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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO QC

PUBLIC HEARING

OPERATION SIREN

Reference: Operation E09/1228

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON MONDAY 27 SEPTEMBER 2010

AT 2.05PM

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This transcript has been prepared in accordance with conventions used in the Supreme Court

THE COMMISSIONER: Mr Payne.

<PAUL MAKUCHA, on former oath

[2.05pm]

MR PAYNE: Commissioner. Mr Makucha, before the break I was asking you some questions about the document at P291, is that still open in front of you?---It is.

10

And just in relation to paragraph 1, I suggest to you that what you have there recorded about an agreement is not subject in any way to any caveat about approval of the Sydney Water board. Do you agree?---Correct.

And do you agree with me that there is nothing in the letter about such agreement being subject to the approval of the Sydney Water board? ---Correct.

20

I suggest to you that when you wrote to Sydney Water setting out this agreement about the purchase of shares there was to your knowledge no such agreement with Sydney Water, do you agree?---There was an outline of a possible agreement.

Do you agree that what you have written there, that Sydney Water Corporation represented by Mr Harvey and you on behalf of the Makucha group having agreed certain matters was untrue to your knowledge?---Not correct.

30

Do you agree with me that you intended to convey to Mr Harvey that such an agreement had been reached?---There was an agreement in principle between Harvey and Makucha acting on behalf of their respective interests.

Do you agree with me it was quite misleading to describe any such agreement in principle as an agreement to enter legally binding relations? ---No, sir, I have formulated agreements in the past with very large corporations, Mercedes Benz, Mitsubishi, in the same terms and they've been tested in the Supreme Court and they were the issues that gave standing and Francis Douglas QC - - -

40

THE COMMISSIONER: Mr Makucha - - -

MR PAYNE: I didn't ask you about Mr Douglas, did I?

THE COMMISSIONER: - - - really.

MR PAYNE: Mr Makucha, in relation to paragraph 3, again I want to suggest to you that you knew that this document was not a legally binding

document upon Sydney Water Corporation at the time you wrote that paragraph 3?---Not correct. I say that it has standing, legal standing.

I want to suggest to you that there was no agreement to your knowledge with Mr Harvey or with Sydney Water that you be paid a deposit within seven days of the date of this letter, do you agree?---The deposit timeframe had not been agreed.

10 Well, when you wrote the deposit, the amount to be agreed shall be paid within, as a deposit within seven days, that statement was false to your knowledge, wasn't it?---No.

I suggest to you that what you were trying to do with this letter was to create a paper trail about this asserted agreement, do you agree?---No, what I was trying to do was outline the, the skeleton of a proposed possible agreement.

20 Do you agree with me that in paragraphs 1 and 3 there is nothing to suggest that it is a skeleton of a possible agreement but rather it is seeking to record what you say is an actual agreement?---It's an outline of an agreement, you can classify it as you wish.

And I suggest to you that you knew at the time you wrote the letter there was no agreement of the kind in paragraph 1?---"Sydney Water Corporation represented by its executive Mr Ed Harvey and Paul Makucha as the only shareholder of Makucha Groups have agreed to enter legally binding relations which means that the Sydney Water Corporation," what part of that do you - - -

30 I suggest to you that there was no such agreement, do you agree?
---Mr Harvey representing Sydney Water said that it seems like a pretty good deal and it doesn't happen every day that Sydney Water is offered a \$10 million benefit and that based upon what I had told him it, it had good promises to be completed and upon that basis given what I disclosed or intended to disclose I wanted some guarantee that it would be stolen from me, the intellectual property or business method.

40 You agreed with me before lunch, do you recall, that shortly after this letter you had a conversation with Mr Harvey when he said to you, Paul, this sounds like a complex agreement. I don't have the delegated authority to deal with this. It would need management and board approval. Do you remember me reading that to you?---You read it to me, I do.

And that Mr Harvey you recollect did say words to that effect to you on or about that day?---Can't, can't remember that.

I see, and if the transcript records you agreeing with me before lunchtime that such words were said on or about that day, do you have any explanation for now saying you have no such recollection?---What, what you stated was

that Harvey allegedly told Makucha that he couldn't agree with it because he didn't have the delegation. Is that correct?

I'll read it to you again. Paul, this sounds like a complex agreement. I don't have the delegated authority to deal with this. It would need management and board approval. That's what he said to you, wasn't it, Mr Makucha?
---What are you reading from, counsel?

10 THE COMMISSIONER: That is, just answer the question, Mr Makucha?
---What, what is it that you want me to answer?

Just concentrate on the question and not what lies behind the question. You'll have to put it again.

MR PAYNE: On or about the day that this letter at P291 bears, 12 March, 2009, Mr Harvey said to you words to this effect, Paul, this sounds like a complex agreement. I don't have the delegated authority to deal with this. It would need management and board approval. Do you agree with me that he said words to that effect to you on or about that day?---I think that's
20 potentially pretty correct, yeah.

And to the extent that you have recorded agreements in the letter at P291, there is no reference to management and board approval being required. Do you agree?---Just as an opening gambit.

And so when you say it has been agreed that was untrue to your knowledge?---No. That's not right.

30 THE COMMISSIONER: I think we'll move on from this.

MR PAYNE: Please turn over to P302?---I'm sorry, P?

P302?---Thank you.

This is a letter of the next day, 13 March, 2009. Again addressed to the Managing Director of Sydney Water Corporation, attention Mr Harvey?
---Ah hmm.

40 You see there in the first paragraph you set out, you are confirming that upon completion of the 49 per cent of the Makucha Group of companies by Sydney Water Corporation or its nominees, we shall within 40 days vacate 111 Baxter Road, Mascot?---I see that.

So by this time, 13 March, 2009, you're leaving Baxter Road at Mascot was linked was it with the joint venture proposal?---It was because there were some lands to be provided by Sydney Water, potentially at Kurnell, the desalination plant which would, would be able to accommodate the records and a mini, a small testing plant for the concept to make some bottled water.

So it's your evidence to the Commissioner is it that you had agreed now with Mr Harvey that rather than leave as you had earlier agreed in 2007, you would within 40 days vacate Baxter Road but only upon completion of the 49 per cent purchase of the Makucha Group of companies by Sydney Water?---Yeah.

And you say that Mr Harvey made that agreement with you?---He didn't disagree.

10

Well, is this - - -?---It was put to him.

- - - is the first that Mr Harvey has heard of it in this letter of 13 March, 2009 is it?---I can't recall.

Do you say you had a conversation with Mr Harvey where you reached that agreement?---I think I probably did.

20

Is it the position that you were putting things, as I think you said to me a moment before about another letter, as an opening gambit and seeing whether Mr Harvey disagreed with it?---At some, of those concepts if you have a look at the number of points in it, when one is negotiating an agreement into the future, one puts down a lot of essential elements for a proposed commercial deal.

And just so - - -?---If they, if the other side doesn't agree, they can always disagree.

30

Just so we're clear Mr Makucha, you say at paragraph 1 of this letter of 13 March, 2009 represents an agreement between you and Sydney Water?---A potential agreement in principal.

I see. So again, the Commissioner should understand it as subject to management and board approval as Mr Harvey told you on or about this day he'd need for the whole joint venture?---That's correct.

40

Thank you?---No, no, no. I always assumed of my own free will that the board of Sydney Water would have to approve because the amounts of money were very large. And Harvey would not have the delegation to cover a very large amount of money. I mean \$10 million in relation to tax matters and so forth like that, is something that the board would be vitally interested in.

I see. So it was clear to you throughout at all times up to and including 3 December, 2009 - - -?---That's not what I said.

I'm asking you a question?---(not transcribable) ask me one.

You can agree or disagree, Mr Makucha, please. Was it clear to you at all relevant times up to and including 3 December, 2009 that any agreement with Sydney Water would need management and board approval?---(not transcribable) agreement. At all material times, Harvey had the delegation standing and support of commercial law, criminal law and all other laws to be able to enter into a binding confidentiality agreement with Makucha. However, I have stated, and I state again that only the board of Sydney Water would have the authority to execute the final agreement which would include the tax benefits, the building of a joint venture bottling plant as such. And that would come after the confidentiality agreement had been signed so as to protect my trade secrets and intellectual property which would be disclosed. And at all material times that was well understood.

10

Please turn over to P308. That's a letter written by you on 13 March, 2009 to the Managing Director, attention Mr Harvey?---I have it in front of me.

You enclosed a number of pages principally from Wikipedia dealing with intellectual property, goodwill, assets et cetera set out in paragraph 1?

---Yes.

20

Did you at any time after 13 March, 2009 ask Mr Harvey if you could speak to anybody else from Sydney Water about this proposal you were making? ---Which proposal?

Your joint venture proposal?---But there's many parts to it.

About any part of it, Mr Makucha? Any, any part of anything you ever put to Sydney Water after this date, did you ask Mr Harvey to talk to anyone else from Sydney Water?---Mr Payne, it was at all times accepted by Mr Harvey that the confidentiality agreement would have to be executed and that a confidence in relation to the matters which I had disclosed to him confirmed by the document and then he would take to the board the agreement, which would show all the calculations of the business modules, the joint venture and everything else.

30

I thought you told me before lunch that when you addressed a letter to the Managing Director you thought the letter was going to the Managing Director?---Well, Mr Payne, I can't help how you think.

40

Did you tell me that before lunchtime or not?---I did and that - - -

Was it true?---Was it true what?

