November 2013

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL ASSESSMENT

INSTRUCTIONS TO CANDIDATES

Introduction

The practical assessment will be focused on a criminal trial in which the defendant, Au Chi Chun, is charged with attempted murder. In order to complete the practical assessment, candidates will be required to do the following:

1. To make or oppose an application for a permanent stay of proceedings
2. To participate in a mini-trial

The material upon which the practical assessment will be conducted

All the material upon which the assessment will be conducted is contained in the attached bundle consisting of, first, the 'Bundle of Evidential Materials', second, the 'Bundle of Defence Materials'.

Your role as solicitor-advocate

Before the assessment, you will be advised whether you will appear as counsel for the prosecution or counsel for the defence.

NB: With each candidate given only a limited time span to complete each allocated exercise, it is important that:

- **Addresses to the Court or to the jury be structured and succinct, getting to the heart of the matter without delay;**
- **Remember, in addressing the jury it is not counsel's role to instruct them on the law, that is the function of the judge.**

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, One-sided, 12 font, Single spaced).

You may refer to the attached authorities as you think appropriate. You do not need to attach them to the skeleton; the Judge will have a copy of them at the hearing. Please note that your arguments must be limited to these case authorities.

Your skeleton must be emailed to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm on the Wednesday prior to the day of the assessment. Please note that if you submit your skeleton late, it may not be marked for the purpose of the assessment.

THE CONDUCT of the Interim Application

If you have been allocated the role of defence counsel, you will make an application for a permanent stay of proceedings.

Your oral application will last a maximum of 15 minutes. It will be made on the basis that, although no bad faith on the part of the police is alleged, the negligence of the police in, first, failing to the gather up broken glass at the scene and, second, losing a knife seized at the scene, means that the defendant has been denied the opportunity of a fair trial. It is not necessary to make the application on both evidential bases. That is a matter for the discretion of the candidate.

If you have been allocated the role of prosecuting counsel, you will oppose the application for a permanent stay of proceedings.

Your oral argument in opposition will last a maximum of 15 minutes.

No reply to submissions will be conducted.

You should be prepared to deal with Judicial interventions and questions in relation to your submissions

THE CONDUCT of Mini-Trial

Witnesses

Please note that only one prosecution witness and one defence witness will attend the mini-trial. Candidates will be advised of the identity of the witness when they hand in their TSPs prior to the assessment. Candidates must therefore be prepared to examine and cross-examine all relevant witnesses.

The witnesses for the two parties are described below.

Prosecution witnesses

The following witnesses will appear at trial to give oral evidence on behalf of prosecution:

1. George Simpson
2. Jasmine Kusum
3. John Black
4. Angelo de Freitas
5. Li Siu Fan
6. Tan Luk Chi
7. Dr. Samit Barka

Defence witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the 1st Defendant:

1. Au Chi Chun
2. Dr. Janet Wong

You can assume:

1. The witnesses will appear at trial in the order listed above
2. For the purposes of the mini-trial, it is to be assumed that the evidence of all witnesses, other than those called, is to be fully in accordance with their statements.

BEFORE the Mini-Trial

Before the day of the assessment, you must complete your Trial Strategy Plan ('TSP'). Please note that this should be completed with respect to all

witnesses irrespective of whether they will appear as live witnesses at the assessment. If you have been given the role of prosecuting counsel, you will complete the TSP from that perspective, if you have been given the role of defence counsel, you will complete the TSP from that perspective.

A blank TSP form has been provided with your assessment papers. You may complete the form in manuscript or you may type it.

You should hand your TSP to the Examining Panel when you arrive at the assessment venue.

DURING the Mini-Trial

Opening Speech

If you are allocated the role of prosecuting counsel, you will be expected to make a brief opening speech to the jury. It will last a maximum of 5 minutes. If you are allocated the role of defence counsel, you will be expected to make a brief speech to the jury at the opening of the defence case. It will last a maximum of 5 minutes.

Conduct of the Examination-in-Chief/Cross-examination

If you are allocated the role of prosecuting counsel, you will be expected to conduct an examination-in-chief of one prosecution witness. It will last a maximum of 10 minutes. If you are allocated the role of defence counsel, you will be expected to conduct a cross examination of that witness. It will last a maximum of 15 minutes.

If you are allocated the role of defence counsel, you will be expected to conduct an examination-in-chief of one defence witness. It will last a maximum of 10 minutes. If you are allocated the role of prosecuting counsel, you will be expected to conduct a cross examination of that witness. It will last a maximum of 15 minutes.

The evidential material in the bundle contains the previous convictions of certain of the witnesses. If you are allocated the role of defence counsel, it will be for you to determine whether to cross-examine the nominated prosecution witness on his or her previous convictions. If you are allocated the role of prosecuting counsel it will be for you to determine whether to cross-examine the nominated defence witness.

You are also required to:

- deal with any interventions/objections made by the advocate representing the opposing party
- Take any objections, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party
- deal with any Judicial interventions/questions as and when they arise

Case Law

The following authorities that the candidates may find useful for the interim application are attached.

- Archbold Hong Kong (ref.: paragraph 4-42)
- R v Chu Kam To [1995] 1 HKCLR 179
- HKSAR v Lee Ming Tee & another [2001] 1 HKLRD 599

Where a defendant is charged as an accessory after the fact together with the principal offender, the former can be permitted to withdraw his plea before the sentence is passed on him, if the latter is acquitted. The correct procedure in such a case is for the court not to accept the plea of guilty until after the trial of the principal offender. The same practice applies to joint conspiracy trials (*The Magistrate, Ex p Att-Gen* (1954) 38 HKLR 127; *R v Ronald Li & Others* (unrep., HCCC 228/1989)).

Where there had not been a deliberate plea of guilty, that is, where there had been some fundamental misconception induced either by misunderstanding or any other cause as to the nature and effect of such a plea, exceptionally *certiorari* to quash the conviction would be an available remedy (see in *Re Fong Ping-sum* [1977–1979] HKC 542; *Re Chan Hung-to* [1977] HKLR 198; *Ng Hong-chan v R* (unrep., Crim App 971/1976); *Chan Kwok-choi v R* (unrep., Crim App 971/1976); *The Queen v The District Judge of Hong Kong, Ex p Att-Gen* (1956) 40 HKLR 260).

A court has no power to allow a plea of guilty to be withdrawn after sentence but a plea of guilty is not *per se* a bar to the right of appeal against conviction (*HKSAR v Au Yeung Boon-fai* [1999] 3 HKC 605; *R v Li Tung-hing* [1992] HKLY 259).

III. STAY OF PROCEEDINGS

Jurisdiction and source of the power to stay criminal proceedings

4–41 In general, if a charge is properly brought before a court of competent jurisdiction that court is obliged to try the case: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598. Lord Morris in *Connelly v DPP* [1964] AC 1254 stated that (at 1304):

> "... generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it."

However, the courts have a residual discretion to make orders including an order staying proceedings brought before it to protect itself from an abuse of the court's process: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598; *Connelly v DPP* [1964] AC 1254; *R v Humphrey* [1977] AC 1; *Warren & Others v Attorney-General for Jersey* [2012] 1 AC 22; [2011] 2 Cr App R 29.

The scope of the power

4–42 The power to stay is confined to its inherent power to protect itself against abuse of its own process: *R v Horseferry Road Magistrate's Court, Ex p Bennett* [1994] AC 42; *Keung Siu-wah v Att-Gen* [1990] 2 HKLR 238 and should be exercised very sparingly and only in exceptional circumstances: *Att-Gen's Reference (No 1 of 1990)* [1992] 1 QB 643; *Tan v Cameron (PC)* [1992] 2 AC 205; *Jago v District Court of New South Wales* (1989) 168 CLR 23. The refrain that runs through the cases is the court's power to deal with procedures that are vexatious, harassing and oppressive and in such circumstances the court has the power to stay those proceedings. The principles derived from the authorities may be stated as follows:

(1) The power is designed to protect its own process from abuse. In *Connelly v DPP* [1964] AC 1264, Lord Morris said at 1301–1302:

> "... a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. [They are] powers which are inherent in its jurisdiction. A court must enjoy such powers to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

Lord Devlin in the same case described it as a power to ensure the court's process is used fairly and conveniently by both sides (at 1347) and observed: "... from early times ... the court had inherently in its power the right to see that its

process was not so abused by a proceeding without reasonable grounds so as to be vexatious and harassing."

(2) In *R v Humphreys* [1977] AC 1 at 46, Lord Salmon pointed out that the power should not be used to interfere with the proper function of the executive in its prosecutorial role. He said:

> "a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution mounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene."

In the same case at p 26D, Viscount Dilhorne said:

> "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred."

(3) The power of the court to stay proceedings should be directed to the prevention of the abusive use of its powers and should not be used to remedy conduct that falls short of abuse of process. In *Moevao v Department of Labour* [1980] 1 NZLR 464, at 470 and 471, Richmond P observed:

> "It cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the court is itself being wrongly made use of."

(4) The court should not assume a disciplinary function over the misconduct of the Executive. In *R v Sang* [1980] AC 402, Lord Scarman (at 454 and 455) said:

> "The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither initiates nor stifles a prosecution. Save in the very rare situation ... of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial."

However, it should be noted that *R v Sang* was not concerned with a stay of proceedings. Moreover, if the conduct of the Executive is such as to lead to an abuse of the process of the courts, a stay must be ordered: *Rona v District Court of SA & Anor* (1995) 77 A Crim R 16; *R v Swingler* (1995) 80 A Crim R 471.

(5) "The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the accused and the prosecution" (per Sir Roger Ormond in *R v Derby Crown Court* (1984) 80 Cr App R 164). And: "The fairness of a trial ... is not all one-sided, it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted."

(6) The means to ensure fairness of trial in any ordinary case is by the court exercising its power to control rather than to stay the proceedings, as stated in *R v Sang* [1980] AC 402; *HKSAR v Lee Ming-tee & Anor* [2001] 1 HKLRD 599.

(7) The court has a wide discretion as to how it goes about determining whether or not to stay the proceedings. The question was raised in *R v Heston-Francois* [1984] 1 QB 278 where it was held that the power to stay:

> "... does not include an obligation to hold a pre-trial enquiry designed to bring about a stay of proceedings into such allegations as the improper obtaining of evidence, tampering with evidence and seizure of an accused's documents prepared for his defence. However reprehensible conduct of this kind may be, it is not, at least in circumstances such as the present, an abuse or, in other words, a misuse of the court's process. It is conduct which in those circumstances falls to be dealt with in the trial itself by judicial control upon admissibility of evidence, the judicial power to direct a verdict of not guilty ... or by the jury taking account of it in evaluating the evidence before them [per Lord Justice Watkins at 290]."

(8) The remedy of stay of proceedings should be sparingly exercised:

> "It is a grave and serious matter for a court to refuse jurisdiction ... when a court comes to consider whether it should refuse jurisdiction in respect of a prosecution brought before it ... then while being careful to protect its process from abuse, it should be very wary indeed of taking that which I have earlier described as a grave and serious course [see *R v Harris* [1991] 1 HKLR 389, at 398 and 399]."
>
> "It [the power to stop a prosecution] is in my view a power that should only be exercised in the most exceptional circumstances [per Viscount Dilhorne in *DPP v Humphreys* [1977] AC 1 at 26]."
>
> "Judges should pause long before staying proceedings which on their face are perfectly regular [per Lord Edmund Davies in *DPP v Humphreys* [1977] AC 1 at 55]."

The categories of abuse are never closed: *R v Li Wing-tat* [1991] 1 HKLR 731, but there appeared two major streams of stay cases. The first is that stay was granted on the basis that requirement of a fair trial had become impossible making the continuing of the prosecution an abuse of process. The second is that although fairness of the trial was not in question, the court might grant a stay because the circumstances involved an abuse of power which so offended the court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process: *HKSAR v Lee Ming-tee* [2001] HKLRD 598.

(9) The court as a jurisdiction to stay proceedings where the human rights of the accused have been violated: *R v Looseley, Attorney General's Reference No 3 of 2000* [2002] 1 Cr App R 29. Ordinarily it would be necessary to demonstrate that the misconduct on the part of the Executive was such as to deprive the accused of a fair trial: *R v Looseley, Attorney General's Reference No 3 of 2000.* However, recent authority demonstrates that the courts are prepared to stay proceedings where there has been a violation of human rights, even when a fair trial remains possible but where the commencement or continuation of a trial would be so contrary to the public interest in the integrity of the criminal justice system, that the trial should not take place: *R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42; *R v Latif & Shazad* [1996] 1 WLR 104, 2 Cr App R 92; *Re Barings plc & Ors (No 2); Secretary of State for Trade and Industry v Baker & Ors* [1999] 1 All ER 311; *R v O'Connor* [1995] 4 SCR 411; *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400.

(10) There will be circumstances, though rare indeed, in which, despite the availability of a fair trial, an abuse of power so offends the court's sense of justice and propriety or, put another way, is of such a kind as to affront the court's sense of justice and propriety with severe consequences for public confidence in the administration of justice, that the court may feel duty-bound to exercise its discretion to order a stay of the proceedings: *Lee Ming Tee HKSAR v Lee Ming Tee & another* (2001) 4 HKCFAR 133 at pp 148, 149 & 151; *HKSAR v Lee Ming Tee & SFC* (2003) 6 HKCFAR 336 at p 395; *HKSAR v Wong Hung Ki* (unrep., CACC 424/2008, [2010] HKEC 706). Such a circumstance will most obviously arise where illegal conduct by law enforcement authorities or prosecutors "is so grave as to threaten or undermine the rule of law itself" in which case the court "may readily conclude that it will not tolerate, far less endorse, such a state of affairs and so hold that its duty is to stop the case." (*R v Grant* [2005] 3 WLR 437 at para 56) Whether the circumstances are such as to warrant a stay under this second limb (a serious affront to the court's sense of justice and propriety) is a highly fact-sensitive question. Note, in *Warren v Attorney-General of Jersey* (above) the Supreme Court held that the outcome of *R v Grant* was wrongly decided.

(11) Where there has been serious prosecutorial misconduct, a court of appeal may quash the conviction and order a re-trial instead of staying the proceedings: *R v Maxwell* [2011] 2 Cr App R 31.

Written notice of an application for a stay of proceedings

4–42A Written notice of an application for a stay of proceedings must be given: Practice Direction 9.7, paragraph 1.[1] Practice Direction 9.7, paragraphs 2–4 requires that that notice of application must:

(1) give details of the nature and grounds of such an application;
(2) provide a skeleton argument and list of authorities; and
(3) identify and summarise evidence to be relied upon by the Applicant.

The prosecutor must provide any reply in writing no later than 7 days before the hearing of the application: Practice Direction 9.7, paragraph 5.

(1) Abuse of process making a fair trial impossible

Delay

4–43 The law in relation to the court's exercise of its power to stay for reason of delay has been reviewed and authoritatively stated in *Att-Gen's Reference (No 1 of 1990)* [1992] 1 QB 643, as approved in *Tan v Cameron* [1992] 2 HKLR 254, PC and *Att-Gen v Charles Cheung Wai-bun* [1993] 1 HKCLR 189, PC. See also *R v F (S)* [2011] 2 Cr App R 28. The test is whether "in all the circumstances, the situation created by the delay in bringing the accused to trial is such as to make it an unfair employment of the powers of the court any longer to hold the accused to account": *Tan v Cameron* [1992] 2 HKLR 254, PC at 255E. The court will not concern itself with penalising the prosecution for fault in causing or permitting the delay. The question the court will focus on is: would there still be a fair trial if the accused has been so seriously prejudiced by reason of the lapse of time in bringing him to trial.

