

31

1/85

OF 1984

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

IN PROCEEDINGS NO. 2121 OF 1980

BETWEEN:

METRO MEAT LIMITED

Appellant and Cross-Respondent
(Defendant)

AND:

FARES RURAL CO. PTY. LIMITED

Respondent and Cross-Appellant
(First Plaintiff)

RACHID FARES

Respondent
(Second Plaintiff)

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

P A R T 1

V O L U M E I

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Respondent
(Second Plaintiff)

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DOC. 1 - Statement of Claim filed 6 November 1980 and as amended on 20 March, 1981 and 23 March, 1982 and 31st May 1982 and as amended on 26th November 1982 and as amended on 8 March, 1983

STATEMENT OF CLAIM FILED THE
6TH DAY OF NOVEMBER 1980 AND AS AMENDED
ON THE 20TH MARCH 1981 AND 23RD MARCH 1982
AND AS FURTHER AMENDED ON 31ST MAY 1982
AND AS AMENDED ON THE 26TH NOVEMBER 1982
AND AS AMENDED ON THE 8TH OF MARCH 1983

1. (a) The first plaintiff is a proprietary company duly incorporated in and according to the laws of the State of Western Australia.
(b) At all material times the second plaintiff carried on business under the name Rachid Fares Enterprises of Beirut/Lebanon.
2. The defendant is a public company duly incorporated in and according to the laws of the State of South Australia and is registered as a foreign company in Western Australia pursuant to the provisions of the 10 Companies Act 1961 as amended.
3. Pursuant to the terms of a contract made 2nd July 1979 between the first plaintiff and the defendant it was agreed inter alia, that:
 - (a) the first plaintiff would buy and the defendant would sell 13,200 tonnes of lamb and 8,800 tonnes of hogget carcasses,
 - (b) the first plaintiff would pay the defendant therefor US\$1,375.00 per tonne for lamb and US\$1,230.00 per tonne for hogget, free alongside 20 ship,
 - (c) the carcasses to be sold and delivered by the defendant to the first plaintiff would conform with the following specifications:

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- (i) as to lambs, young lambs, aged 6 to 11 months, carcass weight about 12 kilograms to about 18 kilograms, mean average weight about 15 kilograms for the total to be sold and delivered pursuant to the contract, and
- (ii) as to hoggets, young hoggets, aged 1 to 2 years, carcass weight 12 to 22 kilograms, mean average weight about 17 kilograms for the total to be sold and delivered pursuant to the contract, 10
- (d) the carcasses would be clean and without heads, legs, tails, offal, kidneys and kidney fat,
- (e) about 80% of the total number of carcasses would be male and about 20% female,
- (f) the carcasses would be obtained from good quality animals killed according to Islamic Rite, and the certificate of Islamic killing would be certified by the Islamic Group in Australia and by the Embassy of the Islamic Republic of Iran,
- (g) the defendant would make delivery of the carcasses 20 free alongside ship in Adelaide and/or Fremantle as follows:
- (i) 2,000 to 3,000 tonnes at the end of August/beginning September 1979, in one bottom, ("the first shipment"),
- (ii) about 4,000 to 4,500 tonnes at the end of October 1979 in one bottom, ("the second shipment"),

DOC. 1 - Statement of Claim filed 6 November 1980 and as amended on 20 March, 1981 and 23 March, 1982, 31 May 1982 and as amended 26 November 1982 and as amended 8 March 1982

(iii) thereafter the defendant would make deliveries of 4,000 to 4,500 tonnes each at such times as would enable the vessel engaged by the first plaintiff to ship the quantity described in sub-paragraph (ii) above to effect consecutive trips to Iran until the total quantity agreed to be sold and delivered by the defendant had been sold and delivered ("the third, fourth and fifth shipments").

10

4. The contract was made orally by the first plaintiff by its servant or agent Rachid Fares and the defendant by its servant or agent Kenneth Dingwall and was evidenced in writing, such writing being inter alia, a telex from the first plaintiff to the defendant dated 3rd July 1979 and a telex from the defendant to the first plaintiff dated 19th July 1979.
5. Pursuant to the Contract the defendant supplied and delivered to the first plaintiff 10,834 tonnes of carcasses, comprising 7,533 tonnes of lamb and 3,301 20 tonnes of hogget in three shipments and the first plaintiff paid the defendant therefor sums in excess of that sum thereby falling due in respect of such supply and delivery, namely US\$14,417,730.13.
6. Thereafter the defendant by conduct and expressly, wrongfully repudiated the said contract, which repudiation the first plaintiff accepted, whereby the said contract was discharged.

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PARTICULARS OF DEFENDANT'S REPUDIATION

By Conduct:

- (a) The defendant sought by telex of 23rd January 1980 to have the first plaintiff defer arrangements for the chartering of the vessel for the fourth and fifth shipments. Thereafter the defendant failed to provide the first plaintiff with the information necessary to enable chartering arrangements to be concluded for the fourth and fifth shipments.
- (b) The defendant by telex of 13th February 1980 demanded payment of moneys additional to those 10 provided for by the contract in consideration of it "examining the position and possibilities" of shipping the outstanding tonnages in the manner provided for by the contract.
- (c) The defendant by telex of 5th March 1980 refused to complete its obligations under the contract on the first plaintiff's acceptance of the defendant's demand for additional moneys subject only to an assurance of due supply and delivery.
- (d) The defendant by its telex of 5th March 1980 20 demanded payment of moneys additional to those provided for by the contract prior to and in consideration of its preparedness "to discuss tonnage for May and July".
- (e) The defendant by telex of 14th March 1980 refused to complete its shipments under the contract on the first plaintiff's paying to the defendant's

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bank the additional moneys demanded by the defendant, the same being payable to the defendant's credit on its lodging a guarantee of performance of its outstanding obligations under the contract.

- (f) The defendant by telexes of 13th March 1980 and 14th March 1980 expressed itself in a manner inconsistent with the good relations previously existing between the parties, and with an intention on its part to complete the contract. 10
- (g) The defendant failed to reply to the first plaintiff's offer of 17th March 1980 to pay immediately all the additional moneys demanded by the defendant conditional only on the defendant's confirming its intention to complete the contract.
- (h) The defendant in response to the first plaintiff's repetition by letter of 21st April 1980 of its offer to pay immediately all additional moneys demanded by the defendant conditional only on the defendant confirming its intention to complete the 20 contract, denied that the contract was made with the first plaintiff, asserted the existence of conditions in the contract inconsistent with those actually agreed, asserted that it required payment before it would "discuss" further shipment, and failed to accept the first plaintiff's said offer.
- (i) The defendant committed the sale of its available stock of lambs and hogget to another purchaser at a higher price than that provided for by the

contract, and in particular in or about March/April 1980 the defendant sold to Oceanic for the purpose of supply to a customer in Iran about 500 tonnes of hogget carcasses for a price equivalent to US\$1,483.00 per tonne. Further the defendant failed to supply the fourth shipment due in April 1980.

Express Repudiation

- (I) The defendant by the said Kenneth Dingwall advised Dr. Vet. Jamshid Bahrami-Kia of the Iranian Meat Organization in March 1980 that the defendant was no longer supplying lamb and hogget to the first plaintiff under the contract because the cost of the stock to the defendant had risen since the commencement of the contract. 10
- (II) The defendant by telex of 17th March 1980 advised the first plaintiff that it was "no longer producing hogget and lamb for you".

7. By reason of the matters aforesaid the first plaintiff has suffered loss and damage particulars whereof will be rendered separately. 20

8. At all material times the defendant knew, as was the fact, that:

- (a) the said 13,200 tonnes of lamb and 8,800 tonnes of hogget carcasses were required to fulfil a contract for the sale of the same to a customer in Iran,
- (b) the said customer in Iran was the Iranian Meat Organization, and

(c) the first plaintiff would suffer substantial loss and damage if, in breach of its contract with the first plaintiff, the defendant failed and refused to sell and deliver the total quantity of carcasses agreed to be sold and delivered.

9. In the alternative to the allegation in paragraph 3 hereof that the said contract was made between the first plaintiff and the defendant, the same was made between the second plaintiff and the defendant and the second plaintiff repeats and relies upon the 10 allegations hereinbefore made mutatis mutandis and insofar as any relevant dealings were between the first plaintiff and the defendant they were by the first plaintiff as agent of the second plaintiff.

10. AND THE PLAINTIFFS CLAIM:

(a) (i) a declaration that the first plaintiff and the defendant entered into a contract in the terms and in the manner described in paragraphs 3 and 4 hereof,

(ii) a declaration that the contract was 20 repudiated by the defendant and discharged upon the first plaintiff's acceptance of such repudiation,

(b) in the alternative to paragraph (a) hereof:

(i) a declaration that the second plaintiff and the defendant entered into a contract in the terms and in the manner described in paragraphs 3 and 4 hereof,

- (ii) a declaration that the contract was repudiated by the defendant and discharged upon the second plaintiff's acceptance of such repudiation,
- (c) damages and interest for the first plaintiff, alternatively the second plaintiff,
- (d) such further or other relief as the Court shall think fit,
- (e) costs.

COUNSEL

T32/1/31 VG

DOC. 1 - Statement of Claim filed 6 November 1980 and as amended on 20 March, 1981 and 23 March, 1982, 31 May 1982 and as amended 26 November 1982 and as amended 8 March 1982

DOC. 2 - Defence and Counterclaim filed on 9 January, 1981 and as amended on 20 March 1981 and as amended on 21 April 1982 and as amended on 23 November, 1982 and as further amended on 8 March 1983

DEFENCE AND COUNTERCLAIM FILED THE 9TH DAY OF JANUARY 1981 AND AS AMENDED ON THE 20TH MARCH 1982 AND ON THE 21ST APRIL 1982 AND AS AMENDED ON THE 23RD NOVEMBER 1982 AND AS FURTHER AMENDED ON THE 8TH MARCH 1983

1. Paragraphs 1 and 2 of the Re-Amended Statement of Claim are admitted.
2. As to paragraph 3 of the Re-Amended Statement of Claim, the Defendant admits that on the 2nd July 1979 an oral contract was made between the Defendant and the Second Plaintiff on the terms set out in paragraph 3, save that:-
 - (i) as to paragraph 3(a), the quantities to be bought and sold were 10,000 tonnes of lamb and 8,000 tonnes of hogget; 10
 - (ii) as to paragraph 3(b), it was agreed that the contract price for lamb and hogget would be the prices which the Iranian Meat Organisation (I.M.O.) had agreed to pay to the Second Plaintiff for lamb and hogget, less an agreed margin, freight allowance and conditional rebate, amounting to US\$465.00 per tonne for both products. The Second Plaintiff represented to the Defendant on the 2nd July 1979 that the I.M.O. had agreed to pay US\$1,840.00 per tonne of lamb and 20 US\$150.00 less than this amount per tonne for hogget. On that basis the contract prices were calculated at US\$1,375.00 per tonne for lamb and US\$1,225.00 per tonne for hogget. The price for hogget was then varied to US\$1,230.00 per tonne. In fact, the I.M.O. had agreed to pay US\$1,850.00

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per tonne for lamb and US\$1,800.00 per tonne for hogget. The correct contract prices were therefore US\$1,385.00 per tonne for lamb and US\$1,335.00 per tonne for hogget, subject however to the "rebate" pleaded in sub-paragraph (v) hereof.

Alternatively, the Second Plaintiff warranted to the Defendant that the I.M.O. prices were US\$1,840.00 per tonne for lamb and US\$150.00 less for hogget, such warranty being a term of the 10 contract between the parties or alternatively collateral thereto.

(iii) As to paragraph 3(g), the agreement was that the Defendant would make delivery free alongside ship in Adelaide and/or Fremantle as follows:-

1. 2,000 tonnes at the end of August 1979.
2. 4,000 tonnes at the end of September 1979.
3. 4,000 tonnes at the end of December 1979.
4. Thereafter, two further shipments of 4,000 tonnes each.

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(iv) It was an implied term of such oral contract that the normal "force majeure" clause would apply to the contract, relieving the Defendant from responsibility for non-delivery due to Acts of God, the elements, Acts of Government, political or civil disturbances, stoppage or restraint of labour, unforeseen absence or withdrawal of freight facilities, strikes, fires, explosions, droughts, war, riots, insurrections, lockouts,

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embargoes or any other acts beyond the seller's control.

PARTICULARS

- (a) Such a force majeure provision was customary in the trade.
- (b) In all previous written contracts between the parties, relating to the sale of live sheep or carcasses, such a provision had been included.
- (v) In calculating the price payable, there was 10 included in the margin between the I.M.O. price (as represented by the Second Plaintiff) and the contract price an amount of US\$30.00 per tonne for "discharge contingencies". It was expressly agreed that this sum per tonne would be rebated to the Defendant by the Second Plaintiff, in respect of any shipment discharged in less than 40 days, and it was an implied term that such "rebate" would be paid immediately or within a reasonable time after discharge of each shipment where 20 discharge was completed within 40 days.

3. Paragraph 4 of the Re-Amended Statement of Claim is denied. The Defendant says that the contract referred to in paragraph 2 of the Re-Amended Statement of Claim was made orally by the Second Plaintiff by its servant or agent Rachid Fares and the Defendant by its servant or agent Kenneth Dingwall. The Defendant denies that the said contract is fully or completely or accurately evidenced by the telexes dated 3rd and 17th July 1979.

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4. Paragraph 5 of the Re-Amended Statement of Claim is denied. The Defendant says that the quantities of lamb and hogget carcasses pleaded were supplied and delivered variously at Adelaide and Fremantle FAS to the Second Plaintiff and the sum of US\$14,417,730.00 was paid by the Second Plaintiff.
5. Paragraph 5 of the Amended Statement of Claim is wholly denied. The Defendant did not either by conduct or expressly repudiate the said contract. None of the particulars set out in paragraph 6 of the Re-Amended Statement of Claim either in themselves or together constitute a repudiation by the Defendant of the contract. The Defendant will say with respect to the alleged particulars of the Defendant's repudiation:
- (a) the recommendation of the Defendant in its telex of the 23rd January, 1980 that the Second Plaintiff advise the shipper to defer decisions on the fourth and fifth shipments in view of the possible cessation of trade between Australia and Iran was wholly reasonable, was made in good faith and was made in contemplation of a possible frustration of the contract between the parties;
- (b) the moneys set out in the Defendant's telex dated the 13th February 1980 were sums due and owing at that date in respect of:
- (i) an express condition of the contract that in the event that ships carrying the Defendant's goods in pursuance of the contract discharged within a 40 day period the Second Plaintiff

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would pay an additional US\$30.00 per tonne immediately upon the discharge of such vessel;

- (ii) an oral agreement between the Defendant and the Second Plaintiff made in January 1980 at the Second Plaintiff's request, whereby the Defendant would purchase 843 tonnes of lamb from the Western Australian Lamb Board and ship this with the third shipment upon the Second Plaintiff's undertaking to pay 10 US\$125.00 per tonne immediately upon such shipment. The said request was made by the Second Plaintiff with a view to the completion of a full cargo for the vessel carrying the third shipment which had been chartered by the Second Plaintiff and/or its nominees and for the avoidance of dead freight and was acceded to by the Defendant to assist the Second Plaintiff;
- (c) the Defendant by its telex of 5th March 1980 did 20 not refuse to meet its obligations under the contract. The Second Plaintiff in its telex received by the Defendant on the 4th March 1980 failed to meet the payments then due and owing under the contract and oral agreement and purported to add a new and onerous term to the contract, the effect of which would have been to require the Defendant to arrange for a bank guarantee in respect of its performance of the

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remainder of the contract, at the expense of the Defendant, and to waive or abandon the force majeure provision which the Defendant says was an implied term of the contract;

- (d) the sums claimed in the Defendant's telex of the 5th March 1980 were as at that date due and owing under the contract and under the said oral agreement;
- (e) & (f) the Defendant did not by its telexes of 13th and 14th March 1980 refuse to complete its shipments 10 but repeated its claim for the sums due and owing under the contract and under the said oral agreement, which the Second Plaintiff wrongfully and in breach of its contract failed and refused to pay, save on condition that the Defendant accept the new and onerous term pleaded in (c) above. In so doing, the Second Plaintiff repudiated the contract; or alternatively was in fundamental breach thereof, entitling the Defendant to suspend further shipments until 20 payment of sums due and withdrawal of the new condition sought to be imposed.
- (g) & (h) the Defendant by its letter of 24th April 1980 further repeated its claim for the sums due and owing under the contract and expressly stated that at no time had it not been prepared to meet its obligations under the contract.
- (i) the Defendant denies that it committed the sale of its available stock of lamb and hoggets to another

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purchaser at a higher price and says that by reason of the Second Plaintiff's failure to perform under the contract and the said oral agreement the Defendant suspended the purchase of hogget and lamb to fulfil the contract with the Second Plaintiff and sold existing stocks at whatever prices it could obtain in mitigation of its damage. The sale of meat to Oceanic was in any event not from supplies intended to fulfil the contract with the Second Plaintiff. 10

(I) the Defendant denies that Kenneth Dingwall communicated with Dr. Vet. Jashmid Bahrami-Kia at any time in March 1980 and denies that he ever represented to the said Dr. Vet. Jashmid Bahrami-Kia that the Defendant was no longer supplying lamb and hogget to the Second Plaintiff.

(ii) the Defendant by its telex of the 17th March 1980 did not repudiate the contract but indicated that it was not at that time producing lamb and hogget for the Second Plaintiff pending the Second Plaintiff's agreement to perform under the contract and the oral agreement. 20

5A. None of the matters particularised in paragraph 6 of the Statement of Claim and occurring before 21st April 1980, fairly and objectively construed, evinced an unequivocal intention on the part of the Defendant to repudiate its obligation under the contract. In any event, the Second Plaintiff did not treat them as such, nor accept such alleged repudiation, but to the

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contrary by its letter dated 21st April 1980 affirmed the contract, which the Defendant in turn affirmed by its letter dated 24th April 1980.

6. As to paragraph 7 of the Re-Amended Statement of Claim the Defendant denies that the Second Plaintiff has suffered loss and damage.
7. Save that the Defendant admits that (as the Defendant knew) the Second Plaintiff was to sell the lamb and hogget supplied under the contract to the Iranian Meat Organisation paragraph 8 of the Re-Amended Statement of Claim is denied. 10
8. In the premises the Defendant denies that either the First or Second Plaintiff is entitled to the relief claimed either as alleged or at all.
9. If which is wholly denied the Defendant was in breach of the contract with the Second Plaintiff and if which is wholly denied the Second Plaintiff suffered loss as a result of such breach the Defendant will say that the Second Plaintiff failed to mitigate its loss by refusing to accept the offer made by the Defendant as to payment of sums owing under the contract and oral agreement. 20
10. If which is denied the contract and the oral agreement were between the Defendant and the First Plaintiff acting as agent or otherwise the Defendant repeats and relies upon the Defence herein contained as if the First Plaintiff were substituted for the Second Plaintiff.

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COUNTERCLAIM

11. The Defendant repeats paragraphs 1 to 10 of its Defence.
12. The Defendant was at all times willing and able to complete the contract but by reason of the Second Plaintiff's failure to pay the sums due and owing under the contract and under the oral agreement and by reason of its seeking to impose a new term of the contract the Second Plaintiff wrongfully repudiated the contract which repudiation the Defendant accepted. The 10 Defendant was at all times willing and able to complete the contract but subsequent to the 24th April 1980 the Plaintiff impliedly repudiated the contract, by purchasing meat to fulfil its contract with the I.M.O. other than from the Defendant; by neither further dealing with nor purchasing meat from the Defendant under its contract with the Defendant; and by failing to pay the moneys due to the Defendant under the contract and the oral agreement.
13. If which is denied the contract and the oral agreement 20 were between the Defendant and the First Plaintiff acting as agent or otherwise the Defendant repeats and relies upon the Counterclaim herein contained as if the First Plaintiff were substituted for the Second Plaintiff.
14. The Second Plaintiff is indebted to the Defendant for sums due in respect of tonnages shipped. Further, by reason of the First or alternatively Second Plaintiff's

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repudiation of the contract the Defendant has suffered loss and damage.

PARTICULARS

| <u>Sums due in respect of shipments made</u> | <u>US\$ Amount</u> | |
|---|-----------------------|----|
| For "rebates" due and unpaid as follows: | | |
| Tonnage actually shipped and discharged in less than 40 days in Iran 10834 x \$30 | 325,020 | |
| Less amount received on 5.3.80 for third shipment at \$30 | <u>116,383</u> | 10 |
| Sub total | 208,637 | |
| Tonnage purchased by Defendant from WALMB on 3rd shipment in respect of which Second Plaintiff agreed to pay an additional US\$125 843 x \$125 | | |
| | 105,375 | |
| Recalculation of amounts due to correct misrepresentation of actual contract price with I.M.O. | | |
| | | 20 |
| Lamb 7,533 tonnes @ \$10 \$ 75,000 | | |
| Hogget 3,301 tonnes @ \$105 <u>346,605</u> | 421,605 | |
| <u>Claims for damages (loss of profits) on balance of shipments:</u> | | |
| 4,699 tonnes hogget @ selling price US\$1,335 | 6,273,165 | |
| Less 4,699 tonnes hogget @ F.A.S. cost \$1,176.79 | <u>5,529,736</u> | |
| Profit US\$ | <u>743,429</u> | |
| 2,467 tonnes lamb @ selling price \$1,385 | 3,416,795 | 30 |
| Less 2,467 tonnes lamb @ F.A.S cost \$1,388 | <u>3,424,196</u> | |
| Loss US\$ | <u>7,401</u> | |
| | <u>735,028</u> | |
| | US\$ <u>1,471,645</u> | |
| Average weighted conversion US\$ to A\$1.1288 Total Claim in Australian Dollars | | |
| | A\$ <u>1,303,725</u> | |

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15. The Defendant counterclaims in the sum of \$1,303,725.00. Alternatively, with respect to the item particularised as "Recalculation of amount due to correct misrepresentation" the Defendant counterclaims as damages for breach of warranty (as pleaded in paragraph 2(ii) of the Defence) and interest thereon.

COUNSEL

T32/4/24 VG

DOC. 2 - Defence and Counterclaim filed on 9 January, 1981 and as amended on 20 March 1981 and as amended on 21 April 1982 and as amended on 23 November, 1982 and as further amended on 8 March 1983

- 1A. Save for the admission therein contained, and save that the Plaintiffs admit that the prices payable under the I.M.O. Contract were US\$1,850.00 per metric tonne C. & F. for lamb and US\$1,800.00 per metric tonne C. & F. for hogget the Plaintiffs deny each and every allegation contained in paragraph 2 of the Defendant's re-amended Defence.
- 1B. As to paragraph 4 of the Amended Defence the Plaintiffs admit that the quantities of lamb and hogget carcasses pleaded in paragraph 5 of the Amended Statement of Claim were delivered variously at Adelaide and Fremantle FAS, that the amount due and owing to the Defendant in respect of such supply and delivery was US\$14,417,730 and that such sum was paid to the Defendant. 10
2. (a) The Plaintiffs deny paragraph 5(b)(i) of the Defendant's Amended Defence.
- (b) In the course of a telephone discussion on the 2nd July 1979 between Dingwall on behalf of the Defendant and the Second Plaintiff on behalf of the First Plaintiff alternatively on his own behalf during which discussion the contract pleaded in paragraph 3 of the Amended Statement of Claim was concluded: 20
- (i) Dingwall said, in effect, that the Defendant was prepared to supply lamb at US\$1,405.00 per tonne,

- (ii) the Second Plaintiff asked, in effect, whether the Defendant could supply lamb at US\$1,355.00 per tonne.
- (iii) it was agreed that the Defendant would supply lamb at a price of US\$1,375.00 per tonne,
- (iv) Dingwall asked whether, in effect, if the contract proceeded satisfactorily the Defendant could be paid some part of the US\$30.00 per tonne by which the Defendant had reduced its original asking price namely 10 US\$1,405.00 per tonne,
- (v) the Second Plaintiff asked, in effect, what part of the US\$30.00 the Defendant was seeking,
- (vi) Dingwall replied, in effect, that the Defendant wanted US\$15.00 per tonne,
- (vii) the Second Plaintiff said, in effect, that if the whole delivery went through without any problems and if the ships could be discharged in Iran in under 40 days from loading and 20 departure from Australia and if the entire transaction was a profitable one consideration would be given to paying the Defendant some part of the said US\$30.00 per tonne.
- (c) In the premises, there was no concluded or binding agreement between the Defendant and the First Plaintiff alternatively the Second Plaintiff for the payment of the whole or any part of the said

US\$30.00 per tonne in respect of lambs supplied by the Defendant pursuant to the said contract.

3. (a) The Plaintiffs deny paragraph 5(b)(ii) of the Amended Defence.
- (b) Pursuant to the term pleaded in paragraph 3(g)(iii) of the Amended Statement of Claim the Defendant was, in respect of the third shipment, obliged to deliver between 4,000 and 4,500 tonnes of meat.
- (c) On the 21st December 1979 the Defendant advised 10 the First Plaintiff alternatively the Second Plaintiff (such advice being given orally by Dingwall on behalf of the Defendant to J. Blanco Villegas on behalf of the First Plaintiff alternatively the Second Plaintiff and by telex from the Defendant to the First Plaintiff) in effect that the Defendant expected to be able to deliver only 2,750 tonnes in respect of the third shipment.
- (d) On the 30th December 1979 the First Plaintiff by 20 telex advised the Defendant that lamb was available from W.A. Lamb Board and insisted that the Defendant supply and deliver about 3,800 tonnes of meat in the third shipment.
- (e) In the course of a telephone discussion between Dingwall on behalf of the Defendant and the Second Plaintiff on behalf of the First Plaintiff alternatively on his own behalf on or about the 1st or 2nd January 1980:

- (i) Dingwall said, in effect, that the Defendant had agreed to purchase 843 tonnes of lamb from the W.A. Lamb Board at a premium of US\$250.00 per tonne and Dingwall asked whether the Defendant could be paid some subsidy in respect of that premium,
- (ii) the Second Plaintiff said, in effect, that if the remainder of the said contract with the Defendant was completed without any difficulties and on schedule consideration 10 would be given to paying to the Defendant some part of the said premium.
- (f) In the premises it was agreed between the Defendant and the First Plaintiff alternatively the Second Plaintiff that subject to the due completion and fulfilment by the Defendant of the said contract with the First Plaintiff alternatively the Second Plaintiff consideration would be given to paying to the Defendant some part of the said premium. 20
- (g) By reason of the matters alleged in paragraph 6 of the Amended Statement of Claim and the Defendant's failure to complete and fulfil the said contract the Defendant did not become and is not entitled to any additional sum in respect of the said 843 tonnes of lamb.
4. As to paragraph 5(c) of the Amended Defence it is denied that the First Plaintiff or the Second Plaintiff sought to add a new term to the contract. The First

Plaintiff alternatively the Second Plaintiff merely sought an assurance from the Defendant that it would complete and fulfil its obligations under the said contract.

5. Save as aforesaid and save insofar as the same consists of admissions the Plaintiffs join issue with the Defendant upon its Amended Defence.

DEFENCE TO COUNTERCLAIM

1. The Plaintiffs repeat their reply herein.
2. The Plaintiffs deny the allegations contained in paragraphs 12, 13 and 14 of the Defendant's Counterclaim. 10
3. The Plaintiffs deny that the Defendant is entitled to the relief claimed or any relief.

C.L. ZELESTIS (SGD)

COUNSEL

T32/4/25 VG

DOC. 3 - Reply and Defence to counterclaim filed 18 December, 1981 and as amended on 23 March, 1982, 31 May 1982, 17 June 1982 and as amended 20 October 1982

DOC. 4 - Composite request for further and better particulars of the re-amended defence and counterclaim and the defendants answers filed 8 July, 1982 and 3 September, 1982 respectively

COMPOSITE REQUEST FOR FURTHER AND BETTER PARTICULARS OF THE RE-AMENDED DEFENCE AND COUNTERCLAIM AND DEFENDANT'S ANSWERS FILED THE 8TH JULY 1982 AND THE 3RD SEPTEMBER 1982 RESPECTIVELY

Request

1. As to each of the terms alleged in -

- (a) paragraph 2(i),
- (b) paragraph 2(ii),
- (c) paragraph 2(iii), and
- (d) paragraph 2(v)

of the re-amended defence give the following particulars

(i) whether the same was made orally, in writing, or partly orally and partly in writing, 10

(ii) if it is alleged that the same was made orally or partly orally:

(A) the date on and place at which and persons between whom the same was agreed,

(B) whether the same was evidenced in writing,

(C) if evidenced in writing identify such writing,

(D) the precise words used and which it is 20 said constitute the term,

(iii) if it is alleged that the same was made wholly or partly in writing, identify such writing.

Answer

1. (a) (i) Orally.

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- (ii) (A) 2nd July, 1979. Kenneth Dingwall in Adelaide and Rachid Fares in London
- (B) No.
- (C) Not applicable.
- (D) Rachid Fares requested a supply of 20,000 tonnes. Kenneth Dingwall said that the Defendant would supply 10,000 tonnes of lamb and 8,000 tonnes of hogget. Rachid Fares said that he agreed with these figures as it would enable him to supply to the I.M.O. 20,000 plus or minus 10 per cent.
- (iii) Not applicable.

Answer

1. (b) (i) Orally.
- (ii) (A) 2nd July 1979. Kenneth Dingwall in Adelaide and Rachid Fares in London.
- (B) Yes.
- (C) The prices were incorrectly recorded in a telex from the Second Plaintiff to the Defendant dated the 2nd July 1979.
- (D) Rachid Fares said to Kenneth Dingwall that the IMO had agreed to pay US \$1840 per tonne for lamb and \$150 per tonne less than this amount i.e. \$1690 per tonne for hogget. Rachid Fares asked that there be deducted from these amounts the following sums and Kenneth Dingwall said that he agreed:-

- (a) \$385 per tonne for freight;
DOC. 4 - Composite request for further and better particulars of the re-amended defence and counterclaim and the defendants answers filed 8 July, 1982 and 3 September, 1982 respectively.

- (b) \$50 per tonne profit for Rachid Fares;
- (c) \$30 per tonne to cover possible delays in discharge, which sum was to be repaid to the Defendant in the event of a discharge of the vessel within 30 days.

This gave a contract sum of \$1,375 per tonne for lamb and \$1,225 per tonne for hogget based upon the prices alleged to have been paid by the IMO. The figure for hogget was then revised to \$1,230 per tonne. 10

(iii) Not applicable.

Answer

1. (C) (i) Orally.
- (ii) (A) 2nd July, 1979. Kenneth Dingwall in Adelaide and Rachid Fares in London.
- (B) Yes.
- (C) The Terms were incorrectly recorded in a telex from the Second Plaintiff to the Defendant dated the 4th July, 1979. 20
- (D) It was agreed between Kenneth Dingwall and Rachid Fares that 2,000 tonnes would be delivered at the end of August, 1979, 4,000 tonnes would be delivered at the end of September, 1979, 4,000 tonnes would be delivered at the end of December, 1979 and thereafter there would be two further shipments of 4,000

tonnes each.

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(iii) Not applicable.

Answer

1. (d) (i) Orally.

(ii) (A) 2nd July, 1979. Kenneth Dingwall in Adelaide and Rachid Fares in London.

(B) No.

(C) Not applicable.

(D) Rachid Fares said that he wanted deducted from the price which he said was payable by the IMO, the sum of 10 \$30.00 per tonne to cover possible delays in the discharge of the shipments. Kenneth Dingwall said that the Defendant agreed to such deduction provided that such sum was repaid to the Defendant in the event that the vessels were discharged within 40 days. Rachid Fares said that he agreed to this arrangement.

(iii) Not applicable.

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Request

2. As to paragraph 2 (iv) of the re-amended defence, give the following particulars:

(a) the precise terms of what is therein alleged to be "the normal "force majeure" clause",

(b) each and every fact matter or circumstance relied upon in support of the allegation that the same was "the normal ... clause",

(c) which trade is the trade referred to in sub-paragraph (a) thereof,

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- (d) each and every fact matter or circumstance relied upon in support of the allegation that such a force majeure provision was customary in such trade.
- (e) identify each and every previous written contract referred to in sub-paragraph (b) thereof and give the terms of each force majeure provision alleged to be included therein.

Answer 2 (a) & (b)

These particulars are sufficiently set out in paragraph 10 2(iv) of the Defendant's re-amended defence and counterclaim.

- (c) The sale of livestock and carcasses from Australia to the Middle East.
- (d) Contracts for the sale of livestock and carcasses from Australia to the Middle East customarily contain such a clause.
- (e) (i) (1) A contract for the sale of live sheep to Iran and
 - (2) a contract for the sale of mutton to 20 Iran, entered into between the Second Plaintiff and the Defendant and both dated the 8th April, 1974 by a further agreement dated the 8th April, 1974 the conditions set out in those contracts were expressed to govern the future supply of mutton and live sheep between parties. The contract for the sale of mutton contains the following force

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majeure clause and the contract for the sale of live sheep has a force majeure clause in substantially similar terms: "Seller is not responsible for non-delivery from Acts of God, from the elements or the acts of Governments, political or civil disturbances, stoppage or restraint of labour, unforeseen absence or withdrawal of freight facilities, or caused by 10 strikes, fires, explosions, floods, droughts, war, riots, insurrections, lockouts, embargoes, contingencies of overland transport, cold storage failure or any other cause beyond seller's control. Notwithstanding this clause however, the seller will do all in its power to overcome any impediments to fulfil this contract."

Request

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3. As to paragraph 2(v) of the re-amended defence, specify each and every fact matter or circumstances relied upon in support of the implied term therein alleged.

Answer

3. (i) Payment for the goods and for all matters incidental thereto was in every case made in respect of each shipment there being no payments agreed to be made at the conclusion of all shipments;

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- (ii) the time of completion of unloading the ship would be immediately known to the parties.

Request

4. As to paragraph 5(b)(ii) of the re-amended defence, state:
- (a) the persons between whom it is alleged the oral agreement was made and the date of and place at which the same was made,
 - (b) the precise words used and which it is alleged constitute the alleged agreement, 10
 - (c) whether it is alleged that the said agreement was evidence in writing and, if so, identify the same.

Answer

4. (a) Kenneth Dingwall in Adelaide and Rachid Fares in London in early January, 1980 (the exact date is unknown).
- (b) Mr Dingwall said that although the Defendant was obliged only to supply 3,000 tonnes for the third shipment, it was prepared to assist the Second Plaintiff to fill the vessel, by purchasing lamb 20 from the W.A.L.B. provided the First Plaintiff agreed to pay an additional \$125 per tonne for the lambs purchased from the W.A.L.B. Rachid Fares said that he agreed with this proposal and specifically to the payment of \$125 per tonne.
- (c) Telexes from the Defendant to Rachid Fares dated the 13th February, 1980 and the 5th March, 1980 respectively.

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Request

5. As to paragraph 5(i) of the re-amended defence, state:
- (a) precisely when the defendant suspended the purchase of hogget and lamb to fulfil the contract,
 - (b) the quantities of then existing stocks that were sold, the date or dates of sale, the purchaser or purchasers thereof, and the prices obtained therefor,
 - (c) the quantities of lamb and hogget sold to Oceanic in 1980, the dates of each sale or instalment of delivery and the price obtained therefor, 10
 - (d) the supplies or stocks of meat (and the source or sources thereof) that were available to the defendant for the purpose of fulfilment of the contract with the first plaintiff alternatively the second plaintiff and such other contracts for supply as the defendant had on foot at the time it "suspended" the purchases of lamb and hogget for the first or alternatively the second plaintiffs.

Answer

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5. (a) Upon the Second Plaintiff's failure to meet the contractual payments due mid February 1980.
- (b) 37.8 tonnes of lambs and 34 tonnes of hogget in store following the loading of the third shipment were sold to divers purchasers.
- (c) On 28th February, 1980 the Defendant agreed to sell Oceanic 11,500 tonnes of mutton at US\$1,700

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per tonne and 500 tonnes of hogget at US\$1,800 per tonne.

- (d) Supplies of hogget were available from Western Australia. In March, 1980 there were approximately 6.5 million hogget in Western Australia. Supplies of lamb were available additionally from South Australia and New South Wales. The Defendant had no other overseas contracts on foot for the sale of lamb and hogget in early March 1980.

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Request

6. As to paragraph 12 of the counterclaim state:
- (a) precisely which sums it is alleged were due and owing under the contract and which the second plaintiff failed to pay,
 - (b) the new term of the contract which it is alleged the second plaintiff sought to impose,
 - (c) the date on and manner in which it is alleged that the defendant accepted the alleged repudiation of the contract by the second plaintiff.

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Answer

6. (a) \$314,025; being the sum of \$95,610 in respect of the 1st shipment, \$113,040 in respect of the second shipment and \$105,375 being the agreed payment for 843 tonnes at \$125 per tonne purchased from the W.A.L.B.
- (b) The term pleaded in sub-paragraph (c) of paragraph 5 of the re-amended Defence.

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- (c) The Defendant accepted the Second Plaintiff's repudiation upon the failure of the Second Plaintiff to reply to the Defendant's letter of the 24th April 1980.

Request

7. As to paragraph 14 of the Counterclaim, give full particulars of each and every item, and the cost thereof, comprised in:
- (a) the cost of hogget alleged at US\$1176.79, and
- (b) the cost of lamb alleged at US\$1388.00. 10

Answer

7. (a) Cost of hogget at US \$1,176.79.
- Cost to the Defendant in producing hogget in March-May 1980:
- At Geraldton: \$31.26 per lb (\$47.16 FAS)
- At Katanning: \$33.27 per lb (\$47.64 FAS)
- Av. FAS price \$47.28 per lb. = A. \$1,042.52 = US \$1,176.79.
- (b) Cost of lamb at US \$1,388.00
- Buying price for 2,467 tonnes of 2nd and 3rd grade 20 lambs in 1980:
- Coolamundra: 90 cents per kilo
- Noarlunga: 100 cents per kilo
- Average buying price = 95 cents per kilo
- Plus per kilo to slaughter, pack, freeze, store and deliver for export - 28 cents per kilo (allowing credit for offal values).
- Total = 123 cents per kilo = A\$1,230 per tonne = US \$1,388 FAS.

DOC. 4 - Composite request for further and better particulars of the re-amended defence and counterclaim and the defendants answers filed 8 July, 1982 and 3 September, 1982 respectively

RACHID FARID FARES, sworn:

EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Your full name is Rachid Farid Fares?---Correct.

Do you live at Mallards, Bucklers Hard, Beaulieu, Hampshire,
England?---Yes.

You are, I think, the chairman of directors of Fares Rural Co. Pty
Ltd, the first plaintiff in this action. Is that
so?---Correct.

You are, of course, the second plaintiff, personally?---Yes.

Mr Fares, did you come to know a Mr Kenneth Dingwall in or
about 1974?---Yes. I knew him in Tehran. I knew him
through Mr Blanco Villegas who introduced us to each
other. 10

Were you associated then, as now, with Mr Blanco Villegas
in certain commercial activities?---Much before 1974.

After you met Mr Dingwall in 1974, did you have, in conjunction
with Mr Blanco Villegas, certain contact with
Mr Dingwall from time to time?---Sorry? Before 1974.

After you met him in 1974?---Yes; all the time.

Both in Australia and, on occasion overseas?---Yes; mainly overseas 20
because from 1974 onwards I did not come to Australia.
That is my first trip to Australia, from 1974.

Of the interests with whom you were associated, who was it who
had the primary responsibility in respect of commercial
interests in Australia?---Mr Blanco Villegas.

Did you, in 1978, incorporate the plaintiff company, Fares Rural
Co. Pty Ltd?---Yes, in Australia.

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MR BURBIDGE: At that time could you tell me who were the directors of the company?---Mr Blanco Villegas, Dr Boueri and myself.