Was it true that you believed that this letter of 13 March, 2009, P308 would be shown to the Managing Director of Sydney Water Corporation?---My expectation was that the operating system of Sydney Water Corporation and Mr Harvey would ensure that such copies of such letters would end up in

the Managing Directors secretariat, however that's operated. I don't know how it's operated.

You had Mr Harvey sign what you describe as the confidentiality agreement. Why didn't you have the Managing Director also sign a confidentiality agreement?---Don't need to. No need. Mr Harvey had the ability and has the ability and standing to bind Sydney Water. Now if you go to equity law, that's confirmed.

- 10 Please turn over to page 360 in this bundle?---Can I just add, because Makucha in part of the information to Harvey in confidence and he agreed was why delivering to him be trade secrets and intellectual property upon that basis.

To him and him alone. Is that what you're saying?---No. No, no, no, no. No, you know better than that. You know the law that I'm talking about. He, as an agent acting on behalf of Sydney Water was binding Sydney Water.

- 20 Thank you, Mr Makucha. Please turn over to P360?---Mr Payne, are you trying to find out the truth of this matter?

THE COMMISSIONER: Mr Makucha, please be quiet, please. You will be asked questions. You need not volunteer anything?---There's a black hair at the (not transcribable).

Mr Makucha, that's a letter from you dated 17 March, 2009 to the Managing Director of Sydney Water, attention Mr Harvey?---Correct.

- 30 MR PAYNE: There was, wasn't there, a meeting on 17 March, 2009 between you and Mr Harvey during which you produced this letter to him? ---If I could look at my schedule.

THE COMMISSIONER: Just answer the question?---Well, I don't have - - -

MR PAYNE: If you don't know that's the answer?---I probably did have a meeting but I can't be sure. If you let me have a look at my summary of meeting dates which is taken from my diaries, I can verify it.

40

Mr Makucha - - -?---Agent Grainger has it and he can verify whether I met on that date or not with Mr Harvey, if it's there it's there.

Mr Makucha, if you don't know the answer to my question without looking at a document you can tell me that, that's find?---Okay.

I don't need you to look at the document, I'm going to suggest to you that there was a meeting and that you said words to this effect to Mr Harvey, Ed,

I'm going to start hiring some accountants. I'm going to get them to check over the bank records and value the tax losses. They'll also start rationalising the company structures and make sure all the companies we use in the joint venture are up to date with tax return and ASIC documents they have to lodge. Do you agree words to that effect were said by you on or about 17 March, 2009 to Mr Harvey?---I believe that's correct.

10 Now, can I ask you about this valuing the tax losses. You had promised Mr Harvey on behalf of Sydney Water that you were going to give Sydney Water I think as you describe it a \$10 million tax benefit?---Correct.

I suggest to you that you were given advice by Mr Malacco that no tax losses could ever be used, in your companies could ever be used by Sydney Water, do you agree?---I suggest that counsel assisting the Commissioner is misleading the Commission on that question.

THE COMMISSIONER: Just answer the question, Mr Makucha. Stop making these comments?---I have the documents to prove it just here.

20 Mr Makucha, just answer the question.

MR PAYNE: Do you agree that you - - -?---They may not be answers that you want to hear but they're the truth.

Mr, Mr Makucha - - -?---That's what I'm here to do.

- - - please, do you agree that you were advised by Mr Malacco that any tax losses in the Makucha group could not be used - - -?---No, that's not correct.

30 - - - by Sydney Water?---That's not correct.

I see. Turn over if you would to P365?---I have it.

This is the fifth and final payment of the \$27,000, \$27,500 that Mr Harvey arranged for Sydney Water to pay your company Mascot Administration Services?---Yes.

40 You agree?---(not transcribable) less invoice numbers 1, 2, 3 and 4.

Yes. What conversation if any did you have with Mr Harvey prior to sending this invoice to him?---I can't remember. I can't, I can't recall.

Turn over the page to P366. This is a letter from you dated 27 March, 2009 to the managing director of Sydney Water, attention Mr Harvey and also cc Mr Gino Malacco?---Ah hmm.

I suggest to you at a meeting on or about 27 March, 2009 you had with Mr Harvey you said words to this effect to him, Now you're going to pay for the accountancy work, right, this is important for the joint venture. It will consolidate the company structure to allow the Sydney Water investment in the companies and it will clarify and provide certainty in relation to the existence of the \$10 million available in relation to tax losses. Do you recall saying that to Mr Harvey?---No, but I can recall saying to Mr Harvey would Sydney Water be prepared to pay for the accounting and tax work and he said yes.

10

Did you tell him anything about a \$10 million benefit available in relation to tax losses?---I certainly did.

THE COMMISSIONER: That's the benefit available to Sydney Water?
---That's right.

Arising from tax losses?---That's right. Yeah, there are letters there - - -

20

No, that's all I wanted to know?---Yes. Mr Payne's - - -

MR PAYNE: Turn over - - -?--- - - - tax (not transcribable)

Mr Makucha, please. Turn over to P376?---I have it.

That's a letter you wrote to the managing director of Sydney Water attention Mr Harvey?---I did.

30

You ask him to approve in principle the use of a portion of land at Kurnell, do you see that?---I do, paragraph 1.

That was rejected by Mr Harvey, wasn't it?---It was not, it took some months for Mr Harvey seeking to get definition of what land was available at the desalination plant at Kurnell, it was probably three or, probably five months, I can't remember but it was some months.

And he rejected it, didn't he?---No, he did not. He, he said he had to deal with another executive at Sydney Water Corporation to see what was available.

40

Turn over to P377. In paragraph 6 there you said to Mr Harvey, I propose to order a custom built in Korea or Japan, a water tanker, such a purpose water tanker will be a world water commodity trader. What did Mr Harvey say to you about that proposal?---He was, he was intrigued by the proposal because I - - -

THE COMMISSIONER: What did he say?---I think he said, Paul you're a big thinker. You're right out there.

MR PAYNE: Do you think that Mr Harvey could authorise you to purchase on behalf of Sydney Water Corporation or some proposed joint venture vehicle a custom built water tanker?---No, that wasn't the, the purpose of this, this, these documents were to state in writing all the ideas and intellectual property that Makucha had generated so that there was a paper trail to confirm them which would be covered by the Confidentiality Agreement. I showed Harvey photos of what 500,000 tonne tankers looked like and when it came to the location stated in paragraph 7 I found a place in Alaska called Sitka which - - -

10

THE COMMISSIONER: Sorry?---Right.

I just want to know what he said?---I've told you.

Thank you.

MR PAYNE: Please look at P379, Mr Makucha?---Yeah.

20 That's a tax invoice from Hall Chadwick to Mr P Makucha and Sydney Water Authority crossed out and Mr Ed Harvey written in. Is that your handwriting?---No, that's Ed Harvey's handwriting.

How did it come to be placed there?---I don't know. I can't tell you.

Was it your practice to take invoices prepared by Hall Chadwick and deliver them in person to Mr Harvey?---I believe I, I did it on a couple of occasions, yes, and also with fee proposals.

30 Did you do it on this occasion, the, the invoice, the first invoice from Hall Chadwick for \$29,700?---I can't, I can't recall but I think that Hall Chadwick may well have electronically transferred by email because Harvey and Gino Malacco had exchanged electronic transmissions on their emails. I don't know the full extent of that because there was a potential, a, the outline of - - -

THE COMMISSIONER: Well, your answer is I don't know?---Thank you for your help.

40 MR PAYNE: Look back at P378?---I'm sorry.

Look back at P378, the page before?---I have it.

That's an invoice dated 31 March, 2009. Did you take that from Hall Chadwick and deliver it to Mr Harvey?---I may have.

And by that time Hall Chadwick had commenced to provide you with accounting advice?---Well, they, they commenced providing accounting

advice which would be for the benefit of both Sydney Water Corporation and Makucha.

Mr Makucha, just so we're clear, I want to suggest to you that Mr Malacco made it clear to you that tax losses in your group of companies could not be transferred to the benefit of Sydney Water, do you agree?---Mr Payne, if I can - - -

10 THE COMMISSIONER: Do you agree or don't you agree?---I do not.

Turn over to page P390. That's an invoice dated 8 April, 2009 from Hall Chadwick to Mr Ed Harvey. Did you deliver that by hand to Mr Harvey? ---I'm not yet upon the letter, sir. At 390 it's a tax invoice.

MR PAYNE: Yes. Did you deliver it to Mr Harvey?---I can't remember. I can't, I can't ah, say for sure whether I did or I didn't or whether they um, ah, provided each other with documentation by electronic methods or whatever.

20 Turn over to P391. That's a letter from you to the managing director of Sydney Water, attention Mr Harvey, dated 2 April, 2009?---Correct.

You say there you've got an urgent need to immediately vacate 11 Baxter Road for the reasons you there give and that you had then moved to a city hotel. I think that was the Hilton. Is that right?---No, I, I had a lot of ah, um (not transcribable) because I had lived in Sheraton Hotel in ah, ah, Phoenix ah, Arizona and over the years I had accumulated a lot of points and I ah, utilised some of the points to live down at the Sheraton Hotel because I could no longer ah, work on this matter and as a matter of fact, all this
30 matter was- - -

THE COMMISSIONER: All right. I think you've given your answer. We don't need a speech, Mr Makucha?---For the sake, forgive me, but for the sake of completeness I always try and give a complete answer.

Just answer the question. You've no need to add on unsolicited information?---Forgive me, Commissioner.