Where an application for stay the proceeding is made on the ground of undue delay, the accused has the burden of proof on balance of probabilities: *HKSAR v Lee Ming-tee* [2001] 1 HKLRD 598. The accused must demonstrate that he has been or will be seriously prejudiced in the preparation or conduct of his defence by unjustifiable delay of the prosecution in bringing the proceedings: *Att-Gen v Cheung Wai-bun* [1993] 1 HKCLR 249. The burden never shifts to the prosecution: *Tan Soon-gin v Judge Cameron* [1992] 1 HKLR 149. There must be a proper factual basis to support such an application: *HKSAR v Lau Kwok-ching & Others* (unrep., CACC 411/1997). Delay is considered from the date of the commission of the offence: *Tan Soon-gin v Judge Cameron* [1992] 1 HKLR 149.

Delay due to complexity of the case or conduct of the accused may rarely support a stay: *Att-Gen's Reference (No 1 of 1990)* [1992] 3 WLR 9. Where the prosecution is not at fault in causing the delay, a stay should be rarely granted: *R v Hung, William* [1992] 2 HKCLR 90; *R v Wong Hak-on* [1989] 1 HKLR 111. Where the problems giving rise by the delay could be remedied by appropriate direction or other remedies available to the trial judge, a stay should not be granted: *R v Dutton* [1994] Crim L R 910; *R v Birchall* (unrep., *The Times*, 23 March 1995). Delay attributable to the accused may rarely be the basis for a stay: *Att-Gen's Reference (No 1 of 1990)* [1992] 3 WLR 9. Delay in discovery of the crime, particularly when the crime was deliberately concealed, would almost certainly not support a stay: *R v West* [1996] 2 Cr App R 374; *Att-Gen's Reference (No 1 of 1990)* [1992] 3 WLR 9. It is the delay which is to be considered not just the portion caused by prosecution: *Deacon Chiu & Another v Att-Gen* [1993] 1 HKLR 57. Article 87 of the Basic Law guarantees the right to trial without undue delay. Also Article 11(2)(c) of the Bill of Rights provides for the same guarantee. Although these rights stand independently of the rights provided at Common Law, the consideration to the granting of a stay is of little significant difference: *R v Hung, William* [1992] 2 HKCLR 90; *R v Cheung Wai-bun* [1993] 1 HKCLR 189; *R v Deacon Chiu Te-ken & Daniel Chiu Tat-cheong* (unrep., HCCC 122/92). The presence of undue delay does not automatically lead to a stay of the proceedings. There must be a balance between the interests of the accused and the public interest in bringing offenders to justice. The assessment of the impact of delay on a case must be assessed by reference to the interests served by the right – the right of a defendant to a trial without delay: *Flowers v R* [2000] 1 WLR 2396. The impact on witnesses and others is not to be ignored: *Brownlee v R* [2001] HCA 36.

[1995] 1 HKCLR 179

Administrative and constitutional law — Bill of Rights, Articles 10 and 11 — fair trial — prosecution losing evidence — prejudice to defendant.

Criminal law and procedure — Bill of Rights, Articles 10 and 11 — fair trial — exhibits lost from prosecution custody — prejudice — stay.

Criminal law and procedure — Magistrates Ordinance (*Cap.* 227) s. 86 — exhibits — production at trial duty of police to produce.

The accused had pleaded not guilty to possession of dangerous drugs for the purpose of unlawful trafficking. The case for the accused was that evidence had been fabricated against them and that the drugs had been planted. Counsel for the accused sought to have the drugs in question produced for inspection. However, it appeared that the drugs and other evidence had gone missing from police custody.

The accused sought to have the proceedings stayed on the basis of s. 86 the Magistrates Ordinance (set out at p.181, lines 4-6.), the common law and the right to fair trial under Articles 10 and 11 of the Bill of Rights. The trial judge, Yam, J., made a ruling in favour of the accused and staying the proceedings.

Held:

1. Under s. 86(4) of the Magistrates Ordinance (*Cap.* 227) the police were required to produce all non-documentary exhibits at trial. However, breach of that provision did not result in an automatic stay: the question was whether an accused would be assured of having a fair trial. (See p.181, lines 16-27.) *Asia Dyeing Co. Ltd. v. The Authority* **[1990] 1 HKLR 263 considered.**

2. On the facts, the failure to produce the drugs and other evidence at the trial would impair the accuseds' ability to undertake their defence. This infringed the accused's right to a fair trial at common law as well as their rights under Article 10 (fair trial) and Article 11 (2)(b) (adequate facilities for the <p.180> preparation of their defence) of the Bill of Rights. The proceedings would be stayed. (See p.185, lines 24-38.)

THE QUEEN v CHU KAM-TO AND ANOTHER [1995] 1 HKCLR 179 (Criminal Case No. 395 of 1994), 8-9 and 21 June 1994, High Court, Yam, J.

[1995] 1 HKCLR 179

Administrative and constitutional law — Bill of Rights, Articles 10 and 11 — fair trial — prosecution losing evidence — prejudice to defendant.

Criminal law and procedure — Bill of Rights, Articles 10 and 11 — fair trial — exhibits lost from prosecution custody — prejudice — stay.

Criminal law and procedure — Magistrates Ordinance (*Cap.* 227) s. 86 — exhibits — production at trial duty of police to produce.

<p.180>

Yam, J.:

Court:

The 1st and 2nd defendants are charged with two counts of possession of dangerous drugs in the respective amount of 40.23 grammes and 53.63 grammes of salts of esters of morphine for the purpose of unlawful trafficking.

The Prosecution alleged that at about 1614 hours on 21st March 1992, the 1st and 2nd defendants were apprehended outside their home at Unit 425, Choi Ping House, Choi Yuen Estate. The 2nd defendant is alleged to have had in her possession a white plastic bag containing dangerous drugs, the subject-matter of the first charge. The premises were allegedly searched with money and further drugs being seized therein, the subject-matter of the second charge.

Both defendants were arrested and taken to Sheung Shui Police Station where they allegedly made admissions under caution.

The case eventually commenced before me on 11th November 1993. Both defendants pleaded not guilty and the 1st defendant objected to the cautioned statement and the issue of voluntariness was tried separately ir *voir dire* proceedings.

On 11th November, counsel for the 1st defendant required the Crown to produce the drugs exhibits for inspection. The case put on his behalf was that the drugs had been planted by the police and that he had never signed on the exhibit envelope containing the drugs. The Crown sought an adjournment to enable them to produce the drugs in court.

The Crown have been unable to locate the drugs. Apparently the Crown discovered that someone imposed as PC 47429 went to the Sheung Shui Police Station on 29th September 1993 and obtained the drug exhibits together with the containers and the envelope containing the drugs. Thereupon the defendants applied for an order of permanent stay of these proceedings before me as against both defendants.

<p.181>

The defence, first of all, relied on Section 86 of the Magistrates' Ordinance which deals with custody of depositions and exhibits after committal. Section 86(4) provides:

"All exhibits, other than documentary exhibits shall, unless the Magistrate otherwise directs, be taken charge of by the Commissioner of Police and shall be produced at the trial by him or by a police officer deputed for that purpose."

It was submitted by the defence that by virtue of the use of the phrase "shall be submitted", there is a mandatory burden on the Commissioner to produce such exhibits. Failure to do so breaches the fair hearing provisions in the Bill of Rights. Any resulting conviction would not be according to law and the defendants would have been denied adequate facilities both for the preparation and conduct of their defence.

The Crown submitted that this section is only directory and relied on the case of **Asia Dyeing Company Limited v. The Authority** (appointed under the Air Pollution Control Ordinance (*Cap.* 311) [1990] 1 HKLR 263.

This case was decided in a totally different matrix of facts. It concerned with the Air Pollution Ordinance, s. 9. The question was whether the Authority should state whether certain pollution was in existence or imminent. The Court of Appeal decided that this section which the Authority had not complied with was only directory and not mandatory. Noncompliance did not therefore vitiate the notification given therein.

In my view, under s. 86(4) of the Magistrates' Ordinance, the Commissioner of Police is under a mandatory duty to take charge of all non-documentary exhibits and to produce them at trial. However, it is not a question whether this section is mandatory or directory. It cannot be that whenever the Commissioner of Police had been in breach of his duty to preserve and produce exhibit to the court, there must be a stay of the criminal proceedings concerned. The question is, whether in the event of such a breach of this duty the court should stay the criminal proceedings under the Bill of Rights or otherwise under the common law.

At common law

I shall start with the case of **R. v. Lambeth Metropolitan Stipendiary Magistrate, ex parte McComb** [1983] 1 QB 551. It has

been said by Sir Donaldson, M.R. at page 564 that:

"However, in *R. v. Lushington, ex parte Otto* [1894] 1 QB 420, 423 Wright, J., said:

'I think it is also undoubted law that when articles have once been produced in court by witnesses it is right and necessary for the court, or the constable in whose charge they are placed (as is generally the case), to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded.'

This suggests to me that once an article has become an exhibit, the court has a responsibility in relation to it. That responsibility is to preserve and retain it, or to arrange for its preservation and retention, for the purposes of justice. The purposes of justice are to ensure that the accused is convicted if guilty and is acquitted if innocent. I would accept that this is the position and would further accept that the **<p.182>** usual course is for the court to entrust the exhibits to the police or to the Director of Public Prosecutions subject to the same responsibility. That responsibility was defined by Griffiths, L.J. in the instant case as being (1) to take all proper care to preserve the exhibits safe from loss or damage, (2) to co-operate with the defence in order to allow them reasonable access to the exhibits for the purpose of inspection and examination, and (3) to produce the exhibits at the trial. That too I accept."

And further at page 566, he said:

"What are the applicant's rights? If he is committed for trial, he can apply to the Crown Court for an order that the Director be required to obtain the exhibits and make them available to the defence for inspection or testing. He has this right because the exhibits have been produced to the committing court and upon committal, in my judgment, responsibility for those exhibits passes to the Crown Court by operation of law. However, any such application would be bound to fail since, in the peculiar circumstances of this case, the Crown Court would be sharing that responsibility with the Irish Court of Criminal Appeal and the Irish Court is that which first had actual custody and only released the exhibits subject to an unqualified undertaking by the Director to return them to it upon the conclusion of the committal proceedings. In other words, the Crown Court's responsibility is subject to the overriding authority of the Irish Court.

Where does this leave the applicant? He will have three courses open to him. First, he can himself make application to the Irish Court for the release of the exhibits. Second, he can ask the Director to make such an application. Third, he can do nothing at this stage and if by the time of his trial, assuming that he is committed, he had not been allowed appropriate access to the exhibits, he can ask the court to refuse to permit them to be given in evidence by the prosecution, that refusal being in exercise of its inherent power to make all such orders as are necessary to secure a fair trial."

This case was decided in a totally different matrix of facts, but to my mind, the guiding principle laid down therein is whether a defendant is assured to have a fair trial. I shall come back to the application of this Common Law principle after my consideration of the Bill of Rights.

Bill of Rights

The defence relies on Articles 10 and 11(1) and 11(2)(b). Article 10 provides *inter alia:*

"In the determination of any criminal charge against him (i.e. the defendants) ... everyone shall be entitled to have a fair and public hearing."

Article 11(1) provides:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."
<p.183>
Article 11(2) (b) further provides:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality.

(b) To have adequate time and facilities for the preparation of his defence."

There are some Canadian cases decided under these articles. I shall now start with the case of **R. v. Luff** 11 CRR (2d) 356. Gushue, J.A. said at page 361, that:

"A stay of proceedings is, as the Crown says in its factum, the most drastic remedy that a judge in a criminal case can grant. As stated by this court in the case of *R. v. Sullivan* (1991) 96 Nfld. & PEIR 7 at 9:

'The staying of criminal charges against an accused person is obviously the ultimate response by the courts to infringements of that person's constitutional rights or an abuse of court process and should only be utilized in the most serious and clearest of cases. While a judge is given the discretion under s. 24(1) to grant a remedy which "the court considers just and appropriate in the

circumstances", it does not follow that the court is thereby given an unqualified right to deal with a breach as it sees fit. Any remedy granted must be for good reason in the circumstances of the particular case.

Obviously, before any remedy under the Charter can be considered by a court, there must be clear evidence, either *viva voce* or by affidavit, of the nature of the breach sought to be redressed and the effect of that breach on the defendant. Where the remedy sought is a stay of proceedings, that evidence would have to be compelling.' "

This case concerns with a:

"... respondent who was charged with failing to provide a proper breath sample into an approved screening device contrary to s. 254(5) of the Criminal Code. At trial, the respondent's counsel made an application under s. 24(1) of the Charter with respect to alleged breaches by the Crown of ss. 11(d) and 7 of the Charter. Counsel argued that he had been denied pre-trial disclosure as the Crown or police had not provided him with copies of all materials in the police file. Instead of receiving copies, he was permitted to review the contents of the police file at the police station. Counsel at trial called no evidence and made no application to the judge for disclosure. An application to stay proceedings was made. The trial judge granted application for the stay and held that the Crown must provide the defence with copies of all documentation in the file of an accused person. The Crown appealed the stay of proceedings entered by the trial judge and appeal was allowed."

In other words, the case again is concerned with different facts. However, the guiding principle is that the court should grant a stay of proceedings in the most serious and clearest of cases and the evidence in favour of the stay would have to be compelling.
<p.184>
In the case of **R. v. Davis,** 13 CRR (2d) 101,

"The accused was charged with sexual assault and uttering threats to cause death. The sexual assault kit was destroyed before the accused was arrested. The accused applied for a stay of proceedings on the ground that the destruction of the sexual assault kit infringed his rights under s.7 of the Canadian Charter of Rights and Freedoms as the unavailability of the kit for independent analysis by the defence of blood and DNA samples deprived him of his right to make full answer and defence. He also claimed that the destruction of the kit infringed his rights under s. 15 of the Charter as it discriminated against him in the defence that persons charged in other cases in which such kits are taken but not destroyed have access to the kit while he did not."

The application was dismissed.

It was held that:

"The Crown in this case was obviously unable to tender the result of any blood tests or any DNA analysis as proof of the accused's guilt, so this was not a case of nondisclosure of Crown evidence. Further, the accused failed to establish that there was a reasonable possibility that the destruction of the kit impaired his ability to make full answer and defence. The application was based solely on conjecture. The mere fact that some potential evidence is destroyed or becomes unavailable does not of itself constitute a Charter breach that will result in an automatic stay.

Section 15 of the Charter had no application in this case."

In other words, the question to be asked is this: Have the defendants established that there is a reasonable possibility that the destruction or loss of the exhibit impaired their ability to make full answer and defence?

A Canadian example from the application of the Bill of Rights in granting a stay will be found in the case of **R. v. Wyatt** 12 CRR (2d) 328.

"The applicant was charged on 30th April 1992, with 14 sexual offences under the Criminal Code. The offences were alleged to have taken place from 1964 to 1974. The applicant's conduct was investigated by the police in 1972 and at the prompting of the police, the applicant underwent treatment. In 1974, the applicant attended further counselling sessions. No incidents were alleged since that time. The Crown stayed 12 counts, but proceeded with two counts arising from matters alleged to have taken place in 1974. Police files for 1974 and earlier, however, were no longer available. A medical witness could not locate all relevant medical records and was not willing to rely on his memory. Defence counsel brought an application to stay the two charges on the basis that the applicant could not make full answer and defence pursuant to s. 7 of the Canadian Charter of Rights and Freedoms."

