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EDITORIAL REVIEW

With the launch of Volume II of the Bulletin, it is perhaps helpful to provide a few reflections on the project.

The objectives of the Bulletin are two-fold. Firstly, to provide practical assistance to the reform efforts now under way in Nigeria, and in particular to the Independent Commission Against Corruption and Related Offences, and to the judges designated to hear corruption cases. Secondly, it is to provide a global audience of judges, legal practitioners and law enforcement agencies with access to the emerging Commonwealth jurisprudence concerning corruption. This is in recognition of the fact that in recent years, many of the fifty-three Commonwealth countries have enacted wide-ranging anti-corruption laws that have introduced new offences and provided significant new powers for the investigation and prosecution of corruption cases, especially through the establishment of anti-corruption commissions. These developments are giving rise to constitutional and other legal challenges and this means that those working in this area need swift and ready access to the emerging jurisprudence.

The importance of Commonwealth jurisprudence is considerable for the shared legal tradition and language encourages the use of comparative materials. Yet, in practice, the process of law reporting in the traditional manner still often remains somewhat leisurely. It is also a fact that not all relevant cases (even if they are eventually reported) will appear in a readily accessible series of law reports. In the event, the majority of the decisions included in Volume 1 of the Bulletin had been handed down within the previous two years and many were, at the time, unreported (and several still remain so).

The richness of Commonwealth jurisprudence in this area is demonstrated by the fact that Volume 1 contains cases from Australia, Canada, Hong Kong, India, Kenya, Lesotho, Mauritius, Namibia, Pakistan, Singapore, Solomon Islands, Sri Lanka, South Africa and the United Kingdom.

The cases and materials in Volume 1 also covered a wide range of subjects and issues and details of these can be found in the Subject Index that is included at the end of this issue. However, a few general comments are appropriate.

Firstly, the cases highlight the extent to which anti-corruption laws and institutions raise significant constitutional issues. Their potentially invasive nature will often seek to make inroads into the enjoyment of fundamental rights and how the courts seek to balance the competing interests is one of the features underlying many of the decisions.

Secondly, a number of cases explore the organisation and powers of anti-corruption commissions. The very constitutionality of such a body was in issue in the decision of the High Court of Kenya in Gachiengo and Kahura v Republic (Vol. 1 Issue 1 p.11). A similar issue was considered by the Constitutional Court of South Africa in the later case of South African Association of Personal Injury Lawyers v Heath, and this is included in this issue. Further a detailed examination of the functions and powers of an anti-corruption commission were
examined in cases such as Parker v Miller (Vol. 1 Issue 2 p.123) and Parker v Anti-corruption Commission (Vol. 1 Issue 2 p.164).

Thirdly, the cases arising out of the Lesotho Highlands Water Project merit special attention. Here a whole series of key issues are examined, including the bases upon which a court may claim jurisdiction to try a corruption offence (R v Sole Vol. 1 Issue 1 p.51) and the use of mutual legal assistance mechanisms (R v Acres International Vol. 1 Issue 2 p.84). Given the fact that proving corruption and related offences is often particularly difficult, R v Sole (Vol. 1 Issue 2 p.23) and the Acres case are also instructive as to use of that courts can make of, for example, circumstantial evidence and similar fact evidence as well as the effect of the failure of an accused to give evidence at trial.

Fourthly, another common feature of corruption laws is the use of presumptions and the reversal of the onus of proof. Courts in several jurisdictions have examined these areas: see in particular Attorney-General v Hui Kin Hong (Vol. 1 Issue 1 p.34) and R (Elliot) v Secretary of State for the Home Department (Vol. 1 Issue 4 p.124).

Finally, Volume 1 also focused on the responsibility of judicial officers. The case of Zardari and Bhutto v The State (Vol. 1 Issue 3 p.34) highlights the political pressures that judges can come under when dealing with high profile corruption cases. See also the findings of the Kenya Constitutional Review Commission on the state of the Kenyan judiciary noted in Vol. 1 Issue 2 p.2. Such instances emphasise the responsibility of judicial officers to uphold their independence and integrity. In this context, the Bangalore Principles of Judicial Conduct (see Vol. 1 Issue 3 p.5) represent the most recent and most significant effort to establish a definitive statement on judicial ethics.

About Volume II

Volume II of the Bulletin has the same objectives as Volume 1 although there are two noteworthy changes. One is that the publication is now under the auspices of TIRI (the Governance-Access-Learning Network). Secondly, the Bulletin will now appear as a bi-monthly publication.

It is hoped that ready access to the comparative jurisprudence will continue to prove of value and help courts avoid the type of problem encountered by the High Court of Kenya in Gachiengo and Kahura v Republic (above) where it was noted:

Reference was made by leading Counsel for the respondent to Uganda, South Africa and Australia to advance the argument that judges have been appointed to head bodies that carry out similar functions to the [Kenya Anti-corruption Authority]. The terms and conditions of those appointments and the legislation pursuant to which the appointments were made, were not made available to us. Counsel's arguments, therefore, became mere statements from the bar.

John Hatchard
Editor
March 2004
THE ORGANISATION AND POWERS OF ANTI-CORRUPTION COMMISSIONS

This section contains four cases that examine different issues relating to anti-corruption commissions.

In South African Association of Personal Injury Lawyers v Heath and Others the Constitutional Court of South Africa considers the constitutionality of the appointment of a serving judge to head an anti-corruption commission. This point was previously considered in 2000 by the High Court of Kenya in Gachiengo and Kahura v Republic (see Issue 1 p.7).

In the South African situation, in 1997 an anti-corruption style commission known as Special Investigating Unit was established by the Special Investigating Units and Special Tribunals Act 1996 (the Act). In accordance with section 3(1) of the Act, which provides that “...the President must appoint a judge as head of a Special Investigating Unit (SIU) established by him or her”, Judge Willem Heath, a serving High Court judge, was appointed as head of the SIU. In the Heath case, the Constitutional Court considered the constitutional validity of:

(i) the appointment of a serving judge as the Head of a SIU;
(ii) the proclamation appointing Judge Heath as the Head of the SIU; and
(iii) the proclamation referring the allegations concerning the South African Association of Personal Injury Lawyers to the SIU for investigation

The case highlights the difficult balancing act required of legislators to provide anti-corruption agencies with adequate powers to counter the serious threat to the rule of law posed by corruption and maladministration but to do so within the confines of the constitution. As Chaskalson, P. notes (at para 4)

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done.

After a lengthy discourse covering some of the basics principles of the separation of powers, including the criteria for assigning a non-judicial function to a judge, the Court held that the appointment of Judge Heath and the two proclamations were unconstitutional. Yet even here the Constitutional Court seeks to avoid undermining "the important work being done by the SIU" [para 49] by ruling that work of the SIU could continue and that the Legislature had one year to amend the Act in order to make provision for the appointment of an appropriate person (other than a judge) as the Head of the SIU. The response was swift with the passing of the Special Units and Special Tribunals Amendment Act 2001, which amended section 3(1) to read:
The President must appoint a person who is a South African citizen and who, with due regard to his or her experience, is a fit and proper person to be entrusted with the responsibilities of the office of the head of a Special Investigating Unit established by the President.

SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS

V

HEATH, First Respondent,
THE SPECIAL INVESTIGATING UNIT Second Respondent,
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent and
THE MINISTER OF JUSTICE Fourth Respondent

Constitutional Court of South Africa

28 November 2000

Cases referred to in the judgment
De Lange v Smuts 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC)
Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC)
Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC)
Grollo v Palmer (1995) 184 CLR 348
President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC)
Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1

For the appellant: WH Trengove SC and M Chaskalson
For the third and fourth respondents: GJ Marcus SC, A Cockrell and SM Lebala
Introduction
1. The Special Investigating Units and Special Tribunals Act (the Act) came into force in November 1996. According to the long title of the Act, its purpose is:

To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto.

2. This appeal concerns the constitutionality of important provisions of the Act and of two proclamations issued by the President pursuant to its provisions. It reflects a tension that often exists between the need on the part of government to confront threats to the democratic state, and the obligation on it to do so in a manner that respects the values of the Constitution.

3. The tension is evident in the affidavit of the Minister of Justice, the fourth respondent in the application, who said:

It is a regrettable and notorious fact that the levels of crime in South Africa are unacceptably high. One aspect of crime which requires special investigative measures relates to corruption and unlawful conduct involving state institutions, state property and public money. Very often, such conduct is perpetrated by public servants and state officials. The experience of other countries suggests that the investigation of conduct of this nature requires special measures beyond the routine investigations conducted by conventional law enforcement agencies.

4. Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done.

The background
5. In March 1997 the President, acting under the provisions of the Act, established a special investigating unit (SIU), which is the second respondent in this appeal. The head of the SIU is the first respondent who is a judge of the High Court. I will deal later with the role of the head of the SIU and with the powers vested in the SIU by the Act. For the moment, it is sufficient to say that the SIU has extensive powers including powers to investigate allegations of corruption, maladministration and unlawful or improper conduct which is damaging to State institutions, or which may cause serious harm to the interests of the public or any category thereof and to take proceedings to recover losses that the state may have suffered in consequence thereof.
6. On 26 March 1999 an allegation was referred to the second respondent for investigation in terms of the Act. The allegation was that there had been

a failure by attorneys, acting on behalf of any person with regard to a claim for compensation from the Road Accident Fund, to pay over to such persons the total nett amount received in respect of compensation from the Road Accident Fund after deduction of a reasonable and/or taxed amount in respect of attorney-client costs ….

7. The appellant is a voluntary association whose members are attorneys and advocates whose practices involve personal injury litigation. It contends that the investigative powers vested in the second respondent by the Act are highly intrusive, that the exercise of such powers against any of its attorney members would constitute an invasion of their privacy, and would cause irreparable damage to their professional reputation. Although the appellant denies that any of its members has ever acted unlawfully or improperly in connection with amounts received by them on behalf of their clients in respect of compensation from the Road Accident Fund (RAF), it says that it has ascertained that the SIU is soliciting complaints against some of its members to enable the unit to investigate the way they deal with RAF claims.

8. It was in these circumstances that the appellant brought proceedings in the Transvaal High Court. It asked for an order declaring certain provisions of the Act to be inconsistent with the Constitution. Further, the appellant asked for orders reviewing and setting aside the proclamation under which the first respondent was appointed and the proclamation under which allegations concerning personal injury lawyers were referred to the second respondent for investigation. Other relief not relevant to this appeal was also claimed.

9. The application was dismissed by Coetzee AJ in the High Court and, with leave granted in terms of rule 18, the appellant has appealed directly to this Court against that order. The first and second respondents indicated in the High Court that they took a neutral stand in the matter, and that they would abide the decision of that Court. They have made no representations to this Court. The third and fourth respondents opposed the appeal.

The issues

10. In the High Court the third and fourth respondents (the respondents) raised a number of preliminary issues. They disputed the standing of the appellant to claim the relief sought by it and they contended that the application was premature. They also contended that the appellant lacked the capacity to litigate because it had more than 20 members, was an association formed for the purpose of carrying on a business for the acquisition of gain by its members, and in contravention [of sections 30(1) and 31] of the Companies Act 61 of 1973 was not registered as a company under that Act. The preliminary objections were dismissed by Coetzee AJ. Although the appellant raised the issues again in its written argument before this Court, we were informed at the hearing of the appeal that it no longer relied on these contentions, and that it abandoned them. In the circumstances there is no need to say anything more about this.
11. Three separate issues are raised by the appellant in the appeal. It contends that:
   a) section 3(1) of the Act and the appointment of the first respondent as head of the SIU are inconsistent with the Constitution because they undermine the independence of the judiciary and the separation of powers that the Constitution requires;
   b) the Proclamation referring the allegation concerning the conduct of attorneys dealing with RAF claims was in any event beyond the scope of the Act and accordingly invalid; and
   c) the powers of search vested in the second respondent by the Act are contrary to the right to privacy which everyone has under section 14 of the Constitution, and are accordingly invalid.

Before considering these contentions it will be convenient to set out the scheme of the Act and the provisions relevant to this appeal.

*The scheme and relevant provisions of the Act*

12. The President is empowered by the Act to establish an SIU for the purpose of investigating allegations of maladministration or unlawful or improper conduct on any of the grounds specified in section 2(2) of the Act. The grounds referred to in sub-section (2) are any alleged:

   (a) serious maladministration in connection with the affairs of any State institution;
   (b) improper or unlawful conduct by employees of any State institution;
   (c) unlawful appropriation or expenditure of public money or property;
   (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
   (e) intentional or negligent loss of public money or damage to public property;
   (f) corruption in connection with the affairs of any State institution; or
   (g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

13. Section 3(1) of the Act provides that the President must appoint a judge or an acting judge of a High Court as head of the SIU. The head of the SIU appoints the staff of the unit which consists of "as many . . . fit and proper persons" as in the opinion of the head of the unit are necessary for its effective functioning. The SIU has extensive powers of investigation including the power to summon and interrogate persons and to conduct searches for evidence that may be relevant to its investigations.

14. If the SIU obtains evidence "substantiating any allegation contemplated in section 2 (2)" it may institute civil proceedings in respect of such matters in a Special Tribunal (ST) established in terms of the Act to deal with such matters.

15. The Act vests the ST with jurisdiction to adjudicate upon any civil dispute emanating from the SIU’s investigations and brought before it by the SIU. The ST may make any order which it deems appropriate to give effect to its decision. The ST functions in the same way as a court according to rules made by its President.
The role of the first respondent as head of the SIU

16. The SIU is a juristic person. According to Mr Rheeder, who describes himself as the manager of a team of investigators and the person in charge of the investigation against the attorneys, the first respondent is the full time head of the SIU and has not sat as a judge since the establishment of the second respondent in March 1997.

17. The extensive nature of the functions performed by the head of the SIU appears from the Minister’s affidavit. The SIU is currently engaged in investigations into approximately 100 organs of state said to involve 221580 cases. The investigations extend over all 9 provinces and include 12 national investigations. Very substantial sums of money, amounting in all to about R3 billion are said to be at stake. As head of the unit the first respondent is required to perform executive functions. He is responsible for the appointment of the staff of the unit who may include officers seconded from the public service. He is also responsible for their supervision and has the power to remove any member of the unit from office "if there are sound reasons for doing so". The SIU may require any person to provide it with information that may be reasonably necessary for the performance of its functions, may require any person to appear before it to produce books, documents or objects, may question any person under oath, may enter and search premises in accordance with the provisions of the Act, and for that purpose may "use such force as may be necessary to overcome resistance against such entry and search of the premises, including the breaking of any door or window". The SIU must refer evidence pointing to the commission of an offence to the relevant prosecuting authority, and may institute civil proceedings in a ST if it has obtained evidence substantiating any allegation contemplated in section 2(2) of the Act. The first respondent is ultimately accountable for the performance of these functions. As head of the unit he may also refer matters to the Public Protector and to the state attorney or a State institution for the institution of legal proceedings against any person, if during the course of an investigation information comes to his attention which in his opinion justifies the institution of such proceedings by a State institution. The first respondent has to determine how each of the investigations is to be conducted, and as head of the unit he also has the power to issue interdicts or suspension orders if he has reason to believe that delay in applying to the ST for such orders would cause serious and irreparable harm to the interests of the public. Any such order has to be confirmed by the ST within 48 hours. The size of the SIU’s staff and its budget are not referred to in the papers, but they must be substantial. The SIU must "from time to time as directed by the President" report on progress, and upon the conclusion of the investigation make a final report to the President. At least twice a year the SIU must report to parliament on its investigations, activities, composition and expenditure. The State Liability Act 20 of 1957 is applicable to the SIU, and for the purposes of that Act, the head of the SIU is equated to a Minister of a department.

18. Coetzee AJ held that the functions that the first respondent is required to perform under the Act as head of the SIU are not inconsistent with the independence of the judiciary. He held that under our Constitution there is no express provision dealing with the separation of powers, and that it was not competent for a court to set aside a legislative provision on the basis that it violates what, at best for the appellant, is no more than a "tacit" principle of the Constitution. He held further that United States and Australian authorities relied upon by the appellant were not
relevant, because the constitutions of those countries provide for a rigid separation of powers, whereas our Constitution does not do so.

19. In the law of contract a distinction is drawn between tacit and implied terms. The former refers to terms that the parties intended but failed to express in the language of the contract, and the latter, to terms implied by law. The making of such a distinction in this judgment might be understood as endorsing the doctrine of original intent, which this Court has never done. I prefer, therefore, to refer to unexpressed terms as being "implied" or "implicit".

20. Coetzee AJ cited no authority for his finding that a legislative provision cannot be set aside on the grounds that it is inconsistent with an implied provision of the Constitution. Counsel were unable to refer us to any authority for such a proposition and Mr Marcus who appeared for the respondents placed no reliance on it. I cannot accept that an implicit provision of the Constitution has any less force than an express provision. In *Fedsure* this Court held that the principle of legality was implicit in the interim Constitution, and that legislation which violated that principle would be inconsistent with the Constitution and invalid [at para 58].

21. The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.

22. In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. In the *Western Cape* case it enforced that separation by setting aside a proclamation of the President on the grounds that the provision of the Local Government Transition Act, under which the President had acted in promulgating the Proclamation, was inconsistent with the separation of powers required by the Constitution, and accordingly invalid. It has also commented on the constitutional separation of powers in other decisions. There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid.

23. In the United States the President is head of government and head of state. The President is popularly elected, and neither the President nor the cabinet are members of Congress. The President is, however, vested with the power to veto legislation passed by Congress. In South Africa the President is head of government and head of state. The President is elected by parliament from amongst its members but ceases to be a member of parliament after having been elected. Cabinet Ministers are appointed by the President from amongst members of parliament, remain members of parliament after their appointment, and are directly answerable to it. There is accordingly not the same separation between the legislature and the executive as there is in the United States. In this respect, the South African system of separation of powers is closer to the Australian system. There, the head of state is the Queen, represented in Australia by the Governor General. The Commonwealth government is headed by the Prime Minister, and the Prime Minister and cabinet are members of parliament. Under this system of "responsible
government" the separation between the legislature and the executive is not as strict as it is in the United States. In all three countries, however, there is a clear though not absolute separation between the legislature and the executive on the one hand, and the courts on the other: it is that separation that is in issue in the present case.

24. The practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied. In *De Lange v Smuts* Ackermann J said [at paras 60-61]:

I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that, whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here -- i.e. the power to commit an unco-operative witness to prison -- is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.

The present case is concerned not with the intrusion of the executive into the judicial domain, but with the assignment to a member of the judiciary by the executive, with the concurrence of the legislature, of functions close to the "heartland" of executive power.