40 MR PAYNE: Turn over to P393. Do you have it?---I do.

That was a letter that Mr Harvey gave to you on or about that date, 9 April, 2009?---Correct.

I suggest to you that immediately prior to you being furnished with this letter you had a conversation with Mr Harvey to this effect. You said, "I have to stop living at 111 Baxter Street, Mascot." Mr Harvey asked, "Why is that?" You answered, "There are threats to my life. It's all to do with bikie gangs around Sydney Airport. It all stems back to when I owned the

signage around the airport, however anyway I'm going to start working more with the accounts and I'll be engaging lawyers to draw up some of the documentation too, so I'll need to be in the city and I'll need to be in better accommodation with more space and services than I have at 111 Baxter Street, so I'm going to move out to a hotel to the city." Do you agree that such a conversation took place?---Yeah.

And that what I've read to you is the effect of what was said by you and Mr Harvey?---Yeah.

10

And then Mr Harvey said to you, "How are you going to fund that?" And you said, "I need money. I'm down to my last few dollars. I"- - -?---I don't remember that.

"I need to have access to the \$25,000 that I paid into court. Things seem to be going okay, are you prepared to release the \$25,000?"---I asked him to release the money. He, he wasn't a man who asked how are you going to pay for a thing.

20

And I suggest to you Mr Harvey said, "The \$25,000 is a performance bond. I need some assurance that you will perform." And you said, "I really need the money. This will give me the funds to finalise a lot of things and to progress the joint venture." Do you agree you said that?---More or less.

And I suggest to you that Mr Harvey said, "Well, when the joint venture proposal goes to the board we'll need to demonstrate that you are off the site and this joint venture arrangement will enable us to recover all the money we've expended on moving you out over the years." Do you agree that he said that?---I don't remember that.

30

Do you deny that he said it?---Ah, I can't remember a refund for all the sum that had been expended in trying to get Makucha out of there, because at no time had I ever been desirous of not paying them back and this joint venture was the way that they would get ah, reimbursed because ah, that's how I am.

Do you remember Mr Harvey saying to you on or about this date, shortly before it, that, "When the joint venture proposal goes to the board, we'll need to demonstrate that you are off the site?"---I can't remember that.

40

Do you deny it?---I neither deny it or concur with it. I can't remember it.

Do you agree with me that this release of funds recorded in the letter at P393 was a device worked out by you and Mr Harvey to put you in funds to move?---Mr Payne, it grieves me that you- - -

THE COMMISSIONER: Just answer yes or no?---No. I was entitled to the money if he agreed.

MR PAYNE: You can close that folder now, Mr Makucha. I'm going to move onto Exhibit P127. Go first of all if you will to the document in the top right-hand corner, P408?---I have it.

That was a letter you wrote on 2 April, 2009 to the managing director of Sydney Water Corporation, attention Mr Ed Harvey?---Correct.

10 Can I ask you about paragraph 4 of that letter. You say there, "Registration of the trademark logo Sydney Water, the registration will be to Sydney Water Corporation and then Makucha Sydney Water Pty Limited will at the same time be given a licence to use the Sydney Water words et cetera." Do you see that?---I do.

That was the proposal at this time you were making to Sydney Water, namely that the registration of Sydney Water to the new class 32- - -? ---Not correct.

20 - - -would be to the Sydney Water Corporation?---Not correct, because that was in relation to using Sydney Water on the bottled water and at this time I had not discovered that Class 32 was missing and, and the, the diligence of Makucha in doing his work to be sure that Sydney Water could be correctly and legitimately and lawfully used on bottled was caused me to make the discovery that Sydney Water had not registered Class 32, which meant the water company did not have any trademark protection in relation to water and water is the main commodity which Sydney Water operates in. I couldn't believe it.

30 Mr Makucha, when you said, "The registration will be to Sydney Water Corporation of that logo", what registration were you referring to?---The graphic ah, ah, the words Sydney Water with the little wave going through it, so that they could be used on, on the bottles of ah, water to be sold by the proposed joint venture and bottling company.

40 Well, when you said, "The registration of the trademark logo will be to Sydney Water Corporation", you're talking about a registration to be carried out in the future?---Ah, no. What that was, that was a part of the contractual agreement between Sydney Water Corporation, number 1 Smith Street, no, they weren't at Smith Street on 2 April, and Makucha and the joint venture for the bottled water.

And the proposal at this stage was that Sydney Water Corporation would have the trademark logo, Sydney Water, in relation to bottled water. Correct?---Correct.

And that there would be some subsequent licence. Do you agree?---That's right. I'll explain it to you, because what I had- - -

THE COMMISSIONER: No, no, you've agreed.

MR PAYNE: Please turn over to page 411?---Can I just explain to you what- - -

No. Turn over to page 411 please, Mr Makucha?---I have it.

That's a letter of 24 April, 2009, from Spruson and Ferguson, the patent and trademark attorneys, to you. Do you agree?---Correct.

- 10 Look down at item B, which is, "During the meetings you shared with us information that you regard as confidential information, including", and B I want to ask you about, "A proposed trademark application by Sydney Water Corporation in respect of bottled water." Do you see that?---I do.

20 That was the proposal at this stage, wasn't it?---Ah, the letter states that, however some of those finer details, this was a letter um, confirmed by Spruson Ferguson. I don't think that's what I ah, ah, meant. They wrote this letter. I don't, I don't have a copy of anything apart from the permission by Sydney Water through its agent, Harvey, to go to Spruson and Ferguson where Sydney Water had undertaken to pay all fees.

But that's because you told Sydney Water through Mr Harvey that the proposed trademark application was going to be made by Sydney Water Corporation. Correct?---On behalf of Sydney Water Corporation.

On behalf of Sydney Water Corporation, not on behalf - - -?---(not transcribable)

- 30 Where does it say that?---Mr Payne, with all due respect, this letter is from Spruson & Ferguson. What they wrote I have no control over. Actually, we had an argument because they didn't agree with, I raised the issue and I gave this point to Harvey and I stated in the documentation that at any time if a corporation assigns intellectual property and they do not assign the goodwill with it, then the assignment is not binding and perfect. And the reason why a lot of patent attorneys and so forth don't assign the goodwill is because they're too mean to pay the ad valorem stamp duty.

40 THE COMMISSIONER: Mr Makucha, if you would just confine your answers to the question?---Forgive me.

Don't make speeches, Mr Makucha?---Forgive me.

MR PAYNE: Mr Makucha, I want to suggest to you that at this time in April, 2009, the proposal that you had made to Mr Harvey was that a trademark extension application be made by Sydney Water Corporation. Do you agree?---No.

THE COMMISSIONER: So where did Spruson & Ferguson get this from?---I, I had two meetings there.

So they could only have got it from you?---I had meetings there, but I think the point that needs to be clarified is Mr Payne thinks that at that time I was aware of the class 32 missing, I wasn't.

You've made that point?---Thank you.

10 MR PAYNE: What is the date you say you first learnt that the Sydney Water Corporation trademark did not extend to class 32?---It's on the bottom of the search which has, which is a copy of the application and the classes which were approved by Sydney Water Corporation's IP patent attorneys, FB Rice & Company. And I think it's about 14 or 15 May, 2009.

So when in this letter at P411, Spruson & Ferguson record you as having shared with them the information that a proposed trademark application by Sydney Corporation in respect of bottled water that was to be made - - -?
---Yep.

20

- - - do you tell the Commissioner that it was your state of mind that Sydney Water already had a trademark in respect of bottled water as at this date?---I don't know what state of mind means, but I tell the Commission that they did not have a bottled water trademark. They did not have a trademark which was capable of protecting any bottled water product because they did not have class 32 of the (not transcribable) protection systems which are the global intellectual property system which classifies products into about 38 classes or groups and services into about seven or eight and Sydney Water had no registration or cover of any water, drinking water, aerated water,
30 carbonated water et cetera, as, as defined by class 32.

So - - -?---FB Rice & Company and Sydney Water had overlooked, through what method I can't tell you, why they overlooked it and how, but we're all here because of that.

Yes, thank you. So at P411 when Spruson & Ferguson set out that a proposed trademark application by Sydney Water in respect of bottled water is to be made, do you tell the Commissioner that on 24 April, 2009, you did not know that Sydney Water's logo did not cover class 32?---I didn't know.

40

Please turn over to P416?---That was, can I just explain that last point to youse.

No, Mr Makucha, please. Please turn over to P416. That's an invoice from Hall Chadwick to Mr Ed Harvey. Do you agree?---Yes, sir.

Was that one that you hand delivered to Mr Harvey or don't you know?---I can't remember. It's possible.

Turn over to, just, sorry while we're there, that's 1 May, and just the fee amount is fees covering professional services on account of registration of the new entities as required in the corporate structure diagram and letter of advice. Just keep that in your mind if you would and turn over to P420?

---Yep.

Is that the diagram that you believe is referred to in P416?---It seems as though that that's correct because upon the top it says 1 May, 2009.

10

Please look in the top right hand box. This is a document prepared by Mr Malacco on your instructions I take it?---Correct.

Sydney Water Corporation existing, we're talking about here. Correct?

---Yep.

20

A 100 per cent ownership of Sydney Water N consolidated group with Sydney Water N, claims and expenses of Sydney Water N and consolidated return and in the last point, owner of Sydney Water trademark (currently not registered)?---That's right. And that means for bottled water. Don't get your hopes up, Mr Payne.

I understand, for bottled water, for class 32. Correct?---No, it doesn't. Without class 32, because I didn't know that class 32 wasn't registered by them. It became the Archimedes revelation, if I'd been bathtub, I would've jumped out.