Were each of those three gentlemen shareholders of the company?---Yes.

Were you the major shareholder?---Yes.

Subsequently was some other person appointed as the managing director?---Captain Mata.

He, I think, was not a shareholding director but the actual executive director?---Correct.

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Can I take you now to 1979? Did you see Mr Dingwall at any time - - -

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MR BURBIDGE (Continuing): - - - at any time in 1979 in 1979 in the United Kingdom?---Yes. I saw him in several locations in, I think, at least two occasions.

On one such occasion did you go with him to your home in Beaulieu? ---Yes. I had the pleasure of having him as my guest in my home.

Was there any other person then present?---Mr Blanco Villegas.

Could you tell me this: During the time that Mr Dingwall was a guest in your home was there, on one occasion, some conversation in relation to the supply by Metro Meat of meat products in Australia?---Yes; in almost all the occasions I had been meeting Mr Dingwall and in most of these occasions Mr Blanco Villegas was with us. As a matter of fact we were trying to make it always coincide that Mr Blanco Villegas be present on each time Mr Dingwall was visiting us. We discussed about several things - live sheep, all our activities - and then Mr Dingwall suggested that we talk about meat. 10

Are you able to tell us approximately when it was in 1979 that this conversation occurred?---I think it was in May. 20

Mr Fares, I do not want you to seek to recall the whole of the conversation but do you recall the quantity of meat that was under discussion at that time?---It was only a proposal from Mr Dingwall that Metro Meat is interested to sell meat to Iran. The figure advanced was about 15,000 tonnes. We were, at the same time, discussing with Iran a much larger figure from another country of supply.

When you say "we", you mean your interests were already discussing, at that time, provision of a much larger volume to Iran. Do I understand that correct?---That is Rachid Fares Beirut who was discussing in Tehran the supply of exactly 30,000 tonnes of frozen meat from New Zealand. 30

Did you subsequently speak to Mr Dingwall by telephone after he had returned to Australia?---Yes.

So far as you can place the date was it the 2nd of July of 1979? ---About this date, yes.

I do not wish you to go to the conversation. Did you or did you not reach some agreement in that conversation - just "Yes" or "No"?---Yes. 40

The following day did you do something in respect of that discussion? ---I had a telex to be sent to Australia informing them of what we have done.

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MR BURBIDGE: I wonder, your Honour, as a matter of convenience, if I could ask Mr Fares whether he might have a copy of volume 1 of the book of documents?

OLNEY J: I think that is a good idea. My associate has a spare copy here.

MR BURBIDGE: There is one in court. Thank you.

TO WITNESS: May I take you to p.16 of that document, now exhibit 1? Can you tell me is that the telex which you caused to be sent on the 3rd of July?---This is correct.

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You have told us that you did not, yourself, go to Australia at any time between 1974 and the present time. Did you keep yourself acquainted with the progress and problems associated with the - - -

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MR BURBIDGE (Continuing): - - - with the contract with Metro Meat?---Yes.

In particular can I take you to p.127 of the document, exhibit 12? Were you aware of the contents of that document within a short time of its receipt?---Yes.

Can I take you now to the first days of the new year? Did you have any contact with Mr Dingwall in the first day or so of the new year?---Yes. I phoned him at the beginning of the new year as usual to wish a good new year and we discussed these matters. 10

Was there some discussion at that time about the problems which Mr Dingwall said were being experienced by the defendant company? Did you talk about the problems? ---I have discussed it with Mr Dingwall, the necessity of supplying the whole quantity under the contract because we had this bank guarantee with Iran.

Would you then, as best you are able, put the conversation back into the words which were used at that time? What did you say to him and what did he respond?---I said, "We must deliver the full quantities. We have the present shipment" which was the voyage 3, "in which there is a shortfall of 1050 tonnes." Voyage 4 and voyage 5 had a shortfall of 1300 tonnes each. He told me that within the time which is a load for this shipment which is March and May the full quantities cannot be produced. It means he cannot produce more than 2500 tonnes for each one of those voyages. Then I suggested that the voyages be deferred to a time somewhere between March and May so that between the completion of the 2500 and the next 2500 there would be some time in which there was a full shipment, 3800 for instance, and then the last shipment could be delayed until later on, probably until July. Mr Dingwall was happy with that proposal - - 20 30

Did he say something about July?---He said that he prefers if it is at the beginning of August rather than July. We agreed that this would be so and we spoke about a telex which Captain Mata had sent to Metro Meat concerning a quantity of lamb which was available at the West Australian Lamb Board. 40

Before going to that can I just ask you, did you reach any agreement as to whether it would be end July or early August for the last delivery?---In principle; it was any time between end July and beginning August. It could be any time. It means to the convenience of Metro Meat. My preference was end July; their preference was beginning August.

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MR BURBIDGE: That was not regarded by you as significant?
---Not significant at all.

Can I just understand the effect of that discussion before moving on to the other one?---Sorry; if I may return to it? For me it was a necessity to have it before the end of July; for them a necessity to have it at the beginning of August but I thought I could sort out this matter with Iran and that is why it was not significant.

When you say, "sort out this matter with Iran", did you have some obligation, yourself, in the person of Rachid Fares enterprises associated with delivery at that time? Did you have some obligation to deliver to Iran?---Yes; according to the contract with Iran we should deliver - and after the contract we always speak to Iran to see when it is needed for them to have the deliveries so it was better for them to receive it before the end of July but we can always sort out that. The proof is that we have delayed it much longer later on. 10 20

Can I now advance to another aspect of that conversation? You have referred to the lamb which Captain Mata had indicated to Mr Dingwall was available through the West Australian Lamb Board - - -

MR BURBIDGE (Continuing): - - - Australian Lamb Board. Was there some discussion in relation to that quantity of produce?
---Correct.

What was said?---Mr Dingwall said that he is aware of this quantity but in order to ship them on the ship we have made available this will cost him about \$250 per tonne additional. He asked me if I could pay a share of that. I agreed to pay a share. I asked him what would be the share. He advanced a figure of \$125. I tried for a moment to see - -

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What did you say?---I said, "Could you make it \$100 instead of \$125?" I remember he laughed and he said, "If you want to pay \$100 why don't you say it at the beginning? This means you are under no obligation to pay anything." Anyhow, we agreed on \$125 but it was very clearly conditional that - -

Do not say that. Would you say what you said about that aspect of the matter? What did you say?---About?

You said you agreed to pay the \$125?---The \$125 per tonne for the - -

Did you agree unconditionally?---No, no. It was conditional so that the two last shipments - that means the shipment four and five - be executed at the full capacity of the vessel. This was a very clear condition.

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That was stated by you as such?---Absolutely. Very clearly.

Can you tell me what was the approximate capacity of the Almeria Star?---About 3800 tonnes.

Were you, in fact, prepared to pay that subsidy of \$US125 per tonne on that Western Australian Lamb Board lamb had the condition which you mentioned been met?---Absolutely.

Could I just ask you another matter, Mr Fares? Have you, yourself, had occasion to negotiate in Iran?---Not recently. It means I have been negotiating in Iran for a long time but I think the last time I have negotiated personally could have been 1976, 1977 probably. I don't recall.

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Could I just ask you, in general terms, is it possible in your experience to negotiate contracts of any size - I am speaking of quantities in excess of 15,000 tonnes of frozen meat - quickly or not?---No. You need time. The proof is when Dr Bahrami went to Tehran to negotiate that contract of New Zealand which subsequently became the contract for Australia. If I am not wrong he was there in Iran for about six or eight weeks to achieve this contract.

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MR BURBIDGE: Could I just ask you this: The directors of the plaintiff company - Fares Rural - were they normally physically located together or in different parts of the world?---In different parts of the world. Mr Blanco Villegas lives in Argentina; myself, I live part of the time in England, part of the time somewhere else; Dr Bahiamí lives most of the time in France, part of the time in England.

In consequence of that situation was there some agreement reached between the three shareholding directors of the company at the time of its incorporation as to the power of each to bind the company?---Each one of us could bind the company whenever it was needed
- - -

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WITNESS (Continuing): - - - was needed.

MR BURBIDGE: So far as the normal practices were concerned, was it normal that you would confer if that were possible whether by telex or telephone but on occasion did it prove to be not possible?---This is correct. Whenever we could confer we would confer; whenever we could not we would take the decisions which should be taken.

That is the evidence in-chief, if the court pleases.

CROSS-EXAMINED BY MR McCUSKER QC:

MR McCUSKER: Mr Fares, you first started to deal with Metro Meats with Mr Dingwall in 1974?---This is correct. 10

In 1974 and the following years did you contract with Metro Meats through Mr Dingwall for the purchase of meat as well as live sheep?---I think so, yes.

Would it be fair to say that your relationship with Mr Dingwall during that period was a very cordial, happy one? ---Extremely happy.

And that there was a great deal of mutual trust?---A great deal.

Which, on the part of Mr Dingwall, he demonstrated by, on one occasion you may recall, paying for various expenses of your organisation in Australia and sending you an account for them later? Do you recall that?---I recall it but I take it that it was a confidence from my side because they were costs which were not foreseen by us and when Mr Dingwall advanced them we did not have a problem in paying them. 20

So throughout your dealings with Mr Dingwall you found that, really, it was sufficient if you had his word and he had yours?---Absolutely.

When you were negotiating for the purchase from Australia from Metro Meats of meat as distinct from live sheep, on those occasions, did you discuss with Mr Dingwall before concluding the contract of purchase the arrangements that you had with Iran?---Not always. Not necessarily. 30

On how many occasions prior to May 1979 did you purchase from Metro Meats through Dingwall meat for import into Iran?---I remember that the first time we met we did a contract for meat in Iran. This is the primary contract we did. On other occasions we have received offers in order to sell meat to Iran but we have had always some problems because there was another company that was taking over the market - Ausfiran. 40

I think Mr Dingwall knows about it. I do not recall we had done substantial things in meat before this contract.

MR McCUSKER: You had purchased meat from Metro Meats prior to this contract?---I do not have it clear in mind but we might have.

Was Iran during this period, from 1974 to 1979, the major country into which you imported meat or were you importing into other countries as well?---The country to which I was supplying meat?

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"Supplying", I should say, yes?---Yes.

Was it indeed the only country to which you were supplying at that time?---Not the only but the major.

The major country?---Yes.

When you were purchasing live sheep for supply to Iran did you regard that as your major activity as distinct from the purchase of meat for import into Iran?---If the live sheep were my major activity?

Yes?---Yes.

That was where your profit in the main lay?---No, because if you ask me if it was my major activity from Australia, yes.

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Yes?---But from other parts, no. For instance, we have bought from New Zealand some years 80,000 tonnes of meat, some others over that figure.

I would like to show you this telex - - -

MR McCUSKER (Continuing): - - - this telex just as one example?
Do you recall receiving this telex sent to you from
Mr Dingwall of Metro Meats on 16th December 1976?
---To Tehran?

Yes?---It is a long time but I think I have received this
telex. I remember this discussion.

That related to the supply of lamb and hogget by Metro Meats
of 2300 metric tonne?---I do not know though if it
has been executed because I think, if my memory does
not fail, that at that moment Austiran was having
probably the monopoly of the supply but I am not sure. 10
This, anyhow, if you could see is CAF. It is on a
different basis.

Yes; so the prices quoted there would be irrelevant so far
as an FAS - -?---Completely different, yes.
For instance, should we have supplied this one Metro
Meat would have given the bank guarantee.

Yes; but in the course of a supply on that basis, would you agree
that you would, in turn, have a contract with the
IMO, the Iranian Meat Organisation?---Sorry, would you 20
repeat that?

You would need to have a contract to sell to the Iranian Meat
Organisation for the purpose of selling meat to Iran?
---Yes; if I take a quotation from Metro Meat I would
do, at my turn, another quotation to the meat organisation.
I would take my own contract. I get the supply from
Metro Meat and then we would agree how he would lodge
his bank guarantee and how I would lodge mine, like
the normal commercial procedure.

As part of your normal commercial procedure, in order to .30
ensure that when you were supplying meat to the
IMO you made a profit, did you not discuss with Mr Dingwall
how much your contract price was with the IMO?---No. This
is not a rule to discuss with Mr Dingwall how much
money I was making.

You certainly did not do so in the case of the sale of live
sheep to Iran, did you?---No.

In the case of the sale of meat to Iran, did you not tell Mr Dingwall
that the basis on which you were prepared to supply
meat was that after allowing for all expenses and \$50 40
for your own profit and overheads, the balance would go
to Metro Meat?---No, no.

When Mr Dingwall spoke to you on 2nd July 1979 with regard to
this particular contract, did you not then have
confirmation from Dr Boueri in Iran as to the position

of your contract with the IMO?---Yes. I had a position from Dr Boueri in this respect.

MR McCUSKER: At the time you spoke to Mr Dingwall on 2nd July and, as you say, concluded an agreement with him on that day, had Dr Boueri, on your information, concluded a contract for you to supply meat to Iran, to the IMO? ---From New Zealand.

Not from Metro Meat; not from Australia?---No. We gave the opportunity to Metro Meat to sell under what we were discussing there.

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In talking to Dingwall did you negotiate on price?---Repeat it, please.

MR BURBIDGE: Your Honour, I do object. I understand my learned friend now to be opening up the question of the conversation of July 2nd and I do formally submit that it is not open to my learned friend to adduce evidence of this matter - - -

MR BURBIDGE (Continuing): - - - of this matter that being,
in my submission, a seeking to derogate or vary
the terms which appear in a written contract subsequently.

OLNEY J: Do you have anything to say on that, Mr McCusker?

MR McCUSKER: A great deal, sir. First, the claim sets up an
agreement said to have been made orally on the 2nd of
July. It is the intention of the defendant to adduce
evidence as to the terms of that oral agreement.
Second, the statement of claim sets up that the oral
agreement made on 2nd July is evidenced by subsequent
telexes as my learned friend has outlined in opening
to your Honour. For that the defence has pleaded that
the subsequent telexes do not accurately or wholly
set out the terms of the oral agreement, on which the
plaintiff sues, made on the 2nd of July.

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OLNEY J: Perhaps you could take me to your pleading on that.

MR McCUSKER: Yes, sir. The pleading appears in the defence
first at para.2 the plea is raised to what the terms
of the oral agreement were. In para.3 which is at p.10
of the pleadings "The defendant says that the contract
referred to was made orally by the second plaintiff
by its servant or agent Rachid Fares and the defendant
by its servant Dingwall. The defendant denies that
the contract is fully or completely or accurately
evidenced by the telexes of the 3rd and 17th of July
1979."

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MR BURBIDGE: I would ask my learned friend to read the balance
of his pleadings.

MR McCUSKER: "The defendant will refer to the entire correspondence
and documentation between the second plaintiff and
its servants or agents and the defendant as evidencing
the said contract and will reply thereon at the trial
for their full terms and effect."

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What the defendant sets up in para.2 of
its defence is quite clearly that the following are
the terms of the oral contract. It is one thing to
say that the contract was written and for the defendant
to admit the written contract and then, in evidence,
to seek to adduce some evidence to vary the terms of
the written contract. Without a plea to support that
clearly could not be done. A plea such as, for example,
that the written contract was executed by mistake
would be one way that such oral evidence would be
admissible.

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The defendant is not doing that. The defendant
says, "The terms of the oral contract on which reliance
is placed by the plaintiff as as follow..." so there
is a clear issue of fact between the parties as to what
the terms were.

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MR BURBIDGE QC
MR McCUSKER OC

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The question of whether the terms of the contract were evidence by the telexes referred to is really a quite separate issue; it goes simply to evidence. Strictly speaking it is probably not a proper plea at all, it is simply a pleading of evidence.

OLNEY J: Are you saying the contract is an oral contract?

MR McCUSKER: Yes; and in that we are ad idem with the plaintiff, sir. The plaintiff sets it up in para.3 of the statement of claim.

OLNEY J: Can you tell me whether the book of pleadings is correct at p.8 on the fourth last line? I follow it, it is just above that - "On that basis the contract prices were calculated at U.S. \$1375 per tonne for lamb and U.S. \$1225 per tonne for hogget. The net contract price for hogget was subsequently agreed at \$1230 per tonne for hogget as evidenced by payments made by the second plaintiff." 10

MR McCUSKER: Yes; that is perhaps unnecessary as a plea as to what evidence the contracts are.

OLNEY J: Yes; but you are saying in your pleading that the contract price for lamb was \$1375 per tonne and for hogget was \$1230 per tonne. 20

MR McCUSKER: We are saying that the contract prices would be - and I think perhaps it is clearer if your Honour looks at the particulars of defence and counterclaim too - but we are saying that the contract price - - -

MR McCUSKER (Continuing): - - - contract price was the IMO price less an agreed margin, and having started on the basis of what the IMO price was as represented the margins were then stated, they came off the IMO price giving a result.

OLNEY J: Is not the result the contract?

MR McCUSKER: No, sir, it is not the contract, it is a mathematical calculation, and if the basis of the calculation as stated proves to be a different one then that must vary the price payable.

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OLNEY J: You say that the second plaintiff represented to the defendant that the IMO price was \$1840 and \$150 less than this amount per tonne for hogget.

MR McCUSKER: On that basis the contract prices were calculated.

OLNEY J: You are not pleading any form of misrepresentation?

MR McCUSKER: Effectively we are, sir, but we are saying it goes to one issue and that is the question of what price should be paid. We are certainly pleading misrepresentation and that, I think, at p.16 of the pleadings. Under the Particulars of Counterclaim your Honour will see that the plea set up is "recalculation of amounts due to correct misrepresentation" - that is, in order to adjust the price resulting from misrepresentation of the actual contract price with the IMO. The actual contract price with the IMO was, as we say, the basis for the contract and the contract figure. This, of course, points up a difficulty which often arises when one splits issues but it is important clearly that the defendant not leave unchallenged the evidence as it stands and establish its version of what the calculated contract price amounted to. Going back to the foot of p.8 and the top of p.9, it is pleaded that in fact the IMO had agreed to pay \$1850 per tonne for lamb and \$1800 per tonne for hogget, and then it is stated that the correct contract prices were therefore \$1385 per tonne for lamb and \$1335 per tonne for hogget, subject to the rebate which is then referred to in a separate matter.

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I am reminded by my learned junior that at p.18 where the reply and defence to counterclaim appear, at para. 2, dealing with para. 5(b)(i) of the defence, it is pleaded in sub-para. (b) of para. 2:

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"In the course of a telephone discussion on the 2nd July 1979 between Dingwall

on behalf of the defendant and
the second plaintiff on behalf of the
first plaintiff alternatively on his
own behalf during which discussion the
contract was concluded - -"

and then there is a narrative in effect of what is said
to have occurred. It is clear, I think - in fact it
is beyond doubt and my learned friend opened in this way -
that the plaintiff relies upon an oral contract - - -

MR McCUSKER (Continuing): - - - oral contract and then the question, of course, a matter of evidence, is as to how that contract, if it is in issue which it clearly is as to some of its terms, may or may not be established.

OLNEY J: So you both say there is an oral contract and you say it is not the oral contract that the plaintiff pleads and you say that the contract was the method of calculation which gave you a figure, the same as the plaintiff says, but you say that the means of arriving at that figure was part of the contract? 10

MR McCUSKER: Yes; part and parcel of the discussion was, we take the IMO price, we adjust for the cost of freight, we adjust for the \$50 margin that was discussed, we allow in this case the \$30 for discharge contingencies and we come to a figure and that is the figure. It is too simplistic, in my submission, that the final result is the contract price. The whole of the discussion, as we have pleaded, is the basis of the contract. 20

OLNEY J: Mr Burbidge, I think the issue is raised on the pleadings. Would you like to comment on that?

MR BURBIDGE: Thank you, your Honour. I would wish to say something. It is true that both parties are in agreement that the telephone conversation resulted in an oral agreement, the difference, of course, in our position being that the oral agreement was subsumed, in the submission of the plaintiffs, by the subsequent agreement, as we would say, appearing on its face on the writing and hence, the parole evidence rule comes into full force. 30

Your Honour, further than that we would be concerned about the proper implication to be drawn from the pleadings, at least in this sense, that my learned friend's pleadings, commencing at p.10 in the papers before your Honour, para.3, says:

"The defendant denies that the said contract is fully or completely or accurately evidenced by the telexes." 40

He says 17th July and that is, presumably, 19th July.

"The defendant will refer to the entire correspondence and documentation between the second plaintiff and its servants or agents and the defendant as evidencing the said contract"

For my part I have no objection whatever to him utilising other written material there in support of some argument, if there be one, to say that the terms are not to be found solely within those documents in so far as he raises an issue on the pleadings. He asserts that there is a contract which is to be spelled out from the whole of the correspondence and documentation as evidencing the said contract. So much we could not, with respect, argue about. However, if your Honour would go from there to para.4 of the pleadings: 10

"The defendant says that the quantities of lamb hogget ...were supplied and delivered"

and that they were paid for in the sum that we assert. That is, of course, no more than a concession that we have accurately pleaded what we got and that we paid the sum we did plus the \$116,000 paid in error.

Paragraph 6 is wholly denied and then he says that they did not expressly repudiate the contract. These are assertions that the defendant did not repudiate the contract at all. He did not rely upon some information that is said to have come to its attention late in the day, that we had misrepresented the price that we were getting from the IMO; that is really said in nothing more than in passing because there was no reliance placed upon that contention at all. It is not said that in consequence of the discovery by the defendant that the basis of the contract had been misrepresented to it, it repudiated the contract or it declined to complete or anything of that nature - no allegation of that nature is made. In our submission all that he says is to be found in here, para.5, none of the particulars constitute a repudiation and then he says the defendant will say that its recommendation that the second plaintiff advise the shipper to defer decisions was wholly reasonable and was made in good faith. It then goes on to give its answers to the various additional particulars relied upon by the plaintiffs and at p.12, sub-para.(c) it says that the defendant did not refuse to meet its obligations under the contract. As we understand the thrust of its proposition, it is that it was entitled, not to continue delivery - - - 20 30 40

MR BURBIDGE (Continuing): - - - continue delivery on the basis that it had not been paid either the WALB subsidy or the discretionary bonus. That is the case we are called upon to meet by the pleadings. That appears, we say, from p.12. The defendant did not refuse to meet its obligations, the second plaintiff failed to meet the payments then due and owing and purported to add a new and onerous term. That is the requirement that they confirm the intention to deliver the balance. They then go on to conclude that section of the pleading at p.13, para. (d) that the sums claimed in the telex were as at that date due and owing. Furthermore, continuing on, the defendant did not refuse to complete its shipment but repeated its claims for the sums due and owing. In (g) and (h), "the defendant further repeated its claims for the sums due and owing". It denies it committed the stock to others and denies our further particulars.

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In our respectful submission, there are two bases at least on which this type of evidence that is now sought, perhaps foreshadowed, and the cross-examination my learned friend seeks to embark upon are precluded. There are at least two, perhaps three. The first is that the documents themselves on their face, prima facie, exhibit all the indicia of a contract. That, we say, subject to your Honour accepting that that contention is sound, that it does exhibit that indicia, unless it were displaced by other evidence ought not be permitted to be interfered with. Whether or not your Honour should allow evidence to be adduced in an endeavour to attack that document - 19th July - in our submission would turn on the pleadings, whether or not it is raised.

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It is not said in the pleadings that the document of the 19th is not a document emanating from the defendant - indeed, my learned friend's concession of Thursday last and absence of objection today make it plain that such is not his case at all. The third reason is that what my learned friend is seeking to do here, without pleading it, is make an allegation of fraud. He asserts, if I understand what has fallen from him at the bar table, that the true basis of this computation was, as a starting price, the IMO figure that we nominated less certain additional figures resulting in a figure which he agrees, on the figure advanced by us, is the figure on which we have sued. He says, however, that the starting figure was wrong - "You misled us by quoting some figure to us that was not a true figure." That, in our submission, amounts to an allegation - unpleaded - of fraud, in defiance of the rules in that regard, but we would say further that in any event clearly such has never been relied

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upon. It is not said in here anywhere that the defendant repudiated because the plaintiff misled it or misrepresented to it the basis of the price which it was receiving from Iran. No such allegation appears. In any event, as I understand my learned friend's submission to your Honour now, it is clear that he agrees that the discussions, whatever they were and on whatever misapprehension he may now seek to advance, led to agreement in the very figures which are evidenced by the telexes. I do not really understand him to assert that the document was not a contract. What he is seeking to do is advance in some fashion which we would submit is irregular and not to be condoned an allegation that he was induced to enter into this contract, which he concedes to be the contract, but on the basis of some fraudulent misrepresentation. In our submission, it is not open to him to approach it in that manner.

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OLNEY J: When I raised with Mr McCusker the question of pleading misrepresentation I was rather surprised, I had forgotten that the word "misrepresentation" had been used in the particulars, but it does not appear to have been pleaded anywhere else.

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I think there is probably considerable merit in your submission relating to the second half of para. 3 on p.10 where the defendant asserts that the correspondence and documentation - - -

OLNEY J. (Continuing): - - - correspondence and documentation
evidencing the contract - -

MR BURBIDGE: It says "reply", I think it means "rely" your
Honour.

OLNEY J: You would concede that I could look at other documents
which may, perhaps, say something different or suggest
something different from the telex of the 19th.

MR BURBIDGE: I would concede that on my learned friend's pleadings
it would be open to him to assert, without breaching the
parol evidence rule in any way, that either some 10
other documents were needed in order to understand
the contract as a whole or, indeed, that the whole
of the documentation before your Honour was needed
in order to constitute the true contract. With that
proposition we could not be heard to argue. Our concern
is that here what is sought to be done is, we would
submit - and your Honour can see the ramifications of
it - that we are to have some cross-examination put
to Mr Fares. Presumably, as my learned friend foreshadows,
Mr Dingwall is then going to get in the box and say, 20
"No; it was a totally different contract altogether"
in some oral conversations which preceded it notwithstanding
any absence of any denial at all in the pleadings as
to the efficacy of the two telexes which were exchanged.
I would concede, on the pleadings, that clearly it is
open to my learned friend to argue the effect of what
we are calling a discretionary bonus clause which appears
in the document of 3rd July. He has some difficulty,
I would have thought, with the Western Australian Lamb
Board subsidy in that both parties plead and assert it 30
to be a separate contract but he may be able to make
good the proposition that by breaching one contract he
was entitled to decline performance of the balance of
another - I would have some doubt about that - but
certainly it will be open to him to argue that. However,
within the ambit of the pleadings we would submit that
clearly it is not open to him to seek to adduce evidence
not only bearing on the written document but directly
at variance with it - not seeking to supplement or add
in any way - but amounting to an attack upon its very 40
foundations notwithstanding his acceptance of the
proposition that it truly reflects the agreement which
was reached.

OLNEY J: Yes. Thank you, Mr Burbidge.

Mr McCusker, I am persuaded that the line of
questioning that you wish to embark upon is not one that
is legitimate on the pleadings as they stand. I feel
that the way the matter has been pleaded it indicates
that the defendant has said that the agreed price was
a certain amount and, in fact - -

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MR McCUSKER: With respect, your Honour, the way it has been pleaded - and my learned friend has put too much of a gloss on what we have agreed and not agreed - at para.2(ii) of the defence we plead specifically to para.3(b) of the statement of claim which sets up the agreed price. In answer to that we admit the oral contract and say:

"As to paragraph 3(b), it was agreed that the contract prices..."

and we then go on; so we are saying that that is the agreement that was made on the 2nd of July. 10

My learned friend put it to your Honour that we are talking about discussions which preceded the agreement. The pleading itself sets up "This is the agreement". Further, for my learned friend to talk as he has - -

OLNEY J: Are you not asking the witness about the discussions?

MR McCUSKER: Yes; sir, as part of the agreement. "It was agreed that the contract prices for lamb and hogget would be..." and we then proceed to set it out - the prices which the IMO had agreed to pay less an agreed margin. As for my learned friend's mention of the parol evidence rule, of course, it is totally irrelevant when we are talking about an oral contract and both parties agreed that this is an oral contract. The pleading as to how it is evidence is, as I say, an unnecessary plea because it is a pleading of evidence. In order to correct any misapprehension, in case it should linger with my learned friend through the trial, the pleading relating to the telex which appears in the defence is clearly a denial. I would have thought that the telexes of the 3rd and 17th of July do fully or completely or accurately evidence the contract - - - 20 30

MR McCUSKER (Continuing): - - - the contract.

OLNEY J: But you really go on and say, supplementary to that, that the whole correspondence and documentation will tell us what the contract really is.

MR McCUSKER: Yes; I can see the difficulty raised by that pleading, sir. It was not intended to be put in that way. It was intended to say that all of the documentation must be looked at but this is all a pleading of evidence; it is nothing to do with a contract. It is a pleading as to how the contract may be proved. As I say, strictly speaking under the rules, it is unnecessary to even refer to the evidence by which one intends to prove the contract. My learned friend, having pleaded the oral contract, opening on the oral contract, is now slipping into a situation where he is putting to your Honour that it is a written contract because only on that basis can he persuade your Honour that the parol evidence rule is applicable and that we are, as he put it, seeking to violate that rule.

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As to the question of how we have pleaded, it is not necessarily the case, as my learned friend has put to your Honour, that this is a pleading of fraud or an attempt to prove fraud without having specifically pleaded it. We are saying, the basis of the contract, the agreement as to the contract price, was as follows - IMO price, less the margins, giving a result. Mathematically the result, on what we were told, was as follows - it turns out as a fact, we do not say it was necessarily fraudulent misrepresentation and that is always a difficult thing to prove, we say simply as a fact, the IMO prices as stated were not correct. Bear in mind, your Honour, that at the time this contract was made Mr Fares was in London, the contract was made, as we understand it, in Iran by his agent Dr Boueri, it is not for us to necessarily establish that there was fraud involved; we simply say the correct figure, the correct base from which the ultimate sum payable was to be calculated was different from the base discussed, therefore it must change.

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I would not have thought there was any difficulty with that pleading. It is not an allegation necessarily of fraud. Fraud may have been there but we are not relying upon fraud. As to the question of this being a basis for our being entitled to repudiate, my learned friend is quite right. We do not admit that there was any repudiation. We say that if we look at the letter of 24th April 1980, and we have

specifically pleaded that, there was no repudiation but to the contrary, an indication of willingness to continue to be bound by our obligations. We do not put forward as a justification, therefore, for repudiation that the contract price was misrepresented. We simply say, as a fact, the contract price has to be recalculated, the sum payable has to be recalculated if one accepts the defendant's version of a basis upon which it was to be calculated because the IMO figure was wrong as stated on 2nd July. It may have been believed to have been correct at the time by Mr Fares and subsequently discovered to be wrong - we do not know. Not having had the contract - despite my learned friend's insistence that the defendant supply all manner of documentation on discovery at the last moment - produced by the plaintiffs until fairly late in the day it is difficult for us to do a great deal about that. 10

In any event, if your Honour contends despite my earnest submissions to the contrary, that the plea as it stands will not support this line then, of course, it is clearly a very important aspect of the defendant's case both as to its defence and counterclaim and I would have to ask your Honour for leave to amend either on the basis of a short adjournment to do so or, indeed, overnight in order to set up, if your Honour considers that only a direct plea of misrepresentation would support this line, a direct plea of misrepresentation. 20

OLNEY J: Is there anything else you wish to add, Mr McCusker?

MR McCUSKER: No, thank you, your Honour.

OLNEY J: The state of the pleadings at the moment, in my opinion, is such that I ought to uphold the objection by counsel for the plaintiff - - -

OLNEY J. (Continuing): - - - for the plaintiff to the line of questioning upon which Mr McCusker was about to embark. In my view, the pleading for the defendant suggests that the terms of the contract were evidenced by a series of written instruments - correspondence and documentation as referred to - and indeed at the bottom of p.8 of the book of pleadings it is expressly pleaded that the nett contract price for hogget was subsequently agreed at \$1230 per tonne as evidenced by payments made by the second plaintiff.

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It seems to me that the defendant is not now entitled to proceed by way of exploring the discussions leading to that agreement as to the price. Whether or not some amendment to the pleading is justified and would correct the position, of course, is something for counsel to consider. I do not know whether this is something which ought be more conveniently considered overnight, Mr McCusker.

MR McCUSKER: It is fundamental to the defendant's case and counterclaim, sir.

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OLNEY J: Yes, in which case it ought to be carefully considered rather than by way of a short adjournment. I take it that the present witness is not likely to want to depart the jurisdiction.

MR BURBIDGE: I am sorry to say, your Honour, that that is precisely what he does want to do.

OLNEY J: Tonight?

MR BURBIDGE: Such was our earnest hope. I must confess that I thought that was overly optimistic myself and I said so but I should say that he is under real pressure as to commitments in the Middle East. I have no objection to my learned friend continuing at the moment subject to the ruling which your Honour has made. If he chooses to amend overnight, perhaps the matter will have to be reconsidered in the morning.

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OLNEY J: I think as the present witness is a party he really ought reasonably expect to be available during the court sitting. The question of any amendment to the pleadings is one which obviously has to be considered when an application is made.

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MR BURBIDGE: Yes. No doubt if my friend is contemplating that type of pleading he would want to take certain instructions, your Honour.

OLNEY J: Would you proceed on the basis I have indicated, Mr McCusker?

MR McCUSKER: That is not to cross-examine, sir, in relation to the discussions regarding the terms of the contract?

OLNEY J: Yes.

MR McCUSKER: That further limits me, sir, in that there are other matters arising from that which I wish to deal with and I think I really cannot.

OLNEY J: Presumably dealing with things between this witness and the IMO?

MR McCUSKER: And between this witness and Dingwall but going to what we say were the true terms of the contract which, on your Honour's ruling, I am precluded from doing. 10

OLNEY J: You are precluded from questioning this witness about matters which would indicate or tend to suggest that the contract was otherwise than has been evidenced by a series of documents.

MR McCUSKER: Yes. I take it that is so, sir, in which case I really cannot usefully advance the matter at this stage a great deal, save perhaps to ask a few questions which go to another issue, if that could be of some assistance. 20

OLNEY J: Yes, go ahead.

MR McCUSKER: Mr Fares, could I direct your attention to the book that you still have in front of you of documents - - -

MR Mc CUSKER (Continuing): - - - you of documents, and in particular to p.149, exhibit 25? That telex from Mr Dingwall to yourself dated 5th March 1980, would it have been received by you at about that time?---Yes; if you allow me one minute to see the sequence to see if I was in London when it was received?

Certainly, Mr Fares?---It was certainly received by me but if in that day or not, I can't answer on this moment.

Are you able to say approximately when you would have received it?---It is explained on p.152 when the secretary in London replied - "As you know Mr Fares is presently travelling. He is, however, expected to return some time over the coming weekend. Your telex will therefore be answered at the beginning of next week." 10

That was on the 7th of March, I think - the date of that telex? ---Yes; this is the date of that telex, yes.

On the 12th of March you sent a telex to Mr Dingwall - that is at p.155 of that book?---Yes.

What was your position at that stage with regard to the contract with the IMO? Had you any definite delivery dates? ---The contract with IMO has a bank guarantee - an unconditional bank guarantee - left completely to their discretion to cash \$4 million or none. The delivery dates are in the contract of IMO. We certainly had delivery dates on that and we had to meet them. 20

What were the delivery dates of the contract?---You have already the contract with you because I am not following the day-to-day things. At that time I certainly knew about the delivery date but now I can't remember that.

While we are having that searched for, Mr Fares; I think over your some years of experience with negotiating with the IMO you had found that it was possible for you to vary delivery dates if there was a reasonable basis for doing so?---Correct. 30

Indeed, in relation to this contract, on your evidence, you had negotiated or you felt that you could negotiate with the IMO to put back the delivery date of the last shipment? ---But I needed for that a final decision.

You needed a final decision?---And specially that at the same moment Mr Dingwall had signed personally a contract to delivery directly to Iran and I was aware of it. 40

I was going to come to that. You were aware of a contract which you say Mr Dingwall had signed as at the 12th of March to deliver to Iran?---I was aware that Mr Dingwall has visited Iran and has signed a contract at the end of February to deliver goods similar to the ones we were delivering and this was worrying me, that's why I was insisting that we have dates of shipment - - -

WITNESS (Continuing): - - - of shipment, because at that moment I had from Tehran threatenings that they are executing my bank guarantee.

MR BURBIDGE: Perhaps this is an appropriate moment to indicate that we have located a photostat copy bearing some markings, which I do not think will affect its usability, of the contract between Mr Fares or his representative and IMO, and I produce that document.

OLNEY J: That is the IMO contract?

MR BURBIDGE: Yes, it is. I have no objection to production of the document on the basis that it be restricted in its use to counsel at the bar table, as I made plain earlier. 10

MR McCUSKER: I am grateful to my learned friend for having no objection to that.

TO WITNESS: You have there the contract between the IMO and yourself, I think executed on your behalf by Mr Boueri. Is that right?---That is correct, yes - signed, not executed, by Mr Boueri.

It was signed, was it?---Yes. 20

It is in Farsi, of course, but does that assist you to establish the delivery dates as provided for by the contract? ---I'll try, if you give me a minute, to see.

MR BURBIDGE: Your Honour, I do not know whether Mr Fares might be - as I am sure the rest of us might be - assisted by the English translation. It would probably be a bit faster. I think it is a matter of trying to translate what 1358 in the Muslim or Islamic calendar is into the equivalent of the present day that is the real problem. 30

OLNEY J: Are these documents being tendered as exhibits?

MR McCUSKER: I do propose to, sir, yes, but I understand they are to be restricted so far as accessibility for some commercially sensitive reason. I do not think that causes any problem.

MR BURBIDGE: I do not believe so, your Honour, although I would not wish them to become in any sense a public exhibit for the reason I have indicated. The defendant is, of course, a competitor.

OLNEY J: Yes. I will ensure that it is the case. 40

MR McCUSKER: I think you have before you the IMO contract in Farsi and the translation which presumably you have checked?---This is correct.

MR McCUSKER: I was asking you about delivery dates under that contract. For what does it provide?---I think they might have been agreed on different writings, the delivery dates. For that we would have to go back to our office in Tehran. Normally in Iran after they do a contract they agree for the delivery dates according to the needs of IMO. Sometimes they agree it when they sign the contract, sometimes they agree it later on.

Under that document is there an agreed - -?---I do not see it under this document.

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I wonder if I could just see the English translation?---Yes, but I might probably help you if we see that the delivery date might be - - I do not see delivery dates on this part of the contract.

I wonder if I could just see that for a moment?---Yes.

There is a clause 7 apparently - - -

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MR McCUSKER (Continuing): - - - clause 7 apparently as translated from the Farsi with a heading, "Time of delivery." You saw that?---Yes; but there is no time because they have been left in order to be later on agreed because we have office in Tehran that deals with these matters. We have a permanent office in Tehran.

So there must be some other document in existence which would show the actual times of delivery but it is not this one?---Most likely in correspondence between our office in Tehran and the IMO for the delivery or they could be simply oral - it means some agreements - because we have been dealing with Iran for a very long time. 10

You say it could simply be an oral arrangement between yourself and the IMO?---It could be between our people in Tehran, between our office in Tehran and the IMO. It means the dates of delivery; yes.

Under the heading "Time of delivery" appears an item "frozen lamb and hogget from Australia" and then about 2000 tonnes" and then there follow "about 4000 tonnes" four times. It would appear from that, if I read it correctly, that it was proposed that there be five shipments under this contract - one of 2000 and four of 4000?---The quantity is mentioned wherever you see "quantity." 20

Yes; but I am looking here at "Time of delivery". Could I just direct your attention to that Mr Fares? Under the heading "Time of delivery" it appears there were to be five shipments, if I have understood it correctly - one of 2000 and then four of 4000?---It appears like this. 30

Was that the basis on which you contracted with the IMO?---No; we contracted on basis of about 12,000 metric tonnes of Australian lamb and about 8000 metric tonnes of Australian hoggett.