25. The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

26. The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the state to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of state or other person may interfere with
the functioning of the courts, and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

27. Mr Marcus submitted that the principle of separation of powers is not necessarily compromised whenever a particular judge is required to perform non-judicial functions. He accepted, however, that the performance of functions incompatible with judicial office would not be permissible. This is consistent with what this Court said in President of the Republic of South Africa and Others v South African Rugby Football Union and Others where it stated [at para 141] that "judicial officers may, from time to time, carry out administrative tasks" but noted that "[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers."

28. It is also consistent with the United States and Australian cases referred to by Mr Trengove, who appeared for the appellant. No precise criteria are set in those decisions for establishing whether or not a particular assignment is permissible. The courts in both these countries determine this in the light of relevant considerations referred to in the judgments.

29. Mr Trengove sought to distill from these authorities certain criteria, which he submitted are relevant to considering whether or not under our Constitution it is permissible to assign a non-judicial function to a judge. They are whether the performance of the function

(a) is more usual or appropriate to another branch of government;
(b) is subject to executive control or direction;
(c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;
(d) creates the risk of judicial entanglement in matters of political controversy;
(e) involves the judge in the process of law enforcement;
(f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.

To this may be added Blackmun J’s summary of the American jurisprudence [in Mistretta v United States 488 US 361 (1989)] as showing that:

Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the Judiciary. [at p.388]

30. These considerations seem to me to be relevant to the way our law of separation of powers should be developed. Mr Marcus did not dispute their relevance, but submitted that they must be seen in the context of each particular case. They should be given a weight appropriate to the nature of the function that the judge is required to perform, and the need for that function to be performed by a person of undoubted independence and integrity.

31. It is undesirable, particularly at this stage of the development of our jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office. The question in each case must turn upon considerations such as those referred to by Mr
Trengove, and possibly others, which come to the fore because of the nature of the particular function under consideration. Ultimately the question is one calling for a judgement to be made as to whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary. In making such judgement, the court may have regard to the views of the legislature and executive, but ultimately, the judgement is one that it must make itself.

32. Counsel for the respondents contended that our Constitution makes specific provision for the judiciary to perform certain functions that are of a non-curial character, and that it accordingly contemplates a less rigid separation of powers than the United States and Australian constitutions. The non-curial functions referred to in the Constitution include the following. The President of the Constitutional Court presides over the election of the President, and designates judges to preside over the election of Premiers. If there is a vacancy in the office of President or Premier, the President of the Constitutional Court sets the time for such elections to be held. The President of the Constitutional Court determines the time for the first sitting of the National Assembly and also presides over the election of the Speaker of the National Assembly. Judges designated by the President of the Constitutional Court determine the time for the first sittings of provincial legislatures, and preside over the election of Speakers of such legislatures. A judge is appointed to perform these functions to ensure that they are carried out impartially and strictly in accordance with constitutional requirements and this is not inconsistent with the role of the judiciary in a democratic society. Counsel also referred to section 178 of the Constitution, which makes provision for judges to sit on the Judicial Service Commission, the majority of whose members are not judicial officers. The Commission has a central role in the appointment of judges and may also give advice to the government on matters relating to the judiciary or the administration of justice. The functions of the Judicial Service Commission are not inconsistent with the role of the judiciary in a democratic society. The appointment of judges is crucial to the functioning of independent courts. The giving of advice on the administration of justice is also related to the subject matter of the judicial office. Government is not bound by the advice given, and if the subject on which advice is sought is contentious, the judges concerned can decline to participate in the giving of such advice.

33. Coetzee AJ held that it was part of the legal tradition of our country for judges to perform executive functions such as presiding over commissions of inquiry and sanctioning the issuing of search warrants. He equated an appointment as head of the SIU to these functions. The "tradition" referred to by Coetzee AJ comes from the era of parliamentary sovereignty. What is now permissible must be determined in the light of our new Constitution, and not necessarily by past practices.

34. In dealing with the question of judges presiding over commissions of inquiry, or sanctioning the issuing of search warrants, much may depend on the subject matter of the commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the
qualities and skills required for the performance of judicial functions - independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the judge is required to determine whether grounds exist for the invasion of privacy resulting from searches.

35. The fact that it may be permissible for judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government. For instance under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not "appropriate to the central mission of the judiciary." They are functions central to the mission of the legislature and executive and must be performed by members of those branches of government.

36. The first respondent has not intruded into the affairs of the executive at his own instance. The legislature made provision for the appointment in the Act and the executive, through the President, requested the first respondent to accept the appointment. I have no doubt that in accepting the appointment the first respondent acted in what he perceived to be the national interest. The fact, however, that all involved acted in good faith and in what they perceived to be the interests of the country, does not make lawful, legislation or conduct that is inconsistent with the separation of powers required by the Constitution.

37. The respondents contend that the position of head of the SIU is not incompatible with judicial office. They stress the importance of the SIU in the fight against corruption, and support the appointment of a judge as head of the SIU on the ground that it is important that the unit be headed by a person whose integrity is beyond reproach. This, said the Minister,

was especially important given the nature and ambit of the tasks which the Unit would be required to perform. It was for this reason that it was thought desirable that these tasks should be supervised by a judge or acting judge of the High Court. Not only was the view taken that a judge or acting judge would be possessed of the necessary integrity, but it was also believed that a judge or acting judge would have the requisite skills and expertise to perform the functions envisaged by the Act.

38. I accept that it is important that the head of the SIU should be a person of integrity. But judges are not the only persons with that attribute. The functions that the head of the SIU has to perform are executive functions, that under our system of government are ordinarily performed by the police, members of the staff of the National Prosecuting Authority or the state attorney. They are inconsistent with judicial functions as ordinarily understood in South Africa.

39. I have already referred to the functions that the head of the SIU has to perform. They include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices. Judges who perform functions such as presiding over a commission of inquiry, or sanctioning search warrants, may also become involved in litigation. But that is an unwanted though possibly unavoidable incident of the discharge of what are essentially judicial functions. One of the purposes of the Act is to
provide special measures for the recovery of money lost by the state, and in the case of the head of the SIU therefore, litigation on behalf of the state is an essential part of the job.

40. The functions a judge who heads the SIU has to perform are all related to the purpose of recovering money for the state, if necessary through litigation. By their very nature, such functions are partisan. The judge cannot distance himself or herself from the actions of the SIU’s investigators. The evidence in this case provides illustrations of partisan conduct on the part of investigators of the SIU, which are inconsistent with the judicial office.

41. The first respondent has not been able to perform his judicial duties for a period of more than 3 years. His appointment is indefinite, and will continue unless he resigns, or is requested by the President, with the consent of the Judicial Service Commission, to resign. Given the workload of the SIU and the indefinite nature of his appointment, he might never return to his judicial duties, yet he remains a judge.

42. Mr Marcus contended that the fact that the head of the unit has been unable to perform his judicial duties for a long period of time, and will continue to be unable to do so for as long as he remains head of the unit, is not relevant. If the functions of head of the SIU and judge are incompatible, that incompatibility existed on the day of the appointment. If they are not incompatible, they do not become so because the appointment is for a long period of time.

43. Whilst the length of the appointment is not necessarily decisive in the determination of the question whether the functions a judge is expected to perform are incompatible with the judicial office, it is, as indicated above, a relevant factor. There may be cases where as a matter of urgency a judge is required in the national interest to perform functions which go beyond the functions ordinarily performed by judicial officers. I express no opinion as to whether the performance of such functions for a limited period in such circumstances would be permissible under our Constitution. The present case, however, is not such a case. The Act contemplates that the head of the Unit will be appointed indefinitely, and the nature of the functions that have to be performed, require that this should be so. The unit could not function effectively if the appointment of its head were to be made on a temporary basis, calling for changes at regular intervals. That would be destructive of the work of the Unit which requires the continuity and control that comes from a permanent appointment, or at least an appointment for an indefinite but long term.

44. In Wilson v Minister for Aboriginal and Torres Strait Islander Affairs the Australian High Court reviewed the Australian authorities dealing with the separation of powers. The case concerned the question whether the constitution permitted the Minister to appoint Justice Mathews to prepare a report about the declaration for preservation and protection from injury or desecration of land of particular significance to Aboriginals, and whether it permitted Justice Mathews to accept such appointment. The report was to be used as an aid to the exercise of the Minister’s discretionary power to make a declaration with regard to land in relation to which a group had sought protection. Under the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 the Minister was required to commission a report from a person nominated by him. The majority held that the nomination and appointment of Justice Mathews was not effective as the performance of the reporting function would be inconsistent with the separation of powers.
required by the Constitution. Kirby J dissented. Notwithstanding his dissent, he expressed sympathy for the view taken by McHugh J in *Grollo v Palmer* in words that seem to me to be of particular relevance to the present case:

it is not compatible with the holding of federal judicial office in Australia for such an office holder to become involved as 'part of the criminal investigative process', closely engaged in work that may be characterised as an adjunct to the investigatory and prosecutory functions. Such activities could 'sap and undermine' both the reality and the appearance of the independence of the judicature which is made up of the courts constituted by individual judges. They could impermissibly merge the judiciary and the other branches of government. The constitutional prohibition is expressed so that the executive may not borrow a federal judge to cloak actions proper to its own functions with the 'neutral colours of judicial action.

45. The functions that the head of the SIU is required to perform are far removed from "the central mission of the judiciary." They are determined by the President, who formulates and can amend the allegations to be investigated. If regard is had to all the circumstances including the intrusive quality of the investigations that are carried out by the SIU, the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the state, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, the first respondent's position as head of the SIU is in my view incompatible with his judicial office and contrary to the separation of powers required by our Constitution.

46. Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the "central mission of the judiciary." Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive’s power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order. It follows that section 3(1) of the Act and Proclamation R24 of 1997, appointing the first respondent as head of the SIU, must be declared to be invalid.

*Appropriate relief*

47. Mr Marcus contended that the role of the head of the SIU as litigator could be separated from the role of the head of the unit as investigator. He submitted that the latter, taken on its own, is similar to the role performed by a judge who presides over a commission of inquiry, and would not be inconsistent with the judicial office. He referred in this regard to New South Wales legislation, which makes provision for a judge to preside over a commission into corruption. The terms of the New South Wales legislation were not referred to, nor the demands that it makes on the ordinary duties of the judge. In any event, a judge of the New South Wales Supreme
Court is not subject to the separation of powers that applies to judges of the Australian High Court and federal judges. The latter hold office under the Commonwealth Constitution which provides for a separation of powers. The former hold office under the New South Wales Constitution, which does not make the same provision for a separation of powers.

48. In the view that I take of this matter, however, it is not necessary to decide whether the investigatory functions of the head of the SIU are consistent with the Constitution. Investigation and litigation by the SIU are inextricably linked, and the Act makes no provision for them to be dealt with by separate functionaries. Moreover, the appointment of the head of the SIU is for an indefinite period involving the performance of numerous ongoing tasks, and is not an appointment for a single inquiry of limited duration, which permits the judge to return to his or her judicial functions once the inquiry has been completed. In my view this is not a case in which severance or notional severance would be an appropriate order. What then is appropriate?

49. If the declarations of invalidity were to have immediate effect, that would undermine the important work being done by the SIU. The legislation has been drafted on the basis that the head of the SIU will control its activities, and will be a person of integrity and independence. If that person cannot be a judge, other criteria must be set for measuring the independence and integrity of the person to be appointed to that office.

50. The fact that the head of the SIU is a judge does not prejudice the persons being investigated. What is involved is the principle that judges must be, and be seen to be, separate from and independent of the legislature and executive. The blurring of this line has already occurred, and is not likely to be increased in a material respect if the first respondent continues temporarily to be head of the unit until appropriate arrangements are made for his replacement. On the other hand, the SIU cannot function without a head of the unit. In the circumstances of the present case, there are good reasons to suspend the declarations of invalidity pertaining to section 3(1) of the Act and the appointment of the first respondent as head of the unit. If the declarations of invalidity are suspended provision can be made for an orderly transfer of the powers of the head of the unit to a functionary who is not a member of the judiciary. That will require amendments to be made to the legislation and time will be required for that purpose. In the meantime the important work being done by the SIU can continue. I will deal later with what is an appropriate period.

The Interpretation of section 2(2) of the Act

51. The President may refer matters to the SIU for investigation only on the grounds mentioned in section 2(2) of the Act: namely, allegations concerning matters detailed in the subsection. The appellant contends that the allegations in the present case do not fall within the purview of section 2(2).

52. Section 2(2) deals with the ambit of the application of the Act which contains various provisions that impact upon an entrenched constitutional right to privacy of the persons affected by them; the broader the reach of the Act, the greater the invasion of privacy. In construing section 2(2) regard must be had to the "the spirit, purport and objects" of the Bill of Rights. The spirit, objects and purport of the Bill of Rights, here the protection of privacy, will better be met in this case by giving a narrow rather than a broad interpretation to these provisions.
53. Section 2(2) contains seven sub-paragraphs. The President relied on sub-paragraphs (c) and (g) in referring the matter to the SIU for investigation. Counsel for the respondents correctly did not suggest that there were other grounds on which the matter could be referred. Sub-paragraphs (c) and (g) provide:

(c) unlawful appropriation or expenditure of public money or property
....
(g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

54. The purpose of the Act appears from its long title which is referred to in paragraph [1] above. That purpose is to provide mechanisms for the investigation of "serious malpractices or maladministration in connection with the administration of State institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public," and for the adjudication of civil matters emanating from such investigations.

Section 2(2)(c)

55. The RAF is a State institution and investigation of any fraud on the RAF would fall within the scope of the Act. But the matters referred to the SIU do not deal with this. The allegations in question relate not to the RAF, but to dealings between particular attorneys and their clients. There is no suggestion that payments made by the RAF to attorneys, on behalf of their clients, were in any way improper or unlawful, or that the investigation can possibly give rise to the recovery of any money on behalf of the state. On the face of it, the investigation is not concerned with the appropriation or expenditure of public money. It is concerned with the reasonableness of charges made by particular attorneys to particular clients for services rendered by them in connection with RAF claims, and to the possible over-reaching of those clients by their attorneys. It involves an investigation into what would be "a reasonable and/or taxed amount in respect of attorney-client costs", and whether a particular attorney has either overcharged his or her client, or failed in some other way to account properly to such client for the compensation paid to that attorney as the client’s agent.

56. The respondents rely on the definition of "public money" in the Act, which reads:

"[A]ny money withdrawn from the National Revenue Fund or a Provincial Revenue Fund, as contemplated in the Constitution, and any money acquired, controlled or paid out, by a State institution."

They contend that money paid by the RAF to an attorney in settlement of a client’s claim is money "paid out" by a State institution, and that it remains public money in the hands of the attorney. If that attorney fails to account properly to the client for the money received on the client’s behalf, that, so it is contended, constitutes an "unlawful appropriation" of "public money" within the meaning of section 2(2)(c).

57. I am prepared to accept for the purposes of this judgment that section 2(2)(c) may linguistically be capable of such an interpretation. In my view, however, the section should not be given such a wide meaning.
58. The primary purpose of the Act is to enable the state to recover money that it has lost as a result of unlawful or corrupt action by its employees or other persons. The public money contemplated by the Act, is the money of a State institution that has been paid out or expended, and which that institution is entitled to recover. Hence the special mechanism for the investigation by the SIU and the recovery of money through the ST.

59. When the RAF pays compensation to an attorney, as agent for the claimant, the RAF’s obligations to the claimant are thereby lawfully discharged. In the hands of the attorney it is money lawfully paid and received, in which the State institution no longer has a legal interest, and which the attorney is then obliged to pay to the client in accordance with the contract between them. If the attorney unlawfully appropriates that money, it would be an unlawful appropriation of the client’s money and not an unlawful appropriation of money of a State institution.

Section 2(2)(g)
60. Section 2(2)(g) contemplates unlawful or improper conduct by "any person". It is the conduct of that person that has to cause "serious harm" to "the interests of the public or any category thereof". Each of these requirements has to be met, and that is not done by rolling up all attorneys who overcharge their clients, and all clients who are overcharged, and treating the totality of all the attorneys as "any person", the totality of all the clients as "the public or any category thereof", and the total overcharging as "serious harm".

61. The allegation that is the subject matter of the investigation in the present case is in extremely wide terms. It makes no distinction between overcharging that is an isolated occurrence and overcharging that is a persistent practice. It makes no distinction between the theft of money and the charging of excessive fees. It makes no distinction between cases in which a full and proper disclosure has been made to clients concerning the compensation received and the fees charged and cases in which clients might have been misled. It covers cases in which the harm that may have been suffered by a particular client is not "serious harm", and cases in which the conduct of a particular attorney who may be investigated affects only the interests of that client and not those of any other person. It is in substance an allegation relating to the way attorneys conduct their practices and not an allegation concerning unlawful conduct alleged to have been committed by a particular attorney in respect of a particular client or clients; nor is it an allegation relating to corruption or maladministration within State institutions, or relating to any matter that affects the state’s financial interests.

62. The allegation requires the SIU to undertake a fishing expedition to establish whether there may have been malpractices by individual attorneys. It lacks the specificity required by section 2(2)(g) to justify the launching of an investigation. In particular, it fails to specify particular acts by a particular attorney which can be said to cause "serious harm" to the "interests of the public or any category thereof".

63. It follows that the matter referred by the President to the SIU did not relate to an allegation contemplated by section 2(2) and the President had no power to refer an allegation in those terms to the SIU for investigation under the Act. The Proclamation ordering the investigation
therefore violates the principle of legality and is accordingly inconsistent with the Constitution and invalid.

64. The allegations do, however, reveal a serious concern about the handling of RAF claims. If true, they call for urgent attention. This Court is not in a position to say whether or not the allegations are well founded. But as an editorial of *De Rebus* of April 1999 [at p.4] pointed out, the allegations are damaging to the attorneys profession and it is in the interests both of the profession and those victims of road accidents who may have complaints about the way their cases have been handled, that there be proper channels for resolving such complaints. There are various ways in which such problems can be addressed. They need not involve the lodging of a formal complaint against the attorney, or complicated investigations. Clients are often reluctant to lodge such complaints and are not likely to do so if there are other less confrontational ways of resolving their concerns.

65. In most cases all that is necessary is accurate accounting and a means of verifying accounts where the client has reservations concerning its accuracy. This does not call for complicated investigations or extensive powers of search. The relevant information is readily available and can be ascertained through enquiries directed to the RAF and the attorney concerned. If there is a structure that facilitates the making of such enquiries, and the provision of such information, without clients having to adopt a confrontational attitude to their attorneys, this is likely to resolve most of the problems. The provision of explanations and accurate information will ordinarily be sufficient to put the client’s mind at rest. If, however, as a result of those enquiries it should emerge that a client may possibly have been overreached by an attorney, appropriate action can then be taken to investigate the complaint.