The application was allowed.
<p.185>
"The applicant bears the burden of showing that he is unable to make full answer and defence on the balance of probabilities as contemplated by s. 7 of the Charter and s. 8(3) of the Criminal Code. The applicant need not establish his position beyond a reasonable doubt. In this case, disclosure of police files for 1974 and earlier is now impossible. Certain medical records are no longer available. Taken altogether, the fact that these documents are unavailable, the problems of memory arising from lapse of time, and the consequent inability to have an adequate foundation for cross-examination or investigation at this late date, leads me to the conclusion that on a balance of probabilities the accused cannot undertake a full and fair defence." (Per Macleod, J.)

The application in the present case

Can the defendants undertake a full and fair defence? In this case, the very offensive substance and exhibits alleged to be seized from the 2nd defendant and the house of the 1st and 2nd defendants' were lost. The jury would be deprived of the opportunity to examine them including their containers.

Further, the Crown alleged that the drugs were sealed and then signed by both defendants whilst they put their case through cross-examination that they had never signed on the envelope. This cannot be produced to court now. I do accept that such a failure to produce those exhibits would prevent a defendant proving a material fact which may go to prove his case or discredit the Prosecution case. What is left behind is the words of the police against the words of the defendants.

That includes the allegation of the police that those drugs which were sent to the Government Chemist were seized from the defendant. This is by no means just an evidential consideration whether evidence can still be given orally *about* them when they failed to produce them. Further, it is not an answer to say they were already formally given an opportunity to inspect all non-documentary exhibits at the return date of the committal proceedings on 29th July 1992. The question is whether the failure to produce them now at the trial would impair their ability to undertake their defence. I think it would.

The loss of these drugs exhibits is one of the most serious cases. They were lost whilst they were in the custody of the police in a police station. It is different from some of the Canadian cases involving destruction of sexual assault kit, or breach test kit which has to be destroyed in normal scientific procedure.

In our present case, there is a real possibility that the failure of producing all these exhibits would impair the defendant's ability to make full answer and defence. In the end I find that their rights are infringed under Article 10 of the Bills of Right, i.e. to have a fair trial, and Article 11 (2)(b), i.e. to have adequate facilities for the preparation of their defence.

By the same token I do not think they can have a fair trial without having these exhibits produced to court under the common law. Accordingly, I order that all further criminal proceedings in this case against the 1st and 2nd defendants in this case be stayed.

P.St.J.S.

THE QUEEN v CHU KAM-TO AND ANOTHER [1995] 1 HKCLR 179 (Criminal Case No. 395 of 1994), 8-9 and 21 June 1994, High Court, Yam, J.

[2001] 1 HKLRD 599

Criminal evidence - privilege against self-incrimination - where privilege abrogated, scope of substituted protection matter of statutory construction - no free-standing derivative use immunity, independent of privilege

Company law - investigation of company affairs - s.145(3A) abrogated privilege against self-incrimination and replaced it with direct use prohibition - materials obtained could be disclosed to police - under Ordinance, prosecuting authorities could make derivative use of materials - whether derivative use inimical to fair trial and presumption of innocence - Companies Ordinance (Cap.32) s.145(3A)

Human rights - rights of persons charged with or convicted of criminal offence - presumption of innocence - immunity against being compelled to testify against oneself or confessing guilt - Hong Kong Bill of Rights Ordinance (Cap.383) s.8, art.11(1), 11(2)(g)

Human rights - equality before law and right to fair and public hearing - Hong Kong Bill of Rights Ordinance (Cap.383) s.8, art.10

Criminal law and procedure - stay - principles - official misconduct - adverse pre-trial publicity - whether permanent stay should be ordered

Ds were Directors in a group of companies. In 1992, pursuant to s.143(1)(c) of the Companies Ordinance (Cap.32) (the Ordinance), the Financial Secretary appointed an Inspector (the Inspector) to undertake an investigation into the affairs of those companies. Under the Ordinance, the Inspector had the power to compulsorily obtain documents and information and could examine officers of the companies. Section 145(3A) provided that such persons could not be excused from answering a question from an inspector on the ground that it might incriminate them but that the question or answer could not be used as evidence against them in criminal proceedings if the person claimed privilege before answering the question. The Inspector reported to the Financial Secretary that there might be evidence of criminal offences. The Financial Secretary then directed the Inspector to give the police access to materials derived from the inspection. Subsequently, Ds were charged with conspiracy to defraud and publishing a false statement of account. At trial the Judge ordered that the proceedings be permanently stayed on the grounds that: (a) handing over the materials to the police was an abuse of the Financial Secretary and the Inspector's statutory powers and a violation of Ds' rights; (b) there had been official misconduct; and (c) there had been prejudicial pre-trial publicity. The Secretary for Justice appealed. With regards to ground (a), at issue was whether on a true construction of the Ordinance, the Financial Secretary was entitled to hand over compulsorily obtained material; and if so were the prosecution entitled to make derivative use of these materials by using them to acquire evidence from other sources.

As for grounds (b) and (c), the Secretary for Justice contended that in the circumstances, a permanent stay was not justified. The official misconduct related to judicial review proceedings commenced by Ds in 1993 with regard to the inspection. Those proceedings were dismissed, but during the proceedings, a misleading affidavit and certain misleading correspondence had been put forward on behalf of the Inspector and the Financial Secretary. The prejudicial publicity related to the Inspector's report being publicised prior to trial. The report was publicised in September 1993 at a press conference and coincided with the police conducting high profile raids on the offices of Ds' companies. It was prejudicial to the prospects of a fair trial. Ds were committed for trial in 1999.

Held, allowing the appeal and remitting the matter to the Court of First Instance for Ds to be tried before a different judge, that:

Ground (a) - Derivative use of information obtained pursuant to s.145(3A)

(1) Where the concerns which led to the Inspector's appointment under s.143 proved justified, in the absence of any express restriction, the Ordinance did not require him to keep the evidence of wrongdoing **(p.601)** from the Financial Secretary or to require the Financial Secretary not to disclose it to the appropriate authorities. The Financial Secretary was acting within the statutory purposes in directing the Inspector to give the police access to the material compulsorily obtained. (See pp.622D-626F.)

(2) Section 145(3A) abrogated the privilege against self-incrimination and replaced it with a direct use prohibition. Where the privilege was abrogated in its entirety, the scope of its substituted protection, if any, became a matter of statutory construction. As a matter of construction, where the use prohibition conferred in place of an abrogated privilege was limited, other use was inferentially permitted. The prohibition in s.145(3A) was framed in limited terms. It prohibited use of questions and answers obtained in the course of an inspection as evidence in criminal proceedings against the person giving the answers. It therefore inferentially permitted derivative use of the questions and answers. Other provisions in the Ordinance favoured a construction opposed to any derivative use immunity. Further, there was no free-standing common law concept of derivative use immunity, independent of the privilege. Accordingly, as a matter of statute and common law, the prosecution was entitled to make derivative use of the materials handed to the police (*Re Pergamon Press* [1971] Ch 388, *Maxwell v Department of Trade and Industry* [1974] QB 523, *R v Sang* [1980] AC 402, *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, *Hamilton v Oades and Corporate Affairs Commission of New South Wales v Oades & Another* (1989) 166 CLR 486, *Lam Chi Ming v The Queen* [1991] 2 AC 212, *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225, *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1, *AT & T Istel Ltd v Tully* [1993] AC 45, *Saunders v United Kingdom* (1996) 23 EHRR 313, *R v Hertfordshire County Council, ex p Green Environmental*

Industries Ltd [2000] 2 AC 412 considered; *Sorby v The Commonwealth* (1983) 152 CLR 281 explained). (See pp.620D-627A.)

(3) Finally, the prosecuting authorities had not violated Ds' rights under the Bill of Rights. First, art.11(2)(g) of the Bill of Rights only applied to persons who faced a criminal charge and at the time of the inspection Ds had not been charged. Also, the immunity then conferred was only a testimonial immunity, namely, the right "not to be compelled to testify against himself or to confess guilt". Secondly, the use of derivative evidence did not mean that an accused would not receive a fair trial (art.10) or that the presumption of innocence (art.11(1)) would be undermined. The derivative use of compulsorily obtained self-incriminating materials could be justified if it was not a disproportionate response to a serious social problem. The question was whether a fair balance had been struck between the general interest of the community in realising the legislative aim and the protection of the fundamental rights of the individual. Here, the aim was protecting the public from corporate fraud, **(p.602)** a major concern which called for strong regulation and the balancing solution adopted by s.145(3A) was entirely acceptable (*Saunders v United Kingdom* (1993) 23 EHRR 313 considered; *R v Warickshall* (1783) 1 Leach 263 followed; *Brown v Stott* [2001] SLT 59 applied). (See pp.627F-643B.)

Granting a stay - grounds (b) and (c)

(4) The staying of criminal proceedings would only be justified in highly exceptional circumstances. A stay would be granted if, first, notwithstanding the range of remedial measures available, a fair trial for the accused was impossible and continuing the prosecution would amount to an abuse of process. Secondly, in very rare cases, a stay might be granted, although the fairness of the trial was not in question, because the circumstances involved an abuse of process which so offended the court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process. In such instances, the court was not exercising the jurisdiction to stay as a means of disciplining the public officials involved *Jago v District Court of New South Wales* (1989) 168 CLR 23, *Tan Soon Gin George v His Honour, Judge Cameron* [1992] 1 HKLR 254, *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 followed). (See pp.612G-616A.)

(5) Here, the official misconduct did not pose any threat to the possibility of a fair trial and while to be deprecated, fell very far short of "an abuse of process, which amounted to an affront to the public conscience and required the criminal proceedings to be stayed". For the trial to go ahead, despite the incidents attending the judicial review proceedings, would not "be contrary to the public interest in the integrity of the criminal justice system" (*R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42, *R v Latif* [1996] 1 WLR 104 applied; *Somchai Liangsiriprasert v United States* [1991] 1 AC 225 considered). (See pp.643C-649A.)

(6) It was exceedingly rare for adverse publicity to lead to a permanent stay. In most cases, while acknowledging that special care must be taken to counteract the possible effects of prejudicial publicity, the court placed its faith in the jury, properly directed, to secure a fair trial for the accused. Here, the Inspector's report should never have been published before the trial was over. However, as it was published more than seven years before trial, any residual prejudice in the mind of a juror was likely to be minimal and could probably be negated by a properly conducted trial and appropriate directions. Hence, there was every reason to believe that Ds would be able to receive a fair trial (*Stuurman v HM Advocate* [1980] JC 111, *The Queen v Glennon* (1992) 173 CLR 592, *R v West* [1996] 2 Cr App R 374 applied). (See pp.649B-658J.)

Final Appeal

This was an appeal by the Secretary for Justice to the Court of Final Appeal against the decision of Pang J on 21 July 2000 (see [2000] **(p.603)** HKEC 854) to grant a permanent stay of the criminal proceedings instituted against the defendant. The facts are set out in the judgment.

HKSAR v LEE MING TEE & ANOTHER [2001] 1 HKLRD 599 Final Appeal No 8 of 2000 (Criminal), 21-23, 26-28 February and 22 March 2001, (Court of Final Appeal), Li CJ, Bokhary, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ

Criminal evidence - privilege against self-incrimination - where privilege abrogated, scope of substituted protection matter of statutory construction - no free-standing derivative use immunity, independent of privilege

Company law - investigation of company affairs - s.145(3A) abrogated privilege against self-incrimination and replaced it with direct use prohibition - materials obtained could be disclosed to police - under Ordinance, prosecuting authorities could make derivative use of materials - whether derivative use inimical to fair trial and presumption of innocence - Companies Ordinance (Cap.32) s.145(3A)

Human rights - rights of persons charged with or convicted of criminal offence - presumption of innocence - immunity against being compelled to testify against oneself or confessing guilt - Hong Kong Bill of Rights Ordinance (Cap.383) s.8, art.11(1), 11(2)(g)

Human rights - equality before law and right to fair and public hearing - Hong Kong Bill of Rights Ordinance (Cap.383) s.8, art.10

Criminal law and procedure - stay - principles - official misconduct - adverse pre-trial publicity - whether permanent stay should be ordered

(p.605)
Li CJ
I agree with the judgment of Mr Justice Ribeiro PJ.

Bokhary PJ
I agree with the judgment of Mr Justice Ribeiro PJ.

Chan PJ
I agree with the judgment of Mr Justice Ribeiro PJ.

Ribeiro PJ
The respondents were charged jointly on two counts of conspiracy to defraud and four counts of publishing a false statement of account, contrary to s.21(1) of the Theft Ordinance (Cap.210). On 21 July 2000, Pang J ordered that those proceedings be permanently stayed.

The charges related to four separate transactions which were announced to have taken place during 1990 and 1991 involving the issue and placement of a substantial number of shares in Allied Group Ltd (AGL), Allied Tung Wing Ltd (ATWL) and Allied Properties (HK) Ltd (APL). These were companies listed on the Stock Exchange and formed part of a larger group (the Allied Group) of which AGL was the holding company.
(p.606)
The first respondent held a controlling interest in AGL and was at the material times, chairman and a director of AGL and APL, and a director of ATWL. The second respondent was a director of AGL and acted as financial controller of AGL and other companies in the Allied Group.

The gist of the prosecution's case was that the public had been misled, with the respondents' connivance, into believing that the four transactions had genuinely resulted in the raising of corporate funds by the issue of shares to independent investors. It was alleged that only a small fraction of the proceeds of the share issues had actually been received by the issuing companies, the reality being that other companies in the Allied Group had been enabled, under the disguise of certain sham banking arrangements, to acquire the shares without payment.

Several years prior to the institution of criminal proceedings against the respondents, the Financial Secretary, Mr Hamish Macleod, had appointed an Inspector, Mr Nicholas Allen, to investigate and report upon the affairs of the Allied Group, including the four transactions upon which the charges were based. Pang J ordered the stay on two broad grounds, both arising out of the relationship between the company inspection and the criminal proceedings subsequently brought.

In the first place, the Judge held that the Inspector had supplied to the police and prosecuting authorities information and documents acquired in the course of the inspection for use in aid of the prosecution and that this amounted to an abuse of the Inspector's statutory powers and a violation of the respondents' rights. He held that pursuing the prosecution in such circumstances amounted to an abuse of the process of the court which would not be permitted.

The stay on the ground of abuse of process rested additionally upon the Judge's finding that in the course of resisting the respondents' challenges to the inspection by way of judicial review, an affidavit and certain correspondence which were culpably misleading had been put forward on behalf of the Inspector and the Financial Secretary.

The second ground for the stay was Pang J's conclusion that by taking the unprecedented step of publishing the Inspector's report when criminal proceedings were intended, by giving such publication prominence at a press conference and by orchestrating such

publicity to coincide with a series of high-profile police raids on Allied Group premises, the Government had created such severe prejudice against the respondents that a fair trial had become impossible.

A third ground, based on delay and allegations as to the state of the first respondent's health, failed before Pang J and was not maintained on appeal.