Yes; but was it correct that there was, in your contract with the IMO, an agreement as to how the product would be shipped and when?---Yes; because normally after the agreement, after you set the quantities, you agree later on on the dates of shipment. This is what we have been doing always in Iran. 40

There were to be, it would appear from that contract under clause 7, five shipments in all. Was that the arrangement? ---This is what appears without saying the dates of shipment because about you could take more or less 10 per cent which is left to our discretion normally.

So the obligation you had with the IMO, is it correct, was to ship five shipments - one of about 2000 and four of about 4000 tonnes?---No. Our obligation with Iran was because this one - - this is the time of delivery

which has not been set in this contract. What has been set finally in this contract is about 12,000 metric tonnes of Australian lamb and about 8000 metric tonne of Australian hogget and on basis of this one our unconditional bank guarantee was delivered. About the programme of shipment - this is something different. Should we have delivered 18,000 tonnes it was within our attributions. I remember that the Iranians had asked that we ship the maximum allowed which is 10 per cent over the 20,000 that is why I agreed with Mr Dingwall on 13,200 and on 8800.

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MR McCUSKER: You are saying that under clause 7 of that particular copy - - and there could be another copy of the contract. Is that right? - there could be some other copy which is more complete?---I wouldn't have thought so. I think that's the copy.

Do you say then that there was never any agreement as to the dates of delivery of each shipment?---Sorry; I didn't say that. I say that normally the agreements are done subsequent to signing the contract and they are done between our permanent office in Tehran and IMO.

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Would that have been in writing - - -

MR McCUSKER (Continuing): - - - in writing?----It could be either way.

At the time, as at 12th March 1980, were you then aware of what your shipping obligations were with the IMO under your contract?---I should have been aware at that time.

What were your obligations? You had two further shipments - -? ---At this moment I do not remember them but the last shipment had been three months before and so far, on 18th March, we did not have an idea of when would be our next shipment and they were expecting a confirmation that the next shipment would be in April in order to notify them and I was chartering a vessel. 10

Would you agree that there was no hard and fast obligation, no fixed date, by which Metro was to ship the fourth or the fifth shipment?---Yes; according to our agreement with Metro there was fixed a date, the same ship, the Almeria Star, should have done return trips in order to take the quantities foreseen.

That, as a fact, did not happen, did it?---No, it did not. 20

It did not happen in relation to the third shipment. The third shipment was not a consecutive voyage, was it?---I do not remember.

It was not a turn-around?---I do not remember it. I am not in the execution part of it.

But you were keeping in touch, as you said in answer to your counsel?---I keep in touch; if there is something that goes wrong in the contract they immediately contact me and that is the reason why I contacted Mr Dingwall at the beginning of the year, to settle this matter. 30

You contacted him at the beginning of the year and you told him or you suggested to him that there be a re-arrangement of the shipping programme?---I suggested instead of loading in March and in May that he could load after March and after May in order to meet our obligations. He agreed.

He suggested to you, on your evidence, that the last shipment be early August?---End of July or early August. It was more convenient for Metro Meat early August; more convenient for me the end of July. 40

When was it that you contacted him to discuss that?---At the beginning of the year, the 2nd or the 3rd of January.

Did you keep any record of when you spoke to him?---No.

MR McCUSKER: Or send any telex to confirm that new arrangement?
---I remember I sent a telex to my office-in Australia
to confirm that.

Do you have that telex there that you sent to your office in
Australia to confirm that?---It should be at the
beginning of the year. I think it is on 3rd January 1980
and it is p.130.

Referring there in para.2: "Can Dingwall phone to confirm
purchase of further 270 tonnes"?---Yes. It has been
sent by the secretary in London, I was in my 10
country house, to confirm further 270 tonnes, raising
total so far just over 3000. I think Metro Meat
produced a further 270 above what has been mentioned
in their telex of shortfalls and the remaining, instead
of being 1000 etc. has been 800 and a few tonnes
which they would buy from the West Australian Lamb
Board if we shared the difference. To enable us to
consider his offer we asked him to confirm two dates
of shipment about 3800, 4000 tonnes, Almeria Star or 20
substitute. He promised to come back tomorrow by
9 a.m. Adelaide time. "Mr Fares suggest you contact
him before then. Please get from areas chief - -"
This is something else.

Was this telex sent after your conversation with Mr Dingwall?
---It should be immediately upon my conversation with him.

That was a telex that your office sent to Captain Mata.
Is that right?---My secretary in London.

You were not saying there that the agreement was made - - -

MR McCUSKER (Continuing): - - - was made but that Mr Dingwall would come back the next morning on it. Is that right?---Yes, but he came back and he confirmed that we would ship by, I think it was, April and another shipment by the end of July or the first days of August.

Do you say that he came back to you to discuss that?---Yes.

Was that personally, by telephone, that he did that?---Yes, by telephone.

So he spoke to you the following morning by telephone. That would have been the 4th?---Probably, because this was our agreement. It was the agreement we reached to pay the \$125 per tonne, it was based on setting those two shipments at the full capacity of the vessels.

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Just look at that exhibit. You say, or your secretary says:

"To enable us considering his offer we asked him" and this is exhibit 14 "to confirm two dates of shipment, about 3800-4000 tonnes Almeria Star or substitute."

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As I understand it, your telephone discussion with him prior to that telex was a proposal, a definite proposal, as to when he should ship the last two shipments, was it not?---He had thought about it and come back.

Was it not your evidence that you had discussed with him two dates for shipment, you had actually put those dates to him?---No, no, no. It means what I discussed with him is instead of giving 2500 tonnes in March and 2500 tonnes in May, why do we not go for a further date some time between March and May in order to have enough production so as to constitute the full capacity of one vessel and then to put forward the second shipment so as to have enough production, because if until May Metro Meat can produce 5000 tonnes, maybe until July they can produce 8000 tonnes. This was the idea.

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Was that then agreed at the time when you spoke to Mr Dingwall in January when you telephoned him?---Yes, it was agreed and that is why we looked for a vessel to take those two shipments.

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It would not appear from the telex that your office sent on 3rd January that agreement had been reached on the one telephone conversation, during the one telephone conversation which preceded the telex?---I think it has been agreed on one telephone conversation and the next day he came back to confirm if they can produce.

MR McCUSKER: You say that on the one telephone conversation when you rang him to wish him festive greetings you discussed these new shipment dates and the quantities and he agreed after in fact suggesting that instead of the end of July it should be early August. Right?---I said that when I phoned him we solved that difference which was coming from that telex. We agreed that the two shipments of February and May would be reported to be some time in April and some time at the end of July or beginning of August, 10 and that if this is so I will pay \$125 per tonne as the difference for the remaining quantity for the present shipment, which was the Almeria Star, for the quantity which they were buying from the West Australian Lamb Board. As Mr Dingwall could not confirm to me which date, the next day he would have done it.

When you spoke to him, I think it was at his home. You spoke to him there, did you not?---Probably because this is where he is expected to be probably at the beginning of the 20 year, and - -

You said to him - -

MR BURBIDGE: I ask that the witness be allowed to finish the answer.

MR McCUSKER: I only asked him whether he spoke to him at his home and I think I got the answer: "Yes". I am simply trying to cut the time down so that we can allow this witness to leave the jurisdiction before the end of the week.

OLNEY J: Go on, Mr McCusker. 30

MR McCUSKER: You spoke to him at his home and I think you put to him that the last shipment could be delayed until July. Is that right?---He suggested - - I suggested to him to delay the shipment as much as he could, as he - - Personally I would have preferred the shipment to be effected in February or April or something, I said to delay them - - -

WITNESS (Continuing): - - - to delay them sufficient time in order to allow Metro Meat to produce. He came with the suggestion of beginning of August. I came with the suggestion of the end of July for the, I think it was, fifth shipment.

MR McCUSKER: On your evidence at little earlier this afternoon you said that Ken Dingwall would prefer that you suggested that it be delayed to July and he said he would prefer delay to the beginning of August?---This is what I did say.

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You then agreed that this would be so. Is that right?---Yes.

So that agreement was reached then and there, on your evidence, that the last shipment be delayed to the beginning of August?---Yes; but nothing impedes that he would come the next day to confirm it.

We will jump onto that. Your agreement with Dingwall by telephone - that day that you rang him - was that the last shipment should be delayed to the beginning of August. Is that right?---I don't understand. I said myself that the last - - yes.

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You said, "We agreed that this would be so" that you did not regard it as significant?---Not that I didn't regard it as significant, I regarded it as an issue to be able to come back to Iran with some answer.

I think the question there was in relation to whether it should be the end of July or the beginning of August. You said that you did not regard it as significant. When asked a further question you said that it was necessary to fulfil your contract as it stood with the IMO to ship by the end of July but you thought you could sort that out with Iran. Is that right?---It means to remember exactly what I have said two years ago or three years ago - whatever. I can't remember exactly. I know that we have agreed that the \$125 per tonne will be paid for the West Australian Lamb Board subject to have the subsequent two shipments loaded with their full capacity whenever Metro Meat can finalise producing the goods.

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I appreciate that, Mr Fares, but I am not asking you to remember what happened all those years ago but what you said a little earlier today. I am just asking you whether that is what you said and if it is correct?---Correct, yes.

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On the evidence that you gave earlier today in-chief, I had understood you to be saying that you had reached agreement with Mr Dingwall that the last - and this was in the course of your telephone discussion with him - shipment would be delayed to the beginning of August. Was that correct that you did agree that?---I remember that we have agreed on a date which was between the end of July and the beginning of August. For me it was more significant the end of July; for them it was more significant the

beginning of August which was a few days between the two versions. For me whether it is the last days of July or the first days of August, it was insignificant - irrelevant means for me.

MR McCUSKER: That was to be a shipment of 3800 tonnes?---Yes.

What was the capacity of the Almeria? Was it 3700?---About that.
It depends on the weight of each carcass. Sometimes it could be over 3800, sometimes below 3700 and depends if you load hoggets you can load less tonnage than you load only lambs because it is a matter of storage. 10

The capacity was understood, was it not, to be 3700 tonnes?---About. About 3700, 3800.

Apart from the agreement that you say was reached that the last shipment would be end of July or beginning of August, what about the fourth shipment? When was that to take place?---I think, if I remember well, it was in April.

Was that agreed to?---Yes.

How much was that shipment?---The same ship - the Almeria Star, about 3800, 3700. It doesn't matter. 20

I am just trying to ascertain from you what you say was finally agreed between you and Dingwall when you telephoned him. Was it this: There was to be a fourth shipment some time in April of 3700 tonnes?---About 3700, 3800 tones.

MR BURBIDGE: Your Honour, I object. My learned friend is asking double questions and I am not objecting but if he is going to make some significance out of 3700 when the witness has, half a dozen times, said "about 3700" then I do object to it. I would ask him to ask the questions one by one. 30

OLNEY J: Yes. I cannot, myself, remember the figure of 3700 having been mentioned at all until it was put by counsel to the witness. Perhaps you had better clarify - - -

OLNEY J. (Continuing): - - - clarify that, Mr McCusker.

MR McCUSKER: Certainly, sir. I thought I had.

TO WITNESS: The figure of 3700 tonnes was the capacity, was it not, of the Almeria Star?---It was about the capacity because "about" allows 10 per cent more or less. If you load only hoggets the Almeria Star will take probably about 3600. If you load only lambs it will take over 3800 and if we find a substitute for the Almeria Star which, at a later stage, we found because I bought a vessel and my vessel was loading and she was loading more than these figures. That is why we have put in the telex, "About 3800 to 4000 tonnes" so at that stage, when we were mixing our relations with Blue Star Line for their vessels, we did not know whether they would still give us their vessel or not and that is why I have put "Almeria Star or substitute". We finished taking the Almeria Star when we continued the contract ourselves. 10

To get it clear, at the time you were talking to Dingwall were you talking about the Almeria Star as being the vessel that you intended to use or were you talking to him about the Almeria Star or some other vessel?---I was talking for the Almeria Star or some other vessel. 20

Did you reach agreement with Mr Dingwall that there should be two further shipments of about 3700 tonnes each?---I agreed with him that there would be two shipments of about the full capacity of the vessel we would find.

Yes, but to clarify that, you might have found a vessel of capacity of 10,000 tonnes and you clearly would not contemplate that?---No; about 3700 means up to 2070 tonnes because if you put 10 per cent over 3700 it makes 4070 so it works the same downwards. Our idea was to maintain the Almeria Star which has started our programme. As a matter of fact we have maintained it when we have been compelled to continue ourselves the shipment. The Almeria Star did two more voyages and then we took our own vessel. 30

This agreement that you reached with Mr Dingwall on the day you telephoned him was that there would be two further shipments?---Yes. 40

The fourth shipment and the fifth shipment?---Correct.

The fourth one would be of about 3700 tonnes?---I do not know why you insist on the "about 3700". It means for whatever is the capacity of the vessel that we take which is shown, what is the capacity here. It means the capacity normally, the vessels that

we had been taking so far to carry the meat which has been produced from Metro Meat were about 3700, 3800, whatever was the capacity. The fact is, we continued with the same vessel we had used with Metro Meat and this was our aim and this vessel was called Almeria Star.

MR McCUSKER: The vessel you used on the three shipments so far was the Almeria Star?---That is correct.

And that vessel had a capacity of about 3700 depending upon whether it was lambs or hoggets - it could be more or less?---That is correct. 10

Obviously, on your evidence as I understand it, if it were lambs then it would be a different total tonnage that could be carried than if it were all hoggets?---This is correct.

The size of the carcass, to some extent, governed the total tonnage that could be carried?---This is what you call the storage factor.

Generally speaking, you could be up or down within what range? ---Depending how good you stow them, depending how light is the carcass, depending on many factors. Technically it is not my speciality. 20

To clarify this for his Honour and, perhaps, for me too - the 3700 tonnes figure we are talking about, that was the stated capacity, was it not, of the Almeria Star - - -

A40. 3.49

MR McCUSKER (Continuing): - - - the Almeria Star?---It was the normal capacity we would foresee for such a ship when she loads within the same mixture of loading which she was loading before.

If it was the same mixture of lambs and hoggets as previously, you would expect her to carry about 3700 tonnes?
---Or maybe 3800, or 4000, I don't know.

OLNEY J: I have before me exhibit 13 where the capacity of this vessel is expressed to be about 3800 tonnes. That is part of the evidence. Is there any great significance in this, Mr McCusker? 10

MR McCUSKER: There is some, sir, yes.

OLNEY J: I see, very well.

MR McCUSKER: It is, with respect, not expressed to be a capacity but it is a telex from Mata to Dingwall and it talks about "about 3800".

WITNESS: I think you should realise that myself, I just leave the things between the office in Australia and the details they take with Metro Meat. The last time I came to Australia was in 1974 and I do not follow the day to day business. I have many other things to do. 20

MR McCUSKER: Getting back to the point of all this, you say that about 3rd January, or perhaps the day before, you reached this agreement with Dingwall as to the further two shipments - one being, you think, about April and the other at the end of July/early August?
---That is correct.

Just to clarify one part of your evidence in your examination in-chief, do I understand that your commitment as you understood it to the IMO was to complete deliveries by the end of July - that is, to complete loading for delivery to Iran by the end of July 1980?---Not necessarily. My commitments with Iran are flexible to the point of not giving them the impression that I am no longer supplying because the moment they have this impression they have got my guarantee which they can execute. I do not know if you have seen the text of the guarantee. 30

No, I have not. It has not been produced?---It is completely unconditional and the bank has no right to refuse the first request of IMO to cash on this guarantee. 40

Because of that you had, as you saw it, a degree of flexibility so long as you did not appear to be about to default?
---Certainly not because of the bank guarantee, because

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of my previous relations with Iran, as long as I keep them happy, that I am supplying, I have a certain degree of flexibility. The moment they start having doubts they can execute. They do not have to give any explanation why they are executing.

MR McCUSKER: You did not tell us when you were examined in-chief about a further telephone call from Mr Dingwall following that conversation when he rang back. Are you quite sure that he did ring back the following day?---Certainly. I am quite sure that we reached an agreement. Whether it was in one telephone call or two telephone calls, we reached an agreement when I telephoned him at the beginning of the year, we reached immediately an agreement. His call back was probably to confirm the dates or something like that, and probably - - 10

Just pausing there, my question was: Are you sure that he called back? You have told us several times that you reached an agreement during your call?---Yes.

So are you sure that he did call back the following day or may that have been simply a possibility?---I think he has called back because I am sure that I reached an agreement with him, and if the agreement was implying that he should have called back to say there is agreement, he must have called back, because for me it is a final agreement. 20

When you dealt with Dingwall you knew that you were dealing with a man on behalf of Metro Meat who could make the decisions?---That is correct.

So when you spoke to him and discussed these two new delivery dates you reached agreement there and then, as I understand your evidence?---Yes. 30

There was no need for him, was there, to call back?---Yes, there was probably a need for him to tell me it is not on 20th April, it is on 27th April, in order to tell me when I should take the vessel.

Did he then call back and give you those delivery dates - - -

X98. 3.55

MR McCUSKER (Continuing): - - - delivery dates?---I am sure he did. I cannot say what he said during his conversation but we had been taking the vessel and we have asked Australia to ascertain that the quantities are there because I feel there is something from Australia ascertaining that the quantities are there.

If he rang back on the following day did you do anything about confirming what he said when he rang back or did you think that was unnecessary?---Would you repeat your question? 10

As I understand your evidence he did ring back the following day to confirm the quantities were there?---Yes.

And the more precise dates of proposed delivery?---Yes.

Some time in April - you cannot recall the exact date?---No, I cannot recall.

But it was some time specified in April?---Yes, I think so.

And some time in July or August?---Some time at the end of July or beginning of August, yes.

You do not have any record now, in 1982, of exactly what he told you then?---Not in my hand, no, but we had this confirmation and we went out to look for chartering a vessel because I would not have gone chartering a vessel if I did not have this confirmation. 20

Did you take any steps to confirm with Mr Dingwall what he told you when you say he rang back the following day; that is, confirm by telex?---This is sufficient. He would take it over with my office in Australia. It was no longer necessary because the performance, he was taking it directly with Australia, never with me.

So you left it really to be confirmed through your office in Australia?---Absolutely. 30

That is by Captain Mata?---By the office in Australia whomever was in charge.

Did you advise your office in Australia of Mr Dingwall's confirmation when he rang back, that is, confirmation of the delivery dates in April and at the end of July?---I must have; I do not recall exactly.

Looking at exhibit 14 which you have there, that is the day, apparently, following your first of the two telephone conversations. Is that right - 3rd January?---No; that is 2nd July, sorry, it is not January. 40

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MR McCUSKER: It is p.130?---I am sorry, yes. What was your question, please?

Was that telex sent on your instructions following the first telephone conversation?---It must have been so. It is not said that it has been sent the day I have instructed for sending because at my secretary in London, there is an answering machine. When there is something I leave it for her on the answering machine and she sends it whenever she is there. Probably on 2nd January she was not there. I cannot ascertain that it was 3rd or 2nd January.

10

In para.2 there is no reference to Mr Dingwall having had a second conversation with you or having specifically confirmed the two new delivery dates?---We always speak by telephone with Australia. It was necessary - - Probably this telex was sent because the people in the office in Australia were not there.

OLNEY J: This telex suggests that Mr Dingwall had telephoned you. In para.2, "KD phoned to confirm purchase." It does not seem to be confirming a conversation that you had initiated by ringing him?---I know, your Honour, that the one who started the conversation was me by calling Adelaide in order to brief him and in order to discuss what was happening in Australia. Probably Mr Dingwall called me back here and then he called later on. Those details - I cannot remember them very accurately - - -

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R13. 4.00

WITNESS (Continuing): - - - very accurately.

OLNEY J: In which shipment was the lamb from the WALB shipped? That was the third shipment, was it not?---That was the third shipment, your Honour, the one in the telex at the end of the year where they mention the shortfall. It was the first one mentioned.

I am just looking at para. 2 on p.130. He apparently spoke about some other tonnages that he had purchased? ---It is p.127, your Honour, and in that - voyage 3, January - there was a shortfall of 1050 because Metro Meat was producing 2750 and as they had been able to produce later on another 270 tonnes they completed the capacity of the ship with another 800 and a few tonnes which they purchased from the West Australian Lamb Board as per our agreement, and then they were supposed to load as per our agreement the two other shipments to complete the contract. I accepted to pay the \$125 per tonne for the West Australian Lamb Board lambs on the condition that the two shipments which are here mentioned, voyage 4 and voyage 5, are loaded with full capacity, and in order to reach that we had to reach an agreement that instead of loading in March and May the loadings will be in April and July to allow Metro Meat to produce sufficient lamb for the full capacity of the shipments.

I am beginning to follow this para. 2 on exhibit 14:

"Dingwall phoned to confirm the purchase of a further 270 tonnes, rising total so far just over 3000, and proposing to load the balance fm" -

Is that "from"?---Yes. This is when - -

"Balance fm" - is that "from"?---"The balance from", yes, "West Australian Lamb Board".

"If we share difference of price"?---That is correct. That is the \$125 per tonne.

That had already been discussed.

"To enable us considering his offer we asked him to confirm two dates of shipment."

The 270 tonnes plus the 800-odd from the lamb board plus the 2750 on p.127 would make up the full shipment, I take it?---The 2750 plus the 270 plus the 843, if I remember. They have constituted the full

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shipment and I think that the full shipment was constituted by those total amounts, your Honour.

OLNEY J: Thank you. I am following it now.

MR McCUSKER: As his Honour has said, that telex refers to a phone call from Mr Dingwall apparently to you. Your evidence is that you phoned him. Was it when you phoned him that the proposed purchase of a further 800 tonnes from the lamb board was discussed - - -

MR McCUSKER (Continuing): - - - board was discussed?---The main issue of my telephone call was to complete the contract. The most important was the problems which were going for the completion of the contract so we started discussing the two last shipments and we came to the matter of the difference which was still needed to complete the ship which was then loading. We came to the conclusion that we will pay \$125 for the quantities that Metro Meat will buy from the West Australian Lamb Board provided Metro Meat prepares the quantity sufficient for the full capacity 10 of two further shipments at dates which Metro Meat think they are capable of producing the full quantities. Those dates were agreed sometimes in April and sometimes end of July/beginning of August. This was the main.

Was that all agreed or was that all discussed and agreed in the course of that one telephone call that you made to him?---I can't say in that moment if it is one telephone call or more than one telephone call. This was the agreement. I never attached an importance if an agreement is reached in one telephone call or in two telephone 20 calls because my memory does not help me to gather these details.

The important thing to you, as you have said, was to get confirmation of the proposed delivery dates of the fourth and fifth shipments and the quantities?---That's correct. This might have been taken by Australia or Mr Dingwall might have come back to me. As a matter of fact my memory seems to say that Mr Dingwall phoned me to confirm to me a date in April and a date which will be the first days of August but I can't swear for it. 30

If he had been able to do that you would have been quite happy about that?---Absolutely. Absolutely. It means at least I would have had something in hand to go back to the Iranians and tell them I am continuing the contract.

Were you obliged under your contract with the Iranians to deliver in April or was it simply a total quantity to be sent by successive shipments provided it was shipped by the end of July?---I must read again my contract to see what were the details of my - -

OLNEY J: Just a minute, Mr Fares. 40

MR BURBIDGE: I do object, your Honour, on the basis of relevance and really on the basis of repetition as well. The question of the flexibility that Mr Fares had under the IMO contract - the relevance is not apparent certainly from the pleadings - but whatever the position may be in that regard it is a matter which, with respect, has already been once fully explored. I know my learned friend is not seeking to delay the matter unduly but nonetheless, with respect, this is a matter that has been canvassed. Unless it has some special relevance, I do submit, it ought not to be recanvassed.

OLNEY J: Thank you, Mr Burbidge.

I think there is probably some merit in that, Mr McCusker. Certainly the matter has been discussed and unless there is some special significance in it, that perhaps has escaped me at the moment, it might be as well to move on to something else.

MR McCUSKER: If that is a direction, sir, I shall.

OLNEY J: Yes. I think Mr Burbidge is quite right in that the question of delivery times as between this witness and his client in Iran does not appear to be an issue in the proceedings. 10

WITNESS: Your Honour, I found something here that says period of the contract.

OLNEY J: Just a moment, please.
TO MR McCUSKER: I would uphold the objection on the grounds that have been raised.

MR McCUSKER: Could I just mention, sir, that of course to say what the point of a particular line of cross-examination is really often blunts the point - it might as well not be pursued. 20

OLNEY J: Fair enough.

MR McCUSKER: There is a point to this. I am not deliberately wasting the court's time. The point of it is that the plaintiff contends that the defendant has impliedly - as well to alleged acts of express repudiation, but impliedly - by various actions repudiated the contract
- - -

MR McCUSKER (Continuing): - - - the contract and as the cases all most clearly point out, in such a contention it is necessary for the court to have regard to all of the circumstances. I am not saying that directly his arrangements with the IMO will, of themselves, establish or negate any question of repudiation but they go towards a further question as to the position objectively viewed of the seller and, indeed, objectively viewed by the buyer of goods. If the plaintiff is relying upon implied repudiation then, as I understand the authorities, they are clearly to this effect that one has regard to the objective position of each party and to all of the circumstances. 10

If the position was that as at March 1980 there was a degree of flexibility, there was no urgency in relation to deliveries to Iran, no undue urgency and, indeed, more particularly, if no urgency was conveyed to the contrary to Metro Meats, this has some relevance to that issue. I can put it no further than that, that to some extent it is often being said that counsel must be given some degree of, not licence but at least leeway, in cross-examining. 20

OLNEY J: I think, have you not already established from this witness that he, apparently, had a fair degree of flexibility and that, if he had the dates to take to the Iranian customer, he could fix things up? That is how I understand his evidence.

MR McCUSKER: Yes; that is in relation, as I understand it, to the last shipment. All I was about to try to clarify - -

OLNEY J: I gathered that it applied to both, that if he had firm dates to give his client then it was, as he said, insignificant to him but the point he was making, as I understood it, was that he wanted the dates. I think you have established that. 30

MR McCUSKER: Thank you, sir. If your Honour has understood that I will not take it any further.
TO WITNESS: I will take you on from there, Mr Fares. You have told us that these confirmation of delivery dates were of importance to you in order that you could, in turn, be sure of honouring your commitments with the IMO?---Certainly. 40

When Mr Dingwall then did confirm the delivery dates and the quantities to you, did you, yourself, take any steps or direct that any steps be taken to confirm what Mr Dingwall had told you which, on your evidence, would have been on either the 3rd or 4th or thereabouts of January?---I must certainly have taken steps and that means not necessarily by writing.

MR McCUSKER: Do you agree then that there is nothing in writing that confirms what you say Mr Dingwall told you as to delivery dates and quantities when he spoke to you in early January?---I said not necessarily by writing; probably my office in Iran would have taken some steps with IMO. We had certainly taken steps for chartering the vessels.

Are you sure that this discussion with Mr Dingwall took place in early January? May it have been at a later time?
---No; early January.

10

Could it have been about the middle of January that you spoke with Mr Dingwall?---No, no. This agreement was reached in early January.

Did he indicate whether he had anyone with him at the time you spoke to him? Can you recall that?---I think he might have been with Mrs Dingwall or something, at least with one of the conversations.

Did he tell you that Mr Jack Ware was with him when you spoke to him, when you rang?---I do not recall this detail.

To clarify this, do you say it may have been that you rang at his home or simply that you do clearly recall?---He might have called me back from his office - - -

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WITNESS (Continuing): - - - from his office. These details I cannot recall. I certainly called him to his home to greet him, that I recall.

MR McCUSKER: I would like to direct your attention to exhibit 17 which is at p.135. That is a telex and you have seen it before, of course, but did you know of its contents before it was sent or after it was sent? ---They do not always read the contents of the telexes to me from Australia before they send them. They are managing Faras Rural here.

10

That telex, I suggest to you, would imply that no agreement had at that stage been reached between you and Mr Dingwall. You say that is not so?---No, this is not so.

MR BURBIDGE: I object. With respect, that is a question of interpretation of somebody else's document and particularly it is surely a question of law.

OLNEY J: Yes. I do not think it is open to this witness to construe it, Mr McCusker.

MR McCUSKER: Mr Faras, that telex reads:

"We must confirm today last two shipments to assure MV Almeria Star. Blue....(reads)....two shipments of 3800 tonnes each prepared between the abovementioned periods."

20

After you spoke to Mr Dingwall early in January and received his confirmation as to the dates of the last two deliveries did you pass on that information as to his confirming the dates of deliveries to Captain Mata?---I think I had done and according to this telex I certainly have done because here what I understand they are looking for is a ship and they have to confirm a ship, and when you confirm a ship you pay and before paying you have to know exactly that the meat is there.

30

The response to that of course was the telex of 23rd January, which is the next page, referring to the problem of sanctions which Metro Meats foresaw. I think your evidence on that is that because you had raised letters of credit which were honoured in the past and would undoubtedly be honoured in the future, Metro Meats would have no problem in relation to possible imposition of sanctions. Is that the essence of what you - -?---I did not get that, sorry.

40

Perhaps I could ask you simply this: Do you consider that Metro's expressed concern about the possibility of

sanctions being imposed and affecting trade was unsoundly based, that there was no basis for that concern?---I would not like to judge the opinion of Metro Meat but the letters of credit, I was opening them from Switzerland, completely unrelated to the situation of Iran. These were not letters of credit coming from Iran to Australia. Even if the Iranian ports are closed the meat will be shipped according to my letters of credit.

MR McCUSKER: Mr Fares, the letters of credit were payable subject to the production of certain documents, were they not?---Yes. 10

As most letters of credit are?---Yes.

Those documents including the bill of lading in relation to the particular tonnage?---Yes.

There was a document requiring the official seal, I think, of approval of the Iranian Embassy, was there not?
---I think the details of the letter of credit are in the letter of credit. They must imply something like that probably. 20

I do not want to labour this point too much but would you agree that had sanctions been imposed - - -

S38B. 4.21

MR McCUSKER (Continuing): - - - been imposed there was at least a possibility that either Metro could have been prevented from delivering meat or that you could have been prevented from getting the necessary documentation that was required in order to fulfil the conditions of the letters of credit?---Had sanctions have happened in Australia?

Yes?---If these sanctions will prohibit me from loading for Iran, you mean?

Yes?---I cannot foresee what would be the sanctions myself 10
but in principle when I am buying on an FAS basis
and when my letter of credit is opened from
Switzerland and when the bank in Switzerland confirms
that the bank regardless of anything happening in
Iran or anything happening between Iran and the
United States, I cannot think it is a matter - -

The conditions to which each letter of credit were subject
were the production of an invoice, certified, three
copies - and I am looking at p.61 - a full set of
clean on board bill of lading marked "Freight 20
Pre-Paid" - do you have the page there? I think it
is a bit difficult to pick up?---Yes.

A certificate of origin and two copies issued by the local
Chamber of Commerce confirming the origin of goods in
Australia, Islamic slaughtering certificate issued
by the Islamic community of the country of origin
and certified by the Embassy of the Islamic Republic of
Iran. Looking at the telex from Dingwall of
23rd January (p.136) he refers in paras 4 and 5
to discussions with Ayatollah Menhaj leaving him in 30
no doubt that if Australia agreed to sanctions against
Iran to support the USA then Iran would cease all
trade with Australia. If his fears had been realised,
if that had happened - we know it did not - would
you agree that it would then have been difficult if
not impossible for him to get a certificate from the
Embassy of the Islamic Republic?---These conditions
are the original conditions of the credit, 4th September.

Yes?---I remember there is an amendment to it. I have not got
it in my head but I remember Metro Meat asked for an 40
amendment so as to make the execution of the letters of
credit very easy, and we have made all the amendments.
Anyhow, the documents which were presented for the letter
of credit had been made easy to the maximum and I do
not think that the policy of Iran was done by a
representative who is supervising the slaughtering here.

Are you saying then that you did not consider that there was
any substance at all in the fears expressed by Metro
Meats on 23rd January?---No, I felt the contrary, because
at that stage Metro Meat was negotiating in Iran to

supply themselves the meat. I felt that it was only an attempt to put me back in order to deliver themselves. If they had these fears, why they were themselves negotiating a new contract? This is a contract in the process of execution.

MR McCUSKER: When did you become aware of that? You say you became aware that Metro Meats were negotiating in Iran?---Our office in Iran is every day at IMO and we know who is negotiating in Iran.

When was it that you became aware of it?---We became aware in mid-January that Oceanic are trying to sell and we try to know who is behind Oceanic and we understood that Metro Meat was behind Oceanic. 10

Did you put that to Mr Dingwall at that time? Did you suggest that to Mr Dingwall?---No. There was no reason why I should call him myself for that.

You say that some time in mid-January you became either aware or at least you believed that Metro Meat were negotiating through Oceanic with Iran?---I am not the agent of Mr Dingwall in order to phone him every time there is something happening in Iran. When I see that they are starting to compete with me in Iran instead of being with the same relations we had before I cannot just consider it necessary myself to interfere in it. 20

234A. 4.25

MR McCUSKER: Was that view of yours that Metro Meats had begun to compete with you in Iran something which affected your view of what happened thereafter? In other words, did that make you think that Metro Meats were not prepared to honour their obligations with you?---Certainly. It started putting doubts which were confirmed later on.

The doubt arising from information that you had that led you to believe that Metro Meats were directly dealing in Iran?---At that stage they started directly dealing in Iran. The doubts started before, I felt that there is a spirit of some misunderstanding. That is why I called him at the beginning of January, but I cannot keep calling him and doing so.

10

As at the beginning of January was that your information, that Metro Meats were negotiating in Iran?---No, at the beginning of January, no.

It was towards the middle of January that that information came to you?---Approximately towards the middle. I cannot say it was the 14th, the 15th or the 20th. I know that in January they started dealing with this matter of Iran.

20

OLNEY J: Would that be a convenient place to stop today, Mr McCusker?

MR McCUSKER: It certainly would, sir.

HEARING ADJOURNED UNTIL 10.00 A.M.

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OLNEY J. (Continuing): That clears the way for us to sail on, does it not?

MR McCUSKER: It does your Honour.

RACHID FARID FARES:

CROSS-EXAMINED BY MR McCUSKER OC (Continuing):

MR McCUSKER: Mr Fares, you produced for us yesterday a copy of the IMO contract, that is the contract between yourself and the Iranian Meat Organisation, which was to some extent incomplete; that is, there was a reference in clause 7 to a schedule of delivery dates but there was no date inserted for each of the five shipments referred to. Do you recall that?---Yes. 10

Do you have that contract here again today?

MR BURBIDGE: I can produce a copy in the meantime, your Honour, and I will find a clean copy in a moment.

MR McCUSKER: That contract was made on your behalf by Mr Jean Boueri in Iran, was it not?---Correct.

It was made, I think you said yesterday, at about the time you were talking to Mr Dingwall on 2nd July. Did you endeavour to get from Mr Dingwall a firm figure before you instructed Mr Boueri to conclude the contract with the IMO?---A firm figure about what? 20

As to prices?---Yes.

Before you spoke to Mr Dingwall, had you been in touch with Mr Boueri to ascertain what prices were likely to be offered by the IMO on your contract?---We had already an agreement with IMO in principle. We had drafted a contract for New Zealand at \$1850 per tonne of lamb.

And for hogget?---For hogget we did not foresee.

When did the question of hogget arise? You had a draft contract for the supply of New Zealand lamb. When did the question of a contract for hogget arise?---When we gave the opportunity to Mr Dingwall to offer and he suggested that he could offer - - We gave him the opportunity to supply 20,000 tonnes. He said, "We could supply about 12,000 tonnes of lamb and 8000 tonnes of hogget." He insisted on that division and he quoted for both, for lamb and hogget. He quoted \$1405 for lamb and \$1230 for hogget. 30

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MR McCUSKER: In the course of your discussion with Mr Dingwall on 2nd July, was there any reference by him - did he raise the question of what price the IMO were paying for lamb or hogget?---I do not recall. He certainly did not raise it for hogget because we never argued the price of hogget at all. He might have raised it for lamb but I do not recall at this stage.

You are probably aware that Mr Dingwall will say that he asked you what price the IMO was paying for lamb. Do you say that could have happened; you simply cannot recall?---Yes; but in Australia it was publicised in the newspapers, I think. The prices were \$1850 or \$1900 because the Lamb Board had already sold lamb to Iran.

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Did Mr Dingwall ask you what prices the IMO were paying the Lamb Board for lamb?---He might have.

Can you recall him asking you whether the IMO let any other contracts in respect of the supply of meat from Australia?

MR BURBIDGE: Your Honour, I do object to the form of the question - "Do you recall him" - that, of course, presupposes that, in fact, he did it. I do submit the proper form of the question would involve my learned friend saying no more than "Did he say" or something to that effect. "Do you recall" presupposes the fact.

OLNEY J: Yes; perhaps it can be asked in a slightly different way, Mr McCusker.

MR McCUSKER (TO WITNESS): Did Mr Dingwall, to your recollection, ask you whether there were any other contracts let by the IMO for the supply of meat from Australia?---He might have.

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Those kind of questions were the questions that, in your past dealings with Mr Dingwall, he commonly raised - - -

MR McCUSKER (Continuing): - - - commonly raised, were they not - questions as to what were the contracts the IMO had for meat from Australia or live sheep from Australia? They were the usual questions he asked in the course of your previous dealings?---We had not had deals of meat with Metro Meat for a long time. We were buying currently the meat from New Zealand.

Had you not bought meat from Metro - -?---In 1974.

- - in 1977?---I do not recall. We might have but it might be a small quantity or something. 10

My instructions are that the quantity was 2403 tonnes of lamb and hogget in 1977?---Was it executed? I do not know. I do not have it in my memory right now. If it was 2000 tonnes and we have bought from New Zealand 200,000 tonnes and we were buying every month maybe 100,000 sheep from Metro Meat all the time - -

You are saying it was a fairly insignificant amount?---Yes.

The question I put to you, let me clarify it, is: In your dealings with Mr Dingwall, who acted on behalf of Metro Meat - I think throughout your dealings he acted for Metro Meat, did he not - specifically your dealings in respect of the purchase of meat from Metro Meat, did he not ask you on previous occasions what other contracts the IMO had let and further ask you what prices the IMO was paying? ---He might have. 20

You say you cannot recall the details, and that is understandable in view of the size of your other dealings, but my instructions are, and I should put it to you, that there were purchases made by you from Metro Meat in 1977, 1975, 1974. Would you agree that that is probably so or you just do not know?---There might be but small quantities probably. We might have helped Metro Meat in that respect because there were union problems here and they had to sell meat to Iran but we never bought, so far as I recall, from Metro Meat on a FAS basis. There are two bases, you can buy meat or help a company to sell meat in a market where you are strong, or buy meat from that company first and then your own for the market. 30 40

The relevant time, of course, is 2nd July 1979 and on that you say that Dingwall may have asked you, you simply cannot recall him asking, the price payable by the IMO?---He may have. I would not have been astonished if he had and I would have answered.

You would have expected, would you not, knowing the trade as you did, that Dingwall would ask that kind of question? ---Not necessarily because we were buying regularly

from another market and he wanted us to sell for him and then he would give a price FAS. On the basis of that price we have to work out our price.

MR McCUSKER: Prior to 2nd July, in June of 1979, did you have discussions with Mr Dingwall about the possibility of this IMO contract being offered to them?---I think a couple of months earlier Mr Dingwall visited me in my country house and we made sure that Mr Blanco Villegas was present there and we had a meeting, the three of us, and we spoke about the live sheep and many other things. Mr Dingwall raised the question of meat and I recall he said, "What about meat? We want to sell meat." Then according to what I have been able to trace, he raised the matter of 15,000 tonnes of lamb, because we were currently discussing the supply of meat from New Zealand but we were buying sheep from Australia and to cover the export of Australian sheep he wanted to be protected with meat. 10

Mr Dingwall will say, I put it to you, that at that time in May he offered 15,000 tonnes, consisting of 8000 of hogget and 7000 of lamb - - - 20

S55. 10.25

MR McCUSKER (Continuing): - - - of lamb?---I do not recall this particular detail.