*The Power of Search*

66. The powers of search vested in the SIU by the Act are apparently seldom used. We were informed from the bar that searches have been undertaken by the SIU on only three occasions, none of which was concerned with the investigation of the allegations that are the subject matter of this appeal. It follows from the finding that has been made concerning the invalidity of the referral that there is no threat to the appellant or its members that these powers will be used against them. In the circumstances there is no need to deal with the challenge to the constitutionality of section 6 of the Act.

*Order*

67. I have previously indicated that it is appropriate to suspend the declarations of invalidity made concerning section 3(1) of the Act and Proclamation R24. Apart from this judgment, there have been judgments in which it has been held that the SIU has exceeded its jurisdiction, and has undertaken recoveries beyond its powers. The constitutionality of other provisions has also been questioned. I express no opinion on these matters, but as amending legislation will be required to address the matters decided by this judgment, the state may wish to consider other issues relating to the structure of the Act and its provisions.

68. If the declaration of invalidity concerning Proclamation R31 of 1999 takes effect from the date of this order, past investigations that were undertaken by the SIU in good faith will be protected. If it is alleged that investigations were not undertaken in good faith or that they went
beyond what was permissible under the Act, the persons affected thereby will retain such remedies as they might have in relation to such conduct. An appropriate order is therefore to declare Proclamation R31 to be invalid with effect from the date of this order.

69. If the legislature wishes to address all the issues raised in this and other decisions concerning the constitutionality of the Act, that may take a significant period of time. Less time will, however, be needed for an amendment to address the declarations of unconstitutionality made in relation to section 3(1) and Proclamation R24, and to appoint a functionary other than a judge to head the SIU. These are the only declarations that are to be suspended. Although there may be reasons for allowing sufficient time for all matters to be dealt with simultaneously, there are good reasons for the first respondent’s position as the head of the SIU to be regularised without undue delay. Time will however be required for the various committees of parliament to consider what is to be done and for appropriate legislation to be drafted. Time must also be allowed for a new appointment to be made, and for the first respondent to transfer his responsibilities to the new head of the SIU in an orderly fashion. I consider that a period of 1 year will be sufficient for this purpose and the declarations of invalidity pertaining to section 3(1) of the Act and Proclamation R24 should accordingly be suspended for that period.

70. The following order is made:

1. The appeal is upheld with costs, which are to include the costs of two counsel.

2. The order made by the High Court is set aside and the following order is made in its place:
   
   2.1 Section 3(1) of Act 74 of 1996 is declared to be inconsistent with the Constitution and invalid.

   2.2 Proclamation R24 of 1997 is declared to be inconsistent with the Constitution and invalid.

   2.3 The declarations of invalidity made in regard to section 3(1) of Act 74 of 1996 and Proclamation R24 of 1997 are suspended for a period of 1 year.

   2.4 Proclamation R31 of 1999 is declared to be inconsistent with the Constitution and invalid.

   2.5 The declaration of invalidity made in regard to Proclamation R31 of 1999 is to take effect from the date of this order.

   2.6 The third and fourth respondents must pay the applicant’s costs which are to include the costs of two counsel.

In Special Investigating Unit v Nadasen the issue revolved around whether the Special Investigating Unit (SIU) established by presidential proclamation to investigate fraud and corruption in the South African province of Eastern Cape, could later extend its operations to another province, namely KwaZulu-Natal.

Here the court declines to adopt a "liberal" construction of the enabling Act. Instead it emphasises that the Special Investigating Unit, like any commission of inquiry, must "stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly" (para 5). Thus although providing for effective investigation into allegations of corruption is vital, this cannot be at the expense of procedural propriety.

Note should also be taken of the separate judgment of Marais, JA concerning the rights of co-defendants in such cases.

SPECIAL INVESTIGATING UNIT v NADASEN

Supreme Court of South Africa
Vivier ADCJ, Harms, Marais, Schutz and Cameron JJA
28 September 2001

Cases referred to in the judgment
Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)
Attorney-General, Transvaal v Manelis 1964 (3) SA 720 (T)
Cape Coast Exploration Ltd v Scholtz and Another 1933 AD 56
Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A)
Naude en Andere v Heatlie en Andere; Naude en Andere v Worcester-Oos Hoofbesproeingsraad en Andere 2001 (2) SA 815 (SCA)
Nigel Town Council v Ah Yat 1950 (2) SA 182 (T)
Nissan SA (Pty) Ltd v Commissioner for Inland Revenue 1998 (4) SA 860 (SCA)
South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)
S v Naudé 1975 (1) SA 681

HARMS JA

[1] Corruption and fraud, for some years now, have been matters of serious public concern. This is evidenced by a number of recent enactments, the use of special task forces and the appointment of commissions of inquiry. Statutes that spring to mind include the Investigation of Serious Economic Offences Act 117 of 1991, the Corruption Act 94 of 1992 and the Special Investigating
Units and Special Tribunals Act 74 of 1996. The latter is the subject of this judgment and references hereinafter to "the Act" are references to it.

[2] As appears from the long title, the object of the Act is to provide for the establishment of (a) special investigating units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and (b) special tribunals to adjudicate upon civil matters emanating from these investigations. One such unit was established together with its related tribunal by way of presidential Proclamation R24 of 14 March 1997. Because the head of this Unit was a judge, the Proclamation was later found to be inconsistent with the provisions of the Constitution but the declaration of its invalidity was suspended for one year as from 28 November 2000 (South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)). This order of the Constitutional Court does not affect the present judgment. [Editor's note: This case is also included in this issue of the Bulletin.]

[3] Consequent upon the Unit's investigation into the affairs of the Durban Metropolitan Council (Durban North and Central Council) in relation to the misappropriation of funds and the irregular receipt of payments in respect of the hiring of equipment, the Unit instituted proceedings in the Special Tribunal against the respondent ("Nadasen") and a co-defendant, claiming payment of some R555 000,00. One claim amounting to R351 805,20 succeeded and judgment was entered against the two defendants jointly and severally. Nadasen appealed to the Full Court of the Natal Provincial Division but the second defendant's executrix (he having since died) did not take part in the appeal.

[4] Shortly before the hearing of the appeal before the Full Court, Nadasen filed a special plea based upon an unreported judgment of Pickard JP. The Unit did not object and was prepared to argue the appeal on that basis. In another turn of events, the case was eventually argued by agreement on yet other bases: (a) did the Unit have jurisdiction to investigate the conduct of the affairs of a KwaZulu-Natal local authority and sue the defendants on its behalf and (b) did the Tribunal have jurisdiction to entertain the action? The Court a quo (per Hugo J, Nicholson J and Msimang AJ concurring) upheld the appeal on these new grounds and the present appeal is with the special leave of this Court.

[5] A unit such as the appellant is similar to a commission of inquiry. It is as well to be reminded, in the words of Corbett JA in S v Naudé 1975 (1) SA 681 (A) 704 B-E, of the invasive nature of commissions, how they can easily make important inroads upon basic rights of individuals and that it is important that an exercise of powers by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby they are created. The introductory part of section 4(1) of the Act emphasises the point. This accords with the approach of the Constitutional Court (South African Association of Personal Injury Lawyers v Heath and Others above para 52). Appellant's reliance upon a "liberal" construction (meaning in the context of
the argument "executive-minded") is therefore misplaced. A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly (cf Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A) 613F-J).

[6] Since the promulgation of Proclamation R24, a series of proclamations have been issued extending the terms of reference of the Unit and Tribunal. It is common cause that these later proclamations are not relevant in determining whether the Unit and the Tribunal had jurisdiction in the matter now before us, simply because they came after the institution of the proceedings mentioned on 29 August 1997. Cf Naude en Andere v Heatlie en Andere; Naude en Andere v Worcester-Oos Hoofbesproeiingsraad en Andere 2001 (2) SA 815 (SCA) 820I - 821A. In order to place Proclamation R24 in context, it is necessary to have regard to the scheme of the Act.

[7] Section 2 empowers the President to establish special investigating units and special tribunals. It reads:

The President may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2) by proclamation in the Gazette:
(a) (i) establish a Special Investigating Unit in order to investigate the matter concerned; or
(ii) refer the matter to an existing Special Investigating Unit for investigation; and
(b) establish one or more Special Tribunals to adjudicate upon justiciable civil disputes emanating from any investigation of any particular Special Investigating Unit:
Provided that if any matter referred to in subsection (2) falls within the exclusive competence of a province, the President shall exercise such powers only after consultation with or at the request of the Premier of the province concerned.
(2) The President may exercise the powers under subsection (1) on the grounds of any alleged-
(a) serious maladministration in connection with the affairs of any State institution;
(b) improper or unlawful conduct by employees of any State institution;
(c) unlawful appropriation or expenditure of public money or property;
(d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
(e) intentional or negligent loss of public money or damage to public property;
(f) corruption in connection with the affairs of any State institution; or
(g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.
(3) The proclamation referred to in subsection (1) must set out the terms of reference of the Special Investigating Unit, and such particulars regarding the establishment of the Special Investigating Unit
or the Special Tribunal as the President may deem necessary.

(4) The President may at any time amend a proclamation issued by him or her in terms of subsection (1).

The concept of "state institution" as used in the Act is wide and is defined in section 1 as follows:

"State institution" means any national or provincial department, any local government, any institution in which the State is the majority or controlling shareholder or in which the State has a material financial interest, or any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act 93 of 1992).

[8] It is convenient next to quote section 14(1), which deals with the conversion of existing commissions of inquiry into units and tribunals under the Act:

(1) The President may, in respect of any Commission of Inquiry:-
(a) appointed by him or her prior to the commencement of this Act; or
(b) appointed by any other executive authority prior to the commencement of this Act, upon the request of such executive authority, and if the objects of such Commission can in his or her opinion better be achieved by a Special Investigating Unit and a Special Tribunal, by proclamation in the Gazette dissolve such Commission and establish a Special Investigating Unit and a Special Tribunal in its place in terms of this Act:

Provided that the provisions of section 2 (3) and (4) shall apply with the necessary changes in respect of the proclamation referred to in subsection (1);

Provided further that....

[9] Three points need to be made at this juncture. First, although the President is entitled to establish a unit to investigate not only matters of national but also of local concern, the Act respects the autonomy granted by the Constitution to provinces. To act under section 14(1), where a commission was appointed by the executive of a province, the President must have the request of such executive as a condition precedent; if any matter falls within the exclusive competence of a province, the President may only exercise the powers under section 2(1) "after consultation with or at the request of the Premier of the province concerned". Second, there is no antipathy between section 2(1) and section 14(1) as suggested by the Court a quo, because a unit and tribunal established pursuant to section 14(1) are established "in terms of this Act", i.e. section 2(1). Section 14(1) does not contain its own establishment provision; it merely circumscribes when and how a unit and its appended tribunal can replace an existing commission. The terms of reference of a unit appointed pursuant to section 14(1) need therefore not be co-extensive with that of the displaced commission. Finally, section 2(1) envisages the appointment of any number of units but does not entitle the President to appoint a roving unit or substitute police force with an unbounded mandate to investigate possible
corruption wherever it may exist. The President must deem it necessary to
appoint a unit "on account of any of the grounds" mentioned in section 2(2);
moreover, he is required to identify the "matter" falling within one or more of
those grounds (cf South African Association of Personal Injury Lawyers v
Heath and Others above para 61). The degree of particularity required does
not arise in the present case.

[10] Reverting to the scheme of the Act, a unit must investigate the matter
referred to it, collect relevant evidence and may then institute proceedings in
the tribunal against the parties concerned for the recovery of what is due to
the particular state institution (sections 4(1)(a) and (b); 5(5) and 5(7)). The
tribunal consists of a judge and has in general terms the powers of a high
court in relation to matters falling within the terms of reference (sections 7, 8
and 9). Appeals lie against a judgment of a tribunal to the Full Court or to this
Court (section 8(7)).

[11] Proclamation R24 was issued pursuant to section 14(1). A commission
had been appointed by the Premier of the Eastern Cape on 14 June 1995
under the chairmanship of a judge to investigate fraud and corruption in the
government of the Eastern Cape and its constituent parts (my summation).
The Premier requested the transformation of the Commission into a unit, and
the President granted the request. The claim against the defendant arose, as
mentioned, from matters affecting a local authority from KwaZulu-Natal. The
issue ultimate in this appeal is whether, as a question of interpretation, the
Proclamation extends to matters within the exclusive competence of that
province.

[12] It is unfortunately necessary to quote the Proclamation in full:

1. Under section 14(1) of the Special Investigating Units and Special
   Tribunals Act, 1996 (Act No 74 of 1996), and upon the request of
   the executive authority of the Eastern Cape, and because I am of
   the opinion that the objects of the Commission of Inquiry into
   Matters relating to State Property in the Province of the Eastern
   Cape established by Eastern Cape Provincial Notice No 10 of 1995,
   can better be achieved by a Special Investigating Unit and a
   Special Tribunal, I hereby dissolve the said Commission and
   establish a Special Investigating Unit and a Special Tribunal in its
   place.

2. Under section 3(1) of the said Act, I hereby appoint Mr Justice
   Willem Hendrik Heath as head of the Special Investigating Unit.

3. Under section 7(2) of the said Act, I hereby, after consultation with
   the Chief Justice, appoint Mr Justice Gerhardus Petrus Christiaan
   Kotzé as Tribunal President.

4. The terms of reference of the Special Investigating Unit are-
   (1) to examine and report to me on:
      (a) any acquisitive act, transaction, measure or practise, pending or
         concluded, having a bearing on State or public property or public
money which belongs to or vests in a State institution or which, at any time prior to 27 April 1994, belonged to or vested in any former State or territory that now forms part of the Republic and which public property or public money, were it not for such acquisitive act, transaction, measure or practice, could have belonged to, or vested in, or could have been liable to be allotted to a State institution;

(b) any interest in, or in respect of, any property contemplated in subparagraph (a);

(c) any person, establishment, institution or society in or by which public property or public money contemplated in subparagraph (a) may be accumulated or may have been used; and

(d) any real or personal right to property contemplated in subparagraph (a) or to the fruits of such property that have accrued or will accrue to any person, establishment, institution or society other than a State institution;

(2) to inquire into, consider and report to me on matters contemplated in subparagraph (1) which have taken place between 26 October 1976 and the date on which the Special Investigating Unit is dissolved; and

(3) to inquire into, consider and report to me on any matter contemplated in section 2(2) of the said Act, which is incidental to the matters referred to in subparagraphs (1) and (2) and which is revealed by any of the investigations of the Special Investigating Unit, and the generality of this subparagraph is not limited by subparagraphs (1) and (2).

5. The seat of the Special Investigating Unit is King William's Town.

6. Subject to section 9(2)(b) of the said Act, the seat of the Special Tribunal is King William's Town or any other place that the Tribunal President may designate as such.

[13] Counsel for the appellant relied heavily upon the wording of paragraph 4(1)(a) and argued that it, in terms, exhibits an intention to appoint the Unit to examine any act, without any territorial limitation, falling within the definition. He readily conceded that there is nothing else in the Proclamation favouring this interpretation and invited us to apply a purposive construction to the Act and the Proclamation. No doubt, the object or purpose of the Act is to investigate allegations of corruption and fraud and to reclaim ill-gotten gains speedily by the use of specialist bodies. The Proclamation evinces the same underlying purpose. But that does not assist in answering the question whether its purpose was to form one unit to tackle and solve the whole country's problems or whether its purpose was to appoint a unit for the Eastern Cape only. One enters here the area of "impermissible speculation as to the purpose of legislation" (per Marais JA in a somewhat different setting in
Nissan SA (Pty) Ltd v Commissioner for Inland Revenue 1998 (4) SA 860 (SCA) 870C.

[14] Like any writing, paragraph 4(1) must be read in context and, unlike an Agatha Christie novel, it usually pays to commence at the beginning. Paragraph 1 makes it clear that the President, at the behest of the Executive of the Eastern Cape, intended to act under section 14(1). The object of section 14(1) is to dissolve an existing commission and to establish a unit and tribunal "in its place". The reader is also informed that the President formed an opinion, as both sections 14(1) and 2(1) require him to do. His opinion was that the Unit and the Tribunal could better achieve the objects of the Commission he was about to dissolve. That Commission, I repeat, was concerned with issues relating to old and new second and third tier governmental structures within the area of the Eastern Cape.

[15] Significant also is what the President did not state. He did not state that he was acting after consultation with all the provincial premiers, a necessary jurisdictional requirement for the countrywide extension of the Unit's powers to matters falling within the exclusive competence of provinces (section 2(1) proviso). I accept that it may not be a requirement for the validity of a proclamation for the President to recite the jurisdictional facts necessary for the exercise of his powers and that the maxim omnia praesumuntur rite esse acta might, in such a case, apply. However, where he has chosen to recite some jurisdictional facts, as he also did in relation to the appointment of the President of the Tribunal in para 3, it has to be concluded as a matter of interpretation that he was not randomly selective in doing so and that he did not arbitrarily omit others that did in fact exist. (Nigel Town Council v Ah Yat 1950 (2) SA 182 (T) 187; Attorney-General, Transvaal v Manelis 1964 (3) SA 720 (T) 725H - 726H.) Manelis, relying also on Cape Coast Exploration Ltd v Scholtz and Another 1933 AD 56 84, pointed out that the presumption arises only where the circumstances of the particular case add some element of probability, something lacking in this instance. If the President did not consult all the premiers, it could not have been his intention to issue a proclamation which would, countrywide, encompass matters falling within the exclusive jurisdiction of the provinces.

[16] Turning then to paragraph 4(1) of the Proclamation, it differs materially in its description of territorial application from the repealed Eastern Cape proclamation. The latter was concerned with the affairs of "the (present) government of the Province of the Eastern Cape" and, in relation to matters prior to 27 April 1994, "any of the now defunct states or the provincial authority which exercised control and administration over the territory which now constitutes the Province of the Eastern Cape". Paragraph 4(1), on the other hand, omits any reference to the Eastern Cape and, seen in isolation, encompasses also provincial matters of the country as a whole.

[17] Read in the light of the constitutional recognition of the autonomy of provinces, the scheme of the Act, the genesis of this Proclamation, the use of the phrase "in its place" (in this context, in the place of the provincial Commission) as well as the recital of jurisdictional facts in paragraph 1 and the omission of any reference to the other provincial premiers, I am satisfied
that the wider interpretation cannot be justified. An overbroad proclamation may, in any event, be liable to attack on that ground alone. The President's stated intention was to act under the proviso of section 2(2) in relation to the provincial matters of the Eastern Cape and it appears to me to be wrong to give a more extensive interpretation to the Proclamation to include the affairs of the other provinces. It follows that the Unit did not have the necessary standing to sue the defendants and that the Tribunal did not have jurisdiction to hear the case.

