long tons of copper.

Would you be good enough perhaps to tell us

what was produced in February, 1958? - February, 1958, of course was after the agreement when it was decided that the mine would close down and you would have to realise that it would take some period to do so. The February figure was 1,956.

Could you give us the March figure? - 1,165.

10 And would you be good enough to give us the December, 1957, figure? - 2,031, but there I would mention that a mud rush occurred and the skip was damaged. May I go on to quote the November figure, 2,261; October figure, 2,423. There is a discrepancy. You must remember February is a short month and in practice you only work the shorter period than the longer months.

20 There was nothing so phenomenal about the January figure to justify this optimism based on the January figure only that the mine would be able to produce its 40,000 tons? - My Lord, that was on the advice of the Consulting Engineers and the Chairman who felt that the evidence before them justified a statement by the Chairman that the 1958 tonnage appeared to be possible at 40,000 tons.

That is outside the actual production figures, because you see in October, 1957, the production was 2,423. In January, 1958, it was only 2,381. In November it was 2,261 a very close approximation? - Yes.

30 There really wasn't a very great difference between those figures and the January figure, was there? - There is an absolutely normal build-up. I do not think the Chairman thought the Consulting Engineers would take into account the exact tonnages produced in any particular month. They are aware of the stoping conditions and what ore is available. I can only repeat that the Chairman felt that, as Chairman of the company, he could make that statement and he made that statement. I am not here to question him.

40 I would not cast the slightest doubt on the Chairman's statement. What does the Chairman mean by the mine's production? Does he mean the production of copper? - Yes.

Well, there was nothing phenomenal in the mine's production for January alone which singled

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it out from all previous ones and subsequent ones and subsequent months? - He means the production figures, the tonnage hoisted, the copper produced the whole general production pattern at the mine.

Something which unfortunately I cannot extract from any of these documents. - I think you can extract them because it is right throughout the whole case of a picture given by the Consulting Engineer throughout the years and showing an improvement in the position. Although there were these difficulties, it is clear that the Chairman and the Consulting Engineers felt justified in making this statement at that time.

10

By YOUNG, J: Mr. Gould, is it your contention there was no improvement by January?

By MR. GOULD: With respect, your Lordship, if your Lordship will allow me, I would like to proceed a little further. What did you say was the position? Was there a great improvement in January, 1958? - I think the mine was certainly in a much better position than it had been for a long time.

20

There was no need for the mine to consider any drastic step by ceasing production. Things were so rosy it could have carried on with production in the sanguine belief that everything would improve in January, 1958? - My Lord, the indications were that the mine was entering a much better period of its history, and, as the Chairman stated, 1958 could have seen 40,000 long tons of copper produced.

30

Were the difficulties of underground water, mud and slush still there? - Improving, certain of them had been overcome and others, as pointed out from time to time, there was faulting of the orebody. In other words, we were opening up a new problem and there were old problems and new problems to be disposed of from time to time. As a director, I felt the position of the company then was better than it had been for some time.

40

So all the concern that the directors were faced with in 1957 was evaporating. In other words, you now felt that the picture in Bancroft was quite rosy from January, 1958, onwards? - Was better.

Please, if you would be good enough to tell me categorically were there serious difficulties in January, 1958, with which the mine was confronted or not? - These difficulties were certainly far less than they had been in either of the two previous years and the tonnage coming forward from stoping was improving and increasing.

10 But were those difficulties that remained serious or not? - The difficulties were not difficulties which could not be overcome. I am not in a position to state how serious they were from the technical angle. The Consulting Engineers assured the Board that there were no problems underground that could not be overcome.

Let's put it like this: Was the stoping still being curbed by underground water? - Curbed, but not as much as it had been in the previous year.

20 Was development, that is to say stope preparation amongst other things, being curbed by the presence of these underground difficulties? - I don't quite know what is meant by Stope preparation. The development underground was proceeding at a very satisfactory pace, but again I would like to make the point clear that in development one has to go from your shaft to your stope and it may be a long way before you get there.

30 So that really there was no reason at all, according to you, why Bancroft Mine should have even considered the possibility of ceasing operations for a period? - On purely technical grounds?

On purely technical grounds. - That was never contemplated by the directors.

40 They didn't need a breathing space at all in order to reduce the water level, clean up, do everything that was done in the period of twelve months that you have told us about from the 1st April, 1958, to the 31st March, 1959? All that wasn't necessary to secure the smooth running and to ensure production at the rated capacity? It wasn't necessary at all, the mine just took a holiday. Is that right? - No, of course, and I think we are mixing up certain points here which, if I may say so, are rather tumbling ahead. I have made the point that in January of 1958 and in the

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previous months there had been a build-up of tonnage which was considered to be satisfactory. There was as you know at the same time a decline in the price of copper which naturally, as we have mixed up the profit now with the underground problems, it naturally affected the profitability of the enterprise. The natural inclination was to say to the Consulting Engineers: "You must step up your tonnage as much as you possibly can to overcome these profitwise difficulties." They were proceeding to do so to the best of their ability, bearing in mind that they had, as you have pointed out, difficulties underground. But it was not contemplated that any of these would cause the mine through these causes to shut down.

10

Mr. Acutt, let me ask you a similar question. Would it have been possible, according to your thinking, for the mine to have produced copper under the difficult conditions in which it was operating at a profit at that stage in January, 1959? - The point I think I made earlier on that the profitability a ton is dependant on the output, the greater the output the smaller the cost per ton, and had the mine produced 40,000 tons per annum, as we hoped, I think that again - I cannot unfortunately predict the price of copper - that the mine could have made a profit per ton, if it had reached that particular tonnage.

20

If it had? - It did in January. It showed the inclinations of building up tonnage.

30

Even if it had built up tonnage, wasn't its costs of production substantially increased by the necessity of combatting the difficulties it encountered underground? - Its costs of production were heavy.

I mean these tremendous pumping operations that had to go on all the time.

YOUNG, J.: He said so. When he said the costs were heavy, must he now repeat it?

By MR. GOULD: With respect, my Lord, I want to carry on.

40

YOUNG, J.: I do not want to hear the same thing over and over again.

MR. GOULD: With respect, my Lord, it is really

in a different context. Mr. Acutt, the pumping would have to continue? - Pumping is continuous in any mine, irrespective of the tonnage.

Because of these difficulties underneath? -
 No, my Lord. Let me make it clear. This is not because of difficulties at Bancroft. The amounts of water being pumped at other mines at the Copperbelt at the present moment are not dissimilar from the amount being pumped at Bancroft. The amount of water is a normal hazard or a normal annoyance which any mining reservation in a heavy watering pumping area has to cope with. Water is not necessarily at the same level throughout the mine, because it depends on the strata above at certain points. In most mines throughout the world water has to be dealt with and this was not a particular hazard. In the early stages of the mine as it happened we had acquired Nchanga before. Nchanga had to cope with water as well. Water is a normal pumping hazard which mining requires to be pumped out.

Could you then tell his Lordship in what way the difficulties which you encountered underground would have had the effect of increasing the cost of production of your copper in Bancroft? - I think I have made that point that until one could get your ore from stoping, the ore that was sent to the mill contained a certain amount of waste. It has to be hoisted up the mine. You have hoisting costs. The optimum of any mine is to sent 100% of the highest grade ore which can go to the plant so that your cost per ton is obviously lower and your profit per ton is obviously higher, and until a new mine gets to that point, there must obviously be higher costs. The costs of development, I have said on many occasions, here were high. The cost of mining at Bancroft was higher than the other mines at that stage.

Right. Now, I am coming to the 26th January. On the 26th January, which was a Sunday -
 Yes.

The gentlemen that you have named met at your house? - Yes.

All the persons concerned were directors of all three companies? - Not all of them, no.

Except the Consulting Engineers and the

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Secretaries? - There were three directors present, Mr. Oppenheimer, the Chairman of Rhokana, Nchanga and Bancroft; myself, deputy-Chairman of the three companies, and Mr. Taylor who was director of Rhokana, Nchanga and Bancroft.

I mean those. Now, you three were directors of all three companies? - Yes.

At this meeting, did you discuss for the first time what to do about this price of copper and Bancroft's difficulties and things of that description? - Bancroft's difficulties were not discussed. The meeting was held at my request because it became clear that we couldn't remain out, although it wasn't considered a power cut could really effect any enormous difference in the whole thing. The psychology, as a major copper producer in the world, we were the last remaining copper company which had not made any gesture and I felt that an opportunity should be taken. I therefore asked Mr. Oppenheimer if he would discuss this and the only day available - he flew up specially from Johannesburg over the weekend - was a Sunday. He actually arrived on the Saturday, and on the Sunday we had this meeting in my house and he proceeded back.

10

20

Now, the object of the meeting was, according to you, only to discuss the question of the cut in production within the group? - Yes.

There was no agreement outside the group between the Anglo-American Companies and other companies that a cut should be made? - No.

30

It was a voluntary gesture? - Yes.

It was not necessary for the Anglo-American Companies to cut production if it didn't want to? - Not vitally, but morally rather imposed.

I mean it was imposed of its own motion? - No, by pressures. There were articles in the Press that there were cuts by everybody else, and it was strange that these companies had not done so.

So what was going to be discussed was whether, as a moral gesture, the Anglo-American Companies should not reduce their production? - Not purely as a moral gesture. I merely mentioned that was one of the factors.

40

What were the other factors? - The world conditions at that particular time, as I have pointed out, indicated that there was an over-supply in the position of copper from 1957 onwards. There had been cuts in production, there had been mines closing down in America, and a general effort being taken by the copper producers throughout the world to reduce the amount of copper which could be said to be surplus to the current demand.

10 Yes, but the point was that if the reduction in the production was made by, let us say, the Anglo-American Companies, all the good could be undone by the American companies producing more. Is that not right? - Yes, that can always happen, I am afraid.

So there was no rationalisation in the industry as a whole? - No.

20 Coming to the group itself, how was this target of 270,000 tons as its target output arrived at? How was the amount of 270,000 tons as a target output for the group arrived at? - On the figures provided for sales purposes at the beginning of the year, contracts and sales discussions have to be started and the people in charge of the selling department call for figures of the amount of copper that they can rely on having from the three mines which we administer technically, and a figure is taken of the optimum target, at least what the Consulting Engineers consider as being the figure
30 which Rhokana, Nchanga and Bancroft could produce during the year.

That is the maximum figure? Not the maximum figure, no; the actual figure of the tonnages which they will say to the metal sales: "You may commit this amount of tonnage."

40 Is there a joint organisation for the sale of the products of the three different companies? - The sales are done through the British Metal Corporation, but for accountancy purposes the sales are distributed through the three producers pro rata to their tonnage.

Now, who determines what tonnage each mine should produce? - The Consulting Engineers state what amount will be produced by each mine.

Is there an agreement between the three

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mines as to the amounts which they will produce?
- No, no agreement whatsoever.

So that when Bancroft was supposed to produce 40,000 out of the target of 270,000 tons which had been set for the year, that was simply because the Consulting Engineers had estimated that it was capable of producing that amount and it was under no legal obligation to produce that amount. Is that right? - Legal obligation, no.

A contractual obligation or an economic obligation, that may come, but so far as Bancroft was concerned it was not answerable to either Nchanga or Rhokana as to whether they produced 40,000 or not? - I think it has very much of an obligation to produce that amount of tonnage for the simple reason that they have accepted the figure and they have told the people they expect to sell their copper to they can do so and had the sales committed themselves to that amount of copper, they would have had to find it, buy it or in any other way.

10

20

That is to the sellers? - Therefore they are not legally tied, but they would have had to produce if the other companies had come on them to produce 40,000 tons for sale, if there had been commitments through the British Metal Corporation of the total amount of copper and they had not produced the copper, they would have had to produce the copper by buying it in the market.

Let's get that quite clear. The British Metal Corporation, does it or does it not sell copper in the name of the three mines individually? - Yes, it does.

30

So it enters into contracts on behalf of Nchanga for certain tonnages? - Yes, it sells on behalf of the three mines. The reason for this, my Lord, is that there is only one smelter and copper does not go out marked "Nchanga", "Bancroft" or "Rhokana" copper. It goes out with the smelter mark or the refinery mark. Those are the yardsticks. The buyer is not concerned with where the copper comes from. The copper comes to the smelter if it is blister copper or to the refinery and is sold. I think the brand is Rhokana copper or Rhokana smelting. If it goes as an electrolytic copper it goes out as Rhodesian electrolytic copper.

40

The name Rhokana or Nchanga or Bancroft did not appear? - Not on the copper. That is purely from the point of view that the agreement is entered into between the mining companies and the seller.

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10 Does Bancroft say: "I will supply 40,000 tons? - Bancroft does not say that. Bancroft, Rhokana and Nchanga, in the agreement to supply this copper, say that they will supply 40,000 tons, or whatever the tonnage is, to the seller of a certain type of copper.

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You must forgive me. Does each one separately undertake to supply a particular tonnage? - To the pool.

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Between whom is that arrangement to supply the pool? - The consulting engineers advise the metal sales people how much each mine will have available for sale each year.

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20 Hopes to have available? - Well, "will have available" is the normal attitude.

Do I understand that Bancroft was held out as a mine that would have available 40,000 tons in the 1958 or 1959 year? - I think about that figure.

So Bancroft was committed to produce that amount? - Was committed to produce 40,000 tons if it was sold, yes.

30 If it was sold? - Yes, but at the beginning of the year if Bancroft then found themselves in a position not to do so and there was some catastrophe, for instance, if you had a strike, clearly you could go back and if that copper was not committed for sale, then you could withdraw it. It is clearly only the copper which was committed for sale.

But Bancroft, as I understand it, didn't have a chance and really couldn't commit itself to sell 40,000 tons? - In the year 1958?

40 Well, in 1957 we had this gloomy picture. How could it commit itself to produce 40,000 tons when it was still suffering from all these difficulties and teething troubles? - The Consulting Engineers were prepared to give that figure for sales and I am not in a position to question it. They believe that in 1958 they would be able to sell 40,000 tons.

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They believed that? - Well, I am told they did, otherwise they would not have given the figures.

Suppose Bancroft had been unable to do it, would the difference have been made up by Rhokana and Nchanga? - They couldn't. The total tonnage available for sale was 2,701 long tons according to the preliminary estimates of the tonnage. I think I dealt with this question earlier when I pointed out that the firm commitments for 1958 - these contracts are entered into round about October of the previous year - were either somewhere in the neighbourhood of 245,000 or 250,000 tons.

10

That is by the group? - By the group, and they had ad hoc sales to take up the balance.

So 240,000 or 250,000 tons had been sold forward? - Yes.

That had to be found within the group? - Yes.

20

Suppose Bancroft was unable to contribute its portion of the 240,000 tons. It was on the basis of 270,000 that Bancroft had to produce 40,000; is that right? - Yes.

On the basis of 245,000, what amount did Bancroft have to contribute? - It would be pro rata.

Would you say it was prorata? - Yes.

Is it possible that the difference between the 270,000 and the 245,000 was really a reduction in Bancroft's own production figure, that is to say, seeing that it does not seem possible that Bancroft would produce the full 40,000 tons? - It is customary every year not to commit the full amount available, to take advantage of ad hoc sales premiums arising on certain types of copper, and it is a normal selling practice to redeem certain copper to meet the possibility of enhanced prices, further commitments, new markets and various other things.

30

By YOUNG, J: Do I gather that the Anglo-American Group commit themselves to the British Metal Corporation? - The mines do, my Lord.

40

I was just coming to that point. Is there no central organisation which does the negotiating with the British Metal Corporation? - What is known as our Metal Sales Department.

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Your Metal Sales Department commits itself to the British Metal Corporation to the tune of, say, 240,000 tons. Now, your Sales Department looks to the three mines to fulfil their commitments, upon which that commitment to the B.M.C. has been made?
- Yes.

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And, of course, if, shall we say, Bancroft through unforeseen circumstances failed to provide its commitment, then if copper was available from the other two companies they would take up the slack? - Their purpose is to sell copper. They would take up the slack had they been able to do so.

If they were not able to do so, then Bancroft would have to go on to the market? - It would have to go on to the market and buy.

20

By MR. GOULD: Suppose Bancroft had never come into existence, would that figure of 270,000 have been reduced by 40,000, in other words if the only two companies in existence were Rhokana and Nchanga?
- For that year, yes,

The target output would then have been 230,000? - It couldn't have included Bancroft, because Bancroft was not in production in your thesis.

30

The 230,000, or in this case the 270,000, is roughly the maximum output of the two mines? -
For that year.

For that year? - It was the maximum output contemplated for that year.

Can you tell us what the rated capacity is of Nchanga? - In October?

In October, yes? - At the present moment, I think about 13,000 tons a month.

No, in that year, in the 1959 year? - May I go back to my books?

40

Surely; from April, 1958 to March, 1959, let us say the 1958 and/or the 1959 year. We are now talking about the rated capacity. What can its plant deal with? - At that particular time?

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Yes, how many tons of ore? - They dealt with 3,171,470 tons of ore.

Is that what it actually milled? - That is sources of tonnage, yes.

But what is the rated capacity? What could the plant cope with? - I think the plant at that time was operating to about full capacity.

So far as Rhokana is concerned, what is the rated capacity of the Rhokana plant?

By YOUNG, J.: What was the rated capacity of Nchanga per month? - May I shorten this question? I can give an assurance that both mines were producing to the maximum of their capacity at the time.

10

by MR. GOULD: In the year 1958-59? - Yes.

Was that after Bancroft had ceased production? - No, they had been producing all the time.

Nchanga and Rhokana were producing at full capacity all the time? - Yes.

So that from the point of view of these two companies, first of all before I go on, as between Nchanga and Rhokana there was no agreement at all as to how much each should produce? - No.

20

Each was at liberty to produce whatever it could? - Yes.

So, so far as Nchanga and Rhokana were concerned, there was no possible benefit they could get from Bancroft ceasing operations? - I think that is made clear in the Chairman's address. What was done in practice was to increase the grade by what is known as over-mining, which is a point I think you made very early on, and I explained the position of over-mining. May I just get out the Nchanga report for 1958?

30

It would be the 1959 year, I should imagine? - I think it is 1959.

Exhibit 22? - on page 6, my Lord, the Chairman sets out there what can be done due to the great flexibility both in plant and mining operations. The value of this flexibility was proved

40

10 during the year. In accordance with the combined programme of output agreed with Rhokana Corporation and Bancroft Mines, Nchanga was scheduled to produce approximately 12,500 long tons of copper a month, equivalent to 150,000 tons for the year. Nearly two months' output was lost because of the prolonged strike of European daily paid employees towards the end of 1958, and furthermore at the time of the strike, production was already slightly behind the scheduled rate for the year. It was nevertheless possible to make up this shortfall and much of the lost production by increasing output for the last four months of the financial year to 15,500 long tons a month." May I make it clear that that is possible, but obviously at increased cost. This had to be made up because they had run short by a strike, but if you press a mine beyond a normal rate you reach a point where your costs go up considerably, and here the mine was pushed in order to make up tonnages of copper which we had sold and which, due to the strike, we were having great difficulty, in fact we could not deliver. The pipeline had run out and our consumers were calling for copper. The mine was therefore pressed beyond its normal capacity and beyond its normal efficiency, which can happen to any property, but it cannot maintain that at an economic level. But the mine was able to press up as much as this. The small increase it was asked to carry, yet it took over a portion of the 13,000 tons which were not to be produced, the extra tonnage which was to be produced when Bancroft went out was a very small amount when you see it was in relation to 150,000 tons per annum.

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40 I still don't understand, Mr. Acutt, if Nchanga and Rhokana were free to produce as much copper as they pleased in order to reach its target of 270,000, why they were keen on adding to the burden of this additional pressure of producing what Bancroft would normally have produced and so on? - I have just been making the point that in relation to 150,000 tons for the year, the additional amount to be produced by Nchanga could be produced at such a low cost, a tremendously low cost, that even if there was a slight burden it was not a very heavy burden because one cannot talk in terms of a few hundred tons of copper as being an immense burden.

We are talking in terms of 40,000 tons of copper? - But they were not asked to produce

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40,000 tons. They were asked to produce 13,000, divided between Rhokana on the basis of 9,000 tons, I think, to Nchanga. This was a very small increase in their tonnage.

I beg your pardon, it was 13,000 after the cut. - Of which Nchanga was asked to produce about 9,000, therefore 9,000 tons over a year to be absorbed when your tonnage is 150,000 tons does not strike me as being something unduly onerous.

For the privilege of producing these additional 9,000 tons and also in order to cut its own production, Nchanga was prepared to pay £1,384,000 to Bancroft and the balance of £780,000 odd Rhokana would be similarly prepared to pay to Bancroft? - In order not to cut its production. 10

And, if need be, produce the additional copper. At your home on the 26th January, what was the real approach to the problem between you three gentlemen in relation to all three companies? Was it a question of the advantage to Rhokana and Nchanga if Bancroft were to stop production? Was it the advantage to Bancroft if it were to stop production and take a breather and clean up its mine while the other two mines would meet the forward sales commitment? What actually was the approach to the whole discussion? - My Lord, it was accepted at the meeting that the three companies, Rhokana, Nchanga and Bancroft should do something to help to improve the general price and the position statistically of copper. 20 30

That could have been achieved if all three had simply agreed to cut their production? - Yes.

Now, from there onwards, where do we go? Were the difficulties confronting Bancroft discussed? - They were raised in passing, in that it was quite clear at the early stage of the meeting that Bancroft would have to remain aloof from any arrangement to cut production. They could not afford to cut production.

Even the 4,000 tons a year, I mean all that Bancroft would have had to cut? - It is £800,000 in money at £200 a ton, and it seems to me to be quite an appreciable amount for a mine with the difficulties of which we have heard. 40

Bancroft was going to produce 40,000 tons.

That was the estimate by its Consulting Engineers.
 If it had to cut, it would have to cut 4,000 tons?
 - Yes.

That in money would have meant £800,000? -
 At about £200 a ton.

10 Is it correct to say that was on the assumption that Bancroft would have been able to produce the 40,000 tons? - It was assumed at the time on the Consulting Engineer's advice that Bancroft would produce the 40,000 tons.

So that to help Bancroft it might have been possible for Nchanga and Rhokana to agree in addition to cutting 10% because that was not a statutory figure, to take over the 4,000 tons and leave it to Bancroft to produce the full 40,000?
 - I don't understand the question, Nchanga and Rhokana and Bancroft were three separate companies with three separate commitments and three sets of shareholders.

20 Each company was free to cut if it desired to the extent to which its operations permitted. No company was morally obliged to reduce its production if that had meant going out of business? - But it would hardly be justifiable to go to the shareholders and say: "Because one of our other companies cannot do it, we are taking it over." I do not think the shareholders would have worn that for one moment.

30 The world price of copper would not have plummeted if Bancroft had simply turned round and said: "I am under no obligation to cut my production by 10%, because if I do so I will be out of business. I cannot afford it, and in any event the 4,000 tons in the scheme of things is neither here nor there." Bancroft was free to say that as an independent agent, was it not? - Yes.