A. The certified questions

The Secretary for Justice appeals against the order for a stay by **(p.607)** leave of the Appeal Committee granted on 19 October 2000. Pang J had certified certain questions of law as being of great and general importance under s.32(2) of the Hong Kong Court of Final Appeal Ordinance (Cap.484). At the hearing of the leave application, the certified questions were reformulated as follows:

Question 1

Where the Financial Secretary appoints an Inspector to investigate the affairs of a company under s.143(1)(c) of the Companies Ordinance (Cap.32) (the Inspector):

(1) What information and materials can the Inspector properly pass to the Financial Secretary?

(2) Is there express or implied power for the Financial Secretary or the Inspector to disclose to the prosecuting authorities materials obtained by the Inspector acting under s.145 of Cap.32 which tend to show that a criminal offence has been committed?

Question 2

In the context of materials obtained by the Inspector what within the criminal process is the scope of the privilege against self-incrimination? In particular, does it encompass derivative use immunity?

Question 3

Where materials have been seized by the police under a search warrant which are the same materials as those obtained by the Inspector, what (if any) use can the prosecuting authorities make of those materials if the information to obtain the search warrant was based on disclosures made by the Inspector to the prosecuting authorities?

Question 4

If there was abuse of power by the executive authorities (whether the Financial Secretary or the prosecuting authorities or otherwise) and/or the Inspector in connection with matters relating to or arising out of the inspection, does the court have the discretion to stay a criminal prosecution on the ground of such abuse of power and if so, how should the court approach the exercise of such discretion?

Question 5

Where a report resulting from a statutory investigation or public inquiry containing findings or comments adverse to named individuals is published and otherwise given publicity and a risk of prejudice to such individuals results in relation to their prosecution for a criminal **(p.608)** offence, how should the court approach the exercise of its discretion on an application to stay such prosecution having regard to possible measures which could relevantly be taken at the trial, including measures concerning the selection and direction of the jury?

B. The facts

The principal facts established for the purposes of the stay application may be summarised as follows.

On 11 June 1992, having conducted an investigation in response to complaints received, the chairman of the Securities and Futures Commission (SFC) wrote to the Financial Secretary expressing suspicions of misfeasance by the first respondent and his associates and recommending the appointment of a company inspector to undertake a wider investigation into the affairs of the Allied Group.

That recommendation was accepted and in early August 1992, the Financial Secretary decided to appoint an inspector whose work would be monitored by a steering group to be chaired by Mr Tam Wing Pong (Mr Tam), Deputy Secretary for Monetary Affairs, on behalf of the Financial Secretary and comprising representatives from the Attorney-General's Chambers and the SFC. This was the first time that such a steering group had been set up in Hong Kong: Re Allied Group Ltd [1994] 1 HKLR 299 at p.301.

The Steering Group was set up to assist the Financial Secretary. Its functions included monitoring the progress and cost of the inspection. This was intended to help meet anticipated criticism from the public and members of the Legislative Council who were thought likely to question the benefits and high cost of such an inspection.

It was also recognised from the outset that criminal proceedings were a likely outcome and the decision was taken to keep the police informed.

On 14 August 1992, Mr Nicholas Allen was formally appointed Inspector under s.143(1)(c) of the Companies Ordinance (Cap.32) (the Ordinance). His terms of reference in relation to the relevant companies were as follows:

(a) in respect of the period since 1 January 1990, to investigate and report on:

(i) all acquisitions and disposals of assets and dealings in assets;
(ii) all loans, facilities, accommodations or guarantees; and
(iii) all options granted or taken,

by the companies or their subsidiaries, ... involving amounts exceeding $10,000,000 ...

(b) in respect of the period since 1 January 1990, to investigate and report on:
(p.609)
(i) all dealings ... by the companies and their subsidiaries in or in respect of shares of Allied Group Ltd, Allied Industries International Ltd, Allied Properties (HK) Ltd, Tung Wing Steel Holdings Ltd, Santai Manufacturing Ltd, Paramount Printing Group Ltd, Asia Securities International Ltd, Crusader Holdings Ltd, Paragon Holdings Ltd and Wai Yick; and
(ii) all loans, facilities, accommodations and guarantees made by the companies and their subsidiaries secured against, or for the purposes of acquiring, shares in the companies listed in (b)(i) above;

(c) in relation to all such transactions described in (a) and (b) above, investigate and report on whether such transactions were made *bona fide*, at arms length and in the normal course of business;
(d) ...
(e) to obtain evidence in a form admissible in criminal or civil proceedings in respect of any matter which may constitute fraud or other offence against Hong Kong law that is identified in the course of the investigation;
(f) ...
(g) to make a final report to me on your investigation on or before 14 February 1993 or as soon as practicable thereafter; and
(h) to confer with the Secretary for Monetary Affairs (or his representative) on matters relating to the inspection as and when he considers necessary.

During the first two months of the inspection, documents from Allied Group companies were obtained and scrutinised. By 12 October 1992, the Inspector felt able to inform the Steering Group that there was "strong evidence to suggest there was never any intention that placements be paid for, which constitutes fraud."

It was decided to tell the police of these suspicions and, on 22 October 1992, Mr Tam held a preliminary meeting with Chief Superintendent BW Munford where the respective roles of the Inspector and the police were considered.

In November 1992, the second respondent sought to challenge the Inspector's powers under the Ordinance. He contended that such powers were invalidated by various provisions of the Hong Kong Bill of Rights (the Bill of Rights) contained in the Hong Kong Bill of Rights Ordinance (Cap.383), especially by the guarantee in art.11(2)(g) that every person "shall be entitled not to be compelled to testify against himself or to confess guilt." Jones J rejected the application, holding that art.11(2)(g) was only concerned with the rights of persons charged with or convicted of a criminal offence and had no application to a company inspection: Re Ronald Tse Chu Fai [1993] 2 HKLR 453. An appeal to the Court of Appeal was dismissed on 26 November 1992.
(p.610)
Interviews with each respondent therefore proceeded. As preparation of the Inspector's report would take some time, it was decided to give the police access to the materials obtained by the Inspector to begin reading into the case, in parallel with the Inspector's finalisation of his report.

The decision to give the police such access was taken on legal advice. The Steering Group and the Inspector were alive to the possible criticism that the police were impermissibly exploiting the inspection to obtain evidence which would otherwise be unavailable to them. To avoid such a suggestion, Messrs Herbert Smith, the Inspector's solicitors, advised that the respondents' interviews should be completed before the police commenced looking at the documents so that it could not be said that interview questions had been posed at the behest of the police. Subject to that precaution, which reflected their advice that "the CCB's [Commercial Crime Bureau's] involvement should take place entirely outside the inspection you are conducting", Herbert Smith stated that the Inspector was not only entitled, but bound to afford the CCB "all possible assistance in familiarising themselves with the material concerned".

The respondents' interviews were effectively completed in the first week of January 1993. One further interview was held with the first respondent in August 1993, but this had not been foreseen in January.

On 7 January 1993, at the Inspector's suggestion, Mr Tam wrote to the Inspector stating that "the Financial Secretary considers that it is appropriate for the CCB to begin familiarising themselves with the materials you have gathered to date" and asking him to "afford them all such assistance as they require."

Thereafter, from about 15 January 1993 onwards, the police were supplied with documents and other materials obtained in the inspection, including interview transcripts and written answers to questions put by the Inspector in correspondence.

As the inspection progressed, the Inspector considered it necessary to clarify or re-define his role under para.(e) of his terms of reference, which required him "to obtain evidence in a form admissible in criminal or civil proceedings in respect of any matter which may constitute fraud or other offence against Hong Kong law that is identified in the course of the investigation".

He wrote to Mr Tam on 25 March 1993, indicating that he would limit himself to directing the attention of the Financial Secretary to:

> (1) instances where I consider criminal offences may have been committed or civil liabilities created; (2) persons who would be able to give relevant evidence in relation thereto; and (3) the documentation relevant to (1) above.

He explained that this was to avoid any "criticism that I have been abusing the powers accorded to me under the [Ordinance]" and cited **(p.611)** legal authority distinguishing the Inspector's role from that of the police.

In the meantime, a debate had developed in the Steering Group as to whether, and if so, to what extent, the Inspector's report should be made public. This was discussed at Steering Group meetings starting in February 1993. The Financial Secretary and the SFC were both strongly in favour of publication. The former wanted to be able to show that the large sums (eventually totalling $46 million) spent on the inspection had resulted in a worthwhile product and to be seen to be adopting a policy of governmental transparency. The SFC wished to publicise to the market the Inspector's concerns regarding the probity of the Allied Group's management and to demonstrate that corporate misconduct would be pursued and uncovered. On the other hand, the Inspector's solicitors and representatives of the Attorney-General's Chambers were both against publication on the ground that it might jeopardise a prosecution since such publicity might make a fair trial impossible.

A compromise solution suggested was that the report should be drafted so that an abridged version could be published, with the most prejudicial parts excised. A draft chapter in that format was circulated to elicit the comments of the Steering Group. On 12 February 1993, Mr Gerard McMahon (Mr McMahon), the SFC's representative, returned his draft with handwritten annotations and comments.

On 11 May 1993, having discovered the existence of the Steering Group, Messrs Lovell White Durrant (LWD), solicitors for the first respondent, wrote to the Financial Secretary asking for information as to its composition and functions and received certain responses in correspondence.

On 21 May 1993, a fresh challenge by way of judicial review was mounted, this time by the first respondent, AGL and APL. This was based on the contention that the Steering Group's involvement had compromised the Inspector's independence or meant at least that he could no longer be seen to be independent, requiring the inspection to be stayed. Kaplan J dismissed the application, holding that there was no evidence whatsoever of bias or of any matters giving rise to a perception of bias: *Re Allied Group Ltd* [1994] 1 HKLR 299. This conclusion was upheld by the Court of Appeal:*R v A-G, ex p Allied Group* (1993) 3 HKPLR 386.

Since part of the respondents' abuse of process allegations arose in connection with those judicial review proceedings against the backdrop of Mr McMahon's comments on the draft chapter and the answers given to LWD's inquiry, it will be necessary to return to some of the details of what transpired.

By the end of August 1993, the final report was ready and copies were submitted to the Financial Secretary, the police and the Prosecutions Division of the Attorney-General's Chambers. The divided opinion as to whether general publication should take place had persisted, but at the Steering Group meeting on 11 September **(p.612)** 1993, the Crown Prosecutor, Mr Grossman QC, appears to have agreed that publication of the report in its edited form could go ahead.

On the same day, informations were laid by the police to obtain search warrants to seize Allied Group documents. Those informations had been prepared on the basis of materials obtained from the Inspector. They resulted in the issue of the necessary search warrants.

On 15 September 1993, the police commenced a series of raids on the offices of Allied Group companies, the searches continuing until 19 September.

On 18 September, two days after the Court of Appeal dismissed the first respondent's appeal against Kaplan J's decision, the Financial Secretary, accompanied by Mr Tam and Government lawyers, held a press conference where the abridged report was publicised. The police raids, the press conference and the report received widespread press coverage. The appellant does not dispute that such publicity was adverse and prejudicial to the prospects of a fair trial of the respondents.

The police established an extensive task force to work on the seized materials in preparation of a case against the respondents. Meanwhile, the second respondent had left the jurisdiction and, on 7 May 1997, over three-and-a-half years after publication of the report, he was arrested in Australia. He subsequently agreed to come back to Hong Kong without an extradition hearing and returned on 26 August 1998, when he was arrested. The first respondent, who had continued to reside in Hong Kong throughout, had been arrested on the previous day. On 16 June 1999, both were committed for trial in the Court of First Instance. Their application for a stay came before Pang J on 27 April 2000, leading to the abovementioned order for a permanent stay dated 21

July 2000.

C. The jurisdiction to stay criminal proceedings

The decision whether or not to bring a prosecution falls entirely within the province of the Secretary for Justice: Basic Law art.63. In general, if a prosecution is brought, the court's duty is to try the case. As Lord Morris (quoting with approval the ruling of the Trial Judge in that case) stated in *Connelly v DPP* [1964] AC 1254 at p.1304:

> ... generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it.

The trial of course proceeds in the vast majority of cases. However, the court also unquestionably has jurisdiction to stay criminal proceedings brought by the Secretary in the exceptional cases where such a course is justified. That jurisdiction rests on the court's inherent power to prevent abuse of its own process: *Connelly v DPP* [1964] AC 1254 at pp.1354, 1361.

(p.613)

In most such cases, the court only grants the stay because, notwith-standing the range of remedial measures available at the trial, a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process. In *Jago v District Court of New South Wales* (1989) 168 CLR 23 at p.30, Mason CJ put it as follows:

> The continuation of processes which will culminate in an unfair trial can be seen as a "misuse of the Court process" which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.

His Honour formulated the question arising on such applications for a stay as follows:

> The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness. (at p.28)

This approach is demonstrated in cases where the accused seeks a stay on the ground of delay. Lord Lane CJ described this as "the most usual ground" for such applications and held that:

> ... no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. (*A-G's Reference (No 1 of 1990)* [1992] QB 630 at p.644)

This was endorsed by the Privy Council in *Tan v Cameron* [1992] 2 AC 205 at p.224, an appeal from Hong Kong.

Other matters, apart from delay, have sometimes been relied on in attempts to stay proceedings. Lord Lane CJ gave examples:

> The abuse alleged may arise in many different forms. It may involve complaints about the methods used to investigate the offence: see *R v Heston-Francois* [1984] QB 278. It may be based as *Connelly v DPP* [1964] AC 1254 itself was, on the allegation that the defendant is being prosecuted more than once for what is in effect the same offence. It may be a misuse of the process of the court to escape statutory time limits: see *R v Brentford Justices, ex p Wong* [1981] QB 445. (*A-G's Reference (No 1 of 1990)* [1992] QB 630 at p.641)

One may add to the list the ground relied on in the present appeal, namely prejudicial pre-trial publicity, considered more fully below. **(p.614)** However, the common thread in these authorities is the requirement that a fair trial has become impossible, making continuance of the prosecution an abuse of the court's process.

A second line of stay cases, also relied on in the present appeal, proceeds on a different basis. These are the rare cases where the court is prepared to grant a permanent stay even though a fair trial undoubtedly remains possible. The leading authority is the decision of the House of Lords in *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42, where, although the fairness of the trial was not in question, the Court granted a stay because the circumstances involved an abuse of power which so offended the Court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process.

While the jurisdiction on this dual basis clearly exists, it is only most sparingly exercised: *Tan v Cameron* [1992] 2 AC 205 at p.221; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at p.31; *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 at p.74.

There are cogent reasons why in principle and in practice such stays are highly exceptional.

In the first place, it is only in very unusual circumstances that a court can properly be satisfied that a fair trial is "impossible". The "fairness" achievable is judged in practical and not absolute terms. As Brennan J pointed out in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at p.49:

> If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of

perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute fairness.

More importantly, the court's primary endeavour is to ensure that a fair trial takes place, employing the law's available resources, and not to abort it on the ground that fairness cannot be attained, save as a last resort. To quote Brennan J again:

> A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of the trial to avoid or minimise prejudice to either party. *(Jago v District Court of New South Wales* (1989) 168 CLR 23 at p.46)

His Honour continued:

> Obstacles in the way of a fair trial are often encountered in administering criminal justice. Adverse publicity in the reporting of notorious crimes *(Murphy v The Queen* (1989) 63 ALJR 422; 86 ALR **(p.615)** 35), adverse revelations in a public inquiry (*Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25), absence of competent representation (*McInnis v The Queen* (1979) 143 CLR 575; *MacPherson v The Queen* (1981) 147 CLR 512), or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed. Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer. (at p.47)

Secondly, in cases where a fair trial remains possible even though official misconduct may be involved in the bringing of the prosecution, the court does not exercise the jurisdiction to stay proceedings as a means of disciplining the police or prosecuting authorities. As Lord Lowry put it in *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 (at pp.74-75):

> The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "pour encourager les autres."