By that you say it could have happened, you simply have no recollection?---Yes.

He will further say that when you spoke to him on 2nd July you told him that Mr Boueri was, at that time, in Tehran negotiating with the IMO?---Yes.

And that the IMO wanted 20,000 tonnes?---Correct.

Did you ask him, therefore, whether he could increase the offer from 15,000 to 20,000 tonnes?---I do not recall that. I recall I gave him the opportunity to supply 20,000 tonnes. He suggested that there would be 12,000 tonnes of lamb and 8000 tonnes of hogget. I asked him at which price and I got the price of \$1405 for lamb and \$1230 for hogget. 10

Did you ask him whether he could increase his previous offer from 15,000 to 20,000 tonnes?---I do not recall. I asked him to supply 20,000 tonnes.

In response to that did not Mr Dingwall then ask you, what other contracts have the IMO let for the supply of meat from Australia?---He might have. 20

You would have expected him to ask that question, would you not, from your knowledge of the trade and his way of dealing?---To ask me what other contracts are - -

Yes; what other contracts the IMO would have let?---Had engaged into?

Yes?---I think we both knew that the manager of the Lamb Board was in Iran and he was trying to sell or he sold meat to Iran.

The question of what other contracts the IMO had let for the supply of meat from Australia would have affected the ability of Metro Meat to purchase meat within Australia or purchase stock for the supply of meat, would it not?---This is a consideration to be done by Metro Meat because, at that stage, we were not ourselves engaged in the market of meat. We were only live sheep and we were buying the meat on FAS basis so I do not have any reason to disbelieve Mr Dingwall if he tells me he can sell 100,000 tonnes of meat. 30

But you knew at the time in July 1979 that from Metro Meat's part, the question of what other contracts there were for the supply of meat to the IMO would affect its buying 40

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ability. You knew that that would be so, did you not?
---I do not have any reason to know it.

MR McCUSKER: Would you not have expected that to be so, that the more contracts the IMO had let, for example, the more competition there would be and the greater difficulty, therefore, for Metro Meat to fulfil a 20,000 tonne order?---You are asking me my opinion if the situation was like this?

At that time, yes?---Depending on how much is the full size of the contract, it means the total quantity which would have been purchased. 10

So the question would be a reasonable one and one that you would expect a seller like Mr Dingwall from Metro Meat to raise?---Or not; I would have found it normal if he raised it or irrelevant if he did not.

Did you tell him that only the West Australian Lamb Board had a contract with the IMO and that that was for 10,000 tonnes?---I do not recall that. I might have. As a matter of fact these were the only ones, according to my souvenir, that were there. 20

According to your recollection that was the only contract that the IMO had let at that time, was it?---Probably; according to my recollection three years ago.

You were in close communication, were you not, with the IMO?
---Personally, no.

But through your agent?---Yes; myself, I was in my country house when I phoned him.

You were in a position at all times to get information from the IMO regarding the letting of contracts for either meat or live sheep?---From my office, yes. 30

MR BURBIDGE: I object to that, your Honour. The getting of information and what the IMO might or might not tell you is, with respect, a bit broad.

OLNEY J: Yes. I was surprised it was even thought to be important. I think this witness can only speak of his own knowledge, the information he has of his own knowledge, Mr McCusker.

O7A. 10.30

MR McCUSKER: Did Dingwall further ask you: "At what price is the IMO buying from the West Australian Lamb Board"?---He might have, and if he would have asked it I would have tried from my office to know which price they would have and I would have told him.

Do you recall telling him the price?---No.

He will say that you told him that for lamb the IMO was paying \$1862.50. Do you recall anything to that effect being said?---No. As I say, I might have, discussions might have taken place in this respect. I do not recollect anything in that respect. 10

Dingwall will further say that you told him that in order to maintain your credibility with the IMO you would have to offer at a lower figure, and you nominated, he will say, \$1840 for lamb and \$150 less for hogget? ---If I would have said anything I would have said exactly what the prices were on the market, the current prices on the market. My prices, the ones I give to IMO, are not to be unveiled to your supplier because you take from your supplier the price FAS. One thing for sure, I received two quotations - one quotation for lamb, one quotation for hogget. We never discussed the hogget, we discussed the lamb only. 20

Did you discuss hogget as being a figure of \$150 less than for lamb?---Absolutely not because we do not work backwards. I am buying from Mr Dingwall on an FAS basis only.

To clarify your answer, do you recall telling Mr Dingwall a price being paid to you by the IMO?---I do not recollect that. 30

You do not recollect it?---I do not remember.

Dingwall will say that he responded to you, saying that he thought the price would have been higher than \$1900. Can you recall him saying anything of that nature? ---No, but if he would have said it would have been normal because he tries to get more for his FAS price.

You have seen the defendant's pleading in this matter and the particulars and you are aware that Mr Dingwall will say that there were certain other figures mentioned. First, do you recall any discussion as to the price of freight between you and Dingwall?---No. I recall that Mr Ian Phillips, who is the export manager, had sent a telex offering freight and I recall having spoken with Mr Dingwall when he again passed through England. I told him, "Please, do not let Mr Phillips interfere in my business", and I told gently Mr Phillips, "Thank you for your help for freight. Let us do the matter ourselves." 40

MR McCUSKER: This was subsequent to 2nd July, was it?
---Yes, but on 2nd July the freight is my own business.
I do not need assistance of the freight.

OLNEY J: When you say Mr Phillips offered you freight are you saying that he offered to supply the transportation of the meat in addition to the supply of the meat? I do not quite follow what you mean?---No, your Honour. When we did this conversation with Mr Dingwall and we agreed on the final prices of lamb, we had agreed on the price of FAS. Then on his own initiative 10 Mr Phillips tried to find the freight in order probably to organise his production and he sent to us a telex not at our request proposing freight to which we immediately replied, "Thank you very much for your assistance. If we need it, we will ask for it - - -"

D88. 10.35

WITNESS (Continuing): "- - - ask for it." It is in the telexes, your Honour.

MR BURBIDGE: Might I ask that the witness have the telex book back again.

OLNEY J: Yes.

MR McCUSKER (TO WITNESS): However, it was not in respect of Mr Phillips' telex that I was questioning you. I am going back to the conversation between you and Dingwall of 2nd July 1979 when the contract was made. Did you and Dingwall discuss the cost to you or did you tell Dingwall anything about the cost of freight as you foresaw it?---I do not recall it. I might have, there is nothing against it. If you discuss a price you might tell anything but I do not recall it specifically.

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Specifically, he, Dingwall, will say that you told him the cost of freight would be \$385 per tonne - -?---Sorry; they told us that the freight is like this through their telex, not through my own researches.

Did you discuss freight with him at all? Can you recall that?---No. 20 I discussed only FAS prices and I was given two prices, one for lamb, one for hogget. We never discussed about price for hogget. We only argued about lamb. This is as far as I can recall.

Dingwall, of course, was discussing with you the sale of meat on a FAS basis?---Correct.

Is that right?---Right; I was giving him the possibility of offering on FAS basis.

For the purpose of doing that, did you not have some discussion with Dingwall to enable a figure to be worked out by Dingwall, to be calculated?---I might have but I do not recall it. If it was anything relevant I would have recalled it.

Would you not expect, when negotiating on a FAS basis, for there to be some discussion as to the final calculation of a FAS price?---It is not normal.

Do you say you might have but you cannot recall discussing this with him?---Correct.

Dingwall will further say that you then discussed a \$50 deduction being made from the IMO price to allow for your margin and your expenses. Did you discuss the \$50 reduction with him?---I never contacted Metro Meat

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as agent to Metro Meat. I am a principal. I take an FAS basis and from thereon I work on - - The proof is that later on I bought my own ship for the transportation of the meat and I have never acted as an agent. I have helped at some time but - -

MR McCUSKER: I am not putting it to you that you acted as an agent but did you not, in discussion with Dingwall in calculating the price, tell him and agree with him that \$50 should be taken into account to allow for your profit and expenses?---I do not recall. It is most unlikely. Unless it is applicable I would not have done it. 10

Did you discuss with Dingwall the question of a possible problem arising from the discharge rate of ships in Iran; that is the discharge of cargo alongside the wharf?---You mean the speed of discharging?

Yes?---Yes.

In respect of that did you request that a deduction from the price be made of \$30 to cover possible delays of discharge? ---We have said, when we agreed on the price - when he offered \$1405 for lambs, I went back to Tehran, I phoned Dr Boueri and I gave him \$1405 for lamb, \$1270, we calculated what should be the freight etc. and we quoted within the price of \$1850 for lamb. I told him to negotiate the price of hoggets with them - - - 20

WITNESS (Continuing): - - - hoggets with them. Then for lamb we found out that this price was not sufficient. Just explaining it, I went back to Mr Dingwall and I said that we have many problems in executing this contract. We do not know whether they are discharging us in Bandar Iman Khomeni or in Bandar Abbas. We do not know how long it would take the discharge because at that same period we had three ships queueing for live sheep and we did not know where to discharge them. We were warned even by the Iranian navy that they would not let us discharge at Bandar Abbas. The letters of credit from Iran were not opened regularly. We had many problems in this respect. The major problem was the discharging. If the ship comes and stays indefinitely the discharge will be a major problem. In this case I said that would be the major problem and I explained later on why this is the major problem. I said, "This is a major problem because we have difficulties in discharging", etc. etc. etc. so certainly I mentioned to him that the discharging was a major problem. 10 20

MR McCUSKER: Was that on 2nd July?---Yes.

You said you came back to Dingwall. Was that on 2nd July or at a later date?---I remember that on the same day we made two telephone conversations - it might be 2nd or 3rd July but most likely 2nd July. We made one conversation in which he gave the price and the second conversation in which we did not even mention hogget. I argued on lamb and he gave a discount of \$30 on lamb.

You say he gave a discount of \$30 on lamb to cover this problem that you foresaw of discharge?---I did not say that. I said he gave the discount of \$30 because we could not cope with the price of \$1405 because of the many inconveniences including the discharging of 40 days. 30

Did you at that time agree with him that if you discharged in less than 40 days the \$30 would be rebated?---No.

MR BURBIDGE: Your Honour, I object to "Did you agree with him". If my learned friend wants that part of the conversation I have no objection to him asking, "What did you say?" 40

OLNEY J: Yes. That is understood.

MR McCUSKER: Do you direct me not to ask whether he agreed?

OLNEY J: I think that the witness can give evidence of what was said on one side and what was said on the other but it is for the court to say whether there was an agreement really.

MR McCUSKER: In the legal sense, yes, sir, that is certainly the case. I find it strange, my learned friend in examination in-chief several times asked the witness what he agreed and whether he agreed, but I will put it a different way.

MR BURBIDGE: Perhaps I will not object every time, your Honour, only when it is an important aspect.

OLNEY J: I think if we can have the witness give evidence of the facts, that being the conversation, it will make it easier.

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MR McCUSKER: When you spoke to him on the second occasion - you say it was a second occasion when you rang back?---Yes.

You had discussed with your agent in Tehran the problems in respect of this price because of the difficulties that you foresaw in discharge. Is that right?---No, because of the many difficulties including the discharge.

Did you tell Mr Dingwall of those difficulties?---Yes, I must have. Everyone recognises the difficulties which are existing in Iran.

And you asked him to reduce the price by a further \$30, the price for lamb?---As far as I recall, I phoned him, I said the price for lamb is too high, I need a rebate, but about the price for hogget, it's okay. I did not argue any cent for the price of hogget. He said that he was too tied for the prices of lamb and then we agreed that he will reduce \$30 per tonne and if everything goes well with me and I end up making money in the contract we will do a refund. I asked him, "How much refund you want on the \$30?" He said, "You will do a refund of \$15 per tonne if you end up making money." I said, "Okay, Ken, I'll do that." "What are your major problems in the execution of this contract?" I explained to him the major problems - I think I have explained because this would have been normal when you argue to reduce the price - and then I said, "If the ships discharge in less than 40 days - - -"

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WITNESS (Continuing):"- - - than 40 days this will alleviate it."I explained and why I am remembering that is because although it is not a condition to the contract, I have put it myself and I said, "Ken, this will be completely to my discretion whether it is done or not, you leave it up to me." He told me, "I leave it up to you" and this is not the first time that he leave things up to me. One time he spent \$120,000 and he sent to me a letter saying, "Rachid, I leave this up to you. I know I have no right to it" and we made an arrangement. 10

MR McCUSKER: I know you cannot recall the precise words used and the precise details but are you clear that there was a second telephone call?---Yes.

Do you recall how long after the first call that was?---I do not know - if it was the same day, the next day, how was it? In the mind something comes that I could not have offered the \$1405, they could have been found too much and then I could have found I could not do them on the same telephone call. Probably, there is 20 a possibility, that while he was on the telephone I phoned Tehran on the other telephone and asked Dr Boueri what is the price. This is also a possibility.

But it is all simply a guess as to what could have happened, is it?---It is all simply a guess. It means from what my mind could help me.

Is it simply a guess, or more than that, that there was a second telephone call?---I think there was a second call but I cannot swear to it because I have the habit, sometimes, when I am discussing, because I have two telephones, 30 I could call on the other telephone Tehran and ask what is happening etc. and then, at the same time - - That is a possibility.

Would you agree then that it is no more than a possibility, you have no recollection of there being a second call. Is that correct?---I agree; it is a possibility, yes. I do not discharge it as being a fact but I cannot remember it.

Did Mr Dingwall, in the course of his discussion with you, this telephone discussion, tell you that he was leaving Australia?---Yes. He told me. 40

That he was going overseas that very day?---Yes. I called him to his home as a matter of fact.

He told you then that he was leaving that day for overseas, did he not?---He should have told me because I called him at home and he was leaving, yes. I know

that because later on Mr Blanco Villegas arrived in Australia and he did not find him.

MR McCUSKER: You say that the \$30 that you discussed with him related only to the price for lamb?---Only. We never discussed the price of hogget.

You have referred to exhibit 1, p.16 of the document. At the foot of that telex of 3rd July it is stated: "We also agree with Mr Dingwall that if vessel is discharged in less than 40 days we would pay Metro Meat a bonus which will be left to our discretion because due to difficulties in contract including big risks of slow discharging provoking delays which will not be compensated by demurrages. Mr Dingwall accepted a last minute discount on lamb prices."?---This is what we are saying. 10

The bonus you refer to there does not refer to a bonus simply on lamb, does it?---Simply on lamb, nothing else.

That is what is intended?---Yes.

Not on the hogget - - -

D78. 10.50

MR McCUSKER (Continuing): - - - the hogget?---No, no, no, no.

Why did you not say in that telex?---I said it because Mr Dingwall made a discount on lamb prices. What is the discount Mr Dingwall did? It was \$30 on lamb. Why shall I refund \$30 on hogget?

Incidentally, you were aware when that telex was sent, were you not, that Mr Dingwall by then would have left Australia - it was on 3rd July, as you understand it? ---Yes. Certainly if I knew he has left I would have been aware that he has left, yes.

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Did your company or you, whoever it may have been, require some form of document to show the IMO to establish that you had concluded a meat purchase in Australia?---No.

You did not?---No.

It was not necessary for you to have some evidence to produce to the IMO that you were able to fulfil your contract? ---For me it is not necessary. For me it is necessary to present a bank guarantee and we presented a bank guarantee unconditional for \$4 million.

Were you aware at any time of Mr Villegas approaching Mr Phillips of Metro Meat to obtain from him a telex to confirm the terms of your telex to Metro Meat?---You can ask Mr Villegas.

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You were not aware of - -?---I was aware that I have asked Mr Villegas to make sure the contract is put by writing because we presented a bank guarantee of \$4 million. Of this I am absolutely sure. As a matter of fact, I called him every day. If you read the text of the bank guarantee it means that IMO by simple request to the bank without having to give any explanation could withdraw \$4 million.

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You mentioned an approach made to you by Mr Phillips regarding the cost of freight?---Yes.

I think that appears at p.14 of the documents, a telex from Phillips?---I have the document numbered 18. Could it be this one?

Page 14?---Yes.

That, of course, is dated the same day as your telephone discussion with Mr Dingwall?---This is correct.

At the top it says, "I have received a phone call from Ken advising that the IMO has agreed to take up from you 20,000 tonnes plus or minus 10 per cent of frozen lamb and hoggets. Final price still to be negotiated."

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MR BURBIDGE: Your Honour, I assume my learned friend would have no objection to me tendering this document. Otherwise, I would object to the giving of oral evidence about the contents of a document not in evidence.

MR McCUSKER: No objection at all, sir.

OLNEY J: Can we take it that that will be put in?

MR BURBIDGE: I tender that, sir.

EXHIBIT EXHIBIT 38 Telex from Phillips dated 2.7.80.

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MR McCUSKER: The reference there to the IMO having agreed to take up 20,000 tonnes plus or minus 10 per cent was in fact the arrangement you spoke of to Mr Dingwall, was it not? Had you told Mr Dingwall on 2nd July that your contract with the IMO was for 20,000 tonnes plus or minus 10 per cent?---I recall having started with Mr Dingwall by saying, it was at his suggestion, to divide the 20,000 into 12,000 of lamb and 8000 of hogget. At the end of the day IMO wanted to have the maximum because all the contracts with IMO are 10 per cent more or less. They wanted the maximum and we agreed on the maximum, which is 10 per cent more. As a matter of fact, this telex has got an immediate reply the same day from me to Mr Phillips. On 2nd July, the same day:

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"Attention: Mr Ian Phillips

"Thanks your telex today concerning meat contract with IMO....(reads)....bank guarantee of which Mr Dingwall is aware has been submitted."

A154. 10.55

MR McCUSKER: Perhaps we should tender that, too, sir.

EXHIBIT EXHIBIT 39 Telex dated 2.7.1980.

MR McCUSKER: Going back to exhibit 38, Phillips has said at the outset of that telex that he understood you had told Dingwall that the IMO had taken up 20,000 tonnes plus or minus 10 per cent. Did you tell Dingwall that that was your contract with the IMO - 20,000 plus or minus 10 per cent?---I might have.

Mr Dingwall will say that that is what you told him and that he said that his company could supply 12,000 tonnes? ---I do not recall that. 10

And that, on that basis, Dingwall will say, you replied that that would be sufficient to fulfil your obligations with the IMO?---That would obviously have been sufficient but I do not recall that we had this conversation. On the contrary, I recall that I asked him to supply the maximum allowed in the contract and that was the reason why we sent our telex and we have their confirmation for the maximum.

Could you turn again to the contract with the IMO that you have before you, the English translation? Incidentally, that contract was not discovered by you in your affidavit of discovery, was it? 20

MR BURBIDGE: Your Honour, I do not think Mr Fares understands the mechanics of this. I concede that it was not discovered. As my learned friend knows it came to Australia with Mr Fares and a basis of confidentiality has been claimed in respect of it. I have indicated that I am content to tender the document on that confidential basis and I will do so at some appropriate moment. If now is an appropriate moment I am content to tender it on the basis discussed yesterday; namely, that its terms would be restricted to the court and those at the bar table - not for disclosure to the clients for reasons of the fact that they are an established competition. 30

OLNEY J: Yes. That is understood. I am not certain what the purpose of the question is at this stage. "You did not give discovery of it?" There may be some other significance to that question, Mr Burbidge. 40

MR BURBIDGE: In that event I will not object to it, your Honour, but if my learned friend does not object to the tender of this document I will tender it now on the basis indicated.

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MR McCUSKER: I proposed to put it forward through this witness.

OLNEY J: You did indicate yesterday that you proposed tendering the document. It is a photocopy, is it not?

MR McCUSKER: Yes. I would prefer to tender the copy that the witness has, sir.

EXHIBIT EXHIBIT 40 IMO contract, with English translation, between second plaintiff and IMO.

MR McCUSKER: You, of course, gave discovery of documents; that is, -10 you supplied the defendant, as you are aware, with a list of all documents that you had in your possession relating to the dispute between you and the defendant? ---I do not understand what the term "make discovery" means.

The document that you have there, the contract, contains some markings, does it not?---This one? Yes.

Certain parts of that document have been crossed through?---Yes.

Were you aware that that was being done and the reason for it? ---When we have given the contract there were a few things which were required by you, I think, which had been supplied to you in pieces - - -

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WITNESS (Continuing): - - - pieces and now you have asked for the rest you are having the rest.

MR McCUSKER: You have been in court and heard your counsel say that there were parts of that document that were of a commercially sensitive nature?---I heard my counsel saying that, yes.

There are deletions, for example, as to the delivery schedule. That was deleted from the copy, I think you are aware, supplied to the defendant. Do you see that?---Yes. Well, I do not know. Here they are but there are no dates on this one. 10

Perhaps you could look at this, which is a copy supplied to us, an extract when we sought the contract from that full contract that you have there. You will see that the delivery dates have been deleted, among other things, from the full copy?---Maybe this is all that you wanted from the contract.

I assure you it is not?---I do not know.

What commercial sensitivity was there about the delivery dates? ---I did not do myself the pleading, I do not know. 20 Anyhow, for instance, about one of your questions yesterday, I see that the period of expiry of the contract was 31.4.59. The Iranian year always starts 21st March so "4" means it is the end of the fourth month - July - which is the end of July, the expiry. This answers one of your questions yesterday, sir, when you asked me when you wanted the delivery before the end of July, because I do not have all the text of all the contracts I have made here.

The full contract, of which we were not supplied a copy, contains the delivery schedule, does it not? Look to the second page of that contract?---Yes, correct. 30

You will see in that document which was not supplied to us that the delivery schedule provides for one delivery of 2000 and then four of 4000 tonnes each?---That is correct.

MR BURBIDGE: Although this matter is not especially sensitive in itself, with respect, there is not much point in me taking the objection to the production of confidential material if my learned friend is then going to read it onto the record in the presence of his client. I am not concerned about that immediate aspect but I am concerned that the very effect of the order made by your Honour as to the limited basis of tender of the document would be avoided if he is permitted simply to read it out aloud in this fashion. 40

MR McCUSKER: I agree with that, sir, but the witness has not explained why that is commercially sensitive and I challenge the claim that it is commercially sensitive and invite your Honour to look at the contract and judge - -

OLNEY J: The particular matter which is being asked about at the moment was of course raised in evidence yesterday and it seems, not having seen the document, the tonnages mentioned there added up to a different figure from 20,000. That is about the only conclusion I could come to. I suppose now that the document is in evidence there ought to be some decision as to which parts of it are commercially sensitive - - - 10

OLNEY J. (Continuing): - - - commercially sensitive and should be restricted.

MR McCUSKER: That is why I was taking this witness through that area.

MR BURBIDGE: Might I perhaps hand a copy to your Honour immediately as a starting point and indicate that I have not made any objections based on relevance; indeed, so far as questions of tonnage are concerned, I have no objection. That was a part of the material handed to my learned friend originally, as was the price. So far as the delivery dates are concerned I, for my part, do not see and have no instructions that it is commercially sensitive and, accordingly, I have made no objection in relation to that aspect of the matter imagining that in some way it may be relevant to some issue. However, so far as the balance of the matters are concerned, the place of delivery, again, is a matter of no commercial sensitivity but, with respect, there is no allegation contained in the pleadings which would make anything relevant other than that which we have produced; namely, the quantities and the price. However, if my learned friend now seeks to know about the delivery schedules then I have no objection to that although, myself, at least at this stage, am not aware of its relevance. I am concerned though if he is going to work his way right through the whole document. That is really what I am saying. 10 20

MR McCUSKER: Clearly, your Honour, I was not working my way through. I had gone right to one particular clause and I think your Honour should see the copy of the contract which is before the witness and the extracts which were provided to us on the basis that the balance was commercially sensitive. 30

MR BURBIDGE: I do not mind that being put in and comment made about it in due course.

MR McCUSKER: I would invite your Honour to see that and perhaps rule. If my learned friend is objecting to a cross-examination on this particular clause, and I am not sure that he was, then I think your Honour should see the clause and judge whether it is proper for me to question on these lines. 40

MR BURBIDGE: I should make it plain that I am not objecting to the particular clause but I am asking my learned friend to bear in mind, as it were, before he moves onto another topic, the nature of the limited usage.

OLNEY J: Perhaps I should see the documents now.

MR BURBIDGE: Your Honour, could I just indicate that the nature of the sensitivity is simply this; where one dealer is aware of the terms on which a previous contract has been made with the Iran Meat Organisation, it is open to that dealer in subsequent negotiations with the Iranian Meat Organisation to say such things as, "You were prepared to deal with our opponent on such and such a basis. Is there any reason why we, for our part, cannot have the same term?" It is, of course, in the accumulation of the terms that the overall contract becomes an entity - - - 10

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MR BURBIDGE (Continuing): - - - an entity. Although any one term in itself could arguably have no great significance, particularly after the event, the importance of it lies in the knowledge that is gained by the opposition as to the terms upon which the IMO was prepared to deal with a competitor, and that is the nature of the claim we make in respect of it.

OLNEY J: Let us just try and work out what it is about this contract that is relevant to the proceedings. 10

MR McCUSKER: May I assist your Honour in that regard? At p.2 of the pleadings in sub-para. (g) it sets out what is alleged to have been a term as to delivery - 2000 to 3000 tonnes and 4000 to 4500 tonnes - and lest your Honour should be under any misapprehension and consider that the defendant approaches this on the basis that the telexes in effect rule everything and override the terms of the oral contract, evidence will be given going to those telexes to explain to your Honour exactly how they came about when Dingwall was away from the country. 20

OLNEY J: Would it be right to say that the plaintiff has pleaded those terms consistently with exhibit 1? What the plaintiff says in the pleading is the same as the plaintiff says in exhibit 1?

MR McCUSKER: That is right, sir.

OLNEY J: For what that is right.

MR McCUSKER: Which we do not accept as being the terms of the contract.

OLNEY J: You say it was different from that. You pleaded to the statement of claim - - 30

MR McCUSKER: Page 9 of the pleadings, sir, sub-para. (iii).

OLNEY J: You say it was different from that. In effect, you give certain tonnages and dates as to 1, 2 and 3, and then as to 4 you say "Thereafter, two further shipments of 4000 tonnes each".

MR McCUSKER: Yes, sir, and it is both relevant directly to the issue and relevant to credibility.

OLNEY J: You say, of course, you raise the issue, the contract was for 18,000 to be delivered in this manner; the plaintiff says it was 20,000 to be delivered in that manner. That is an issue between you? 40

MR McCUSKER: Yes, it is, sir. The plaintiff of course does not say it is 20,000; the plaintiff says it is 22,000.

OLNEY J: Whatever it is - 22,000.

MR McCUSKER: As I think your Honour will appreciate, looking at the contract, the contract and the delivery schedule have some bearing on that issue.

OLNEY J: As has been explained to me so far, the contract that this witness had or his company had with IMO was to supply 20,000 tonnes under which by usage or some provision, and I am not sure yet, he could supply 22,000.

MR McCUSKER: It was because the contract provided for plus or minus 10 per cent. I put to the witness that Dingwall will say - or I propose to put to the witness that Dingwall will say - that in the discussion about the plus or minus 10 per cent it was agreed that it would be 18,000 because that was what Metro was proposing to supply to increase its offer from 15,000 to 18,000 and he was told by the witness that that would suffice to satisfy the obligations of Rachid Fares under the contract. That has a direct relevance to the delivery schedule, and perhaps I may be permitted to ask further questions as to how that delivery schedule came about. 10 20

OLNEY J: How the delivery schedule in this contract came about?

MR McCUSKER: Yes - a delivery schedule, sir, which for reasons which escape me was not supplied as part of the extracts from the contract which were produced last week to the defendants.

OLNEY J: On your own pleading, Mr McCusker, you say it was - - -

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OLNEY J. (Continuing): - - - it was 2000 end of August, 4000 end September, 4000 end December 1979 and two other at 4000.

MR McCUSKER: That is a total of 18,000, sir.

OLNEY J: You say that was the agreement?

MR McCUSKER: Yes.

OLNEY J: And you seek to refer to this contract in some way to say that because there was some agreement between this witness or his company and IMO - - Are you saying that the agreement was, the terms would be the same as in his contract? 10

MR McCUSKER: No, your Honour. The ruling I seek is whether or not I am to be permitted to cross-examine on that part of the document. I am not sure whether my learned friend objects to it.

OLNEY J: He has said he is not specifically objecting so perhaps we should get on and see where it will lead us to.

MR McCUSKER: I hope it will emerge in the course of cross-examination, sir.

OLNEY J: You want the witness to see the document, do you? 20

MR McCUSKER: I would also ask that that extract which was supplied by the solicitors for the plaintiffs to the solicitors for the defendant be tendered as an exhibit as well.

EXHIBIT EXHIBIT 41 Extract of contract.

MR McCUSKER: Mr Fares, you have there exhibit 41 which is, as I think you are aware, an extract from that contract supplied on your behalf by your solicitors to the defendant's solicitors?---Yes.

You will see that extract does not contain by any means all of the terms of the contract which is exhibit 40, the one right next to your hand?---Yes. 30

I think, on your instructions, certain parts of that contract were excised on the basis that they were commercially sensitive?---It is not so. I have been requested to send a contract when I was in London. I said that I did not see why I should exhibit my own contract with Iran which is irrelevant for Metro Meat and I suggested that I send a telex from the bank to confirm that we had a contract and we had a letter of credit. Then we came to Australia and I said, "This

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is the contract." I have not made the pleading myself.

MR McCUSKER: Do you consider that any part of that contract is commercially sensitive, that you should not allow the defendant to be aware of its terms?---Everything in a contract is sensitive although it is irrelevant at this stage because Mr Dingwall, in February or in early March, has seen this contract in Iran. You wanted to know what is sensitive, for instance, about the schedule of deliveries.

10

Yes, please?---Normally - and I have to explain it - when I buy from a supplier on FAS basis and I sell to a buyer on a CIF basis, I always try to protect myself especially when I give a bank guarantee for \$4 million, that should there be any problem of supply I will not be caught by it through my bank guarantee. Although the contract foreseen for about 12,000 tonnes for lamb and about 8000 tonnes for hogget, I always take the maximum margin from the supplier, FAS, and I always tend to bind myself with the buyer with the minimum. Anyone else who would have made a contract with Iran would have put in this clause, everything to reflect the 20,000. You have to be clever in order to put the clause which I have put for IMO because according to this clause even if I come below my commitments with IMO they cannot - - They can, at any moment they want, seize my bank guarantee - - -

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WITNESS (Continuing): - - - bank guarantee but according to that way of putting the programme of deliveries they cannot seize my bank guarantee logically. This is one way of putting it and I am sure somebody else would not have put it that way, somebody else would have completed it to be 20,000 tonnes, and if you would have completed it to be 20,000 tonnes it will be more liable to the bank guarantee. I do not see why I should explain the finesse of a commercial operation when all we are talking about is how much I have agreed with Metro Meat for a purchase on an FAS basis. 10

MR McCUSKER: How did it come about that a figure of 2000 tonnes was inserted in the delivery schedule as being the amount for the first shipment?---Because we agreed with Iran that they will be contented with 2000 but we had taken a ship that could lift 3800 or 3700 or 3900, so we wanted to have less dead freight and we were insisting with the supplier to give us as much as possible for the first shipment - not that it was vital to have that but it is vital for the economy of the operation. 20

Did you discuss with Mr Dingwall the quantity of each shipment and did you not, in the course of that discussion, agree that the first shipment should be 2000 tonnes? ---We agreed that the first shipment will be the maximum possible. We had the confirmation of Mr Phillips and later on we had the confirmation of Mr Dingwall - -

I am sorry, just stick to what you discussed with Mr Dingwall on 2nd July. In discussing with him the terms of the contract did you agree with him that the first shipment should be 2000 tonnes? "Yes" or "no"?---I do not recall that but if you will see the telexes, it is all written about our agreement, how much will be the first shipment. I do not recall the schedule of delivery in my particular conversation on 2nd July. 30

I think you have agreed that you told Dingwall that your contract with the IMO was for 20,000 tonnes plus or minus 10 per cent. Did you tell that to Dingwall or not? ---Normally when you buy you say 12,000 and 8000 - this is 20,000. Then I must have said "It is plus or minus 10 per cent" - I must have said - and then I must have asked him to make the maximum and he must have agreed because we have put it. 40

You say "he must have"?---I think - I cannot recall those details.

Mr Dingwall will say, and I would ask you to comment on this, that when you told him the contract was for 20,000 tonnes plus or minus 10 per cent he said that his company could supply 18,000 tonnes?---I cannot recall that.

MR McCUSKER: Did you discuss with him the proposed schedule of delivery?---I must have but I do not recall. We must have because we have put it later on. I am sure we have because we must have said it when we say "We want so much, so much". When you discuss normally you discuss "When can you supply?" and then Metro Meat would say, "We can supply between such a date and such a date". They might have said, "We can supply between the end of August and, for instance, April" or something like that.

10

Your answer is that you must have discussed it with him and you have given the reason?---My answer is that I do not recall; secondly, we might have discussed it. We should have discussed it because I have put it on my telex.

The copy of the contract that you have there, the schedule of delivery dates, shows the amounts - 2000 plus 4000 tonnes - but it does not show the dates themselves. Is there a copy of a contract which shows the dates? ---No. Normally the contract is done with IMO, at least the ones I do, and this is again a commercial finesse. When we do the contract - - -

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WITNESS (Continuing): - - - the contract we leave to ourselves the possibility of discussing the schedule of delivery at a later stage because we leave ourselves a margin to organise the ships because, as you would imagine, I would not charter a vessel before signing a contract. I sign a contract. I present my bank guarantee. I wait for the letter of credit and then I pay the millions that I have to pay to charter a vessel.

MR McCUSKER: Having spoken to Dingwall, did you contact Mr Boueri in order to tell him what quantities Metro were prepared to supply?---Repeat it, please. 10

Having spoken to Dingwall on 2nd July, did you contact Dr Boueri to tell him what quantities Metro were prepared to supply?---I must have.

Did you tell Dr Boueri that Metro were prepared to supply 2000 tonnes first shipment and four of 4000 tonnes?---I do not recall that. I do not recall particulars.

They, of course, are particulars that appear in the schedule. Had they been agreed before you spoke to Dingwall or after you spoke to Dingwall? I mean agreed with the IMO?---This schedule with IMO? 20

Yes?---The schedule should have been agreed after we spoke with Mr Dingwall or it should have been proposed or - - Normally if I was doing now a new contract I would, for instances, ask my supplier on a FAS basis, "When can you produce the product?" He would say, "I can produce from that date to that date, the beginning would be difficult because it is not yet the season, for instance, but then later on it will be more than that" and then I take my precautions with the company to whom I am supplying in order to take it within the spirit of what would have been the indication in the country of supply. 30

From that is it probable that you spoke to Dr Boueri about the schedule of deliveries after you had discussed that with Dingwall?---Or at the same time or before but most probably at the same time because we had waited to have the confirmation of Mr Dingwall and when we had it immediately we have sent the bank guarantee. 40

When you had Mr Dingwall's confirmation that his company could supply 2000 tonnes plus four at 4000 tonnes, did you not then tell Mr Boueri so that he could put that information in the contract with the IMO?---I did not say, when I get the confirmation of Mr Dingwall that he can supply 2000 in the first shipment. I said, we might

have understood from Mr Dingwall, because I cannot recall my conversation with him, that in the beginning it would be difficult to produce and then it would be easier, then we adjusted consequently like this but it is my belief and I think that Mr Dingwall mentioned the 2000 and mentioned that he could help to make it more than that and that is the reason why we have put 2000 here and that is the reason why we have put 2000 in the contract.

MR McCUSKER: Can I just clarify that? You say, that is the reason I put 2000 here; you mean that is the reason you put 2000 in the delivery schedule in the IMO contract?---Yes; that must be the reason why. I cannot now recollect the situation in which I have made this contract exactly and accurately but it might be like this. 10

You mentioned yesterday that you had become aware, I think, by mid-January - and correct me if I am wrong - that Metro was negotiating for a contract directly with the IMO?---I had, in the meantime, telephoned Tehran and asked them when they had informed me, if they recall etc., about the first - - They told me the second half of January so the second half of January, as far as I can recollect, they had informed me from Tehran that a Mr Rahjah had presented, had contacted, IMO in order to tell them that they can offer meat on behalf of Oceanic and Metro Meat - - - 20

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WITNESS (Continuing): - - - and Metro Meat.

MR McCUSKER: You were informed of that, you say, some time in the second half of January?---I do not recall but I know that by the time I received the telex you kindly mentioned yesterday, because this telex did not come to me, it came to Australia, and it has been answered by Captain Mata, because I have been looking at this telex, so it is not a telex which I have answered to Mr Dingwall, it has been answered by Captain Mata - by that time and according to all the precedents which 10 we have had as difficulties in the execution of the contract with Metro Meat, and the information I am receiving from Tehran - it was evident to me that the intention was not the political situation, the intention was that Metro Meat did not want to complete the contract.

That was what you concluded by mid-January or towards the end of January?---This was my feeling.

That was your feeling?---Yes.

20

That feeling was based on the fact that you had learned of negotiations taking place in Iran?---On the basis of all the precedents of the contract plus that I have learned that they were negotiating directly with Iran.

I think you said further that in February you learned that Mr Dingwall had learned of the contents of your contract with the IMO?---When you have been asking me earlier I said I think that Mr Dingwall, when he was visiting Tehran in February, personally signed the contract of 30 70,000 which was done between Oceanic and IMO and he might have seen this contract on the basis of which a new idea came to him for this pleading.

Were you, in February, informed that Mr Dingwall had become aware of the term of your contract with the IMO?---No. I was aware in February that Mr Dingwall was there and that Mr Rahjah was with him all the time, and Mr Rahjah is in good connection with the meat organisation so there is nothing else I can assume.

40

Did you conclude, Mr Fares, in February - did you come to the conclusion - that Mr Dingwall had learned of the contract prices between you and the IMO for this contract?---If he had seen the contract - - this is not what in February was worrying me. In February was worrying me to continue the execution.

We will come to that in a moment but in February did you come to a conclusion that Dingwall had become aware of the actual contract prices between you and the IMO? ---No.

MR McCUSKER: At what time did you reach that conclusion?

---This conclusion was irrelevant to me. Now I only came to that indication when you were asking me about this and I heard his Honour saying that yourself you have put 4000 tonnes to me. It was evident that if he did not see this contract he must have seen its equivalent in Tehran.

Having concluded, I think, that Metro Meat - having concluded towards the end of January or in the second half of January - did not want to go ahead with their contract with you, did you ask Mr Dingwall whether that was so?---No.

10

You had had in the past a very cordial and close relationship, I think?---I remember once I tried to contact Mr Dingwall. I did not find him and I did not attempt again because from all the information I was receiving from Australia it was obvious that I do not think I should myself every time go back to Mr Dingwall. The move I made in the beginning of January was a move which was not normal. I did it because I wanted to eliminate all doubts and we reached that agreement, and after reaching this agreement then it has not been executed.

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You say you reached an agreement with him in January as to the supply of the balance of the meat?---Yes, the balance of the meat and on the basis of that we agreed to pay \$125 per tonne for the 843 tonnes of lambs from the West Australian Meat Board - - -

WITNESS (Continuing): - - - Meat Board.

MR McCUSKER: Incidentally, under the terms of the contract between Metro and yourself, you say it was 2000 to 3000 tonnes to be delivered at the end of August/beginning of September 1979?---Yes; and that they will do all the maximum in order to improve on that quantity.

Were you informed that Mr Dingwall had returned to Australia on 20th August 1979?---If I was informed that he returned to Australia?