40 Then it was open to Nchanga and Rhokana to say: "We are going to play the game. We are allied companies. We will each reduce by 10%?" - Yes.

Or by nothing, isn't that right? - Yes.

So that your first step in the calculation that Bancroft would not be able to afford to cut its production by 10% is really a point of no

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substance from its own point of view? - Could you repeat that?

I say it was a matter of no consequence to the price of copper or world production whether Bancroft cut its production by 10% or not. - Can I go back to this. - Can I go back to this figure of the commitments of the companies? The obvious effect was that the companies should cut all together. If one is remaining outside of an arrangement - which it clearly could have done had it decided to do so - the impact of a cut is lessened very considerably, whatever the tonnage. The very fact that a few people are remaining outside I think lessens the impact of a cut. That is purely a matter of opinion, my lord.

10

So you then considered that Bancroft couldn't afford the cut. I know you cannot tell us in direct sequence, but where did the conversation and the discussion go from there? - I think I have indicated that the general feeling of the meeting was that one should achieve a cut on the 270,000 tons which is known in the trade as being the combined output of these mines, and therefore, as you have put it, there was the alternative perhaps that Nchanga and Rhokana could take this cut on their own heads, but it was quite clear that that alternative could not be considered because, as I pointed out, these companies were separate companies and it would be quite impossible to point out that they had done this in order to let Bancroft off. If they had of their own free will privately and separately arrived at a decision to cut any amount, I do not think it would have come off. However, in the context of this discussion, it was quite clear that Rhokana and Nchanga could take no separate action in that way and therefore the conversation went on: "Well, how on earth are we going to cut this mine? It is so clear that Bancroft cannot! We accepted that. The point arose of the cost of production at Nchanga and Rhokana, and the cost of production at Rhokana and Nchanga were lower and this prompted the idea from the Consulting Engineers that in view of this very low cost to Nchanga, it would pay Nchanga and Rhokana to produce more, for the cut to be produced on the 270,000 and that Rhokana and Nchanga would make a profit on the transaction.

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Had that already been calculated by that Sunday morning? - No, it had not. It was calculated in the morning.

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It was calculated in the morning while you were discussing the matter? - And the meeting went on in the afternoon.

10 And it was said by yourselves in your capacity as directors of Bancroft: "Well, Bancroft's cost of production is very much higher, they should cease production entirely." Is that right? - No, it was put in the discussion that clearly if Bancroft went on producing it would produce this amount of copper in this way it was enabled to make its contribution to the cut, secure the amount required to maintain its plant, its interest, and to continue with underground work and really strengthen its position, perhaps to come back into production in a year's time. I cannot give a logical sequence of the discussion which took place.

20 I cannot understand if Bancroft was able to produce 40,000 tons of copper and it was against that background that you were having the discussion, why the question should ever have arisen that Bancroft should cease production entirely for a period of one year? - I thought Counsel had made this very clear by pointing out quite often that Bancroft in 1958, even on a production of 40,000 tons at that price of copper, was not going to make very handsome profits. In fact, I think it was mentioned earlier that we could anticipate a loss in 1958.

30 In 1959? - In 1959. I think you made that point yourself.

40 Was that discussed on that Sunday, that if Bancroft did continue with its production that it was likely to make a loss in 1959? - No, because we couldn't unfortunately see what the price of copper would be, but it was obviously raised that in the context of discussion that Nchanga was the lowest cost producer. In fact, at one point of the thing the discussion obviously went over all these different possibilities of what would happen. Nchanga's costs were so much lower than anybody else's that the thought arose that perhaps Nchanga should take it all on on themselves, because of the profit which arose from this transaction.

Didn't this perhaps dawn on you gentlemen that the copper price had just about reached its nadir on this basis, even if Bancroft could produce

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40,000 tons, it could only produce the 40,000 tons at a very substantial loss? - My Lord, it is very difficult to predict how long the price will stay at that level, and in practice the price did go up. I wouldn't like to say that it was entirely or in any way due to these cuts, but the price did go up,

I am trying to picture the conversation about Bancroft on the 26th January, and to ask why it ever occurred to anybody as against the background that you have depicted that Bancroft should cease production of copper for a year. Whatever made you think of it? - Well, the Consulting Engineers pointed out that from Nchanga's point of view it was worth while them doing this business, merely from a pure financial gain point of view rather than cut.

10

But Bancroft is a separate company with its own shareholders. We now have to consider that company. It has been producing for a year. It is just about turning the corner. That is the picture you have provided. It has employees. It has housing. There is going to be a tremendous uprooting by closing down Bancroft for a year. Where did the necessity or even the thought of the advisability of closing down arise in your minds as far as Bancroft was concerned? - I can only repeat that it was one of the many topics which were discussed from 9 o'clock in the morning of that day and went on throughout the day.

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(Tea adjournment)

The question was, when did it first occur to you that Bancroft should cease production entirely? Was it on that Sunday morning? - It was a suggestion which arose out of mulling over the whole problem on that Sunday morning.

And it was appreciated right away this would involve uprooting all employees, the Bancroft township and everything that went with it? - It would mean the closing down of the service plant if it ceased production.

40

And many employees would have to be discharged?
- Yes.

And alternative employment would have to be found for them? - Yes.

It was quite revolutionary from the point of view of the Bancroft community to close down that mine? - Yes, my Lord. Going to another point, if I may, exactly the same point would occur if either of the other two mines reduced. You would have had an upheaval at three mines, because it would have been necessary for them probably to reduce their staff.

10 In so far as you gentlemen were concerned, you then thought it would probably be better from the group point of view for Nchanga and Rhokana to do the production, having regard to the low price of copper, is that right? - No, the group point of view was never brought into consideration at all. Each of these mines was discussed as separate entities with separate problems and the fact that we were together over a long period meant that we discussed the things openly, obviously from each point of view, but the group as such on which there
20 has been quite a lot of emphasis has no standing at all.

You discussed the question of a cut. It was obvious Bancroft couldn't cut. What was the sequence after that? You then said there were figures to show that it would be inadvisable for Nchanga and Rhokana to cut? - That if they cut clearly there was going to be hardship on certain members of their staff as well, and the whole cost of their production is increased by the
30 lowered production. That led to an obvious conclusion that really the thing to do is to try to increase production on any mine, in fact, that goes for Bancroft too, but clearly in the circumstances there was no question of a unilateral increase in production at any one mine. The discussion was how best to achieve an overall reduction in the tonnage of copper and therefore it was natural that some point should be drawn to the fact that there were
40 certain mines which were producing at a higher cost, and the effects of these cuts on Rhokana and Nchanga were discussed, and it led, I think, to a very understandable point being made by the Consulting Engineers that quite clearly if Bancroft, which was the highest cost producer, went out altogether there were immense gains for Rhokana and Nchanga possible if they took up the additional tonnage, and it was calculated on the graph which I think has been put in since in the afternoon on the preliminary figures available this clearly looked

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as being more advantageous to Nchanga and not quite so advantageous, but advantageous to Rhokana in ordinary normal circumstances.

Was the graph prepared there and then? -
The graph was available in the afternoon. No, the graph wasn't. The figures were. The graph was produced the next day.

There wasn't a graph in regard to Bancroft?
- No, there were figures.

What did the figures reveal? - The figures 10
revealed that at the particular price of copper which was prevalent at the time that Bancroft was probably likely to have a further year of non-profitable production.

Isn't that universal, instead of seeing a nice profitable production, Bancroft was likely to run at a very considerable loss? - At a loss. The severity we couldn't calculate.

Are the figures available, the calculations which were placed before you? - I have not 20
them with me.

Are they available? - They can be calculated from reports.

No, the figures about the non-profitable basis of Bancroft's production that were produced? - These figures were produced from Consulting Engineers. They keep a running check on things. It is quite clear I think by looking at the reports that on a 40,000 ton of copper at the particular price of copper which was ruling at the time it was going to be a tough year for Bancroft. I think 30
that is not disputed by anyone.

But what about Bancroft's commitment to the British Metal Corporation to produce 40,000 tons of copper? You told us that she was committed? - No, I said our commitments were 245,000 tons of copper.

But Bancroft was committed, let us say, for 30,000 or 35,000? - Bancroft was not committed to the 270. It was committed to its proportion of 40
245.

Would that be about 35,000 or 36,000 or 37,000?
- I would rather do the calculation if it is made.

It obviously had to take a 10% reduction in its cut, therefore if it was 35,000, it would be 3,500.

Bancroft, you have told us, was obliged to supply a quantity of copper. Make it 30,000 tons. What was to happen to its commitment if it went out of business? - It was only committed to 245,000, the whole lot, not 270,000.

10 I agree, but Bancroft was committed to its pro rata share, Let's call it 30,000 instead of 40,000. What happened to its commitment? You have told us she was committed? - I don't know what you mean by commitment. The 245,000 tons were the commitments of the three companies.

20 Yes? - Nchanga was producing 150,000 tons of copper a year. Rhokana was producing plus or minus 90,000. At the time I think it was more than that. Anyhow, one can arrive at the figure, because it was 270. The other mines were producing 230,000 tons and it was therefore, if one was going to carry out one's commitment by and large, a further 15,000 tons had to be added to those companies to provide the amount of 245,000 tons of copper for which we were committed. That would have been produced by Bancroft in the ordinary course of events.

30 I understood you to say to his Lordship this morning that in the ordinary way if Bancroft had failed to attain the 40,000 tons for which it had been committed, it would have had to buy copper in the market to fulfil those commitments? - If that copper had been committed, I repeatedly pointed out that 240,000 tons.

40 By YOUNG, J: If it were unavailable from the group - If Bancroft had fallen short on providing its copper for the 245,000 tons which was committed, it is probable it would be about 30,000 tons of that, it would probably have to purchase copper. But the fact of purchasing copper and selling copper is a very simple matter. You do not make a profit or loss. You can buy it and sell it. There is no particular hardship. In other words, they had to produce the copper, whether they produced it or whether they bought it. In practice, although mining companies do not do it, it is merely a question of buying copper to make up their fulfilment. In a month's time you get the payment for it, so there was no hardship.

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No, but from the point of view of the relationship between this independent body, the Bancroft Mine and the British Metal Corporation, was Bancroft going to be released from its obligation to deliver the 30,000 tons of copper? - It was going to be released from its obligation, because other mines would take over the 15,000. The cut would involve the difference between 270,000 and 245. The other mines would provide half of it. May I put it this way: Rhokana and Nchanga would maintain their production at their previous level and would not cut, therefore they absorbed some of Bancroft's 10%. They would also take over additional tonnages in order to provide the copper up to 13,000 tons and therefore there was no question of anybody failing in their commitment. All that happened was, in order not to cut, therefore there was no loss of copper, Rhokana and Nchanga were not cutting and Nchanga put forward the proposal that they would take over the tonnage.

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All right, so we have got as far as this, that you have said that on figures produced on that Sunday it became obvious to Mr. Oppenheimer and to yourself and Mr. Taylor that as members of the Board of Bancroft, if you had to produce your pro rata share of copper in the 1959 year you would have done so on a non-profitable basis or at a loss, is that right? - May I go back?

You said that? - I couldn't say that. I said dependent on the price of copper, it didn't appear that there was likely to be much profit. I don't think it is an important point, but one cannot look into a year ahead. One must purely take the figures at the present price of copper.

30

The present price indicated there would probably be a loss? - Yes.

You are not prepared to tell me how substantial that loss was. You don't remember. Wouldn't Bancroft then be only too pleased to be relieved of that obligation to produce that amount of copper for the British Metal Corporation which it was committed to produce? Why should it require a payment of £2,165,000? - Who was going to meet the interest charges in the plant and machinery which had been ordered? There was plant and machinery ordered for the forthcoming production year. You read in the Consulting Engineer's report about pumps being installed. Those pumps do not come

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out of thin air. The whole mine had forward commitments. It had interest, which was £600,000 a year.

I understand that only too well. - Well, where was this to come from?

10 But that was no concern of Nchanga's or Rhokana's. As far as they were concerned, they were independent companies. - My Lord, I am getting a little mixed up, but I think I was asked a question as a director of Bancroft. I was asked why Bancroft didn't merely say to Rhokana and Nchanga: "Thank you very much, we would like now to pull out of our commitments." That was the question to Bancroft. I pointed out that as a Bancroft director quite clearly it would have been nonsense because Bancroft had to meet its commitments and could not have done that.

20 How could Bancroft have met its commitments by producing copper at a further loss? It would have only aggravated its position. - But the loss which would be made would not be a total loss. It would recover portion of its operational cost. Even if you look back on the previous years, it has not all been lost. A lot of the loss in previous years was interest.

I am talking of operational losses. - During the year it hopes obviously Bancroft would increase its production and sell copper at a higher price.

30 At a loss. This is a simple position. Bancroft, as you told us, had to pay interest. It had ordered plant. It had to do work. It required funds on the one hand and it was still committed to produce copper at a loss, which would go to aggravate its position. That is clear. You don't buy these things out of losses. You can alleviate your position by making profits. That's right, isn't it? - You can also reduce your losses by certain operations. The losses would not obviously have been as great. You get back some of your working costs. It is not all losses. Furthermore, there is always in mining the hope that the copper market might have improved considerably. In other words, you cannot a year beforehand tell what the position will be at the end of the following year. You can take a shrewd guess.

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So did you, in your capacity as directors of

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Bancroft, virtually say to the other two companies: "Gentlemen, we ourselves will continue producing copper unless you pay us an amount of £2,165,000," and then you sat as an Nchanga board and you sat as a Rhokana board, and you say to yourselves: "Here are graphs which show we can make a profit by producing this additional copper and not cutting our own production rate, even if we pay back Bancroft £2,165,000," and therefore you say: "It is perfectly all right, Bancroft. We shall pay you that for the privilege of producing the additional copper." - You put it in one way, but in effect what does the conversation between three bodies arrive at but a conclusion? I wouldn't like to say which one.

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Now, would you admit that the £2,165,000 which you have already stated was the exact amount estimated to meet Bancroft's capital requirements, to meet its liabilities to pay interest? - To meet its working costs.

Of pumping and development? - Yes.

20

That that amount was fixed with a view to helping Bancroft, because of its difficulties and with Nchanga? - May I answer one at a time?

Wait, and that the £2,165,000 was just the figure which cancelled Bancroft's requirements for the year, is that right? - Can I put it this way: When this was discussed it was quite clear that Bancroft could not even contemplate any discussion unless it had the amount of money required by it to carry on its operations during the year, and this was stated. There was no question, the figure was worked out at the time on what it was and this was the figure that Bancroft stated they could not even consider anything less.

30

Is it correct to say that without Bancroft's yea or nay, Nchanga and Rhokana could have produced as much copper as they pleased? You have told us that already. There was no target between the three companies? - Apart from physical limitations.

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Apart from physical limitations? - Yes.

So that Nchanga's production or Rhokana's production was not dependent on lack of consent or otherwise? - Not on its consent, no.

10 So Bancroft had nothing which it could really sell to either Nchanga or to Rhokana in the form of a right to produce copper? - My Lord, I think that is probably correct that it had nothing it could sell, if one takes the whole matter out of its context. The purpose of the meeting was to reach agreement how best a 10% cut in the copper could be achieved. If one immediately takes it out of that context, of course, Bancroft or any company can do what it likes, but as far as the world sales of copper were concerned, it was the opinion of the directors that a cut in the announced output of the three mines should be made, and it was their endeavour to find a way and means of doing that.

Now, we go on to say Bancroft needed £2,165,000 to finance its development, its pumping and to pay its interest? - That was the estimated cost of its requirements during the year.

20 It is admitted that unless the price of copper rose considerably it could not make it from producing its 30,000 or 40,000 tons? - No, it would have made a loss.

It would then have had to borrow the money from some other source or finance itself in some other way, because we know its funds had been exhausted? - It would probably have had to raise more money temporarily.

30 That was the way Bancroft was situated and it had no bargaining counter with either Rhokana or Nchanga for saying: "We will sell you something for the payment of £2,165,000." - If the alternative was that, it had to stay in production. It was not a question of coming out of production. It had no alternative but to remain in production, to attempt to increase its production and therefore make it incumbent on the other mines, if they wanted to achieve what had been set out at the original meeting, the greater reduction, then even 10% in order to achieve the cut

40 But I didn't say, with respect, let's be quite realistic here. I didn't say what pistol Bancroft would have held to the heads of either of these two companies. - But in business you don't hold pistols. You presumably produce the facts and figures of what you expect to do. Bancroft directors are extremely reasonable people and so are

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Rhokana and Nchanga directors, and they therefore found it quite easy to arrive at a reasonable agreement. Obviously, an agreement is not one-sided.

By YOUNG, J.: Would Bancroft have lost more if it had borne the 10% cut than under this arrangement? - It couldn't do so, because it would have been producing at a totally uneconomic figure.

Would not Bancroft's have lost much more if it had sought a 10% cut than under this arrangement? - My Lord, I think Counsel is making the point that they would say they wouldn't absorb the cut. 10

That is a matter of policy. You said you required Bancroft to participate in this general cut? - Yes.

Therefore that had to take place or this was just a method of minimising the losses? - Bancroft obviously couldn't take part in the cut unless they received some form of revenue to cover their commitments and they made that point clear. It was then that Rhokana and Nchanga came with these other suggestions which have been made. 20

By MR. GOULD: And the other suggestions were that if you save us the trouble of cutting our production and give us the chance to produce an additional amount of copper, we shall give you the additional amount of money that you require for development. - Because it is profitable for us to do so.

This I think you will agree is also, viewed from the point of view of Bancroft, just manna from heaven, isn't it? Let me give you your thinking on this. Bancroft was facing difficulties. We know it had suffered losses on October production. There was an estimate that for the 1959 year it would suffer further losses. It had no money. It required £2,165,000, so that instead of producing copper at a loss, increasing its capital expenditure on the mine from I think at that stage about £20 million odd to something more and paying interest on all that as a future commitment, here for nothing, for getting a release out of trouble which would have accentuated if it had to cut its production as well, as his lordship put to you, just for getting out of trouble it gets out of the blue £2,165,000? - My Lord, it was never considered as manna from heaven by any of the directors. On 30 40

Bancroft after all, as the point has been made, there had been £20 million spent on this mine, and it was the object of the directors to bring this mine to a successful production. It had taken a little longer, it had cost a little bit more, but that did not lessen the determination of the directors to see this mine as a payable mine. You couldn't do anything else. The closing down of a mine is not a pleasant decision to take.

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10 It was taken of necessity? - It was not taken of necessity. It was taken here because there was an opportunity presented by Nchanga which made it possible for Bancroft to accept the proposal put forward.

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Well, so far Nchanga has been treated as a completely independent body. Could you perhaps give us some indication of what Rhokana's interest was in Nchanga? What was its shareholding in Nchanga? - 27%.

20 Wasn't it over that? I think the reports talk about 33 to 34%? - If they do, I think that is wrong.

30 May we just look at Rhokana's balance sheet. Let's take Rhokana, 1958, which would be Exhibit 28 under its investments at the bottom of page 12, my Lord: "Investments in association companies. Nchanga. The company retained its holding of £2,355,000 £1 stock units in Nchanga, representing 33.6% of the issued capital." I think you will find the same, subject to correction, in 1959. - I must apologise, my Lord, I didn't realise it was that much.

I would just like to check up on 1959 so as to make quite sure I am not misleading his Lordship.
- I think that is not the right figure, my Lord.

Rhokana, 1959, my Lord, also on page 12.
"During the year the company's holding Nchanga represented 33.6%" It was broken down? - Yes.

40 They took up new shares, that is Rhokana. Other companies in the group - you know what I mean by that - do they have shareholdings in Rhokana, for example Rhodesian Anglo-American? - Nothing very large directly.

But they did have some shares in Rhokana? -
In Rhokana, yes.

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I beg your pardon; in Nchanga? - I cannot recall the figure.

But you think they had some shares? - I am rather doubtful.

Anglo-American properties? - I cannot pull the figures out of my head, but may I put it this way, the Nchanga holding of shares which we are referring to is mainly in the Rhokana Corporation. The other companies in the Group may have a few shares, but nothing very much.

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You will agree that 36% is virtually control in the practical sense of Nchanga? - I have never quite understood that. I have been told repeatedly that in law 25% does represent control, but in practice it has never protected anybody from a take-over bid.

YOUNG, J: It certainly does not apply in law.

By MR. GOULD: It is only in practice. So far as Rhokana is concerned, it has a stake in Nchanga and I take it to a certain extent in the set-up Nchanga was subject to persuasion, if not dictation at the hands of Rhokana? - My Lord, as we are on this question of investments in Rhokana, may I first deal with one point. If you look through the investments in association companies, the company holds 26.56 in Mufulira Copper Mines, Ltd. Is it suggested that here again the company controls or has some controlling interest?

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No, because I think Mufulira Mines belong to another group, Rhodesian Selection Trust, where the larger shareholding is held by them. But anyhow, don't let's waste his lordship's time on this. It is perfectly clear these companies were interlocked? - They have interlocking shareholders.

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And as far as Rhokana is concerned, it really had an interest in seeing that Bancroft was kept alive and improved. It had a great stake in Bancroft as well? - It has a considerable interest in Bancroft.

And if Bancroft had closed down completely, you have told us there would have been a tremendous loss to Rhokana and other companies? - That was not contemplated, my Lord.

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Now, this £2,165,000 was earmarked by both Nchanga and Rhokana. It was given provided it was earmarked for use by Bancroft for specific purposes. In other words, Nchanga and Rhokana said to Bancroft on that Sunday afternoon, "We will pay you £2,165,000 to be used by you for the following specific purposes: (1) to pay interest on your loans; (2) to do your pumping; and (3) to effect a certain amount of underground development." - I think this is an over-simplification of the position. These, in fact, were the things which Bancroft said they wished to do with the money. There was no commitment that they should be used for that alone.

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Are you sure? - As far as I know, there was absolutely no understanding. The main point was that the mine should cease production. There were letters exchanged which set out what the money would be used for, because Bancroft had stated what the money should be used for. I think it covers general cement work, interest and maintaining the mine in a position to open up.

20

In all the annual reports of Bancroft, Rhokana and Nchanga, in each one it is categorically stated that Nchanga and Rhokana undertook in consideration of Bancroft's undertaking to cease production to pay out an amount calculated to meet its requirements for these particular purposes - Yes.

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Wasn't Bancroft under a duty then really to apply the money for those purposes and for no other purposes? - I don't think the question ever arose that there was ever any other purpose for which they could apply it. I do not quite understand the question.

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If we were to look at the letters which were exchanged on the following day - I am afraid I will have to detain the Court just for a few minutes on this - the letter of the 27th January, 1958, annexure C, Exhibit 15, Mr. Denman on behalf of the Secretary writes to Bancroft. (Exhibit 15 read.) You say it wasn't proposed that Bancroft should reduce her production? - My Lord, I am sorry; I may be getting a bit muddled. I do not think I ever said that.