[18] The result may appear to be unsatisfactory but we know that Proclamation R24 was amended shortly after the proceedings against the defendants had been instituted. Proclamation R72 of 11 November 1997 substituted para 4 of R24, limited the activities of the Unit to the Eastern Cape and specified the matters to be investigated. Only after the judgment of the Special Tribunal was a presidential proclamation (R70 of 15 July 1998) issued at the behest of the Premier of KwaZulu-Natal, covering the subject matter of this case. Neither proclamation has an effect on the outcome of this appeal. The same applies to an affidavit, filed after the hearing of the appeal, by the former head of the Unit in purported response to a question raised by a member of this Court. It is, obviously, inadmissible in relation to the sole issue before us, namely the meaning of the Proclamation. However, its ostensible object was to establish the fulfilment of the condition precedent set by section 2(1), viz. the prior consultation with or the request of all the provincial premiers for the establishment of a unit to investigate the matters listed in the Proclamation in their respective provinces. This it failed to do. Instead of coming to grips with the issue, the affidavit consists of generalities and surmise based largely upon hearsay. Also, it would be unfair to allow the introduction of a novel factual issue at this late stage of the proceedings.

[19] The appeal is dismissed with costs.

VIVIER ADCJ, SCHUTZ JA and CAMERON JA agreed

MARAIS, JA

[1] In the view I take of this matter it would not be right to express any opinion on the merits of the decision of the Court a quo that the Special Investigating Unit had no locus standi to institute the claims which it did and the Special Tribunal no jurisdiction to entertain the claims. I regret that I am unable to reconcile myself to the extraordinary procedure in which the Court a quo acquiesced and which, if upheld, could result in injustice to the second defendant whose executrix was entitled to be given an opportunity of being heard, but was neither heard nor given any notice of what was afoot.

[2] The contentions permitted to be raised for the first time in the appeal to the Court a quo were not even foreshadowed in the belated Special Plea. There was no allegation made in it that the matters investigated fell within the exclusive competence of the province of KwaZulu-Natal and that the Proclamation did not extend to encompass such matters. The grounds upon which the Special Plea rested were that the notice instituting the proceedings
was bad because the President had not in terms conferred authority to sue upon the Special Investigative Unit and that, in the absence of a cession of rights to it, the Unit could not sue on behalf of the institution which had allegedly suffered damage.

[3] However, those grounds were not even considered by the Court a quo. Instead, the court noted in its judgment that "the appellant started off by addressing us on the question of whether the Special Investigating Unit had the jurisdiction to investigate matters in [KwaZulu-Natal] and whether the Tribunal in consequence had jurisdiction to hear such matters". It then proceeded to decide the question. This despite the fact that a decision upholding the contention would render void the judgments given in respect of second defendant.

[4] The second defendant had a judgment against him on one claim and a judgment in his favour on another. He acquiesced in those judgments and did not appeal. Neither did appellant cross-appeal. The outcome of his co-defendant's appeal could not affect the judgments given in respect of him as long as no question of the Special Tribunal's jurisdiction arose. Far from any such question having arisen, jurisdiction of the Tribunal had been expressly admitted in the pleadings at the trial. If any such contention was to be raised the second defendant's executrix would have a direct and substantial interest in the matter and would require, at the very least, to be notified (if not joined), and would be entitled to be heard if she so desired. See Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 649 and 659.

[5] What happened before the Court a quo was, however unintended, an affront to one of the most fundamental tenets of natural justice. Audi alteram partem. After the conclusion of the trial, and after the delivery of judgment, the trial was in effect re-opened at the instance of a defendant in the absence of, and without notice to, a co-defendant who had a judgment in his favour, to enable the very jurisdiction of the tribunal to be challenged. It was a challenge which, if successful, would render void both the judgment for and the judgment against the absent co-defendant. And even if it could be argued that the decision would not bind his executrix if she were to be sued in the civil courts and she attempted to raise a plea of res judicata, she would have to establish at least that the tribunal did have jurisdiction. She would be faced with a decision to the contrary by a full court by which any single judge in KwaZulu-Natal would be bound - a decision given (and this would be the most bitter pill of all) in a case in which the deceased was actually one of the parties and therefore entitled to be heard. Had the issue been raised at the trial as it should have been, he would have had such an opportunity but he was given none simply because his co-defendant belatedly raised the issue on appeal and no one took account of his executrix's obvious interest in the matter.

[6] It is no answer to say that there could conceivably be other persons in other cases who might also find themselves hit by a finding that the Special Tribunal had no jurisdiction and that they could not all be expected to be notified or joined. That does not excuse a failure to give notice to or to join a co-defendant in the self-same case where it is clear that the co-defendant has
a direct and substantial interest in the resolution of the point raised on appeal for the first time.

[7] If the Court a quo was minded to allow the issue to be ventilated on appeal the least it should have done was to insist upon notice being given to second defendant's executrix to enable her to decide whether she wished to be heard. It is idle to speculate whether she would or would not have made use of the opportunity. There is no way of knowing. I consider the proceedings before the Court a quo to have been irregular and productive of potential injustice. I do not see how its decision can be allowed to stand while second defendant's executrix's interest continues to be ignored.

[8] Strict orthodoxy would necessitate allowing the appeal, setting aside the judgment of the Court a quo, remitting the appeal for rehearing before a different panel of judges and ordering that, if the proposed attack upon the tribunal's jurisdiction is to be persisted in, or any other ground of appeal raised which, if successful, would or might vitiate the judgments given in respect of the second defendant, notice thereof be given to second defendant's executrix, and she be joined and heard if she so desires.

[9] However, there have already been substantial costs incurred and the matter is before this Court. It has been argued and if the executrix of the second defendant were to be joined, but elected to take no part in the debate, much time and money will have been wasted. I would therefore make an order along the lines of that made by this Court in the Amalgamated Engineering case, above, at 663. I would also order that a copy of this judgment be served on second defendant's executrix.
The Western Australian Anti-Corruption Commission was established under the Anti-Corruption Commission Act 1988. In March 1998 the Commission issued a notice (the March notice) requiring the plaintiff to give evidence before the second defendant, a Special Investigator appointed by the first defendant.

The plaintiffs sought an injunction against the Commission and its Special Investigator. Material had been obtained by means of search warrants issued under the March notice which were said to have been issued under unlawful terms of reference by the Anti-Corruption Commission. Later new terms of reference (the June notice) were issued by the Commission which overlapped with those in the March notice. It was argued by the plaintiffs that because the terms of reference in the June notice were substantially the same as in the March notice, then if the March notice was invalid, then this also applied to the June notice (even though there was no evidence to suggest that this notice had not been formulated in accordance with the 1988 Act).

WESTERN AUSTRALIAN POLICE UNION OF WORKERS & ORS v ANTI-CORRUPTION COMMISSION & ORS

Supreme Court of Western Australia (in Chambers)
Steytler, J

21 July 1998

For the Plaintiffs: L A Tsaknis
For the Defendants: R M Mitchell

STEYTLER, J

This is an application brought by the plaintiffs for an injunction restraining the defendants until judgment or further order from requiring any police officer or member of the first plaintiffs' union or any other of the plaintiffs to attend and give evidence before the second defendant, who is a Special Investigator appointed by the first defendant, and from conducting any further investigation in relation to or making use of any matter or thing obtained pursuant to or in reliance on what is described as a notice of allegations or class of allegations issued by the first defendant, the Anti-Corruption Commission, to the second defendant, dated 9 March 1998.

The principal proceedings are brought about by an originating summons for a declaration that a notice issued by the Anti-Corruption Commission to the second defendant, Mr Tannin, on 9 March 1998, requiring Mr Tannin to investigate certain allegations is void and of no effect on the grounds that the notice and each clause in the notice, firstly, fails to specify an allegation or allegations or class of allegations as required by various provisions of the Anti-Corruption Commission Act 1988 ("the Act"); secondly, that it fails to identify a public officer or any person in respect of whom the allegations or class of allegations relates; and, thirdly, that it fails to require the second
defendant to investigate and report to the Commission on an allegation, allegations or class of allegations specified in the notice as required by sub-section 8(1) of the Act.

Mr Tsaknis, who appeared on behalf of the plaintiffs, has told me of his intention to amend that originating summons to include an allegation that the notice went outside the proper inquiry powers of the second defendant and also to seek a declaration that the summonses issued by the second defendant to the second, third and fourth plaintiffs on 9 June 1998 pursuant to a written notice given to the second defendant on or about 22 June 1998, to each of which I will refer in due course, are void and of no effect.

The notice which was issued on 9 March 1998 ("the March notice") is expressed in extremely broad terms. What it does is to specify various allegations into which the Special Investigator is required to inquire as follows ("the March terms of reference"): 

1. Any alleged corrupt conduct, criminal conduct, criminal involvement or serious improper conduct by any public officer (present or past) involved, either directly or indirectly, in the theft, possession, distribution, sale, supply or use of any illicit or prohibited drug between the period 1 January 1980 to the present time or in any activities directly or indirectly associated with or related to such conduct or involvement.

2. Any alleged corrupt conduct, criminal conduct, criminal involvement or serious improper conduct by any public officer (present or past) involved, either directly or indirectly, in the search at 133 Duke Street Scarborough, Western Australia, on or about 22 June 1982 or in any activities associated directly or indirectly with or related to that search whether before, during or after its conduct.

3. Any alleged corrupt conduct, criminal conduct, criminal involvement or serious improper conduct by any public officer (present or past) involved, either directly or indirectly, in the execution of a search warrant at 1834 Wanneroo Road, Neerabup, Western Australia on or about 6 April, 1983 or in any activities directly or indirectly associated with that search whether before, during or after its conduct.

4. Any allegations against any public officer (present or past) of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct related to the aforementioned matters or disclosed during investigations by the Special Investigator, or during inquiries or investigations by officers of the Anti-Corruption Commission, whether related to the aforementioned matters or not.

On 23 June this year the plaintiffs applied for injunctive relief against the defendants in terms of which they sought orders similar to those now sought. Paragraph 1 of the summons sought an order that:

1. The Second Defendant be restrained and an injunction be granted restraining him until judgment in this action or further order of the Court, whether by himself, his servants or agents or otherwise from:
   a) requiring any Police Officer who is a member of the First Plaintiff's Union to attend and give evidence before the Second Defendant; and
   b) conducting any further investigation in relation to any matter or thing;
pursuant to, or in reliance on, the Notice of an Allegation, Allegations or class of Allegations issued by the First Defendant to the Second Defendant dated 9 March 1998.

The Court made an order, in pursuance of that summons, as follows:

(1) On the undertaking of the Second Defendant that he will not, whether by himself, his servants or agents or otherwise, require any Police Officer who is a member of the First Plaintiff's Union to attend and give evidence before the Second Defendant or conduct any further investigation in relation to any matter or thing pursuant to, or in reliance on, the Notice of an Allegation, Allegations or class of Allegations issued by the First Defendant to the Second Defendant dated 9 March 1998, the Plaintiffs' summons for interlocutory injunction dated 19 June 1998 be adjourned sine die.

The summons for interlocutory injunction which has been brought before me today rests in part upon a contention that the undertaking pursuant to which the adjournment was granted on 23 June 1998 has effectively been breached.

The background to the matters giving rise to today's application are set out in affidavits which have been sworn by the second plaintiff and others. The second plaintiff, Mr Ferguson, is a senior sergeant with the Western Australian Police Service and is currently the officer in charge of the Gosnells police station. On Wednesday, 25 March 1998, he was summonsed to appear at a hearing before the Anti-Corruption Commission. He has deposed, in para 4 of his affidavit, to the fact that, after appearing before the Commission, he accompanied two investigators to his home in respect of which a search warrant had been issued to search his premises. At the same time he was told that a search warrant had been issued to search his work premises at the Gosnells police station.

In para 6 of his affidavit he deposes to the fact that, as a result of his appearance before the Anti-Corruption Commission on 25 March 1998, he faces criminal charges of misleading the Commission. In para 7 he deposes to the fact that on 24 June 1998 the Crown supported his application for the hearing of the charges of misleading the Commission to be adjourned pending this Court's decision on the validity of the terms of reference decided upon by the Anti-Corruption Commission on 9 March 1998. He says that an election date in respect of those charges has been fixed for 17 August this year.

Then, on 29 June 1998, Mr Ferguson's solicitors received a letter from counsel assisting the Special Investigator advising those solicitors that the Special Investigator had been appointed pursuant to the Act to investigate and report to the Commission on allegations and a class of allegations specified in a written notice given to him on 22 June 1998 ("the June terms of reference").

On 1 July his solicitors responded to the Commission's correspondence advising it that the use of the search materials taken from his home and his place of work and also from the premises of Mr Ibbotson and Mr Stone would constitute a breach of the undertaking which had been given to the court on 23 June 1998. His solicitors also requested that the status quo in relation to the materials seized pursuant to the March
notice be maintained until such time as the court had heard the action challenging the March terms of reference and the validity of the March notice.

The letter dated 29 June referred to by Mr Ferguson informed Messrs Quigley Coulson that the specific allegations and class of allegations referred to the Special Investigator by the Commission in the June notice had been ordered to remain confidential. It also said:

Those allegations and class of allegations involve several new matters not previously referred to the Special Investigator but also allegations that are related to and very substantially overlap with the allegations or classes of allegations referred to the Special Investigator for his investigation in a written notice given to him on 9 March 1998.

After dealing with other matters the letter went on to say:

Having said that the Special Investigator would obviously not want there to be any suggestion that he is not prepared to honour his undertaking. Accordingly, the purpose of this letter is to advise you of the proposed course of action and invite you to indicate whether your clients accept the position outlined above, or whether they take a contrary view. No examination will be made of the documents before 9.00am on Thursday 2 July to give you sufficient time to respond to this letter.

If you have a contrary view it is my intention to submit to the Special Investigator that, rather than there being any argument concerning the operation of the undertaking he should appoint a day and time for the return to your clients of certain of the seized materials that they appear to be entitled to possess, and to issue a summons to your clients, in respect of the June notice, to attend before the Special Investigator for the same day and time to produce those materials to the Special Investigator.

On 13 July the Anti-Corruption Commission served upon the solicitors for the plaintiffs a summons for Mr Ferguson to appear before the Special Investigator on 23 July 1998 in order to give evidence and to produce certain documents listed in an attachment.

A copy of that summons, which is exhibited to Mr Ferguson's affidavit, discloses that in pursuance of section 9 of the Royal Commissions Act 1968 as applied under section 40 of the Anti-Corruption Commission Act the special investigator required Mr Ferguson by that summons to attend the Special Investigation on 23 July 1998 and to give evidence and to produce the documents listed in annexure "C" which, as I understand the position, essentially lists those documents already in the possession of the Commission. Mr Ferguson says in this last respect, in para 16 of his affidavit, that the documents required to be produced by him pursuant to that summons are the same documents that were seized pursuant to the search warrant issued on 24 March 1998 and executed on 25 March 1998 save for the documents described by reference to Anti-Corruption Commission bar code numbers 10504 and 10511.

Accompanying the summons was an order dated 9 July 1998 providing for the release of documents, previously seized by the Special Investigator, to Mr Ferguson at his
forthcoming appearance before the Anti-Corruption Commission on 23 July 1998. That order provides that in pursuance of a nominated provision of the Royal Commissions Act as applied by the Anti-Corruption Commission Act:

That the material listed in the attached annexure marked "C" be released to Paul Christopher Ferguson subject to the conditions that the material not be released to Paul Christopher Ferguson before 11.45am on Thursday 23 July 1998 and that the material not be released except into the personal custody of Paul Christopher Ferguson at the offices of the Anti-Corruption Commission, 66 St George's Terrace.

Similar orders were made in respect of Mr Ibbotson and Mr Stone and also Mrs Ibbotson. Mr Ibbotson has himself filed an affidavit in support of the application which effectively provides a background similar to that deposed to by Mr Ferguson. The same is true of Mr Stone.

Mr Tsaknis submits that what the defendants are effectively doing is seeking to overcome their undertaking by the expedient of the first defendant issuing new terms of reference to the second defendant, without having disclosed that it had done so when giving the undertaking to the court, and keeping those new terms of reference confidential.

He submits that they have, by the issue of the summonses, effectively required Messrs Ibbotson, Ferguson and Stone to produce documents already obtained by means of the invalid search warrants and known to them only by that means.

Mr Tsaknis submits that the concern of the plaintiffs which led to the giving of the undertaking was to prevent any further investigation of the matters raised by the allegations in the March notice pending the determination of the validity of that notice. He contends that, if an injunction is now not granted effectively supporting the terms of the undertaking, then that undertaking will be set at nought and the allegations in question will be investigated in circumstances in which documents which are potentially relevant to them were unlawfully acquired.

He submits further and in the alternative that the summonses pursuant to which the documents are now sought to be obtained are unlawful in that the documents are not now and were not at the time of the issue of the summonses in the custody or control of the persons to whom the summonses were issued but were rather in the custody or control of the Special Investigator himself.

Next he submits that, because the June terms of reference are substantially the same as those in the March notice (in respect of which he relies upon the terms of the first defendant's letter dated 29 June 1998), then if the March notice is invalid, as is contended for in the principal proceedings, so too must be the June notice.

Finally he submits that the balance of convenience favours the granting of the interlocutory injunction. He submits, in that respect, that if the 9 July summonses are unlawful then the persons to whom they relate will have been required to produce documents and give evidence unlawfully in circumstances in which one of those
persons at least is facing serious charges with respect to the evidence given by him pursuant to the March notice. He submits that, in any event, reputations may be damaged in the course of the inquiry and that derivative evidence may subsequently be obtained and acted upon which may not be identifiable as such.

I am prepared to assume, for the purposes of these applications, that the matters raised by way of the originating summons are arguable and that the March notice is arguably unlawful with the consequence, if it is unlawful, that the search warrants issued pursuant to that notice are likewise unlawful.

However, that is not enough to justify the grant of the injunction sought. It seems to me that there is substance to the submissions made by Mr Mitchell on behalf of the defendants that the objection to the March notice is essentially one of form. While Mr Tsaknis may prove to be correct in his submission that the defects pointed to by him, if they be defects, are such as to invalidate the whole of the notice, the point remains that there is, on the face of it, nothing to prevent the first defendant from formulating a new notice which is more specific in its terms and which is lawful and within the powers given under the Anti-Corruption Commission Act. Moreover, there is no evidence before me, at all, to suggest that the June terms of reference have not been so formulated.

As to the submission that the admission as to an overlap is such as to lead to the inference that the June terms of reference are necessarily deficient if that be true of the March terms of reference, it seems to me that the width of the March notice is such that any subsequent notice, even if validly drawn up would necessarily overlap it.