Yes?---I know that he visited me some time in August, by the end of August probably, and for that I arranged for Mr Blanco Villegas to be with us in London. We had as usual, as for everything concerning meat, concerning live sheep, we had a meeting, the three of us, in London or at Mallards, I do not remember. However, Mr Dingwall visited us and he assured us that he will do his best to load the maximum quantity with the first shipment and we spoke about the live sheep etc. So I might have known that he was on his way to Australia. 10

Can I refer you to the telex, 3rd September 1979, p.55? That was a telex sent to you on 3rd September 1979 by Mr Dingwall?---That is correct. 20

You recall receiving that on or about that date?---A little later because I was in the Mediterranean because every year between July and October I am in the Mediterranean but that year I think we went back to England or something to meet Mr Dingwall. When I received this telex I recall I was in Spain, in Marbella, and Mr Blanco Villegas was with me.

To take you to the last two paragraphs of that telex, he has listed a number of matters that he said were of concern to him in the earlier part and he concludes: 30

"I regret having to take this action because I realise it will cause some inconvenience. However, if this results in everyone knowing where they stand it can only be for everyone's benefit in the longer term. I believe that this can only be settled by the three of us meeting in Adelaide as quickly as possible because until all the matters are cleared up and we have necessary payment documents, the production, if any, will be diverted to other sales that are available." 40

OLNEY J: Is this document being tendered, Mr McCusker?

MR McCUSKER: Yes; it might be convenient now, sir.

EXHIBIT EXHIBIT 42 Telex dated 3rd September 1979
p.55 and p.56.

MR McCUSKER: I will take you to the contents of that
telex?---Yes.

The first complaint that Mr Dingwall was making was in
relation to the letter of credit documents, was
it not, at that time, the failure to arrange for
the necessary letter of credit documents?---This
is what Mr Dingwall was saying. 10

Yes; was that correct, that it had not been arranged at that
time?---The letter of credit was arranged but Metro
Meat did not want the letter of credit the way it
has been arranged - - -

WITNESS (Continuing): - - - been arranged because Fares Rural wanted to open the letter of credit for them, Metro Meat wanted the letter of credit directly from Switzerland. Fares Rural wanted to protect themselves for the live sheep, Metro Meat wanted to protect themselves for the live sheep for the unions. All over this telex you see that the main worry of Mr Dingwall is not the letter of credit, it is the fact that Fares Rural was merely contacting Bennetts Farmers in the south and he had agreed 10 days ago with Mr Blanco Villegas in London that Fares Rural would not load from South Australia, that Metro Meat would load sheep from South Australia. All over this telex you see that the worry of Mr Dingwall was not at all the matter of the meat but he raised the issue of the meat because he was nervous for the matter of the live sheep and when we met in London - Mr Blanco Villegas, Mr Dingwall and myself - we discussed everything concerning the deliveries of the meat. Mr Dingwall had given his instructions to Mr Phillips to send the telex to Fares Rural, they were trying to make the maximum possible quantities for the first shipment, and all the worries of Mr Dingwall were why on earth - he does not say it like this, I can read what he says - -

MR McCUSKER: Could I take you to - -

MR BURBIDGE: I would ask that the answer be completed.

MR McCUSKER: He is not answering my question.

MR BURBIDGE: Perhaps you should have let him.

OLNEY J: I am afraid that the answer has been so long that I have forgotten the question.

MR McCUSKER: The question was whether there was a complaint about the letters of credit and I think the answer was that, yes, there was, but there was a lot of other material too.

OLNEY J: Yes. Go ahead, Mr McCusker.

MR McCUSKER: Could I take you to another part of the telex, Mr Fares? At paras 7 and following he raised the question of prices being paid for stock - para. 7 of the telex?---"I also advised him that lamb and hogget prices on the hoof were well above our break even level and the prices negotiated with you and the West Australian Lamb Board was the only buyer holding the market - -" Yes.

Yes, and following that: "I have been checking this out for two weeks since I returned from overseas and on Friday information was supplied to me from a member of the

lamb board that the West Australian Lamb Board has two prices in its contract - the first shipment at US\$1862.50 CAF and the balance at US\$1925 CAF." He goes on to say: "The first figure agrees with the figure you quoted me at the time of our negotiation and the second figure is the figure I reported to you that had been supplied to me by a person in the meat industry who happened to be on the same plane as McSporran on his way back from Tehran." McSporran was the chairman of the lamb board, I think?---Yes.

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MR McCUSKER: "You assured me that this was not the negotiated price as you have seen the contract." Just pausing there, he refers in that telex to a figure that you had quoted him as being the figure that the lamb board had negotiated for lamb with the IMO - \$1862.50. He says you quoted that figure to him. Looking at that telex, do you agree that that was the figure that you had quoted to him at the time of your negotiations?---I do not recall that. As I said, I cannot recall but that has nothing to do with the agreement on the FAS price.

20

Perhaps it is a matter of comment but it is clear to you from that telex that there are a number of matters he is complaining about, there concluding by requesting that you meet to discuss these various matters? ---He is here complaining that I was not aware of the prices of Iran and he is saying "I do not understand how you are not fully informed on this contract or that the first shipment price was low for lambs" and he says "If you sold at \$1840 - -" This figure is very close to the figure we sold at but it is not correct. We sold at \$1850.

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He says in that telex, para. 10: "If you sold at US\$1840 CAF it can only mean that you sold lambs and hoggets at an all in price of this figure - - -"

MR McCUSKER (Continuing):"- - - of this figure; if not Jean Boueri has done a bad deal compared with McSporran which I would greatly doubt is the case."?---That means that our company is not as clever as the Lamb Board. That is all it means.

He says there, "If you sold at US\$1840". Did you do anything about this telex? As a result of receiving this telex, did you contact Mr Dingwall?---Immediately, and I told him, we will stop every work with Metro Meat, live sheep and meat, if he follows up this matter and we agreed then amicably that we open the letter of credit and we opened it the next day from Switzerland. 10

Mr Dingwall will say that you called him a day or so after that telex was sent and that you told him that the figures you had quoted to him on 2nd July, including the figure of US\$1840 per tonne as being your price with IMO, were correct. Did you ring him?---I rang Mr Dingwall.

Did you talk to him about what he said in para.10 of that telex? Did you raise that matter with him?---I do not recall having spoken about a given paragraph. I recall I have told Mr Dingwall, I assure you and Mr Blanco Villegas was with me, that we had no intention to take live sheep from South Australia because the main concern was taking live sheep from South Australia, but I am very cross that this situation is taken and if this is the position of Metro Meat we are going to stop all our relations with Metro Meat. I remember that my sister, who was with us on the yacht, came down and was saying, "Why were you shouting so much?" 20 30
I remember having become very angry when I received - -

Just a moment; I am not asking for your state of mind at the moment but simply, paragraph 10 of that telex says to you, if you sold at US\$1840 CAF, it can only mean that you sold lambs and hoggets at an all-in price of this figure. If not Jean Boueri has done a bad deal. He was putting it to you, as you saw it, that the price you had stated to him as being your CAF price could not be correct?---It is not the business of Metro Meat at which price I have sold. They are not concerned with me at which price I have sold. 40
If I have given to him the price of lamb, which I do not recall, I do not see the relevance of it.

You certainly did not reply to him by telex. You did telephone him?---Yes.

Did you say anything about para.10? I know you said other things but did you say to him, for example, "Where

did you get this figure of \$1840?"?---I do not recall what I have said by telephone conversation because the main importance in that telephone conversation was the live sheep.

MR McCUSKER: Did not that paragraph, as you saw it at the time, imply that he was accusing you of having given him the wrong price?---No; because I was not his partner in Iran and I am my own principal and whatever price I sell to Iran is the concern of no-one.

Mr Dingwall will say that you telephoned him, you spoke to him about that matter in para.10 and you re-assured him that that figure was the correct figure, \$1840?---This is incorrect because the reason of my telephone conversation at that time was only to tranquillize him that we are not taking sheep from South Australia and to make a concession to him that the letter of credit will be opened from Switzerland instead of being opened from Western Australia. 10

In para.11 he says: "Additionally, since my return, I have the file and the quotes on shipping and see that we are offered the Almeria Star at \$335 liner terms both ends for the first shipment yet allowance in the contract was set at \$375 per tonne." 20

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MR McCUSKER (Continuing): Do you see that?---Yes, I see it.

Did you discuss that with him?---No. Each time we only sent a polite telex to Mr Phillips to tell him not to interfere in our business.

He was saying there to you directly that in the contract an allowance of \$375 per tonne was made for the shipping costs, was he not? That is clear enough.

MR BUREIDGE: Your Honour, with respect, these clearly are matters of interpretation. I suppose it is open to my learned friend to ask the witness his opinion of the interpretation but, with respect, they are boardering on the legal aspects of the matter to some extent. 10

MR McCUSKER: I know every time I get to a sensitive area, sir, my learned friend objects.

MR BURBIDGE: That is not so.

OLNEY J: I think whatever the witness says about para. 11, the words are there.

MR McCUSKER: Did you respond to para. 11 either by telex or by telephoning Mr Dingwall in any way?---I did not respond by telex and I do not recall my exact telephone conversation with him. All I can recall is that his main concern was the live sheep. Why do you not read the whole telex, please? 20

We will come to do that, but I am dealing here with para. 11. I think there is some other part of the telex which deals with the question of shipping costs, freight costs?---And with the letters of credit.

You tell us?---Yes.

He is saying there, and I will quote it word for word: "Yet allowance in the contract was set at \$375 per tonne" - that is the contract, as you understood it surely, between you and Metro Meat?---Metro Meat did not interfere in my chartering vessels. 30

I know that but can you suggest why he was saying that to you at that time?---Because Metro Meat always they wanted to try what was happening in other matters but it is completely irrelevant from our contract.

Was it not the truth that an allowance was set in the contract between you and Dingwall on 2nd July at \$375 a tonne for freight?---No. 40

Did you refute that particular statement when you spoke to Mr Dingwall? Did you say that was not so or did you telex him to say that was not so?

MR BURBIDGE: I do object to this, your Honour, on the basis of its relevance. As I understand my learned friend's case, the allowance was \$385 not \$375, and I refer your Honour to p.24 of the book of pleadings. It is right at the bottom of the page. It is a request for particulars and it is said to be \$385 and not \$375 which appears in the telex.

OLNEY J: What is said in the actual defence?

MR BURBIDGE: \$375 in this September telex, your Honour. In the defence itself there is only a contract conglomerate figure given of \$465 which is said to be made up, as I gather from the answers, of \$385 plus \$50 plus \$30 which is said to be the bonus. The \$50 is said to be the profit margin for Mr Fares, including his expenses, and \$385 is said to be the figure for freight, which makes it up to \$465.

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OLNEY J: Thank you, Mr Burbidge. I think myself that the question is probably permissible on the basis that - - -

OLNEY J. (Continuing): - - - the basis that Dingwall was making an assertion that there was a contract in which some allowance was made for freight and I suppose it is a matter of comment and a question of credibility if, at one time he was saying it was one figure and at another time he was saying it was another figure. On the basis that the defendant is saying that there was a contract which had a formula, then I suppose the questioning is admissible.

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MR McCUSKER: That is the basis on which I would proceed, sir.

TO WITNESS: Perhaps just for the record I should put it to you that Mr Dingwall will say that the actual agreement on 2nd July involved an allowance of \$385 for freight. Was that allowance made in negotiating your contract with Dingwall or, indeed, was any allowance made for freight at that time? ---I only negotiated FAS prices.

To answer the question, did you or did you not agree with Dingwall that an allowance should be made for freight when negotiating the price?---I do not recall that. I do not have to. I was only negotiating FAS prices.

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You would say then that para.11 and the point he was making there had nothing to do with your contract with Metro Meat?---Absolutely, because maybe here Mr Dingwall is referring to my contract with Iran, that I have allowed so much with my contract with Iran. That is his assessment. I do not have even to answer him because my contract with Iran belongs to me.

Do you say that you thought that para.11 simply referred to your contract with Iran?---Now I am trying to think. At that moment, reading the whole telex and being on vacation, you only think what you would think when you read the whole telex. If you read the whole telex you will see that the content is Metro Meat worried that our office in Australia is interfering on the live sheep and that is why they are trying to jeopardize the operation of meat and they say that the letter of credit, they will never receive it from Western Australia because Western Australia want to protect themselves against the unions and Metro Meat do not want to give them this opportunity and they make another suggestion which is irrelevant. They said they wanted their letter of credit from Switzerland. So after my discussion with Mr Dingwall that day by telephone from Spain we opened a letter of credit for him from Switzerland. We asked Fares Rural to change the policy of opening directly and open it from Switzerland. That was all the relevance of this telex for us at that stage.

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MR McCUSKER: The letter of credit which was opened was by order of Rachid Fares Enterprises, was it not?---By order of Fares Rural.

Will you look at p.57?---Yes.

"By order of Rachid Fares Enterprises in favour of Metro Meat"?---If we read higher it says, "At the request of Fares Rural Pty Ltd, Fremantle, we hereby open our irrevocable letter of credit number"so and so as follows. "By order of Rachid Fares" etc. This is sent from the Continental Bank to the Bank of Adelaide. 10

Who was responsible on the letter of credit?---Sorry?

Who was the responsible party under the letter of credit?---Rachid Fares Enterprises.

And did not Mr Dingwall tell you that the suggested introduction of Fares Rural was not acceptable to him?---Yes. That is why we opened it. We made a concession on this point.

In the telex you mentioned a little earlier about the question of Metro wanting protection from the unions, I think you said?---When there is export of live sheep the unions of the freezing works, they want to impose an export of meat - sometimes, not all the time - so as we have been taking all our supply of live sheep from Metro Meat in the past - - - 20

WITNESS (Continuing): - - - in the past and as since the incorporation of Fares Rural in Western Australia in agreement with Metro Meat we started making our own supply of live sheep through Fares Rural in Western Australia, Metro Meat wanted to make sure that we leave the supply of live sheep from South Australia with Metro Meat, and this is what we agreed. The contract which has been taken for meat, it was obvious that a contract has to be supplied by Fares Rural, but Metro Meat did not understand it that way and we gave in at this point, we accepted that he receives the letter of credit instead of from Fares Rural from Switzerland, and we have done it. If you see the date, it is 4th September. Where it is I do not know. There is a point on that - probably 4th September - so the day he has sent this telex to London it has been communicated to me to Marbella and the letter of credit was opened on 4th September from Switzerland.

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MR McCUSKER: Was not the position that it was suggested to Metro that they should show as the exporter Fares Rural and Metro refused to agree to that? ---Metro refused. That is why we accepted to do that.

And insisted that its contract was with you. That is what Mr Dingwall told you, is it not?---What he feels but - -

MR BURBIDGE: When my friend says "with you" I wonder would he make it clear what he means.

MR McCUSKER: With Rachid Fares Enterprises, which I think is you individually, is it not?---Yes, that is correct. I was referring that if Mr Dingwall was feeling that his contract was with Rachid Fares Enterprises that is his own feeling, but when Fares Rural does a contract through one of its directors I think it is the privilege of Fares Rural to say who has done the contract.

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Did you make any response to Mr Dingwall's complaint or statement about your having quoted to him a lamb board figure which he had found was not the figure applicable to all purchases from the lamb board?---I am not the agent of Mr Dingwall. I might have quoted a figure, he might have asked me for an information, I might have had the information to help him from Tehran and I might have had the wrong information so it is completely irrelevant. It means I am a principal and if I helped in some way - -

Do you say that when you telephoned Mr Dingwall in response to this telex you were angry and showed anger?---I regret

sometimes I get angry.

MR McCUSKER: How long did the conversation, this angry conversation that you had, last? Was it a lengthy one or a fairly short one? I would not hold you to minutes? ---Well, it was certainly more than a minute because we agreed on that telephone conversation everything went okay and that is the proof why we opened the letter of credit immediately.

When you spoke to him by telephone did you have the telex with you and did you go through the telex points with Mr Dingwall?---No. We only phoned and our major conversation on that telephone was that he agreed with Mr Blanco Villegas that we would interfere with the live sheep in South Australia and why Captain Mata is interfering in the live sheep in South Australia. We told him, "We respect our engagements. Captain Mata will not interfere with the live sheep in Southern Australia. You will keep supplying these live sheep from Southern Australia." He said, "I do not accept the letter of credit from inside, I want to be the exporter." "Okay, do not worry, Ken, you will be the exporter" but we do not want to start the contract with a nervous situation like this. I think that in his telex he has been more nervous than I have been in my telephone conversation.

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In relation to paras 8, 9, 10 and 11 of that telex, did you discuss anything at all that you can recall?---I do not recall because they are completely irrelevant.

I put it to you, in fact Mr Dingwall will say and I would like you to comment, that the conversation was fairly brief and fairly amicable - - -

MR McCUSKER (Continuing): - - - fairly amicable?---At the beginning it was not amicable at all because I was nervous. You get nervous with somebody whom you trust. It means you can get nervous with your brother, you keep amicable to a certain point and then you agree.

He will say that in the course of that discussion you re-assured him that the prices you had quoted to him on 2nd July were correct; that is, the Lamb Board prices and the price you had with the IMO. You re-assured him that they were correct?---I repeat that our conversation was mainly based on the concern of Metro Meat for the live sheep and for the letter of credit, where it has to be opened. The other details, in that conversation, they were irrelevant. That means I do not recall any one of them, the other details. It means I would not give them any relevance. 10

Are you saying then that those points he made in the telex about prices were simply not answered by you at all? ---I did not say that. I said I did not recall what I answered in that time but they are certainly not to be interpreted accordingly to my contract with Metro Meat. It means I have no contract with Metro Meat to be their agent or to work backward a price of Iran in order to erect a price FAS. 20

The first shipment went by the Almeria Star?---I think so. We have only used two vessels, the Almeria Star and my vessel.

The Almeria Star was the only one used for this contract for the three shipments?---Yes; for three shipments with Metro Meat. 30

You contend that the agreement reached on 2nd July with Dingwall was that the meat would be delivered in such a way that there could be consecutive voyages of the Almeria Star. That was the original agreement?---Yes; or any other ship.

Yes; consecutive voyages of a ship, I should say, but the ship you had in contemplation was the Almeria Star, was it not?---Yes, because I usually take my ships from the Blue Star. 40

Did you, in fact, charter the Almeria Star at the outset for consecutive voyages?---That is a matter of memory. I think we took the Almeria Star for three voyages. Normally, to protect myself, I always take for one voyage and I take an option for other voyages. I do not know how I did operate on that occasion. We have an agent in England who does this for us but

probably - because we always take precautions because when you charter a vessel for several voyages you have to pay for several voyages - I cannot swear on it, we have taken the Almeria for one voyage and then, when we were sure of the contract, we could have taken an option for two more voyages, then an option for some other voyages. Securing the vessels was something we were always doing because, I repeat, this is only 20,000 tonnes but we are dealing with hundreds of thousands of tonnes from New Zealand.

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MR McCUSKER: We have called for the documents relating to the charter of the vessel. The only one we have been supplied with is this time charter for a single voyage. It is a photocopy?---May I see it, please? I confess this is the first time I read, personally, a time charter because I have people to do this for me but - -

If you cannot answer the question - -?---It is not I cannot answer it but it would not worry me, if it is one voyage, because we would have had an option for more voyages. The proof is that we executed the other voyages - - -

WITNESS (Continuing): - - - other voyages. Myself, when I had to interfere any time to take a vessel, I would have called a gentleman in Blue Star and over the phone I would have fixed a vessel in five minutes, and then those would do the charter but not myself.

MR McCUSKER: Your answer to that is that you do not know what arrangements were made for consecutive voyages, if any. Is that right?---Yes.

If the original contract had been for consecutive voyages, would it not have been normal to have chartered the vessel for consecutive voyages?---No. It is much safer commercially to take a vessel for one voyage and take an option, especially when you deal with a receiving country where there are some sorts of problems. 10

Did you take an option, do you know?---I must have because we have continued.

I would like to take you to a little later in time. Do you recall receiving a telephone call from Mr Dingwall on 7th November 1979 when he asked you to pay the \$30 per tonne? 20

MR BURBIDGE: I object to "Do you recall", your Honour.

MR McCUSKER: Did Mr Dingwall make a telephone call to you early in November 1979? If you do not recall, tell us?---I do not recall.

Perhaps I could take it a little further. Mr Dingwall will say that he did make such a call. This was after the first voyage. That may place it in your mind. It was after the first voyage had been completed and discharge of the cargo had been completed?---I do not recall. I have been asked not to comment a lot but sometimes I cannot help myself. The first time I remember that a request has been done for a payment of a bonus was about the telex which arrived for the bonus when all other arguments were no longer - - when was it, in February, March, I do not know. 30

I appreciate that is the evidence you have given. Would it be fair to say, Mr Fares, that with so much other business on your mind it is impossible for you to recall everything that happened without reference to the telexes?---Generally. I do not have a bad memory but generally it is extremely difficult for me to remember details. Obviously, when you look at telexes, when you go through one thing, the human being memory comes a little bit back but there is a limit of how much I can remember. 40

MR McCUSKER: I am just asking you to comment on this.
Mr Dingwall will say that quite apart from the telex you have referred to he made a telephone call, and he will refer to a diary that he kept of a telephone call on 7th November, and raised with you the question of the \$30 per tonne due on the first voyage.

MR BURBIDGE: Your Honour, I do not think my learned friend should seek to impose upon the witness the concept that there is a diary entry, if there be such, with respect.

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OLNEY J: I do not know that that is going to affect the witness's answer.

You are putting to the witness what your client will say?

MR McCUSKER: Yes, sir.

OLNEY J: You are being asked to comment on the statement Mr McCusker has made that Mr Dingwall will speak of a telephone conversation in which this question of the bonus was raised. Do you have any comment to make about that?---Yes, your Honour. I do not recall. Furthermore, should it have happened, my first reaction would have been, "Mr Dingwall, let us see what would happen until the end of the contract, to see if we make money or not out of the contract" because we did not agree one shipment and certainly we never agreed on a reimbursement of \$30, your Honour. We agreed on the reimbursement of one half of it, of \$15, should everything go right, and we left it completely to my discretion. We never agreed on \$30 and throughout our telexes where we have said we will pay the \$30 we have always put our reserve that due or not due we want to pay them in order not to leave room for argument.

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I think you have answered the question. You do not recall it.

MR McCUSKER: I think, in fairness, I should take it a little further. Dingwall will say in the course of the telephone call he made to you, when he raised this question of the \$30, you referred to the fact that the current loading of the vessel which was then in Adelaide for the second voyage, had been delayed by cold store strikes. Taking that piece by piece, do you recall that there was a delay in the loading of the vessel for the second voyage?---Yes. I recall there was a delay on which we were worried because they called me from Iran. They said, "What happened to the vessel?" We inquired of Australia. The vessel had been delayed. I do not know if it was the first, the second or the third.

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Do you recall discussing that particular matter, at any time, with Dingwall by phone?---I recall he phoned me once and told me that he was doing his best to improve on this matter of the unions. I started claiming, why this delay, and he says, "This is the reason why I am calling you." This, I recall, because I remember I was sleeping and I became nervous and then I was sorry to be nervous while he was calling me to tell me that there was a delay. I recall it for that particular reason but nothing else.

He will say that you, in fact, raised the delay on the second voyage with him?---No, no. He called me because myself, I might have asked my office in Australia to see why the vessel is delayed and one morning at 4 o'clock or 5 o'clock or 2 o'clock - I do not know - I received a call from Mr Dingwall explaining what are the reasons for the delay, while I was sleeping. That I recall.

30

Do you recall there being any other conversation apart from that in which the question of delay on the second voyage, or any other voyage, was raised?---I do not recall.

I am obliged to put to you that he will say, when he asked after the first voyage for the \$30 per tonne that he said was due, you referred to the delay in the loading of the vessel for the second voyage and he to that said it had nothing to do with the rebate of \$30 due. To finish it so that you can comment on the whole, he will further say that you then agreed that you would pay the \$30 and it had nothing to do with the delay of the second loading?---No. It could not have been like this because if he would have said, "\$30", I would have told him immediately, "These are only \$15 and they are only on lambs." The fact that the claim is \$30 it could not have been the subject of the conversation because my first reaction would have been, "Where did the \$30 come from?"

MR McCUSKER: Do you recall the discussion of any rebate after the first shipment had been made? Do you recall him raising that question with you by telephone?---No; because I tried to recall that but I cannot.

I would like to take you now to your evidence dealing with the WA Lamb Board purchase of 800 tonnes. You mentioned this yesterday?---Yes; 840 and some tonnes.

You have told us that that matter was raised in the course of a telephone discussion in early January?---That is correct. 10

Are you still confident that that was early January or could it have been later in January?---According to my memory it is early January.

In the course of that discussion did Dingwall say to you that Metro's agreement had been to supply 2000 tonnes plus 4000 plus a further 4000 - - -

MR McCUSKER (Continuing): - - - a further 4000 for the first, second and third shipments. Did he mention that to you?---I do not recall that.

Did he put to you that they only needed to ship 3000 tonnes on the third shipment in order to be within their agreed delivery rates?---No, no, no. I do not recall it, first, and then it could not have been because our agreement with them was very clear that in the first shipment they will load 3000 and if possible much more than that. We said 2000 to 3000 and then we insisted on Mr Dingwall that it would be 3000 or more, he promised that and in their telex which they have sent to us confirming the terms of the contract, if you read the last line: "We will do our best to ship the largest possible quantity." That is their telex of 19th September. "Mr Ian Phillips, Export Manager. Accordingly, we will ship maximum tonnage available by the first vessel at the beginning of September."

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Now, can we come back to the discussion about the lamb board purchases?---Yes, please.

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At that time did not Mr Dingwall say to you that they only needed to purchase a further small amount in order to make up the third shipment which he said was a requirement of 3000 tonnes?---No, sir. The requirements for the third shipment were the full capacity and he has sent a telex and he said there is a shortfall of so much.

Did he tell you in this discussion about the lamb board purchases that they had already purchased 300 tonnes from stores in Victoria at a loss to Metro of \$200 a tonne? ---I do not recall that but I have seen it in one of the telexes that they have done that, but I do not recall it as far as the telephone conversation is concerned.

30

Did Dingwall ever tell you directly by telephone that that is what they had done - purchased some meat at a loss to them in order to make up the meat requirements? ---I remember that phone call was extremely friendly. We settled the matter by pushing the dates of shipment and I allowed for \$125 per tonne to complete the shipment from that, and he said that, as far as I remember, they would do their best in order not to be 900 tonnes or whatever, which was all that was available at the lamb board, but whatever they could not produce themselves. It was in fact 843 or whatever.

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As at the time he was discussing the third shipment with you what did you understand to be the position? Where was the vessel at that time for the third shipment? ---Which date was it?

MR McCUSKER: You have said it was in early January?---The third shipment, yes.

Where was the vessel then, as you understood it, on your information?---Would you please repeat your question?

The vessel for the third shipment - where was it at that time? Was it in Australia?---I cannot recall. It should be clear in the telexes.

In the course of this discussion about the purchase from the lamb board was it he who initiated this discussion and told you about the availability of the lamb board meat, the 800 tonnes?---Do you mean when I phoned him at the beginning of the year? 10

Yes?---Did he raise the matter of the 900 - -

The 800 or 900 tonnes, yes?---I think - I cannot recall but I think - from Australia they had informed me that the meat exists, that Metro Meat are saying that there is no lamb while there is lamb in store available for sale at the West Australian Lamb Board, and that Metro Meat could buy this lamb to export it, so I spoke to him and I spoke to Mr Dingwall, and said "This will cost us so much. Would you share with me the difference?" and this is how we came to the agreement - - 20

WITNESS (Continuing): - - - the agreement naturally subject to the other two shipments being made with the full capacity.

MR McCUSKER: I think you have seen some reference in telexes to the fact that Metro had purchased 300 tonnes from Victoria at a loss to themselves of \$200 per tonne?---No. I am referring to the 900 tonnes of Australian meat.

Quite apart from that, you say that you were aware from telexes or from some other source - - ?---I think I have seen 10 in one of the telexes that there is 300 tonnes which was mentioned in South Australia while the 900 was from Western Australia. I do not know which telex.

OLNEY J: It is p.127 may help you.

MR McCUSKER: In relation to that, Dingwall says in that telex, "We will buy the product even though it will cost over \$200 per tonne lost to Metro with freight included to Adelaide to ship." Do you see that in para.2 of the telex?---Yes.

Dingwall never suggested that you should subsidise Metro or 20 pay part of Metro's loss on that purchase, did he?

OLNEY J: In fact Dingwall did not say, "We shall buy". He said, "We are negotiating to buy some meat that is already under offer to somebody else."

MR McCUSKER: Yes. "If the other party does not take the 300 tonnes we will buy the product even though it will cost over \$200 per tonne loss to Metro with freight included - -" TO WITNESS: I think you know, as a fact, that that did occur, that the 300 tonne was purchased?---I do not know myself. Why should I know? I am not following 30 the progress of the shipments.

What I am putting to you though is that at the time you spoke to Mr Dingwall, whenever it was in January, he had previously purchased - or Metro had purchased - to your knowledge, 300 tonnes of lamb from Victoria at a loss to themselves of \$200 per tonne. Were you aware of that?---No. I am not aware.. This telex is sent to Captain Mata, not to me, the telex which he says about the 200 tonnes.

Yes, but was it not because of the telex to Captain Mata that you spoke to Mr Dingwall, because of the concern you had about the availability of meat?---Because from 40 Australia they phoned me or they communicated with me and they said, "The situation is that we have a shortfall on the three shipments to come. What shall we do with the situation?" Then I remembered I spoke with Mr Blanco

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Villegas in Buenos Aires, I ask him to phone Mr Dingwall. He told me, "Why should I do it? Do it yourself." Then I thought, "Yes, I will phone him and say Happy New Year or something and discuss this matter."

MR McCUSKER: Discuss this question of the shortfall?---Yes.

So when you spoke to Dingwall you were aware, were you, of the contents of the telex he had sent to Mata on 21st December?---I do not remember. If they would have sent it to me, to England, I would have been aware. I do not recall if I had been aware of the fact of the \$200 difference for the 300 tonnes because we never discussed about them. I do not recall we have discussed. We discussed only about the 900 tonnes which were existing in the Western Australian cold storage. 10

In relation to the \$30 rebate which, as you know, the defendant claims was agreed to be paid, did Mr Dingwall ring you in mid-December some time about that matter after the second voyage had been completed?---I do not recall that and I would not call it a rebate. This is a pure discretionary bonus. 20

But whatever we call it we know what we are talking about.

OLNEY J: It cannot be a rebate, whatever it is. He is not cutting back the price.

MR McCUSKER: A refund, if you like, sir.

OLNEY J: It is not a refund; it is an extra payment - - -

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OLNEY J. (Continuing): - - - extra payment.

MR McCUSKER: Yes.

TO WITNESS: The evidence of Mr Dingwall will be that he rang you again. It was the second occasion that he spoke to you about this \$30 in mid-December 1979. Do you agree that by that time the second shipment had been discharged?---I do not know when the second shipment has been discharged but again I say if Mr Dingwall - I do not recall he has called me but if he has - called me and if he had pronounced \$30 I would have immediately said, "No, it is \$15 and it has to be left to the end and it is only on lambs." 10

Again, Mr Fares, Mr Dingwall will say that he did speak to you on the second occasion after the second voyage and that again you promised to pay that amount and the amount for the first voyage?---I never promise to pay anything which I do not pay. It is out of my history. I do not recall this conversation.

I would like to refer you now to the telex which is dated 23rd January 1980. That is exhibit 17, the telex from Captain Mata. We referred to that yesterday when you were giving evidence. It is at p.135?---Yes, sir. 20

Mr Dingwall will say that at about that time, shortly before that time, he had spoken to you by telephone regarding the fourth and fifth delivery dates. You said it was a matter of discussion early in the new years, it may be just a matter of a couple of weeks, but he will say that he spoke to you on or about 15th January 1980 regarding those new delivery dates?---To me personally?

Yes?---I do not recall that because I think that we have already fixed those dates before then but I do not recall this conversation. 30

Looking at the telex, there is a reference that Blue Star would put the ship to your disposition some time between 25th April to 15th May and 15th to 30th July. Are those periods between 25th April to 15th May and again 15th to 30th July commonly referred to as "lay time"?---I think these are the periods when a ship owner will imagine his ship will be ready at the port of loading. 40

Some time within those dates?---Yes, and they are always approximate.

So for the fourth shipment, for example, looking at the date 25th April to 15th May, on those dates the ship could have arrived as early as 25th April and as late as 15th May?---To me this means that the ship we are chartering can make two voyages. The first one, the

ship could be between 25th April and 15th May and the second time it could be between 15th and 30th July. "Metro Meat, please confirm to us that you have the goods ready by then because we are going to sign the charter party." That is the meaning of this telex.

MR McCUSKER: I would like to take you next to the telex of 3rd February 1980 - - -

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MR McCUSKER (Continuing): - - - 1980, exhibit 22, in which Mr Dingwall has raised the matter of the rebate or the extra price or the \$30 in any event, and the 843 tonnes of lamb purchased from the WA Lamb Board. This is p.142. I think at the time the telex was sent to you you were not in the United Kingdom but elsewhere. Is that right?---This is what shows from the next telex, yes.

That is your telex of 4th March, is it?---Do you mean my reply to him?

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I am sorry, there is the telex of 13th February which says you are on holiday and that the telex had been transmitted and there is your telex in reply, exhibit 23, p.145?---Yes.

Will you refer to those two telexes; the telex of 3rd February is referred to in your telex, wrongly, as 13th February. Does that appear to be correct? You are, in fact, answering his telex of - -?---I think it might be 13th February.

Thank you; I have misread my copy. So exhibit 23 is the answer to exhibit 22. Can you recall when you received the telex of 13th February? I know you were on holiday so it might have been some time?---No. I cannot recall it but I have replied to it with this telex, the telex on p.145.

In his telex of 13th February, among other things, at para.2 he says, talking about the additional price which was expected to be about \$30 per tonne: "This was discussed with you during December in respect of the first voyage and accepted. However, we have not received any payment in this respect." Your telex, exhibit 23, does not refer to that. Looking at it now does it help you to recall whether or not there was any discussion in December about payment of that \$30 in respect of the first voyage?---I do not recall it.

Or any earlier raising of the question of the \$30 extra payment prior to the telex of 13th February?---No. I do not recall it. Now you will tell me, why you did not put it in your answer? May I answer that?

Certainly?---Because, at that stage, myself, according to what has been happening, I had the impression, personally, that anyhow there was a pretext which Metro Meat was looking for in order not to execute and if I start discussing, "It's not 30, it's 15. It's not on everything. It's only on lambs. It's not this" - this would open a polemic which I did not want to open - - -

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WITNESS (Continuing): - - - to open, so instead of doing that and without accepting the principle of whether these amounts are due or not, I paid them. I wanted the shipment to be continued and especially during February - 13th February - they were well advanced in Iran with the negotiation of their own contract.

MR McCUSKER: The telex from Dingwall was 13th February and you replied in March. Prior to your reply did you confer with either Captain Mata or Villegas about the position of Metro supplying further meat?---I think I might have because when a telex of this matter is sent to me it means probably it would have been sent to Mr Blanco Villegas, even in my absence. 10

Can you recall having any discussion before you sent that telex in March to Dingwall or sending any telexes to either Villegas or Mata about the performance by Metro?---At this moment I do not recall but we should have. It was only normal to have discussions. We do not operate each one just like this.

Is it correct to say that by the time you sent the telex of 4th March you had reached a conclusion that Metro did not want to perform?---No - - 20

MR BURBIDGE: Do not answer just for the moment.

Your Honour, I am not certain that we are talking about the same telex. My friend said 4th March. Is he in fact talking about the telex at p.145?

OLNEY J: I thought so, which is 29th February.

MR BURBIDGE: Yes, 29th February. I am not sure whether he has passed on to something else but I had thought that maybe I was mistaken. I think it is 29th February. 30

MR McCUSKER: I am sorry, 29th February.

TO WITNESS: By that time had you reached a conclusion that Metro Meat did not wish to perform?---I do not easily reach conclusions, that is why I paid what he was claiming for.

Had you reached that conclusion on the basis, among other things, of the information that you had as to negotiations in Tehran between the IMO and Metro Meat?---This was one of many other things. You realise that on 29th February the contract was already signed in Tehran. On 28th February, according to my information, they already signed the contract and Mr Dingwall personally was in Tehran signing the contract. 40

Did your information go so far as to say what kind of product was being sold - whether it was lamb, hogget or mutton? ---Maybe at that moment I have it. Now I have not got it in my head.

MR McCUSKER: Would it have made any difference to you whether the contract that you understood was being negotiated covered mutton or lamb or hogget? That is, your view as to whether or not Metro had decided to renege on its contract with you?---Would you repeat, please?

Yes. Your information, which caused you among other things to think that Metro was not going to perform its contract, was that it had signed the contract in Tehran to supply meat to Iran?---This is one among its many other factors. 10

Yes. I said "among other things"?---Yes.

It was a very important factor as you saw it, was it not? It was a very important matter that influenced your thinking?---If this was - -

If this was true?---Sorry, I am not with you.

Your information that Metro had made a contract in Iran was one of the things that made you conclude that Metro was not going ahead with its contract with you?---I did not conclude that Metro was not going to go ahead. I was under the firm impression that Metro was not going ahead and because I was under this impression I did not want to argue on the things advanced in his telex, and instead of arguing I decided to pay and not to leave any margin for argument. As you could see from my telex, I did not argue because I have said in my telex even though the performance of the four month shipment was far from being satisfactory and the bonds to be paid for prompt delivery is entirely left to our discretion - - - 20

WITNESS (Continuing): - - - to our discretion, We are, nevertheless, ready to pay for the first two shipments and for any further one which will be completed in less than 40 days. Even I let down the conditions - if the contract is performed late benefit or not, a bond is calculated on the basis of \$30 per tonne provided, however, that the full quantities foreseen in our agreement will be delivered. I did not argue whether it is applicable on lamb or hogget. I did not argue if it is 15 or 30. I did not argue if it is discretionary or not. I said, "I'll pay it." To that effect we have already instructed our bank in Zurich to open a letter of credit in your favour for the amounts to be paid in respect of the bonus at the condition that the quantities foreseen in our contract were fully delivered. We paid it.

10

MR McCUSKER: You did not deal in that telex with the question of the extra tonnes of lamb that had been purchased from the WA Lamb Board, the 843 - as it turned out - tonnes of lamb, did you? ---We might have dealt with it in a future telex because most of my telexes are dictated and most of the telexes I receive are read to me over the phone. You could see probably in another one that immediately we rectified this situation.

20

Had you, at this stage, caused any inquiries to be made to see what meat could be purchased from an alternative source to fulfil your contract with Iran?---That was the people in Australia who should have done it. If they would have not done it at this stage they would not have been performing correctly their duties.

30

You would have expected them to do that?---Obviously, when you have a \$4 million bank guarantee which is unconditional and you see that a contract, loadings, are not being done you want to know what other products are available on the market.

In response to that telex, it would seem, came one from Mr Dingwall to you, exhibit 25, p.149?---Yes.

40

This was asserting that the agreement was that the extra payments should have been made immediately after completion of discharge in Iran where discharge took place within 40 days and raising again the question of the lamb. It concluded: "Only after we have received full payment am I prepared to discuss tonnage for May and July." I think, following that, there was a transmission

of a payment of \$30, the bonus so-called \$30.
It was actually the preceding day, possibly, the
4th of March, that the transmission was arranged.
That appears from exhibit 26, p.150.

MR BURBIDGE: Your Honour, I think I must object to the
terminology, "transmission was arranged"; the
effect of opening a letter of credit is rather
different. The payment to which my learned friend
alludes was payment which was simply an annexation
by the bank of moneys then available
for the benefit of a particular account. It could
hardly be described, with respect, as a transmission
of moneys. 10

MR McCUSKER: I will put it a different way.
TO WITNESS: The arrangement for payment of the extra
payment of \$30 had been made by you? Did you make
the arrangement?---The arrangements had been made by
me, yes.