Didn't you say it was understood right from the word Go that Bancroft couldn't possibly reduce her production. - The suggestion was all the companies were discussing the thing in general. This letter follows the discussion on the Sunday.

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"It can be assumed therefore that your production costs are substantially higher than those of either Rhokana or ourselves." That is a clear statement? - This is written by Nchanga Consolidated Copper Mines.

This is just a formal letter regarding what was discussed. "It is assumed that your production costs are substantially higher than Rhokana or ourselves" is sheer nonsense. It is known. How can you reconcile this letter with what you said earlier that in January, when you met on that Sunday, it was anticipated that Bancroft would be able to produce 40,000 tons of copper, without this enlarged development programme? - My Lord, the question of a large development programme must be understood clearly. A large development programme was being undertaken. The Chairman has stated that throughout. The Consulting Engineers have referred to it repeatedly. 10

Please, it says your cost of production is very much higher than Nchanga's or Rhokana's, and it will remain so until you have been able to increase the tonnage milled and until copper is produced at the full rated capacity of the plant at your mine? - Yes. 20

That is 156,000 tons? - It will remain high.

"We understand further that for this purpose a large development programme must be undertaken." - Yes. 30

Without which you will not be able to produce at full rated capacity. That was in your mind on the 22nd January? - My lord, with deference, I have stated all along that the company wished to carry out a development programme in order to increase its tonnage and was doing so. This is an absolute statement of fact. Whatever happened, it would have to carry out a development programme to open up a new mine.

All right, shall we just carry on. "In these circumstances a 10% reduction in your planned output of 40,000 long tons of copper during 1958 may possibly increase your production costs to the extent that you could not, in view. inter alia, of the heavy burden of interest payments on loans and on the 5% notes, continue mining operations except 40

under the greatest difficulty." - This was written by Mchanga to Bancroft.

That's right, but it sets out the general discussions that took place the previous day. You have no comment on that? Does it correctly reflect what was discussed the previous day? - Yes, I did not choose the wording, but I think in general if you are taking the exact position, yes.

10 "The production costs of Rhokana and ourselves will obviously also be affected by a 10% reduction in output, but to a lesser extent. The total planned output of all three companies for 1958 is 270,000 long tons, and the proposed 10% reduction is therefore equivalent to 27,000 tons. On a Group basis the highest saving will be achieved if your company, as the highest cost producer, will cease production for the proposed period of one year." What does that mean, "on a Group basis"? - Well, 20 my Lord, it means discussing only those three mines, there were probably other mines which one could have brought in. This was discussing the Group, discussing the three mines who were in the discussion. You cannot have in other words the mines outside.

Doesn't it really mean you are considering the rationalisation of copper production within the Group, within the three companies, you are just rationalising and saying: "Let those who can produce at a profit produce. You cannot, because you 30 will produce at a loss," and that is a rationalisation of the principal as a whole. Isn't that really what it means? - No.

Surely? - I don't see it.

There is nothing wrong with it. I would never suggest there is anything wrong with it. I just ask you if that is not what you meant by a Group basis? - It is perfectly clear that the Group basis means for the three mines. This is clearly the most economical way of doing it. I think one 40 must not take it out of its context. I would prefer you to read on.

I will read on: "The difference between the tonnage your company expects to produce this year (40,000 long tons) and the proposed reduction in Group output of 27,000 long tons will be made up

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by Rhokana and ourselves, which can be obtained at comparatively low cost." - Not from a Group from an individual point of view. Both those companies could obviously produce at a low cost.

Then you continue: "In consideration of your ceasing production for one year on the basis set out in this letter, Rhokana and ourselves jointly undertake the payment to your company of a total sum of £2.165 million during the year that your company will not have been in production. The payments will be made monthly, the first being on or about 31st March, 1958. The proportions payable by Rhokana and ourselves will be a matter for settlement between the two companies. It is understood that the abovementioned undertaking will enable you during the period of one year to cover your interest on outstanding loans and on the 5% notes, to pay for the essential development required to allow your company to produce at the full rated capacity of the plant and to pay for the pumping operations which are necessary at the Bancroft No. 1 shaft. This will put your company into a position to resume mining operations at short notice on a full production basis, and therefore at a considerably lower cost per ton than can be achieved now." Now, on that paragraph, was the substance of this paragraph discussed at the meeting on the 26th January - I am paraphrasing it - that if Bancroft is given £2,165,000 it will be able to pay its interest on outstanding loans, it will be able to pay for the essential development required to allow the company to produce at full rated capacity, it will be able to pay for the pumping which is necessary and then it will reach a position which we estimate to be a year - I am saying that in parenthesis - when instead of working under the terrible conditions which it is working under now it will be able to start full production at short notice and therefore at a lower cost of production and it will be on its feet financially for the future. Was that discussed on the Sunday afternoon? - Yes, of course it was. Not the exact words, not the way in which you put it. The discussion of Bancroft's position was discussed, because Bancroft obviously were unable to agree to any proposal - this is the proposal which was set out here, which follows the discussion.

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So that the whole truth of the matter here was

that one of the matters under discussion on the Sunday was the difficulties with which Bancroft was confronted and it was felt that if it ceased operations and really concentrated on underground development and cleaning up, pumping and so on, it would reach the position where all its difficulties would have evaporated and it could make a brand new start at full rated capacity? - Bancroft's position was only brought in because of the origin of the meeting. It was obvious when the proposal was put forward that Bancroft should cease production, naturally Bancroft's position was discussed, but that was not the purpose of the meeting, nor did it come up for more than the required amount of discussion.

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But what was discussed is that during this year of cessation of production it would have a breathing space to put its mine in order for economic production? - There was no breathing space. It was what the company simply had to do anyhow. It had to pay its interest on its loans.

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But you already have Mr. Oppenheimer's statement saying unhampered by the problems of producing copper they would be able to get on with this better. - I do not dispute that, that if you have only one thing to tackle you can clearly do it more readily.

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So that the cessation of production of copper was a further advantage Bancroft was going to get, because it would not be hampered with producing copper any more and it would be able to concentrate entirely on improving its mine and effecting the essential development.

By YOUNG, J.: Isn't this paragraph plain? Doesn't it mean what it says?

MR. GOULD: I agree.

YOUNG, J.: You go on paraphrasing it and putting it backwards and forwards, and the paragraph is as plain as can be.

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MR. GOULD: With respect, my Lord, I have just put to the witness the question whether it is in accord with or at variance with what took place on the Sunday? - I said it was generally in accordance with it.

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"It is estimated that after allowing for the cost of the above-mentioned undertaking, the profits of Rhokana and this company would, even at the present price of copper be higher than if a 10% cut in production were initiated on a separate basis by each company. We appreciate that if your company agrees to our proposals, it will not be possible to cease production abruptly" - Yes.

"We confirm that any copper produced in the period March/April, 1958, while closing down operations are in progress, and any revenue arising from its disposal shall be ignored for the purpose of the arrangements set out in this letter. We also appreciate that if your company agrees to the proposal it will affect many of its employees and the community of Bancroft. We very much regret that this step will be necessary and we shall make every endeavour to assist wherever possible. We nevertheless consider that in the overall circumstances the proposals we have put forward in this letter, in conjunction with Rhokana, are the most suitable that can be arranged for all three companies." I am sorry to detain you, but what are these overall circumstances? Are those the circumstances referred to in this letter? - It goes right back to the very beginning of the discussion. It was required to try to cut the production by 10% and in discussing this it became clear that Bancroft could not cut production. I think the overall circumstances are set out throughout the case.

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What it means is the circumstances we have discussed in evidence? - Right throughout.

Now, here again you talk of the interest of all three companies? - This is Nchanga putting the idea to Bancroft.

A similar letter was written by Rhokana? - Yes.

Also saying exactly the same thing. Now, from the point of view of Rhokana, apart from its mining operations it was also in Rhokana's interests at least that Bancroft should be afforded the opportunity of putting its house in order. Is that not right, of developing its mine and going over to full production at full rated capacity later? That is right, is it not? - It could be argued, of course, that it had a double-barrelled interest.

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And you say Nchanga had no interest at all. Nchanga was only concerned with the question of whether it would make a profit on this transaction? - It had no connection with the other.

10 Nchanga had never before had contracts of this particular description with the other mining companies where it undertook to produce a greater amount of copper, if another would cease production? - The circumstances had never arisen and they have not arisen again.

You say this was in the ordinary course of business of Nchanga as a copper mining company? - Would I say that?

Would you say this was entered into in the ordinary course of business? - I say any agreement which is for the benefit of the company is in the ordinary course of business.

20 Although we were talking about abnormal circumstances we are talking about abnormal circumstances in which this type of agreement is arrived at. - I do not think that the fact that one has to cut copper from time to time is abnormal circumstances. As I pointed out, I think they have arisen again within a few years. The fact that they were able to take perhaps an unusual way to avoid the full impact of this cut falling on them does not make it abnormal. It is unusual and is not likely to occur frequently.

30 When the subsequent cut had to take place, there was no negotiation for Bancroft to cease production on payment of a big fee and for Nchanga and Rhokana to avert the cut in that way, was there? - The present one?

There was a cut after 1959? - There is presently a cut in force.

40 There was never a suggestion that Bancroft should cease operations and that Nchanga and Rhokana should pay her a sum in consideration of her so doing in order to keep down their costs of production. - A meeting was held to discuss how the cut should be effected, in exactly the same way as previously. It was decided that the three companies should all cut as best they could in the circumstances. The directors of the three

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companies believed it was in the interests of the three companies to accept the cut.

Each company separately? - And each company separately has accepted virtually a 10% cut of their output or their sales.

In this letter you talk about the interests of all three companies. In various reports by the Chairman reference is made to these arrangements being in the interests of all three companies. Is that right? - Yes.

10

You gentlemen on this Sunday afternoon, or at the Sunday meeting, considered the proposed arrangement from the interests of all three companies, isn't that right? - Yes.

And if it would be in the interests of one but not all the others, the arrangement would not have been made? - Well, the one which it was not obviously would not have accepted it.

The truth of the matter is that the boards of all three companies are, with inconsequential differences, the same. We have examined the personnel in 1959. We have examined the personnel in 1958 and in 1957. With one or two differences, the Boards are the same in all three companies. Is that not right? - With one or two notable differences.

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Well, how notable are they? - Can we go through this again?

His Lordship can examine it himself. - I would like to make this point, because I think this is a point on which Counsel has dwelt rather heavily. Which year would you like?

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Let's take 1958 for Bancroft, Exhibit 7, which I think is the year when all these discussions took place. For Nchanga that would be Exhibit 21 and Rhokana Exhibit 28. - May I make it clear that certain of these people on the boards are there by virtue of their being nominated by companies, and except where there is an overlapping or if they are, as you would describe it, outside the Anglo-American orbit, I will mention who they represent this year. May we go through Rhokana and Nchanga and Bancroft in that order?

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Mr. Oppenheimer is the Chairman in three cases. The Deputy Chairman is myself. On all the Boards you have Mr. Beckingham, who is a director of the three companies and who is a director of Anglo-American. Mr. Marshall Clark, who is a director of the three companies, Sir Charles Cumings, who represented the British South Africa Company, who have a major stake in these companies, is on the three boards. Mr. Kenneth Richardson, who represents the Barnata Group, the J.C.I., is on the three boards. They have interests which flow from their original interests in Rhokana. Mr. Rowlandson, who represents the Rio Tinto Group, is on the three boards. Mr. Seys, who is a representative of the Rothchilds Bank in London is on two boards. He is on Rhokana and Bancroft. Mr. H.H. Taylor and Mr. W.D. Wilson are on the three boards. Mr. H. Rissik who represented Mineral Separation is on the board of Nchanga alone, and naturally in alternate directors there are some differences as well, because the alternates in each case represent the principal and therefore the shareholders.

So that the boards are virtually identical, are they not? - I think with notable exceptions two boards are identical. You have Mr. Seys who is not on Nchanga and you have Mr. Rissik on the Nchanga board.

I put it to you, Mr. Acutt, that unless there is a direct conflict of interests between one company and the other, you gentlemen would at all times be concerned about trying to reconcile the interests of the three companies that you represent. Is that not right? - One attempts obviously to live as harmoniously as possible.

If in this case therefore you are able to work out a scheme - I am not saying that in a sinister sense - whereby the interests of all three companies could be served, and you satisfied yourself that no company would be prejudiced at the expense of the other, then that would be a scheme which would commend itself to you. Is that not right? - It would bear looking into.

In this case, the scheme which was worked out was one which would suit the book of Bancroft perfectly. That is correct, is it not? - I don't think so necessarily. It suited the book of Bancroft as it turned out and it was what Bancroft

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felt they had to demand in order to fit in with the other suggestions. This was a freely negotiated agreement.

Well, yourself, in your capacity, knew what Bancroft demanded and the question then was what advantage or disadvantage would accrue to Nchanga. Is that not right? And Nchanga could quite clearly face its shareholders and say: "Although we make a payment to Bancroft, we stood to make a profit in our own business". - The shareholders in every case, who are different in very marked respects in some of the companies, had to be faced as always. The position was put to the boards and subsequently put to the shareholders, and, so far as I am aware, there has not been one dissentient voice raised by a shareholder. We have had the annual meetings and therefore they approved of what the directors have carried out.

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So that the whole scheme was tested out during that discussion from the point of view of the three different companies separately by you gentlemen who met on January 26th? - Yes.

20

And you were satisfied it was unobjectionable from the point of view of each of the companies and that it was in the interests of each of three companies. Would you say Yes to that? - Generally speaking, yes.

Re-examination. Re-examined by Mr. Welsh:

My learned friend put three board propositions to you at the request of his Lordship. The first of them was that it was inevitable that Bancroft would have to close down in 1958. Now, I would like to have this quite clear. Prior to the meeting on the 26th January, 1958, was there ever any discussion among directors of these companies about Bancroft closing down? - No, my Lord.

30

Was it ever contemplated by the directors of Bancroft that Bancroft would have to close down or would close down? - No, my Lord, it was not.

Then on the 26th January, 1958, how did the question of Bancroft's closing down arise? - It arose in general discussion where the Consulting Engineers pointed out that Nchanga's production cost and Rhokana's production cost was very much

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lower than the cost of production of Bancroft, and therefore in substitution of Bancroft's meeting a cost which they simply could not meet, the alternative of Bancroft ceasing production should be examined.

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10 The second proposition my learned friend put to you was that Bancroft could not have proceeded in 1958 with copper production at the rate of 40,000 tons per year. Incidentally, on that point, I might just show you Exhibit 15. Would you look at Exhibit 15, which is the letter which my learned friend was cross-examining you on a few moments ago, the letter of the 27th January, 1958. Would you look at the bottom of page 1, the last sentence, where it is stated: "The difference between the tonnage your company expects to produce this year (40,000 long tons) and the proposed reduction in Group output of 27,000 long tons will be made up by Rhokana and ourselves" As at the 26th and 20 27th January, 1958, did Bancroft expect to produce 40,000 long tons in that year? - Yes, my Lord.

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In other words, I take it that this letter is not a piece of subterfuge which was designed to conceal the truth? - No.

30 This morning you corrected an impression which you had given yesterday in regard to the January figures of output. You gave his lordship some reasons this morning relating to the months between October, 1957, and January, 1958. Have you, in fact, taken out the production figures from February, 1957, until March, 1958? - Yes.

And have you also taken out, or rather have you produced, a copy of the estimates which were made by the Consulting Engineers in respect of the year 1958? - Yes.

40 I would like to show you these two documents. Exhibit 31 will be the summary of the estimates and Exhibit 32 will be a table of the actual copper produced in long tons. Now, dealing first with Exhibit 31, you will see there estimates for Rhokana, Mchanga, Bancroft and also Kansanshi. That is another small mine. - Yes, Kansanshi was closed down, I think, from early in 1958.

If you look at Bancroft figures, they range from 2,640 gradually increasing up to June. These

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are the figures for 1958. - This is for the calendar year.

These are the estimates for the calendar year 1958? - Yes.

Then it was estimated that production would rise in the second half of the year? - Yes.

Into the 3,400 mark? - Yes.

Can you tell his Lordship when the Consulting Engineers produced these estimates? - They were produced in 1957 for the purpose of the sales. 10

How long before the end of the year? - They were sent down on about the 29th August, 1957, and were used as a basis for the consideration of the metal sales contract.

Was it then upon these estimates that the figure of 277,000 tons was based? - Yes.

If you look at the table on the right-hand side, the figure in long tons is 276,750? - Yes, Kansanshi was going out, so you got down to roughly 270,000. 20

Now, would you look at Exhibit 32, which gives the actual figures of production for Bancroft from February, 1957, when it started producing, until March, 1958, when it suspended production. February was 611, March 364, April 739, May 883, June 1,264, July 1,068, August 1,519, September 1,858. Then there is a comparatively large increase of about one-third to October, up to 2,400, somewhat lesser figures for November and December, then there is this figure of 2,381 for January? - Yes. 30

The figures for February and March are less because by that time the decision had been taken. Is that the reason why they are less? - Yes.

Would you compare the figure of 2,381 for January in Exhibit 32 with the estimated figure in January on Exhibit 31? The estimated figure on Exhibit 31 was 2,640? - Yes.

So that the actual production for January fell short of the estimated figure by less than 300 tons? - Yes. 40

My Lord, these figures were only extracted last night at my request, and, of course, my learned friend has not seen them, and if he wishes to ask any further questions I shall have no objection to his doing so. In regard to the actual production figures, were weekly figures produced for the Consulting Engineers? -- Weekly figures of production, yes.

They had weekly figures? -- Yes.

10 What was the purpose of them? -- They normally have from any mine the ordinary weekly figures which go through the mill, merely to see how the mine is progressing.

So that the Consulting Engineers would be in close touch from week to week with the actual progress and operations? -- Yes.

20 Now, the third proposition which my learned friend apparently is going to contend for is that, if Bancroft could have continued mining, it could only have been at a colossal rate of loss. In your evidence-in-chief this was put to you and you said it was probably true that had prices remained as they were losses would have continued to pile up. Then you said that pumping would have had to continue and overhead expenditure would have continued and any copper produced would only have helped to improve the position. I would like you to elaborate on that for his lordship. Firstly, can you give us any idea of the percentage of the total expenditure in a copper mining company which consists of overhead or fixed expenditure? --

30 Yes, the general yardstick, my lord, is 60% fixed, 40% variable. That is the general yardstick which is taken. It varies obviously from mine to mine.

Have you any idea what it was in the case of Bancroft? -- About that.

40 About 60? Now, this morning it was suggested to you that had Bancroft not suspended production but continued producing, its financial position would have got worse. Have you any comment to make on that, in view of the evidence which I have just quoted to you? -- Yes, I didn't understand the question to be quite that way. I think it was put that the decision would not necessarily improve

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very considerably, but quite clearly if the production was growing and depending on the copper price, there was no reason why the position should worsen. I think the words I used were the position should improve, but it is dependent on the price, and I would not like to give a categorical statement that it would, but the production was increasing and therefore one should expect that the profitability of the mining operations should improve.

10

The alternative to this would presumably have been to close the mine down altogether? - Which is unthinkable.

The financial consequences of that speak for themselves.

By YOUNG, J.: The point, if I understand correctly, surely is that although Bancroft was producing at an overall loss, the direct costs of production were in fact less than the sale price of copper, so that every ton of copper produced helped to relieve the position? - Yes.

20

By MR. WELSH: Is that correct? - Yes, every ton of copper produced helped to relieve the position.

In other words, by producing copper you would not increase losses. On the contrary, you would mitigate them? - I do not think it was suggested we would.

I thought it was. That was the suggestion, as I understand it, that was made this morning. - It is quite clear that obviously the more copper that can be produced the better the position of the company.

30

Now, I want to deal for a moment with the relationship between these companies. You have indicated to his Lordship that there are some outside directors on each of these boards. There are outside interests involved? - Yes.

It was suggested to you this morning that the directors of Nchanga were subject to what my learned friend called persuasion, if not dictation, at the hands of Rhokana, because of Rhokana's shareholding in Nchanga? - Yes.

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May I just ask you whether that is true, whether any of you, in your capacity as directors of Nchanga, laboured under any persuasion or dictation because you were also directors of Rhokana? - No, my Lord, not at all.

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May I put it to you very broadly, did you gentlemen who were directors of all these three companies consider in turn the separate position of each of these companies? - Yes, my Lord.

10 You have already expressed the view that these arrangements were in the interests of each of these three companies? - Yes.

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Was that the honest opinion of you all? - I think it was. Everybody, those who were there and those to whom it was explained, were of that belief.

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There is also the fact that Rhokana held a substantial investment in Bancroft? - Yes.

20 That is actually mentioned in the Chairman's review of Rhokana as one of the reasons why this deal was advantageous to Rhokana, but was this aspect of the matter discussed at the meeting of the 26th January? - No, my Lord, it was not discussed at all. The whole position was on the operational side.

30 If I xcan ask you a hypothetical question, would Rhokana have entered into this agreement but for the fact that it held this investment? - Oh, yes, on the figures given by the Consulting Engineers it was obviously in its interests to do so, irrespective of its investment.

What was the relative position that Rhokana held on share capital in Bancroft? - Nchanga has no holding. In fact, the holding was not taken into consideration at all. It was on the production side.

40 My learned friend cross-examined you at considerable length about stoping preparation figures. I am not quite sure what relevance all these things have, but in case they turn out to be relevant, I would like you just to give the figures to his Lordship. Firstly would you look at the Bancroft report for 1956 to 1957, Exhibit 6. The figures

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appear on pages 13 and 14. I wonder if you would just make a note of these figures so that we can tot them up. On page 13, dealing with No. 1 shaft, the figure is 20,128. No. 2 shaft, which my learned friend tended to shun rather, on page 14 the figure is 19,035, making a total for the year of 39,165? - Yes.

Then for the year ended 30th June, 1958, if you look at Exhibit 7 on page 11, in the first column, No. 1 shaft is 27,812 plus 803, and No. 2 shaft, which again my learned friend rather kept off, in the right-hand column is 34,631, making a total of 64,000 odd. - 64,231.

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Then the 1958/59 figure appears in Exhibit 8, page 9, in the report, in column 1, 83,897? - Yes.

My learned friend put it to you that that figure was higher than all the figures before, but of course that is not correct. The total for the previous period is about 100,000? -- Yes.

20

I wonder if you would just tell his Lordship at what stage of the development of a mining property stoping takes place. The first thing is to sink the shafts? - Yes.

And then? - Well, the first thing is to sink the shaft and from the shaft drives are put out to the orebody or to the reef, whichever it happens to be. This is generally not carried out on one level. It is carried out at several levels. At the same time the pumps are installed and the general ore requirements of the mine. Drives are forced out as far as possible in different ways. It depends entirely on the mine which way it is done, but the purpose is to return at some point either from those drives or directly using those drives to the orebody, and on approaching the orebody work is done to open up a portion of the orebody which can be stoped, and by stoping that means removing the entire ore, or as much of it as is possible with safety, so naturally in an early mine opening up the work tends in the early stages to be towards the primary development and the secondary development, which is stoping, comes later.