30

You thought did you that by looking up on the website of IP Australia and seeing that the logo and - - -?---I (not transcribable).

You thought did you by discovering that the logo wasn't applied to class 32 that you could thereby become the owner of the Sydney Water logo in respect of that class?---Mr Payne, I - - -

Yes or no, Mr Makucha?---Mr Payne, don't try - - -

THE COMMISSIONER: Just answer the question, Mr - - -?---Makucha.

40

- - -Makucha, please?---Could you repeat your question?

MR PAYNE: Do you say that by learning that the Sydney Water logo had not been applied to class 32 you thereby became the owner of the Sydney Water logo for the purposes of class 32?---I never said that.

Thank you?---I have never ever been a pretender to ownership of the trademark of Sydney Water being the words with the little wave through it. The only think I am an owner of is the intellectual property in relation to one class of water which attaches to that trademark and that is class 32, the

water. That's all. I have never ever sought to convert, detain, obtain or whatever that trademark for the rest.

Do you say you are the owner of the Sydney Water logo in respect of bottled water?---If it's captured by class 32 and I think it is, it may well be that I am.

10 And you became the owner by learning that Sydney Water had not applied that mark to that class. Is that what you say?---No. What I say is that that was the original discovery of Paul Makucha and that discovery was subsequently applied for registration. And I have been the first owner of that registration to have prior standing. Now, one other issue that I need to bring to your attention is that Sydney Water and the trademark, I never had to offer to give 50 per cent of a very valuable item, worth potentially \$1 billion to give Sydney Water 50 per cent, a phenomenal amount of say \$500
- - -

20 This is very public spirited of you but it's not an answer to my question, Mr Makucha?---Well, I've tried to answer you more completely than I need to.

Yes. Please just answer my question. P420, you agree with me at the time this was prepared you had told Mr Malacco that the Sydney Water trademark was not registered in respect of bottled water. Agreed?---That's correct. And it did not have- - -

THE COMMISSIONER: All right. That's your answer?---Thank you.

30 MR PAYNE: And it was the proposal that you told Mr Harvey about that Sydney Water become the registered proprietor in respect of Class 32 but they would assign the trademark to Sydney Water P. Do you agree?
---Who's they? No, that's not correct. You're making that up.

Have a look at the line- - -?---You're not, you're not correct.

Mr Makucha, have a look at the line under Sydney Water Corporation existing?---Excuse me.

THE COMMISSIONER: Just answer the question, Mr Makucha?---No.

40 I beg your pardon?---No.

Is your answer?---If we can hear the question again.

All right. Your answer is no.---Come on, let me hear the question again. I want to be sure. Just give me the question again, Mr Payne.

MR PAYNE: Have a look at the line under Sydney Water Corporation existing. Do you see the arrow from Sydney Water Corporation to Sydney Water P Pty Limited?---Excuse me, which line are you talking about?

There is two arrows coming out of the Sydney Water Corporation box. Do you see that?---Is it this one here which you're referring to, the right-hand top?

10 The Sydney Water Corporation existing. The right-hand box I've been asking you about for the last ten minutes?---Thank you, Mr Payne.

There is a short arrow coming out of that. Do you see that?---That's right, yeah.

It says, "Assign licence Sydney Water trademark?"---That's right.

20 The proposal at that time was that Sydney Water Corporation would remain the owner of its logo and mark but it would be assigned to Sydney Water P. Do you agree?---That's right. For the reason that I had no- - -

THE COMMISSIONER: No, that's enough, Mr Makucha?---I think you need to hear this?

No. I need to hear an answer to the question that you've been asked? ---Forgive me.

MR PAYNE: Turn over to page P443, please?---What is it, 4?

30 43. That's a letter written by you to the managing director of Sydney Water on or about Monday 11 May, attention Mr Harvey and Mr Malacco. Do you agree?---Correct.

You say in paragraph 5 that Sydney Water Corporation has advised Paul Makucha on multiple occasions to register the trademark Sydney Water, being the two words Sydney Water in different colours of blue and aqua with the wave through the word water?---Correct.

Do you see that?---Yes.

40 Who on behalf of Sydney Water had advised you on multiple occasions to register the trademark?---Mr Harvey.

And what you had told Mr Harvey was proposed at that time was that Sydney Water Corporation remained the owner of the mark. Correct? ---That's right. That was prior to my discovery, sir.

Thank you?---Because the discovery- - -

THE COMMISSIONER: It's all right. It's all right.

MR PAYNE: Please look over at, paragraph 5 continues, actually it's paragraph 6 on P444. You're setting out then your state of knowledge at this time, namely that Sydney Water have permitted Paul Makucha to instruct IP lawyers to register the trademark of Sydney Water which is then to be contemporaneously assigned to the new JV company for substantial consideration. Do you see that?---I do.

10 So that Sydney Water would receive the substantial consideration for the assignment of the mark to the new JV company. Agreed?---That's right. There's a reason for it, the reason being that it was discovered by- - -

THE COMMISSIONER: No one has asked you for the reason. What you now want to say is not responsive to the question and I won't allow it? ---Forgive me.

MR PAYNE: Please turn over to P452, Mr Makucha?---4?

20 52. That's a letter from you dated 12 May, 2009, addressed to the managing director of Sydney Water, attention Mr Ed Harvey?---I have it.

Have a look at the second page of that letter, paragraph 8, P453? ---Paragraph 8, yeah. I have it.

You're confirming a telephone conversation of Mr Harvey- - -?---Ah hmm.

- - -saying that you will be able to collect a letter confirming the trademark registration Sydney Water to Sydney Water Corporation and then the
30 assignment of the mark to the JV company. Do you see that?---That's fine, yeah, I agree with that.

That was- - -?---You missed the point.

That was what you told Mr Harvey this was all about. Correct?---At that point in time that was correct, because the discovery hadn't been made in relation to the missing Class 32.

40 Do you say you have received legal advice from any person confirming what you told me a moment ago, that you are probably the owner of the logo and mark as they relate to Class 32?---Could I, could I grab a intellectual property textbook and show you- - -

THE COMMISSIONER: No?---the particular section which confirms my ownership?

No. The question is whether you have received legal advice from a lawyer?---Yeah, I have. It's been confirmed.

MR PAYNE: Who was that?---I spoke to many lawyers about it. You have a copy of all the records.

THE COMMISSIONER: What lawyer has told you- - -?---Well, Mallesons.

MR PAYNE: Mallesons told you you were the owner of the Sydney Water logo?---I spoke, I spoke to Mallesons about it. Harvey gave me permission to go to Mallesons to use them for the intellectual property.

10

THE COMMISSIONER: Who in Mallesons told you that you were the owner of the Sydney Water logo?---I stated it in a letter and they never refused it and never, never ever denied it.

You have said on oath that Mallesons, as I understand it- - -?---I'm not here to tell a lie.

Well, I just want to understand this- - -?---Yeah.

20

- - -because I may have misunderstood you and I'm giving you an opportunity now- - -?---Thank you.

- - -to change, to say exactly what you say the position is. Do you say that some person in Mallesons gave you legal advice to the effect that you were the owner of the logo Sydney Water?---No. That's not what I'm saying.

No. Well, that's all I want to know. Who other, what other lawyer has told, has given you advice to the effect that you are the owner of the Sydney Water logo?---None.

30

MR PAYNE: Thank you?---However- - -

THE COMMISSIONER: No, no. I don't want a however.---(not transcribable)

It's not in answer to my question. Thank you?---Excuse me. Your question is not fair of me.

I am the judge of that, not you?---I understand that.

40

So be quiet now, please. Just answer Mr Payne's question?---Thank you.

MR PAYNE: Please turn over to P461, Mr Makucha. That's a letter written by Mr Harvey on or about 14 May, 2009?---It is.

You dictated its contents to him?---I don't believe so.

He came up with the words contained in this letter all by himself. Is that what you say?---No. He may not have. He may have had lawyers at Sydney Water help him with it.

Do you- - -?---I've always taken a view that most of the documentation from Harvey and Sydney Water was, was ah, authorised and checked by lawyers because I- - -

10 Did he ever, did he ever tell you that, Mr Makucha?---I think I asserted it in our conversations, yes.

You asserted it in the conversations?---Yeah. And he never denied it.

I see. So when I ask you whether Mr Harvey has told you something, I withdraw that. Look at P461, please?---I have it.

20 "Sydney Water Corporation wishes to amend existing trademarks to include the water that's provided and owned by Sydney Water Corporation." Do you see that?---"Sydney Water Corporation wishes to amend", "To include", that's right, "To include the water that is provided and owned by Sydney Water Corporation." That's right.

You saw this letter on or about the date it bears?---Ah, I can't tell you exactly what date I saw it in but- - -

You saw it in 2009?---Oh, yeah, it would be one day afterwards because it was so important I would have jumped on the fastest train to Parramatta.

30 And it's clear, isn't it, that what Mr Harvey is saying here is that the Sydney Water Corporation will remain the owner of the logo and the mark. Correct?---No, Mr Payne. Mr, Sydney Water Corporation via its agent, Edward Kenneth Harvey, sought to steal Makucha's intellectual property, being the discovery by Makucha of the missing Class 32 water. Now, that's what caused the, the 700-page, as it is stated, confidentiality agreement because they tried to be thieves and in the first instance I got Harvey to confirm that the intellectual property of the discovery regarding 32 was Makucha's and in another letter and then I decided to do a very good job as per the, the advice in the decision by Gummow in the High Court of what a confidentiality agreement- - -

40

THE COMMISSIONER: Mr Justice Gummow. Mr Justice Gummow?
---I'm sorry, forgive me. I'm a man of the people, your Honour.