Was that before receipt of - -

MR BURBIDGE: Your Honour, I am sorry to interrupt my learned
friend in the course of cross-examination but can
I just understand that we are not at cross purposes?
May I ask if my learned friend is dealing with the
payment of the \$116,000, part of the moneys claimed
for additional bonus? I rather think the witness
is talking, when he says "payment was effected",
that a letter of credit was opened to the full amount
conditional upon the assurance of which he spoke.
I think we may be at cross reference there. 20

MR McCUSKER: Yes. I think that is probably correct, sir. 30
I will put it a different way.
TO WITNESS: The telex of 5th March, exhibit 25, p.149 -
that was not received by you immediately it appears because
you were travelling and you were expected to return
shortly - - -

MR McCUSKER (Continuing): - - - return shortly. It appears at p.152 as a telex to Dingwall. Do you see that? You replied at p.155 by telex of 12th March?---That is correct, yes.

You responded then and my learned friend has gone through it so I will not take you through it again, but in reply you received (at p.158) a demand for payment in respect of both the \$30 and the \$125 per tonne. At that stage, Mr Fares, had you learned from your people in Australia what progress they had made in finding out the availability of meat to fulfil your IMO contract or whether they had done anything at all about it?---I do not recall that because, as I say, what they do in Australia while I am in UK and travelling, this does not come to me but when there is a situation like a telex which is addressed to me by Mr Dingwall, this comes to me and I reply to it. 10

Before replying to it had you made any inquiries of Captain Villegas or anyone else in Australia to see whether alternative sources of meat were available? 20
---From the first moment the political situation was raised in the telex we had the doubt that there will be no more supply, and it was the duty of our people in Australia to seek alternative sources of supply while myself I am seeking to maintain the supply from Metro Meat, so this is what we have done. For instance, in our telex of 17th March it says:

"Attention Mr Dingwall - reference our exchange of telexes. 30

"Regardless of the consideration whether amounts are due or not due and in order to avoid further discussions, we are prepared to pay a bond of US\$30 per tonne on all three shipments already effected" - this is p.161 - "and on the shipments to follow as well as a premium of US\$125 per tonne on the \$843 on behalf of the West Australian Lamb Board but we need to be assured that you are going to supply the remaining tonnage. In fact, your attitude gives us serious doubts as to your intentions in this respect. As you know, if the remaining tonnage is not supplied the damages that would occur would by far exceed any amounts of bonus or premium. While we have already properly ensured the payment for Metro, it is - - 40

Mr Fares, we have read through it and I did not want to go right through it again?---Sorry, yes.

MR McCUSKER: I would like to take you to the end of the book, exhibit 37, which is at p.167. It is an answer to your letter of 21st April, it is a letter of 24th April, and at p.2 of that letter in the third last paragraph, if you could take two of those paragraphs, Dingwall says:

"In further telexes dated 5th March and 14th March I made it very clear to you....(reads)....prepared then and only then to discuss the balance of tonnage to be shipped."

10

Did you receive that letter?---This is an insulting letter. I am not an office boy in the office of Mr Dingwall and he is not ruling what should be done and how things should be considered, so receiving such a letter all I have to do is to regret that I have received it.

You felt insulted by that letter?---Absolutely - anyone would feel.

Is that why you chose not to reply to it?---It is no longer myself who should reply to this letter. We have put enough guarantees to him and the telex which you asked me not to continue, the last paragraph of this telex of 17th March, was saying - and it is a telex from me:

20

"From our side we confirm that as soon as we have your confirmation the payment to Metro of US\$30 per tonne bonus on the three shipments as well as the premium of US\$125 per tonne for the 843 tonnes will immediately be effected."

30

Why should myself say, "I am ready, please tell me only that you are continuing", and then the situation is "No, you pay and after you pay I will consider if I am continuing or not." You do not consider it insulting?

OLNEY J: I think we will continue at 2.15.

LUNCHEON ADJOURNMENT

UPON RESUMPTION:

MR McCUSKER: Mr Fares, going back to the discussion on 2nd July with Mr Dingwall, was there any discussion at that time about the difficulty that Metro Meat might have in getting certification for its meat works for production for export to Iran?---I do not recall it during these discussions but I recall having received a request to make a few abattoirs of Metro Meat accepted by Iran which we did very quickly.

At or about the time that the agreement was made with Metro, can you recall there being at any time this question raised by Dingwall that, in respect of the first shipment, he would need to have certification for his plant before he could proceed to produce for that shipment?---Could you repeat it, please. 10

We will take it in parts. Would you agree that in order to produce meat for export to Iran the meat works had to be certified by the representative of the IMO in Australia?---They had to be accepted.

Which meant, normally, a visit by the IMOs representative and an inspection of the works?---In principle, yes. 20

That certification depended on the IMO representative being available to carry out the inspection?---No.

How was it to be certified unless there was a representative there?---Now I go back to my memory. It is a difficult question that you have put. There has been, as far as I recall, an inspector who came to Australia before July and who inspected most of the abattoirs of Australia. He pointed out on some rectifications to be done in some abattoirs and there was a list of abattoirs which were already accepted. At that stage, I think there was one or two abattoirs of Metro Meat which needed something to be amended in these abattoirs and which amendments, in fact, they had done. They needed somebody to accept these abattoirs or they needed an amendment in the letter of credit to make the certification easier. I remember we did both of them and at a certain stage, instead of getting the imposition that there should be somebody to actually sign in order to be able to get the documents paid by the bank, we got an Islamic community in Perth, Western Australia or wherever and their certificate was acceptable and the only requirement was a legalisation of this certification - a legalisation of signature by the Iranian embassy, so far as I recall. 30 40

Did Mr Dingwall mention to you on 2nd July 1979 that there could be a problem - not that there would be but that there

could be a problem - in respect of production for the first shipment, specifically a problem because at that stage Metro Meat did not have certification for its meat works for production for Iran?---It could be. I do not recall. Before you said that my impression was that the main problem was that we were not yet in the season because the season starts somewhere at the end of August/beginning of September, but it could be. I do not recall it.

MR McCUSKER: Mr Dingwall will say that was mentioned by him and he told you that for that reason - - -

C41. 2.22

MR McCUSKER (Continuing): - - - that reason Metro Meat could only undertake to supply 2000 tonnes for the first shipment?---It could be, it could be that for my reasons I asked him to supply more and they did some efforts and they have been able to supply more, but I do not recall this conversation.

Having started there at the beginning, may I take you now to the end? After your receipt of the letter of 24th April 1980, the one which you said made you feel insulted, did you then yourself cause any steps to be taken to complete the requirements of the IMO contract - that is, to purchase meat to fulfil that contract?---On the contrary, I reacted the way I always react. I just gave up trying to contact Mr Dingwall and I kept all things ready for Metro Meat to ship if they wanted to execute. I left the instructions with the bank to pay only on confirmation from Metro Meat. Then the telex I sent to Metro Meat that I would pay by simple confirmation, not any bank guarantee but simple confirmation, that they will execute and I left the letter of credit open. Actually, the letter of credit, I have never cancelled it. It expired in June 1980. 10 20

OLNEY J: That is not really the answer to the question. The question was: After you got the letter of 24th April 1980 did you do anything about purchasing meat on the Australian market to fulfil your contract with the IMO? ---Personally, from London, no, your Honour, but they might have taken from Australia some steps, which would have been very normal. 30

Was the balance of the contract with the IMO fulfilled or executed?---No, your Honour. We still had to make three shipments to fulfil it and that is why we have been compelled to buy the meat and we have fulfilled this contract at loss.

You have fulfilled the contract by buying meat?---Yes, your Honour.

The question was whether you did anything after 24th April 1980 to buy that meat?---We must have done, yes, your Honour, 40 but we did not cancel the letter of credit.

That was not the question you were asked?---I am sorry, your Honour.

MR McCUSKER: Do you know what steps were taken in Australia by your company, the first plaintiff, or on your behalf to purchase meat?---No, because this part of it is left for Australia. I do not interfere myself in what they do locally.

MR McCUSKER: Were you not given any reports of what was happening?---This does not come to me.

Did it not concern you to ensure that the contract with the IMO was being fulfilled?---Very much it concerned me.

Did you not therefore keep yourself in touch with what was being done in Australia for that purpose?
---Certainly. It is not that I have kept in touch to see what has been done, I have asked that they fulfil the contract, we have chartered a vessel - as a matter of fact, I think the Almeria Star was chartered for two voyages - we have been informed by the Blue Star line that they could not possibly give it for further voyages and I bought a ship myself in order to fulfil the contract and the ship was called Fares Reef. 10

When did you buy the ship to fulfil the contract?---We started negotiating to buy the ship I think in that period.

Yes, but do you know when? It is a fairly big order?---Sorry, I do not recall. 20

Was it before 24th April?---I cannot answer this question now but by going back to the records we can know it immediately.

Do you know when you completed the purchase of the ship?
---I cannot answer it now.

Do you know when you completed the contract with the IMO?---Yes. The last shipment I know was some time in June in the next year because as we have been delayed by Metro Meat into deciding whether they are loading or whether we have to prepare the meat ourselves - - - 30

WITNESS (Continuing): - - - meat ourselves. The next shipment, after the one of December of January, took a long time, several months, to be ready, and then we had to take the contract until the next year. It means we would not finish the contract in 1980, but we finished it in 1981 and the last shipment has been waiting 102 days to be discharged.

MR McCUSKER: In Iran?---In Iran, yes.

What about the first of the three shipments that were made in order to fulfil the contract? When was that made? 10
---Two of them were made in 1979, because we are discussing the third one, which was at the beginning of 1980.

The first of the three shipments, I understood, that you made after the 24th of April 1980. When was the first of those three shipments that you made? You said that two were with the Almeria Star and one with your own ship?---I do not recall. They might be at the middle of the year, probably, but I could know that.

You do not know?---It is very easy. It is a matter of phoning 20
to the office and I can say. Just offhand, it might be June/July, something like that.

Was it all lamb and hoggett that you exported in order to fulfil the order?---We can find it here, according to the list we have. I know that at the end of the day the losses were so high that we stopped fulfilling the contract, and we still have got a part of the contract so far which is not completed.

How much is that?---It would be a very small quantity.

Was any part of the shipment or shipments used to fulfil the 30
contract mutton, as distinct from lamb?---The last shipment.

The last shipment was mutton?---Yes.

Did the IMO accept that shipment as being in part fulfillment of the contract?---No; because they still are arguing that we did not fulfil the contract, although we tried to convince them; because at that stage they had already bought mutton from somebody else. I remember that at the beginning of the year we were begging them to buy mutton from us and they did not want to buy mutton. 40
Then, when we had evidence that they had bought mutton, we asked them to buy mutton also from us, which they did, and we supplied them mutton. At the end of the day, however, they kept arguing and by simple luck they have forgotten to renew the bank guarantee or to ask for its "uncancellation" and it was cancelled by simple luck.

MR McCUSKER: Do you know from whom the purchases of meat were made for these three shipments after April 1980?---I would have to ask Australia how they did it. Believe me, I do not enter into the day-to-day business here.

Captain Mata would be more likely to know that, I take it? ---Probably some other people, those who have been connected in the matter of meat.

You simply were given no information as to the source of the supply of meat for this contract?---There is no reason to give me information. You have a broker office in Australia. All I need is the contract to be executed.

10

I have no further questions.

RE-EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Fares, do you recall being asked in cross-examination some questions about Mr Phillips giving you certain advice about freight, and you referred, I think, to certain telexes, did you not?---Yes.

Would you look please at pp.14 and 15 - - -

DOC. 5 - Plaintiffs evidence -
R.F. FARES, RXN

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DOC. 5 - Plaintiffs evidence -
R.F. FARES, RXN 23.11.82

X92. 2.32

MR BURBIDGE (Continuing): - - - pp.14 and 15 of the documentation before you? Are those telexes the telexes to which you referred as the information which had been sent to you, I think you said unsolicited, from Mr Phillips and your reply which you said was politely saying, "Do not bother"? Are those the two telexes in question?---Yes.

You were asked questions about the discretionary bonus and in the course of answering those questions you indicated that this was not the first time that such a situation had arisen and you made reference to a sum of some \$120,000 which had been incurred by Metro Meat without your knowledge and in respect of which they had made an application to you for refund. Do you recall that?---Correct. 10

I wonder would you look, please, first at p.8 of the document in front of you. You see that, I think, to be a letter to you from Mr Dingwall, do you not? Go through to p.12 and I would like to take your attention to the paragraph at the top of p.12 of Mr Dingwall's letter. Perhaps you might read that through? Just read the first two paragraphs to yourself, please? ---Yes, I have read them. 20

Is that the payment which you referred to as one of \$120,000? Is it the same example of which you were speaking? ---Yes, I think it might be this one but there are many examples like this throughout our co-operation with Metro Meat.

Did you in fact pay the \$125,000 which had been left to you to decide whether it was fair to reimburse Metro or not - or do you not know?---I do not know. We have paid something but I do not know what it was, but I could find it out. I do not recall. 30

I tender the letter commencing at p.8 and running through to p.12.

EXHIBIT EXHIBIT 43 Letter from K. Dingwall to R.F. Fares.

MR BURBIDGE: Mr Fares, you were asked a number of questions about your relationship with Mr Dingwall in particular and Metro Meat through him. At any stage was some request made to you to loan some money to that company?---Yes. 40

Can you tell us approximately when it was?

MR McCUSKER: Sir, does this arise out of cross-examination?

OLNEY J: I was just wondering about that.

RE
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DOC. 5 - Plaintiffs evidence - 23.11.82
R.F. FARES, RXN

MR BURBIDGE: Your Honour, it arises in this way: It has been put to the witness that the question of discretionary bonus was not one which was within his discretion. His answers have asserted that the relationship between them was such that this was a common occurrence and in expansion of the proposition that there was such a relationship I seek to adduce evidence of a substantial loan made and the lack of formality associated therewith - - -

RE
2121/80

MR BURBIDGE QC 23.11.82
DOC. 5 - Plaintiffs evidence -
R.F. FARES, RXN

K2. 2.37

MR BURBIDGE (Continuing): - - - therewith. Your Honour,
if needs be I would seek leave to ask it as
though in-chief.

OLNEY J: I think that issue is raised in the dealings
between the parties, Mr McCusker.

MR McCUSKER: Yes. I withdraw the objection, sir.

MR BURBIDGE: Can you just tell me approximately when was
the loan?---I think it was before May 1978 because
they are mentioned in the letter of Mr Dingwall
of 25th May. It was \$1 million of unsecured bond. 10

Why did you loan that money to the company?---Because we had
a lot of confidence in Metro Meat.

Were you asked to loan it?---Yes. Mr Dingwall asked me.

You have told us it was unsecured?---Yes; absolutely.

Was some further request made to you by Mr Dingwall in relation
to the taking up of shares?---Yes.

Shortly, did you take up shares?---We took shares in Metro Meat.
I do not recall how many but I think, at some stage,
Mr Dingwall told me I was the largest single shareholder
in Metro Meat. 20

Was that done at his request?---At his request, yes.

You were asked a number of questions about a bank guarantee
which you had given in respect of your contract to
the Iranian Meat Organisation. I show to you a document
of 4th July 1979. Would you look at that document,
please? Is that document the document to which you
refer?---The bank guarantee?

Yes?---Yes; except that it has been amended to read \$4 million
and there is a telex in this respect.

I tender that document, your Honour. 30

EXHIBIT EXHIBIT 44 Copy of bank guarantee
dated 4th July 1979.

MR BURBIDGE: Is it that document which you say the Iranians
omitted to request you to extend?---They are permitted
to cash - -

Can I just stop you? Is it that document which you say they
omitted, they did not, in fact, request you to extend?
---That is correct.

Of course, for that reason, it ceased to be valid in their hands?
---That is correct. They never cancelled it. It
cancelled itself.

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MR BURBIDGE: Mr Fares, you were asked questions about the use of the word "about" appearing in various documents of a contractual nature. Does that word "about" have some specific significance in the shipping and meat trades?---In the meat trade? Commercially "about" means approximately and it is admitted under letters of credit that it could allow 10 per cent more or less.

So it means plus or minus 10 per cent?---Yes; unless otherwise specified because if you specify minus or plus 5 per cent it is not specified.

10

You made mention of your knowledge that Mr Dingwall had, himself, been in Iran in February 1980 and had signed a contract.

I seek to tender, in respect of that,
two documents - - -

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DOC. 5 - Plaintiffs evidence -
R.F. FARES, RXN

23.11.82

MR BURBIDGE (Continuing): - - - two documents obtained from documentation produced yesterday. One is dated 10th April 1980, headed ANZ Bank, and the second, a document which is a telex and certain other documentation annexed all under cover of a "With compliments" slip which it is agreed between the parties, although it does not appear on the copy except in handwriting, is dated 20th March 1980. They all relate to the Oceanic/Metro Meat contractual arrangements in Iran at that time. 10

EXHIBIT EXHIBIT 45 Two documents: 10th April 1980 ANZ Bank: 20th March 1980 telex.

MR McCUSKER: Your Honour, It is difficult to see how the tendering of these documents can be done in re-examination but I do not object to it.

OLNEY J: I think counsel is getting it in on the basis that he was asked questions about Mr Dingwall being in Tehran in February 1980 to execute a contract.

MR McCUSKER: Yes; but they can hardly be put in through this witness but, as I say, I am happy for them to go in by consent. 20

MR BURBIDGE: Mr Fares, you were asked a number of questions about meetings between yourself and Mr Dingwall and you indicated in those that on a number of occasions, at least - in fact, I think all occasions when you met personally - Mr Blanco Villegas was present. Do you remember indicating that?---On every occasion in which we had discussed business.

Is Mr Blanco Villegas - you have already told us he is a director of Fares Rural Co., the first plaintiff - in any way employed by you in a personal sense?---No. 30

Does he have any association whatever with Rashid Fares Enterprises, Beirut, Lebanon?---No.

You were asked a number of questions about the telex from Mr Dingwall of 3rd September 1979 to be found at p.55 and now exhibit 42. You, in response to questions, indicated that you had originally intended that payment for the shipments would be effected by letter of credit opened by Fares Rural Co. but that after receipt of this telex, you conceded the point, I think you said, and opened teléxes directly from Switzerland. Do you recall that evidence?---Correct. 40

Will you look at p.47 and the pages that followed through to p.54? Is that document the original letter of credit opened by Rashid Fares Enterprises, Beirut, Lebanon

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in favour of Fares Rural Co. Pty Ltd? Is that the
initial document of which you spoke?---Correct.

MR BURBIDGE: I think there are some amendments to that document
which carried through to p.54?---Correct.

Will you turn now to p.57 - - -

MR BURBIDGE (Continuing): - - - to p.57. From p.57 through to p.63 documentation relating to and including the letter of credit which you opened on, it would seem, 4th September - looking at p.61 - from Switzerland, from Rachid Fares Enterprises, Beirut, Lebanon, in favour directly of Metro Meat Limited? ---Yes, at the request of Fares Rural.

So the letter of credit which precedes p.55 is the original letter of credit and associated documentation, and the letter of credit which follows p.55 is the substituted letter of credit. Is that correct? ---That is correct, because the bank had already the instructions.

10

I tender pp.47 to 54 inclusive.

EXHIBIT EXHIBIT 46 Pages 47 to 54 inclusive.

MR BURBIDGE: I tender the documents comprised in pp.57 to 63 inclusive.

EXHIBIT EXHIBIT 47 Pages 57 to 63 inclusive.

MR BURBIDGE: Mr Fares, just to identify that latter letter of credit, it is I think that which relates to the first voyage, is it not?---This is correct.

20

You were asked questions relating to when you were first aware of a claim being made by Metro Meat for a bonus payment of \$30 per tonne on all meat and you directed attention, I think, to p.142 which is a telex of 13th February 1980, now exhibit 22?---Yes, I have it.

Had you any earlier indication from any source of such a claim?---No.

Would you look, please, at p.127, exhibit 12? You were asked a number of questions - first about the capacity of the vessel. Do you recall those yesterday?---That is correct.

30

You were asked also a number of questions about the totality of the tonnage which the purchase by the defendant from the Western Australian Lamb Board enabled. Do you recall those questions today? Do you remember being asked about that?---I have been asked, yes.

Would you look at those quantities that are shown there under the headings "Total" and "Shortfall"?---Yes.

40

It is apparent, I suppose, that the totality of those on each occasion is 3800 tonnes, is it not?---About, yes, because this is what we always foresee.

You mean that there will be a margin around that figure - - -

MR BURBIDGE (Continuing): - - - that figure?---According to if we load lamb or hoggett, or which mixture.

Would you look please at the telex of the 3rd of January 1980, p.130? That is a telex, you indicate, sent by your secretary in London, following you thought a telephone conversation or perhaps two telephone conversations with Mr Dingwall. Can you tell us, looking at para.2, what - - I withdraw that. I ask you to go to p.142, document 22. Would you look at the tonnages in there said to have been sent by the defendant, where they appear under the heading "Total" at the top of that telex? Do you see those tonnages?---Yes. 10

Do you see the third voyage, 3879? Was that in fact the tonnage which was sent by the defendant?---It must be, because this is the one for which the lamb from the lamb board was purchased; so it must be.

The total that was in fact shipped on that occasion, following the discussions which you had, was 3879 on the third voyage or thereabouts?---Yes; because if you notice, there was on this one less hoggett than lamb. That is why it allows for more tonnage, as I was saying yesterday. 20

Whilst on that column of figures, that figure of 3187 for the first voyage: Was that correct also? Is that what they in fact sent?---It must be correct, yes. I have no doubt, nothing to doubt, about it.

You were asked finally, Mr Fares, questions about the manner of certification for meat slaughtered in Australia for the Iranian market. I show to you a document headed, "Iranian Halal Certificate". Would you look at that one? Is that document, which I show to you - I would ask you to look at both the face and the reverse - an example of such a certificate?---This is an example. 30

I do not mean to suggest that the particulars have any significance in the present case?---This is what they call normally Halal certificate. I had in mind that their presentation was slightly different, but this is in fact a Halal Certificate. 40

Would you look at the reverse of the document?---This is a legalisation of a signature. It says here in Farsi that they are legalising the signature marked "X". There is no signature marked "X" but this means it is a legalisation of a signature by the Iranian embassy.

You say it is different from what you had in mind. Is that correct?---It means it is a different presentation but to the same effect.

It may be a later one, Mr Fares. I will withdraw it; thank you.

Your Honour, that completes the matters in re-examination. I wonder if I might seek your Honour's leave to ask one question which I omitted to ask in-chief?

OLNEY J: Yes, I think so.

FURTHER EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Fares, I did ask you yesterday whether, when you formed the company, each of the directors had power to bind the company in their own right, and you indicated that they did?---Yes.

10

When you reached agreement with Mr Dingwall - - -

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R.F. FARES, RXN

MR BURBIDGE (Continuing): - - - with Mr Dingwall by telephone on 2nd July 1979, were you acting on your own behalf?---When I do a business for Australia I never act on my own behalf. I act on behalf of Fares Rural.

You are acting on behalf of Fares Rural?---Certainly.

That was the additional matter, your Honour.

OLNEY J: Mr McCusker, do you wish to cross-examine?

FURTHER CROSS-EXAMINED BY MR McCUSKER OC:

MR McCUSKER: You say that you never do business on your own behalf when doing business in Australia but, of course, you did business on your own behalf before the incorporation of Fares Rural?---But after the incorporation - moreover I can say something; I have never done business with Metro Meat except on behalf of the group because Mr Dingwall and myself, Metro Meat and myself, we have been introduced to each other by my other partner in Fares Rural. I never met Metro Meat before. Mr Blanco Villegas is the one who introduced us.

10

20

Thereafter, in your dealings with Metro Meat, you say you dealt on behalf of the group, the group being yourself and Mr Villegas?---No; Fares Rural.

But Fares Rural was not incorporated in Australia until 1978? ---That means the group which later on was called Fares Rural. From the incorporation of Fares Rural onwards, there was no reason for me to deal on other behalfs.

In earlier transactions and earlier deals with Metro Meat prior to 1978, did you deal in any other name than in your own name?---Would you clarify your question, please?

30

Yes. When dealing with Metro Meat prior to the incorporation of Fares Rural in Australia, did you deal in your own name or in some other name?---Shall I take it when we were buying live sheep from Metro Meat because this is what we did?

Yes?---They were doing the agreements, organising everything from Australia and Australia was requesting for the opening of the letters of credit and the letters of credit were - - It means it was not my interference at all.

40

Can I refer you to p.1 of the volume of documents?---Yes.

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P100. 3.04

MR McCUSKER (Continuing): - - - particular contract, Mr Fares, would you agree or not that all other contracts that you made with Metro Meat were made in your name? You may have been contracting for the group but they were made in your name - Rachid Fares? ---Maybe technically until Fares Rural was created in Australia, yes. There was no other way.

Throughout your dealings with Metro Meat you personally contracted; so far as Metro Meat was concerned, Dingwall dealt with Rachid Fares, did he not?---No, 10
throughout all the deals in Australia Mr Dingwall dealt with Mr Blanco Villegas, with the people in the office in Australia or with myself.

Mr Blanco Villegas introduced Dingwall to you, I think?---That is correct.

Thereafter, Dingwall dealt with you on behalf of Metro Meat for the supply of meat or live sheep?---Mainly live sheep because he was in contact even more with Mr Blanco Villegas than with myself. The only one who came to Australia from 1974 was Mr Blanco Villegas, not myself. 20

I have no further questions.

NO FURTHER RE-EXAMINATION

WITNESS WITHDREW

JORGE ALBERTO BLANCO-VILLEGAS, sworn:

EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: I think your full name is Jorge Alberto Blanco-Villegas?---Yes.

Your address: Is it Quintana 576, Buenos Aires, Argentine?
---That is true.

Do you hold a position as a director, a shareholding director, in the company Fares Rural Co. Pty Ltd?---Yes.

Do you have a certain responsibility for a particular area in consequence of agreement between yourself and other directors?---Yes. 10

That responsibility is for which area?---Australia.

I want to take you to May 1979. Do you recall being present at the home of Mr Rachid Fares in Hampshire, England?
---Yes, I remember.

Do you recall Mr Dingwall being present at that time?---Yes, I remember.

Was there a conversation relating to meat which you can relate, if asked to do so - you could relate parts of it if asked to do so?---I could relate part of it. 20

Did you in fact leave the United Kingdom before Mr Dingwall?
---Yes.

You left Mr Fares' home?---Yes.

Subsequently, did you have occasion to fly to Australia in July of 1979?---Yes. In one of my usual visits to Australia, I was here in July.

Is it normal for you to be in regular communication one way or another with Mr Fares?---Yes.

When you arrived in Australia, did you communicate with Mr Fares or he with you? - just yes or no?---Yes. 30

Following that communication did you yourself make a telephone call?---Yes.

To whom did you telephone?---I called Metro Meat.

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MR BURBIDGE: From where?---From Fremantle.

You were telephoning to where?---To Adelaide.

Did you speak to some person who you knew?---Yes.

Who was that?---Mr Ian Phillips.

Your Honour, I wonder if I should ask if Mr Phillips is in court. I know there has been no order made for the witnesses; indeed Mr Dingwall appears to have been in court for the whole time, although he is of course no longer with the defendant company and I make no objection to that. However, if Mr Phillips is in court, then I would like to know if he is here.

10

I am told he is here, your Honour; thank you.

OLNEY J: Are you seeking any order?

MR BURBIDGE: Would your Honour allow me a moment?

I am, your Honour, in something of quandary. I am told that it is usual to seek an order - - -

MR BURBIDGE (Continuing): - - - an order that all witnesses be excluded. That would, presumably, have the effect of permitting those witnesses relevant to the plaintiffs' case to stay and have the effect of excluding the person I assume to be the primary witness, Mr Dingwall, for the defendant. In those circumstances I do not seek an order for witnesses but I indicate that without any right to comment in the event that Mr Phillips chooses to remain or those instructing my learned friend see fit to take no action in relation to his presence. 10

OLNEY J: Yes. It is, in this jurisdiction, a common thing for counsel to ask for an order excluding witnesses which, of course, applies equally to the plaintiffs' witnesses and the defendant's witnesses when made. However, it is the sort of order, at this stage of the trial, which would be very difficult to make in view of the fact that, no doubt, the plaintiffs' witnesses have been in court throughout. You are establishing as a fact that Mr Ian Phillips is in court and I think that is about as far as it can go. 20

MR BURBIDGE: Thank you, your Honour.

MR McCUSKER: Sir, if my learned friend feels there is some importance attached to this particular witness not being present I would ask that he leave the court, if that is the situation.

MR BURBIDGE: I am not saying that particular attention attaches; it is a matter for my friend.

MR McCUSKER: It is more comfortable in here so if there is nothing attaching to it I will not ask him to go but I would not like it to be the subject of comment later. 30

OLNEY J: I do not think it can be now, in the circumstances, Mr McCusker. If Mr Phillips stays, that is it.

MR BURBIDGE: Mr Blanco-Villegas, did you speak to Mr Phillips?
---Yes; I called him.

Can you tell us in terms of the date approximately when it was in July?---I think I started calling him around 8th or 10th July, more or less - 10th July.

Can you tell me what you said to him at that time?---I ask from him if he knew about a contract agreed between our company and Metro Meat and in case he knew about that contract, that I would like to have a confirmation of that contract by telex sent to our office. 40

What did he reply?---He say, "Yes, I will send it."

MR BURBIDGE: How long does telex normally take to pass from Adelaide to Fremantle?---I think only a few minutes from the time we prepare it.

Did a telex, in fact, arrive immediately after that conversation or not?---No.

What did you do next?---I called him again.

The same day?---The next day.

What conversation ensued the following day?---I say, "I didn't receive the telex." He say, "Yes. I will be sending it to you."

10

Did the telex arrive immediately after that telephone conversation? ---No.

What happened next?---I do not remember if I called him for the third consecutive day or if there was a weekend in the middle. I think I waited until Monday and I called him again.

Was there any telex there by that time?---No.

On the third occasion that you telephoned, what conversation ensued?---I do not remember if I made the conversation in the third or the fourth call but in one of those I say, "What is the reason I am not receiving the telex? Are you tracing Ken to know if you can send it?" He say, "Yes. You know he is not here. I am trying to see where he is. I am not finding him."

20

Did he say which country he was in?---I think he was in the States.

Did he make any arrangement about what he would do in respect of the telex you were seeking?---I knew that as soon as he got in touch with Ken we were going to receive the telex - - -

A43A. 3.19

WITNESS (Continuing): - - - telex, so I say "Well, please try to get in touch with him and send me a telex."

MR BURBIDGE: Did you have a further telephone conversation with him a day or so after that?---Yes, I have another conversation with him and I ask to him, "Have you found Ken?" and he say, "Yes, I find him so I will be sending a telex."

After that conversation did something happen in relation to a telex?---The telex came.

Would you look, please, Mr Blanco-Villegas, at p.26 of that volume in front of you?---Yes. 10

Yes, what?---I am looking.

Witness one, counsel nil, I think, your Honour! Having looked at it, do you have any comment to make as to the identity of that telex?---This is the telex I received.

Did you in fact have a certain conversation with Mr Dingwall in November of 1979 at the Menzies Hotel in Sydney? ---I have had several conversations with Mr Dingwall and one of those has been the one in November at the Menzies Hotel. 20

Are you able to tell us some parts of that conversation which you recollect if asked?---I think we met for the breakfast and we start discussing about the difficulties of the Iranian situation that were worrying him. I am not a person of very good memory but in general I recall that he was aiming to get a bank guarantee for in case something happened in Iran and I stated to him that he should not be worried because the letters of credit were not opened by Iran directly, the letters of credit they were opened by ourselves, and since many years we did not have troubles about fulfilling to the satisfaction of Metro Meat all the requirements of the letters of credit - - he insisted on the guarantee, saying it was a risk and that the board was not happy, the board of Metro Meat, and I said at the end of those friendly conversations that I would be happy to give a guarantee to their satisfaction in case that Metro Meat could give us the same guarantee that they were going to fulfil the agreement. 30 40

In short, you offered him a guarantee conditional upon him giving a guarantee of performance. Does that sum it up?---I think that was in some way a matter of pride because I thought that we should be trusted and if they needed a bank guarantee I was ready to give it because I was sure we were going to fulfil our

obligations, and then I asked him the same to be given for us.

MR BURBIDGE: What was his response to that suggestion?---Honestly I do not remember exactly but I think that he tried to go through the conversation and leave it loose without any decision and such as to say, "Well, if I insist I will be sinking in giving the bank guarantee." He refused to give the bank guarantee at the beginning but I insisted and nothing was agreed at the end.

10

There were problems of one kind or another with the execution of the contract. I think that is common ground?
---Yes.

Did you fly to Australia in March of 1980 for the purpose of seeking to deal with the problems - - -

A70. 3.24

MR BURBIDGE (Continuing): - - - with the problems?---I think that I came in April, end of March/April.

Did you, at that time, make contact with some representative of the defendant company?---Yes. Immediately I arrived; at that stage the situation was worsening and we were very worried, all of us, because of the bank guarantee so as soon as I reached Perth I called Mr Ware who was the managing director for Western Australia, Metro Meat, and with whom I have had friendly relations, trying to call his attention on the problem we were having and, in some way, asking his intervention to make Ken Dingwall think about trying to solve it. 10

Did you, in fact, make some telephone call in relation to the matter to Adelaide?---After Mr Ware stated there was nothing he could help, he suggested me to go to Adelaide because Ken was there. The next day I flew to Adelaide and I called Mr Dingwall.

What happened when you did that? Were you able to establish contact with him?---No. I talk with his wife. Doreen told me that he had just left that morning. 20

Did you make a telephone call to some other person?---Yes. Not being able to have a talk with Ken and not being able to get any result from Mr Ware, I decided to call Mr Turner who was the chairman of Metro Meat.

What happened?---I called him to his office. The secretary answered the phone call and she said, "Wait a second. I will call him." She came back some minutes later and she said that Mr Turner was overseas.

Did you make any further attempt to contact Mr Turner?---I called him - - No. I do not remember having - I think that I tried to contact somebody else but I do not remember his name. It was a member of the board but I cannot remember the name now. 30

Were you successful in speaking to anyone at all at Metro Meat?
---Yes.

Did you manage to speak to anyone?---No.

That is the evidence in-chief, your Honour, but before I sit down may I say, I notice Mr Dingwall is referring to diaries with certain regularity. Such diaries have been the subject, one would have thought, either of discovery or certainly of the subpoena. Documents have been produced to us and I would ask that my learned friend give me an assurance - and if your Honour felt 40

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it appropriate, the court an assurance - that all such diaries have, in fact, been produced.

MR McCUSKER: The diaries that have been produced are large diaries in which notes are contained by Mr Dingwall of relevant matters and other matters that I mentioned yesterday. This particular diary, I understand, is simply a personal appointments diary and my learned friend is welcome to look at it. It just says where Mr Dingwall was on a particular day. I dare say that each of the witnesses called by the plaintiff to date would keep such a diary. It is like a little notation - we have not seen that either but if my learned friend wishes to see it I do not think there is any objection. 10

MR BURBIDGE: Thank you. I do wish to see it and perhaps I may see it now?

MR McCUSKER: May I, in turn, ask that similar diaries - if we are getting down to this point - be produced to us because we have seen nothing of this nature from any of the plaintiffs' witnesses. It is a one-way traffic.

MR BURBIDGE: Your Honour, the position, as I understand it, is this; I am instructed that Mr Dingwall has been making reference to a number of diaries which - - - 20

MR BURBIDGE (Continuing): - - - of diaries, which he apparently has in his bag. We specifically sought by subpoena that such documents should be produced, and I had imagined that we had them but it seems that we do not have them. I am a little concerned that it appears at least - and there may well be some explanation; if so, no doubt we will learn what it is - that the court's order has not been complied with and I would ask my learned friend perhaps to investigate.

MR McCUSKER: It is patently clear it has, sir, and that this is, with all due respect, not correct. These diaries are personal diaries of Mr Dingwall. They range through - and my learned friend, I think, can have the lot subject to there being nothing of an intensely personal nature - - They are simply appointment diaries kept by Dingwall personally. 10

As far as the subpoena is concerned, they were not produced on the subpoena. The subpoena was directed to diaries in the possession of the company which these certainly were not, are not and never have been. I do not know how far we go in this, sir. These are simply personal appointment diaries, including notes like "Cootamundra" and "Australia Day holiday" and all the rest of it. 20

MR BURBIDGE: I should say immediately, your Honour, that my learned friend is quite correct. The subpoena was addressed to the company. In that sense certainly they are not in possession of the company. Perhaps it is sufficient that the memory seems to have been refreshed. I will withdraw any request to see them at this stage. 30

MR McCUSKER: It is not a matter of my memory being refreshed, sir, with all respect. I do not like it being put that way. My memory is clear as to what was required.

MR BURBIDGE: No, sir; I did not mean that. I was not offering anything in relation to my learned friend. I meant that Mr Dingwall's memory seemed to have been refreshed.

OLNEY J: No doubt if Mr Dingwall is called as a witness and he has a contemporaneous note that is proper to refer to, then he will be able to refer to it by use of his personal diary. 40

MR BURBIDGE: Thank you, your Honour. That is the evidence in-chief of Mr Blanco-Villegas.

CROSS-EXAMINED BY MR McCUSKER QC:

MR McCUSKER: You visited Australia in March of 1980, Mr Blanco-Villegas?---I think I visited at the end of March or the beginning of April, yes. DOC. 5 - Plaintiffs evidence - J.A. BLANCO-VILLEGAS, XN

MR McCUSKER: The first contact that you made in Australia - that is, from Metro Meats - was with Mr Jack Ware. Is that right?---Yes.

You had dealt with him on some occasion in the past?---Yes, if dealing means having conversations about supply.

You knew Mr Ware as the manager for Western Australia at the time - that is, the meatworks manager for Western Australia, I think?---Yes.

You were more anxious, I think, to see Mr Dingwall, were you not?---I was anxious to find the solution to a problem. 10

When you saw Mr Ware in essence did he tell you that you should talk to Mr Dingwall about any such problem?---Yes.

Did you tell him what the problem was?---Yes. If I called, surely I explained the problem.

What did you tell him the problem was?---That we were facing big difficulties to get the supply from Metro Meat, that that situation could carry us a big damage, and that knowing his friendship with Ken, I was asking his co-operation to help to solve the matter. 20

I think that conversation took place in your hotel suite at the Parmelia at the time?---Yes.

He came to see you there?---Yes.

You were asking him - and obviously you do not know the precise words - to talk to Ken Dingwall?---Yes.

About the present problem with regard to the supply of meat? ---Yes.

He told you that you had better talk directly to Ken Dingwall. Is that right?---(Inaudible response)

Were you aware at that time that Metro Meat through Dingwall was claiming that money was owed to Metro Meat?---I think so. 30

V9A

You think so; it is probably a bit difficult to build on that. Did you know what the problem then was? You were not getting the meat at the time?---I remember having discussed the programme of some - - I don't remember exactly the date, because I have discussed the programmes but I don't remember at which moment - - -

WITNESS (Continuing): - - - which moment. I do not know if at that time I knew about the claim or not. I knew that we were getting difficulties to get the supply.

MR McCUSKER: You wanted to find out what the difficulties were and to overcome them?---Trying to overcome the difficulties, yes.

On that, Mr Ware said that Mr Dingwall was the man to talk to?
---Yes.

From your past dealings with Metro Meat, that was your understanding, was it not - that Mr Dingwall was the man that you had to talk to in connection with meat exports?---Yes, but we have had at that time some negative reactions from him so I was trying to find a way to meet the kind of arrangement.