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Case for the Appellant closed.

Case for the Respondent closed.

Counsel addressed the Court.

No. 8

JUDGMENT OF YOUNG, J.

(Southern Rhodesia, Salisbury)

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No. 8

1961. April 10, 11 : May 9.

Young, J.

R.S. Welsh, Q.C. and with him R.H. Christie for
the appellant.Judgment of
Young, J.

9th May, 1961.

B. Gould, Q.C., with him B. Goldin, Q.C. for the
respondent.

10 YOUNG, J.: In this case the primary facts do not
present any great difficulty. Much
of the field is, on the pleadings, common cause;
and on the issues not admitted one witness only
gave evidence. He is Mr. Keith Acutt, the joint
deputy-chairman and resident director of the Anglo-
American Corporation of South Africa Ltd. As was
to be expected, Mr. Acutt was entirely objective
and helpful.

20 The Anglo-American Corporation are secretaries
and technical advisers to three copper mining compan-
ies operating on the Copperbelt in Northern
Rhodesia. These companies are (1) Rhokana Corpora-
tion Ltd. (briefly Rhokana); (2) Nchanga Consoli-
dated Copper mines Ltd. (briefly Nchanga), and (3)
Bancroft Mines Ltd. (briefly Bancroft). They are
sometimes referred to as the Anglo-American Group;
for, while nominally independent concerns, they
are linked by overlapping directorates, with the
chairman and deputy-chairman in each case being
30 Mr. H.F. Oppenheimer and Mr. K.C. Acutt respective-
ly. Rhokana and Nchanga are old-established and
very prosperous mines, especially Nchanga, where
production costs are relatively low and profits
high; but Bancroft is a comparatively new mine,
with certain special problems, and at the material
time not yet established on a paying basis;
although production of copper was already quite
considerable. The production from all three mines
was marketed by a common sales department through
the British Metal Corporation; but as between the
40 three mines the commitment in copper to the B.M.C.
was apportioned; and each company was responsible
for the fulfilment of its obligations. This meant
that if, say, Bancroft's production failed to meet

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Bancroft's commitment the company would have to buy copper on the market to make up the shortfall.

By the middle of 1957 the world supply of copper had outstripped demand at the price wanted by the producers, and in consequence prices were falling sharply. To meet this situation certain large producers in other parts of the world initiated a voluntary ten per cent cut in production in the hope (and in some cases on the assumption) that all or most large producers throughout the world would follow suit. So it came about that in December, 1957, the question had to be faced whether or not the three companies constituting the Anglo-American Group should follow the lead of other big producers and apply the ten per cent cut to their normal production. It was considered that neither the Group nor any member of it should stand aloof; and accordingly the principle of a cut of ten per cent in production was agreed to by the several directorates. In January, 1958, joint discussion took place on how best to apply the cut to the Group's production, and a scheme was devised. On January 27, 1958, this scheme was approved in an exchange of letters between Nchanga and Bancroft and between Rhokana and Bancroft. It is necessary only to set out (omitting formal parts) the letter from Nchanga to Bancroft:

"We understand that despite some measure of success you are still experiencing the operational difficulties referred to in your Company's Annual Report for the year ended 30th June, 1957. It can be assumed therefore that your production costs are substantially higher than those of either Rhokana or ourselves, with no prospect of lowering them until such time as you are able to increase the tonnage milled and copper is produced at the full rated capacity of the plant at your mine. We understand further that for this purpose a large development programme must be undertaken.

"In these circumstances a 10% reduction in your planned output of 40,000 long tons of copper during 1958 may possibly increase your production costs to the extent that you could not, in view, inter lia, of the heavy burden of interest payments on loans and on

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"the 5% Notes, continue mining operations except under the greatest difficulty. The production costs of Rhokana and ourselves will obviously also be affected by a 10% reduction in output, but to a lesser extent.

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"The total planned output of all three companies for 1958 is 270,000 long tons, and the proposed 10% reduction is therefore equal to 27,000 tons. On a Group basis the greatest saving will be achieved if your Company, as the highest cost producer, will cease production for the proposed period of one year. The difference between the the tonnage your Company expects to produce this year (40,000 long tons) and the proposed reduction in (Group output of 27,000 long tons will be made up by Rhokana and ourselves, which can be obtained at comparatively low cost.

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"In consideration of your ceasing production for one year on the basis set out in this letter Rhokana and ourselves jointly undertake the payment to your Company of a total sum of £2.165 m. during the year that your Company will not have been in production. The payments will be made monthly, the first being on or about 31st March, 1958. The proportions payable by Rhokana and ourselves will be a matter for settlement between the two companies.

30

"It is understood that the abovementioned undertaking will enable you during the period of one year to cover your interest on outstanding loans and on the 5% Notes, to pay for the essential development required to allow your Company to produce at the full rated capacity of the plant and to pay for the pumping operations which are necessary at the Bancroft No. 1 shaft. This will put your Company into a position to resume mining operations at short notice on a full production basis and therefore at a considerably lower cost per ton than can be achieve now.

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"It is estimated that after allowing for the cost of the abovementioned undertaking, the profits of Rhokana and this Company would even at the present price of copper be higher than if a 10% cut in production were initiated on a separate basis by each company.

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"We appreciate that if your Company agrees to our proposals it will not be possible to cease production abruptly. We confirm that any copper produced in the period March/April, 1958, while closing down operations are in progress, and any revenue arising from its disposal, shall be ignored for the purpose of the arrangements set out in this letter.

"We also appreciate that if your Company agrees to the proposal it will affect many of its employees and the community at Bancroft; we very much regret that this step will be necessary and we shall make every endeavour to assist wherever possible. We nevertheless consider that in the overall circumstances the proposals we have put forward in this letter, in conjunction with Rhokana, are the most suitable that can be arranged for all three companies."

That proposal was accepted by Bancroft in a letter of the same day. The sum of £2,165,000 due to Bancroft in terms of arrangement was apportioned between Nchanga and Rhokana, the former's share amounting to £1,384,569; and this sum was paid by Nchanga to Bancroft during the year ended 31st March, 1959. Also by agreement between Rhokana and Nchanga responsibility for the additional tonnage to be provided to cover Bancroft's reduced commitment for the year was apportioned, Nchanga assuming liability for an extra 9,000 tons per month. This meant that Nchanga had to step up its production by that figure.

In Nchanga's accounts for the year ended 31st March, 1959, the payment to Bancroft is reflected as a deduction from sales of metals and concentrates in the operating account and in Bancroft's accounts the receipt of the money appears as a revenue item in the profit and loss account. In accordance with this way of treating the matter, Nchanga in their returns for the year ended March 31, 1959, under the Income Tax Act, 1954, reflected the payment as an allowable deduction in terms of sec. 13 (2) (a) which lays down that deductions allowed in the determination of taxable income shall include

"expenditure and losses (not being expenditure and losses of a capital nature) wholly and exclusively incurred by the taxpayer for the purposes of his trade or in the production of the income."

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10 However, the Commissioner of Taxes took a different view, and in the assessment notice for the year ended March 31, 1959, he wrote back to taxable income the payment of £1,384,569 and assessed Nchanga to tax accordingly. The dispute is whether or not the Commissioner of Taxes has been shown to be wrong, for by sec. 56 of the Act the burden of proof is on the taxpayer. The Commissioner's contentions as advanced in the pleadings are (i) that the payment was not an expense wholly and exclusively incurred by Nchanga for the purposes of their trade or in the production of the income, (ii) alternatively, that the expenditure is of a capital nature.

20 On the first issue, viz., whether or not the expenditure of the sum of £1,384,569 by Nchanga was wholly and exclusively incurred for the purposes of its trade or in the production of its income, counsel for the Commissioner contended that the agreement of January 27, 1958 was primarily, or at least to some extent a device to assist Bancroft out of its financial difficulties. No doubt from Bancroft's point of view the agreement was visualised as having that effect, and was correspondingly attractive to Bancroft and to Nchanga (a Group member) as well. But, in my view, it does not follow that because an agreement is calculated to have substantial and welcome advantages to the party of the second part it cannot be wholly or exclusively laid out for the purposes of the party of the first part. The implication in counsel's argument was that Nchanga could, but for Group considerations, have struck a much harder bargain with Bancroft, having regard to the latter's vulnerable financial position. But even if this were so (and it is an open question) it is not, to my mind, necessary for business to be done in a pitiless way for it to qualify as an operation of business for the purposes of the Income Tax Act.

30 The question is, I think, whether the proposal was considered reasonable and advantageous to Nchanga, qua trader in copper production. If it is, then, prima facie expenditure under it qualifies as an outlay for the purpose of trade; and this is so even if the arrangement was obviously advantageous to the other contracting party. Here I accept the evidence of Mr. Acutt that the Nchanga directorate bona fide took the view that the proposal was in the interests of Nchanga from a trading point of view. Mr. Acutt gave convincing reasons for this

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view, and I can find no sufficient basis for the suggested alternative conclusion, viz., that the transaction was substantially a subsidy to Bancroft to enable Bancroft to put their house in order. I am against the Commissioner on the first point.

I find the second question, viz. whether the proper inference from the evidence is that this expenditure was not of a capital nature, much more difficult. I take it that, in the economic sense, expenditure is of a capital nature if the intention is to create, add to or improve the present investment position designed to produce income in the more or less distant future. This basic idea appears to be implicit in most of the leading decisions. I shall refer to two at this juncture. In British Insulated & Helsby Cables Ltd. v. Atherton, (1926) A.C. 205 at 213, Viscount Cave said:

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

In like vein is the dictum of Lawrence J. in Southern v. Borax Limited, (1940), 4 All E.R. 412 at 416:

"On the question as to whether this is a payment properly attributable to capital or to revenue, in my opinion, the principle which is to be deduced from the cases is that, where a sum is laid out for the acquisition or improvement of a fixed capital asset, it is attributable to capital, but that, if no alteration in the fixed capital asset is made by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company."

The emphasis on fixed capital assets in that case was due to the particular facts. Within the limits of the principle thus stated, the question where to draw the line between capital and revenue payments is

one of fact, or rather secondary fact: Atherton's case (supra) at 213; A. v. Commissioner of Taxes, 1954 (1) S.A. 38; Hinton v. Maden & Ireland Ltd. (1959) 3 All E.R. 356; Associated Portland Cement v. I.R.C. (1946) 1 A.. E.R. 68 at 74; New State Areas v. C.I.R. 1946, A.D. 610; Lowenstein v. Commissioner of Taxes, (S.R. March 24, 1961).

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10 Counsel for Nchanga argued that the expenditure was part of the cost incidental to the performance of Nchanga's income-producing operations, and not part of equipping Nchanga's income-producing machines. They claimed that the outlay was not with a view to bringing into existence an asset or advantage for the enduring benefit of the trade, but merely in order to avoid a loss of revenue and, if possible, to increase current profits during the tax year. On the other hand, 20 counsel for the Commissioner contended that the expenditure was of a capital nature in that, while the intention was to create an advantage for the benefit of Nchanga's trade, the benefit was sufficiently enduring to qualify as a capital outlay. They listed the following benefits:
(a) the avoidance of dislocation of trade which would have resulted from the application of the 10% cut to Nchanga's normal production; (b) the elimination of a competitor (even if only for twelve months) and the capture of an increased share of the market.

30 I shall now notice some further aspects of the evidence. The agreement of January, 27, 1958, did not in point of fact continue beyond twelve months, for in April, 1959, Bancroft resumed production with a capacity and a target of 50,000 tons, as compared with a capacity and a target of less than 40,000 in 1957. Further, the 10% cut in Group production was restored with effect from the middle of 1958; and, while this was sooner than 40 expected, it was all along recognised that output restriction was not a long-term solution to the problem, and that the cuts would be restored in due course. It is to be noted too that, while Mr. Acutt was of opinion that the arrangement with Bancroft had no enduring effect on Nchanga, he agreed that the application of the cut to Nchanga would have meant something of an upheaval there. Finally, it is to be observed (as illustrated in the graph, Exhibit No.13) that provided the price of copper remained above £130 per ton the proposal

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could not involve a loss for Nchanga; and Mr. Acutt was of opinion that there was very little prospect of the price falling as low as that.

I shall next refer to some of the more important cases cited by counsel on both sides. The first was the New State Areas case (*supra*), where a gold-mining company claimed to deduct from gross income certain sums paid to a municipality in respect of sewage disposal. One sum was an annual payment to cover redemption of the cost to the council of constructing sewers on the company's land, while the other was an annual payment to cover the cost to the council of constructing its sewers off the company's land. It was held that the first payment was of a capital nature, while the second was a permissible deduction, as it was merely a payment for the use of the sewers, which never became the property of the company. This case is perfectly consistent with the principle as I have endeavoured to state it. The next case was Mitchell v. Noble Ltd., (11 T.C. 372) in which a company agreed to pay a director, of whom they wished to rid themselves, the sum of £19,200, payable in five annual instalments, in full satisfaction of all claims against the company. It was held that this sum was an admissible deduction. It was considered that the money paid to get rid of an unsatisfactory servant is no more of a capital nature, nor is the benefit more permanent, than the sum paid to the servant by way of salary. This decision too purported to be in accordance with the principle which I think applies. Collins v. Joseph Adamson & Co., (1937) 4 All E.R. 236, was a case in which an association formed for obtaining prices of boilers had in one case applied a part of its funds to the purchase of (a) a business which it thereupon wound up, (b) its plant, which it thereupon destroyed, and (c) a covenant preventing future competition; and in another case to the acquisition of the shares in a company to secure it as a member of the association. It was held that in both cases the expenditure was of a capital nature; in the first case the fact that no tangible asset resulted was said to be immaterial, provided the expenditure created an advantage of an enduring nature. The removal of a competitor was in the circumstances such an advantage. In the second case there was the acquisition of a business. Here again the decision appears to follow the principle which I have

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stated. It emphasises that the investment or the activity of making provision for the future may be productive negatively or indirectly, e.g. by removing a competitor, provided, of course, that the advantage is sufficiently enduring. A case which bears some comparison with the present one in certain respects is United Steel Companies v. Gullington (23 T.C. 71). Two steep companies entered into an agreement with a railway company whereby, in consideration of a payment to the railway company of £180,000, payable in equal monthly instalments over ten years, the railway company undertook to close down its steelworks and to buy steel from the steel companies. The court held that the instalments of the sum of £180,000 were payments of a capital nature. Scott L.J. said:

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"I agree with the view that each instalment of the £180,000 was a capital payment for two broad reasons. The first is that the extinction of the railway company's own manufacturing works was in itself a capital advantage to the steel companies, both because it increased the total demand in the market generally by the whole amount of the railway company's requirements, which were very large, and because it enabled them by the agreement to acquire the right to the whole custom of the railway company for the ten years. If the payment had been made in one single sum of £180,000 it would, in my view, have been indubitably a capital investment about which there could be no discussion at all. The second reason is that if the lump sum would have been a capital expenditure, the mere fact that it was to be paid in instalments did not, in law, alter the fundamental character of the expenditure."

The period here, ten years, is, of course, very substantial when compared with the period of one year, and this is obviously a very important consideration; but the case does show that the advantage does not need to be indefinite. Sun Newspapers Ltd. v. Federal Commissioner of Taxation (61 C.L.R. 337) was a comparable case, and there is one passage only in the judgment of Dixon J. which I think it necessary to set out, because it gives a consolidated statement of the

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tests to be applied in an inquiry such as this.
At page 362 Dixon J. said:

"But the ideas of recurrence and the idea of endurance or continuance over a duration of time both depend on degree and comparison. As to the first it has been said it is not a question of recurring every year or every accounting period, but the real test is between expenditure which is made to meet a continuous demand as opposed to an expenditure which is made once and for all. By this I understand that the expenditure is to be considered of a revenue nature if its purpose brings it within the very wide class of things which in the aggregate form the constant demand which must be answered out of the returns of a trade or its circulating capital and that actual recurrence of the specific thing need not take place or be expected as likely. ... Recurrence is not a test, it is no more than a consideration the weight of which depends upon the nature of the expenditure. Again the lasting character of the advantage is not necessarily the determining factor. In John Smith & Son v. Moore (12 T.C. 266) the coal contracts which Lord Haldane and Lord Sumner thought were acquired at the expense of capital had a very short term Again the cases which distinguish between capital sums payable by instalments and periodical payments analogous to rent payable on revenue account illustrate the fact that rights and advantages of the same duration and nature may be the subject of recurrent payments which are referable to capital expenditure or income expenditure according to the true character of the consideration given, that is, whether on the one hand it is a capitalised sum payable by deferred instalments or on the other hire or rent accruing de die in diem or at intervals, for the use of the thing....."

And then Dixon J. summed up his conclusions as follows (p. 363):

"There are, I think, three matters to be considered (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and (c) the means adopted to obtain it, that is, by providing a periodical reward or outlay to cover

"its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use and enjoyment."

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10 Now, the facts of the present case reveal the following features: (1) Mchanga, in fact, treated the expenditure as revenue in that they wrote off the whole amount against the income of one year, and the capital structure of the company as represented in the accounts remained unaffected. This lends some measure of support to Mchanga's case, because the ordinary principles of accounting are relevant in an inquiry such as this. On the other hand there was no evidence that this was the only way to deal with the matter; and the remarks of Lord Greene M.R. in the Associated Portland Cement case (supra) at pages 70-71 are worth repeating. He said:

20 "On the question whether an item of expenditure is of a capital or a revenue nature, it is no doubt helpful to consider the circumstances from the accountancy point of view. But one must be careful to define one's terms. Whether or not an item of expenditure is to be regarded as of a revenue or capital nature must in many, and, indeed, in the majority of cases, I should have thought, depend upon the nature of the asset or the right acquired by means of that expenditure. If it is an asset

30 which properly appears as a capital asset in the balance-sheet, then that is an end of the matter. But it must never be forgotten that an asset which may properly, and quite correctly, appear, and only appear, in the balance-sheet as an asset may be acquired out of revenue. There is nothing in the world to force a company or a trader who buys a capital asset to debit the cost of it to capital. Conservatively managed companies every day pay

40 for capital assets out of revenue if they are fortunate enough to have the revenue available. It is, therefore, no sufficient test to say that an asset has been paid for out of revenue because the consequence does not, by any means, necessarily follow that it is an asset of a revenue nature as distinct from a capital nature. Similarly, there is nothing to prevent a company or a trader who has acquired a capital asset from refraining from

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placing any value on that asset in his balance-sheet. I put to counsel for the appellants an example which I think is worth repeating. If a trader buys up somebody else's business and pays £10,000 for the goodwill, that being the price on which the vendor insists, there is nothing in the world to prevent the purchaser paying the £10,000 out of revenue and debiting it to revenue account, and then writing down the goodwill in his own balance-sheet to nothing. The fact that he has written it down in his own balance-sheet does not mean that he has not got an asset. He has; he has the goodwill, but for his own domestic purposes he chooses not to put a value upon it; just in the same way as many companies, who have patents of very great value indeed, are in the habit of valuing them at a pound in their balance-sheet, or at some other nominal sum. I venture to think, therefore, when one is considering the nature of an asset acquired by a piece of expenditure, it is by no means conclusive to find that the asset does not have any definite value set upon it in the balance-sheet." 10 20

(2) The payment was made out of circulating capital and not out of, nor in connection with, any item of fixed capital. This feature also favours Nchanga's contention, but its limitations are implicit in the passage from the judgment of Lord Greene M.R. which I have just recited. (3) The expenditure was of a very large sum and apparently quite unique. It was incurred with the object of turning what promised to be a substantial set-back (the 10% cut) into a positive advantage. Not only would any dislocation of Nchanga's business organisation be avoided, but the development promised to be profitable for Nchanga. (4) The transaction temporarily eliminated a competitor (Bancroft) from the market; but, on the other hand, it was visualised that Bancroft would in due course come back into the market stronger than before. (5) The expenditure was not recurrent except in the sense that cuts in copper production (not an unusual development in the industry) were likely to recur and that a comparable situation might theoretically arise. 30 40

Weighing together these features in the light of the authorities, I have come to the conclusion that, on the evidence, it is a possible and a proper inference that, to borrow the words of 50

Dixon J. in the Sun Newspapers case at page 364:

"In principle the transaction must be regarded as strengthening and preserving the business organisation or entity, the profit yielding subject, and affecting the capital structure"

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10 of Nchanga. The Chief object was to preserve from impairment and dislocation Nchanga's organisation. The probabilities are that the advantages of this to Nchanga's business were lasting, or, at any rate, sufficiently lasting to qualify as an "enduring" advantage within the meaning of Viscount Cave's dictum. If that inference has not been displaced (and I think it has not), my conclusion must be that Nchanga have failed to discharge the onus of showing that this expenditure was not of a capital nature. On this aspect of the case my decision is for the Commissioner.

That means that the appeal fails and is dismissed. There will be no order as to costs.

20 (Signed) J.R. DENDY YOUNG, J.

Appellant's attorneys: Scalen & Holderness.

Respondent's attorney: Federal Government
Solicitor.

No. 9

No. 9

O R D E R

Order.

Case No. 1627/60

9th May, 1961

Salisbury: Monday and Tuesday, the 10th and 11th day of April, 1961.

Before the Honourable Mr. Justice Young.

30 Mr. R.S. Welsh, Q.C. and with him Mr. R.H.Christie
for the appellant

Mr. B. Gould, Q.C. and with him Mr. B. Goldin, Q.C.
for the respondent

WHEREUPON, after reading documents filed of record, and hearing Counsel,

C. A. V.

In the
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Southern
Rhodesia

AND THEREAFTER, that is to say, on Tuesday, the
9th day of May, 1961,

IT IS ORDERED:

No. 9

That the appeal be and it is hereby dismissed.

Order.

That there be no order as to costs.

9th May, 1961

BY THE COURT

- continued.

(Signed) E. POPE SIMMONDS.

ASSISTANT REGISTRAR.

In the Federal
Supreme Court

No. 10

No. 10

Notice of
Appeal.

NOTICE OF APPEAL

10

7th June, 1961.

The above-named Appellant, having on the 9th day of May, 1961, had its appeal against the Respondent's disallowance of its objection to his assessment upon the Appellant for the year ended 31st March, 1959, dismissed by the High Court of Southern Rhodesia, sitting at Salisbury,

DOES HEREBY GIVE NOTICE that it intends to appeal to the Supreme Court for an order -

(a) allowing the said appeal; 20

(b) declaring that the assessment made by the Respondent upon the Appellant for the year ended 31st March, 1959 (No.1 SC/2371/59) is invalid;

(c) directing that the said assessment be amended by allowing as a deduction the amount of £1,384,569.0.0d;

(d) directing that the said assessment be amended by determining the taxable income of the Appellant for the year ended 31st March, 1959, at the amount of £8,363,136.0.0d. instead of £9,747,705.0.0d 30

on the following grounds:-

1. The learned trial Judge's finding that

"it is a possible and a proper inference that.... in principle the transaction must be regarded as strengthening and preserving the business organisation or entity, the profit yielding subject, and affecting the capital structure of Nchanga"

In the Federal
Supreme Court

No. 10

Notice of
Appeal.