The mere fact of an overlap does not, in my opinion, lead to any inference as to the invalidity of the later terms of reference. Its validity or otherwise will depend upon the terms of the notice itself regardless of whether or not there is some overlap, even if it be a "substantial" overlap.

I should mention, in this respect, that paras 2 and 3 of the March notice are in their terms reasonably specific and it may be that any overlap in respect of those paragraphs, even a substantial overlap, may not have any consequence with respect to the lawfulness or otherwise of the later notice.

Next, so far as the terms of the undertaking are concerned, it seems to me that, on its proper construction, it goes no further than to undertake not to conduct any further investigation pursuant to or in reliance on the notice dated 9 March 1998.

I am unable to accept that it could have been intended that the undertaking was one not to conduct any investigation into any matter falling within the compass of the March notice, even if it be a matter which fell within the compass of a later and more specific notice. Were the position otherwise the Special Investigator would, by the undertaking, have effectively been precluded from investigating, under any notice at all, any matter bearing upon any of the issues, at all, described in the March notice. That is not how the undertaking reads and nor, in my opinion, could that sensibly have been intended.

It seems to me also that the failure to disclose, at the hearing of the earlier injunction application, that a new notice had been prepared on the day prior to the giving of the
undertaking is not such as should support the grant of any injunction today. The undertaking given was essentially in terms meeting the relief sought by the plaintiffs and was, I have found, in terms which were unambiguous. There was, at that time, no need to disclose the fact that new terms of reference had been formulated, no summonses yet having been issued pursuant to them.

Moreover, as will be apparent from the correspondence exhibited to the affidavits to which I have referred, the plaintiffs have been told by the defendants of the position as it now prevails and have been given an opportunity to take such steps as to them might seem appropriate in respect of it.

So far as the summonses are concerned, I am not persuaded that they are themselves unlawful or that there is any reasonable prospect that the plaintiffs will establish that they are so unlawful. At best there is an argument that the recipients of those summonses are not required to produce documents which were not in their custody or control at the time of issue of those summonses (as to which see section 9 of the Royal Commissions Act as incorporated by section 40 of the Anti-Corruption Commission Act). If that argument has substance, and I am inclined at this early stage to doubt that it has, then it is an argument which can be raised on the return of each summons and is not such as to invalidate the summons itself.

If, at the time at which the plaintiffs are required to produce the documents referred to (being the return date of the summonses), an objection is made that those documents were not at the material time in the custody or control of the plaintiffs and if there is substance to that objection and it is not acceded to, then it seems to me that it would be a simple matter for the second defendant to issue another summons at that time and to have the documents produced pursuant to that summons.

Mr Mitchell, who appeared on behalf of the defendants, has submitted that neither the power of a Special Investigator to issue a summons nor the power of the Anti-Corruption Commission to request the production of documents are conditioned on either the issue of a warrant or on any state of mind of the person exercising the power. He submits also that there is no basis for challenging the validity of the Special Investigator's actions on the ground that the minds of its officers were "infected" with knowledge obtained through looking at documents seized in a search conducted pursuant to a warrant which was, if the plaintiffs are right, invalid.

He contends, next, that the suggestion that such an investigative embargo or immunity exists as to documents seized in that way is without any support by way of authority or principle.

I am inclined to accept those submissions.

In all of the circumstances it seems to me that no adequate basis has been shown for the grant of an injunction in these proceedings at this stage. I am not persuaded, as I have said, that either the June terms of reference or the summonses are likely to be found unlawful, on the evidence as it stands, or even that there has yet been shown to be any triable issue in those respects. As regards the June terms of reference there is,
as I have said, no evidence at all of their contents, the terms of that document having been kept confidential pursuant to provisions in the Act.

Nor, as will be apparent from the foregoing, am I persuaded that there has been or will be any breach of the undertaking to which I have referred or that there has been any material non-disclosure. Also, and quite apart from the various matters to which I have referred, if it should later turn out that the documents in question have been unlawfully obtained or that they will be unlawfully obtained by means of the summonses which have since been issued, then there will remain scope for the plaintiffs to object to the use of these documents or to the use of any information derived from those documents in any proceedings which may affect the rights or reputations of any of the plaintiffs. There is nothing to suggest, at this early investigative stage, that there is any imminent threat of that kind.

While I accept that the secrecy provisions under the Anti-Corruption Commission Act may make it difficult for the plaintiffs to determine just what use or derivative use has been made of those documents, I am not presently persuaded that any such difficulty is insurmountable.

I should say, finally, that it seems to me that the terms of the summons for injunctive orders, as it is presently drafted, would result in the making of orders wider than I would be prepared to make in any event.

As the summons stands, the orders sought would preclude the defendants from requiring any member of the Western Australian Police Union to attend and give evidence before the Anti-Corruption Commission and would prevent the defendants from conducting any investigation in relation to or making use of any matter or thing obtained pursuant to or in reliance on anything expressed in the notice dated 9 March 1998. There is simply no basis for the making of any order as wide as that.

For all of these reasons it seems to me that it would be inappropriate to grant the injunction sought in these proceedings at this stage and I propose consequently to dismiss the application.
The Ch'ng Poh case examines the validity of a search warrant issued by the Independent Commission Against Corruption, the basis of which was an alleged offence under the Hong Kong Prevention of Bribery Ordinance. Here, the Privy Council examines the scope of section 9 of the Ordinance and, in particular, whether dishonest acts by an agent (in this case a solicitor) are covered by section 9.

COMMISSIONER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION v CH'NG POH

Judicial Committee of the Privy Council,
Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Nolan, Lord Hoffmann,
Lord Clyde

16 June 1997

Cases referred to
Morgan v Director of Public Prosecutions [1970] 3 All ER 1053
R v Ng Man Ho [1993] 1 HKC 632

For the appellant: J Guthrie Q.C.
For the respondent: Not represented

LORD LLOYD OF BERWICK

1. On 21st May 1996 Mr. A.R. Wright, a magistrate at the Eastern Magistrate's Court, Hong Kong, issued a warrant under section 10B of the Independent Commission Against Corruption Ordinance authorising officers of the Commission ("ICAC") to search the premises of a firm of solicitors ("X & Co."). Although the warrant does not refer to a specific offence, it is common ground that the only basis for the application was an alleged offence under section 9 of the Prevention of Bribery Ordinance. That section provides:

9(1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his -

(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or

(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.
(2) Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's - 

(a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or 

(b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business, 

shall be guilty of an offence.

2. On 22nd May 1996 the warrant was executed, and a quantity of documents were seized. On 12 June 1996, Ch'ng Poh, a prisoner serving a five year sentence for conspiracy to defraud, gave notice of an application for leave to apply for judicial review on two grounds. The first ground was that the magistrate had no jurisdiction to issue the warrant under section 10B of the ICAC Ordinance. The second ground was that some of the documents were subject to legal professional privilege, since X & Co. were then acting as Ch'ng Poh's solicitors in respect of his appeal against conviction.

3. The application came before Seagroatt J. on 2nd July 1996. He held that while the evidence, if true, showed that very serious criminal offences had been committed, these were a matter for the police rather than ICAC. He therefore quashed the warrant, and ordered the return of the documents to X & Co.

4. On 21st August 1996 the Court of Appeal, by a majority, dismissed ICAC's appeal, and subsequently refused leave to appeal to the Board. The reason given by the Court of Appeal for refusing leave was that since the documents had in the meanwhile been voluntarily surrendered by Ch'ng Poh and X & Co., and were by then in the possession of ICAC, the issue as to the validity of the warrant was academic. Their Lordships were nevertheless persuaded to grant special leave to appeal. For the adverse decision of the Court of Appeal was said to be of considerable importance to ICAC in the discharge of its statutory duties. The case has been argued by Mr. Guthrie Q.C. on ICAC's behalf. Neither Ch'ng Poh nor X & Co. were represented.

5. The facts alleged in support of the application for the warrant are set out in a lengthy information sworn by Mr. Gerald Roger Osborn. The information is helpfully summarised by Litton V.-P., who gave the leading judgment in the Court of Appeal. Since it is important in this case to understand the nature of the case being made by ICAC, it is necessary to set out the facts as summarised in full. Mr. Guthrie was good enough to agree that the summary is fair and accurate. It reads as follows:-

(1) Ch'ng Poh had been convicted in July 1994 of offences of conspiracy to defraud and publishing a false statement in the annual reports of a limited company. He was sentenced to a total of 5 years' imprisonment and ordered to pay costs not exceeding $15 million.

(2) A key prosecution witness at his trial was one C.H. Low, an accomplice.
(3) After his conviction, Ch'ng Poh lodged an appeal against conviction to the Court of Appeal.

(4) Mr. A, a partner in the firm of solicitors X & Co., was Ch'ng Poh's solicitor on his appeal. The firm did not act for Ch'ng Poh at his trial.

(5) Warwick Reid, the former head of the Commercial Crimes Unit in the Legal Department, imprisoned for corruption in July 1990, was approached by Mr. A in prison; Mr. A proposed to Reid that if Reid could assist Ch'ng Poh's appeal by swearing an affidavit that would discredit C.H. Low as a witness, Reid would be paid a very substantial sum: the implication being that some of the statements in that affidavit would be false.

(6) Mr. A later visited Reid in prison again and asked him to sign a prepared affidavit which Mr. A had brought along with him. Reid refused because he wanted payment first. Mr. A handed a name card to Reid and told Reid that the person named on the card, a T.K. Li, would contact him in New Zealand after his release from prison.

(7) T.K. Li did contact Reid in New Zealand later, after Reid's release, and paid him NZ$1 million and US$25,000 for making the affidavit. The affidavit was sworn on 2 December 1994, three days after Reid's return to New Zealand from prison in Hong Kong.

(8) In mid-December 1994 Reid went to Singapore and met C.H. Low and T.K. Li. A discussion took place on how much C.H. Low would be paid for not contradicting what Reid had said in his affidavit and generally for not co-operating with the ICAC. There were further discussions later concerning payment for C.H. Low's silence. T.K. Li acted as the go-between for Ch'ng Poh.

(9) In one intercepted telephone conversation between Reid and C.H. Low, Reid said he would telephone Mr. A to enquire about the progress regarding the proposal to pay C.H. Low for not co-operating with the ICAC.

6. In the penultimate paragraph of the information Mr. Osborn summarised ICAC’s case as follows:-

The evidence gathered to date supports the allegations that Reid was paid NZ$1 million for signing the false affidavit and that he also tried to persuade C.H. Low not to co-operate with the ICAC or give evidence contradicting Reid's affidavit in return for payment.

7. It is quite clear, therefore, that the case being made by ICAC was that Reid had been bribed by Mr. A., and that Reid and Mr. A. had between them attempted to bribe Low.

8. From where did the NZ$1 million come? The answer is obvious. The money was coming from Ch'ng Poh, who hoped thereby to secure his acquittal on appeal. Mr. A. was acting as Ch'ng Poh's agent in bribing, or attempting to bribe, Reid and Low.
9. If that is the correct reading of the information - and it is difficult to see how a magistrate would read it in any other way - section 9(1)(a) of the Bribery Ordinance was simply not engaged. As Litton V.-P. put it:-

Section 9(1)(a) criminalises corrupt transactions with agents: not dishonest acts by agents.

10. It was, as he said, a case of a dishonest solicitor "prepared to do his client's dirty work". Mr. A., Ch'ng Poh and Reid were no doubt engaged in a conspiracy to pervert the course of justice. A search warrant might have been obtained by the police under the general criminal law. But there was no jurisdiction to issue a warrant under section 10B of the ICAC Ordinance.

11. But Mr. Guthrie argues that the information sworn by Mr. Osborn is susceptible of another meaning, and that both Seagroatt J. and the Court of Appeal misunderstood the nature of the case being made by ICAC. He concedes that Mr. A. was the agent of Ch'ng Poh in bribing Reid, but he was also the agent of the partners in X & Co. Although there is no direct evidence of Mr. A. having received a bribe from Ch'ng Poh, it is obvious that such must have been the case. If so, says Mr. Guthrie, Mr. A. would have accepted an advantage without lawful authority from the partners in X & Co. as an inducement to do an act in relation to X & Co.'s affairs. Since X & Co. were acting as Ch'ng Poh's solicitors in the appeal, one assumes, for example, that the affidavit sworn by Reid was filed in the name of X & Co. The filing was, so it is said, an act done by Mr. A. in relation to his principal's affairs (i.e. the affairs of X & Co.) which was induced by a bribe received by Mr. A. from Ch'ng Poh. It therefore falls within section 9. The error of Seagroatt J. and the Court of Appeal lay in assuming that an agent can have only one principal.

12. In his printed case Mr. Guthrie went further. Even if Mr. A. had received no more than the firm's ordinary fee, this would still be an "advantage" for the purposes of section 9. However Mr. Guthrie did not press the argument that far in his oral argument before the Board.

13. In support of his main argument Mr. Guthrie relied on the dissenting judgment of Liu J.A. in the Court of Appeal and the decision of the Divisional Court in Morgan v. Director of Public Prosecutions [1970] 3 All ER 1053.

14. The short answer to this argument is that the Court of Appeal did not misunderstand the nature of ICAC's case. For the very same argument was indeed advanced in the Court of Appeal, and was rejected by Litton V.-P. in the following trenchant observations:-

Mr. McWalters submits that the judge had misunderstood Mr. Reading's argument on behalf of the ICAC: the judge thought that the ICAC's case was that Mr. A was the offeror of the bribe (offering a bribe to Reid to make the false affidavit) whereas in truth the ICAC's case was that Mr. A was the offeree: receiving some hidden benefit from Ch'ng Poh by rendering the dishonest services, in relation to his 'principal's affairs', that is, his own firm's affairs. It is not surprising that the judge had 'misunderstood' the argument. Only by the application of the most convoluted logic, in reading the information, could one begin to glimpse such a conclusion. A magistrate, in
reading the information, is required to give it an ordinary straight-forward interpretation. He is not required to undergo mental gymnastics in order to justify the issue of the warrant.

15. Their Lordships agree. But since the scope of section 9 raises a question of some importance for ICAC, their Lordships add some further observations of their own.

16. The six sections of the Ordinance which precede section 9 are all concerned with the bribery of public servants. Section 4 makes it an offence to bribe or attempt to bribe a public servant on account of his performing or abstaining from performing any act “in his capacity” as a public servant. Section 9 is the only section in the Ordinance dealing with persons other than public servants. It is confined to agents. It does not say, like section 4, that the agent must have been acting in his capacity as an agent. Instead the act done (or not done) by the agent must be an act done or not done “in relation to his principal's affairs”. But as Keith J. pointed out in R v Ng Man Ho [1993] 1 HKC 632 at page 638 the alternative words serve much the same purpose. They are clearly intended to be restrictive. It is not enough that the recipient of the bribe should be an agent in fact. Otherwise any partner in a firm of solicitors, accepting an advantage without authority or reasonable excuse, would be caught by the section. This would be much too wide. Moreover it would mean that a dishonest solicitor who happened to have one or more partners would be caught by the section, but a sole practitioner would not.

17. So what do the limiting words mean? They mean that, for the section to apply, the person offering the bribe, must have intended the act or forbearance of the agent to influence or affect the principal's affairs. Accordingly section 9 would apply if Ch'ng Poh had bribed Mr. A. to secure him a benefit at X & Co.'s expense, for example, to arrange a reduction in X & Co.'s ordinary professional fees; or if X & Co. were induced to act in a way in which they would not otherwise have acted. Thus it is an essential ingredient of the offence under section 9 that the action or forbearance of the agent should be aimed at the principal. If it is sufficient for the purposes of the person offering the bribe that the agent should act on his own without involving his principal, then, whatever other offence may have been committed, it is not a corrupt transaction with an agent for the purposes of section 9.

18. If the facts put before the magistrate had been that Ch'ng Poh offered Mr. A. a bribe in order to secure the filing by X & Co. of an affidavit which they both knew to be false, then a case might just have been made out. But as already mentioned, that is not a fair reading, or indeed a possible reading, of the information sworn by Mr. Osborn.

As for Morgan v. Director of Public Prosecutions, on which Liu J.A. relied in his dissenting judgment, the facts were that Mr. Morgan was a shop steward and a convenor, at Rover & Co. Ltd.’s factory. As such he was the agent of the union. But he was also an agent of the car company by whom he was employed. Accordingly when he persuaded the car company to re-employ a subcontractor from whom he had received a bribe, he was acting “in relation to” the car company's affairs. Indeed the case is a good example of the sort of
circumstances in which section 9 applies. The fact that Mr. Morgan was also
acting in relation to the union's affairs did not affect the position. The case
shows that an agent can act simultaneously for two principals. But that is as far
as it goes. Properly understood it affords no support for Mr. Guthrie's argument.

Their Lordships will humbly advise Her Majesty that the appeal ought to be
dismissed, with no order as to costs.
ELECTORAL MALPRACTICE

Allegations of corrupt practices involving parliamentarians and government ministers were examined in two cases in Volume 1: Attorney General v Jones (Issue 3 p.11) and R v Musuota (Issue 3 p.19).

In the case of Ah Him v Amosa, the Supreme Court of Samoa was faced with a related issue, i.e. an election petition from an unsuccessful parliamentary candidate alleging that the respondent, the successful candidate, had used bribes and undue influence in his election campaign.

The case raises two issues of particular interest. Firstly, the argument of the respondent that presenting gifts to his supporters at public meetings was done in accordance with Samoan custom. Here the Supreme Court rules that this does not constitute a defence if the real purpose or one of the purposes behind the giving of money, food, or drink is to induce or influence an elector to vote for a particular candidate. Secondly, the Supreme Court makes the important point that an elector who knowingly accepts a bribe also commits the offence of bribery. On a related issue, the Supreme Court also rules that one accomplice (in this case a recipient of largesse from the candidate) can corroborate the evidence of another accomplice.

Finally, the prevalence of presenting "gifts" to supporters is perhaps indicated by the finding of the Supreme Court in relation to the respondent's counter petition, that the petitioner himself had undertaken similar acts of bribery.

AH HIM v AMOSA

Supreme Court of Samoa
Sapolu CJ, Vaai J, Nelson J

10 May 2001

Cases referred to in the judgment
In re Election Petition Safata Territorial Constituency, Pule Lameko v Muliagatele Vena [1970-1979] WSLR 239
Re Mitiaro Election Petition [1979] 1 NZLR 1
R v Hartley [1972] 2 QB 1

For the petitioner: TRS Toailoa
For the respondent: TV Eti
The allegations made by the petitioner are that:-

either not pursued, or not actively pursued.