The public interest lies in the guilt or innocence of the accused being fairly and openly determined at trial. For this to be displaced, powerful reasons must exist for concluding that such a trial, although fair, would nonetheless constitute an intolerable abuse of the court's process. The instances where such an argument has any prospects of success must necessarily be very rare.

Thirdly, in cases where the ground on which a stay is sought concerns alleged unfairness in the use of particular classes or items of evidence, the courts, for procedural reasons, are extremely reluctant to determine the evidential questions on a stay application. This is because the fairness of using the evidence may be incapable of evaluation prior to the trial itself. The impact of such evidence on the fairness of the trial may need to be considered in the context of the evidence as a whole so that the question may best be dealt with as a question of admissibility to be determined by the trial judge and possibly made subject to his residual discretion to exclude the same: **(p.616)** *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 412; *Clinton v Bradley* [2000] NIECA 8 at para.17.

It is with the foregoing principles in mind that the Judge's decision falls to be considered.

D. Was the prosecution an abuse of process because of use made of materials derived from the inspection?

D(i) Pang J's conclusions

The Judge found that the Inspector had handed over to the police materials obtained in the course of the inspection and held that this was an abuse of his powers under the Ordinance. Accordingly, he held that a prosecution brought in reliance on such tainted evidence was an abuse of the court's process. Disclosure to the police was found to be an abuse of the Inspector's powers because:

(a) no express authority (referred to as an express "gateway") to make disclosure had been conferred by the Ordinance;

(b) in law, such authority would not be implied "because statutory powers may only be used for the purposes for which they were expressly conferred" and because such conduct purported to override the privilege against self-incrimination which was well-established at common law;

(c) the statutory purposes of a company inspection did not extend to the Inspector providing evidence to the police, his powers being limited to handing over any information uncovered solely to the Financial Secretary; and,

(d) the Inspector had exceeded his powers by handing over such information directly to the police.

D(ii) The respondents' position on appeal

The Judge's conclusions appear to have been urged upon him by the respondents at the hearing below. However, while the Judge was right to hold that the provisions of the Ordinance, and in particular s.146, in combination with his terms of reference, restricted the Inspector to supplying information and reports only to the Financial Secretary, this is a point which factually does not avail the respondents.

On appeal, the respondents did not seek to dispute the appellant's contention that the Inspector had not in fact handed any information directly to the police acting in his own capacity, but that he had only done so on the express instructions and acting on behalf of the Financial Secretary.

As indicated above, the Financial Secretary had appointed the Steering Group to help him monitor the inspection and directed Mr Tam to chair it on his behalf. In the Inspector's terms of reference, he was instructed by the Financial Secretary to confer with Mr Tam **(p.617)** on matters relating to the inspection. The first contact with the police was by Mr Tam (and not the Inspector) on 22 October 1992. When, in January 1993 and thereafter, the police were given access to the documents and information, this was done by the Inspector pursuant to the written instructions of Mr Tam, conveying the Financial Secretary's view as to the desirability of this course.

Mr Jonathan Caplan QC, leading for the first respondent (whose submissions on these matters were adopted by Mr Gary Plowman SC, leading for the second respondent) did not dispute the correctness of regarding Mr Tam as the Financial Secretary's representative in these circumstances. He was clearly right not to do so. Under what has become known as the *Carltona* principle, the courts have recognised that:

> ... the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. (*Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 at p.563)

This is applicable to a Secretary in the HKSAR Government and the principle has been adopted in Hong Kong: *Commissioner for Labour v Jetex HVAC Equipments Ltd* [1994] 3 HKC 42.

It follows that insofar as Pang J's conclusion rested on the narrow ground that the Inspector had impermissibly handed documents and information directly to the police, that conclusion is contrary to the evidence or based upon a misconception of the capacity in which the Inspector provided the police with the materials and cannot be sustained.

The respondents however continued to dispute the power of the Financial Secretary *himself* handing over inspection materials to the police. They continued to espouse the "gateway" argument and to argue that such conduct exceeded the statutory purposes of a company inspection.

D(iii) The provisions of the Ordinance

Whether the respondents' contentions are correct depends in the first place on the proper construction of the relevant provisions of the Ordinance.

Section 143 sets out the circumstances in which the Financial Secretary may appoint an Inspector, as follows:

Section 143: Investigation of the affairs of a company in other cases

(1) Without prejudice to his powers under s.142, the Financial Secretary:
(p.618)

(a) shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Financial Secretary may direct, if the court by order declares that its affairs ought to be investigated by an inspector appointed by the Financial Secretary; and

(b) may do so [in circumstances not material]; and

(c) may also do so if it appears to the Financial Secretary that there are circumstances suggesting:

(i) that the business of the company has been or is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or

(ii) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members ...

An Inspector is given compulsory powers to obtain documents and information from, among others, the officers and agents of the companies in question. For example, s.145(1) makes it:

> ... the duty of all officers and agents of the company ... to produce to the inspector all books and documents of or relating to the company ... that are in their custody or power, to attend before the inspector when required so to do and otherwise to give to the inspector all assistance in connection with the investigation that they are reasonably able to give.

Section 145(2) gives the Inspector power to examine such persons under oath, and if cooperation is refused, he can have the person brought before the court under s.145(3) to be punished for contempt.

Section 145(3A) is particularly important and is in the following terms:

> (3A) A person is not excused from answering a question put to him under this section by an inspector on the ground that the answer might tend to incriminate him but, where such person claims, before answering the question, that the answer might tend to incriminate him, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than proceedings [which are not material].

Also important is s.146 which materially provides as follows:
(p.619)

Section 146: Inspector's report

(1) The inspector may, and, if so directed by the Financial Secretary, shall, make interim reports to the Financial Secretary, and on the conclusion of the investigation shall make a final report to the Financial Secretary.
(2) ...
(3) The Financial Secretary:

(a) shall:

(i) forward a copy of any report made by the inspector to the company at its registered office;
(ii) if he thinks fit, furnish a copy thereof, on request and on payment of the fee appointed ... to any person who is a member of the company ... or whose interests as a creditor of the company ... appear to the Financial Secretary to be affected; ...

(b) may cause the report or any part thereof to be printed and published;
(c) may, or if such report or any part thereof is printed and published shall, cause a copy to be delivered to the Registrar.

(4) The inspector may at any time in the course of his investigation, without the necessity of making an interim report, inform the Financial Secretary of matters coming to his knowledge as a result of the investigation tending to show that an offence has been committed or that civil proceedings ought in the public interest to be brought by any body corporate.

Provisions bearing on what may be the consequences of an inspection include the following:

Section 147: Proceedings on inspector's report

(1) In relation to any prosecution arising from any report made or information supplied under s.146 ..., it shall be the duty of all officers and agents of the company ... other than the defendant in the proceedings, to give to the Secretary for Justice all assistance in connexion with the prosecution that they are reasonably able to give, and s.145(5) shall apply for the purposes of this subsection as it applies for the purposes of that section.
(2) ...
(3) If from any report made or information supplied under s.146 ... it appears to the Financial Secretary that any civil proceedings ought in the public interest to be brought by any body corporate, **(p.620)** he may himself bring such proceedings in the name of and on behalf of the body corporate.

Section 148: expenses of investigation of the affairs of a company

(1) The expenses of and incidental to an investigation by an inspector appointed by the Financial Secretary under section ... 143 shall be defrayed in the first instance out of the general revenue of Hong Kong, but the following persons shall, to the extent mentioned, be liable to repay such expenses to the Government.

(a) any person who is convicted by a court or magistrate on a prosecution instituted as a result of the investigation ...

D(iv) These provisions and abrogation of the privilege against self-incrimination

It is undoubtedly true that, like everyone else in Hong Kong, the respondents enjoyed a privilege against self-incrimination at common law. This is a deep-rooted privilege, having been established in England since at least the sixteenth century: *Lam Chi Ming v The Queen* [1991] 2 AC 212. It entitles a person:

> ... to refuse to answer a question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal". (Gibbs CJ in *Sorby v The Commonwealth* (1983) 152 CLR 281 at p.288,

citing *Lamb v Munster* (1882) 10 QBD 110 at p.111)

However, it is equally beyond doubt (leaving aside for the moment any possible consequences of the Bill of Rights) that such common law rights can be overridden by legislation *R v Scott* (1856) Dears & B 47. As Lord Mustill stated:

> ... statutory interference with the right is almost as old as the right itself. Since the 16th century legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material, and in more recent times there have been many other examples, in widely separated fields, which are probably more numerous than is generally appreciated. (*R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1 at p.40)

It is clear (and was not disputed by any of the parties on appeal) that s.145(3A) is such an enactment. It takes effect in two ways. First, it abrogates the privilege against self-incrimination by providing that a **(p.621)** person is not excused from answering a question put to him by an inspector on the ground that the answer might tend to incriminate him. Secondly, if the person claims the privilege before answering, then although an answer must nevertheless be given, s.145(3A) replaces the privilege with a statutory prohibition on how the answer can be used. It prescribes that "neither the question nor the answer shall be admissible in evidence against [the person answering] in criminal proceedings." Such a provision may be referred to as a "direct use prohibition" (sometimes called a "use immunity" or "direct use immunity").

Assuming (although this is subject to challenge by the appellant) that some of the answers were self-incriminating, once the respondents gave them to the Inspector, their privilege against self-incrimination was extinguished in relation to the answers given. This is because the essence of the privilege is the withholding of answers. Having given the answers, the respondents were left with the protection afforded by the prohibition against use of the answers in evidence against them.

The prosecution have tendered a unilateral undertaking to the Court that they will respect the prohibition and will not seek to rely on any of the oral interviews with the respondents or on the correspondence with them, save where it involved the production of company documents. Both sides agree that no privilege against self-incrimination protects such documents. The prosecution also stated that they will not rely on any comments made by the respondents on draft transcripts or on the draft report, subject to the same exception concerning non-privileged company documents. Furthermore, they will not seek to cross-examine on the basis of such materials.

It may very well be that the use prohibition would in any case prevent such use of the materials. However, what is clear is that any applicable privilege against self-incrimination was overridden by the Ordinance years before any charges were laid against the respondents and before the start of any criminal trial. On the stay application and on this appeal, the issues engendered by the company inspection did not relate to the respondents' entitlement to refuse to answer questions that might be put at the trial on the ground of privilege. They concerned the prosecution's entitlement, if any, to use evidence obtained by the police separately (particularly by execution of search warrants), having been assisted in obtaining that evidence by use of the Inspector's materials.

The issue, carried over to this appeal, is in other words neither about the availability of the abrogated privilege against self-incrimination nor about enforcement of the direct use prohibition. It is about the permissibility of "derivative use" by the prosecution of the compelled testimony and information. Was the Financial Secretary entitled to hand over the compulsorily obtained materials to the prosecuting authorities and were the latter entitled to use them to help acquire evidence for the prosecution from other sources?

These questions of principle are before the Court although Mr Michael Thomas QC, leading for the appellant, points out that **(p.622)** the respondents have been unable at this stage to identify any matters to be used at the trial specifically derived from any answers they may have given to the Inspector.

D(v) Whether the statutory purposes were exceeded

The Judge rightly concluded that, having obtained what may have been self-incriminating materials, it was not open to the Inspector or Financial Secretary to do whatever they liked with them. They were bound to use such materials only in accordance with the statutory purposes of company inspections instituted under the Ordinance.

Thus, in *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 at pp.255--6, dealing with the use that the English police could properly make of materials seized in the context of the Police and Criminal Evidence Act 1984, Dillon LJ cited with approval the following passage from the judgment of Sir Nicholas Browne-Wilkinson V-C in the Court below:

> ... there manifestly must be some limitation on the purposes for which seized documents can be used. Search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy - fundamental human rights. Where there is a public interest which requires some impairment of those rights, Parliament legislates to permit such impairment. But, in the absence of clear words, in my judgment Parliament cannot be assumed to have legislated so as to interfere with the basic rights of the individual to a greater extent than is necessary to secure the protection of that public interest. In the case of this Act it is plainly necessary to trench upon the individual's right to his property and privacy for the purpose of permitting the police to investigate and prosecute crime; hence the powers conferred by Pt.II of the Act. But in my judgment Parliament should not be taken to have authorised use

of seized documents for any purpose the police think fit.

The question which therefore falls to be considered (before considering any Bill of Rights implications) is whether, in instructing the Inspector to hand over the compulsorily obtained materials to the police for their use in aid of a contemplated prosecution of the respondents, the Financial Secretary was acting within the statutory purposes of the inspection.

This is a question with several facets. It involves asking:

(a) what are the statutory purposes of a company inspection and whether they include the supply of evidence uncovered to the police;
(b) whether as a matter of construction, the provisions of the Ordinance permit the contemplated derivative use of the materials; and,
(p.623)
(c) whether a free-standing derivative use immunity exists at common law, capable of surviving a statutory abrogation of the privilege against self-incrimination.

D(vi) An inspector's role in general
In *Re Pergamon Press* [1971] Ch 388, the leading authority on the inspector's duty to act fairly, the English Court of Appeal considered the role of a company inspector when operating under rules very similar to those applicable in the present case. Having pointed out that inspectors do not play a judicial or quasi-judicial role but "only investigate and report", Lord Denning MR continued as follows (at p.399):

> But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding-up of the company, and be used itself as material for the winding-up: see*Re SBA Properties Ltd* [1967] 1 WLR 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see s.41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large.

Sachs LJ stated:

> ... the inspectors' function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action: it is no part of their function to take a decision as to whether action be taken and *a fortiori* it is not for them finally to determine such issues as may emerge if some action eventuates. (at p.401)

Buckley LJ added:

> If inspectors are disposed to report on the conduct of anyone in such a way that he may in consequence be proceeded against, either in criminal or civil proceedings, the inspectors should give him, if he has not already had it, such information of the complaint or criticism which they may make of him in their report and of their reasons for doing so, including such information as to the nature and effect of the evidence which disposes them so to report, as is necessary to give **(p.624)** the person concerned a fair opportunity of dealing with the matter, and they should give him such an opportunity. (at p.407)

In *Maxwell v Department of Trade and Industry* [1974] QB 523, a later case concerned with the same company inspection, Lord Denning reiterated that an inspection "is simply an investigation, without anyone being accused" and added:

> ... the inspectors have to make their report. They should state their findings on the evidence and their opinions on the matters referred to them. If their report is to be of value, they should make it with courage and frankness, keeping nothing back. The public interest demands it. It may on occasion be necessary for them to condemn or criticise a man. Before doing so, they must act fairly by him. (at pp.533-4)

This is an approach which accords with the views of the European Court of Human Rights:

> ... the Court recalls its judgment in *Fayed v United Kingdom* [(1994) 18 EHRR 393 at para.61] where it held that the functions performed by the Inspectors under s.432(2) of the Companies Act 1985 were essentially investigative in nature and that they did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative. (*Saunders v United Kingdom* (1996) 23 EHRR 313 at p.337)

The inspector's role has therefore been seen in other jurisdictions with similar laws as involving the investigation and reporting of the facts regarding the companies under inspection. It is not his job to investigate the criminal liability of any individuals involved nor to collect evidence to establish such liability. However, in carrying out his task he may well come across evidence of criminal activity. Where this occurs, he may disclose such evidence to the appropriate authorities, leaving it to them to consider what, if

any, action to take in consequence.