7th June, 1961

- continued.

was a finding at which no reasonable person could arrive, and was wrong in law.

2. The learned trial Judge's finding that

10 "The chief object was to preserve from impairment and dislocation Nchanga's organisation"

was a finding at which no reasonable person could arrive and was wrong in law. The true and only reasonable conclusion was that the purpose of the expenditure was to avoid a cut in the production of the Appellant and to increase the production of the Appellant and thus to maintain and if possible increase the profits of the Appellant for a period of one year.

20 3. The learned trial Judge's finding that

"The probabilities are that the advantages of this to Nchanga's business were lasting, or at any rate, sufficiently lasting to qualify as an 'enduring' advantage within the meaning of Lord Cave's dictum"

was a finding at which no reasonable person could arrive and was wrong in law.

30 4. On the facts found by the learned trial Judge (varied in accordance with paragraphs 1, 2 and 3 hereof) the expenditure was not, in law, of a capital nature.

5. The learned trial Judge's conclusion that

"Nchanga have failed to discharge the onus of showing that this expenditure was not of a capital nature"

was a finding at which no reasonable person could arrive and was wrong in law. The true and only reasonable conclusion was that the expenditure was not of a capital nature and that the Appellant

In the Federal
Supreme Court

discharged the onus of showing that such was the
case.

No. 10

DATED at SALISBURY this 7th day of June, 1961.

(Signed) BASIL HONE

Notice of
Appeal.

7th June, 1961
- continued.

SCANLEN & HOLDERNESS,
Appellant's Attorneys,
Barclays Bank Building,
Manica Road,
Salisbury.

TO: The Registrar of the Federal Supreme Court, 10
Salisbury.

And to: The Registrar of the High Court,
Salisbury.

And to: The Federal Government Solicitor,
Respondent's Attorney,
Vincent Building,
Jameson Avenue,
Salisbury.

No. 11

No. 11

Notice of
intention to
apply for leave
to amend Notice
of Appeal.

28th September,
1961.

NOTICE OF INTENTION TO APPLY FOR LEAVE TO AMEND 20
NOTICE OF APPEAL

PLEASE TAKE NOTICE that at the Hearing of the
above-mentioned Appeal, Application will be made on
behalf of Appellant to the above Honourable Court
for leave to amend Appellant's Notice of Appeal
dated the 7th day of June, 1961, in the following
respect:-

By the addition to the grounds of appeal of
the following Paragraph:-

"6. The learned trial Judge misdirected himself 30
by placing too heavy an onus on the Appellant,
requiring the Appellant to displace an infer-
ence that he held to be no more than a poss-
ible one."

DATED at SALISBURY this 28th day of September, 1961.

(Sgd.) JOHN McGRAW.
SCANLEN & HOLDERNESS,
Appellant's Attorneys,
Barclays Bank Building,
Manica Road, Salisbury. 40

TO: The Registrar of the Federal Supreme Court,
Salisbury.

AND TO: The Federal Government Solicitor,
Respondent's Attorney,
Central House, Central Avenue, Salisbury.

No. 12

In the Federal
Supreme CourtJ U D G M E N T

No. 12

Before: the Honourable Sir John Clayden, Chief
Justice,
and the Honourable Sir Francis Briggs,
Federal Justice,
and the Honourable Mr. Justice Quenet,
Federal Justice.

Judgment.
7th November,
1961.
Clayden, C.J.

10 At SALISBURY on the 16th and 17th days of October,
1961.

Appearing for the Appellant: R.S. Welsh, Q.C.,
with him R.H. Christie of Counsel.

Appearing for the Respondent: D. Gould, Q.C.,
with him B. Goldin, Q.C.

CLAYDEN, C.J.:

20 In Northern Rhodesia there are three copper
mining companies in what is called the Anglo-
American Group. They are Rhokana Corporation Ltd.,
the appellant in this case, and Bancroft Mines Ltd.
I shall refer to them by the first word in their
names. They are independent companies, with over-
lapping directorates, and with the Anglo-American
Corporation of South Africa Ltd. acting as secre-
tary and providing technical advice for each
company. The one witness in the case, Mr. K.C.
Acutt, was at material times joint deputy chair-
man and resident director in the Federation of the
Anglo-American Corporation of South Africa Ltd.
30 and deputy chairman of each of the mining compan-
ies. In 1958 Rhokana and Nchanga were old estab-
lished mines. Bancroft was a mine which was in
the process of development.

40 In 1957 the price of copper had fallen and in
an effort to keep up the price copper producers in
the western world had voluntarily cut their pro-
duction. It was regarded as essential that the
mines in the Anglo-American Group should also
adopt this policy. To discuss how this should be
brought about a meeting was held in Salisbury in
January 1958. The estimated production of copper
for the 1958 year of the three mines was 270,000
tons, of which Rhokana and Nchanga were expected
to produce 230,000 tons, and Bancroft was expected
to produce 40,000 tons. The 10% cut in production

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- continued.

which was considered necessary would reduce this production to 243,000 tons, with Rhokana and Nchanga producing 207,000 tons and Bancroft producing 36,000 tons. As a result of the discussion it was considered that the best interests of each mine would be served if Bancroft ceased production for the year in return for a money payment by the other two mines, and the other two mines produced the 36,000 tons which Bancroft would otherwise have produced. It was estimated that the sum to be paid should be £2,165,000. In pursuance of this scheme a letter was written by Nchanga to Bancroft on 27th January 1958, and the proposals were confirmed by a letter from Rhokana. The letter set out difficulties which Bancroft was having, discussed Bancroft's production costs and the effect of a cut in production on them, stated that Rhokana and Nchanga could produce the copper to make up the Group's estimated tonnage more cheaply, and then made an offer in these terms:

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"In consideration of your ceasing production for one year on the basis set out in this letter Rhokana and ourselves jointly undertake the payment to your Company of a total sum of £2.165 m. during the year that your Company will not have been in production. The payments will be made monthly, the first being on or about 31st March 1958. The proportions payable by Rhokana and ourselves will be a matter for settlement between the two Companies."

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This offer was accepted.

The result of the two companies taking over Bancroft's cut production of 36,000 tons was that their production went up from 207,000 tons to 243,000 tons, 13,000 tons more than their estimated production of 230,000 tons before the cut. The extra 13,000 tons were divided in the proportion 4 to Rhokana and 9 to Nchanga, so that as far as Nchanga was affected it was enabled, while the Group made a 10% cut, to produce its estimated production without a cut plus another 9,000 tons. It was agreed between Rhokana and Nchanga, having regard to their respective shares of the 36,000 tons of production made available, that Nchanga should pay £1,384,569 out of the £2,165,000. This was paid by Nchanga to Bancroft during the tax year ending on 31st March 1959. Nchanga claimed

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to deduct what it had paid from its income, as expenditure incurred in the production of its income under s.13 (2) (a) of the Income Tax Act No.16 of 1954. The claim was disallowed by the Commissioner, and on appeal to the High Court of Southern Rhodesia it was held that the amount could not be deducted as it was "of a capital nature" and so not a permissible deduction. The appellant now appeals against that decision on what are maintained to be questions of law within s.60 as amended, the section which provides for a further appeal to this Court "on a question of law decided by the High Court."

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- continued.

In the hearing before the High Court the Commissioner maintained that the amount could not be deducted under s. 13 (2) (a) because it was not "wholly and exclusively incurred by the taxpayer for the purposes of his trade". Most of the cross-examination of Mr. Acutt was directed to that issue. The decision on this issue was in favour of Nchanga, and that finding is not contested so that it is unnecessary to discuss it.

The first question to be determined is whether or not the finding that the payment was of a capital nature was a finding of fact. For if it was this Court cannot consider the appeal. The portion of the judgment which needs be referred to in this regard is the concluding portion. The learned judge said: "Now the facts of the present case reveal the following features." The first two, which were in favour of Nchanga, need not be considered here for it is common cause that they do not affect the issue. The learned judge then set out three other features:

"(3) The expenditure was of a very large sum and apparently quite unique. It was incurred with the object of turning what promised to be a substantial set-back (the 10% cut) into a positive advantage. Not only would any dislocation of Nchanga's business organisation be avoided, but the development promised to be profitable for Nchanga. (4) The transaction temporarily eliminated a competitor (Bancroft) from the market; but, on the other hand, it was visualised that Bancroft would in due course come back into the market stronger than before. (5) The expenditure was not recurrent except in the

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sense that cuts in copper production (not an unusual development in the industry) were likely to recur and that a comparable situation might theoretically arise."

The judgment concludes in a paragraph which contains three parts. First it is said: "Weighing together these features in the light of the authorities, I have come to the conclusion that, on the evidence, it is a possible and a proper inference that" the transaction must be regarded as strengthening the business organization and affecting the capital structure of Nchanga. Then was interposed: "The chief object was to preserve from impairment and dislocation Nchanga's organisation. The probabilities are that the advantages of this to Nchanga's business were lasting, or, at any rate, sufficiently lasting to qualify as an 'enduring' advantage within the meaning of Viscount Cave's dictum." And finally it was said: "If that inference has not been displaced (and I think it has not), my conclusion must be that Nchanga have failed to discharge the onus of showing that this expenditure was not of a capital nature. On this aspect of the case my decision is for the Commissioner."

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One does not want to be meticulous in the consideration of words used in a judgment, but there are many difficulties in this paragraph. "A possible and a proper inference" can be read with the emphasis on "proper", as "an inference which can properly be drawn." But the matter does not end at that. There is then a finding of fact as to the "chief object" of the transaction, which not only is at variance with the finding in the previous paragraph, feature (3), but also, for reasons to be discussed later, is not at all supported by the evidence. This finding can only be where it is in order to add weight to the inference mentioned before. The judgment then returns to consider how that inference affects the onus on the taxpayer. If the inference as first drawn had been meant to be the probable inference the conclusion must I think have been not merely that Nchanga had failed to prove that the expenditure was not of a capital nature but that it was not. And the way in which it is stated shows that the approach was that a taxpayer who does not displace a proper inference, which may not be the probable one, cannot succeed.

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The speeches in Edwards v. Bairstow 1956 A.C. 14 show that a conclusion that expenditure was or was not of a capital nature could not ordinarily be reopened as a question of law. But in this appeal there are I consider two matters which justify re-examination of the question. In Commissioner of Inland Revenue v. Strathmore Consolidated Investments Ltd. 1959 (1) S.A. 469 (A.D.) at 477 Ogilvie Thompson J.A. dealt with a finding of one of the facts in the case by inference, and said: "Even if it be so regarded" (that is as an inference) "there is no evidence from which such an inference or deduction can reasonably be drawn Nor can the matter be dismissed on the ground that the above misdirection was merely incidental reasoning; for the misdirection in question appears to have coloured the whole approach....." This statement can be applied verbatim to the finding that the "chief object was to preserve from impairment and dislocation Nchanga's organisation." In addition, though, applying the words of Viscount Simmonds in Edwards v. Bairstow (supra) at 31, the Court may be assumed to have been rightly directed in law what the characteristics of capital expenditure are, I cannot but find in this case that the conclusion which was reached was reached by a misappreciation of the effect of the inference as above stated. This opens the way to a reconsideration of the case on a question of law, for in the words of Lord Radcliffe, in the same case at 33, this is a case in which "the Commissioners", (in this case the High Court) "although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular." It was not the law as to what was capital expenditure which was misunderstood but the law as to how it could be proved that expenditure was not of a capital nature. The decision that this is a case in which a question of law is involved is made the more easy by the fact that it was not urged on behalf of the Commissioner that it was not such a case.

Before considering the case generally it is convenient to deal with two matters. The first is the finding that "the chief object was to preserve from impairment and dislocation Nchanga's organisation." The only possible basis for this finding

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lies in a chance remark made by Mr. Acutt. It was never suggested on the papers, or in cross-examination, that the proposed cut in production would impair or dislocate the organisation of Nchanga. The witness was being cross-examined in regard to Bancroft, and in answer to the question, "It was quite revolutionary from the point of view of the Bancroft community to close down that mine?" he said: "Yes, my lord. Going to another point, if I may, exactly the same point would occur if either of the other two mines reduced. You would have an upheaval at three mines, because it would have been necessary for them probably to reduce their staff." A little later there was the question: "You then said there were figures to show that it would be inadvisable for Nchanga and Rhokana to cut?", and the answer: "That if they cut clearly there was going to be hardship on certain members of their staff as well, and the whole cost of their production is increased by the lowered production" This answer was a long answer discussing the advantages of the scheme, and contained a further passage: "if Bancroft, which was the highest cost producer, went out altogether there were immense gains for Rhokana and Nchanga possible if they took up the additional tonnage."

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If the finding, when it spoke of impairment and dislocation, was referring to the dismissal of employees, and certainly no other "dislocation" can be found to be suggested in the case, the answers do not show that it would have affected the mine organization at all. The first question related to the effect on Bancroft employees, and the answer seems to relate to the mining communities at the other mines. If there was doubt in regard to this, due to the use of the word "upheaval", the matter was made clear in the only other answer which relates to the question by the reference to hardship on certain members of the staff. And if the finding is referring to any other type of impairment or dislocation, except of course increased cost of production, the evidence not only does not give a basis for the finding but is quite contrary to it. There was evidence that in the Nchanga mine great flexibility both in plant and mining operations was possible, and that the mine had been able, after a strike, to make up a loss of production for two months in the next four months. There was also evidence to indicate

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that the 10% cut in Nchanga production figures of about 150,000 tons would have little effect except in regard to operating costs. In so far as the avoidance of increased cost of production was a purpose, and of course it was, that was bound up with the purpose of making a profit, and not the avoidance of any dislocation.

10 I consider that there was no evidence on which to base the finding as to the "chief object" in the conclusion of the judgment, or indeed the finding in the third feature, "Not only would any dislocation of Nchanga's business organisation be avoided . . .", if that is to be taken in the sense that there would have been dislocation and a purpose of the scheme was to avoid it. If that passage means that Nchanga could in its business organisation go on as if the cut had not been made it is self evident. If it means that any dislocation that might have come about would be avoided
20 there is nothing wrong with the finding, but it must be read in the light of evidence that there would be none.

The second matter to be dealt with is the question of forward contracts. This was not dealt with in the judgment, presumably because it was not then urged that it had importance. But in this Court much has been made of it. All the copper produced by the three mines was dealt with in one refinery, and sales were made of the copper after
30 it had passed through the refinery. Of the estimated production in the three mines a large proportion was, as it is put, "committed for firm sales" through the British Metal Corporation. Of the estimated production in 1958 of 270,000 tons either 240,000 or 250,000 tons had been sold forward. The evidence is somewhat vague about these contracts for the nature of them does not seem to have been much in issue. On the evidence these forward sales were not sales in which a price was
40 fixed; they seem to have been undertakings to supply. That there were no sale prices is made apparent by the fact that when Nchanga and Rhokana were considering what could be paid to take over Bamcroft's cut production a graph had to be prepared, based on different prices of copper, to show at what low price the proposed agreement would cease to be profitable. If there had been prices it is clear that there would have been no need for this calculation; for Nchanga's and

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Rhokana's cut production was 207,000 tons, and what they took over was 36,000 tons making the total up to 243,000 tons, and so the whole of what they took over would have come within the tonnage committed for sale, and, if there were prices, they would have been known, and calculation based on other prices was useless. Nchanga therefore was not acquiring by its payment the benefit of any contract with a fixed price. At the most it can be said that Nchanga knew it would be able to sell the tonnage which it produced instead of Bancroft. But there is nothing whatsoever to indicate that if that tonnage had not been committed for sale there would have been any difficulty in selling it at market prices. And market prices seem to be what would have been got for copper "committed for firm sales". That the matter is vague does not I consider involve that any inference should be drawn that a tonnage "committed for sale" had any special value. The matter does not seem to have been in issue on the evidence.

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I have next to consider what is meant in s.13 (2)(a) of the Act by "expenditure (not being expenditure of a capital nature)". These words are not in the exact form of the words considered in English and Australian cases to which reference has been made, but under the different statutes the question which arises is whether or not the expenditure is a capital expenditure, and decisions as to how that is to be determined are obviously applicable. In South Africa, where the wording is the same, the matter was fully considered in New State Areas Ltd. v. Commissioner for Inland Revenue 1946 A.D. 610. Watermeyer C.J. at 620 first pointed out that the expenditure, the deduction of which is prohibited, is "expenditure of a fixed capital nature not expenditure of a floating capital nature" and then said: "The problem which arises is, therefore, usually whether expenditure in question should properly be regarded as part of the cost of performing the income earning operations or as part of the cost of establishing or improving or adding to the income earning plant or machinery". At 621, before examining the English authorities, he said: "In ordinary cases it is not difficult to distinguish between capital expenditure and revenue expenditure, but there are many cases on the border line Several tests for determining the doubtful cases have been suggested in English

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cases which are useful in some circumstances, but many of them have turned out to be insufficient and inconclusive when applied to other circumstances." There is then a survey of the English and Scottish cases, with in the forefront Vallambrosa Rubber Co. Ltd. v. Farmer 1910 S.C. 519 and British Insulated & Helsby Cables Ltd. v. Atherton 1920 A.C. 205, and at 627 Watermeyer C.J. said: "The conclusion to be drawn from all these cases seems to be that the true nature of each transaction must be enquired into in order to determine whether the expenditure attached to it is capital or revenue expenditure. Its true nature is a matter of fact and the purpose of the expenditure is an important factor; if it is incurred for the purpose of acquiring a capital asset for the business, it is capital expenditure, even if it is paid in annual instalments; if, on the other hand, it is in truth no more than part of the cost incidental to the performance of the income producing operations, as distinguished from the equipment of the income producing machine, then it is revenue expenditure, even if it is paid in a lump sum." In Rand Speculation & Finance Co. Ltd. v. Commissioner for Inland Revenue 1953 (1) S.A. 348 (A.D.) at 356 Centlivres C.J., after referring to the New State Areas Case, said: "It is in some cases an extremely difficult question as is evidenced by those cases in which there has been an acute difference of judicial opinion. The difficulty is occasioned by the fact that there is no statutory definition of the words 'of a capital nature'. Lord Macmillan drew attention to this difficulty in van den Bergh's Ltd. v. Clark (Inspector of Taxes) 1935 A.C. 431 at p. 438, and added: 'While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem.'" But in Atlantic Refining Co. of Africa (Pty.) Ltd. v. Commissioner for Inland Revenue 1957 (2) S.A. 330 (A.D.) the New State Areas Case was spoken of as settling the law, with the remark at 334: "The difficulty lies in the application to the facts of particular cases".

In argument on both sides what was said by Viscount Cave L.C. in Atherton's Case (supra) has been greatly relied on, and it is necessary therefore carefully to consider what he did say, in

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order to see when and how it is to be applied. The well accepted dictum at 213-4 reads: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such expenditure as attributable not to revenue but to capital".

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That is a passage of great authority, and much accepted. Of that test it was said by Dixon J. in Associated Newspapers Ltd. v. The Commissioner of Taxation (1938) 1 A.L.J.R. 403 at 412 that it was "a phrase which by constant use has become almost a formula". But it is to be noted that in the case, at 410, he applied a test similar to that in the New State Areas Case, whether the expenditure was for "the business entity structure or organisation set up or established for the earning of profit" or for "the process by which such an organization operates to obtain regular returns by means of regular outlay". And in van den Bergh's Case (supra) Lord Macmillan referred to Atherton's Case and said, at 439, "This case has been generally recognised as the leading modern authority on the subject, though I fear that Romer L.J. was unduly optimistic when he said that it 'placed beyond the realms of controversy the law applicable to the matter: Anglo Persian Oil Co. v. Dale (1932) 1 K.B. 124, 145'".

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The test by its terms is of limited application. It applies only where there is a payment made "once and for all". It does not deal with the case, and there are many such, in which recurrent payments are of a capital nature. A recent such case was Hinton v. Maden & Ireland Ltd. (1959) 3 All E.R. 356 in which various tests were applied in the speeches. And in its very terms Lord Cave's test is only decisive one way. It can determine what is a capital payment, but if a payment is by it not shown to be of a capital nature the issue has still to be decided whether it has been proved not to be of a capital nature, at least under s.13 (2)(a), if the taxpayer is to be allowed to deduct the payment.

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Without presuming in any way to suggest that the test is not as valuable as it has been found

everywhere to be, it seems to me that if the question at issue can be determined by a test which can be applied in all circumstances, and which can settle the question both ways, that should be the initial approach. That was done in the New State Areas Case, and other cases in the Appellate Division, and it seems to have been done in the Associated Newspapers Case. It avoids the contradictory enquiry in special circumstances spoken of by Lord Cave. It avoids the question which has caused the courts so much trouble in applying Lord Cave's test, and on which seemingly irreconcilable decisions are given, as to the length of time which, for a particular asset or advantage, can be regarded as making it an "enduring" one. And of course if a more general test does not indicate a result there is always the test in Atherton's Case to be applied.

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In this case the circumstances are very special, and the payment, though quite unusual, is associated, whether as a capital or non-capital payment, with the normal operations of the taxpayer. In such a case particularly it is I think proper first to try to determine whether, according to the true nature of the expenditure, it was made as part of the cost of performing the income earning operations or as part of the cost of the income earning machine or structure.

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I propose therefore first to consider whether on the facts it can clearly be said that the expenditure was either part of the cost of the income earning operations or as part of the cost of the income earning structure. I use the word "structure" as being a word which sounds wider than plant or machinery. The payment was obviously made in order to make a profit, but that is of course a neutral factor in a case such as this. Nchanga spent the money to get the right for a year to produce more of its own copper than it would otherwise have been entitled to produce. Giving the widest meaning to income earning structure I do not see how on a simple approach it can be said that that was added to by what Nchanga spent. That structure was a mine; the ore from which to produce copper was unaltered; the plant with which to produce the copper was unaltered. In fact there was detriment to them, for as a result of the expenditure the ore could be lessened and the

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plant worn more. The only question in the case seems to be whether expenditure to enable a person to work his income producing structure harder for awhile is of a capital nature. If no question of the right to do so were involved such expenditure would not seem to be of a capital nature. An illustration might be expenditure on the importation of workmen when there was a labour shortage. It is hard to find a case in which a right to do so is involved, for ordinarily there is probability of recurrence in payments made in that regard, as for example in licence fees which increase with production. An example would be if a country, which imported all its motor cars, found that its traders were so overstocked that it had temporarily to restrict further imports in their interests, and did so by the imposition of a heavy fee for the right to import at all. I have little doubt that a trader in some type of car who found it worth his while to pay that fee would not be regarded as making a payment of a capital nature. All these reasons seem to me to indicate that the expenditure was not made as part of the cost of the income earning structure. 10 20

Examination of the alternative nature of this payment seems to lead to the same result. Can it be said that this expenditure was part of the cost of income earning operations. In the main the expenditure related only to a part of the production of Nchanga. The extra tonnage was much more expensive to produce. Normally I think it can be said that an expenditure related to capital directly affects the whole production, and not some small part of a product which is all of the same kind. But the expenditure did also have effect by reducing the cost per ton of the whole of the production. And it seems to me that what happened was that a producer, faced with an increase in the cost of his product because of a cut in production, found a way to avoid that cut in production, and indeed to increase his production, and so to keep his cost of production in his main operations down, by producing some of the same product at a very high cost, though still at expected prices at a profit. His arrangement increased his profit in two ways: it kept his cost of production of the bulk of his product down, and it provided a profit even in the expensive part of his operations. I would say that such a management of his affairs was part of 30 40 50

the cost of income earning operations.