On 16 March, Muagututagata Peter Ah Him, who polled the second highest number of votes, filed an election petition seeking avoidance of the respondent's election under sections 112 and 113 of the Electoral Act 1963 by alleging that the respondent, in the course of his election campaign, committed the corrupt practices of bribery, treating and undue influence in terms of sections 96, 97 and 98 of the Act respectively. The petitioner also sought a declaration that he should be declared elected as Member of Parliament for his constituency. This declaration was either not pursued, or not actively pursued.

The allegations made by the petitioner are that:-

(1) on or about 16 or 17 January 2001 at the respondent’s residence at Afega, the respondent met with about 30 matais (electors) from the village of Tuanai and there presented them with ‘suas’ and $1,000 for the purpose of inducing and influencing those electors to vote for the respondent;

(2) on or about 19 January 2001 at Tuanai, the respondent met with ‘faletua ma tausi’ (electors) of Tuanai and there presented those electors with the sum of $1,200 for the purpose of inducing those electors to vote for the respondent;

(3) on or about 19 January 2001 at Tuanai, the respondent met with the ‘aumaga’ (electors) of Tuanai and there presented those electors with $800 for the purpose of inducing those electors to vote for the respondent. Subsequently on or about 23 January 2001 at the respondent's residence at Afega the respondent again met with the representatives of the ‘aumaga’ (electors) of Tuana'i and there gave them another $200 for the purpose of inducing those electors to vote for the respondent;

(4) on or about 31 January 2001 at the village of Malie the respondent met with electors of Malie and there gave them $1,300, two rugby balls and four bottles of vodka for the purpose of inducing and influencing those electors to vote for the respondent;

(5) on or about 14 February 2001 in a meeting of the ‘pulega a Malua i Sasa'e’ of the Congregational Christian Church of Samoa held at Tuanai, the respondent, while addressing
the meeting, stated that if he wins the election he will provide a computer for the ‘pulega’ for the purpose of influencing those electors to vote for the respondent; There were about sixty people in that meeting and about forty of whom were electors of the Sagaga-Le-Usoga constituency;

(6) on or about 5 February 2001 during a meeting of the village of Afega, the respondent by his uncle Fata Pemila pronounced that every elector of Afega is to vote for the respondent and any elector who does otherwise will face the traditional penalty of ‘ati ma le lau’ (banishment from the village) and that was done for the purpose of compelling electors to vote for the respondent; and

(7) on or about 5 February 2001, the respondent by members of his family or agents pronounced a tapu of the ‘auluma’ of Afega that all of the ‘auluma’ is to vote for the respondent or otherwise face a fine of ten sows or $200 and that was done for the purpose of compelling electors to vote for the respondent.

The burden of proving each of these allegations lies of course on the petitioner who brings the allegations, and the required standard of proof is beyond reasonable doubt: In re Election Petition Safata Territorial Constituency, Pule Lameko v Muliagtele Vena [1970-1979] WSLR 239, 241. With that standard of proof in mind, we proceed now to consider each of the allegations against the respondent in turn on the basis of the evidence which was given partly by way of affidavit from nearly all of the witnesses called in these proceedings and partly by way of oral testimony.

Starting with the first allegation by the petitioner, the evidence shows that the constituency of Sagaga-Le-Usoga is made up of the villages of Tuanai, Afega and Malie. The petitioner is from the village of Malie and the respondent is from the village of Afega. On 8 January 2001 the village of Afega held its monthly meeting during which the question was discussed of who would be its candidate for the up-coming general elections to be held on 2 March. The meeting decided to put forward the respondent as the candidate for Afega. Matais were then sent to inform the village of Tuanai about the decision by Afega. This is known as the ‘faaalataua’. According to the evidence given by the respondent, the purpose of this ‘faaalataua’ sent by Afega was to invite Tuanai to come and meet with Afega so that Afega would formally notify Tuanai of its unanimous decision on who would be its candidate for the up-coming general elections and to find out whether Tuanai would give its support.

On 10 January, a meeting was held at the respondent’s residence at Afega between the two villages, each village being represented by its matais. The discussion that took place centred solely around the respondent’s candidacy and the general elections. ‘Suas’ comprising of one carton of herring and $100 cash were then each presented to Saena and Saena, the paramount matais of Tuanai, and $1,000 was presented to the other matais of Tuanai who were present. These presentations were made by the respondent and his family and it was the respondent who made the speech that accompanied the presentations. In all there were about thirty matais in the delegation from Tuanai. All of them were electors. This allegation was not denied by the respondent. In fact in his evidence he admitted making the presentations.
What is in dispute here is whether the presentations were made with the corrupt intent in terms of the Act, that is, the intent to induce the matai electors of Tuanai who were present at the meeting to vote for the respondent at the general elections. We have concluded that in the circumstances the respondent had that intent at the time the presentations were made. It would not be realistic to view the presentations in isolation, divorced from the context in which they were made. The purpose of the meeting in which the presentations were made was clearly in relation to the respondent’s proposed candidacy. The discussion that took place at the meeting was focused exclusively on the respondent’s proposed candidacy and the election. The total amount of money, $1,200 in all, that was given out is not insignificant. The persons to whom the money was given were electors. And the general elections were imminent.

In his evidence, the respondent explained that it was in accordance with Samoan custom for him and his family to make the said presentations as part of the normal customary courtesies, especially as it was his wish to become an election candidate that caused the meeting with Tuana’i to be held. Even if that is so, we are of the view, for the reasons already given, that in the circumstances of what took place, compliance with Samoan custom was not the only motive, or the dominant motive, behind the presentations. It would be sufficient for the purpose of establishing the intent required for bribery and treating in terms of the Act, if one of the motives which accompanied the presentation of money or food was to induce electors to vote for the respondent: see judgment of Donne CJ in the High Court of Cook Islands in Re Mitiaro Election Petition [1979] 1 NZLR 1.

We also note in this connection the affidavit evidence of the witnesses Seugogo Leuma and Fafai Tauvaa, both electors of Tuanai, who said that at the meeting in Afega, Taliaoa Maoama, an orator who was the spokesperson for Afega, informed Tuanai that the respondent was the election candidate for Afega and asked for their support. And when the $1,000 was given out Taliaoa Maoama urged Tuanai to remember the election.

Counsel for the respondent raised one matter by way of defence that we need to refer to. He submitted that the dates of 16 or 17 January 2001 contained in the first allegation by the petitioner are wrong as the correct date of the meeting between Tuanai and Afega was 10 January 2001 as if to suggest that the first allegation must therefore be dismissed on that basis. We do not accept this submission. The actual words used in the petition are “on or about the 16 or 17 day of January 2001”. The disparity between the dates contained in the petition and the correct date of the meeting is a matter of only a few days. It is also to be noted that the dates in the petition are preceded by the words “on or about”. In a situation of this kind, we are of the view that section 115 of the Act, which enjoins the Court on the trial of an election petition to be guided by the merits and justice of the case without regard to technicalities, applies. We therefore do not consider that the disparity in dates is fatal to the first allegation.

Counsel for the petitioner, in this connection, referred to the English Court of Appeal decision in R v Hartley [1972] 2 QB 1 which was a case on a criminal indictment, where Sachs LJ in delivering the Court’s judgment said at p.7:
[If] the words ‘on or about’ the date are used in an indictment, then provided that the offence is shown to have been committed within some period that has a reasonable approximation to the date mentioned in the indictment, then the fact that the date is not correctly stated does not preclude a valid verdict of guilty.

This passage, even though stated in relation to a criminal indictment instead of an election petition, clearly supports rather than contradicts the view we have taken as to the disparity in dates in this matter.

For these reasons, we are satisfied beyond reasonable doubt that the presentation of monies constitutes bribery in terms of section 96 of the Act and the presentation of cartons of herring constitutes treating in terms of section 97.

In respect of the second allegation by the petitioner, the evidence shows that on 12 January 2001 the respondent met with about one hundred members of the ‘faletua ma tausi’ and the ‘aualuma’ of Tuanai at the women’s committee house at Tuanai at about 10 am in the morning. The members of the ‘faletua ma tausi’ and the ‘aualuma’ of Tuanai who were present were electors. At the meeting, the respondent explained the issues he stood for as an election candidate and what he wanted to do for the good of his constituency, especially in the field of education as the respondent is a teacher by profession. Clearly the respondent was at the time on the campaign trail to promote his candidacy. There is nothing wrong with this. This is how political campaigning should be done. An election candidate must try to win support with ideas. Unfortunately, the respondent went further than that and gave out $1,200 to those who were present at the meeting.

According to the witness Tautala Faalaa, a female elector of Tuanai called for the petitioner, when the respondent gave out $1,200 he said that is the money to be distributed amongst yourselves ‘ua le suka a le loomatua’ (which literally means for each ‘old lady’ to buy sugar with) but bear in mind the election. If I win, whatever assistance you need we will meet. The witness Fofoaivaoese Enoka, another female elector of Tuanai called for the petitioner, also gave evidence which is substantially the same as the evidence of the witness Tautala Faalaa. The evidence of these witnesses were not expressly denied by the respondent. They were not put to the respondent.

In his evidence, the respondent stated that what he did was entirely in accordance with the requirements of Samoan custom. It was not only part of the ‘faaalataua’ his village of Afega had sent to Tuanai that he met with the ‘aualuma’ of Tuanai, but given the status of the title Maulolo he holds, it was expected of him in accordance with Samoan custom to make a presentation of money. This was more so as he was at this meeting to convey his wish to the ‘aualuma’ of Tuanai. As a matter of Samoan custom, he would not have been looked upon favourably if, as the holder of the title Maulolo, he did not make the monetary presentation which he made.

We think that when the respondent met with the ‘faletua ma tausi’ and the ‘aualuma’ of Tuanai, he was there principally as an election candidate and not as the holder of the title Maulolo. He was actually out campaigning for his candidacy. The meeting that was held was solely for the
purpose of promoting his candidacy. What was said by him at the meeting was all about his candidacy and the up-coming general elections. The money that was given out was not insignificant and it was given to electors. At the time, the general elections were imminent. There is also the evidence of the witnesses Tautala Faalaa and Fofoaivaoese Enoka as to what was said by the respondent to bear in mind the election when he gave out the money. That evidence was not put to the respondent or denied by him. On their own accounts, the witnesses Tautala Faalaa and Fofoaivaoese Enoka would be accomplices as they received monies from the respondent’s presentation which they claim to be bribes. But the evidence of one accomplice can be used to corroborate the evidence of another accomplice in material particulars. From these circumstances, the inference is irresistible that the real intent of the respondent behind the giving of money to the ‘faletua ma tausi’ and the ‘ausaluma’ of Tuanai was to induce those electors to vote for him at the general elections.

We do not accept that the real motive behind the giving of money by the respondent was to comply with Samoan custom. The meeting was a campaign meeting and not a customary one. The respondent had already met with the matais of Tuanai which in Samoan custom is the village of Tuanai. When the ‘faaalataua’ was sent to the matais of Tuana’i that was the village of Tuanai. To meet again with the ‘faletua ma tausi’ and the ‘ausaluma’ of Tuanai could not have been part of that ‘faaalataua’. It was part of an election campaign. But even if some people may think that the respondent was complying with Samoan custom, if one of his motives in giving out money was to induce the electors at the meeting to vote for him in the general elections, that is sufficient for the purpose of establishing the corrupt practice of bribery. We believe that was the real motive of the respondent in this incident.

We need also refer to the disparity in dates as shown in the evidence of the respondent and what is contained in the petition as this was raised as a matter of defence. The respondent’s evidence is that the meeting with the ‘faletua ma tausi’ and ‘ausaluma’ of Tuanai was held on 12 January 2001. We accept that evidence as opposed to what is contained in the second allegation in the petition that the meeting was held on or about 19 January 2001. For the reasons we have given in relation to a similar disparity in dates in relation to the first allegation, we also conclude that the disparity in dates in this incident is not fatal to the second allegation.

For the reasons we have given, we find the second allegation of bribery made against the respondent proved beyond reasonable doubt in terms of section 96 of the Act.

As for the third allegation by the petitioner, it actually relates to two allegations of bribery. One which involved the presentation of $800 to the ‘aumaga’ of Tuanai at Tuanai, the other which involved the giving of $200 to representatives of the same ‘aumaga’ at the respondent’s residence at Afega. The evidence shows that after the respondent’s meeting with the ‘faletua ma tausi’ and the ‘ausaluma’ of Tuanai on 12 January, the respondent on the same day met with the ‘aumaga’ of Tuanai. There were about sixty electors at that meeting. At this meeting the respondent explained the reasons for his wish to run as a candidate in the elections and the issues he stood for. He also handed out pamphlets setting out those issues and what he wanted to do for his constituency if elected. He then responded to questions from his audience. If the respondent had stopped there, his campaign would have been quite lawful and proper. It is the way a political campaign should be conducted, for votes should be won with ideas and not with
food or money. Unfortunately, the respondent did not stop there. He went further and presented $800 to the ‘aumaga’ of Tuanai.

Now the witnesses Iole Faalaa, Faifua Lio and Paletasala Taiala Tovia, who are electors of Tuanai called for the petitioner, all testified they were present at the first meeting with the ‘aumaga’ of Tuanai and each of them received money from the $800 that was presented by the respondent. Iole Faalaa received $20 and Faifua Lio and Paletasala Taiala Tovia each received $10. The witnesses Iole Faalaa and Paletasala Taiala Tovia also testified that the respondent when giving out the money asked the ‘aumaga’ to remember him on election day. These witnesses would be accomplices because by their own accounts they claim that the monies they received were bribes. It can therefore be dangerous to act on their individual evidence without corroboration. However, the law provides that the evidence of one accomplice can provide corroboration for the evidence of another accomplice in material particulars. We see the evidence of these witnesses as corroborating one another.

In his own evidence, the respondent admitted that he did give out $800 to the ‘aumaga’ of Tuanai when he met with them which provides further corroboration of the evidence given by the witnesses Iole Faalaa, Faifua Lio and Paletasala Taiala Tovia. He explained in some detail that what he did was expected of him by Samoan custom given the status of his title Maulolo and the fact it was him who wanted to run as an election candidate. Thus the money he presented to the ‘aumaga’ of Tuanai was in accordance with custom.

Having regard to the circumstances surrounding the monetary presentation made by the respondent to the ‘aumaga’ of Tuanai, we do not accept that his real or only intention was to comply with Samoan custom. The clear inference is that he wanted the ‘aumaga’ of Tuanai to look favourably upon his candidacy and thus vote for him at the election. Not to give out money could result in those electors not looking favourably upon the respondent and thus not vote for him at the election. The respondent’s real motive was therefore to win the support of the ‘aumaga’ of Tuanai for his candidacy.

For those reasons, we find to have been proved beyond reasonable doubt that the presentation of money made by the respondent to the aumaga of Tuanai on 12 January 2001 constitutes bribery in terms of section 96 of the Act beyond reasonable doubt.

We turn now to the second part of the third allegation by the petitioner. The evidence shows that on 23 January 2001, the respondent held another campaign meeting at his family’s house at Afega. About two hundred electors including about sixty non-matai electors from Tuanai were present. The meeting took about two hours. During the meeting the respondent gave out pamphlets which set out the issues he stood for as an election candidate and what he intended to accomplish for his constituency if elected. He explained those issues and responded to questions from the audience. Again if the respondent had stopped there, there would have been nothing wrong with his campaign. As we have already stated, it is the way political campaigning for an election should be carried out. Unfortunately, the respondent went further and gave out another $200 to the representatives of the ‘aumaga’ of Tuana’i who were present.
The evidence of the elector Iole Faalaa who was present at that meeting shows that the respondent gave out $200 to the aumaga of Tuanai and said “la alofagia le palota” which really means, vote for me at the election. Iole Faalaa also testified that he received $30 out of that money when it was distributed amongst the ‘aumaga’ of Tuana’i. Faifua Lio, another non-matai elector of Tuanai who was present at the same meeting, also testified to the respondent giving out $200 to the representatives of the ‘aumaga’ of Tuanai from which he received $5. The witness Paletasala Taiala Tovia, another non-matai elector from Tuanai, who was present at the same meeting, gave substantially the same evidence.

In his evidence, the respondent admitted to making a further presentation of $200 to the representatives of the aumaga of Tuanai at the meeting held at his family’s residence at Afega on 23 January. His explanation was that his original plan for Tuanai was to give $1000 to the ‘aualuma’ of Tuanai when he met with them on 12 January and another $1,000 to the ‘aumaga’ of Tuanai when he met with them later on the same day. However, when he went to meet with the ‘aualuma’ of Tuanai, he found there were also ‘faletua ma tausi’ present. So he decided to increase the money to be given out at that meeting to $1,200 to include the members of the ‘faletua ma tausi’ who were present. As a consequence, only $800 was left with him which he later gave out at the meeting with the ‘aumaga’. Thus when he saw senior members of the ‘aumaga’ of Tuanai at the meeting held at his family’s house at Afega on 23 January, he felt that was the opportunity to give them another $200 to make up to $1000 the money for the ‘aumaga’ of Tuanai as he had originally planned.

The Court has already held that the presentation of $800 to the ‘aumaga’ of Tuanai constitutes bribery. We hold the subsequent presentation of $200 to the ‘aumaga’ of Tuanai is also bribery. We do not accept that the respondent’s real or sole purpose in giving out $200 was simply to make up to $1,000 the money for the ‘aumaga’ of Tuanai. At the time of this second presentation, the general elections were drawing close. The respondent was clearly out campaigning to win support for his candidacy. No doubt he wanted to win in the elections. The meeting held on 23 January at Afega was another of the respondent’s campaign meetings. For him to give out $200 to electors of Tuanai in such circumstances, he was actually running a real risk of being found guilty of bribery. To consider such presentation in isolation without having due regard to the circumstances in which the presentation was given would be unreal. We find that the respondent’s real purpose in making that further presentation of $200 to the ‘aumaga’ of Tuanai was to induce them to vote for him at the elections. Accordingly, it is bribery in terms of section 96 the Act.

In relation to the fourth allegation by the petitioner, it is clear from the evidence of the witnesses Muliavii Misiko, Palauli Vaai, Silimanai Vena Leapai, Tuataua Tausiilenuu and Sagato Fepuleai, who are electors of the village of Malie called for the petitioner, that on 31 January 2001 the respondent and some members of his election committee met with matais and non-matais of Malie at the residence of the pulenu’u of Malie. Amongst those people were matais, women and members of the aumaga of Malie. The witness Tuataua Tausiilenuu estimated about twenty matais and fifty non-matais of Malie were present.