MR PAYNE: Can you just attend to my question, Mr Makucha, it was clear when you read this that Mr Harvey was asserting that Sydney Water Corporation would remain the owner of the logo and the mark as it related to class 32, do you agree?---

No, what he was asserting to was that there had been no oversight by Sydney Water and that there is no confirmation that would, they were trying to steal with that letter, that's why that letter's been written by a lawyer.

THE COMMISSIONER: Sydney Water was trying to steal the Sydney Water logo?---No. The class 32, Commissioner. You understand what I'm on about.

10 The trademark?---No, I'm talking about the trademark has five classes in it of, of - - -

I understand?---Right. Now - - -

Are you saying that they were trying to steal your right to apply for a class 32 trademark, is that what you are saying?---Exactly, thank you for your help.

MR PAYNE: You understand don't you, Mr Makucha, that only, that under the Trademarks Act only the owner of a mark can apply for registration?
20 ---You're wrong Mr Payne and I can show you the textbook here. Will you allow me - - -

No.

THE COMMISSIONER: The answer is no, the answer to your question is no, Mr Payne.

MR PAYNE: So your, your evidence about P461 is that this was an attempt by Mr Harvey to steal the Sydney Water logo and the Sydney Water mark
30 so far as it related to class 32?---No, he was trying to steal my discovery which is my intellectual property.

THE COMMISSIONER: It's not, I don't Mr Makucha's saying that he was trying to steal the logo, he was trying to steal, he was stealing the idea that you could register a different mark for class 32, is that right Mr Makucha?
---He was trying to steal my discovery of that particular missing class. That's all I claim.

MR PAYNE: And just so we're clear, Mr Makucha, you didn't want to
40 register a different mark or logo, you wanted to register the Sydney Water mark and logo which was applying to other categories, you wanted to register that in relation to class 32, so Sydney Water's own logo and own mark but to a new class, correct?---I was trying to complete the mark and give them 50 per cent and I was happy to have the benefit of the other 50 per cent because it validated by lifelong career of giving to people and helping and not being a bloody, a person who, being opportunistic totally.

THE COMMISSIONER: Mr Payne would you repeat the question please.

MR PAYNE: I'll move on.

THE COMMISSIONER: No, I think it would be helpful if we had a proper answer to the question.

MR PAYNE: If the Commissioner pleases?---Could you try it again so I can comply.

10 Just have a look at the top right-hand corner, just so we're on the same page. Sydney Water, you see how its written there?---Which page, sir?

461, P461?---Yes, I have it, yeah. That's the (not transcribable).

Yes. You agree with me that that is the property of Sydney Water, correct? ---Well, all classes apart 32, yes.

20 And you say do you, it's your understanding of the law, that despite the notoriety of this mark it was open to you to begin using the mark in relation to bottled water and other items in class 32, do you?---It was without even asking them.

I see?---I'll repeat it for you.

THE COMMISSIONER: No, no, I think your - - -

MR PAYNE: I, I understand.

30 THE COMMISSIONER: - - - your contention is understood.

MR PAYNE: And you tell the Commissioner do you that you receive, you've never received legal advice from anybody confirming what you've just said to me?---I have, from textbooks, legal textbooks on intellectual property which I have - - -

You have discerned yourself from textbooks certain matters but you've never been told by any lawyer that what you've just told me is correct? ---I had confirmation on the point from - - -

40 THE COMMISSIONER: No, just answer the question, please, Mr Makucha?---Yes, but I can't remember particularly - - -

Your answer is that you haven't received legal advice?---No, no, that's not right, I have.

Well, well, who have you received, who did you receive legal advice from? ---I've had discussions with - - -

No, who have you received legal advice from?---What's your definition of legal advice? Is it, is it a discussion about a point or is it when I give them instructions and they give me an answer?

Has someone, has a lawyer expressed the opinion to you in, in a situation that simply, that's not just simply kerbside advice if you understand that expression - - -?---Yeah, I understand that.

10 That you were free to register the mark Sydney Water for class 32?---Can I answer you in the alternative?

No, I just want you to answer that question?---Well, kerbside, I don't have any written confirmation but however I have discussed the point with three or four patent lawyers.

Who are they?---They're all contained in this volume where Harvey had written to the various - - -

20 Are you able to give their names now?---Oh, yeah ah - - -

Well, what are they?---Um, there is one lawyer group who specialise in IP and they are in North Sydney and its upon that letter of their proposal - - -

Well, what are their names?--- - - - that I - - -

What's the name of the lawyer?---Excuse me, I - - -

30 What is the name of the lawyer that gave you advice?---(not transcribable) Commissioner, I'm - - -

I don't want a long story, I want to know the name of the lawyer who gave you the advice?---Is it Griffith Hack and it's, it's the same crowd who gave the fee proposal and then Harvey confirmed in his own handwriting with his own signatures that Makucha owned the intellectual property of the discovery.

40 Are you basing this on a letter from Griffith Hack or are you basing this on a conversation you had with an individual?---I'm basing it on a conversation that I had and I was - - -

All right, that's, thank you for that answer. Can you please identify the name of the individual?---There were two women.

What were their names?---One, one is a, I think a South African woman, Slepps, Sheps and the other lady is an English lady by the name of Tara Parkes.

And they expressed the opinion to you that you were entitled to use this logo Sydney Water for class 32?---Being the first registrant.

Yes, you were entitled to register I beg your pardon - - -?---Yeah, that's right, I'd be - - -

You were entitled to register the - - -?---(not transcribable)

10 Sorry, I just want to get clear what you're saying. You're saying that these two women who are patent attorneys expressed to you the opinion that you were entitled to the mark Sydney Water for class 32?---And also that - - -

Is that right?---Um, I believe so.

What do you mean you believe so? Did they or didn't they?---Excuse me, I've explained to the Commissioner that I did not take a proposal to them asking them to give a written advice.

20 I understand that but people can give advice - - -?---You're pressing the point.

I'm pressed, you are not, you are not answering my question?---Well, I'm trying to answer it very truthfully and honestly so you can't cause me a problem, Commissioner.

I'm trying to find out whether they expressed that opinion to you and - - -? ---We had discussions not only about that but also about the fact that an assignment has to incorporate the goodwill.

30 I'm just trying to find out whether you are saying that these two people expressed the opinion to you that you were entitled to register that mark, Sydney Water, for class 32. You've said that they did so orally. I'm now trying to get confirmation from you that they orally expressed that opinion to you?---Ah - - -

Did they or didn't they?---Amongst other opinions. Look, I want to - - -

40 I'm sure they expressed many opinions to you but I want to know whether amongst the opinions they expressed to you was the opinion that you could use, you could register the mark Sydney Water for class 32?---Look, the Commission has the ability and the authority to contact these people and - - -

Are you refusing to answer that question?---I am not. I am still - - -

Because I have to warn you that refusal to answer a question is, will be contempt of the Commission?---Well, I'm not in contempt.

I'm not saying you are, I'm asking you to - - -?---I don't wish to be.

Well, I've said that, Mr Makucha, I would just like - - -?---Can you let me have my textbook on intellectual property?

No, I don't want your textbook?---Well, it has the section of the Trademark Act.

MR GORDON: Commissioner - - -

10

THE COMMISSIONER: I'm asking you for that. Mr Gordon, I will give you an opportunity, do you mind sitting down?---I - - -

Mr Makucha, I want, my question is did these two persons whom you've identified express the opinion to you orally that you were entitled to register the mark Sydney Water - - -?---No.

- - - for class 32?---No, I'm not, no, I'm just saying no, I mean, you won't, you won't take a (not transcribable) - - -

20

Well, was there anybody - - - ?--- - - - explanation.

Was there anybody else who expressed such an opinion to you?---I can't remember all the conversations but I went to, I had contact with eight or nine patent attorney companies with the approval of Sydney Water and it's agent Harvey and I explained to them what the scope of the work was and that was to register the trademark and I sought to ascertain whether they had any conflict of interest and the bottled water soft drink business has some very big players, Nestle, Pepsi, Coke, there you have it.

30

I'm not sure how that helps you but anyway, Mr Gordon, did you want to say something?

MR GORDON: Commissioner, I don't wish to make the application but I feel it might be prudent, I wonder whether we could have a five minute break.

THE COMMISSIONER: I think that's an excellent idea, Mr Gordon.

40 MR GORDON: Thank you.

SHORT ADJOURNMENT

[3.10pm]

MR GORDON: Thank you, Commissioner.

THE COMMISSIONER: Thank you, Mr Gordon. Mr Payne.

MR PAYNE: And just finally on this document at P461, if you, do you still have it opened in front of you, Mr Makucha?---I do.

I've been asking about the logo but also the mark in relation to the word Sydney Water. Again your understanding is that you had not at that stage been applied by Sydney Water to class 32. Correct?---I'm sorry?

10 It had not at that stage been applied by Sydney Water to class 32?---Correct. It was vacant. 32 does not appear on the registration search for Sydney Water.

20 And you say do you that you thought by discovering this absence that you became the owner of the mark Sydney Water so far as it applied to class 32?---I became the, I was the discoverer and by virtue of the discovery I obtained certain rights and that upon exercising those rights or having the capacity to exercise the rights without seeking any sort of confirmation from Sydney Water, the registration of class 32 would be able to proceed based upon the law that I can demonstrate to you because there is law in the Australian Intellectual Property text books describing how a mark selling scarves can be, can have a successful application for someone selling liquorice.