D(vii) The statutory purposes: the provisions of the Ordinance
In Hong Kong, the relevant provisions of the Ordinance support that general approach. As indicated above, s.145(3A) abrogates the privilege and replaces it with a direct use prohibition. That prohibition is framed in limited terms. It only applies to the questions asked and the answers given. The prohibited use is the use of such questions and answers as evidence in criminal proceedings against the person giving the answers. It says nothing about prohibiting any other use. **(p.625)** Therefore, on its face (and subject to there being any free-standing derivative use immunity at common law or pursuant to the Bill of Rights), s.145(3A) abrogates the privilege and then forbids only direct use, inferentially permitting derivative use of the questions and answers obtained in the course of an inspection.

In *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1 at p.40, Lord Mustill gives some support to such a construction. In his discussion of similarly structured provisions, that is, provisions which override the privilege (which he refers to as an "immunity") and leave in its place a statutory use prohibition, he stated as follows:

> These statutes differ widely as to their aims and methods. In the first place, the ways in which the overriding of the immunity is conveyed are not the same. Sometimes it is made explicit. More commonly, it is left to be inferred from general language which contains no qualification in favour of the immunity. Secondly, there are variations in the effect on the admissibility of information obtained as a result of the investigation. The statute occasionally provides in so many terms that the information may be used in evidence; sometimes that it may not be used for certain purposes, *inferentially permitting its use for others*; or it may be expressly prescribed that the evidence is not to be admitted; or again, the statute may be silent. (Emphasis added.)

The other relevant provisions of the Ordinance also favour a construction opposed to the existence of any derivative use immunity.

Thus, s.143 includes as instances when an inspector may be appointed the existence of circumstances suggesting: (i) "that the business of the company has been or is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose ..."; or (ii) "that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud ...".

The conduct envisaged in these provisions is obviously conduct likely to give rise to criminal (and other) liability. Where the concerns which led to the Inspector's appointment prove justified, it is hard to accept, in the absence of any express restriction, that the Ordinance should be construed as requiring him to keep the evidence of wrong-doing from the Financial Secretary or to require the Financial Secretary not to disclose it to the appropriate authorities. The public interest would certainly favour a construction enabling the Financial Secretary to inform all public authorities charged with duties which may be relevant to the misconduct uncovered, whether they be "prosecuting, regulatory, disciplinary or even legislative" authorities, to quote from *Saunders v United Kingdom* (1996) 23 EHRR 313. It would then be for such authorities to decide on any appropriate course of action.

Section 146(4) expressly authorises the inspector, at any time in the course of his investigation, "to inform the Financial Secretary of **(p.626)** matters coming to his knowledge as a result of the investigation tending to show that an offence has been committed". These are wide words apt to cover not merely an expression of the inspector's opinion, but his relaying to the Financial Secretary the evidence in support of his conclusion. In the absence of any express restriction, there is nothing to suggest that the Financial Secretary should be precluded from passing on such information to the appropriate authorities.

That the sanctioning of disclosure by the Financial Secretary to the Secretary for Justice was intended is evident from s.147. That section envisages prosecutions "arising from" a report or information supplied by the inspector and in such cases, it places a duty on all officers and agents of the relevant company (other than the defendant in the proceedings) "to give to the Secretary for Justice all assistance in connexion with the prosecution that they are reasonably able to give". The prosecution could hardly "arise from" such information if its disclosure by the Financial Secretary was forbidden.

Further support for allowing such disclosure can be derived from s.148. This creates a liability for the expenses of a company inspection on the part of "any person who is convicted by a court or magistrate on a prosecution instituted as a result of the investigation ...". A prosecution *resulting from* an inspection is very likely to include one where the authorities were provided with material to mount such a prosecution.

It follows that as a matter of statutory construction, the Financial Secretary (in the present case, acting through the Steering Group) was acting within the statutory purposes and not exceeding or abusing his powers in directing the Inspector to give the police access to testimony and information compulsorily obtained from the respondents.

Indeed, it appears that this was the Court of Appeal's view in the judicial review proceedings involving the Allied Group and the first respondent *(R v A-G, ex p Allied Group Ltd* (1993) 3 HKPLR 386) and that the contrary had not been argued. Penlington JA stated (at p.411):

> There can be no dispute, and indeed it is not suggested, that where there is evidence uncovered pointing to possible criminal conduct those responsible for the initiation of criminal proceedings should be made aware of those facts as soon as possible. I agree with Kaplan J that there is nothing sinister in the suggestion that the inspector should advise the Attorney-General as soon as any such information comes to his knowledge.

Similarly, Bokhary JA stated (at p.416):

> It is not suggested on behalf of any of the applicants that it would be wrong for an inspector who came across evidence of wrongdoing to draw such evidence to the attention of the appropriate authorities without delay.

(p.627)

These statements must be read in the light of the fact that in this case the Financial Secretary was acting as aforesaid after the Inspector had informed him, pursuant to s.146(4), that there was strong evidence of fraud.

D(viii) Paragraph (e) of the terms of reference

The respondents took a new point on appeal. This was the contention that para.(e) of the Inspector's terms of reference (requiring him "to obtain evidence in a form admissible in criminal or civil proceedings in respect of any matter which may constitute fraud or other offence against Hong Kong law that is identified in the course of the investigation") was*ultra vires*.

In the light of the foregoing discussion of a company inspector's role and the statutory purposes of an inspection, there is plainly considerable force in that contention. A direction to "obtain" evidence for possible use in criminal proceedings should not have featured in the Inspector's terms of reference.

It is, however, a point that the appellant was able to meet on the facts. As mentioned above, on 25 March 1993, obviously worried about this very matter, the Inspector indicated (and the Financial Secretary apparently accepted) that he would confine his activities under para.(e) in the manner referred to above. So limited, his conduct fell within proper bounds, consonant with the statutory purposes identified above.

D(ix) A free-standing derivative use immunity at common law?

Having found from a survey of certain authorities that a derivative use immunity as a free-standing doctrine was not well-established, Pang J nevertheless held that he was "prepared to recognise that the privilege of derivative use immunity should be enjoyed by a person within [Hong Kong] and this right is to be treated as an extension of his right to use immunity."

It would appear that the Judge was treating derivative use immunity as an immunity which exists independently at common law and is capable of surviving a statutory abrogation of the privilege against self-incrimination. Accordingly, in our case, although s.145(3A) abrogated the privilege and replaced it only with a direct use prohibition, saying nothing about any derivative use immunity, such an immunity nevertheless continued to exist "as an extension of" the respondents' "right to use immunity".

With respect, such a conclusion cannot be supported. The "use immunity" upon which the Judge proposed to graft a derivative use immunity "as an extension", can only be the direct use prohibition provided by s.145(3A) in place of the abrogated privilege. That "use immunity" or direct use prohibition does not arise as a matter of common law but by statute, and its scope is a matter of statutory construction. Any "extension" must be justified as a matter of construction. As **(p.628)** discussed above, on their true construction, far from supporting the existence of any wider derivative use immunity, the relevant provisions of the Ordinance strongly indicate that the Financial Secretary was at liberty to pass on compelled materials to the prosecuting authorities for their use in any contemplated prosecution.

Lord Mustill's *dictum* giving support has already been mentioned. His Lordship suggested that a statute which expressly provides that compelled evidence may not be used for certain purposes, inferentially permits its use for other, hence, derivative, purposes:*R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1 at p.40.

There is, in addition, strong persuasive authority from the Australian High Court against the survival of any derivative use immunity in cases where the privilege has been abrogated by statute. In *Hamilton v Oades and Corporate Affairs Commission of New South Wales v Oades & Another* (1989) 166 CLR 486, when construing s.541(12) of the Companies (New South Wales) Code, a provision materially similar to s.145(3A), Mason CJ stated as follows:

> ... s.541 is significant in three respects. First, it expressly abrogates the privilege. Secondly, it specifically provides that answers which may otherwise have been privileged are not admissible in criminal proceedings other than proceedings under the section or other proceedings in respect of the falsity of the answer. Finally, it explicitly empowers the court to give directions concerning the examination. The second and third matters just mentioned are designed to reduce any element of unfairness to the witness that may arise as a result of abrogation of the privilege: see *Sorby v The Commonwealth* (1983) 152 CLR 281 at p.295.
>
> Of course the section gives no protection to the witness against the use in criminal proceedings of derivative evidence, that is, evidence which is obtained from other sources in consequence of answers given by the witness in his examination. It would be difficult for Parliament to provide for specific protection against derivative use of such answers given by a witness. Immunity from derivative use tends to be ineffective by reason of the problem of proving that other evidence is

derivative: *Sorby v The Commonwealth* (1983) 152 CLR 281 at p.312. But in any case, by enacting s.541 without providing such specific protection, Parliament has made its legislative judgment that such action is not required and has limited specific protection to the possible consequences of direct use in evidence of the answers of the witness, thereby guarding against the possibility that the witness will convict himself out of his own mouth - the principal matter to which the privilege is directed. (at p.496)

Dawson J's judgment was to similar effect:

> The scheme of the present section, s.541, is such as to make the conclusion inevitable that the privilege against self-incrimination has **(p.629)** been excluded as a basis for refusing to answer a question. That is so whether the answer tends to incriminate directly by way of admission or indirectly by providing information from which guilt may be established. The character and purpose of the present section remain the same as in *Mortimer v Brown*, but there is now express provision excluding the privilege and providing a measure of protection which was previously unavailable to a person being examined, namely, the inadmissibility in evidence in criminal proceedings of an answer where the privilege has been claimed during the examination. As Mason and Wilson JJ and I pointed out in*Sorby v The Commonwealth* (1983) 152 CLR 281 at pp.310-1, the purpose of the latter provision can only be to give compensatory protection to a witness when the legislature abrogates the privilege. It may, however, be observed that the provision affords protection only in relation to incrimination of a direct rather than of a derivative kind. (at p.508)

The respondents sought to rely on *Sorby v The Commonwealth* (1983) 152 CLR 281, referred to in these quotations, as authority for the existence of a common law derivative use immunity which survives statutory abrogation of the privilege. At first sight, it may appear that passages in some of the judgments in that case support such a proposition. Thus, in the course of his analysis of United States constitutional jurisprudence on the privilege, Gibbs CJ appears to suggest that the common law reflects his description of the United States position as follows:

> ... it seems to be generally accepted in that country that the privilege requires the proscription of indirect, or derivative, use, as well as direct use, of the evidence which the witness was compelled to give, and that a statutory provision which prevents only the direct use of the evidence is not enough to destroy the privilege. (at pp.293-4)

However in their joint judgment, Mason, Wilson and Dawson JJ expressed the effect of the privilege in rather different terms. They said:

> As Gibbs CJ has demonstrated, s.14(2) in itself does not provide a protection to the witness which is coextensive with the protection given to him by the privilege. This is because the privilege protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character. (at p.310)

In my judgment, properly understood, *Sorby v The Commonwealth* (1983) 152 CLR 281 is not authority for the proposition advanced by the respondents. It was a case concerned with the effect of s.6DD of the Royal Commissions Act 1902 (Cth), as amended. That section provided as follows:

> **(p.630)**
> A statement or disclosure made by any witness in the course of giving evidence before a Commission is not (except in proceedings for an offence against this Act) admissible in evidence against that witness in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory.

It will be noted that, unlike our s.145(3A) (or s.541(12) of the Companies (New South Wales) Code), s.6DD says nothing about the privilege against self-incrimination or its abrogation. It merely imposes a general restriction on direct use against a witness of evidence given by him before a Royal Commission.

The High Court was therefore being asked to determine whether s.6DD had impliedly abrogated the privilege and it was in that context that the passages quoted above are to be found. Put at its highest, as expressed by Gibbs CJ, what the judges were pointing out was that an *unabrogated* privilege against self-incrimination, that is, a privilege to decline to answer questions, necessarily carried with it not only protection against direct but also derivative use of any self-incriminating answer. Accordingly, since the protection conferred by the direct use restriction imposed by s.6DD was not co-extensive with the protection conferred by an *unabrogated* privilege, the contents of s.6DD did not, without more, necessarily imply a legislative intention to abrogate the privilege. As Gibbs CJ put it (at p.295):

> To provide that the answers may not be used in evidence is not to reveal clearly an intention that the privilege should be unavailable, although, if the legislature did intend to remove the privilege, it might, in fairness, at the same time prevent the use in criminal proceedings of statements which otherwise would have been privileged.

Where, as in the present case, the words of the statute clearly abrogate the privilege and substitute for it a limited direct use prohibition, the privilege is abrogated in its entirety and the scope of the substituted protections, if any, becomes a matter of statutory construction. *Sorby v The Commonwealth* (1983) 152 CLR 281 is not authority for saying that a clear abrogation of the privilege coupled with an express direct use prohibition leaves intact a derivative use immunity at common law.*Hamilton v Oades*

and Corporate Affairs Commission of New South Wales v Oades & Another (1989) 166 CLR 486 is authority to the contrary.

Support in principle for the absence of any common law derivative use immunity can also be found in the cases concerning the admissibility of evidence derived from an inadmissible confession. Confessions are by definition self-incriminating and they are excluded where involuntary, being regarded as unreliable or unfair: *Lam Chi Ming v The Queen* [1991] 2 AC 212 at p.218. Lord Griffiths, giving the advice of the Board in that case stated:

(p.631)

> Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also *upon the principle that a man cannot be compelled to incriminate himself* and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary. (at p.220) (Emphasis added.)

Yet, even in cases where a confession is ruled to have been involuntary and inadmissible, evidence derived by the police from the knowledge acquired through that confession is admissible provided that the derivative evidence can be adduced without any reliance on the excluded confession. Lord Scarman in *R v Sang* [1980] AC 402, stated the principle in these terms:

> ... Long before 1898 [when the accused was given the right to testify on his own behalf], however, the courts were faced with the problem of reconciling fairness at trial with the admissibility of evidence obtained as a consequence of an inadmissible confession. The problem was resolved in *R v Warickshall* (1783) 1 Leach 263 by the court declaring, at p.300: "Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived ..." (at pp.453-4)

That principle was acknowledged in *Lam Chi Ming v The Queen* [1991] 2 AC 212.

The common law in this area of the law of evidence is therefore dealing with the situation where: (i) an accused's privilege against self-incrimination has been unlawfully abrogated by a confession being improperly obtained from him; (ii) the common law imposes a direct use prohibition by excluding the involuntary confession as inadmissible; *but* (iii) the common law admits independent evidence against the accused even though it is derivative evidence obtained by using the excluded confession (subject always to the court's general residual discretion to exclude evidence where this is necessary to secure a fair trial for the accused: *SJ v Lam Tat Ming & Another* (2000) 3 HKCFAR 168 at p.178, [2000] 2 HKLRD 431 at p.440).