I have not discussed, and I do not propose to discuss, the many cases which were cited as indicating from their facts that the result should be one way or another in this case. This case is in my view not similar to any one of those cases and the analogy is always strained. There are however two submissions on behalf of the Commissioner which I must mention. The one is that the payment in Bancroft's hands was a capital receipt, and so as made by Nchanga it should be regarded as a capital payment. I do not propose to discuss Bancroft's position. Assuming that it was a capital receipt that fact has no real bearing on Nchanga's liability to tax.

The other submission is that the payment was in effect made to buy out a competitor. It was denied in evidence that that was the object of the scheme, though that of course is not conclusive. It must be judged against a background that Nchanga, by agreeing to the cut, had first eliminated itself to a degree. The whole purpose of these arrangements was not to compete in the market against the other mines in the Group but to join with the other mines in the best interests of all for the future. The argument can only relate to some part of the tonnage concerned for if Bancroft was eliminated as a competitor Rhokana was strengthened as a competitor. But the truth of the matter, as shown by world production figures, is that these mines were not in competition with each other. Except in so far as they were forced to cut production to keep up the world price of copper they were selling all that they could produce. And if the payment was designed to eliminate the competition of Bancroft it was a very short-sighted way to do so, for the effect of the payment was to get Bancroft out of its financial and production difficulties in a year, so that at the end of the year it could be a strong competitor.

In dealing with this submission I entrench on a finding of fact that "the transaction temporarily eliminated a competitor (Bancroft) from the market." That finding was not based on direct evidence; the evidence was that the object of the payment was not to eliminate Bancroft as a competitor. It was an inference. With respect I consider that there was not evidence on which it could be based. The finding is made that the elimination was temporary,

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by which must be meant for the year in which Bancroft's production ceased. In that year there could not be any competition at all between Bancroft and Nchanga if Bancroft continued to produce. The entire permissible production of each mine, after the cut, had been committed for sale before the arrangement was made. And regard must be had only to the cut production for it was only that production which was possible to Bancroft, having regard to the necessity for the cut in production. Apart from what I have said earlier this last fact seems to me conclusively to deal with the submission based on elimination of a competitor. Bancroft was not a competitor. 10

Approaching the case on the first basis I consider that Nchanga did prove clearly on a balance of probabilities that the payment was not of a capital nature.

If the test propounded by Viscount Cave in Atherton's Case is used there is not I think 20
reason to treat the expenditure as attributable to capital. I assume, contrary to my own view, that this is not such a case as should be regarded as having special circumstances in terms of that test. The payment was made once and for all. The learned judge's suggestion that there was a possibility of recurrence does not mention at all how unlikely it was that Bancroft would again be in a position in which it would be to its advantage to cease pro- 30
duction. There was advantage to Nchanga in being able to produce more than it could otherwise have done. But I do not think on any of the authorities cited that that advantage can be regarded as one for the "enduring benefit" of Nchanga's trade. The learned judge's finding in this regard was based on the advantage being the avoidance of dislocation of Nchanga's organization. But if that is left aside, as it must be, the only advantage was limited to a year. Not only did the closing down of Bancroft 40
come to an end then, but so did the agreed cut in production. And the restoration of Nchanga to its old position, of being able to produce what it could, came not as any result of the payment but because the cut ceased. This was at best a temporary arrangement to meet a temporary position. The test from Atherton's Case would not I consider show the payment to be capital.

I consider therefore that the appeal should

be allowed with costs of appeal in this Court, and the Commissioner is ordered to amend the assessment of the appellant for the year ended 31st March, 1959, in terms of paragraphs (c) and (d) of the grounds of appeal.

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JUDGMENT of BRIGGS, F.J.

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10 The appellant company, which I shall call "Nchanga", and two other companies which I shall call "Rhokana" and "Bancroft" are all copper producers in Northern Rhodesia and members of what is loosely but conveniently described as the Anglo-American group. They are not in the strict sense controlled by the Anglo-American Corporation of South Africa Limited, which I shall call "Anglo-American". They are all independent public companies. But their boards are largely the same as
20 the Anglo-American board. Anglo-American are secretaries and consulting engineers to all of them, and it may fairly be said that ties are very close. Rhokana is a large shareholder in and creditor of Bancroft. Nchanga was not at any material time a shareholder in Bancroft, but was a creditor for a large sum. Since, however, Rhokana, whose financial stability was and is beyond all argument, had guaranteed this debt, it can hardly be said that Nchanga was at all interested financially in Bancroft's prosperity. Rhokana and
30 Nchanga are relatively old-established and are cheap producers. Bancroft was incorporated in 1953 and first came into production above January 1957. It encountered considerable physical difficulties, notably by water; the planned rate of development was not achieved and at the beginning of 1958 production costs were still high.

40 From a peak of £436.10. per long ton in March 1956 the price of copper declined until on 11th December 1957 it stood at £176.5, and in February 1958 it was about £160. Without any binding agreement to do so, most of the major world producers of copper had cut production during 1957

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with the object of improving the world price. The Anglo-American group were by the end of 1957 the only very large scale producers who had not made a cut. Mr. Acutt, a joint deputy chairman of Anglo-American, and deputy chairman chairman of the three producing companies, lived in Salisbury and may be said to have been in immediate control of them. He formed the view that cuts should be made. This was partly the result of outside pressures, but he had in mind that the moral effect of the general cut would be enhanced if all the major producers showed a solid front, and that, although the cut could by no means be relied on to raise prices, it would be more likely to do so if the Anglo-American group participated. At Mr. Acutt's instance a meeting was held in Salisbury on 26th January 1958 at which Mr. Oppenheimer, chairman of all four companies, Mr. Acutt and members of the managerial, technical and financial staffs attended. It was agreed in principle that a cut of ten per cent. for one year should be effected if possible, and means of doing this were discussed. The target programmes for the three mines for 1958 were in round figures Nchanga 140,000 long tons, Rhokana 90,000, and Bancroft 40,000, making 270,000 in all. Of this some 240,000 had been the subject of forward sales contracts. It seems, however, that these were for the most part, if not entirely, contracts to sell at market prices, not at fixed predetermined prices. Their importance was thus in affording secured markets, and they gave no direct financial advantage. A cut of 10% by the group would merely mean that 243,000 tons would be produced, but practically all of this would be placed under existing contracts as produced.

The difficulties which faced the meeting were numerous and affected the three companies in different ways. It is hardly necessary to say that those present were well aware of their duty to consider separately, and to protect, the interests of each company, a duty which they were all well accustomed to performing. Any cut in production is unwelcome to a copper mine, for fixed costs are as high as 60% of the total, while variable costs are no more than 40% Nchanga and Rhokana were in a sense well able, as cheap producers, to support the burden, though on a basis of £162, the price on 27th January 1958, the estimated cost to Nchanga would have been £1,272,000. Bancroft on the other hand in its

then condition was in no position to effect a cut at all. Its revenue would on cutting by 4,000 tons have come down by some £650,000, and it simply could not accept that at the time. It was suggested that Rhokana and Nchanga's stronger shoulders might bear the whole burden, but on this further cut the estimated loss to Nchanga would have been £1,469,000 and it was felt that the extra loss of £197,000 could not be justified from Nchanga's point of view. It was finally suggested that the best method in the interests of all three companies was for Rhokana and Nchanga to produce between them the reduced group total of 243,000 and for Bancroft to go out of production for a year from 1st March 1958. This would mean an increase of some 13,000 tons above Rhokana and Nchanga's planned production, a relatively small amount which they were able to undertake, Nchanga's share being estimated at about 9,000. Obviously this would not only preclude any loss by cutting, but should ensure some additional profit to them. Obviously also Bancroft must be compensated. The quantum was reached by reference to Bancroft's actual needs. It had to cover interest charges, provide for continuing development required to bring production to the full rated capacity of its plant, and pay for necessary pumping operations. The figure arrived at was £2,165,000; to be divided between Nchanga and Rhokana in proportion to actual production. In the event, Nchanga's share proved to be £1,384,569.

The next problem for the meeting was to estimate the probable results of this proposal, if carried out, on all three companies. As regards Nchanga and Rhokana this was done by calculations embodied in a graph showing profits as they would be at various prices for copper (a) on a straight ten per cent. cut, and (b) on the slightly increased total production, but deducting the proposed payment to Bancroft. The graph showed that at any price above £130, which was lower than anyone's worst expectations, Nchanga would be better off on basis (b), at the then price of copper it would be better off by some £600,000, and if copper rose it would benefit correspondingly. For Rhokana the critical price was about £135, but the general effect was the same. Bancroft would have the moral advantage of having participated in the group cut and the

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physical advantage of being able to concentrate without financial anxiety on development which would make possible full scale, and so cheap, production after the shut-down. Here then was a scheme about which a shareholder of any of the three companies might well have been enthusiastic. Binding agreements to carry it out were made the next day; it was duly put into effect, and subsequent events proved that it was just as beneficial to each of the three companies as any one of them could have hoped. Nchanga duly paid to Bancroft by monthly instalments the sum of £1,384,569, and charged it against the year's production of copper.

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The Commissioner decided that this was a capital payment, and overruled an objection, and Nchanga appealed to the High Court without success. Nchanga now appeals to us, and the appeal lies only on questions of law. We are not concerned with the nature of the payment by Rhokana, or of the receipt by Bancroft. The Commissioner's case in the High Court was fought on two grounds, which I set out,

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"The sole reason or, alternatively, the dominant reason for the said payment was the desire and intention of the appellant and Rhokana Corporation Limited to provide the said Bancroft Mines Limited with the said funds to enable the latter to overcome its technical and financial difficulties and, in particular, to enable Bancroft to finance certain underground development work and to cover the interest on its loans.

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"Alternatively, the said payments were made solely and exclusively for the purpose of eliminating competition in the production and sale of copper and, or, of securing or creating conditions favourable to and for the enduring benefit of their trade."

This was rather a remarkable attempt to face both ways. The conflicting ideas of Nchanga and Rhokana on the one hand supporting Bancroft as an act of charity, and on the other hand grinding Bancroft in the dust to reduce competition, seem to have caused some difficulty in the cross-examination of Mr. Acutt, who was the only witness; but the High Court rejected the first of the alternative contentions and there was no attempt to revive it before us. We are

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therefore concerned only with the second contention and with the High Court's grounds for accepting it, if indeed it did. Nchanga of course contends that the truth lies half way between the Commissioner's two contentions, that the payment was neither an act of charity nor an attempt to improve the profit-making machine (or secure an advantage of an enduring nature for its own benefit), but a temporary and necessary expedient to enable it to maintain or increase its own profits, which must otherwise have been seriously reduced.

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At the outset of his judgment the learned Judge found that Mr. Acutt was not only a witness of truth, but was "as was to be expected entirely objective and helpful." He never in any way qualified or varied this finding at any stage of his judgment. He had before him a considerable quantity of documentary evidence, but he nowhere points to any discrepancy between any of it and Mr. Acutt's oral evidence. He expressly accepted Mr. Acutt's evidence "that the Nchanga directorate bona fide took the view that the proposal was in the interests of Nchanga from a trading point of view", and it was on this that he rejected the Commissioner's first contention. The learned Judge then directed himself, as I think, with perfect correctness as to the distinction between capital and revenue payments, and that "the question where to draw the line is one of fact, or rather secondary fact."

On the second issue the learned Judge, at different points in his judgment, stated the facts which he found relevant as follows,

".... while Mr. Acutt was of opinion that the arrangement with Bancroft had no enduring effect on Nchanga, he agreed that the application of the cut to Nchanga would have meant something of an upheaval there."

"(1) Nchanga, in fact, treated the expenditure as revenue in that they wrote off the whole amount against the income of one year, and the capital structure of the company as represented in the accounts remained unaffected. This lends some measure of support to Nchanga's case, because the ordinary principles of accounting are relevant in an

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inquiry such as this. On the other hand there was no evidence that this was the only way to deal with the matter."

"(2) The payment was made out of circulating capital and not out of, nor in connection with, any item of fixed capital. This feature also favours Nchanga's contention, but its limitations are implicit in the passage from the judgment of Lord Greene M.R. which I have just recited. (3) The expenditure was of a very large sum and apparently quite unique. It was incurred with the object of turning what promised to be a substantial set-back (the 10% cut) into a positive advantage. Not only would any dislocation of Nchanga's business organisation be avoided, but the development promised to be profitable for Nchanga. (4) The transaction temporarily eliminated a competitor (Bancroft) from the market; but, on the other hand, it was visualised that Bancroft would in due course come back into the market stronger than before. (5) The expenditure was not recurrent except in the sense that cuts in copper production (not an unusual development in the industry) were likely to recur and that a comparable situation might theoretically arise.

"Weighing together these features in the light of the authorities, I have come to the conclusion that, on the evidence, it is a possible and a proper inference that, to borrow the words of Dixon J. in the Sun Newspapers case at page 364:

'In principle the transaction must be regarded as strengthening and preserving the business organisation or entity, the profit yielding subject, and affecting the capital structure'

of Nchanga. The chief object was to preserve from impairment and dislocation Nchanga's organisation. The probabilities are that the advantages of this to Nchanga's business were lasting, or, at any rate, sufficiently lasting to qualify as an 'enduring' advantage within the meaning of Viscount Cave's dictum. If that inference has not been displaced (and I think it has not), my conclusion must be that Nchanga have failed to discharge the onus of showing that this expenditure was not of a capital nature."

It may be noted that the numbered points (1) and (2) do not in any way lead towards the learned Judge's conclusion. If anything, they might suggest the contrary conclusion, but he is right in treating them as inconclusive. Point (3) is perhaps a nexus of conflicting points. The first sentence seems to suggest "capital". The second seems to favour "revenue". The third is perhaps equivocal. Point (4) has the sting in its tail. On balance the arrangement was likely to strengthen rather than reduce competition. Point (5) may lean towards "capital"; but a "comparable situation" was most unlikely to arise again, in that, on the evidence, Bancroft was expected to become a cheap producer and so to be able at a future date to bear a cut in production, if that should prove necessary, without undue difficulty, or at least without the special difficulties which existed in 1958.

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I think I have set out fairly all the relevant material on which the learned Judge relied. Much of it appears at first sight to be equivocal. And I am obliged to say that I find his decision difficult to understand. I am not sure whether the words "it is a possible and a proper inference" are confined to the finding expressed in the quotation from Dixon C.J., leaving subsequent matters as unqualified findings, or whether all the findings are subject to the comment that they form part of "a possible and a proper inference". And I am by no means sure what those words themselves mean. If they mean "a possible and therefore a proper inference", I think they indicate a misdirection if, as in this case, the whole decision turns on that inference. The question in a case of this kind is not what inferences could be drawn from the evidence, but what inference should be drawn, as being most fully in accord with the evidence and the probabilities as a whole, and taking into account that the onus lies on the taxpayer to establish his facts on a balance of probabilities. If the learned Judge had even said "a possible and the proper inference", I should suppose that he had these principles in mind, but his words seem rather to suggest that many inferences are possible and, perhaps on a basis of onus of proof, any one of them may properly be drawn, at least if it favours the Crown. I think that must be misleading, and may be wrong. It is very rarely that in a

In the Federal
Supreme Court

No. 12

Judgment.

7th November,
1961.

Briggs, F.J.

- continued.

In the Federal
Supreme Court

No. 12

Judgment.

7th November,
1961.

Briggs, F.J.

- continued.

civil case, where proof on a balance of probability is enough, conflicting inferences from facts found are so evenly matched in validity that neither can be preferred to the other. If this was in the learned Judge's view a case of that type, he would have been right in giving judgment for the Crown. I have, as enjoined by Usher's Wiltshire Brewery Ltd. v. Bruce, (1915) A.C. 433, 471, attempted to ascertain the true meaning of the findings of fact, and I think that probably was what the learned Judge meant. I proceed on that assumption.

10

The question for decision in accordance with Lord Cave's test in Atherton v. British Insulated & Helsby Cables, 10 T.C. 155, was the dominant motive and intention of the Nchanga directors in making the expenditure, and that intention may be ascertained from what they did, as well as from what they have said. It must be accepted that a cut of 10% in production would probably have resulted in some slight degree of "impairment and dislocation of Nchanga's organization", and that the avoidance of that was an advantage which was to some extent lasting. I do not think therefore that it can be said in strictness that there was no evidence to support the learned Judge's findings. Nor was that the case put forward for Nchanga before us. They relied on submissions that the decision was one at which no reasonable Judge of fact could have arrived, and that the true and only reasonable conclusion on the evidence was the opposite of that found. Edwards v. Bairstow 1956 A.C. 14; Cooper v. Stubbs, (1925) 2 K.B. 753, 768. It must be remembered in this case that the Judge of fact has given reasons for his findings, and especially that he has given a finding on credibility. See Chipembere v. R. unreported, F.S.C. Appeal No. 56 of 1961.

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30

Although the general submission in the Commissioner's case that the sum paid was of a capital nature is wide enough to cover the High Court's findings, it is important that the grounds on which the High Court relied were not specifically raised in the Commissioner's case and were not really part of the case put forward at the trial. In our typed record the examination-in-chief of Mr. Acutt fills 26 pages, his cross-examination 130, and his re-examination 8. In chief he dealt with the two contentions of the Commissioner in this way,

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10 "Would you look at paragraph 2(b) of the Commissioner's case. Here it is said: 'The sole reason or, alternatively, the dominant reason for the said payment was the desire and intention of the appellant and Rhokana Corporation Limited to provide the said Bancroft Mines Limited with the said funds to enable the latter to overcome its technical and financial difficulties and, in particular, to enable Bancroft to finance certain underground development work and to cover the interest on its loans'. What do you say about that? - That is not correct. Nchanga had no share holding in Bancroft.

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7th November,
1961.

Briggs, F.J.

- continued.

20 "Nchanga did have these loans. Was it intended to protect repayment of the loans or payment of interest on the loans? - The loan, if it can be even considered to come into account, or the notes, were guaranteed by Rhokana.

"Was this, in fact, a factor which entered into the minds of the directors when they entered into this agreement? - No.

"What, then, was the purpose of the directors in entering into the agreement? - The purpose of the Nchanga directors was to benefit Nchanga.

30 "In the way in which you have already described? - In the way in which I have already described.

40 "Would you next look at paragraph 2(c) of the Commissioner's case. This is an alternative contention. Firstly, he says: 'The said payments were made solely and exclusively for the purpose of eliminating competition in the production and sale of copper and, or, of securing or creating conditions favourable to and for the enduring benefit of their trade.' Let us deal, first of all, with the elimination of copper competition. Is that statement true, that the payments were made solely and exclusively for the purpose of eliminating competition in the production and sale of copper? - No.

"Was that the purpose at all? - No, the

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Supreme Court

No. 12

Judgment.

7th November,
1961.

Briggs, F.J.

- continued.

true position is that the directors of all the three companies were of the opinion that their overall production must be cut. The problem with which we were confronted at our meeting in January, 1958, was how to achieve this cut in production in a manner which would be least detrimental to all three companies. The reason why it was decided that Bancroft should cease production for one year was not that Nchanga and Rhokana wished to eliminate competition on the part of Bancroft, but its costs of production were much higher than those of Nchanga and Phokana.

10

"But for that fact, Mr. Acutt, would it have been decided to suspend Bancroft's entire production for that one year? - No.

"But because of that fact, it was so decided and, therefore, payment had to be made to Bancroft? - Well, Bancroft was obviously not prepared to consider such a proposal without a payment.

20

"And then there is this second statement which comes actually from one of the English cases, that the payments were made solely and exclusively for the purpose of securing or creating conditions favourable to and for the enduring benefit of that trade. Now, what do you say about that? - I think that is incorrect. The purpose of Nchanga was to avoid a cut in its production and to increase its own production and thus maintain and if possible increase its profits. Having regard to the fact that there had to be an overall cut in production, Nchanga could not have achieved its purpose had Bancroft not agreed to suspend production.

30

"They talk here about conditions favourable to and for the enduring benefit of trade. I think you have dealt with that already. Could this agreement have been of any enduring benefit? - I don't think so. The agreement was to operate for a period of one year only and it was to attempt to rectify the temporary excessive supply over demand at the time, which was one of the causes of the decline in prices. It was a short term problem which was aimed, as far as Nchanga was concerned, as I said before,

40

"at maintaining and if possible increasing Nchanga's profits during the period of one year, during which the agreement was to operate.

In the Federal
Supreme Court

No. 12

"Was there any kind of agreement or understanding between the Anglo-American copper producers and other copper producers either in this country or abroad? - No, there was no such understanding at all.

Judgment.

7th November,
1961.

Briggs, F.J.

-- continued.

10 "How are cuts in production regarded, generally speaking, by copper mining companies or any mining company? - Well, as temporary expedients. Experience has shown they are temporary expedients.

20 "His Lordship asked you a little earlier when these cuts were restored and you said producers didn't make announcements when they restored their cuts, but do you know when some of these cuts were restored? - Yes, although they didn't make an announcement of their cuts being restored, from the very fact of their tonnages being published and their figures given to date, it is clear to see what the production of a property is and the cuts began to be restored about the middle of 1958.

30 "Now, we have referred already to Bancroft's projected production of 40,000 tons and you have pointed out that that was less than one per cent. of the world production in the previous year? - Yes.

"Could the suspension of Production of Bancroft for one year have had any effect upon world copper prices? - No.

"Any enduring effects anyway? - No, I think not, nor did anybody concerned think that they could have.

40 "The agreement, you have said, was for one year? - The agreement was for one year and when it was agreed to do this scheme, it was never contemplated there would be any enduring effect upon the copper market, particularly as the directors of Bancroft were determined to resume production in April, 1959, and in fact, did do so."

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Briggs, F.J.

- continued.

The cross-examination was almost exclusively devoted to establishing the Commissioner's first contention, which, as I have said, was rejected. The only passages which appear to be relevant to the learned Judge's findings are as follows,

"You would have had an upheaval at three mines because it would have been necessary for them probably to reduce their staff."

"If they" (i.e. Nchanga and Rhokana) "cut clearly there was going to be hardship on certain members of their staff as well." (i.e. as well as Bancroft's).