At this meeting, the respondent spoke in support of his candidacy. He explained the issues for which he stood as an election candidate and what he would do for the constituency if elected.
Pamphlets which set out those issues and what the respondent would do if elected were also distributed. The respondent then gave out 'lafos' (monetary gifts) of $100 and $50 to some of the matais who were present and handed $1,000 to the pulenuu to be distributed amongst the other members of the village of Malie who were present. He also gave the pulenuu two rugby balls for the Malie rugby team and four bottles of vodka. In total the respondent presented $1,300, two rugby balls and four bottles of vodka. The witness Muliavii Misiko said that when the $1,000 was presented, the respondent stated “Good luck for the election” whereas the witness Sagato Fepuleai said that the respondent stated “bear in mind the election”. These pieces of evidence were not denied by the respondent and were not put to him. The witnesses Muliavii Misiko and Sagato Fepuleai also said that the pulenuu, when distributing the $1,000 presented by the respondent, made threatening remarks about what he would do to those non-matai electors who were given money if they do not vote for the respondent. From the monies given out by the respondent Muliavii Misiko received $30, Palauli Vaai received $30, Silamanai Vena Leapai received a ‘lafo’ of $100, Tuataua Tausiilenuu received a ‘lafo’ of $50 and Sagato Fepuleai received $10. On their own accounts, all these witnesses must be treated as accomplices. But as already stated, the evidence given by one accomplice can provide corroboration for the evidence of other accomplices.

In his evidence, the respondent explained at length that his purpose in making these presentations of monies, rugby balls and bottles of vodka was to comply with Samoan custom. He said that at the time of his election campaign there were differences between his village of Afega and the village of Malie so that Afega would not send a ‘faaalataua’ to Malie as it had done with Tuanai concerning the respondent’s candidacy. For that reason, according to the respondent’s evidence, he decided not to meet with the village of Malie otherwise he would offend his own village of Afega. However, with the assistance of one of his election committee members, the respondent was able to obtain the consent of the pulenuu of Malie for the respondent and his election committee to meet with the 21 year old electors and the rugby team of Malie. It was the respondent’s wish to meet with the 21 year old electors and members of the Malie rugby team. The proposed meeting was accordingly arranged to be held on 31 January at the house of the pulenu’u of Malie.

On the day of the meeting, the respondent went with his election committee to Malie with two rugby balls and four bottles of vodka as the respondent’s ‘oso’ (customary gift) for the 21 year olds and members of the Malie rugby team. The respondent also had with him $300 but that was not planned to be part of the ‘oso’. Upon arrival at the venue for the meeting, not only the 21 year olds and the Malie rugby team turned up, but also matais and women. The respondent testified he was caught by surprise and was unprepared. So he sent back one of his election committee members to his wife at Afega for another $1,000 as the customary dignitaries of Malie comprising of Maualaivao. Aumatahi and the Toafitu had come to the meeting. The pulenuu of Malie then made a speech followed by a speech by the respondent. After the exchange of customary speeches, the respondent then addressed the meeting about his election candidacy. He explained the issues he stood for and what he wanted to do for the constituency if elected. Pamphlets which set out these issues and what the respondent would do for the constituency if elected were also given out. The pamphlets were clearly intended for the 21 year old electors. The respondent also answered a few questions from the audience concerning his candidacy.
'Lafo's' of $100 and $50 were then given out by the respondent to the matais of Malie who were present. It appears $300 was spent on lafos. The sum of $1,000 was then handed by the respondent to the pulenuu for distribution to the rest of the people who were present. The rugby balls and four bottles of vodka were also given to the pulenuu. So the respondent does not dispute having given monies and other valuables at this meeting at Malie. What he disputes is that he did not have the intention of bribing or treating the electors who were at this meeting.

Essentially what the respondent was saying was that his purpose for making these presentations was to comply with Samoan custom. He is the holder of the title Maulolo. The customary dignitaries of Malie had come to his meeting. In the circumstances it was difficult for him not to observe Samoan custom by giving out ‘lafos’ to the matais and $1,000 for the others present. He felt glad at the opportunity to meet with the customary dignitaries of Malie and he said if he had had $5,000 on him at the time he would have given all of it to those present. The respondent considered the sum of $1,000 to be insufficient.

If the purpose of the respondent in making these presentations was to comply with Samoan custom as he put it, the Court takes the view that that was not the only or the dominant purpose behind those presentations. The meeting was a political campaign meeting, not a customary one. The purpose of the meeting was for the respondent to meet the 21 year old electors of Malie. The only subject that was discussed at the meeting was the issues the respondent stood for as an election candidate and what he would do for the constituency if elected. The elections were imminent. The evidence also shows that this was the first time the respondent had shown so much generosity to the people of Malie. The clear inference to be drawn is that the real purpose behind these presentations was to gain the support of the electors present for the respondent's candidacy. The respondent, however, said in Samoan custom he would not have been regarded favourably as the holder of the title Maulolo if he had not made these presentations. We are of the view if that is correct, the respondent's real purpose was to gain support for his candidacy. He must have known that any unfavourable consideration of himself as the holder of the title Maulolo would impact unfavourably on his candidacy for at the time he was not only the holder of the title Maulolo but also an election candidate, and what affects the respondent as the holder of the title Maulolo would also necessarily affect the respondent as an election candidate. As the respondent was on the campaign trail at the time he made his presentations of monies, rugby balls and bottles of vodka, we are of the view the most influential consideration in his mind at the time was not to comply with Samoan custom, but to win in the elections.

We therefore conclude that the allegations of bribery and treating contained in the fourth allegation by the petitioner have been proved beyond reasonable doubt in terms of section 96 and section 97 of the Act.

As for the fifth allegation by the petitioner, the evidence shows that on 14 February 2001, the ‘pulega a Malua i Sasa’e’ of the Congregational Christian Church, which includes the villages of Tuanai, Afega and Malie that make up the Sagaga-Le-Usoga constituency, held a meeting at Tuana’i. About sixty people attended the meeting and about forty of them are electors of the
Sagaga-Le-Usoga constituency. According to the evidence of the witness Pautalo Vaalele who is a deacon and elector of Malie called for the petitioner, the respondent was present at that meeting of the ‘pulega’ and he addressed the meeting and offered to provide a computer for the ‘pulega’ if he wins the election. The witness Fafai Tauvaa, an elector of Tuanai who was also called for the petitioner gave similar evidence.

In his evidence the respondent denied that what was mentioned at the meeting was a computer. He said what was talked about was a photocopier. The effect of his evidence is to deny that he made a promise to the ‘pulega’ he would provide a photocopier for them if he wins in the elections. The witness Apelu Lelevaga, who is the elder minister of the Congregational Christian Church for Tuanai, testified that he was the chairman of the meeting of the ‘pulega’ which was held at Tuanai on 14 February and what was discussed at that meeting was not a computer but a photocopier. He denied that the respondent offered to purchase a photocopier for the ‘pulega’.

We have given careful consideration to the evidence in relation to the present allegation and we are not satisfied beyond reasonable doubt that what is alleged by the petitioner against the respondent did happen. This allegation is therefore dismissed.

In respect of the sixth allegation made by the petitioner, the witness Taliaoa Sooula for the petitioner said that about two weeks before the elections’, a delegation of the ‘ualuma’ of his village of Afega came to his home and informed his family that Fata Pemila, an uncle of the respondent, had pronounced a village tapu that all the electors of Afega are to vote for the respondent or face banishment from the village. Elisapeta Faasavalu another witness for the petitioner also testified that about two weeks before the elections, a delegation of the ‘ualuma’ of her village of Afega come to her home and informed her family of the village tapu which required all electors to vote for the respondent or face the traditional penalty of banishment from the village. The purpose of this evidence is to establish against the respondent the allegation of undue influence under section 98 of the Act.

There are several difficulties with this allegation against the respondent. The evidence adduced in support is all hearsay which necessarily affects the weight to be attached to it. Fata Pemila was also called to testify and he denied ever making a pronouncement for all the electors of Afega to vote for the respondent or face banishment from the village. He said that could not have been done as there was a second candidate, Fata Uili Kapeteni, for Afega contesting the elections. Apparently the title Fata and the title Maulolo are the two paramount orator titles of Afega. If it is true a tapu was pronounced as alleged, it must necessarily follow that Fata Uili Kapeteni, his family and supporters would be banished from Afega. But there is no evidence that Fata Uili Kapeteni, his family and the electors who voted for him have been banished from Afega as to render credibility to the present allegation. Further, no evidence was given to show that the respondent had any knowledge of the tapu which is being alleged against his uncle Fata Pemila or that Fata Pemila was an agent for the respondent as to make the respondent vicariously liable for the actions of Fata Pemila.

Accordingly, this allegation against the respondent is also dismissed.
We have also considered the evidence adduced for the petitioner in support of the seventh allegation which is one of undue influence against the respondent and the evidence adduced for the respondent to counter that allegation. There is no evidence to connect the respondent to the alleged tapu imposed by the ‘auluma’ of Afega on its members to vote for the respondent or face banishment. There is also no evidence the respondent had any knowledge of such a tapu. There is also no evidence that the ‘auluma’ of Afega were agents or acting as agents for the respondent when they imposed the tapu alleged by the petitioner against them.

This allegation is therefore also dismissed. That concludes the allegations made by the petitioner in his petition against the respondent.

Before leaving the petition, we consider that the Court should say something concerning certain matters that came out of the evidence relating to this petition. To give money to an elector for the purpose of inducing such elector to vote for a candidate amounts to the corrupt practice of bribery in terms of section 96 of the Act. Similarly, to give food or drink to an elector for the purpose of influencing such elector to vote for a candidate amounts to the corrupt practice of treating in terms of section 97 of the Act. Compliance with Samoan custom is not a defence if the real purpose or one of the purposes behind the giving of money, food or drink is to induce or influence an elector to vote for a particular candidate. The Court will be particularly astute in scrutinizing evidence of custom to see that custom is not used as a veil to obscure what is in actual fact an intention to induce or influence an elector to vote for a candidate at an election.

Secondly, an elector who knowingly accepts a bribe or treat also commits bribery or treating. If it is true, as suggested from the evidence, that during the time of elections it has become the habit of electors to have expectations of being given money, food or drinks by the candidates of their constituencies, then the sooner such habit stops the better. It provides for clean and lawful elections if electors are to vote on the basis of issues and policies rather than on the basis of such one day, or a few days, benefits such as money, food or drink given to them by candidates or expected by them from candidates.

Thirdly, there is no particular time period when bribery or treating is allowed. Bribery and treating for election purposes are prohibited at all times. It will therefore be a mistake to think that bribery and treating are allowed outside the “period of election”, which commences on the day after the Chief Electoral Officer gives public notice of polling day and ending on polling day, but prohibited within that period. What the law says is that, except at a funeral, any candidate who gives money, food or drink to an elector during the period of election commits an illegal practice in terms of section 99A. It does not matter if there was no intention or purpose of inducing or influencing the elector to vote for a particular candidate. Such a giving within the period of election is deemed an illegal practice. Liability for an illegal practice is therefore strict. But if such a giving is also made with the intent or for the purpose of inducing or influencing an elector to vote for a candidate, then it becomes the corrupt practice of bribery or treating.

We turn now to the respondent’s counter petition which contains allegations of bribery and treating against the petitioner. The respondent alleges that:-

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(1) on or about the afternoon of 22 December 2000, the petitioner met with more than twenty matais and more than twenty ‘taulealea’ of Tuanai at his premises at Saleufi and gave each matai $100 and each taulealea $50 for the purpose of inducing those electors to vote for the petitioner thereby committing the corrupt practice of bribery; and

(2) on or about the evening of 30 January 2001, the petitioner held a party for about five matais and more than twenty ‘taulealea’ of Tuanai at his residence at Leififi Malifa and served them with beer and other drinks and gave $100 to each matai and $50 to each ‘taulealea’ for the purpose of inducing those electors to vote for the petitioner thereby committing the corrupt practices of treating and bribery.

Dealing now with the first allegation in the counter petition, the evidence of the witnesses Aauloa Fale, Pouono Tupai, Anisi Saimoni and Faleaupu Faalaa who are electors of Tuanai called for the respondent, show that on late Friday afternoon, 22 December 2000 they attended a meeting held at the petitioner's premises at Saleufi. About twenty matais and twenty taulealea, all electors of Tuanai, were present. Most if not all of the people present were sitting on chairs. The presence of these electors at the petitioner's premises at Saleufi was in response to an invitation sent by the petitioner through his election committee to meet with Tuanai. At about 4.30pm the petitioner arrived at the meeting. He made a brief speech thanking those present for accepting his invitation. He then gave some money to his employees to be distributed amongst those people who were present. Each matai was given $100 and each ‘taulealea’ was given $50.

The witness Aauloa Fale who is a matai elector was given $100. He testified that at the meeting, the petitioner asked for the support of those present and to remember to vote for him and that he wanted to meet with them again. The evidence of this witness was seriously shaken under cross-examination from counsel for the petitioner and we would have disregarded his credibility completely if it was not for the fact that what he said about the petitioner giving out monies at his premises at Saleufi was corroborated by the other witnesses called for the respondent and confirmed by the petitioner himself and his witnesses in their evidence. The witness Pouono Tupai who is a ‘taulealea’ elector received $50. He testified that at the meeting the petitioner stated to remember the election and that they would meet again. The witness Anisi Saimoni, another ‘taulealea’ elector, also received $50. He testified that the petitioner stated to bear in the mind the election. The witness Faleaupu Faalaa, another taulealea elector, also received $50. He also testified that the petitioner shook hands with those present as they were about to depart and said to him don't forget, we'll meet again. On their own accounts, all of these witnesses would be accomplices for they all claim that the monies which were given to them were bribes. As such, it will be dangerous to act on the individual evidence of each of these witnesses without corroboration. We bear that in mind in considering the evidence of these witnesses. At the same time we also bear in mind that the evidence of one accomplice can provide corroboration for the evidence of another accomplice in material particulars.

In his evidence, the petitioner admitted to the meeting held at his premises at Saleufi and the presentation of monies he made to the matais and ‘taulealea’ of Tuanai in the sums stated by the witnesses for the respondent. The members of the petitioner’s election committee, namely, Fata Ilalio, Iosefa Moevao and Iole Faalaa who testified on this aspect of the first allegation in the counter petition also confirmed the meeting at the premises of the petitioner at Saleufi and that
each matai and taulealea of Tuanai who was present was given $100 and $50 respectively. To this extent, the evidence given by and for the petitioner provides corroboration for the evidence given by the witnesses for the respondent.

Where the two sides are in conflict is on the question of whether the presentation of monies made by the petitioner was for the purpose of inducing the electors to whom the monies were given to vote for the petitioner at the general elections. One of the main grounds into which this conflict resolved itself is whether what was done by the petitioner was in accordance with Samoan custom. The petitioner and his witnesses including Tupā’i Simi the pulenuu of Tuanai, said what was done was in accordance with Samoan custom. The respondent and his witnesses, on the other hand said it was not. Much evidence was given and much time was spent on this aspect of the case. After consideration of the relevant evidence and the opposing views on Samoan custom given by the two sides, the Court is of the view that what took place at the petitioner’s premises at Saleufi was not Samoan custom as such. In the first place, if this was the petitioner’s ‘o’o’ to the village of Tuanai as the then sitting Member of Parliament for the Sagaga-Le-Usoga constituency, it would have been appropriate and in accordance with custom to have the ‘o’o’ performed at Tuanai or at least at some other place within the constituency. It is not custom, in our view, for the petitioner’s ‘o’o’ to be performed here in Apia. Secondly, it is clear from the evidence of the petitioner himself that his decision to have his ‘o’o’ at his premises at Saleufi was based on the advice given to him by the ‘tuua’ of his village in order to lighten the burden for him as he had also performed a ‘o’o’ to the constituency a few months before in July 2000 after he had won in the parliamentary by-election held in June. Thus it is clear that the petitioner’s decision to have his ‘o’o’ at Saleufi was not based on considerations of Samoan custom, but was for the purpose of reducing the burden on him. Thirdly, there was no exchange of customary speeches or an ava ceremony which are the usual features of a customary meeting. Fourthly, in a customary meeting only matais meet, the taulealea of the village do not take part in the meeting except for the purpose of preparing and serving the ava and performing other services as required of them by the matais. In this meeting, both matais and ‘taulelea’ were present together and were sitting on chairs. Fifthly, it appears that what happened at this meeting was that the petitioner made a brief speech thanking those who were present then monies were given out. A matai then responded by thanking the petitioner for the monies; the meeting then dispersed. In substance and in form, this can hardly be described as a proper meeting or a meeting consistent with Samoan custom. It is clear that the petitioner and those at the meeting just got together, the petitioner then made a brief speech, someone else made a speech in reply, monies were then given out and everyone went home. It appears that what happened was just a brief get together for the purpose of the petitioner giving out monies to the electors present then everyone went home happy. This is hardly a proper meeting in accordance with Samoan custom. Sixthly, the witnesses for the petitioner testified that each matai was given a ‘fao’ of $100 and each ‘taulealea’ was given a fao of $50. If that was so, it is not Samoan custom to give a ‘fao’ to a taulealea. The petitioner’s witness Tupā’i Simi, who is the pulenuu of Tuanai also testified that it is not Samoan custom to give a ‘fao’ to a ‘taulealea’. Our own experience confirms that as a fact.

Be that as it may, the real question for the Court’s determination is whether the presentation of monies was made by the petitioner for the purpose of inducing electors to vote for him at the elections and not whether it was made in accordance with custom. Samoan custom provides no
defence to electoral bribery if the real purpose or one of the purposes behind a presentation of money is to induce an elector to vote for a candidate at the elections. The relevance of evidence of Samoan custom is to show whether the real intention behind a presentation of money is to comply with custom thus negating any allegation that the real intention behind such a presentation was to induce an elector to vote for a particular candidate at the elections. The Court will, however, be particularly astute in scrutinizing such evidence.

Other evidence were adduced to show that the presentation of monies made by the petitioner at his premises at Saleufi was not made for the purpose of inducing the electors of Tuanai who were present to vote for the petitioner. The petitioner testified that prior to the general elections, incumbent Members of Parliament of his political party were advised to make their ‘o’os’ to their constituencies. He also sought legal advice from his solicitor on what can legitimately be done. He also sought advice from the ‘tuua’ of his village of Malie about performance of his ‘o’o’ for his constituency. The ‘tuua’ of his village advised him to lighten matters by performing his ‘o’o’ at his residence because the petitioner had performed quite a burdensome ‘oo’ for his constituency in July 2000 after he became Member of Parliament for his constituency in the parliamentary by-election held the previous month. Because of that advice, the petitioner decided to perform his ‘oo’ at his premises at Saleufi. Instead of performing one ‘oo’ for all the three villages of his constituency, the petitioner performed three separate ‘oos,’ one for each village. Thus the ‘oo’ for Malie was performed on 20 December, the ‘oo’ for Afega was performed on 21 December and the ‘oo’ for Tuanai was performed on 22 December. About $4,000 in total was given for Tuanai. It is clear from the evidence that what was involved in these individual ‘o’os’ was much less in terms of money than the one ‘oo’ the petitioner performed for the whole of his constituency in July 2000.