10

In effect, using Mr Ware as a man to ease the path?---Yes. I thought that they were good friends, we were all good friends at that time.

Your discussion with Mr Ware was a perfectly cordial discussion?
---Yes.

When you then sought to contact Mr Dingwall you found that he had just left Australia?---Yes.

20

Did you speak in the end to anyone at all from Metro Meat?
---I have not been able.

Apart from Ware, of course. For how long were you in Australia?
---I usually stay two or three weeks or 10 days, it depends on the occasion.

Did you make these attempts to overcome the problem that you understood existed over the entire period you were here or just in the first few days you were here?---I think I did my best what I thought I could with the answers I got, I did not insist.

30

Was it at someone's suggestion that you came to Australia to see what could be done to overcome the problem, whatever it was?---I do not think I received suggestions. I travel to Australia often and I think that was the opportunity trying to do something and I was really very well prepared to reach any kind of agreement, even if it was not convenient from our commercial point of view.

It was not at anyone's suggestion, you simply decided that since you were coming to Australia you would raise this matter?---I do not remember it being suggested. I do not know. I make my own decisions.

40

MR McCUSKER: Had you before coming to Australia been in contact either by phone or personally or by telex with Mr Fares?---All the time.

What was your normal method of communication? By telex?
---By phone.

Had you and he discussed whatever the problem was before you came to Australia?---Yes.

As you saw it, it was some problem which you would have to define and then try to overcome?---Yes.

After that visit and after your discussion with Mr Ware did you have anything further to do with Metro Meat? 10
---I have had always a lot to do with Metro Meat.

I am sorry, that was a bit wide. After that visit, I think it was about April 1980 - -?---I am not get very good to recalling things. I must honestly explain to you because I am sorry not being able to answer, this is not the only activity that I have. I belong to the board of more than 15 different companies so it is a mixture of travelling and places and so it is not that I am all day working in this only company. 20

So far as Metro Meat is concerned - - -

All1A. 3.40

MR McCUSKER (Continuing): - - - concerned, to the best of your recollection, after your visit in April 1980 - and incidentally, Mr Ware will say it was 12th April, does that sound about right to you - -?---It could be.

Did you have any further dealings with Metro Meat?---I think I would have had some shipments prepared by Metro Meat at that time. I do not think we have stopped completely activity at that time. I think we have some more shipments or partial shipments.

Of meat?---Of livestock.

10

No more of meat as far as you know?---Not more of meat, I think.

You are not sure of that?---I am not sure.

At some time, as I understand it, your company or Mr Fares - and I am not sure which but either your company or Fares - proceeded to attempt to purchase meat other than from Metro in order to fulfil a contract made with the Iranian Meat Organisation?---Yes. At some stage around April or March we started feeling that we were not going to receive any supply from Metro Meat and that was endangering the guarantee that we have given to Iran, so we started searching the market in which possible way we could be getting supply.

20

Did you ultimately secure some supply of meat for that purpose? ---I am not the man in charge of doing those things.

Who was in charge of that?---The Australian office.

Who was in charge of the Australian office?---In the Australian office Captain Mata was the managing director but we have appointed somebody to help in the kind of activity that we did not know. I do not know who. As a director of Fares Rural I help to make the policies and to see if they are followed but I am not from Argentina following the day to day decisions. I come here two or three times a year and I see if what we have decided is done. I do not know about every-day decisions.

30

Would you turn to p.164 of that volume you have there, exhibit 36? That is a letter from Fares Rural to the manager of Metro Meat Limited. Do you have that letter of 21st April 1980?---Yes.

40

Were you in Australia still when that letter was written?---I do not know. I could be but I am not sure about it.

The letter purports to have been signed, I think, by Captain Mata, who was the managing director according to that of Fares Rural Co. Pty Ltd?---May I read it to see?

MR McCUSKER: Certainly?---I do not think that I have been in Australia this time. Could be, but I remember that I have left urgently to Japan because I have something to do in Japan and I do not think I was in Australia at the time of this letter.

Did you confer with Captain Mata? Did you discuss with Captain Mata the sending of such a letter before you left Australia, or indeed after you left Australia?---I am not sure about that because could be on the phone. I am not sure I have discussed. I would have discussed general matters and the worries of the problem but Captain Mata was the managing director of the company.

10

It would appear that you must have spoken to Captain Mata at some time before you left about - -?---The result of my inquiries.

Yes. Can you recall whether as a result of that discussion it was decided to send this letter - - -

C8. 3.45

MR McCUSKER (Continuing): - - - this letter?---It could be, it could be, that on the phone we could be talking about the need of sending a letter.

By that time are you able to say whether any inquiries regarding the availability of meat from elsewhere had been made and if so, what the result of those inquiries was?---I remember that the inquiries should have resulted in us getting the meat because we have supplied it.

Just listen to the question; that letter is dated 21st April. Before the date of that letter, do you know whether your company had made inquiries in order to get meat? ---I think that they have been doing inquiries since before this letter because we had a terrible doubt about the result of getting the meat from Metro Meat. 10

I know you cannot be precise in your memory on this but do you know when those inquiries began, approximately?---They could have started in March or April or May. I do not remember exactly - as soon as we start feeling that we were not going to receive the supply, surely I have been talking to Captain Mata saying, what we can do? Then they have just tried to know if the meat could be available somewhere. 20

Your relations - and I say "your" both personally and in business - with Mr Dingwall had always been very cordial before then?---Very.

There was considerable mutual trust, was there not?---Yes.

Had there been a change in that relationship in the preceding three or four months - that is late 1979 and early 1980? ---I cannot appreciate a change. I remember that once in a phone conversation with Mr Dingwall he was very angry because - - I do not remember dates. He was thinking that I was not saying the truth because my assurance of not getting direct supply of livestock from South Australia but I have stated personally to him in a conversation held in London. 30

So that particular problem seemed to have been ironed out?---Yes, but in good terms.

When was that? Can you recall roughly when that was?---I think it was not before this.

Between July 1979 and April 1980?---Yes. 40

This matter was raised by him by telephone and you ironed it out very happily?---It started when I decided not to get more supply from Western Australia, from Metro Meat. I called Mr Ware to explain the reason why I would

like to take our own supply but giving him the assurance, because he asked so, that we were not getting supply from other sources in South Australia. I think that was what started creating a problem.

MR McCUSKER: A change in your company's operations had begun, had it not? You were starting to buy directly in Australia having established your company in Australia? ---We started testing which was the result of making it directly in very small quantities such as to have a feeling of the prices we were needing to pay to our 10 suppliers and I discovered that there was such a difference that in Western Australia we could organise ourselves because we have our head office here and we have better means at a lower price.

When did you draw that conclusion?---I think by that time when I met Mr Ware. It should be that visit in early July when I requested the contract signed between Mr Fares and Mr Dingwall - - -

WITNESS (Continuing): - - - and Mr Dingwall. I called Mr Ware to our office in Fremantle. I explained to him the situation. I showed him some figures and I say, "The decision is made." We have invested a huge amount of money in our bases and we have started running a company. We cannot outlay 100 per cent in another company even being such a friendly company.

MR McCUSKER: As part of your company's development of its business in Australia, did you see it as being desirable that your company should be named as an exporter of meat wherever possible?---Yes. 10

Was that for the reason that there were difficulties with the unions at that time, that meant it was desirable to demonstrate that you were exporting meat that was slaughtered as well as live sheep?---Yes.

For that reason did your company seek to be named as the exporter of this particular - - ?---I have pushed Mr Fares to help in selling Australian meat, mainly because of that reason.

It was your desire that your company should be shown wherever possible as being the exporter of slaughtered meat? ---It was the main objective. 20

Should you have failed to do that, there was a possible problem with regard to the export of live sheep?---Yes.

That was - the export of live sheep - your company's principal proposed activity?---It was at that time the principal activity.

When you saw Mr Phillips - you have told us that this was in July 1979 - I think you told us that you tried to get from him a telex of confirmation of your company's telex on perhaps three occasions that you approached him?---More. 30

More than three occasions?---Yes.

It was clear to you, was it not, that Mr Phillips simply did not know what arrangements had been made by Dingwall with Rachid Fares?---Can you repeat that question?

Perhaps I could put it more positively. Did Mr Phillips tell you that he did not know the arrangements that had been made between Ken Dingwall and Rachid Fares?---No, he did not tell me that he did not know. 40

But he did tell you that he could not himself give confirmation. Is that right?---No, he did not tell me that he could not.

Did he tell you, when you first spoke to him, that before he could give confirmation he would have to contact Ken Dingwall?---No, he did not tell me that.

MR McCUSKER: He simply said he would give you the confirmation?
---Yes.

You were anxious to get that confirmation?---Of course.

Why was that?---Four million dollars.

Apart from that, you had dealt with Metro Meat in the past very much on a basis of trust, had you not?---Never given \$4 million of guarantee, no, only on the word of men, that something could happen. Even between friends, when you make an agreement, you make an aide memoire to remember what is happening.

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Did you tell Mr Phillips that you required this confirmation for the purpose of being able to demonstrate to the IMO that you could fulfil your contract? Did you give him any particular reason for requiring the confirmation?---To have the confirmation of the contract signed.

Yes. Did you tell Phillips why you wanted to have a confirmatory telex from him?---Yes. I do not think it is needed to ask why.

No; but do you recall whether you did tell him or not?---No.

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Just to clarify that, do you say that you did not tell him or you simply cannot say whether you told him or not?
---I think I told him that I needed confirmation of the contract, because I was worried about knowing, by Mr Fares, that he gave a bank guarantee of \$4 million - - -

WITNESS (Continuing): - - - of \$4 million and that our company was bound to pay the losses if they could happen.

MR McCUSKER: Do you say that Phillips actually told you before he finally sent the telex that he had made contact with Dingwall?---Of course.

He told you that he had made contact?---I ask him because I could not understand the reason not to receive the confirmation of the contract so after calling so many times I ask, "Which is the reason, you are needing to contact Ken to send this telex" and he say - - well, I cannot say that he say "Yes". "Well, I have to see", and at the end I discovered that he needed the approval. 10

You cannot say that he actually said (and there were certain shoulder movements then) that he had contacted Mr Dingwall?---Yes. He said that he had contacted Dingwall at the end, before sending the telex.

When did he tell you that? On the last occasion that you spoke to him?---On the last occasion he spoke with me because of that reason before sending the telex. 20

Was that at his office or at yours or by telephone?---By telephone all the time.

Are you quite clear in your recollection of that particular point?---Absolutely sure because I was so worried about it.

You have told us that he was putting you off and not telling you why. Perhaps I should put it this way: On the more than three occasions you spoke to him he was telling you he would give you a telex and it just never came up?---Yes. The first three or four times he never explain why not, so I ask him which was the reason, if he was trying to contact Ken, and he admitted that. 30

When did you ask him that? After about three times?---Yes.

He admitted that he had tried to contact Ken?---Yes.

And then later you got the telex?---Later I got the telex, yes.

Do you think, Mr Villegas, that possibly you simply assumed that he had contacted Ken Dingwall before he sent the telex?---No, I do not assume. I am repeating his words.

That is - -?---That he has contacted Ken Dingwall. 40

Mr Phillips will say that he was asked to give a confirmatory telex in a rush by you, and indeed it appears that you were anxious to get it?---I was.

MR McCUSKER: And that he did give the confirmatory telex without reference to Ken Dingwall.

MR BURBIDGE: If it please your Honour, I do not know quite how this witness can be asked to comment on that matter.

OLNEY J: The witness has already said that he was told something different from that.

MR BURBIDGE: I think we are in issue over this, are we not?

OLNEY J: I suppose that is about where it has got to rest.

MR McCUSKER: I will just leave it at that, sir. I have obviously covered the point.

TO WITNESS: I think you have referred to a conversation that you had in the United Kingdom with Mr Dingwall at the home of Mr Fares in, I think, July 1979. Do you recall that?---Yes.

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MR BURBIDGE: It was May, not July, 1979.

OLNEY J: Yes, the evidence was certainly not July. It was May 1979.

WITNESS: We have one in July and one in May.

MR McCUSKER: Was there one in July 1979?---Yes.

Was that a meeting at which you and Fares and Dingwall were present?---Most of the time we were with the three persons. I do not know exactly which conversation you refer - - -

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WITNESS (Continuing): - - - you refer.

MR McCUSKER: A conversation that took place at Mr Fares home on 28th July 1979?---Which home, because Mr Fares has two homes in England.

I am afraid I cannot assist you there at the moment but it was on a Saturday. Wherever the meeting took place do you recall having a discussion in late July 1979?---Yes.

Did Mr Dingwall raise the question of your company's operations in Western Australia?---Yes. 10

Did he put it to you that you had agreed that no changes would be made within Western Australia as far as your company's operations were concerned without notice to Metro Meat?---Not at all. I have repeated what I have said in Australia to Mr Ware regarding the decision to make our own supply from Western Australia. I emphasised it to the request of Mr Dingwall that we were not going to get supply from other sources in South Australia.

In November 1979, did you visit Australia and go to South Australia?---In November I remember being with Mr Dingwall 20 in the eastern states. I do not remember going to Adelaide. Maybe I went but I remember meeting him in the Menzies Hotel because of his request of giving a guarantee for the supply of remaining sheep.

In relation to that request, as I understand it, your recollection is that at the end of the discussion you said, "You give us a bank guarantee and we will give you one."?---Yes.

It was left like that?---Yes.

There was no decision reached, was there, as to what was to be done about that?---The decision had to be made by Mr Dingwall because I offered plainly, "If you want the bank guarantee we give it but as soon as you give me another one." I thought that it was a matter of pride. Why should we give a guarantee? 30

Did he explain why he wanted the bank guarantee?---The reason he explained was not convincing for me. That is why I say - -

What reason did he give?---The Iranian situation, if the vessel was going to be able to discharge in the Iranian ports, if the Iranians were going to honour the contract - 40 I do not remember - most of those things.

That matter was the subject of some discussion in the newspapers at the time, the question of possible Iranian sanctions?---I did not understand it in that way because

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we were receiving a free alongside basis and the letter of credit being opened from the Swiss bank, I did not understand that there was any risk for Metro Meat. The risk was for ourselves.

MR McCUSKER: Did you say that to Mr Dingwall?---I think that I have said many many things because we have had long conversations. I think we had a breakfast and then we had some lunch or a sandwich together so we have been talking about that matter.

In the course of that you told him that you thought that the risk was not a real risk at all for Metro?---Yes. 10

Did he tell you that he thought there was a risk, nevertheless, because if sanctions were imposed they might be prevented from loading meat onto the boat?---Of course; Mr Dingwall is a very intelligent person. He should have given me a lot of possibilities that I did not agree on.

Did he put that forward as being Metro's risk, that they thought if there were sanctions then they might be prevented from loading meat onto the ship? 20

MR BURBIDGE: Your Honour, I think I should ask the relevance of this. It is, after all, as has been pointed out many times, free alongside. There is no question, surely, of Metro Meat loading onto the ship. The problems of loading onto the ship are those of the plaintiffs. I do submit that it is just not relevant. I do not wish to stop my learned friend if there is some issue of credit involved but it is an FAS contract and the question just does not arise.

OLNEY J: I thought the matter had been raised in the telexes on the basis that the Australian government might prohibit the export of meat to Iran in support of American sanctions against that country to do with the hostages. So, I suppose, if by Australian government action Metro Meat were prohibited in actually dealing in meat for the Iranian market - - - 30

OLNEY J. (Continuing): - - - Iranian market, then some problem might arise. That is how I understood it came into it.

MR BURBIDGE: If we are restricted to that area that has been raised by the telexes and the like, I suppose there would be no complaint, but this is surely now asking this witness to deal with the position or discuss the position as though Metro was in some way to be precluded by some action from loading onto the ship. With respect, that is just something that was not part of their contract. There is no suggestion that Metro loads onto the ship. Their obligation ceases alongside. 10

OLNEY J: Yes. They have to get the meat alongside the ship.

MR BURBIDGE: To the wharf. If there is some question directed to that proposition, then of course there would be no objection made. However, I do object to questions, on the basis of relevance, propositions, involving the concept of Metro loading these ships.

OLNEY J: I think that point is well taken. I am not sure that the questions were really dealing with the loading of the meat, were they, Mr McCusker? 20

MR McCUSKER: I am assured by those who know better than I, sir, that my learned friend had missed the point, that I was cross-examining this witness simply about what Mr Dingwall said to him in the course of a discussion when the question of a guarantee, because of sanctions, was raised. My learned friend may from this witness, in re-examination, elicit that such assertions as were made by Dingwall were without any possible foundation; but I think I can only cross-examine one witness at a time. 30

OLNEY J: You were asking him what was said in the conversation.

MR McCUSKER: Yes, sir. I will come to the basis of it, and I think I must lay it because one of the complaints appears to be - one of the alleged acts of implied repudiation - this reference to the question of sanctions and the request that there be a deferment in the shipping, because of that.

OLNEY J: Yes; go ahead. 40

MR McCUSKER: Mr Villegas, you agree that Mr Dingwall requested a guarantee and it was because, he said, of the possibility of sanctions being applied against Iran?---Yes; around that matter was the - -

Did he tell you that there was the possibility, if that occurred, as he understood it - - ?---A possibility of it?

MR McCUSKER: Did he tell you that if that happened, that if sanctions were applied, then that could mean that Metro Meat would have produced meat for which it could not get paid?---I think he said so, and I explained to him that it was not a risk for Metro Meat, because the letter of credit was on free-alongside basis. Then we should divert the meat somewhere else, but we were engaged in taking the quantities.

As you say, he is an intelligent man. Did he not give you as a further reason that even though your letters of credit were good and unchallenged, it may be that with sanctions the company could not get the export licence, it simply could not export the meat? ---I repeat, it could be possible to export to Iran but we could have the chance to put them, if so, somewhere else.

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Did he tell you, did he point out, that the letter of credit required certain documentation and certification which might not be available if sanctions were imposed?---The letters of credit are open by yourselves, are very easily changed, upon a phone call to put the conditions in which we need them.

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That may well be so, but did he raise that matter with you? ---I don't remember. It was a very long conversation, so long ago.

Did you become aware - - -

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MR McCUSKER (Continuing): - - - become aware at some stage of Metro Meat's claim that it was entitled to a further payment of \$30 per tonne in respect of each shipment when there was discharge at Iran in less than 40 days?---I knew since the beginning that that entitlement did not exist.

That is not answering my question. Were you aware that Metro Meat claimed - -?---Claimed, yes.

Did Mr Dingwall ever discuss that claim with you?---I do not remember.

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Do you recall meeting Mr Dingwall in Sydney at the Menzies Hotel in November 1979?---Yes.

Were you staying at the Menzies?---Yes.

Did he come to see you?---I do not know, we meet each other, if he was coming or I was going.

Was it an arranged meeting or a chance meeting?---No, we always try to arrange. Every time I came to Australia I was trying to know which were his movements to be able to meet him.

At that time did he ask you why his company had not received this \$30 per tonne?---I do not remember anything at all having spoken about that matter.

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I must put it to you because he will say that at that meeting at the Menzies Hotel he raised this question with you? ---He could say that.

Do you say to that that it did not happen or that it may have happened but you have no recollection?---I have no idea about that happening because if it so could happen I should have called immediately Mr Fares to ask him something about that situation.

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To take you a little further, he will say that he raised this with you, asked why it had not been paid, and that you told him that you considered that this should be paid at the finish of the entire contract. Do you remember any such conversation?---Honestly, no. The main reason for that conversation that I recall was the instability of Iran. I do not remember.

There was not any discussion about the \$30 per tonne rebate at the same time as the discussion about the Iranian sanctions?---I do not remember that. Maybe he could have told me something about that. I do not remember. I knew in case that things were going properly we should be giving him back \$15 on lambs. That is what I remember.

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MR McCUSKER: That was your understanding from Mr Fares?---Yes.

He will say further, just to conclude it, that you told him that he had better take up the question of payment of this \$30 directly with Mr Fares?---Me?

Dingwall will say that that is what you replied. Have you got any recollection at all of that conversation - about the \$30, that is?---Not at all.

I have no further questions, thank you.

OLNEY J: Do you re-examine?

MR BURBIDGE: There is just one matter, your Honour. It really is by way of reply. I would seek to tender a telex at p.122 of the document, Vol. 1, that document being a telex of 18th December 1979 to Bennetts Farmers of South Australia. The basis upon which I seek to tender that is - -

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MR McCUSKER: I have no objection, sir.

EXHIBIT EXHIBIT 50 Telex to Bennetts Farmers dated 18th December 1979.

RE-EXAMINED BY MR BURBIDGE QC:

MR BURBIDGE: Mr Blanco-Villegas, you were asked about a conversation which you had with Mr Fares and Mr Dingwall in London in late July 1979. Do you recall those questions? During that conversation was any reference made to the telex which had been sent on 19th July? ---I do not remember.

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WITNESS WITHDREW

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J.A. BLANCO-VILLEGAS, XXN

DOC. 5 - Plaintiffs evidence -
J.A. BLANCO-VILLEGAS, RXN ---
23.11.82

KENNETH DINGWALL, sworn:

EXAMINED BY MR McCUSKER QC:

MR McCUSKER: Mr Dingwall, where do you live?---At present I am temporarily in Melbourne, because I am just taking a position over there. I have been living in a hotel for the last three weeks. However, my home is still 71 Mt Osmond Road, Mt Osmond, Adelaide.

That is South Australia. Do you have any qualifications?---Yes, I do.

What are they?

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MR BURBIDGE: I object to this, your Honour, on the basis of its relevance.

OLNEY J: Is it relevant?

MR McCUSKER: It is really by way of description. If I said, "What is your occupation?" my learned friend may equally object to its relevance; but I will not pursue it.

MR BURBIDGE: I would not object to that, your Honour.

MR McCUSKER: What is your occupation?---I am the group executive director international of Elders-IXL Ltd.

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Prior to that did you hold the position of managing director of Metro Meat, the defendant?---Yes. Until the 31st of March this year.

I think that Metro Meat underwent a transformation. Is that right? Was there a change in its constitution?--A change in ownership, at the end of February this year, when they were taken over by the Adelaide Steamship Co.

Did you, following that, obtain your present position as the group executive director international operations, Elders?---Yes. I took up that position on the 3rd of November.

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Does that mean that you are still engaged in the meat and live-stock business, among other things?---That is one very small portion of the business overall that I have responsibility for.

In April 1979 were you the managing director of Metro Meat? ---Yes.

How long had you held that position as at that time? Since when had you held it?---I was appointed managing director some time early in 1971.

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Prior to that were you with Metro Meat, and if so, in what capacity?---Yes. I had been with them approximately 15 months as assistant general manager.

MR McCUSKER: Would it be correct to say that you spent all of your working life in the meat livestock rural industry?---No, it would not be correct to say that.

Prior to working for Metro Meat what was your position?---I was previously Queensland manager for Anderson Meat Industries.

Apart from that, have you held a position as an accountant at some earlier date?---Accountant and control, that is true, for the Rheem Australia organisation.

I think it is common ground that your first contact with the Fares organisation was some time earlier than 1979. 10
When was it that you first came into contact with the organisation?---My first contact was in April 1974.

Did you then meet Mr Fares?---No. I met Jorge Villegas and a Mr Edgar Runnicles.

Had you known Mr Villegas prior to that time?---No. I knew of him but I had never met him prior to that.

Was it through Mr Villegas that you ultimately came to meet Mr Fares?---That is true, yes.

When was that?---Later that month, after discussions with Mr Villegas in Perth actually. I went through a type of negotiation with him; what was possible on live sheep and meat for Iran. He seemed satisfied with the negotiations and - - 20

MR BURBIDGE: I would object, your Honour.

MR McCUSKER: Did he say anything that made you think what you were about to say just then?

MR BURBIDGE: Your Honour, I object to this material from 1974, unless my learned friend says it has some relevance to some aspect in his case. 30

MR McCUSKER: It does have some relevance, the earlier dealings. I do not know whether my learned friend is objecting to anything prior to 1979 or whether he simply objects to this part of the evidence.

MR BURBIDGE: I am a bit concerned about going so far back in history, really - - -

MR BURBRIDGE (Continuing): - - - really, your Honour. Unless he said it had some particular relevance I would object to it. I certainly do not object to anything prior to 1979 as such.

OLNEY J: There is some pleading that refers to relationships in 1974. I assumed we were getting round to that.

MR McCUSKER: Dealing with that, sir, yes. I will get around to it a little more directly.

OLNEY J: Yes; perhaps we could go directly to it.

MR BURBRIDGE: If the court pleases.

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MR McCUSKER: There is some evidence that was adduced in re-examination of Mr Fares as to his involvement - -

MR BURBRIDGE: I withdraw the objection.

MR McCUSKER: Mr Dingwall, you met Mr Fares in April 1974 and ultimately did you, on behalf of Metro Meat, make some arrangements?---Yes; I met him in Teheran in April 1974 and spent about three or four days in Teheran with him.

What ultimately resulted from your meeting?---A contract for both live sheep and meat which covered, in general conditions, a period of time thereafter.

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The contract in question - who drafted that contract?---I did personally.

(Could the witness be shown the book at this stage, Vol.1, the documents at p.1?). Is that the contract which you personally drafted?---Yes.

Made between Metro Meat and Mr Fares?---Mr Rachid Fares, that is correct.

At that time did Mr Fares say anything to you to suggest that you were dealing with anyone other than Mr Rachid Fares?
---No.

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Sir, I think that is already in evidence.

OLNEY J: Yes, 28.

MR McCUSKER: I would turn you to p.4 of the book of documents, Mr Dingwall. Under the heading "Force Majeure" you will see there a provision: "The seller is not responsible for non-delivery...", and so on?---Yes.

For how long had you had experience in the meat export business at that time?---Eleven years.

How was it you came to insert that particular clause, the force majeure clause?---Well, it is a fairly standard type

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of clause for meat deliveries on the international market which covers the major things that could happen outside of your control which would have an effect on performing a contract.

MR McCUSKER: In relation to that particular contract, did Mr Fares tell you what his purpose was for the purchase of meat as mutton and live sheep under that contract?

MR BURBRIDGE: Your Honour, I do object to that. With respect I would submit that whatever conversations may have been at that time they could hardly have any effect - - 10
I assume this is directed to the concept of which of the two plaintiffs is the true contracting plaintiff but I do submit that whatever the situation may have been prior to the incorporation of the company in mid-1978 this evidence could not affect that situation.

OLNEY J: Yes; that seemed to be the view I was forming. Before the first plaintiff came into existence things that were said and done between the witness and Mr Fares would hardly be of any significance.

MR McCUSKER: There are two aspects, may it please your Honour, 20
in respect of which I think this evidence has relevance, One is that the first plaintiff in effect is saying: "Whatever the dealings may have been prior to my incorporation, you dealt with Mr Rachid Fares on the basis that he was the agent for the first plaintiff after my incorporation", and indeed there is some evidence - although it is not very strong - as to Metro Meat dealing with the Fares organisation or "group", as I think he described it - - -

MR McCUSKER (Continuing): - - - it - the group. The other aspect of the evidence that has relevance is with regard to the course of dealings so far as the involvement of the IMO is concerned. I have already, to some extent, foreshadowed this aspect of it - the fact that the purpose of the supply of meat under these contracts was in turn that Mr Fares could fulfil contracts with the IMO and that has some bearing, I think, on this case, particularly as regards any arrangements made prior to July 1979 involving the manner in which prices were calculated. 10

OLNEY J: I will let you proceed, Mr McCusker, but I hope you will just keep an eye on the relevance of the questions.

MR McCUSKER: In your discussions with Mr Fares regarding this first contract was there any mention by him of with whom he was dealing in turn?---Yes. From the discussions it was very plain to me that he was virtually a sole proprietor, entrepreneur, who had been doing quite a lot of business in Iran for many years and he had a running contract with the IMO for the supply of live sheep as his principal activity in Iran. 20

In drafting the contract you have referred to, the first of the contracts made between Metro and Fares, was there any reference to the IMO contract made by Mr Fares?---I do not know for sure. Could I check it?

I am sorry - not in the contract itself?---I follow you.

So far as your negotiations with Mr Fares were concerned?---Could you repeat that question?

When you were negotiating with Mr Fares for this particular contract was there any reference to any other contract - in the terms of your discussions with Fares?---The only reference was to the contract he was holding with the IMO for the commodity. 30

Thereafter did Metro Meat provide any further meat or live sheep to Fares?---Yes, from that time on we continued on a progressive basis over quite a number of years on both live sheep and meat. In the case of live sheep very consistently on a schedule turn around of one vessel initially and later on two vessels and finally three vessels. In the case of meat it was a spasmodic situation depending on the demands of the Iranian IMO. These were never predictable but were tending to be in the second half of each calendar year. 40

After the first contract did you, as a rule, contract in writing or orally or how?---No. The first contract actually covered the general agreement and conditions that were laid down for both meat and live sheep for a period

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K. DINGWALL, XN

of almost three years. The practice at that time was to interchange telexes or telephone calls on timing of a vessel to come to Australia and that is how most of the contracts were carried out during that period and thereafter.

MR McCUSKER: During the period from 1974 to 1979 how would you describe your relationships with Mr Fares?---I can only say that from a business point of view they were very good. From a personal point of view we were very good friends.

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Mr Fares has given some evidence, you heard yesterday, regarding his investment in Metro. Do you recall that occurring? ---Yes, he referred to a loan I think.

OLNEY J: And shares.

MR McCUSKER: And shares. Are you able to comment on that?

MR BURBIDGE: I object to "Are you able to comment on that?" your Honour. That, with respect, really places the matter at large. I have no way of knowing whether what the witness is about to say is admissible or inadmissible, prejudicial. I do submit that is a question that is far too broad, particularly as no question was addressed to Mr Fares in relation to that allegation. 20

MR McCUSKER: I could not, sir, because it was in re-examination that the evidence came out.

TO WITNESS: You recall the evidence in question, do you not?---Yes.

Were you aware at the time of any investment being made or any loan being made - - -

MR McCUSKER (Continuing): - - - made or shares taken up by Mr Fares?---Yes. I knew of that in 1978.

You have heard the evidence he gave on that. Do you agree with the evidence he gave?---No, I do not. The description he gave of it indicated that it was a loan that we had asked for by Metro Meat from Fares which was the exact opposite of what actually happened.

Can you tell his Honour what did happen?---I think it probably started in 1976, the basis of this. Both Fares and Villegas were in Buenos Aires and I visited them down there. They made an approach to me to join their company. I told them I would have to give it a lot of consideration. I returned to Australia and did not give them an answer immediately but some months later they raised the subject again and I gave it further consideration. I discussed it with the board of Metro. Metro wanted to retain my services and we had - -

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MR BURBIDGE: Your Honour, I must object to this. With respect, this is assuming a narrative; it is not an answer to the question. I just have no way of knowing what is coming. It has just dropped into narrative form. "Metro were anxious to retain my services" and so on. That is not responsive to the question. It is quite uncross-examinable and it is not admissible.

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OLNEY J: The witness was referred to the evidence of Mr Fares which, according to my note, was that he had lent the company \$1 million of unsecured notes. He was asked by Dingwall to lend the money and was asked to and did take up shares in Metro Meat. "At one stage I was the largest single shareholder in the company." The witness was asked whether that was true or not and he said, "No", it was the other way around. I am not quite sure where we go beyond that, if it is necessary to go beyond that.

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As I understand it, that evidence was given to show the mutual trust that existed at that time between Fares and Metro Meat which does not seem to be in issue.

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MR McCUSKER: Briefly, was an investment of some sort made by Mr Fares in the company?---Yes; the company made a decision to make an overall note issue to shareholders generally and allocated one million of those convertible notes which were convertible in seven years time. Those notes had all the other advantages of shares for bonus issues, cash issues at discounts etc. and that one million was issued to Fares. He paid \$1 million

for them. He got the shares after that because we made our one for four bonus issue some time later.

MR McCUSKER: In relation to the supply of meat to Mr Fares following 1974, can you tell us very briefly, did you supply lamb, hogget or mutton or what?---After 1974 we provided lamb and hogget on a number of occasions.

In Australia when does the hogget season run?---Principally from April to September.

And the lamb season?---It varies in each state slightly depending on the climatic conditions but I would say, generally, starting late July in some areas and going through to January in the case of Tasmania but the patterns are slightly different in each state. 10

Over the period from 1974 to 1979, did your company supply meat as distinct from live sheep to Fares?---Yes, that is true.

Will you tell us, as briefly as you can, the way in which that was done? How did you negotiate with Mr Fares?---Negotiations varied on each occasion. Some were based on an FAS price that we quoted to him in Australian dollars, sometimes an FAS price quoted in US dollars, sometimes on a US C & F basis which is delivered the Iranian port - they are the three main ways of negotiations which actually took place during those five years - - - 20

WITNESS (Continuing): - - - those five years.

MR McCUSKER: During those years when you were negotiating with Mr Fares for the supply of meat, what was the position of Metro? Did it have its own meat resources or did it have its own stock? Can you tell us something briefly about the position of the company in relation to the supply of meat?---It had a regular meat business which was slaughtering through its various abattoirs stock on an every day basis, some for the domestic market - I am talking about live stock as distinct from stock in store - and some for the export market.

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Where did it have its abattoirs situated?---Initially, going back to the 1974 period, we had them in Western Australia and South Australia and by 1979 we also had a plant in New South Wales.

How many in Western Australia?---Two.

And in South Australia?---Two.

New South Wales?---One.

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And those in Western Australia were Geraldton and Katanning? ---That is correct.

When you received an order for the supply of meat or when you negotiated and concluded a contract for the supply of meat with Mr Fares, how did you go about fulfilling that contract? Did you have to buy in stock or what did you do?---Where there is a special type of order like Iran specifications are different from other markets and it required halal slaughtering conditions which did not prevail in many of the other markets. We did not carry any product in store against those types of orders. We had to then set about organising our production, organising our buyers to buy the right class of stock, produce it in accordance with our production schedules to meet a certain shipment date.

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Over that period, when you sold meat to Fares, was there any uniform basis on which you negotiated the prices? ---No, I do not believe so. I think it varied under the circumstances at the time. In some instances, we sold, as I said, on a FAS basis and other times we sold on a C & F basis and we chartered our own ships and delivered with our own ships on a C & F basis.

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Did you enter into any contract or did you supply any meat in 1976 to Fares?---I am sure we did but I know my memory is not that good that I can recall exactly the details of it. I think we did, in 1976.

MR McCUSKER: In dealing with Mr Fares - this is prior to 1979 - how did you negotiate prices, bearing in mind that he was selling to IMO?---Generally we quoted on a price that we required from an FAS point of view at this end. As I became more experienced in the market in Iran, we started and commenced doing some shipments on a direct basis with our own contracts with the IMO, in the first instance on different classes of meat, such as beef and mutton cuts which were frozen in cartons as distinct from carcasses which were the principal trade that Rachid Fares was in. We did also a contract of our own in 1977, I think, on lamb and hogget, on a direct basis and we were in touch with that market on a continual basis and we were aware of the prices on a deliver basis that they were paying.

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Coming to 1979, in May 1979 do you recall if you visited London?---Yes, I did.

Did you there see Mr Fares?---Yes, I saw him in London before he went to his home in Hampshire - - -

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WITNESS (Continuing): - - - Hampshire.

MR McCUSKER: Did you discuss anything to do with the supply of meat with him at that time?---Not in London. I discussed that with him down at Hampshire, at Bucklers Hard.

What did you discuss?---There was both Mr Villegas and Mr Fares there and we initially had a long discussion about live sheep.

Dealing with meat?---I put a proposition to them that they should consider offering 15,000 tonnes of meat from Metro for the coming contracts IMO were looking at for the second half of the year. 10

15,000 tonnes of meat from Metro. Did you specify what kind of meat?---Yes, it was lamb and hogget - approximately 50/50.

When you put that to them did you - - Firstly, if they had accepted that proposal and adopted it how was Metro to have supplied that meat?

MR BURBIDGE: I object to that, your Honour. Surely it is common ground that whatever the ultimate contract was it was not that one. 20

MR McCUSKER: In any event, in relation to that offer of 15,000 tonnes, what happened?---I left them with the offer at that particular time and Rachid promised he would get in touch with me as soon as anything developed in Iran in respect of it.

Following that conversation did you have any further conversation with Mr Fares regarding this matter prior to the 2nd of July?---Yes, I did. If I could have my diary I could tell you exactly when it was because I remember making a note of it. 30

I do not think the precise date matters?---It was only a day or so before that because he actually called me and asked me for some quotes on beef for Bulgaria and I gave him those quotes and I asked him how the things were going and he said Jean Boueri was in Teheran and things were getting close to a head and he would let me know as soon as possible. I advised him I was going overseas very shortly in the following week and if he could let me know as soon as possible I would appreciate it.

Did you hear further from him on the 2nd of July?---Yes. 40

When he telephone you, I think?---Yes, he telephoned me early in the morning, about 2 a.m.

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MR McCUSKER: Would you tell his Honour what was then said between you and Fares so far as this particular matter is concerned - the supply of meat?---Yes. Mr Fares called me and said that Jean Boueri had now got most of the details ironed out with the IMO. However, the tonnage I had offered was not enough for what he wanted to offer and he suggested that he preferred to have an offer for 20,000 tonnes instead of 15,000 tonnes and I said to him - -

MR BURBIDGE: Your Honour, I think at this stage I would ask that, if the conversation is to be given, it be put, as far as reasonably possible, into the first person rather than in some narrative form. 10

MR McCUSKER: I thought he said, "I said to him."

MR BURBIDGE: I think he is but I think at the same time there is a certain amount of summarising going on. I have not objected to that but if we are to come to what may amount to an allegation of an oral contract, as I understand it is to be, then I would submit I am entitled to the benefit of the ordinary rules of evidence in relation to it. 20

MR McCUSKER: I must confess, your Honour, that I said, "What was the conversation?" and the last words the witness said before he was stopped were, "I said".

OLNEY J: Yes, I think the conversation started off by Fares saying that Jean Boueri had most of the details ironed out but the tonnage was not sufficient and that 20,000 tonnes was wanted and this witness commenced by saying "I said."

MR BURBIDGE: I thought he said, "I said that" and that was the reason I sprang to my feet. 30

OLNEY J: If that is so, I must say I did not quite pick it up.
TO WITNESS: Mr Dingwall, in this evidence of a conversation would you just repeat so far as you can recall - - -

OLNEY J. (Continuing): - - - recall, what was actually said by you and by Mr Fares?---Yes.

MR. McCUSKER: Your Honour, may I interpolate that to expect the witness to say, "I said", and then proceed as it were to put inverted commas around it, would be to give a quite misleading view? This witness could not, and who could, say precisely the words.

OLNEY J: Well, that is understood.

MR McCUSKER: If the witness said, "I said that Metro would do this", is that objected to? 10

MR BURBIDGE: Perhaps we could hear it and see. I do not want to object in advance, your Honour. I would sooner hear the evidence, with respect.

OLNEY J: I think it is desirable, as far as possible, that the words be recalled, and if he cannot recall the words to say the effect of the words.

MR McCUSKER: Do you recall precisely verbatim any of the words used?---I do not think so, no.

Did you make any note at any time regarding this conversation?
---Only some short notes on figures that were discussed, 20
that was all.

When did you make those notes?---I made some at the time and some afterwards, the following day I think.

It was 2 a.m. when you got the telephone call, you said?---Yes.

How long after the completion of the call did you make the notes?
---I think probably I just made a couple of brief notes at the time, and then the following morning I made some more copious notes in my diary when I was at the airport in Sydney.

OLNEY J: Could you just tell me where you received this call at 2 a.m. on the 2nd of July?---I was in bed in my home in Mt Osmond in Adelaide. 30

And when you say you made some notes the following morning do you really mean the same morning?---Yes; the same morning - sorry.