THE COMMISSIONER: Mr Makucha, do you say you obtained by discovering that Sydney Water had not registered the mark Sydney Water in respect of class 32?---Commissioner, I say the rights that I obtained by the discovery are to make a registration or to apply for registration with IP Australia the class 32 in relation to Sydney Water.

30 I see. Yes, Mr Payne?---And only that.

MR PAYNE: And do you say Mr Makucha, that you have ever used either the logo or the mark in the sale of bottled water or any other water product? ---I have not.

And do you say that nevertheless, by virtue of your discovery you obtained a sufficient interest so that you have in all probability become the owner for class 32 purposes of that logo and that mark?---Can you just repeat - - -

40 THE COMMISSIONER: Well, I think Mr Payne wants to know how you say you became the owner of the mark in respect of class 32?---The discovery by Makucha of the non-registration of class 32 and the subsequent application for registration of class 32 to apply to that mark confirmed certain rights in relation to that intellectual property upon Paul Makucha. However, I took the generous position of advising Sydney Water of their problem and saying that I would share 50/50 with them. And now I end up here for that gratitude. Terrible.

MR PAYNE: Please turn over to 466 in bundle. That's a letter to you from the Managing Partner of the Intellectual Property Practice at Mallesons Stephen Jaques dated 15 May, 2009?---What number is that?

466. Tell me when you're there. Top right hand corner - - -?---Yeah, yeah.

10 (not transcribable) 466, do you see it?---Tony O'Malley. Yeah, I got it.

Yes?---Yeah. A rectangular 41, which is Makucha's sticker, yeah. I've got it.

I see. You're told in the second sentence that if we are to represent you into a registration of a brand name for your proposed joint venture with Sydney Water, we would need to receive confirmation from Sydney Water itself that it is happy for us to do so. Do you see that?---I do.

20 You never provided such confirmation did you?---Well, they, they contacted Sydney Water (not transcribable). Sydney Water have a retainer with Mallesons. And one of the reasons why I went to Mallesons is to ask them because they were a firm which had been vetted by Sydney Water to see if they could do work in this matter. That's, that's how clean my hands are in this matter.

30 And you understood that they were telling you that they would need to receive confirmation from Sydney Water itself that it was happy to do the work. Correct?---The letter speaks for itself and I agree what you read into it.

So your state of mind was that Sydney Water were not happy for Mallesons to work with you in relation to the joint venture?---I don't know what, what the state of mind was for third parties. And I can't allow you to draw a conclusion or an inference which is not correct by saying that, because I didn't receive a letter from Sydney Water. I don't know what transpired between Mallesons and Sydney Water. Perhaps it might become abundantly clear that Sydney Water are angry with Mallesons because Mallesons overlooked the class 32 missing.

40 Mr Makucha, on 15 May, 2009, when you received this letter back from Mallesons, why didn't you ring Mr O'Malley and say, but I don't have confirmation from Sydney Water that they're happy to go ahead?---Mr O'Malley doesn't respond to my phone calls because I, I rang Mr O'Malley in relation to this matter six months ago.

At this time, no, I see?---Six months ago. And I told him that there was a problem with some of his staff. He never responded, he wasn't interested.

Mr Makucha, I suggest to you when you received this letter on 15 May, 2009 you understood that you could not provide confirmation that Sydney Water was happy for you to go ahead as you'd suggested. Do you agree? ---No, I provided a copy of this letter to Harvey. If I take you to Freehills letter in the preceding page, what do you make of that? It's about the same subject.

10 Please, Mr Makucha, it'll go much quicker, I'll ask some questions, you can answer them rather than make speeches?---I understand the system, however this is the truth Commission.

I want to suggest to you that when you received this letter on 15 May, 2009 you knew you were in no position to provide confirmation that Sydney Water was happy for Mallesons to act in relation to this joint venture. Do you agree?---I don't agree with you, sir.

20 Turn over please to document at 467, the next page. That's a document written by you to the Managing Director of Sydney Water, attention Mr Harvey and Mr Malacco?---Correct.

Is this a document where you're seeking to confirm something that you say Mr Harvey said to you?---That's right. He told me that Mallesons were on their panel. There's about three law firms, major law firms, Sparke Helmore, Mallesons and I forget who the other, the major law firm is.

30 Why then didn't you go back if you knew Mallesons were on the Sydney Water Panel, why didn't you go back and use them for this trademark application?---Well, I went there and when they said they had to obtain confirmation from Sydney Water, I gave all this material to Harvey and I never heard any more. And he told me to keep trying other outfits. And I ended up finding, you can tell by when the registration application was made in August, how long I had spent on finding another company, a patent and intellectual property lawyers who did not have a conflict of interest.

40 Well, in relation to Mallesons, the conflict of interest was that the act for Sydney Water. You knew that?---Tony O'Malley stated that in his letter, yes. I didn't, I didn't perceive that would've been initially a conflict of interest, otherwise I wouldn't of wasted my time to go there and wasted their time.

I suggest to you Mr Makucha that you well understood at about this time that you were in no position to provide evidence of authority from Sydney Water in relation to these negotiations for the joint venture and the IP aspects of it?---That's a wicked assertion on your part.

You disagree with it I take it?---I do.

Go to P468. That's another letter to Mr Harvey, To whom it may concern, which I take it you saw on or about the date it bears?---I have no quarrels with your - - -

10 Did you dictate its contents to Mr Harvey?---No. However I did during the course of these events bring to Harvey's attention that I was extremely angry, totally disappointed with the dishonesty which had been sought to be used against Makucha in trying to allege or assert that I might've been some form of person working for Sydney Water on a retainer. It had always been clearly stated and I went to a lot of trouble to state that I was not in any way a person who was a consultant to Sydney Water, the reason being there was a case in the High Court which is - - -

THE COMMISSIONER: Mr Makucha, you're making speeches again? ---I'm trying to suit the subject, sir. It's based on the issue that I had to clearly at all times state that the discovery was mine so they could not assert that I was working for them.

20 You were only asked whether you dictated this to Mr Harvey and you said no?---That's right. That's right. I believe it was, this letter was drafted by their lawyers after I had made representations to Harvey.

To whose lawyers, Sydney Water's lawyer?---Yeah, that's right, their in-house lawyers.

All right?---You're a lawyer, you can read it.

30 Okay?---I can't, I can't write like that. I'm a new Australian. I speak with new Australian.

Mr Payne?

MR PAYNE: Mr Makucha, I want to suggest to you- - -?---Yes.

40 - - -a suggestion I want to make about this, nothing to do with you being an employee, so just attend to the third from the bottom paragraph, I want to suggest to you it was clear to you that these trademarks referred to by Mr Harvey here were going to be owned by Sydney Water Corporation and licensed to the licence holder, Sydney Water P. Do you agree?---Yeah, but this didn't include the Class 32, this is still, and let me just expand on that, it goes to the issue of the proposition that Makucha made that Coca Cola, Pepsi, Franklin were using waters from Sydney Water, charging a lot of money purporting that they were spring waters, so I, I created a methodology which I discussed with Harvey whereby Sydney Water would be able to charge the Nestles, the Coca Colas, the Pepsis and all such a fee for using the water.

THE COMMISSIONER: All right?---And that- - -

I think you've answered the question, Mr Makucha.

MR PAYNE: Then turn over to P472 to 473. That's the handwritten document that was eventually sent by Mr Stafford on your behalf to IP Australia. Correct?---I believe that to be the case.

10 And I want to suggest to you, Mr Makucha, that prior to Mr Harvey writing this, you never explained to him your view that you or one of your companies was the owner of the Sydney Water logo and mark as it related to Class 32?---No, that's not correct. What, what, what, there had been discussions with Gino Malacco about the fact that I wanted to give Sydney Water half of something they didn't have or have any right to, that was the Class 32 water, and the tax advice was that if I didn't have the registration effected in the company, the tax position would be that it would cost me, if it's worth a billion dollars it would cost five hundred million in tax.

20 Do you suggest that you explained anywhere in writing to Mr Harvey prior to this date that you were asserting ownership of the Sydney Water logo and mark as it related to Class 32?---Yes, he is totally aware of that. That's what that is a confirmation of or one of the confirmations.

You wrote to Mr Harvey and explained that in detail, did you?---Here's Harvey's confirmation in writing. You can't do better than that.

THE COMMISSIONER: You might have told him orally, Mr Makucha? ---That I did, face to face.

30 But you've been asked about whether you put it in writing?---I can't remember, but I think, I feel pretty sure that the point would be verified appropriately within the confidentiality and implementation agreement by Stafford.

40 MR PAYNE: Well, let's look at his understanding. Look at P72 with me, P472 with me. "The objective", this is the second paragraph, the engagement, so this is Griffith Hack we're talking about, "Is to register the trademark of Sydney Water Board of bulk water as transmitted and communicated by pipes, vials et cetera and also registration of the trademark for bottled water using its own brand of water as delivered by its own transmission et cetera et cetera system. Bottled Sydney Water package can only be sold by the licensee." Do you see that?---Yeah, that's right.

The licensee was going to be Sydney, Sydney Water P. Correct?---That's right.

Sydney Water was still going to be the owner of the mark. Correct? ---Well, that's what they thought.