Evidence was also given by and for the petitioner that it is the practice for incumbent Members of Parliament to present ‘oos’ to their constituencies at the end of their parliamentary terms. The petitioner’s immediate predecessor as Member of Parliament for the Sagaga-Le-Usoga constituency had done the same thing at the end of his parliamentary terms and on one such occasion he performed his ‘oo’ in a nightclub in Apia instead of doing it within the constituency. Evidence was also given by and for the petitioner which denied the evidence given by the witnesses for the respondent that the petitioner had said at the gathering at Saleufi to remember the elections and words to like effect.

After giving careful consideration to all of this evidence, we have come to the conclusion that the monies which were given by the petitioner to the ‘taulelea’ electors of Tuanai at Saleufi on 22 December 2000 were accompanied by an intention to induce those electors to vote for the petitioner at the 2001 general elections. We are of the view that the presentation of ‘lafos’ of $50 to each ‘taulelea’ elector cannot be explained on the basis of Samoan custom for it is not custom to give ‘lafos’ to the taulele’a of a village, only matais are presented with ‘lafos’. We also consider the sums of $50 given to each ‘taulelea’ elector of Tuanai to be substantial and not insignificant. Furthermore, the customary practice when making a presentation to a village, apart from any ‘lafos’ or ‘suas’ for the matais, is to give the whole presentation to the village and the matais of the village will decide what to give to the ‘taulelea’ or ‘aumaga’. The evidence of the petitioner is that he received complaints after his ‘oo’ in July 2000 that the ‘taulelea’ of Tuanai received very little from the matais who distributed Tuanai’s share of that ‘oo’. So he decided to
give monies direct to the ‘taulele’a’ of Tuanai to ensure there was no more of such a complaint. With respect to the petitioner, we are of the view that the giving of sums of $50 to each ‘taulealea’ elector of Tuanai was not just for the purpose of meeting such a complaint; it was also for the purpose of gaining favour with those electors for the purpose of the up-coming elections. How the matais of Tuanai distributed Tuani’s share of the petitioner’s ‘o’o’ in July 2000 would be a matter between the matais and ‘taulele’a’ of Tuanai themselves and of no real concern to the petitioner. The real reason or one of the reasons, as we see it, for the petitioner being concerned was because he wanted the support of the ‘taulele’a’ of Tuanai at the elections.

We are also not able to accept the evidence that at that point in time the petitioner had not made up his mind whether to run in the general elections. Given the trouble he had been to of seeking advice from his solicitor and from the ‘tuua’ of his village on what to do, we are of the view the petitioner had made up his mind at that stage to run again as a candidate in the 2001 general elections. There is also evidence that since September 2000 the petitioner and his election committee were already working on making certificates of identities (IDs) for some of the electors of Sagaga-Le-Usoga. The petitioner also appears to be an intelligent businessman. We do not believe that after only a few months as Member of Parliament for his constituency, he would spent $4,000 on each village of his constituency, apart from his money spent on IDs, unless he had by 22 December made up his mind to run again as a candidate in the 2001 general elections.

We wish to point out here that there is no law which says that the presentations of ‘oos’ by incumbent Members of Parliament to their constituencies at the end of their parliamentary terms are immune from the provisions of the Electoral Act 1963 which make a presentation of money or food for the purpose of inducing or influencing electors to vote for a particular candidate bribery or treating. If the purpose or one of the purposes of a ‘oo’ is to gain favour with the electors of a constituency and thereby inducing or influencing those electors to vote for the presenter or giver of the ‘oo’ at an election, that is bribery or treating, as the case may be, in terms of the Act. It does not matter if the ‘oo’ is performed outside of the period of election. Counsel for the respondent made a thoughtful point when he submitted that if the law allows incumbent Members of Parliament to make ‘oos’ at the end of their parliamentary terms but not the other election candidates, that may give the incumbent Members of Parliament an advantage over other election candidates who are not in that category. Counsel further submitted that the law will be imposing double standards in favour of incumbent Members of Parliament as against other election candidates for the playing field will not be level as between the two categories of candidates. The Court takes due notice of these submissions. As we have already stated, if the purpose or one of the purposes of a ‘oo’ is to induce or influence electors to vote for the presenter or giver of the ‘oo’ in an up-coming election, that is bribery or treating, as the case may be, in terms of section 96 or section 97 of the Act. There is nothing in the Act which gives immunity to a ‘o’o’ from its provisions on corrupt practices.

For the foregoing reasons, we are satisfied beyond reasonable doubt, that the presentation of monies made by the petitioner to ‘taulele’a’ electors of Tuanai at Saleufi on 22 December 2000 amounted to bribery in terms of the Act. We are left with some doubt in relation to the monies presented to the matais. That part of the first allegation in the counter petition is therefore dismissed.
As for the second allegation in the counter petition, the respondent relies on the evidence of two witnesses. These are Ifo Saena, a ‘taulealea’ elector of Tuanai, and Manase Ainoa, a resident of Tuanai who is an elector in a different constituency. Essentially what these witnesses said is that on 30 January 2001 they were present at a party held by the petitioner at his residence at Malifa. Attending the party were matais and ‘taulelea’ of Tuanai. Beers were served and the petitioner gave out $100 to each matai and $50 to each taulealea. Because the witness Ifo Saena does not drink alcohol, he was given a large bottle of coke. Both these witnesses also said that during the party the petitioner asked the people who were present for their support in the election. On their own accounts these witnesses must be treated as accomplices.

The petitioner and members of his election committee Fata Ilalio, Iosefo Moevao, Iole Faalaa, Fafai Tauvaa and Seugogo Leuma strongly denied in their evidence that the gathering at the petitioner’s residence at Malifa on 30 January was a party and that beers were served and monies were given out. They also testified that what took place at the petitioner’s residence was not a party but a meeting of the petitioner’s campaign committee and only ice water was served. The meeting took less than an hour.

Given the conflict in the evidence and the fact that the evidence of the witnesses Ifo Saena and Manase Ainoa were seriously shaken by the skilful and effective cross-examination from counsel for the petitioner, we are left in a reasonable doubt whether beers were served and monies were given out by the petitioner at his residence at Malifa as alleged in the counter-petition. That doubt must be resolved in favour of the petitioner.

Therefore the second allegation in the counter petition is dismissed.

All in all then we find four allegations of bribery and two allegations of treating proved beyond reasonable doubt against the respondent in terms of section 96 and section 97 of the Act respectively. Given the margin in the general elections of twelve votes between the petitioner and the respondent and the large number of electors who were involved in the allegations of bribery and treating made by the petitioner, we also find that the corrupt practices committed in relation to the election for the purpose of procuring the election of the respondent prevailed so extensively that it may be reasonably supposed to have affected the result of the election in terms of section 113 of the Act.

Accordingly we declare the election of the respondent void under section 112 of the Act. Alternatively, the election of the respondent is also declared void under section 113 of the Act.

In addition, we find one allegation of bribery proved beyond reasonable doubt against the petitioner in terms of section 96 of the Act.

The Court will report its findings to the Honourable Mr Speaker.

As the petitioner succeeded in his petition in part, and the respondent succeeded in his counter-petition in part, we make no order as to costs.
CRIMINAL LAW

The question in issue in this case is whether, for the purposes of a charge under section 105B of the Crimes Act 1961 of receiving personal information knowing that the information had been obtained corruptly contrary to section 105A of the Act, the Crown must establish that the offender knew the information had been obtained in a "criminal manner". The views of the court on whether "corruption" involves an element of dishonesty may be compared with those expressed in R v Harvey and R v Godden-Smith (see Issue 4 pp.101-2)

THE QUEEN v LEOLAH

Court of Appeal of New Zealand
Gault, J and Thomas, J

23 November 2000

Cases referred to in the judgment
Grant v Borg [1982] 2 All ER 257
Hall and Latimer v Attorney General (High Court, Wellington, unreported, 1998)
R v McDonald [1993] 3 NZLR 354

For the appellant: M Kennedy
For the Crown: J Pike

THOMAS J giving the judgment of the court:

Question in issue
[1] The question in issue in this case is whether, for the purposes of a charge under section 105B of the Crimes Act 1961 of receiving personal information knowing that the information had been obtained corruptly contrary to section 105A of the Act, the Crown must establish that the offender knew the information had been obtained criminally.

The conviction and appeal
[2] The appellant, Mr Leolahi, was found guilty following a trial before a judge alone of five representative counts of knowingly using corruptly disclosed information contrary to section 105B. Mr Leolahi was sentenced to nine months imprisonment. He has been subsequently granted home detention.

[3] Mr Leolahi appealed against his conviction on the basis that the trial Judge misdirected himself in law. He commenced, but later abandoned, an appeal against sentence.
The facts

[4] The charges against Mr Leolahi were one of a number of prosecutions which were brought following the discovery that certain employees of the Inland Revenue Department were leaking confidential taxpayer information to members of the public.

[5] At all relevant times Mr Leolahi worked for an Otahuhu firm, The Money Shop, which specialised in offering finance to persons whose applications had been rejected by larger institutions. His responsibility was to locate the addresses of defaulting debtors and arrange for repayment. In performing this task he would generally use the services of Telecom or make enquiries through debtors’ relatives.

[6] These avenues of inquiry did not always work. Then, in 1996, an IRD employee, a Ms Matagi, sought finance from The Money Shop. Mr Leolahi noted her occupation on her loan application form. He quickly set up a meeting with her. It was agreed that he would pay Ms Matagi $10.00 for each address supplied to Mr Leolahi from the IRD information database. The evidence shows that Ms Matagi was initially reluctant to co-operate, but Mr Leolahi brought pressure to bear on her and she finally agreed to disclose the information. Mr Leolahi was the more dominant party in a position of power over Ms Matagi, and he was able to manipulate her weakness and financial problems to his own advantage. The trial Judge described Mr Leolahi as "very persuasive" and Ms Matagi as a "gentle biddable person". Ms Matagi made it clear to Mr Leolahi that what she was doing was wrong and that she could lose her job. But Mr Leolahi, in the words of Ms Matagi, just "laughed it off".

[7] Between June and October 1996, Mr Leolahi obtained a large number of addresses of debtors. For much of this period, he got in touch with Ms Matagi every day. Ms Matagi initially faxed Mr Leolahi the addresses from her office, but later did so from a library fax machine and by post. The two also met frequently away from their respective offices. Physical exchanges of money and information were executed in a clandestine fashion.

[8] The arrangement was eventually discovered and Ms Matagi, after pleading guilty, was convicted of offences against s 105A and sentenced to nine months imprisonment. She later testified against Mr Leolahi in Court, conceding that she knew her actions were illegal.

[9] As stated above, Mr Leolahi was eventually convicted on five representative counts under section 105B. Each count relates to a separate month during the term of the arrangement between Mr Leolahi and Ms Matagi, that is, between June and October 1996.

The ground of appeal and the Judge’s direction

[10] It is convenient to first set out the relevant statutory provisions. Section 105A reads as follows:

*Corrupt use of official information* - Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly uses or discloses any information, acquired by him in his official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or any other person.
[11] Section 105B provides:

*Use or disclosure of personal information disclosed in breach of section 105A*

(1) Every person is liable to imprisonment for a term not exceeding 7 years who,-
(a) Having received personal information (being information that comes into that person's possession as a result of the commission of an offence against section 105A of this Act); and
(b) Knowing that the information has been disclosed in contravention of that section-uses or discloses that information to obtain, directly or indirectly, an advantage or pecuniary gain for that person or any other person.
(2) It is a defence to a charge under this section if the person charged proves that the person was legally authorised to use or disclose the information.
(3) In this section, the term "personal information" means any information about an identifiable natural person, including a deceased natural person.

[12] It is immediately obvious that section 105B (the section under which Mr Leolahi was convicted), is closely linked to section 105A (under which Ms Matagi was convicted). While section 105A is directed at officials who corruptly abuse their position, section 105B is directed at private citizens who profit from such corruption. Paragraph (b) of subs (1) requires the Crown to prove that the accused received the information knowing it to have been disclosed in contravention of section 105A. Information is disclosed in contravention of section 105A where it is acquired by an official acting in an official capacity and then corruptly disclosed to a third party for an advantage or pecuniary gain.

[13] Mr Leolahi does not dispute any part of the actus reus of the offence. His sole argument is that the Crown did not adduce sufficient evidence to prove that he received the information with the requisite knowledge prescribed in paragraph (b). Thus, Mr Leolahi accepts that he knew that Ms Matagi acquired the addresses in her official capacity as an IRD employee, and that she disclosed the addresses to him for pecuniary gain. He claims, however, that he did not know that she was acting "corruptly" by passing the information on to him. His argument is essentially that, even though he realised that it was wrong for Ms Matagi to disclose the information, he did not realise that this was a "criminal" wrong as opposed to a mere breach of employee confidentiality. He therefore did not have the "deliberate criminal intent necessary" to commit the offence: see *R v McDonald* [1993] 3 NZLR 354, at 358.

[14] In dealing with this argument, the trial Judge discussed Mr Leolahi's knowledge and actions in some detail. He found that Mr Leolahi was persistent in pressing Ms Matagi for more and more information. He also found that Mr Leolahi knew that the information he was given came from the IRD computer and that he could not have obtained this information across the main counter. The Judge also commented on the clandestine nature of the dealings. Mr Leolahi and Ms Matagi met away from their respective places of work and Mr Leolahi paid Ms Matagi in cash passed over in blank envelopes. While he would sometimes ring Ms Matagi at work, telephone conversations would be cut short if other people were nearby.
[15] In the result, the Judge held that Mr Leolahi knew it was wrong or improper for Ms Matagi to disclose the information to him. He "certainly ... knew, so I am entirely persuaded, that Matagi was abusing her position". The Judge concluded:

In the vernacular he, so I find, had it over her; and there was nothing of the essence of what she did, and of the context in which she did it that escaped him;.. He was surely close to being, if not in fact and law, a party to Matagi's own offending. Certainly, in terms of the knowledge pre-requisite to s 105B, the accused knew that he was involving Matagi in turning aside from what was right. He had her putting her data base access to an improper use. It amounted to a "perversion of the power or position held" by Matagi, to use the words of Gallen J in Hall and Latimer v Attorney General (High Court, Wellington, unreported, 1998, at p 11). That was the area of corruption.

[16] The Judge gave short shrift to the argument advanced on behalf of Mr Leolahi that Mr Leolahi needed to have specific knowledge of the criminality of Ms Matagi's actions. He believed that this argument amounted to a plea of ignorance of the law contrary to section 25 of the Crimes Act. On this basis, the Judge found Mr Leolahi guilty on all counts and convicted him accordingly.

The submissions in this Court

[17] In this court Ms Kennedy, counsel for Mr Leolahi, again accepted that Mr Leolahi knew that what Ms Matagi was doing would have been contrary to the terms of the contract of employment with the IRD but, Ms Kennedy urged, he would not necessarily have known that Ms Matagi was breaking the law. It had not therefore been established that Mr Leolahi had the necessary criminal intent. He was required to know that Ms Matagi's actions were illegal, not merely immoral. In support, Ms Kennedy relied on two New Zealand cases: R v McDonald, (above); and Hall and Latimer v Attorney-General (above). The former case concerned an allegation of corruption in a private business deal contrary to the Secret Commissions Act 1910. Williamson J stated (at 357-358) in the context of that Act, that the word "corruptly" -

...would appear to be one designed to describe the mental element which an offender must have when giving or accepting a gift, namely that degree of deliberate criminal intent necessary not only to perform the act itself but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party's business.

We do not discern anything in those observations or in that case which would support the proposition that Mr Leolahi had to know that Ms Matagi was acting illegally. The word "corruptly" is not to be equated with the word "illegally".

[18] In the Hall and Latimer case, Gallen J noted (at 9) that the term "corruptly" has been the subject of a number of judicial interpretations, and that "Judges have pointed out the difficulty in adequately determining precisely what is meant" by the word. The learned Judge agreed that there must be a "degree of criminal intent". He expanded his observation as follows (at 10):

That intent it seems to me must be one which so colours an official action that it may be said to be done for an improper motivation and a motivation will be improper if it is one
which has an element of purpose outside that which is contemplated by the conferment of the power concerned and it moreover one which could properly be described as morally unacceptable. It is for that reason that some of the authorities use the term "dishonest".

[19] While we do not disagree with Gallen J's dictum, we do not consider that it is prudent to seek to proffer a precise definition of what is meant by the word "corruptly" in section 105A. In broad terms, however, it connotes the improper use by an official of information which belongs to a governmental body. The official abuses his or her official capacity and the trust that is reposed in them as a holder of a public office. Being a public office the information is ultimately public property and must be treated as such. The application of this broad meaning will depend on the circumstances of the particular case. Whatever meaning is given to the term in this case, however, we have no doubt that Ms Matagi acted corruptly, a fact no doubt reflected in her guilty plea.

[20] Whether the person to whom an official discloses information knows that the official is acting corruptly will depend on the recipient's knowledge of what the official is doing. Again, there can be no real dispute as to Mr Leolahī's knowledge in this case. The Judge found that he knew that he was coercing Ms Matagi to do that which was wrong and that what she was doing at his bidding was an improper use of her position. In fact, the Judge said, "there was nothing of the essence of what she did, and of the context in which she did it that escaped him". This knowledge amounts to knowledge that Ms Matagi disclosed the information "corruptly". The trial judge's conclusion was undoubtedly correct.

[21] With respect to Ms Kennedy, her argument reduces to the assertion that Mr Leolahī did not realise such behaviour in a public official amounted to a criminal offence. This contention is, as was argued by Mr Pike for the Crown and recognised by the trial Judge, a plea of ignorance of the law. Such pleas are barred by section 25 of the Crimes Act. Lord Bridge's dictum in *Grant v Borg* [1982] 2 All ER 257, at 263, is apposite:

...the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and to my mind, wholly unacceptable.

[22] This dictum is directly relevant to this case. In accordance with traditional doctrine, the Crown in a prosecution under s 105B is only required to prove that the offender knew the "facts material to the offender's guilt". As found by the trial Judge, Mr Leolahī knew these facts, including the fact that Ms Matangi was acting corruptly. He may not have known that his dealings with Ms Matangi amounted to a criminal offence or, if he appreciated that it was an offence, he may not have realised how serious the offence is regarded. But he knew the facts material to the elements of s 105B. These facts are all the Crown must show.

[23] For these reasons, the appeal is dismissed.
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