MR McCUSKER: May the witness have leave to refer where necessary to his diary for the purpose of refreshing his memory as to this telephone conversation?

OLNEY J: Do you have something to say, Mr Burbidge?

MR BURBIDGE: Only this, your Honour, that has not as yet been established on the evidence that the notes were made the evening - - The notes made in the evening were in fact made in the day. It is left in a somewhat ambiguous state at the moment. I rather gathered 40

that some brief notes had been made and then he made notes in the diary next day. - -

OLNEY J: Copious notes were made later.

MR BURBIDGE: I am just uncertain as to whether or not the notes that are in the diary are notes that were all made the next day or whether it is said - -

OLNEY J: That is the impression I got. Perhaps that could be covered.

MR BURBIDGE: As a second matter, sir, I would ask that the witness exhaust his memory as far as possible before making reference to the contemporaneous notes. 10

MR McCUSKER: The notes that you made (just to clarify the first matter) in the diary: Did you make them all at the same time or at two different times?---No. I think I made them at two different times, maybe three different times, actually. I could not be sure on that at this time.

OLNEY J: What about the notes you made - the brief notes - presumably, as I understood it, at about 2 a.m? Were they made in the diary?---Yes, I believe so. That was the time when I made the first notes on it. 20

MR McCUSKER: The next instalment, as it were, of the notes which you said were fuller notes: When did you make those?---They would have been made the same morning, approximately 9 o'clock in Sydney airport.

What did you do that same day? This was 2 a.m. when you received the call. At 9 a.m. you were at Sydney airport, were you?---I caught the quarter to seven plane from Adelaide to Sydney, and transferred to the international terminal, made some phone calls, and caught the plane to the United States. 30

The second part of the notes that you have described you say you made at Sydney airport?---Yes. I made most of the notes at that time.

What was the nature of the notes that you made at 2 a.m. or thereabouts after the phone call?---Probably the price and something that may have been unusual about it, that was not normal.

MR BURBIDGE: I object to that, your Honour.

OLNEY J: Can you say what notes you made or not at 2 a.m.?---Not exactly, no. 40

MR McCUSKER: I will now proceed, sir, to exhaust the witness's memory so far as possible. We may have to come back to that point.

OLNEY J: The witness seems to be trying to recall what notes he made, but it is his memory of the conversation that is relevant, not his memory of the notes - - -

OLNEY J. (Continuing): - - - of the notes.

MR McCUSKER: No, but the notes, of course, may well be of great assistance on the question of memory.

OLNEY J: To refresh his memory, yes - true enough. However, it still has not been specifically said whether the notes were notes of the conversation.

MR McCUSKER: Thank you, sir.

TO WITNESS: The notes that you made at the time - what were they notes of?---They would have been notes of some features of the conversation at that time.

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When Mr Fares rang you, what did he say, as far as you can recall?

If you can recall, tell us the words that were used?

---As closely as possible, he indicated he needed a greater offer of tonnage because the IMO were willing to buy 20,000 tonnes. Knowing that I had offered him 15,000 tonnes I said to him: "Well, Rachid, it's more tonnage than we envisaged; there can be other factors involved in putting up additional tonnage and I'd like to know, is there any other contract being let for Australia?" He said - -

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MR BURBRIDGE: Your Honour, I think I must object; this material, if it is relevant, was not put to Mr Fares: "Were there any other contracts for Australia?" Unless I am mistaken, no material, no allegation of this nature, was put to Mr Fares. I will check with my learned junior, your Honour, but I am sure that is so.

MR McCUSKER: At p.126, sir, this question was put, half-way down:

"Can you recall him asking you whether the IMO let any other contracts in respect of the supply of meat from Australia?"

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OLNEY J: Yes.

MR McCUSKER: To which Mr Burbridge, not the witness, said:

"Your Honour, I do object to the form of the question."

MR BURBRIDGE: Yes, I see that, your Honour. That is clearly sufficient and I apologise to my friend. Without the transcript, of course, the question had slipped from memory.

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MR McCUSKER: Shall we continue?

OLNEY J: "Mr Fares said..."?---I am just trying to think where I got to, your Honour.

OLNEY J: You were asking whether any other contracts - -?---I asked him if there were any other contracts being let in Australia. He said yes, there was a Lamb Board contract. I asked him what type of tonnage was involved, and he said 10,000 tonnes. I asked him was there any other contract that he was aware of, and he said no. On hearing that then I think I said to him: "It's possible that we therefore can buy additional product outside of our own production capacities in the eastern states, like New South Wales and Victoria", 10 but it would depend on the price that we arranged whether that would be possible. The discussion then went on; I asked him, first of all, what was the price of the West Australian Lamb Board and he told me \$1862.50 per tonne. That was the US C & F price per tonne. I thought that figure - -

MR BURBRIDGE: I object to that, sir.

MR McCUSKER: Do not tell us what you thought at the time, but we might come back to what you knew at the time. What did you actually say to Mr Fares when he gave you that figure?---Well, along the lines that that figure seemed to be low to me in view of the prices that I would have expected the market to be at that time because of the New Zealand price being over \$2000 a tonne, which I was aware of. 20

OLNEY J: Did you say that to him?---I believe so, yes. He said that was the price he had had the information about, and then I asked him what was the price he made his offer at, and he said he had to go in slightly lower than that price at \$1840 - and we were talking about lamb at this particular stage. 30

MR McCUSKER: Did he say why he had to go in lower than that price?---Yes. He said he needed to have credibility with them. I am not sure exactly at that stage whether he said there were new directors there, because I knew there had been changes in directors at the IMO, and I could understand then him making that particular statement - - -

WITNESS (Continuing): - - - particular statement.

MR McCUSKER: He was talking about lamb at that time, I think you said?---That is correct; yes. It followed then from that. He said, "That's the figure". I said, "What do you think about the prices that I quoted on the 15,000 tonnes" that he had offered at US\$1500 FAS and US\$1350 FAS for hogget. He said they were too expensive in relation to his price, too high in relation to his price. I said, "Rachid, we have had some information on shipping, and price levels on the shipping indicate approximately \$375 freight rates. He said that might be so but he thought the figure should be slightly higher than that at \$385.

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MR BURBIDGE: Could I ask that the conversation be actually given?

MR McCUSKER: I understood the witness to say, "He said that might be so but he thought", all of which is what he said. I will clarify that.

TO WITNESS: Would you go over that part of your evidence again?---He said, when we were discussing freight rates - -

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OLNEY J: You told him that your information for freight was \$375?---My information was about \$375.

What was his response?---His response was he thought it would be more like \$385. I said to Rachid, "That gets us down to" whatever the calculation was that I was looking at. He said, "I need to have an allowance". That brought me below the \$1500 mark that I had quoted. What I was trying to get to was some idea of what price level was possible to negotiate with him. He said he would need \$50 to cover his margin and that I knew he had certain expenses in Iran, which I conceded and said to him, "If we do that the figures work back to \$1405". I considered that for a period and said to him, "I think we could do something along those lines, Rachid". He then said to me the problems he might have with demurrage payments at the other end because since the revolution the ports of Iran had been congested and he therefore would like to have some provision made for a further reduction in case of any major delay in discharging the meat in the Iranian port.

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I asked him what kind of figure did he have in mind. He said "Perhaps" or "Say \$30". I said, "Rachid, what happens, for example, if you don't have a delay? Can we have some arrangement where we get a rebate of the \$30 that we are now deducting or adjusting?" He said, "Yes", he could consider that. I said, "What type of delay is involved?" We discussed this and he suggested we could come to an arrangement where it would be paid back if there was a discharge

within 40 days. That was the bulk of that conversation and we finished up on that basis at \$1375. All that discussion had been about was the lamb prices from a rate that was quoted to me of \$1840. At the time the \$1840 was discussed - I think it was at that time, it might have been slightly later - he said that - - -

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WITNESS (Continuing): - - - that he had got \$150 less for hogget. He did not quote a price for hogget.

OLNEY J: When you say "a bit later" was it in the same telephone conversation?---Yes, there was only one telephone conversation. Having received that information there were not any further calculations on the hogget price because the deductions for freight and other items such as the \$50 margin and the \$30 for delays would have been exactly the same for hogget or lamb under the shipments, so the figure then that was decided on, I thought at the time, was \$1225, being a deduction of \$150 from \$1375. I tried to construct that at some later time which came out to \$1225 but in actual fact the confirmation from Rachid came back at \$1230. I do not understand how it arrived that way; my memory does not recall any discussion about any slight differences. 10

MR McCUSKER: Do you have any recollection of a figure of \$1230 being discussed, at the time you spoke to Fares, for hogget?---Not at that time, no. 20

So far as your recollection of the conversation goes there was essentially no calculation of the hogget price similar to the way you described the calculation of the lamb price?---No, there was not.

Save for the fact that there was \$150 less - -?---Than the lamb price.

MR BURBIDGE: I think that should not be led. The evidence given by a witness as opposed to that given by my learned friend was that he thought something or other, which I do not repeat, but he had certain thoughts about the matter. My learned friend then says, "No recollection of any calculation" to which the witness says, "That's right" and my learned friend then says, "Save for the calculation." There is no evidence of the calculation to which my learned friend refers. I do submit he ought not to lead something of that nature. 30

MR McCUSKER: I did not say "calculation". I said "Save for the reference to the \$150" and I was then interrupted.

MR BURBIDGE: The word "calculation" I have written down.

OLNEY J: I have not got an exact note but I thought you did refer to the previous calculation that had been made to arrive at the \$1375. 40

MR McCUSKER: To get it quite clear, you have told us how you went through a calculation to come to a figure for the lamb? ---That is right.

MR McCUSKER: Did you do any calculation of any nature so far as the hogget price was concerned?---Not at that time other than a mental calculation.

On what was that mental calculation based in terms of anything said over the telephone by Fares to you?

MR BURBIDGE: I object to that, your Honour.

OLNEY J: I do not think the mental calculation can be any evidence of the verbal contract, Mr McCusker.

MR McCUSKER: You left Adelaide, as you said, and that same morning you went to Sydney and then overseas, I think. 10
Is that right?---That is right.

How long were you away from Australia?---Approximately six, maybe seven, weeks.

Before you left Australia - and I do not want you to tell us what you said - did you say anything to anyone at all from Metro Meat about this discussion you had with Fares?---Yes, I did.

Who did you speak to?---I spoke to Ian Phillips, the export manager for Metro Meat.

You have told us some detail regarding the telephone discussion. 20
Did you give Mr Phillips any of that information.

MR BURBIDGE: This is one stage worse than asking the inadmissible question because we are now being asked to infer what was said which is, with respect, one stage beyond the hearsay which is in itself inadmissible. I do submit that he cannot give the evidence in that way. Knowing the actual conversation is not admissible, we are to be told the subjects which either have no relevance at all, if nothing can be drawn from them, or if they have any relevance it lies only in that some inference 30
can be drawn about what was actually said - - -

MR BURBIDGE (Continuing): - - - actually said so I do submit it is objectionable for that reason.

OLNEY J: It is all right to say that before he left Australia he spoke to Phillips and, indeed, it is all right for him to say that he told him about the conversation with Fares.

MR BURBIDGE: Yes. I do not object to the topic but when you start to discuss which details of the conversation did you pass on to him, the effect of that is every bit as good as if he had asked, "What did you tell him about the price?" and so on. 10

OLNEY J: Yes. Mr McCusker?

MR McCUSKER: It is put really, not in order to elicit details of what he said but what he did not say.

MR BURBIDGE: I think I would have to object on the basis of relevance, your Honour. What he did not say could not be relevant, with respect. Perhaps if it becomes relevant at some stage my learned friend might re-attack the problem but there is no basis having been shown for some relevance for something which was not said between internal officers of the defendant company. 20

MR McCUSKER: The relevance, I would have thought, is this. As I understand it, part of the plaintiffs' case is based on a telex that Mr Phillips sent. The question really is, on what information, if any, was that telex based.

OLNEY J: Mr Phillips will answer that, will he not?

MR McCUSKER: We might get the same objection, sir. That points up, in my submission, the relevance of this evidence. It is not sought to adduce the evidence as evidence of the truth of what was said to Phillips. It is sought to adduce it in order to establish the extent to which he was informed when he sent the telex. I am sure that your Honour, in the dichotomy that I mentioned yesterday, can easily separate the one from the other. My learned friend is objecting to it, as I understand it - if it is an objection made on the basis that the evidence of such conversation is not the evidence of truth, I accept that but I am putting it forward on the basis that it is extremely relevant to know and for this court to know what information Phillips had at the time he sent the telex. It may have been wrong information; we know that there is an issue between Fares and Dingwall as to what was said in this telephone conversation and what Mr Dingwall may have said to Phillips will not 40

help us on that issue but it will help us on an entirely different issue as to whether, in effect, Phillips was acting as the alter ego of Dingwall or whether he was simply doing something based on no information at all.

MR BURBIDGE: Your Honour, my learned friend gives me another basis of objection, with respect. There is no suggestion that Mr Phillips is an alter ego of this man. This man is not a defendant. Mr Phillips was the export manager of the defendant company. He has his own problems there, if I may so phrase it, but he says in terms of Mr Dingwall cannot be of assistance. 10

OLNEY J: I am prepared to allow you, Mr McCusker, to ask the witness as you have done whether, before he left Australia, he spoke to Mr Phillips and whether he told him of the telephone conversation and I am prepared to allow you to ask whether he gave Phillips the exact details of what had been agreed but I think that is as far as you can go.

MR McCUSKER: That is as far as I would wish to go, thank you, sir. 20

OLNEY J: Yes. I assumed it was.

MR McCUSKER (TO WITNESS): Did you tell Mr Phillips the full details of what you had agreed with Mr Fares?---No.

OLNEY J: I do not think you can go any further than that - - -

OLNEY J. (Continuing): - - - further than that.

MR McCUSKER: No; I do not wish to, sir.

TO WITNESS: Just going back to the telephone conversation of Mr Fares, you have referred to the question of price and the way it was calculated for lamb and that you spoke to Fares about a supply increasing from 15,000 to 18,000 tonnes?---That is correct.

Was there any discussion at that time about what quantities of lamb and what quantities of hoggett?---Yes. 10
We had previously offered 15,000 tonnes with 7000 tones lamb, 3000 tonnes hoggett. I increased that to 10,000 tonnes lamb and 3000 - I left the hoggett tonnage the same. At that stage I was not offering 20,000 tonnes in actual fact, but in the discussion that took place with Mr Fares, it was understood between us - -

MR BURBIDGE: I object to that.

MR McCUSKER: No. Just - -

MR BURBIDGE: Indeed, that with respect highlights my problem. 20
If it is to be relied upon, then it must be given, with respect, in the first person; otherwise, we get into this, "We understood" routine.

MR McCUSKER: Do not tell us what you or he understood. It is often a convenient way we have of describing what was said. Would you tell us what was said?---Yes. He said he wanted to book 20,000 tonnes. I said I could not offer him 20,000 tonnes but by offering 18,000 tonnes he would then be in a position, on a minimum basis, book 20,000 tonnes plus or minus with the IMO. 30

Plus or minus?---Ten per cent.

We heard some evidence about this practice in the trade of an offer plus or minus. Are you aware of any such practice?---Yes. That was quite a regular situation with the IMO where we had done contracts ourselves in previous years on that basis.

Was anything else said between you and Mr Fares specifically with regard to - -

MR BURBIDGE: I would ask that my friend not lead, your Honour, on such a sensitive matter. 40

OLNEY J: We were dealing with tonnages. Have you exhausted that - - ?

MR McCUSKER: I have, sir, so far as the total quantity is concerned. I had an objection raised by my learned friend previously on the basis that the question was too general, that my learned friend would not be able to know what was coming. I am about to tell him what

is coming and he objects to that.

MR BURBIDGE: Your Honour, I must protest. I did not say that at all. What I objected to was to summaries on a previous occasion. I have no objection to my learned friend saying, "Was anything else said?" - which I would have thought was the normal approach to obtaining the balance of any conversation.

OLNEY J: You have exhausted the information you wanted to get on tonnages. Perhaps you could ask the witness if anything else was said.

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MR McCUSKER: Very well, sir.

TO WITNESS: Was anything else said regarding this contract? You have told us of the discussions regarding price and the total tonnage?---Yes. We discussed the shipments, particularly the first proposed shipment as to when that would be, which is a normal thing under the circumstances. He proposed that we ship, I think, towards the end of August on the first shipment and then consecutively approximately every two months. I agreed that this was a reasonable type of programme and said so; however, I said to him that the first shipment would have to be a fairly low tonnage because of the situation with the problems that we were going to have and still had at that time with the Iranian authority approval for our meatworks, which we did not have. I suggested that we should make the first tonnage 2000 tonnes. He said to me, "Could we make it higher? Could we make it to 3000 tonnes?" I said, "I could not guarantee more than 2000 tonnes and even 2000 tonnes will be difficult to guarantee if we have any delay in getting our approvals - - -"

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WITNESS (Continuing): " - - - our approvals." That was basically the discussion on the shipment side of it.

MR McCUSKER: I would like to refer you to a telex which is exhibit No. 1, p.16. You have prior to today seen that telex: "We retransmit following from Mr Fares to Mr Ian Phillips" - do you see that? It is dated 3rd July?---Yes.

I would like to refer you also to p.26, a document which is exhibit No. 2, a telex from Phillips to Fares Rural dated 19th July 1979?---Yes. 10

The first of those two telexes, exhibit 1, appears to have been received on or about 4th July 1979. Where were you then?---On 4th July?

Were you in Australia?---No. I was in the United States, I believe, at that time.

Where were you on 19th July when the telex from Phillips was sent?---I would have been somewhere in the British Isles.

Were you in contact with Mr Phillips at any time while you were overseas?---Yes. I cannot recall exactly but I think I would have been because it was normal for me to be in contact with him periodically at three to four day intervals. 20

When did you first see the telex which is exhibit 1 and the telex which is exhibit 2 in reply?---Actually, I think this particular exhibit 1 I did not see until it was presented as documents from the plaintiff.

It is a retransmission in fact. When did you see a telex which contained the body of that information?---That telex I do not believe I saw until probably February 1980. 30

OLNEY J: Which one are you talking about?---That is the first one, your Honour.

Page 16?---Page 16, yes.

Exhibit 1, in February 1980?---That is right.

MR McCUSKER: And the second, exhibit 2?---I saw that for the first time at a meeting date with Captain Mata. It would have been the day after I got back from overseas, which I believe was 21st August 1979.

OLNEY J: On 21st August you got back?---I got back on I think the 19th or the 20th, your Honour. 40

MR McCUSKER: Before we come to that event, after you came back on 21st August, or was it 19th August - -?---I think I got back on the Sunday, if that was the 19th, and the Monday was the first day in the office.

MR McCUSKER: While you were overseas did you see Mr Fares, when you were in London?---Yes, I did. I saw him very shortly after I got to London.

Was anyone else with him when you saw him?---Yes. He had, I think, his nephew Amado with him, maybe Jorge Villegas at that stage - - -

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WITNESS (Continuing): - - - that stage. I cannot be sure of that but the following day I did see both Mr Fares and Jorge Villegas together. No, sorry, that is not right. I am mistaking that for another period. Jorge Villegas was not there then, I saw him later that month. It was only Rachid and I think Mr Boueri was there at the time and Amado.

MR McCUSKER: Did you make any diary entries relevant to this matter?---Yes. I probably have a note in my diary in that respect. I can pinpoint exactly who was there, probably, from my diary. 10

May the witness refer to the diary for that purpose, sir?

OLNEY J: Yes.

MR McCUSKER: You are referring there to an appointments diary, are you?---Yes, this is my appointments diary. It will pinpoint where I was at that particular time. I arrived on Friday the 13th in London. I think this was the occasion when my son actually met me at the airport. He was in England at that time.

Can you take us to the meeting with Mr Fares?---I went to see Mr Fares with my son. He had Amado, his nephew, with him at that time. I can recall that now. 20

Are you able to tell us the date of that meeting?---Yes. I believe that would have been Friday the 13th.

In any event, can you tell us what was discussed between you and Mr Fares?

OLNEY J: Perhaps we could just clarify it because I was led to believe that there was a contemporaneous note indicating who was present at the meeting. I take it there was no note indicating who was present at your meeting with Fares?---No, there was not. It is entirely by memory. 30

Can you tell us what was discussed, in relation to this meat contract, between yourself and Mr Fares, if anything?---I do not know if there was much discussed about the meat contract on that particular occasion. It was more of a social evening as I can recall. My son and Amado are of a similar age and we went out to dinner.

Did you have any further meeting with Fares while you were in London?---I can check that but I think I came back to London some time later in the month and had a meeting, because I had asked him to see if he could get Jorge Villegas to come to London so we could have a discussion about some changes which had occurred only a week before on Australian live sheep. 40

MR McCUSKER: Did that meeting take place?---Yes, it did -
towards the end of that month.

I do not think the precise date is important. It was just
a meeting between yourself, Fares, and Villegas?---Yes.

Will you tell his Honour, firstly, where was that meeting? Was
it in London, Hampshire, or where?---It was in London
at Rachid's house at Eton Place.

What was discussed so far as is relevant to the meat contract?
---It was not relevant so much to the meat contract.
It was principally in respect of live sheep where
I had been advised from Australia - -

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Do not tell us what Australia told you. What did you say to
either Mr Villegas or Fares about the meat?---I
do not believe I said anything specific about the
meat contract at that particular meeting.

Was there a discussion about anything to do with your business
dealings or the business of Fares at that time?---Yes.

Would you tell us, briefly, what that was?---I expressed to them - -

MR BURBRIDGE: I object to that, sir, on the basis of its
relevance. It did not have anything to do with the
meat contract and I would submit it had no relevance
or certainly no obvious relevance.

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MR McCUSKER: Probably not directly but Mr Villegas did give
some evidence in relation to this meeting as I recall
it - - -

MR McCUSKER (Continuing): - - - I recall, and I will not dwell on it.

OLNEY J: It may well be that it is relevant, I do not know - it is always unwise to try and guess what counsel was leading to. I am prepared to leave it to you, Mr McCusker. If the matter is relevant, you can proceed.

MR McCUSKER: I think, on reflection, I will pass on, sir.
TO WITNESS: Could I take you to your return to Adelaide and what took place in relation to this contract shortly after your return to Adelaide? Did you have a meeting? I think you mentioned before that there was - -?---Yes, I had a meeting the second day I was back in the office. I had a meeting with my own staff on the Monday, the first day back.

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Do not tell us about that?---As a result of that, I called Captain Mata and asked him if he could meet me the following day because it was urgent and he agreed to come over and meet me on the Tuesday. We had an appointment for the Tuesday afternoon.

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We have not had evidence from Captain Mata. Who was he, as you understood it?---Captain Mata was, I believe, the managing director of Fares Rural Australia.

At that meeting, what was said by you to Captain Mata, so far as is relevant to this?---I commenced the meeting by talking to him and stating we were disappointed about the present situation with the contract with Rachid Fares because we had not received a letter of credit. He said there had been a letter of credit come out and he had sent the details to Metro Meat. I said, "Yes, but the letter of credit details were not satisfactory" and also that the letter of credit was not made out to Metro Meat. He said to me that it was not meant to be made out to Metro Meat. It was made out to Fares Rural because they were going to run the contract or something to that effect. I said, "I do not understand that. How does Fares Rural come in as the contractor when I did a deal with Rachid Fares, as I have always done?" He said the contract had been transferred some time in the previous month while I was away. I said, "I do not understand. What are you talking about?" He said, "Through Mr Ian Phillips " and he referred to a telex; confirmation from Mr Ian Phillips. I called Mr Ian Phillips into the meeting and asked him to bring the Fares file. We always open a file for each new contract. Mr Phillips came to the meeting and I said to Ian, "Ian, Captain Mata has said to me here that there was a telex where we have confirmed a contract with Fares Rural. Have you got that telex in your file?" He said to me, "I do not know anything about

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a confirmation of a contract. I have sent the details of the telex I received from Rachid from London at the request of Jorge Villegas to Perth." I said, "Let me have a look at it." That is the telex you asked me to look at on p.26. I said to Captain Mata, "Based on what Ian has said, this is not a transfer of a contract from Metro to you. We still have a contract with Rachid Fares and I will not accept it as a contract with you. It was never intended to be that way - - -"

WITNESS (Continuing): " - - - that way. I will only accept a letter of credit direct to Metro Meat from Rachid Fares Enterprises." He said to me that this was arranged so that we could get cover - I think cover was the term he used - for meat shipments in their own name out of Australia to give them cover for any necessary ratios that might be required if there was any union problems with the export of live sheep. I said to him that that had always been covered by Metro in the past, by the shipments of Metro product, for the live sheep that we had been exporting and I could realise that now that they had taken over the West Australian live sheep shipments perhaps he had some substantiation for wanting to do contracting meat in their name and export it in their name. However, because of the total tonnage of meat that Metro exported on a general basis we believed that we could still give them that cover anyway and that we never do any major contracts of this nature and pass the right to be the exporter over to somebody overseas because of the other factors involved, such as the export expansion grant scheme, factors like that that could be influenced if we transferred the exporter or the right of being the exporter to some other party. 10 20

MR McCUSKER: What did Captain Mata respond to that, if anything? ---I do not know, I cannot remember exactly what his response was in words but I think it was to the extent that he would talk to Mr Villegas about it and advise me. The meeting virtually finished at that point. 30

At that time or about that time after your return, apart from this question of who was the contractor that was raised, was there any other question of concern in relation to this contract?---Yes. There was concern at the fact that we did not have our authority at that stage from the Iranian government to slaughter meat for the meat contract. I raised that with him at that time and told him that we were taking an enormous risk in producing the product we had produced up to that stage. We had, in fact, been keeping our production down to very low figures in Western Australia on hoggets because the hoggets would be unsaleable anywhere else if the product we had already produced was not allowed to be shipped because it had been produced before we got our official approval of the plant. We would be left with a product that we could not sell unless we sold it at a discounted price as mutton. 40

Did you raise that with Captain Mata?---That was one of the points of dissatisfaction I raised at that time, yes.

MR McCUSKER: Can I take you now to a telex of 3rd September,
exhibit 42, p.55? You have seen that telex before?

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MR McCUSKER (Continuing): Is that your telex? It appears to be from you to Mr Fares?---Yes. It is.

I would like to take you to a couple of matters within that telex, first to para.6 in which you state having referred to other problems with regard to the letter of credit provision. You said:

"This would be bad enough if it was not for the fact that two weeks ago(reads)....never sells meat on this basis."

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When you refer to Captain Mata having advised you of that, to what conversation are you referring?---To that conversation and the meeting I have just been talking about.

You go on to say "Jorge Villegas raised this point again on the phone and I advised him that if he had this in mind why was it not negotiated before because we would not have agreed to produce on this basis." Right?---Yes.

In relation to the discussion with Captain Mata, did such a discussion take place with Jorge Villegas we say he raised on the phone?---I do not recall it at this stage but obviously I must have had a discussion with Jorge between that meeting and sending this telex.

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You said later, "He explained that he wanted the protection from unions by having the export of meat in Fares Rural's name and I answered by offering him 8000 tonnes of hoggets" etc. Is that factually correct? ---Yes. I made the offer to him that if he wanted to do that that is fine. We could slaughter on a service basis. He would buy the livestock. He would put it through our plants. We would charge him service fees and he could export the meat.

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I will take you to para.8 where you are talking in paras.7 and 8 about the prices of lamb and hogget in Australia. In para.8 you say:

"I have been checking this out for two weeks since I returned....(reads)the balance \$US1925 cif."

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Right?---Yes.

You go on to say:

"The first figure agrees with the figure you quoted to me at the time of our negotiation."

Just stopping there, the first figure you referred to in that telex, at what time are you talking about when

you refer to it having been quoted to you?---I am talking about the time that Rachid Fares spoke to me on 2nd July at 2 o'clock in the morning.

MR McCUSKER: Then:

"The second figure is the figure I reported to you that had been supplied(reads)....price as you had seen the contract."

Could you tell us about that? You are referring there to a discussion or a report made to you?--- Yes. The person was a meat broker in Sydney called Stewart Couzens.

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Without telling us what Couzens said to you, did you say anything about that matter prior to this telex to Mr Fares?---I think I may have discussed that with Rachid while I saw him in London, because I saw him on a number of occasions. I do not know exactly when but I think by the way that is written that I probably did say something to him while I was in London before I came back to Australia.

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You go on to say:

"I don't understand how you were not fully informed on this contract or(reads)....would greatly doubt is the case."

L65B. 4.07

MR McCUSKER (Continuing): In relation to that assertion,
"If you sold at US\$1840 CAF", to what are you referring?
---I am referring to the same conversation we had
on 2nd July at 2 o'clock in the morning.

Could you explain to his Honour why you conclude, as you do
there, "it can only mean that you sold lambs and
hoggets at an all in price at this figure"?---What
I am saying is that if the lamb board price was
\$1925 for the current season lambs as distinct from
the lower price for the old season lambs, his price
of \$1840 that he claimed he had sold at to me was
too big a differential below the price the lamb board
had sold at for the same season lambs. I am surmising
in my own mind in putting that on paper that if that
is the case he must have therefore sold both hoggets
and lamb at an all in price, which is not unusual in
Iran. Metro itself two years before had sold a
3000 tonne parcel of about 55 per cent, I think, at
the time, of lamb and 45 per cent of hogget at an
all in price.

You raised that matter, and in para. 11 you refer to the question
of shipping. You say:

"Additionally, since my return, I have
the file on the quotes of shipping and
see....(reads)....yet allowance in the
contract was set at \$375 per tonne."

I would like to deal with that point. When you are
referring to allowance in the contract being set to
what are you referring?---I am referring to the
discussion I had with Rachid where we talked about
the C & F price US landed Iran, where we had our
discussion about a provision to cover the cost of
freight. I noticed that the \$375 does not line up
with the final figure that we did deduct of \$385 but
I think that was my suggested price and I probably
incorrectly used that in this telex at that time
instead of \$385.

You conclude that telex by saying:

"I believe this can only be settled by
the three of us meeting in Adelaide as
quickly as possible because until all the
matters are cleaned up and we have the necessary
payment documents production if any will
be diverted to other sales that are available."

Did you in fact have a meeting with Mr Fares or did
you hear from Mr Fares following that telex?---No,
we did not have a meeting. Some time shortly after,
maybe a day or two after, I had a telephone call from
Mr Fares from Spain.

MR McCUSKER: When he spoke to you did he speak regarding the telex?---Yes.

What did he say?---I can remember he was pretty agitated because he said he did not like the tone of my telex, expressing it like that. I do not know whether they were the actual words he used but something like he did not like the tone of my telex, he thought it was unnecessary. He assured me that the discussions he had had with me about prices in the conversation on 2nd July were correct and that I should not take notice of rumoured prices, the letter of credit problems would be sorted out. I cannot recall whether he did say anything about the live sheep side of it but he gave me general assurances that everything that was involved, if I had the difficulties that I was complaining about, he would sort out between us and it would not be necessary to have a meeting - - -

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H83. 4.12

WITNESS (Continuing): - - - a meeting but the major thing that he said was his assurance that the prices I was putting to him that could be incorrect, were correct.

MR BURBIDGE: Your Honour, I object to that. The witness says it was the major thing that he was saying. That, surely, is his own conclusion.

OLNEY J: It is probably not all that important. Nevertheless, the witness says Fares said the matters in issue could be sorted out. 10

MR McCUSKER: Yes; of course, that is not the whole of the evidence, sir.

TO WITNESS: He referred, you say, to the question of price that you raised in the telex?---Yes.

Counsel for the plaintiff objects to you talking about it as being the major thing that he mentioned. He obviously mentioned the price, he mentioned the letter of credit. Was there anything else that he mentioned?---Yes. Looking at what I had said in the telex to him he did, briefly, discuss the live sheep and referred, I think, to the meeting we had had with Jorge in London and said that I did not have anything to fear from that, that it was some kind of exploratory information that Captain Mata had been over in South Australia asking questions about, just to check whether the prices we had been giving them were okay - something along those lines. 20

Subsequent to that was a letter of credit issued in favour of Metro Meat to cover the first shipment?---Yes. There was a letter of credit, I believe, very shortly thereafter made direct to Metro Meat. 30

The next thing in the chain of events - did you, in October, have occasion to call anyone from Mr Fares' organisation or his employ? Specifically, did you, at any time, have any discussion with Mr Jean Boueri?---I could have had.

May the witness refer to his diary at this point, sir, to an entry of 4th October?

OLNEY J: In order to see whether he did have the conversation and not - -

MR McCUSKER: Not in order to see what he said but simply to remind himself of the date, sir. 40

OLNEY J: Yes, all right.

MR McCUSKER: On 4th October do you recall having a conversation with Mr Jean Boueri?---I believe I did have a conversation about that time with him, yes.

MR McCUSKER: Can you recall the substance of that conversation or the subject of it?---No, I do not think I did.

OLNEY J: You do not think you did have a conversation?---I am sorry; I think I had a conversation with him because I can recall noting to call Jean Boueri at a particular number but I cannot recall exactly now what I discussed with him.

MR McCUSKER: The first shipment, I think it is common ground, was completed and the ship concerned was the Almeria Star?---Yes, that is correct.

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In relation to the first shipment, do you recall now the total of hogget and lamb tonnage - - -

A244. 4.17

MR McCUSKER (Continuing): - - - and lamb tonnage?---Yes. I believe it was about 3100 tonnes.

The second shipment which followed - was there any delay of any kind there?---Any delay involved?

So far as the loading of the Almeria Star was concerned?
---Yes, there was a delay involved in Adelaide when it returned for loading on its second voyage. We had a problem with cold store strikes in South Australia, for those stores supplying the ship.

Did you make a telephone call to Mr Rachid Fares at any time about this time?---Yes, I did, during the period of time the ship was in Adelaide loading. 10

Are you able, without reference to your diary, to recall the exact date that you called Fares?---I think it would have been around the end of the first week in November.

When you called Fares what did you say to him in relation to this contract?---I said to him that the first shipment had discharged in Khorramshahr in slightly less than 10 days. In view of that fact, we should now be being paid the \$30 per tonne as discussed in our contract on 2nd July. He said that it did discharge, it had discharged very well and there were not any delays, however because of the problems we were having in Adelaide in loading the second voyage he believed that there should be some offset because of the cost to him of having the ship loading in Adelaide for a greater number of days. I said back to him that the two were entirely different things and not related - one was a discharging situation in the port in Iran which we had an agreement for for payment back to Metro if it took less than 40 days; the other was a loading problem in Australia which bore no relationship to that part of the agreement, and we discussed this at some great length actually and it resulted in him saying to me, "Okay". The discussion that did take place was about who was at fault on the loading side, who was at fault about the strike, etc. and that is why it took so long, and he said to me at the end of that, "Okay, we will fix it up." 20 30

Referring to - -?---Referring to the payment for \$30 per tonne. 40

I would like to take you next to the telex, which is 9th November 1979, exhibit 3. It is p.104, Mr Dingwall. That is a telex from you to Captain Mata and refers to a delay in loading and so on. Could you tell us what the position was at that time as regards your production of meat for the purpose of this contract? Was there any difficulty being experienced?---In the production, you mean?

MR McCUSKER: Yes?---Let me please read the telex first.
No, I do not believe we could have had any trouble
at that stage because we are saying - - -

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WITNESS (Continuing): - - - we are saying we have estimated the capacity of the vessel because, understanding that we did not load it to full capacity on the first voyage, the same vessel - we put 3100 tonne on it - we estimate it on the normal basis of 125 cubic feet per metric tonne, that the vessel would load approximately 3700 tonnes. We have said that we have additional lambs in store in Western Australia to top up if necessary in case the tonnage which can vary, according to the stowage factors, was greater than 3700 and we would have had enough tonnage surplus to fill the full capacity of the vessel. What we are then requesting for is an amendment to the letter of credit that we had to bring it into line with our estimated figures we were supplying. 10

MR McCUSKER: Can you tell us whether in November 1979 you recall having any meeting with Mr Villegas?---Yes, I did.

Again, would reference to your diary be helpful on the question of the date that you met him?---It was about a week or a week and a half after I had spoken to Rashid. 20

With my learned friend's permission I can direct you to the particular note?

MR BURBIDGE: Yes.

MR McCUSKER: Would you refer to 16th November 1980?---Yes, I have a note, "Jorge, Menzies, room 941."

That is 1979, I think I said 1980?---Yes; 1979.

You met Mr Villegas at the Menzies Hotel in Sydney?---That is correct.

Did you have any discussion with him in relation to this contract?---Yes. 30

What did you say to him?---We had a fairly long discussion over a meal, I can recall. One of the topics - there were two main topics, I think - that was discussed between us was the \$30 per tonne. I think I discussed with him that I had spoken to Rashid about it, that we had not received any payment, and he said he believed it was not payable until the end of the contract. I argued that point with him and stated my case, that I believed the \$30 per tonne was payable each and every shipment after it was discharged in the port of Iran in less than the 40 days specified. It was not an accumulated situation because the vessel either did or did not discharge in less than 40 days and there was not a situation where, if it took 50 days on the next voyage, that you could cancel out the first voyage. 40

One thing did not offset the other so there was, obviously, a situation that was applicable just the same as, had we loaded his vessel and presented documents it was paid. It was a fact that was quite clear in my opinion.

MR McCUSKER: What did he respond to that?---He said that he did not believe, in his opinion, that that was the case - - -

WITNESS (Continuing): - - - the case, however, he could not make the decision on it - refer it back to Rachid.

MR McCUSKER: You say there were two main topics. What was the other topic of discussion?---The other topic I raised with Jorge was the fact that because of the hostage problem which had occurred in Iran, both the British and the American embassies had been taken over and hostages taken, I was very afraid and the board of the company was very afraid, under those circumstances, of the possible ramifications of this in any contracts which were being done by the company to Iran. I put it to him that the company would like a bank guarantee of being able to be paid if, for some reason, due to this problem, we would not be able to ship the meat. His reply was, "You have a letter of credit." I said, "Yes, Jorge, that is true but a letter of credit does not get us over the problem. The letter of credit has requests in it which demand certain documents which have to be in accordance with the terms of the letter of credit and if, for some reason, the sanctions that have been mooted in the paper via Australia in support of the United States take place we would not be able to get certain documents and approvals, from the Dept of Primary Industry, for example, for a health certificate, a certificate of origin - - there are about five or six main documents you require to be able to present (even with a bill of lading from the vessel, assuming you could get it on board) to be able to get your money from the bank. We would find it would be impossible to get some of those documents if we trod the road to Iran. He did not think I was right in this. He did make the comment that in any case if they could not load it and take it to Iran they would take it to some other place. I said I was not happy about that situation, because that had happened once before with a tonnage of meat in 1974, when a change of mind in Iran, when they made a decision in the government IMO not to take the balance of a contract we had at that time, left us with 2000 tonnes of mutton in Australia which they did not take somewhere else. We had to find a market for it at a loss. This particular situation was much more dangerous, because we are talking about hoggets and the only market in the world is Iran, if we are going to get the true price for a hogget.

Go on?---We could sell it, sure, we could send it to Japan and sell it for mutton but at a substantial reduction in price, so I used that argument and he did say, finally, after we had discussed this at great length,

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that all right, they did not mind putting up a guarantee if Metro would put up a guarantee. I said to him, "It sounds all right but what can our guarantee mean if a sanction says we cannot ship - we cannot physically move the product on board a vessel? The guarantee cannot be worth anything." So I did not see that as a solution.

MR McCUSKER: You mentioned there were two main topics. It appears from your evidence that neither of those was resolved by your discussion with Mr Villegas? ---No, they were not.

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OLNEY J: This would be a convenient place to stop, Mr McCusker. We will adjourn until 10 a.m.

HEARING ADJOURNED UNTIL 10.00 A.M.

THURSDAY, 25TH NOVEMBER, 1982.