These common law principles are quite inconsistent with the existence of any derivative use immunity surviving abrogation of the privilege. This conclusion appears to accord with the views of Lord Hoffmann in *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 412 where, discussing certain compulsory powers to obtain information conferred on a local authority, his Lordship stated:

(p.632)

> ... English law does not regard the use of evidence obtained in consequence of an involuntary statement in the same light as the admission of the statement itself: see *Lam Chi Ming v The Queen* [1991] 2 AC 212, in which Lord Griffiths said that an involuntary confession did not become admissible because it had led to the discovery of evidence which confirmed its truth. On the other hand, subject to the trial judge's discretion under s.78, evidence was not inadmissible merely because it had been discovered in consequence of an involuntary confession: see *R v Warickshall* (1783) 1 Leach 263. The appellants cannot therefore say that the possible use of evidence obtained in consequence of the information provided under s.71(2) would offend any policy of English law. (at p.421)

The respondents finally rely on a line of civil cases in support of their argument in favour of a common law derivative use immunity. These are cases decided in the course of the judicial development of the *Anton Piller* and *Mareva* jurisdictions. The respondents relied in particular on the following passage in the speech of Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380:

> ... whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: it is not only a possible but probably the intended result. The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences. (at p.443)

In my judgment, properly read in context, this is a passage that does not assist, but militates against the respondents' argument. In developing the *Anton Piller* jurisdiction the courts, particularly in intellectual property cases, had been granting orders made *ex parte* requiring the defendant to give immediate answers to interrogatories relating to the supply and sale of copyright or patent infringing goods. Some such infringements constituted criminal offences so that the question before the House of Lords was whether, when faced during an *Anton Piller* raid with an order of the court requiring an immediate and potentially self-incriminating answer to an interrogatory, the defendant was entitled to assert his privilege against self-incrimination and refuse compliance. The question was, in other words, whether the judicial order abrogated the privilege. The answer given by the House of Lords was that it did not do so and that, if factually justified, the defendant was entitled to assert the privilege and decline to

answer.

In the quotation cited, Lord Wilberforce was answering a submission by the plaintiff in favour of treating the privilege as abrogated on the **(p.633)** basis that the order for interrogatories could be made subject to an undertaking that the information would not be used in criminal proceedings. It was in rejecting that suggestion that Lord Wilberforce spoke of the need to protect a party from derivative use of the information. The words preceding the quoted passage are as follows:

> There are some further points on this aspect of the case. First, I do not think that adequate protection can be given by extracting from the plaintiffs, as a term of being granted an Anton Piller order, an undertaking not to use the information obtained in criminal proceedings. Even if such an undertaking were binding ... the protection is only partial, *viz* against prosecution by the plaintiff himself. Moreover, ...

It follows that what Lord Wilberforce was saying was that if the privilege were to be abrogated so as to require answers to the interrogatories on the terms of an undertaking approximating to a direct use prohibition, this would not give the defendant sufficient protection since it would not prevent "a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character" - in other words, derivative use. In principle, this is contrary to the respondents' argument because it shows that, if the privilege were to be abrogated by judicial order, there would be no residual common law derivative use immunity. The House of Lords decided in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 that the privilege should not be abrogated at all, thus protecting the defendant from both direct and derivative use of any answer.

Some ten years later, in *AT & T Istel Ltd v Tully* [1993] AC 45, the House of Lords retreated from such absolutist protection of the privilege in civil cases. They decided that where sufficient alternative protection could be devised, the order requiring disclosure had to be complied with notwithstanding a claim of privilege against self-incrimination. In that case, an undertaking given by the plaintiff in conjunction with a letter from the Crown Prosecution Service were taken to be sufficient alternative protection. Significantly, this was on the footing that the letter was construed as an undertaking by the potential prosecutor to make no use whatsoever, whether direct or derivative, of disclosures made in obedience to the court's order. This is made clear in the speech of Lord Lowry who stated:

> The words "prevent" and "independently" [in the letter] convey clearly to my mind that the prosecuting authorities regarded themselves as inhibited for all practical purposes from making use of material disclosed in consequence of the court order and that they felt free to pursue their own inquiries and to use material thereby discovered. I also think that, realistically speaking, the Crown Prosecution Service letter disposes of the potentially troublesome **(p.634)** question whether the authorities might have decided to follow up clues revealed by the primary disclosures on the part of the defendant. (at p.69, see also Lord Templeman at p.57 and Lord Ackner at p.63)

The underlying assumption as to the absence of any derivative use immunity at common law therefore remained unchanged. It is implicit in *AT & T Istel Ltd v Tully* [1993] AC 45, as much as it was in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, that an abrogation of the privilege against self-incrimination, even if accompanied by an undertaking against direct use, would not prevent derivative use. Protection against such derivative use had to be achieved by a form of order and an undertaking tailored for this purpose.

The conclusion that the foregoing analysis leads to is therefore that a "derivative use immunity" does not exist as a free-standing common law concept or doctrine. Where the privilege against self-incrimination is overridden, in the absence of any binding restriction on use (whether statutory, by judicial order, by undertaking or otherwise), self-incriminating answers thereby obtained are subject to unrestricted use. Where the use prohibition or restriction conferred in place of an abrogated privilege is limited, other use is inferentially permitted. Accordingly, in the present case, as a matter of statute and common law, the prosecution was entitled to make derivative use of the company inspection materials handed to the police by the Financial Secretary.

D(x) The effect of art.11(2)(g) of the Bill of Rights

Article 11(2)(g) of the Bill of Rights appears under the heading "Rights of persons charged with or convicted of criminal offence" and provides as follows:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (g) not to be compelled to testify against himself or to confess guilt.

Pang J held that the Inspector's activities were "a blatant violation of the respondents' rights under art.11(2)(g)" which, he appears to have held, became activated after the respondents were charged. He reached that conclusion by the following reasoning:

> A person's right against self-incrimination, in my view, can only be removed for the stated purpose of the legislation. Since the stated purpose of s.145(3A) is to facilitate the Inspector's enquiry, any suggestions that the answers could be used for any other purpose, or as in this case to facilitate police investigation, would be inconsistent with art.11(2)(g) if a person is eventually charged with a criminal **(p.635)** offence. It cannot be the intention of the legislature that s.145(3A) could circumvent the provisions of art.11(2)(g) of the Bill of Rights Ordinance.

With respect, that reasoning cannot be supported. Indeed, the respondents did not seek to support it on appeal.

It is necessary to identify the precise nature of the immunity conferred by art.11(2)(g). As Lord Mustill pointed out in R v Director of Serious Fraud Office, ex p Smith [1993] AC 1 at p.30, the general entitlement of every citizen "to tell another person to mind his own business", recognised as a starting point by the common law, has been subject to encroachment by common law doctrines and statutes so that the "right of silence" is more properly regarded as a disparate group of immunities which differ in scope and effect. For our purposes, the relevant starting point is the common law privilege against self-incrimination which, in Lord Mustill's words is:

> A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them. (at p.30)

It is self-evidently of a broad application, protecting every person against any questioner. It is, however, subject to statutory abrogation and was, as already discussed, abrogated by s.145(3A) of the Ordinance.

Article 11(2)(g), on the other hand, only applies to persons who face a criminal charge and the immunity then conferred is only a testimonial immunity, namely, the right "not to be compelled to testify against himself or to confess guilt". It is therefore of a much narrower scope than the common law privilege against self-incrimination and had no application at the time of the company inspection since neither respondent had been charged at that time.

Accordingly, when the Inspector interviewed the respondents in 1993, by operation of s.145(3A), their common law privilege was abrogated, and questions and answers, including possibly self-incriminating answers were elicited, thereafter being subject to the direct use prohibition imposed by the section.

When the respondents were charged, some years later, the privilege in relation to those questions and answers had long since disappeared and could not be revived. Having answered the Inspector's questions in 1993, there remained no relevant information for art.11(2)(g) to protect. Accordingly, there was no breach of the Article by the Inspector, "blatant" or otherwise.

As mentioned above, the real issues concern the lawfulness or otherwise of the prosecution's derivative use of the materials obtained from the Financial Secretary. Direct use is both prohibited and foresworn by the prosecution. Derivative use of independently obtained evidence, even if obtained pursuant to clues provided by the compelled testimony falls outside the purview of art.11(2)(g) since, in adducing such **(p.636)** independent, albeit derivative, evidence, the prosecution does not seek to compel either respondent to testify against himself or to confess guilt.

That art.11(2)(g) is inapplicable was indeed the conclusion reached by Jones J against the second respondent in *Re Ronald Tse Chu Fai* [1993] 2 HKLR 453. The appeal against that decision was dismissed without argument on this point. The Judge's decision on the basis of art.11(2)(g) cannot stand.

D(xi) A derivative use immunity based on arts.10 and 11(1) of the Bill of Rights?

Given that no derivative use immunity avails them either under the Ordinance, at common law or under art.11(2)(g), the respondents sought to argue that it was possible to deduce such an immunity as an indispensable part of the right to a fair trial and/or the presumption of innocence which are given constitutional protection by arts.10 and 11(1) of the Bill of Rights.

(a) Articles 10 and 11(1)

Those articles materially provide as follows:

> **Article 10: Equality before courts and right to fair and public hearing**
> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...
>
> **Article 11: Rights of persons charged with or convicted of criminal offence**
> (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(b) Saunders v United Kingdom

The respondents' argument appears to be inspired by the jurisprudence being developed by the European Court of Human Rights (ECHR) in respect of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950; Cmd 8969 (the Convention) and in particular by that Court's decision in *Saunders v United Kingdom* (1993) 23 EHRR 313.

> The Convention (now scheduled to the UK Human Rights Act 1998) confers the right to a fair trial in its art.6 which is relevantly in the following terms:
> 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to

a fair **(p.637)** and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

6(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

6(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Two features may immediately be noted. First, the fair trial and presumption of innocence provisions in arts.6(1) and 6(2) are not substantially different from arts.10 and 11(1) of our Bill of Rights. Secondly, the Convention does not have an equivalent of our art.11(2)(g) and contains no express provision regarding any privilege against self-incrimination.

In the absence of such an express provision, the ECHR has felt able to deduce the existence of such a privilege as an integral part of the art.6 rights: see the cases cited at *Halsbury's Law of England* (4th ed.), Vol.8(2), para.142 n.13. *Saunders v United Kingdom* (1996) 23 EHRR 313 is one such case, and is relied on by the respondents for the following passage in the judgment:

> ... although not specifically mentioned in art.6, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under art.6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art.6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence in art.6(2) of the Convention. (at p.337, para.68)

(p.638)

It is, however, important to grasp what the issues in *Saunders v United Kingdom* (1996) 23 EHRR 313 were. The applicant had been tried and convicted in connection with unlawful share support dealings during a contested takeover of a public company. Those criminal proceedings had been brought after a company inspection by inspectors appointed by the United Kingdom Department of Trade and Industry. The prosecution relied heavily on materials compulsorily obtained by the inspectors *by way of direct use against the accused at the trial*, a course which was then permitted under s.434(5) of the Companies Act 1985. Not only were the transcripts of his interviews referred to in opening and closing submissions, prosecuting Counsel actually spent three full days reading the questions and answers to the jury.

Accordingly, in holding that such proceedings violated the right to a fair trial under art.6(1) by infringing the accused's right not to incriminate himself, the ECHR was dealing with a case involving a statutory abrogation of the accused's common law privilege coupled with an express statutory *permission* for the resulting questions and answers to be directly used against the accused at his criminal trial.

Plainly, the respondents cannot succeed in their attempt to deduce a derivative use immunity solely on the basis of art.6(1) and *Saunders v United Kingdom* (1996) 23 EHRR 313. The use made by the prosecution of the compelled testimony in that case is expressly excluded by the direct use prohibition in s.145(3A) of our Ordinance. Accordingly, there is no need to*deduce* protection against such use in our case. So the exercise which the ECHR had to undertake is irrelevant in our legislative context. In any event, *Saunders v United Kingdom* does not purport to rule on whether a derivative use immunity is an essential part of a fair trial. The ECHR was careful to make clear the limits of its decision. As the Court pointed out:

> ... the Court's sole concern in the present case is with the use made of the relevant statements at the applicant's criminal trial. (at p.337, para.67)

It was, moreover, anxious to indicate the limits of the right against self-incrimination which it was deducing, excluding at least certain forms of compulsorily obtained evidence from its ambit:

> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. (at pp.337-8, para.69)

(p.639)

In these circumstances it is not surprising that in *Brown v Stott* [2001] SLT 59, the Privy Council, on an appeal from the High Court of Justiciary in Scotland, emphasised the limits of the privilege against self-incrimination deduced from art.6(1), stressing that it was not absolute in its operation.

This was a case involving a statutory power given to the Scottish police under the Road Traffic Act 1988, s.172(2)(a) to require someone to name the person driving a particular car at a stated time. An answer was potentially self-incriminating where, for instance, the person asked would have to name himself, thereby making it obvious that he had committed the offence of drunken driving. Such an answer had been given in *Brown v Stott* [2001] SLT 59 and the procurator fiscal made it clear that it was intended at the forthcoming trial of the respondent to lead evidence of the respondent's admission made under s.172(2)(a). It was therefore another *direct use* case.

The Privy Council held that even *direct use* of compulsorily obtained self-incriminating materials was not absolutely prohibited by art.6(1) but could be justified if it was not a disproportionate response to a serious social problem and did not undermine the accused's right to a fair trial viewed in the round. This was explained by Lord Hope as follows:

> ... the European Court and the European Commission have interpreted the article broadly by reading into it a variety of other rights to which the accused person is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self-incrimination with which this case is concerned. As these other rights are not set out in absolute terms in the article they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial. As *Keir Starmer*, p.182, para.4.75 has observed, where express restrictions are provided for by the Convention there is no room for implied restrictions. But where the European Court has read implied rights into the Convention, it has also read in implied restrictions on those rights.
>
> The test of compatibility with art.6.(1) which is to be applied where it is contended that those rights which are not absolute should be restricted or modified, will not be satisfied if the modification or limitation "does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved": *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at para.57. (At p.79, see also Lord Bingham at p.71, Lord Steyn at pp.72-5 and Lord Clyde at pp.83-4).

See also the recent Privy Council decision in *HM Advocate v McIntosh (Sentencing)* [2001] SLT 304 which applied this approach in relation to the presumption of innocence protected by art.6(2) of the Convention.

(p.640)

(c) Is use of derivative evidence unfair?

Although it is clear that *Saunders v United Kingdom* (1996) 23 EHRR 313 cannot get the respondents home, the issues in that case implicitly pose the fundamental question whether use of derivative evidence is inimical to the concept of a fair trial and/or the presumption of innocence. Is it not true that the direct use prohibition in the present case was enacted because such use of compulsorily obtained evidence would be unfair? If so, does it not logically follow that derivative use of that excluded self-incriminating evidence is also unfair?

The Privy Council in *Brown v Stott* [2001] SLT 59 decided that in some situations direct use of compulsorily obtained evidence will not be unfair for art.6(1) purposes. It concluded that, without impairing a fair trial, the privilege against self incrimination may be legislatively modified so as to permit the direct use of evidence compelled pursuant to legislative authority, where the legislation is directed to meeting a serious social evil and the modification satisfies the test of compatibility stated by Lord Hope. The proportionality test, which is part of the compatibility test, raises the question whether a fair balance has been struck between the general interest of the community in realising the legislative aim and the protection of the fundamental rights of the individual. The Privy Council's conclusion must be viewed against the broad requirement of art.6 of the Convention that the trial process in any given case has not been rendered unfair and the further requirement that the accused is not called upon to disprove his guilt.

Adopting this approach, which, in my view, is the correct approach, a similar conclusion should be reached in relation to a derivative use inferentially permitted by an abrogating statute in attempting to meet a genuine social evil.