Absolutely that's what they thought?---No, no, but they didn't get away with it. They were trying to steal it. That's, that's how you ended up with a bloody confidentiality agreement that thick, because the rotten bastards tried to steal my intellectual property. Finish.

THE COMMISSIONER: Mr Makucha, there's a - - -?---Forgive me, I understand.

10 (not transcribable) language?---I know, I know. But, but this is the time to ventilate that issue.

I don't think it is the time to ventilate the issue and I won't allow it to be ventilated?---All right. Okay. Forgive me. But again I ask your forgiveness.

20 MR PAYNE: Mr Makucha, just so we're clear, I want to suggest to you that you understood Mr Harvey to be saying here that the trademarks, Sydney Water and the logo as applied to Class 32 would be owned by Sydney Water but licensed to some company associated with you. Do you agree?---That's what he tried to organise and if I was a sillier man he might have got away with it but he didn't get away with it because that was not the case and I pulled him up very bloody short and that's how the handwritten confirmation ended up there and this was written and signed under closed circuit television scrutiny in the foyer or the, the meeting modules at Sydney Water Corporation immediately adjacent to the desk of the chief security officer, an American guy to whom I used to report every time I went there and I got a confirmation tag with the time, date, and it's in their system and you can see this- - -

30 THE COMMISSIONER: Mr Makucha, do you say that what Mr Harvey wrote here was dishonest?---No. Scrupulously honest and reflects that facts, the true facts.

MR PAYNE: Well, I just took you to the part where he talked about Sydney Water P being the licensee on P472. Do you see that?---The top of the page has 472P.

That's right?---The bottom has 473.

40 That's right. I'm asking you about, every question I ask you will be addressing the top of the page, so you understand?---Okay. I understand. Thank you.

So I'll read to you, "Pipes delivery system, communication et cetera, bottled Sydney Water package can only be sold by the licensee of the Sydney Water brand, being Sydney Water P." Do you see that?---(NO AUDIBLE REPLY)

THE COMMISSIONER: That's at the bottom of the page.

MR PAYNE: The bottom of that page?---I'm looking.

THE COMMISSIONER: It's the last four lines of the handwriting on the page, Mr Makucha?---Yeah. Yeah.

10 MR PAYNE: So it was scrupulously honest, was it, that Sydney Water P would be the licensee. Correct?---That's, that, that, that's the first time I've ever seen that and thank you for bringing it to my attention. I think that's just an error of writing. There is no dispute that Makucha discovered the missing Class 32 and there is no disputing and it has never been disputed in any competent court or forum, legal forum, that I have not had the right to make the application for registration.

20 Mr Makucha, I won't take that up with you, but I will take this up with you. It's clear, isn't it, reading those words that Mr Harvey understood that Sydney Water P was to be the licensee and he still understood, as you told him repeatedly in the prior months, that Sydney Water Corporation was going to own its own trademarks. Correct?---Don't be mischievous. Sydney Water never owned the trademark in relation to Class 32. Now, you're being mischievous because the media's out there- - -

THE COMMISSIONER: Mr Makucha, no one is insulting you here. You should not insult anybody else?---But the media, forgive me, it's not an insult, it's not an insult, it's a statement of fact.

30 Well, I regard it as that and I won't allow it?---Well, the media, can you tell the media to stop insulting me and destroying my (not transcribable)

I have control of the court, of this hearing room. I do not have control of the media and to the extent that I have control of the hearing room I will not allow that kind of insulting language to be used?---I withdraw it. Forgive me. However, can I just explain that I think that Harvey misunderstood the legal capacity or functionality of Sydney Water- - -

Is that your signature on the left-hand side?---Yes, it is.

40 Why did you put your signature there?---I put it there to confirm that I had, if you go to the front page of that bundle of documents at P469 you will see my initial which is that squiggly PM and at 21/5/09.

Yeah, I see, I see that?---Right. And the reason for that is so that no one could ever dispute that Makucha had that confirmed in writing.

Had, had confirmed in writing what is contained on 472?---472, 473.

Yeah?---Yeah, because - - -

Because, because at that stage you were, you were content with it?---Yeah, well I didn't think they were going to shaft me and (not transcribable)

But that says, so you were content with the position that the bottled Sydney Water could only be sold by the licensee?---By Sydney Water P or its licensee.

It doesn't say that?---Well, it is what it is and I don't seek to - - -

10

MR PAYNE: Just so we're clear, Mr Makucha, it says sold by the licensee of the Sydney Water brand being Sydney Water P Pty Limited, you see that?---(NO AUDIBLE REPLY)

So Sydney Water P is the licensee that Mr Harvey's talking about, correct? ---Sydney Water P is the company which has the registration of it, the application.

20 THE COMMISSIONER: No, that's not what this says?---I understand that's right. I concur with the Commissioner that's not what it says.

MR PAYNE: And it's clear - - -?---But in reality what, what has occurred is that the registration has been applied for in Sydney Water P.

I do understand that Mr Makucha, I promise?---I'm sure.

I do understand that, my question - - -?---So do I, I understand it too.

My question though is this?---Yeah.

30

This is the document or one of them that was sent with Sydney Water P's registration application, you agree?---So it has been said.

Well, I'll take you to that in a little while but you agree with me that it is clear reading this that Mr Harvey thought what he was doing here was recording that the licensee of the Sydney Water brand, Sydney Water P would sell the bottled water but that he understood that Sydney Water would own its own logo and mark in relation to class 32, do you agree? ---No, Mr Payne, Mr Harvey was being wicked and being shifty because that type of behaviour and his attempt to create a, an argument which probably would have permitted Sydney Water to argue that I being a
40 employee or a subcontractor to Sydney Water, all the work that I had done in relation to the discoveries in intellectual property belong to them. Now, that had to be corrected quickly. That's what Harvey got up to with those letters.

THE COMMISSIONER: So when you, when you signed it you didn't realise what he'd written, is that what you say?---The part that I was most

interested in was Sydney Water, this is page 473, Sydney Water confirms that the intellectual property in relation to these trademarks of Sydney Water, bottled water, dah, dah, dah, dah, is the IP of Paul Makucha, that's, that the most powerful, potent statement of - - -

That wasn't, my question was you signed, is it now your position that you signed this by mistake?---No, I did not. It contains the, Sydney Water P, this, this document here confirms or is a confirmation or a form of confirmation by Harvey that Paul Makucha owns the intellectual property.
10 Makucha can put it in any company he likes. He didn't even have to put it in a company. If I wanted to be a bastard and put it in my own name Sydney Water would never get it because the tax position would be huge so I advised Harvey the way that it should be done so as to protect my interests and give Sydney Water 50 per cent of something they had overlooked was based upon the advice of Gino Malacco and the tax position.

As conveyed by you to Mr Harvey?---That's right.

And what Mr Harvey was writing down here was what you told him to write?---No, it was, it was what Mr Harvey had agreed when I pulled him
20 up short in relation to what they had sought to achieve the erroneous and untruthful - - -

I'm not sure how you pulled him up short when you've got your signature on it?---Yeah, but that was after. What caused this to be, the need for this statement to be dictated and signed is the fact that I made some fairly severe utterances about people and corporations when they are shown that they have overlooked something and its of huge embarrassment that they then try to set about trying to create a situation how to pinch it.
30

So I take it it was you who prepared and dictated it as you, to use your words?---I told Harvey what, what he needed to confirm in writing that the IP was, was mine because some weeks later Harvey at a meeting out there said Makucha, do you want to sell your IP. It was about 16 or 17 June and Makucha said I can't sell it, I'm too (not transcribable) and the tax position, the tax would be prohibitive.

Yes, Mr Payne.

40 MR PAYNE: Mr Makucha, I want to suggest to you this page P472 makes it clear that Mr Harvey believed Sydney Water P was going to be a licensee from Sydney Water Corporation of Sydney Water's logo and mark in relation to class 32?---Yes, it had to be. It was meant to be. Mr Payne - - -

THE COMMISSIONER: It's more than - - -?--- - - - let's just clarify the point, for, for good - - -

MR PAYNE: You agree with it or you don't agree with it, Mr Makucha, one or the other?---I don't agree with it but can you - - -

Thank you, please turn over to P488?---Up until this date Sydney Water have not exercised their option for 50 per cent of Sydney Water P.

We'll come to that, Mr Makucha, I promise?---For \$500 to get 50 per cent of the logo in class 32 I would suggest is a bargain.

10 We'll come to that, Mr Makucha, I promise?---488.

488?---I'm there.

This is, this is a tax invoice from Hall Chadwick to the managing director - - -

THE COMMISSIONER: Is that 487 or 488?

MR PAYNE: 488, Commissioner.

20

THE COMMISSIONER: Are you not dealing with 487?

MR PAYNE: No, that wasn't paid.

THE COMMISSIONER: No, right.

MR PAYNE: 488 is a tax invoice from Hall Chadwick you delivered to Mr Harvey by hand?---I can't, I can't agree or disagree with that, I can't remember.

30

That was for professional services for registration of Sydney Water Health Pty Limited?---I can't, I can't remember, they might have sent it to each other by mail or whatever, I can't, there's a lot of documents gone through my - - -

Just dealing with Sydney Water Health, do you agree with me that Mr, that your, that your understanding at all relevant times was that Mr Harvey could not himself negotiate to completion with you about any proposal concerning Sydney Water Health Pty Limited but rather before there was an agreement the board would have to approve such agreement?---Not agreement, Mr Harvey confirmed the registration of that company and granted his permission for its registration and it is so stated in writing by Harvey.