10

It was never suggested to Mr. Acutt in cross-examination that the transaction was intended to strengthen or preserve the business organization or entity, or that the chief object was to preserve from impairment and dislocation Nchanga's organization, or that to do so might be expected to confer some lasting benefit on Nchanga. The sentences quoted above, if read in their context, do not really support the learned Judge's findings. Mr. Acutt was being asked about the effects of a cut of 10% on Bancroft, and particularly about hardship likely to be caused to employees dismissed by Bancroft. Every question for some pages had related to Bancroft, and then the record reads,

20

"The question was, when did it first occur to you that Bancroft should cease production entirely? Was it on that Sunday morning? - It was a suggestion which arose out of mulling over the whole problem on that Sunday morning.

30

"And it was appreciated right away this would involve uprooting all employees, the Bancroft township and everything that went with it? - It would mean the closing down of the service plant if it ceased production.

"And many employees would have to be discharged? - Yes.

"And alternative employment would have to be found for them? - Yes.

40

"It was quite revolutionary from the point of view of the Bancroft community to close down that mine? - Yes, my lord. Going to

another point, if I may, exactly the same point would occur if either of the other two mines reduced. You would have had an upheaval at three mines, because it would have been necessary for them probably to reduce their staff.

10 "In so far as you gentlemen were concerned, you then thought it would probably be better from the group point of view for Nchanga and Rhokana to do the production, having regard to the low price of copper, is that right? - No, the group point of view was never brought into consideration at all. Each of these mines was discussed as separate entities with separate problems and the fact that we were together over a long period meant that we discussed the things openly, obviously from each point of view, but the group as such on which there has been quite a lot of emphasis
20 has no standing at all.

30 "You discussed the question of a cut. It was obvious Bancroft couldn't cut. What was the sequence after that? You then said there were figures to show that it would be inadvisable for Nchanga and Rhokana to cut? - That if they cut clearly there was going to be hardship on certain members of their staff as well, and the whole cost of their production is increased by the lowered production. That led to an obvious conclusion that really the thing to do is to try to increase production on any mine, in fact, that goes for Bancroft too, but clearly in the circumstances there was no question of a unilateral increase in production at any one mine. The discussion was how best to achieve an overall reduction in the tonnage of copper and therefore it was natural that some point should be drawn to the fact that there were certain mines which were
40 producing at a higher cost, and the effects of these cuts on Rhokana and Nchanga were discussed, and it led, I think, to a very understandable point being made by the Consulting Engineers that quite clearly if Bancroft, which was the highest cost producer, went out altogether there were immense gains for Rhokana and Nchanga possible if they took up the

In the Federal
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No. 12

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1961.

Briggs, F.J.

- continued.

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1961.

Briggs, F.J.

- continued.

"additional tonnage, and it was calculated on the graph which I think has been put in since in the afternoon on the preliminary figures available this clearly looked as being more advantageous to Nchanga and not quite so advantageous, but advantageous to Rhokana in ordinary normal circumstances."

Counsel never reverted to the question of an "upheaval" at Nchanga, or "hardship" to its employees. It is of course apparent from the context that Mr. Acutt, in using the word "upheaval" was thinking exclusively in terms of reduction of staff. Impairment and dislocation in any general sense were never mentioned. Mr. Acutt was merely conceding that to reduce staff means an upheaval for those dismissed. There is, moreover, evidence of Mr. Acutt elsewhere, which was not touched in cross-examination, that Nchanga's organization was not such as would be materially impaired or dislocated by a temporary cut of production, but that on the other hand it had achieved "great flexibility both in regard to plant capacity and mining operations" and was thus able to "adapt itself to swift changes in the scale of production." This was proved during a two months' strike late in 1958. If the learned Judge relied on the two phrases which I have quoted, he must either have misunderstood their meaning, or assumed that they involved consequences which did not spring from them.

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The evidence, accepted as true and candid, given at length and tested so far as the Crown thought necessary, though not directed specifically to those matters which the learned Judge thought decisive, in effect contradicted his findings in every respect. I find it unnecessary to quote, but it is perfectly clear that on that evidence the Nchanga directors were not in the least concerned with strengthening or preserving the business organization as a whole. That was quite unnecessary. Their object was to avoid a large temporary loss of revenue, and if possible to enhance profits over the same short period. It is equally clear on the evidence that no real impairment or dislocation of Nchanga's organization was likely or expected if this cut took place, and that by transfers within the group or to other employment the companies expected and were able to mitigate to a great extent the dislocation and hardship which a

40

cut would cause to individuals. The evidence directly contradicts the finding that "the chief object was to preserve from impairment and dislocation Nchanga's organization." The desire to cause as little hardship as possible to individual employees may have been a factor in the decision, but it is unreasonable to suppose that it could have been a major, much less the dominant, one; and the evidence shows that it was not. On the issue of lasting benefit to Nchanga, it is not clear whether the learned Judge considered that benefit would continue beyond the period of the one year cut. If he did, his finding is contrary to the evidence; but if he thought that benefit over the one year was an enduring advantage within Lord Cave's test I think he misapplied the test. I think also that in this case it is fair to regard the findings as a whole, rather than to analyse them in detail. If this is done, it is apparent that the decision in this case was not really on a question of degree. The acts and motives of the Nchanga directors considered as a whole should have led directly to a single conclusion.

If we were dealing with the verdict of a jury, or with findings of Special Commissioners given, as so often, without reasons, I should assume that the judges of fact, without imputing conscious falsehood to Mr. Acutt, must have considered that his views were coloured by his wishes and that Nchanga's intentions as shown by its Board's acts were a better pointer to motive than the oral evidence. That often happens, and a finding made on these lines cannot easily be attacked. But here the position is quite different. If, which I do not for a moment accept, the evidence of conduct suggests that the motive of Nchanga was such as to make this a capital payment, that inference is expressly negatived by oral evidence of motive and intention which has been accepted as true. If the oral evidence is true, no inference contradicting it can be a proper inference. If the learned Judge had rejected, or even given qualified approval to, the evidence of Mr. Acutt, his conclusion might be supportable, though it would not commend itself to me. As it is, I think the judgment is self-contradictory. On the finding as to credibility, there could be only one true and reasonable conclusion, that this payment was a revenue transaction. On this aspect of the case I wish only to

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Briggs, F.J.

-- continued.

In the Federal
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add that I agree with all the reasons given by the
learned Chief Justice for adopting this view.

No. 12

I would allow the appeal with costs and order
that the assessment be amended accordingly.

Judgment.

(Sgd.) F.A. BRIGGS.

7th November,
1961.

Federal Justice.

Briggs, F.J.
- continued.

DATED at SALISBURY this 7th day of November,
1961.

Quenet, F.J.

JUDGMENT of QUENET, F.J.

I have had the advantage of reading the judg-
ments prepared by the learned Chief Justice and by
Briggs, F.J. But for one matter, I express my
respectful concurrence with the conclusions they
have reached and consider there is nothing I can
usefully add.

10

It was submitted the learned trial judge mis-
directed himself on the question of onus. The
relevant passage in the judgment reads: "Weighing
together these features in the light of the author-
ities, I have come to the conclusion that, on the
evidence, it is a possible and a proper inference
that, to borrow the words of Dixon, J. in the Sun
Newspapers case at page 364:

20

'In principle the transaction must be regarded
as strengthening and preserving the business
organisation or entity, the profit yielding
subject, and affecting the capital structure'

of Nchanga. The chief object was to preserve from
impairment and dislocation Nchanga's organisation.
The probabilities are that the advantages of this
to Nchanga's business were lasting, or, at any
rate, sufficiently lasting to qualify as an 'endur-
ing' advantage within the meaning of Viscount
Cave's dictum. If that inference has not been
displaced (and I think it has not), my conclusion
must be that Nchanga have failed to discharge the
onus of showing that this expenditure was not of a
capital nature. On this aspect of the case my
decision is for the Commissioner."

30

As I understood the appellant's counsel, he

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submitted there would be no ground for complaint if by the words ".... it is a possible and a proper inference" the learned judge meant to say: "It is a possible and the proper inference"; if, on the other hand, in using these words he intended to convey that on a consideration of the features of which he spoke, his conclusion was based upon a possible as opposed to a probable inference, he misdirected himself because the appellant was only required to establish a balance of probability in its favour. The answer to this question, so it seems to me, is to be found in the language used by Dixon, J., quoted by the learned trial judge and adopted by him for the purpose of expressing his own conclusion. The operative words in the passage cited, are: "...the transaction must be regarded...." If that be a correct view of the matter, the meaning of an otherwise equivocal phrase becomes clear - it means: "it is a possible and the proper inference....."

As I have said, my dissent is limited to this aspect of the matter. I agree the appeal should be allowed.

(Sgd.) V.E. QUENET.

Federal Justice.

DATED at SALISBURY this 7th day of November, 1961.

No. 13

NOTIFICATION OF RESULT OF APPEAL

30 To: The Registrar of the High Court of Southern Rhodesia, Vincent Building, Jameson Avenue, SALISBURY.

Messrs. Scanlen & Holderness, Barclays Bank Building, Manica Road, SALISBURY.

The Federal Government Solicitor, Central House, Central Avenue, SALISBURY.

TAKE NOTICE that the Federal Supreme Court sitting at Salisbury on the 16th and 17th days of October, 1961, has considered the above appeal.

In the Federal
Supreme Court

No. 12

Judgment.

7th November,
1961.

Quenet, F.J.

- continued.

No. 13

Notification of
result of
appeal.

7th December,
1961.

In the Federal
Supreme Court

No. 13

Notification
of result of
appeal.

7th December,
1961

- continued.

AND FURTHER TAKE NOTICE that the said Federal
Supreme Court has on the 7th day of November, 1961,
finally determined the same and has allowed the
appeal with costs.

AND IT IS ORDERED that the Commissioner of
Taxes amend the assessment of the Appellant for
the year ended 31st March, 1959 in terms of para-
graphs (c) and (d) of the grounds of appeal.

GIVEN UNDER MY HAND and the Seal of the
Federal Supreme Court.

10

(Sgd.) J.M.N. HEARN

ASSISTANT REGISTRAR.

DATED at SALISBURY this 7th day of December,
1961.

In the
Privy Council

No. 14

Order granting
Special Leave
to Appeal.

27th June, 1962.

No. 14

ORDER GRANTING SPECIAL LEAVE TO APPEAL

AT THE COURT AT BUCKINGHAM PALACE

The 27th day of JUNE, 1962

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

20

LORD PRESIDENT

MR. BROOKE

MR. SECRETARY PROFUMO

MR. BEVINS

WHEREAS there was this day read at the Board
a Report from the Judicial Committee of the Privy
Council dated the 21st day of June 1962 in the
words following viz:-

WHEREAS by virtue of His late Majesty
King Edward the Seventh's Order in Council of
the 18th day of October 1909 there was re-
ferred unto this Committee a humble Petition
of The Commissioner of Taxes in the matter of
an Appeal from the Federal Supreme Court of
the Federation of Rhodesia and Nyasaland

30

between the Petitioner (Respondent) and Nchanga Consolidated Copper Mines Limited Respondent (Appellant) setting forth: that the Petitioner desires to obtain special leave to appeal from a Judgment of the said Federal Supreme Court delivered on the 7th November 1961 allowing an Appeal by the Respondent from a Judgment of the High Court of Southern Rhodesia dated the 9th May 1961 whereby an Appeal by the Respondent against the disallowance of its objection to an income tax assessment made upon it for the year ending 31st March 1959 was dismissed: that the assessment was made in respect of the Respondent's income from copper mining and the question is whether a sum of £1,384,569 paid to Bancroft Mines Limited falls to be included as an expenditure on revenue account in the computation of the said income or whether the said sum falls to be excluded from such computation as being an expenditure on capital account: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the said Judgment of the Federal Supreme Court of the Federation of Rhodesia and Nyasaland dated the 7th day of November 1961 or for further or other Order:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Federal Supreme Court of the Federation of Rhodesia and Nyasaland dated the 7th day of November 1961:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Federal Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

In the
Privy Council

No. 14

Order granting
Special Leave
to Appeal.

27th June, 1962

- continued

In the
Privy Council

No. 14

Order granting
Special Leave
to Appeal.

27th June, 1962
- continued.

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of the Federation of Rhodesia and Nyasaland for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

10

(Sgd.) W.G. AGNEW.

Exhibits

9.

Production Cuts
announced by
World Producers.

(Undated)

E X H I B I T S

EXHIBIT 9. - PRODUCTION CUTS ANNOUNCED BY
WORLD PRODUCERS

In order to attempt to correct the growing burden of over-supply, various producers commenced production cuts from about May, 1957. A large number of the smaller high cost producers however announced that they could not afford to cut production. By December, 1957, the following major producers had announced reductions in output as follows:-

20

<u>Date</u>	<u>Company</u>	<u>Quantity</u>	
30th May, 1957	Roan Antelope	10%	
30th May, 1957	Mufulira	10%	
15th July, 1957	Miami (Arizona)	15%	
15th July, 1957	Inspiration (Arizona)	15%	
15th July, 1957	Phelps Dodge	9,000 tons	
20th July, 1957	Annaconda (Yerington)	16%	30
12th September, 1957	Calumet and Hecla (Michigan)	Closure 4 mines 2,000 tons	
17th September, 1957	(Miami (Arizona)	Further 5%	
17th September, 1957	Inspiration (Arizona)	Further 5%	
13th December, 1957	Kennecott	12%	

On 11th January, 1958 the Chilean producers announced that they would cut production by 10% provided that other countries collaborated. Union Miniere in the Congo cut 10% on 15th January, 1958, Phelps Dodge a further 9% on 20th January, 1958 and Kennecott a further 10% at its United States plants on 24th January, 1958. On this particular day the L.M.E. Price was £161.12.6.

Exhibits

9.

Production Cuts announced by World Producers.
(Undated)

-- continued.

10 Further cuts were announced by producers in South West Africa (in February), Peru (in March), Canada (The International Nickel Company, in March, April and July) and the United States (March to June). At the mid-year, the total of announced cuts from the then existing capacity rates was at a yearly rate of approximately 450,000 tons.

EXHIBIT 10. - DOCUMENT showing PROFIT before and after Production Cut.

10.

NCHANGA CONSOLIDATED COPPER MINES LIMITED

Document showing profit before and after production Cut.

20 By 27th January, 1958, the price of copper had fallen to about £162 per long ton. At this price the effect of a 10% cut in production would have been as follows:

(Undated)

(a) Position before cut planned production:

144,600 long tons per annum

Revenue @ £162 per long ton	£23,425,000
Cost @ £129.5 per long ton	18,726,000

Mine Cost	£92.10. 0
Railage, Freight, etc.	23. 0. 0
Royalty	14. 0. 0

30 PROFIT before Tax £ 4,699,000

(b) Position after cut production:

130,140 long tons per annum

Revenue @ £162 per long ton	£21,083,000
-----------------------------	-------------

Cost as above	£18,726,000
---------------	-------------

less saving on variable

costs of 14,460 long

tons @ £74 per long ton 1,070,000 £17,656,000

Made up of

40% mine cost £37

Railage, Freight, etc. 23

Royalty 14£74

PROFIT before Tax £ 3,427,000

THEREFORE LOSS BEFORE TAX BY CUTTING IS £1,272,000

Exhibits

11.

Document showing loss before tax on production.
(Undated)

EXHIBIT 11. - DOCUMENT showing LOSS before tax on production.

NCHANGA CONSOLIDATED COPPER MINES LIMITED

If Nchanga and Rhokana had to absorb the full cut of 10% of 270,000 tons, i.e. 27,000 tons between them the apportionment of the cut, based on planned production, would have been:

Nchanga	$\frac{144,600}{233,700}$	= 16,700 tons
Rhokana	$\frac{89,100}{233,700}$	= 10,300 tons

The cost of this arrangement to Nchanga would have been as follows:

10

(a) Before cut. Production 144,600 tons.

Revenue @ £162 per long ton	£23,425,000
Cost @ £129.5 per long ton	18,726,000
Mine Cost	£92.10. 0
Railage, Freight, etc.	23. 0. 0
Royalty	<u>14. 0. 0</u>
	<u>£4,699,000</u>

(b) After cut. Production 127,900 tons.

Revenue @ £162 per long ton	£20,720,000
Cost - as above	£18,726,000
Less saving on variable costs of 16,700 tons @ £74 per ton	<u>1,236,000</u>
	<u>£17,490,000</u>
	<u>£3,230,000</u>

Therefore loss before tax on cut of 16,700 tons is

£1,469,000

EXHIBIT 12.

This Exhibit is a graph, accompanying the letter, Exhibit 14, which was later replaced by the graph Exhibit 13, see page 194a. Exhibit 12 has not therefore been printed in the Record.

194a.

EXHIBIT 13. - GRAPH comparing relative costs of
increased and cut production.

Exhibits

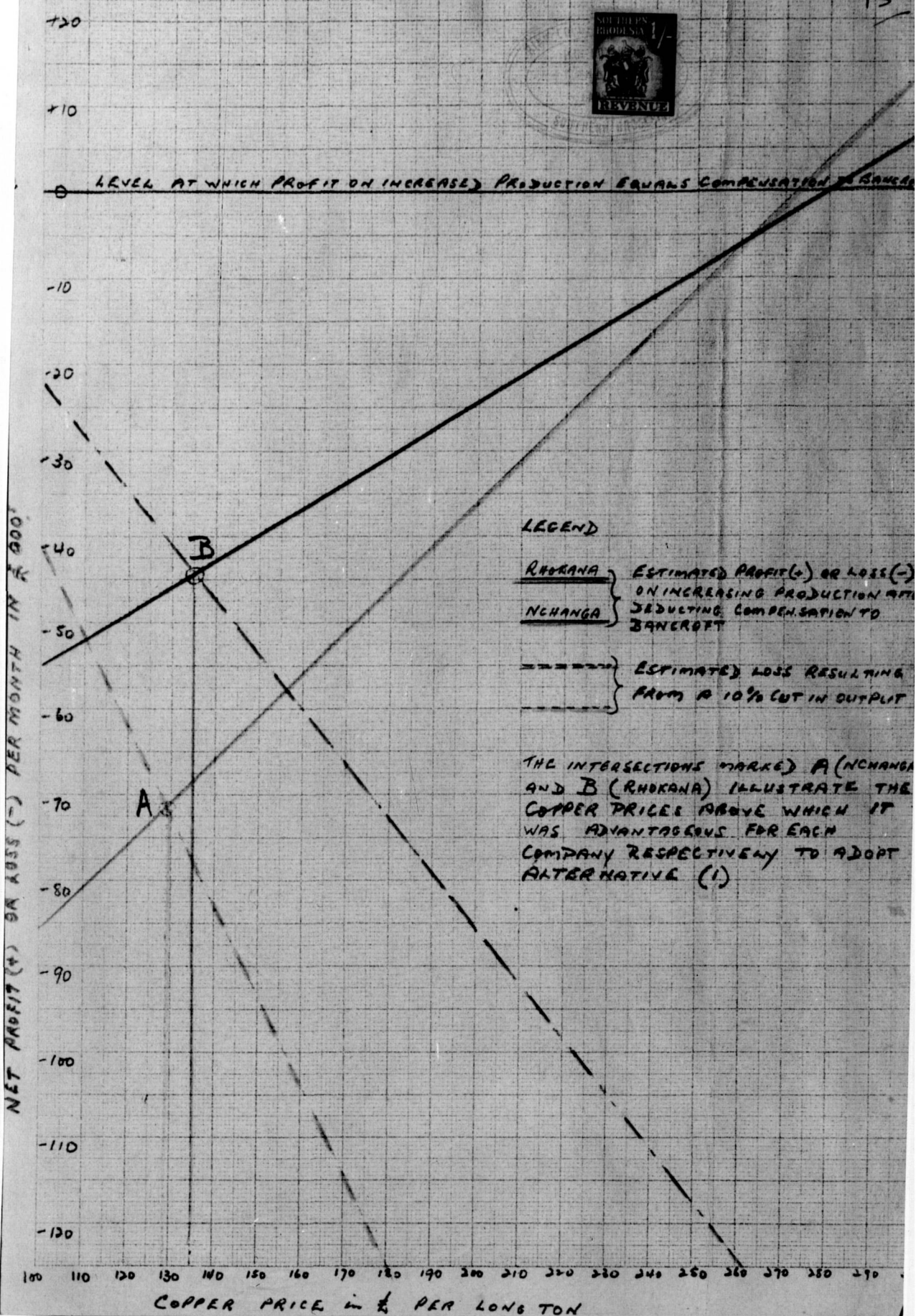
13.

Graph comparing
relative costs
of increased
and cut pro-
duction.

(Undated).

GRAPH COMPARING RELATIVE COSTS TO RHOHANA & NCHANGA OF
 (i) INCREASING PRODUCTION BUT PAYING COMPENSATION TO BANERDT
 (ii) CUTTING PRODUCTION BY 10%

13



**EXHIBIT 14. - LETTER, Rhokana Corporation Limited
to The Inspector of Taxes (Companies) Salisbury.**

Exhibits

14.

23th December 1959.

The Inspector of Taxes (Companies)
P.O. Box 8143,
SALISBURY.

**Letter,
Rhokana Corporat-
ion Limited to
The Inspector
of Taxes
(Companies)
Salisbury.**

Dear Sir,

SUBVENTION PAYMENTS TO BANCROFT MINES LIMITED

28th December,
1959.

10 We refer to a recent interview at your office with Mr. Palentine when the subvention payments made to Bancroft Mines Limited by this Company and Nchanga Consolidated Copper Mines Limited were discussed. At this interview we were asked to produce figures to substantiate our statement that the savings anticipated by Rhokana and Nchanga would, at least, have equalled the payments to be made to Bancroft.

20 We enclose our file copy of figures (all on a monthly basis) extracted prior to the final agreement with Bancroft, together with a graph of these figures, which show quite clearly that even at the L.M.E. price of £170 ruling in March, 1958, Rhokana and Nchanga, after making the subvention payments, would, in one year, have made a combined saving of approximately £1.2 millions.

30 The graph shows that the "break-even" L.M.E. prices for Rhokana and Nchanga were approximately £135 and £130 respectively. which meant that both companies could suffer a further drop from the L.M.E. price of £170 and still gain under the proposed agreement with Bancroft. It was hoped, however that the overall reduction in output would strengthen the L.M.E. price and an increase of £10 per ton would have brought in a further £2.4 millions on the basis of a combined planned production of approximately 240,000 long tons.

40 We would point out that although the subvention payments totalled £2,165,000, the figure of £2,000,000 was used in the abovementioned calculations for the simple reason that the balance of

Exhibits

14.

Letter,
Rhokana Corporat-
ion Limited to
The Inspector
of Taxes
(Companies)
Salisbury.

£165,000 would be offset by interest paid by Bancroft to Rhokana and Nchanga.

We hope that the enclosed figures will help to clarify the position and we should be grateful if you would return them after they have served your purpose.

Yours faithfully,

ANGLO-AMERICAN CORPORATION OF SOUTH AFRICA LIMITED
Secretaries.

28th December,
1959

AJB/AA.

Per.

10

- continued.

15.