40

It's one of the companies involved ultimately in the Confidentiality and Business Implementation Agreement?---Yes.

You agree that for that purpose and actually using this company to do anything on behalf of the joint venture that would have required the consent

of Sydney Water's board, do you agree?---Sydney Water board after the Confidentiality Agreement has been executed, it means that whatever is, has been or will be divulged to them, they will maintain the confidence so that they will not steal the ideas or the business methods from Makucha and at all times it has been the case that they would be able to take whichever items from my intellectual proposals at any time they like and if they took them there was a asking price.

10 Please turn over to P493?---And Justice Gummow describes that that is, you have to be very careful doing Confidentiality - - -

THE COMMISSIONER: Please don't make speeches?--- - - - Agreements because if you don't - - -

Stop, I'm really not interested in that at the moment?---Thank you.

MR PAYNE: Please turn over to P493. That was a tax invoice from you to the managing director of Sydney Water attention Mr Harvey?---Yeah.

20 Initial deposit for entering into joint venture IP and bottled water operation and provision of \$10,000,000 benefit to Sydney Water Corporation?--- Correct.

Can we just analyse each part of that. Deposit for entering into joint venture IP. Do you tell the Commissioner that by this date, 26 May, Sydney Water had entered into a joint venture IP?---(NO AUDIBLE REPLY)

30 I joint venture for IP and bottled water, I'm sorry?---I don't understand your point. Can you clarify it?

Do you say there was an agreement between you on the one hand and Sydney Water on the other by this date, 26 May 2009, about any joint venture for IP and bottled water?---The confidentiality agreement provides, and this is an initial confirmation, that they will not seek to misuse intellectual property and that the confidentiality agreement is being created or will be created to confirm all that and for the sake of abundant caution, the confidentiality agreement has to be very very particular in detail.

40 THE COMMISSIONER: Do mind asking the question again? Mr Makucha has not6 replied to it.

MR PAYNE: Do you say, Mr Makucha, that by this date, the 26 May, 2009, there was any agreement between you or your companies and Sydney Water on the other hand for a joint venture for IP and bottled water? ---I don't believe that there was because I don't think that twenty thousand was paid. I can't remember.

Why did you send a tax invoice for a deposit for entering into a joint venture if there had been no entry into a joint venture?---Well, that's the consideration which I referred to in the opening letter setting out the proposals of the JVs between Makucha and Sydney Water. That's probably, that twenty thousand that I refer to is payment within seven days but it took, you know, some months more.

With the Commissioner's permission I'll ask you a third time. Do you say there was an agreement between you- - -

10

THE COMMISSIONER: He said no.

MR PAYNE: No. I see. In relation to the \$20,000, it wasn't paid. That was because you had a conversation with Mr Harvey about it, wasn't it? ---I can't remember.

I suggest to you that Mr Harvey said to you, in relation to the invoice, "Paul, this is problematic. We haven't entered into a joint venture yet. This sort of thing should be spelt out in the executive summary." He said that, didn't he?---He may have. I don't dispute it and I don't agree with it, but he may have.

20

You replied, I suggest, "How can I get some money then?" He said, "Well, are there any other assets you have at Baxter Road that you are willing to sell?" And you said, "I will look at it and give you an invoice." Do you agree that that was said?---No, I don't.

Do you deny it?---I neither agree or deny it because I can't remember the, the conversation that you're talking about and the time and place.

30

You agree, don't you, you were never paid this \$20,000 as an initial deposit?---I can't remember ever receiving that.

Look over at 507?---Ah hmm.

40

That's an invoice from you to managing director, Sydney Corporation, attention Mr Harvey. Total price inclusive of the GST being nineteen and a half thousand dollars?---Well, they got a bargain, didn't they? That, that's a bona fide transaction. One of those buildings costs \$12,000 two years beforehand and they take four or five months to get made, plus the air-conditioning and whatever so- - -

Mr Makucha?---I've sold, I've sold watches to pawnbrokers, all sorts of things when I've been broke.

Mr Makucha, I suggest to you that this was a device worked out with Mr Harvey for you to obtain nineteen and a half thousand dollars because he told you he couldn't pay the \$20,000 deposit. Do you agree?---It's no more

of a device than you coming down here and getting \$5,000 a day in the Commission. I sold and I gave good market value. I needed some money and the sale of those items meant that I wouldn't have to shift them.

To your- -?---To shift them getting a crane, a lever crane that costs \$8,000 a day and semi-trailers and taking it, may as well get rid of it.

I'm not suggesting it wasn't in your interests to receive money for these. What I'm suggesting is there was never - - -?---You did too.

10

- - -there was never any conversation with Mr Harvey was there about any need that Sydney Water Corporation had for these buildings, the subject of this invoice?---With all due respect, Mr Payne, it is not in my - - -

THE COMMISSIONER: Just answer the question. Was there such a conversation or wasn't there?---A conversation about what? Whether Sydney Water needed it?

20

MR PAYNE: Yes?---Harvey said Sydney Water always need these things.

You knew they didn't need them didn't you Mr Makucha?---Excuse me. Do you want to sit in this chair?

You knew they didn't need them didn't you Mr Makucha?---That's not correct.

Have a look at 508, Mr Makucha?---I don't care.

30

This is the initial version of this invoice that was paid and you'll see in - - - ?---So what? So what, I'm selling - - -

THE COMMISSIONER: Are you agreeing that it is the initial version?---It may well be, I haven't read them. But it's not a crime for me to sell things.

Yes, please read them and see if it's the initial version?---Well, one's 26 May and the other one is - - -

40

21 May?---Yeah, seven days apart. And a further verbal agreement of the 20th to sell two only 13 metre by seven point five site offices. One only ablution block. Right.

I think, I take it your answer is yes, it is the earlier version?---I can't certainly be sure. I can't - - -

All right. That's your answer.

MR PAYNE: Have a look at the second paragraph - - -?---They are linked, the two, the two issues are linked.

Thank you. Have a look at the second paragraph on P508. You say there that the two site offices and the ablution block are for ownership of the JV company Sydney Water P Pty Limited. Do you see that?---I do. You were the owner of Sydney Water P Pty Limited at that time. Correct? ---There is a share option for Sydney Water P to be 50 per cent owned by Sydney Water.

10 Please, please Mr Makucha, you were the owner at this time 100 per cent - - -?---(not transcribable)

You were the owner of 100 per cent of the shares of Sydney Water P Pty Limited at this time. Correct?---And in place was the share option agreement to be exercised at any time at will by Sydney Water, yes.

THE COMMISSIONER: Before, before the option was exercised and it still hasn't been exercised - - -?---That's correct.

20 - - - you were the sole owner of Sydney Water P Pty Limited?---That's right.

MR PAYNE: You were selling these two offices and ablution blocks to a company you wholly owned. Correct?---No. It's not right.

30 What did you mean when you wrote are for the ownership of the joint venture company, Sydney Water P Pty Limited?---That was an error, because the joint venture company, they're a, the main joint venture company is probably Paul Makucha Holdings. I'm not an accountant but that's the explanation.

Your agreement wasn't it with Mr Harvey to get you some money that you would construct this device of selling two ablution blocks to yourself, Sydney Water P. Correct?---It is not correct at all, because I can sell whatever I like when I like it providing I have title facility.

Have a look at the last sentence in this paragraph 2, the cost of these items will be refunded to Sydney Water Corporation in due course?---That's fine. That's okay. It's not a problem.

40 Well, the reason for that wasn't it Mr Makucha is that this wasn't a real transaction was it?---The joint, it was always contemplated that the joint venture company would refund Sydney Water Corporation for any monies which had been used in the establishment. And that's what that leads to.

I understand that Mr Makucha. And the true position was this was nineteen and a half thousand dollars Mr Harvey was arranging to pay to you to help in the establishment of this negotiation you were having isn't it?---Sorry?

He was arranging for nineteen and a half thousand dollars to be paid to you because you needed some money in circumstances where you were negotiating with him about this joint venture. Correct?---No. I, I go by what the invoice states.

10 What the invoice states is that you're going to sell two ablution blocks to yourself and refund the money in due course?---Well, that, that, I agree that on the face of it that's what it means, but that's not the reality of the day and at no time has there ever been any desire to implement something of that nature.

THE COMMISSIONER: This is not a genuine sale is it?---It is.

20 MR PAYNE: See Mr Makucha, you'd already sent an invoice for \$20,000 in relation to the joint venture and Mr Harvey told you he couldn't pay it. Correct? He didn't have authority. He told you that didn't he?---No. And I can't believe that I remember that. That's not right. Harvey never said to Makucha that he had no authority to pay any of these invoices. The first time that came up was in December, January.

Well, you sent him an invoice for \$20,000 and you agreed with me before it was never paid. Correct?---Yeah, but that's probably not based on authority.

30 It was never paid was it because you agreed with Mr Harvey that what you would instead was concoct this sale so that you got nineteen and a half thousand dollars from Sydney Water that you weren't entitled to. Do you agree?---I don't agree with you and I'd like to ask you to stop being so vicious.

THE COMMISSIONER: Mr Payne, have you finished with this invoice?

MR PAYNE: Yes, Commissioner.

THE COMMISSIONER: Is this a convenient time?

MR PAYNE: I'm sorry, yes, Commissioner.

40 THE COMMISSIONER: We'll adjourn until 9.30am tomorrow.

AT 4.01PM THE MATTER WAS ADJOURNED ACCORDINGLY
[4.01pm]