Letter, Nchanga
Consolidated
Copper Mines
Limited to
Bancroft Mines
Limited. (Annexure
"C" to Case of
Nchanga Consolida-
ted Copper Mines
Ltd. in the High
Court of Southern
Rhodesia.)

**EXHIBIT 15. - LETTER, Nchanga Consolidated Copper
Mines Limited to Bancroft Mines Limited.
(Annexure "C" to Case of Nchanga Consolidated
Copper Mines Ltd. in the High Court of
Southern Rhodesia.)**

NCHANGA CONSOLIDATED COPPER MINES LIMITED

Bank Chambers,
Jameson Avenue
Salisbury.

27th January, 1958.

20

27th January,
1958.

The Secretaries,
Bancroft Mines Limited,
P.O. Box 1108,
Salisbury.

Dear Sirs,

Curtailment of Group Copper Output

We refer to discussions held jointly with your Company and Rhokana Corporation Limited on the existing low price of copper when it was proposed that the three companies should, during the year commencing March, 1958, curtail their production by a tonnage equal to 10% of their planned output for 1958. It was also suggested that if practicable

30

the reduction should be implemented on a Group basis and that Rhokana and ourselves should submit proposals in this regard for consideration. This letter records our joint proposals, which will be confirmed by a similar letter from Rhokana.

Exhibits

15.

Letter, Nchanga Consolidated Copper Mines Limited to Bancroft Mines Limited (Annexure "C" to Case of Nchanga Consolidated Copper Mines Ltd. in the High Court of Southern Rhodesia.)

10 We understand that despite some measure of success you are still experiencing the operational difficulties referred to in your Company's Annual Report for the year ended 30th June, 1957. It can be assumed therefore that your production costs are substantially higher than those of either Rhokana or ourselves, with no prospect of lowering them until such time as you are able to increase the tonnage milled and copper is produced at the full rated capacity of the plant at your mine. We understand further that for this purpose a large development programme must be undertaken.

27th January,
1958

- continued.

20 In these circumstances a 10% reduction in your planned output of 40,000 long tons of copper during 1958 may possibly increase your production costs to the extent that you could not, in view, inter alia, of the heavy burden of interest payments on loans and on the 5% Notes, continue mining operations except under the greatest difficulty. The production costs of Rhokana and ourselves will obviously also be affected by a 10% reduction in output, but to a lesser extent.

30 The total planned output of all three companies for 1958 is 270,000 long tons, and the proposed 10% reduction is therefore equal to 27,000 tons. On a Group basis the greatest saving will be achieved if your Company, as the highest cost producer, will cease production for the proposed period of one year. The difference between the tonnage your Company expects to produce this year (40,000 long tons) and the proposed reduction in Group output of 27,000 long tons will be made up by Rhokana and ourselves, which can be obtained at comparatively low cost.

40 In consideration of your ceasing production for one year on the basis set out in this letter Rhokana and ourselves jointly undertake the payment to your Company of a total sum of £2.165m. during the year that your Company will not have been in production. The payments will be made monthly, the first being on or about 31st March, 1958. The proportions payable by Rhokana and ourselves will be a matter for settlement between the two companies.

Exhibits

15.

**Letter, Nchanga
Consolidated
Copper Mines
Limited to Bancroft
Mines Limited
(Annexure "C" to
Case of Nchanga
Consolidated
Copper Mines Ltd.
in the High Court
of Southern
Rhodesia.)**

27th January,
1958

- continued.

It is understood that the abovementioned undertaking will enable you during the period of one year to cover your interest on outstanding loans and on the 5% Notes, to pay for the essential development required to allow your Company to produce at the full rated capacity of the plant and to pay for the pumping operations which are necessary at the Bancroft No. 1 shaft. This will put your Company into a position to resume mining operations at short notice on a full production basis and therefore at a considerably lower cost per ton than can be achieved now.

10

It is estimated that after allowing for the cost of the abovementioned undertaking, the profits of Rhokana and this Company would even at the present price of copper be higher than if a 10% cut in production were initiated on a separate basis by each company.

We appreciate that if your Company agrees to our proposals it will not be possible to cease production abruptly. We confirm that any copper produced in the period March/April, 1958, while closing down operations are in progress, and any revenue arising from its disposal, shall be ignored for the purpose of the arrangement set out in this letter.

20

We also appreciate that if your Company agrees to the proposal it will affect many of its employees and the community at Bancroft; we very much regret that this step will be necessary and we shall make every endeavour to assist wherever possible. We nevertheless consider that in the overall circumstances the proposals we have put forward in this letter, in conjunction with Rhokana, are the most suitable that can be arranged for all three companies.

30

Yours faithfully,

ANGLO-AMERICAN CORPORATION OF SOUTH AFRICA LIMITED

Secretaries.

per E.R. Denman.

OTP/HM.

40

EXHIBIT 16. - LETTER, Bancroft Mines Limited to Respondent. (Annexure "D" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia.)

Exhibits

16.

Letter, Bancroft Mines Limited to Respondent. (Annexure "D" to Case of Nchanga Consolidated Copper Mines Limited in the High Court of Southern Rhodesia.)

BANCROFT MINES LIMITED

Bank Chambers
Jameson Avenue
Salisbury

27th January, 1958.

10

The Secretaries,
Nchanga Consolidated Copper
Mines Limited,
P.O. Box 1108,
SALISBURY.

Dear Sirs,

CURTAILMENT OF GROUP COPPER OUTPUT

27th January,
1958.

20

We thank you for your letter of today's date setting out your proposals, in conjunction with Rhokana Corporation Limited, in regard to the cessation of production by this Company for one year commencing in March, 1958. We have to advise that the joint proposals are acceptable to this Company and we will accordingly arrange to cease production on the basis set out in your letter.

To confirm the arrangements we are addressing a similar letter to Rhokana Corporation Limited.

Yours faithfully,

ANGLO-AMERICAN CORPORATION OF SOUTH AFRICA LIMITED

Secretaries.

30

Per E.R. Denman.

OTP/HM.

EXHIBIT 18. - EXTRACT from the MINUTES of a MEETING of DIRECTORS of Bancroft Mines Limited held at Leslie Pollak House, Kitwe, on 5th March, 1958.

18.

Extract from the Minutes of a Meeting of Directors of Bancroft Mines Limited held 5th March, 1958.

4. PRODUCTION POLICY:

- (a) Arrangements made with Rhokana Corporation Limited and Nchanga Consolidated Copper

Exhibits

18.
Extract from
the Minutes of
a Meeting of
Directors of
Bancroft Mines
Limited held
5th March, 1958.
- continued.

Mines Limited for a 10% reduction in the
combined output of the three companies
during the year commencing March, 1958,
in terms of which the Company would cease
production for a year, were CONFIRMED.

CERTIFIED a true extract.

ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LIMITED
Secretaries

per (Signed) E.R. Denman.

19.
Extract from
the Minutes of
a Meeting of
Directors of
Nchanga Con-
solidated
Copper Mines
Limited held on
5th March, 1958.

EXHIBIT 19. - EXTRACT from the MINUTES of a
MEETING of DIRECTORS of Nchanga Consolidated
Copper Mines Limited held at Leslie Pollak
House, Kitwe, on 5th March, 1958

10

4. FINANCE:

(b) Production Policy

Arrangements made with Bancroft Mines
Limited and Rhokana Corporation Limited
for a 10% reduction in the combined out-
put of the three companies during the
year commencing March, 1958, in conse-
quence of which the Company's production
would have to be increased to an average
of 12,260 long tons per month, were
CONFIRMED.

20

CERTIFIED a true extract.

ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LIMITED
Secretaries.

per: (Signed) E.R. DENMAN.

20.
Extract from
the Minutes of
a Meeting of
Directors of
Rhokama
Corporation
Limited held on
5th March, 1958.

EXHIBIT 20. - EXTRACT from the MINUTES of a
MEETING of DIRECTORS of Rhokana Corporation
Limited held at Leslie Pollak House, Kitwe,
on 5th March, 1958.

30

3. FINANCE:

(b) Production Policy

Arrangements made with Bancroft Mines
Limited and Nchanga Consolidated Copper
Mines Limited for a 10% reduction in the
combined output of the three companies
during the year commencing March, 1958,
in consequence of which the Company's
production would have to be increased
to an average of 7,775 long tons per
month, were CONFIRMED.

40

CERTIFIED a true extract.

ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LIMITED
Secretaries.

per: (Signed) E.R. Denman.

EXTRACT of EXHIBIT 22. - ANNUAL REPORT of
Nchanga Consolidated Copper Mines Limited
for the year ending 31st March 1959.

Extract from
Annual Report of
Nchanga Consoli-
dated Copper
Mines Limited for
the year ending
31st March, 1959.

OPERATING ACCOUNT)
For the year ended)
31st March 1959) NCHANGA CONSOLIDATED COPPER MINES LIMITED
(Incorporated in Northern Rhodesia)

1958		£		£	1958
4,509,961	Stock of metals and concentrates, 1st April, 1958	4,751,383	Sales of metals and concentrates	£26,290,987	
13,988,607	Operating Costs	14,412,277	Less: Payments to Bancroft Mines Limited - see directors' report.	1,384,569	24,906,418
1,195,381	Depreciation	1,289,934			23,605,181
2,598,387	Railage, freight and other realisation charges	2,793,035	Stock of metals and concentrates 31st March, 1959	5,606,796	4,751,383
6,064,228	Balance to profit and loss account	7,266,585			
28,356,564		£30,513,214		£30,513,214	£28,356,564

PROFIT AND LOSS ACCOUNT

For the year ended 31st March 1959

£		£		£	£
208,771	Head office administrative expenses	220,842	Balance from operating account	7,266,585	6,064,228
185,192	Interest payable	176,200	Interest receivable and other revenue	993,192	1,203,252
28,137	Directors' fees, including £25,000 additional remuneration payable under article 86(A)	28,200			
6,845,380	Profit before taxation, carried down	7,834,535			
17,267,480		£8,259,777		£8,259,777	£7,267,480
2,475,000	Amount provided for income tax on the year's profit	3,130,000	Profit before taxation, brought down	7,834,535	6,845,380
4,370,380	Net profit for year, carried down	4,704,535			
16,845,380		£7,834,535		£7,834,535	£6,845,380
1,000,000	Appropriated for capital expenditure	729,450	Net profit for year, brought down	4,704,535	4,370,380
1,050,000	Dividends: Interim of 4s.9.6d. per unit less tax, equivalent to 3s.0d. (1958 - 3s.0d) per unit net	1,050,000	Provision for taxation in previous years no longer required - see directors' report	400,967	25,531
2,450,000	Recommended final of 15s.2.4d per unit less tax, equivalent to 9s.6d. (1958-7s.0d.) per unit net	3,325,000	Unappropriated profits, 1st April, 1958	850,154	954,243
3,500,000					
850,154	Unappropriated profits 31st March, 1959	851,206			
15,350,154		£5,955,656		£5,955,656	£5,350,154

SALISBURY, 9th July, 1959.

NOTES ON THE ACCOUNTSExhibits

1. There are contingent liabilities in respect of:
- (a) a guarantee jointly and severally with Rhokana Corporation Limited of the dividend on and redemption at varying premiums of £1,055,727 (1958-£1,088,327) 5 per cent redeemable cumulative preference stock issued by Rhodesia Copper Refineries Limited;
- 10 (b) other guarantees amounting to £65,000 (1958 - £65,000).

2. Contracts for capital expenditure not provided for in the accounts amount to approximately £340,000 (1958 - £1,270,000).

3. There are commitments:

(a) To subscribe by 31st July, 1961, for further Federal Treasury Bonds amounting to approximately £2,000,000 (1958 - £3,500,000);

20 (b) in respect of deferred liabilities under deeds of covenant amounting to £108,000 (1958 - £123,000).

4. No provision has been made for depreciation of either mining properties or shaft sinking and development. Depreciation is provided on buildings, machinery, plant and shaft equipment and in addition thereto, renewals and obsolescence are normally charged to operating account either directly or, in the case of certain short life equipment, by the operation of provision accounts. Movements on the provision accounts during the year were as follows:

30

	1959 £	1958 £
Balance 1st April, 1958	391,000	319,000
Charged to Operating Account	305,000	334,000
	<hr/>	<hr/>
Less: Expenditure	696,000	653,000
	<u>279,000</u>	<u>262,000</u>
Balance 31st March, 1959	<u>£417,000</u>	<u>£391,000</u>

5. No provision has been made in the accounts for the proportion of deferred liabilities in respect

22.

Extract from Annual Report of Nchanga Consolidated Copper Mines Limited for the year ending 31st March, 1959

- continued.

Exhibits

22.

Extract from
Annual Report
of Nchanga
Consolidated
Copper Mines
Limited for
the year ending
31st March,
1959

- continued.

of African employees' pensions attributable to service prior to 1st April, 1956.

6. The cost of copper in stock includes royalty on 32,275 long tons payable at the time of production but excludes royalty on 4,733 (1958 - 4,733) long tons which would on the basis of the royalty rate ruling at 31st March, 1959, have amounted to £121,000 (1958 - £71,000). Royalty on this tonnage is payable by specified minimum instalments related to the then current price, and will be finally settled by 30th September, 1964.

10

7. The amount of £3,130,000 provided for taxation, covers the estimated liability to Federation of Rhodesia and Nyasaland taxes and foreign taxes on the profits of the year.

8. Sterling and South African balances are converted into Rhodesian currency at par.

9. The sum of £4,375,000 shown in respect of dividends is the amount payable by the company. In respect of dividends payable by the London paying agents to or to the order of members whose registered addresses are in the United Kingdom, or to members who have mandated payment to addresses in the United Kingdom, there is deducted United Kingdom income tax at the standard rate as reduced where appropriate by a provisional allowance in respect of Federation of Rhodesia and Nyasaland taxes by way of relief from double taxation, except where authority has been received from the Inspector of Foreign Dividends to pay without such deduction.

20

30

EXHIBIT 25. - REVIEW of BOOMS and SLUMPS and
GRAPH SHOWING EFFECT.

Exhibits

25.

No review of the past history of the metal trade would be complete without some comment on the price cycle as it has affected non-ferrous metals.

Review of Booms and Slumps and Graph showing effect.

(Undated)

10

The price cycle is an admitted fact, although many efforts have been made by well-meaning but ill-advised planners to abolish it. It can be throttled down for a time but like a repressed disease it merely breaks out in the form of more unpleasant and violent symptoms.

20

Price movements are of course usually due to changes - either actual or foreshadowed in supply and demand; in free markets therefore sentiment is a powerful factor. We will have a look at copper price movements over the last 150 years and merely try to observe whether there is any sort of natural rhythm in the price curve and to note the contemporary political or economic events which may have disturbed that rhythm.

Referring to the graph on page we observe:-

30

The copper price was relatively low at around £80 a ton in 1785. Around 1785 the French political situation was becoming ugly, revolution actually breaking out in 1789. From then onwards, during the great wars of the Directory and later of Napoleon Buonaparte the copper price rose strikingly. The peak seems to have been reached in 1808 when it oscillated between a "high" of £200 and a "low" of £130. After Napoleon had been defeated and trade became more normal the price fell and dipped to £85 in 1830. It hardened somewhat till 1836 (a "high" of £117) only to fall again to between £80 and £90 in 1850. The impending outbreak of the Crimean war (which actually began in 1854) pushed it up to £135 in 1853 but it fell again to below £70 by 1870.

40

The Franco Prussian war (1870-1) forced the price up temporarily to £108 but it soon began to fall again till 1895. (In 1889-1900 great discoveries of copper were being made in the U.S.A.)

Exhibits

25.

Review of Booms
and Slumps and
Graph showing
effect.

(Undated)

- continued.

It rose again between 1895 and 1900, the Boer War doubtless helping the rise.

The First World War (1914-18) resulted in copper touching £153 in 1917. After that war a trade depression followed and by 1932 the price was down to only £25: During the Second World war the U.K. Government pegged copper at £62 but the price shot skywards once the brakes were released, helped by the Korean War (1950-3) and by American stockpiling. The price hit £436 in 1956. Then came the inevitable decline and in 1958 the price went down to £160.

10

Prices have also been influenced from time to time by general commercial and banking crises, by speculative attempts to "corner" the market and by producers' output restriction schemes.

Psychological reasons also affect the price curve. There seems to be a tendency for a price boom to start towards the end of each decade and for a smaller upward ripple in the middle of each decade. But this tendency can be easily disturbed by unforeseen factors, so that it is unwise to reckon definitely on a 5-year minor and 10-year major oscillation.

20

We have only taken copper as an example. The other main metals which are traded in freely (in contradistinction to those whose quotations are fixed by a few large producers) have behaved in a somewhat similar fashion.

30

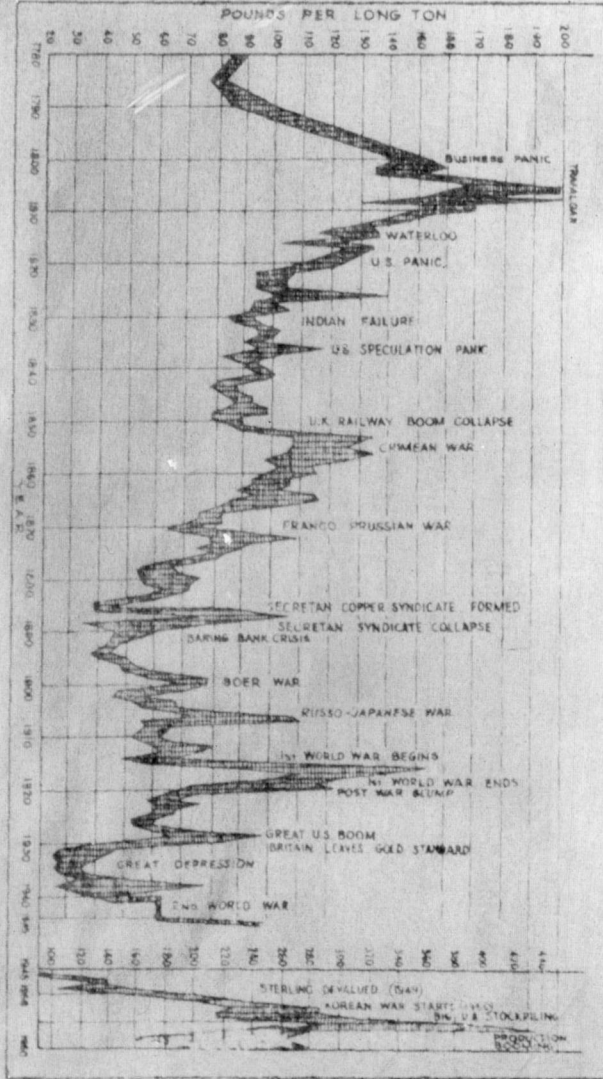
206a.

Exhibits

25.

Review of Booms
and Slumps and
Graph showing
effect.

(Undated)



Highest and Lowest London Copper Prices, 1780-1957

EXHIBIT 26. - REVIEW of WORLD COPPER PRODUCTION,
1948, 1957 and 1960

(as published in the Review of Non-ferrous Metals
issued by the British Metal Corporation Limited)

Exhibits

26.

Review of
World Copper
Production,
1948, 1957 and
1960.

(Undated)

LONG TONS

	1948	1957	1960
U.S.A.	745,000	975,000	975,000
Congo	153,000	236,000	300,000
Canada	215,000	322,000	390,000
10 Chile	438,000	477,000	520,000
Northern Rhodesia	223,000	429,000	565,000
Australia)		54,000	105,000
Japan)		80,000	90,000
Mexico)		60,000	60,000
Peru)	339,000	56,000	170,000
Philippines)		40,000	50,000
South and S.W. Africa)		70,000	80,000
Other countries)		241,000	255,000
	2,113,000	3,040,000	3,560,000
20 Sino-Soviet bloc	177,000	460,000	540,000
	2,290,000	3,500,000	4,100,000

Exhibits

31

Summary of
estimated
copper Pro-
duction for
1958.
(Undated)

EXHIBIT 31. - SUMMARY OF ESTIMATED COPPER PRODUCTION for 1958

Calendar Year 1958	RHOKANA		NCHANGA		BANCROFT		KANSANSHI		TOTAL	
	Long Tons	Short Tons	Long Tons	Short Tons	Long Tons	Short Tons	Long Tons	Short Tons	Long Tons	Short Tons
Jan.	7,390	8,280	11,870	13,290	2,640	2,960	400	450	22,300	24,980
Feb.	7,250	8,115	11,870	13,290	2,790	3,120	400	450	22,310	24,975
Mar.	7,480	8,380	11,870	13,290	2,940	3,290	400	450	22,690	25,410
Apr.	7,130	7,980	12,080	13,530	2,950	3,300	400	450	22,560	25,260
May	7,600	8,510	12,080	13,530	2,950	3,300	400	450	23,030	25,790
June	7,190	8,050	12,080	13,530	3,080	3,450	400	450	22,750	25,480
July	7,530	8,215	12,130	13,585	3,420	3,830	400	450	23,280	26,080
Aug.	7,510	8,410	12,130	13,585	3,490	3,910	400	450	23,530	26,355
Sept.	7,420	8,315	12,130	13,585	3,490	3,910	400	450	23,440	26,260
Oct.	7,630	8,545	12,130	13,585	3,490	3,910	400	450	23,650	26,490
Nov.	7,630	8,545	12,130	13,585	3,490	3,910	400	450	23,650	26,490
Dec.	7,540	8,445	12,130	13,585	3,490	3,910	400	450	23,560	26,390
TOTALS	89,100	99,790	144,630	161,970	38,220	42,800	4,800	5,400	276,750	309,960

NOTE: The above estimated tonnages are taken from recent letters from the Mines except that Bancroft's tonnage has been reduced from July in anticipation of a flotation bottleneck.

EXHIBIT 32. - COPPER CONCENTRATES PRODUCTION
of BANCROFT MINES LIMITED for 1957.

Exhibits

32.

(RAILED TO SMELTER)

Recoverable Copper
in concentrates produced

Copper
Concentrates
Production of
Bancroft Mines
Limited for
1957.

(Undated)

	<u>1957</u>	<u>Long Tons</u>	
	February	611	
	March	364	
	April	739	
10	May	883	
	June	1264	
	July	1068	
	August	1519	
	September	1858	
	October	2423	
	November	2261	
	December	2031	mud rush skip damaged
	<u>1958</u>		
	January	2381	
20	February	1956	
	March	1165	

IN THE PRIVY COUNCIL

No. 32 of 1962

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF THE FEDERATION
OF RHODESIA AND NYASALAND

B E T W E E N

THE COMMISSIONER OF TAXES (Respondent) Appellant

- and -

NCHANGA CONSOLIDATED COPPER MINES
LIMITED (Appellant) Respondent

R E C O R D O F P R O C E E D I N G S

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook,
London E.C.4.
Solicitors for the Appellant.

LINKLATERS & PAINES,
Barrington House,
59-67, Gresham Street,
London, E.C.2.
Solicitors for the Respondent.