Corporate fraud is today a matter of major concern which calls for strong regulation of the kind found in ss.142 to 152F of the Ordinance, particularly s.145(3A). Moreover, those who hold corporate office and are engaged in corporate activities, especially activities which impinge upon the public, are well aware of the existence of the legislative regulatory regime and that compliance with its provisions is a necessary condition of participation in those activities.

No one could seriously argue that it is wrong or unfair for the legislature to empower an inspector to investigate the facts where circumstances suggest that a company's affairs may be conducted with intent to defraud others. As discussed above, where the investigation confirms such fears, the public interest in protecting the public from fraud strongly suggests in principle that the product of the investigation should be made available to the appropriate public authorities. Balancing against that public interest the important countervailing public interest in an accused being assured of a fair trial, the solution adopted by s.145(3A) appears to be entirely acceptable and consistent with the purposes of arts.10 and 11(1). The legislature has struck a balance which allows the Inspector to abrogate the privilege but subjects the elicited evidence to a direct use prohibition, inferentially permitting derivative use.

(p.641)

In evaluating this balance, it is important to bear in mind that the purpose of the privilege is to respect the will of the accused to remain silent, thereby ensuring that the accused is not compelled to provide proof of his or her guilt. The privilege has no

application to evidence which exists independently of the will of the accused. This proposition was expressly recognised in *Saunders v United Kingdom* (1996) 23 EHRR 313 at para 69. Indeed, in my judgment, there is much to be said for the general proposition that there is no inherent unfairness in establishing a person's guilt by the use of reliable objective evidence obtained from an independent source, even if the acquisition of that evidence was facilitated by clues contained in the excluded admissions. This view accords with common law doctrine based on *R v Warickshall* (1783) 1 Leach 263 and the cases approving it, cited above.

Taken in the foregoing context and also in the context of our trial procedures as a whole (including the court's residual discretion to exclude evidence to secure the fairness of the trial), the absence of a derivative use immunity does not mean that an accused will not receive a fair trial. Nor does it undermine the presumption of innocence.

(d) The respondents' reliance on the Canadian cases

In an attempt to bridge the obvious gap in their argument based on *Saunders v United Kingdom* (1996) 23 EHRR 313, the respondents invited the Court to follow the approach adopted in a series of Canadian decisions which arose in the context of the Canadian Charter of Rights and Freedoms (the Charter): *Thomson Newspaper Ltd v Canada (Director of Investigation & Research)* (1990) 67 DLR (4th) 161; *RJS v The Queen* (1995) 121 DLR (4th) 589; and *British Columbia Securities Commission v Branch* (1995) 123 DLR (4th) 462.

> The effect of these complex decisions may (hopefully without doing them too much injustice) be summarised as follows.
>
> The Canadian Charter contains in its s.13, protection against self-incrimination in the following terms:
>
> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

It follows that, unlike the position under the Convention, the Charter makes some express provision for protection against self-incrimination. However, it will also be noted that this is a provision which is much narrower in scope than the direct use prohibition contained in s.145(3A). It only avails a witness who testifies in proceedings and operates only by prohibiting adverse use of his testimony in any other proceedings.

It is therefore perhaps unsurprising that the Canadian Supreme Court (like the ECHR) took steps to broaden the use protection available where the privilege is abrogated. The vehicle for doing so was s.7 of the Charter which provides as follows:

(p.642)

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court held that the privilege against self-incrimination had the status of "a principle of fundamental justice" and so was entitled under s.7 to constitutional protection extending beyond the narrow confines of s.13. However, such protection was not absolute (in contrast with the approach under the Fifth Amendment of the United States Constitution). Therefore it was constitutionally possible for a statute to abrogate that privilege provided that any such abrogation was accompanied by alternative measures providing protection co-extensive with that which a citizen would enjoy with his privilege against self-incrimination still intact. After initial doubts as to the nature and extent of the alternative protection required, the Court appears to have settled on it taking the form of a direct use prohibition plus a "partial derivative use immunity".

Such a derivative use immunity was held only to arise where first, the accused discharged an evidential burden of showing that "but for" reliance on his compelled testimony, the derived evidence could not, as a matter of logical probability, have been obtained by the prosecution; and, secondly, where the prosecution failed to discharge its consequential burden of showing that it had acquired that evidence independently and without reliance on the compelled testimony. In such cases, the judge was given a discretion as to whether to exclude the derived evidence.

This much simplified account of the relevant Canadian decisions is sufficient to demonstrate the magnitude, indeed, the impossibility, of the task facing the respondents. The Canadian jurisprudence does not provide any basis for deducing a derivative use immunity in the HKSAR.

The Canadian case law developed in a highly specific context, responding to the peculiar statutory and constitutional needs and values of that jurisdiction. As with the ECHR, the Canadian Supreme Court was moved to deduce or imply rights against self-incrimination in response to protection which was evidently considered too narrow. Given the width of the existing direct use prohibition in our case and the protection generally available under art.11(2)(g), no similar exercise is called for in Hong Kong. Echoing the comment of Lord Hope in a different context in *Brown v Stott* [2001] SLT 59, it is appropriate to say that the questions which the Supreme Court of Canada was asking itself are not the same as those arising in this case and there are differences in detail.

In any event, in the constitutional, legislative and common law context of the HKSAR, and in line with the approach adopted in *Brown v Stott* [2001] SLT 59, the impact of directly or derivatively using compulsorily obtained evidence on the fairness of a trial and on the presumption of innocence must be assessed, not in absolute terms, but **(p.643)** by balancing the competing public

interests, and not by focussing on one aspect, such as the absence of any derivative use immunity, in isolation, but by taking the trial process as a whole.

There is accordingly no basis for contending, in the present case, that arts.10 and 11(1) of the Bill of Rights require the Court to deduce a derivative use immunity in favour of the respondents.

E. Was the prosecution an abuse of process because of official misconduct in connection with the judicial review applications?

Having concluded that neither the handing over of the materials to the police nor its derivative use by the prosecution involved any abuse of power nor any abuse of the court's process, the question that now falls to be considered concerns two discrete, but related incidents alleged by the respondents to constitute an independent abuse of the court's process. These were incidents connected with the judicial review proceedings initiated against the Inspector in May 1993.

E(i) Mr McMahon's affidavit

As indicated above, Mr McMahon was the SFC's representative on the Steering Group and on 12 February 1993, he returned his copy of a draft chapter of the report to the Inspector containing his handwritten annotations and comments. He, along with other members of the Steering Group, had been asked to comment on the format of the draft in view of the suggestion that an abridged report might be published to meet concerns about the publicity jeopardising the contemplated prosecution.

However, apart from some editing points, Mr McMahon offered comments which were plainly of substance. Thus, where the draft stated that the Inspector thought a particular explanation from the first respondent was implausible, Mr McMahon commented:

> Surely it can be stronger than this! Cannot the word "untruthful" be used.

Where in the draft, the Inspector stated that a certain matter represented "a genuine error and that no individuals were culpable in this regard", Mr McMahon wrote:

> This is being a little kind to AGL directors ...

Where the Inspector's draft stated: "I am satisfied that Paul Ng was not aware of [a criticised] scheme I have described", Mr McMahon commented:

> This is being a bit kind to Mr Ng. Please review the statement.

(p.644)

At the end of the draft chapter, Mr McMahon wrote:

> Comment: CCB should have enough, even now, to charge LMT, RT and LSC ...

The argument advanced on appeal did not focus on whether comments of this nature should have been made at all. It is therefore unnecessary to decide that question. The respondents' complaint centred on what happened in May 1993, some 31/2 months later, when the first respondent, AGL and APL sought leave to apply for judicial review contending that the Steering Group's involvement had compromised the Inspector's independence or the perception of his independence and seeking a stay of the inspection.

Faced squarely with the issue of the Inspector's independence and of his relationship with persons on the Steering Group, Mr McMahon swore an affidavit on 2 June 1993 in which, among other things, he stated:

> I can assure the applicants that the Inspector has not sought my opinion in relation to the conclusions he is reaching in respect of the inspection and nor have I offered any opinions in relation thereto ... I have not sought to nor have I in any way improperly influenced the Inspector or prevented him from adopting an independent approach to his investigation.

Kaplan J dismissed the application, holding that there was no evidence whatsoever of bias or of any matters giving rise to a perception of bias: Re Allied Group Ltd [1994] 1 HKLR 299, this ruling being upheld by the Court of Appeal: R v A-G, ex p Allied Group Ltd (1993) 3 HKPLR 386.

Pang J was severely critical of Mr McMahon's affidavit and of the fact that it had been put forward to the Court on the Inspector's behalf. The Judge's criticism was entirely justified. There is no doubt that it was inaccurate and highly misleading of Mr McMahon to state that he had not offered his opinions or sought to influence the Inspector's views. He clearly had. The draft chapter and comments by members of the Steering Group had not been forgotten as they were mentioned (in anodyne terms) by the Inspector in his own affidavit filed contem-poraneously. When faced with the respondents' complaints before Pang J, the prosecution had considered calling Mr McMahon and had ample opportunity of doing so. But he was never called and has never tendered any explanation to the Court about the contents of his affidavit.

The respondents point out that in the final report, certain changes along the lines suggested by Mr McMahon were in fact made. One is obviously unable to say why this occurred or whether the changes resulted from Mr McMahon's comments, particularly

since the Inspector swore an affidavit saying that he had reached his conclusions (p.645) independently. That, however, is not the point. The Court is entitled to expect candour and honesty in evidence presented to it by public officials acting as regulators and guardians of the public interest. Mr McMahon's affidavit fell far short of what was required.

E(ii) The reply to the LWD inquiry
In May 1993, LWD, the respondents' solicitors, wrote asking the Financial Secretary for information about the Steering Group in the context of the same proceedings, describing the involvement of the Steering Group as a matter with "serious implications for the on-going investigation."

A draft letter responding to LWD's queries was prepared for the Financial Secretary and shown to the Inspector. It stated that no formal individual appointments to the group had been made but indicated that representatives of the Financial Services Branch, the Attorney-General's Chambers and the SFC, regularly attended, adding: "Other persons have attended, from time to time, as appropriate" but declining to name them.

The letter was re-drafted by the Inspector's solicitors, Herbert Smith, deleting the reference to others attending the Steering Group meetings on the ground that:

> ... it may not be advisable to inform them that other (unidentified) persons have attended from time to time. To do so may put [LWD] on a train of enquiry and while, for instance, we consider the CCB's occasional attendance at our meetings is unobjectionable we do not wish to give them fuel for an unmeritorious argument that the CCB have been in some way influencing the course of the inspection.

In consequence, when Mr Tam's letter went back to LWD, it identified the members of the Steering Group as himself, Mr McMahon and Mr JT Allen of the Attorney-General's Chambers, saying nothing about any other persons attending and declining further answers to the queries received.

The letter represents a regrettable misjudgment on the part of the Inspector and his solicitors. Viewed in context, it was a less than candid reply likely to have been misleading. By identifying three members and saying nothing about anyone else, it naturally suggests that there was no one else on the Steering Group.

While the explanation for this exceedingly guarded behaviour is evident from the advice given by the solicitors, it was not the right approach to take. Of course the work of such a group requires and is entitled to the protection of confidentiality. However, when it was clear that the respondents' solicitors were expressing what were plainly legitimate concerns about having a Steering Group "steer" a company inspection in which their clients were principally involved - these being concerns that the Inspector had himself been advised about from (p.646) the outset - it was incumbent on the Inspector and his advisers to be candid to such properly interested parties about the arrangements. The advice to the Inspector throughout had been that, subject to the precautions taken, the arrangements involving the police were quite proper. It is therefore regrettable that these arrangements were not simply disclosed and defended.

E(iii) A stay on the basis of these complaints?
Without in any way diluting the force of the criticisms which it has been unfortunately necessary to voice, it does not follow that these matters justify a stay of the prosecution.

The incidents complained of do not themselves pose any threat to the possibility of a fair trial for the respondents. Nor, in the event, did they result in any unfairness to them. Mr Caplan submitted that but for the concealment of the facts, Kaplan J was likely to have given leave to proceed with the judicial review and that, in consequence, the respondents had been deprived of the chance to challenge the Inspector's arrangements with the police and in the Steering Group. Such deprivation was temporary. The Inspector's arrangements eventually came to light when the prosecution provided the respondents with "unused material", leading to the stay application where all such challenges to the inspection were fully canvassed.

The rarity of situations where a stay is justified even though the fairness of the trial is not in doubt has been mentioned in section C of this judgment. In R v Horseferry Road Magistrates Court, ex p Bennett [1994] 1 AC 42, where such a stay was granted, the abuse was (on assumed facts) extreme. Lord Bridge described it in the following terms:

> ... the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing ... (at p.64)

It was an abuse which his Lordship described as calling into question "the maintenance of the rule of law itself" (at p.67). Moreover, but for such abuse, the accused would not have been brought within the court's jurisdiction at all, plainly a reason for suggesting that the court should decline to exercise jurisdiction so unacceptably acquired. As Lord Lowry described it, the case was one in which:

... it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances. (at p.74)
(p.647)

In *R v Latif* [1996] 1 WLR 104, the House of Lords gave valuable guidance as to how such applications should be approached. Lord Steyn, with whom the other Law Lords agreed, pointed out that where some form of official misconduct was involved in the alleged abuse of process, the court is faced with a "perennial dilemma":

If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. (at p.112)

The solution adopted was as follows:

The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: R v Horseferry Road Magistrates Court, ex p Bennett [1994] 1 AC 42. (at p.112)

Lord Steyn added:

The speeches in R v Horseferry Road Magistrates Court, ex p Bennett [1994] 1 AC 42 conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means. (at pp.112-3)

In R v Latif [1996] 1 WLR 104 itself, the House of Lords, applying these principles, upheld the lower courts' refusals of a stay. The case **(p.648)** involved two men convicted of offences concerning a scheme for the smuggling of 20 kg of heroin into the United Kingdom from Pakistan. The scheme had been worked out with an undercover agent of the customs and excise authorities. The defendants contended, and the Trial Judge found, that that undercover agent had lured them into the United Kingdom by trickery and deception. However, they had travelled there voluntarily, having been willing participants in the scheme which had always been aimed at importing the heroin into the country.

On such facts, it is easy to see why the discretion was exercised against any stay. The men were international drug-traffickers who had targeted the United Kingdom. Deceptive subterfuges of the kind used were not in any sense disproportionate to the seriousness of the dangers they posed. They were also, in practical terms, necessary if such drug-traffickers were to be apprehended. As Lord Steyn pointed out, Lord Griffiths had made this observation in Somchai Liangsiriprasert v United States [1991] 1 AC 225 where he stated:

It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red letter day for the drug barons. (at pp.242-243)

There can be no doubt that the official misconduct complained of in the present case, while to be deprecated, falls very far short of "an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed". For the trial to go ahead despite the incidents attending the judicial review proceedings would not "be contrary to the public interest in the integrity of the criminal justice system".

It seems clear that Pang J did not base his decision to stay the proceedings on the abuse of process ground solely or even substantially on the judicial review incidents. He did so on the footing that the arrangements for supply of information to the police were unlawful and a blatant breach of the respondents' rights. As he put it in his judgment:

Violation of a respondent's fundamental right in common law or a right which is recognised by the Bill of Rights Ordinance, must be, in my view, a most compelling ground to stay any criminal proceedings brought against a respondent in violation of such rights.

The premise on which the Judge exercised his discretion was therefore his finding of unlawfulness on the Inspector's part. For the reasons **(p.649)** stated above, the finding was wrong in law so that such exercise of discretion on the abuse of process ground cannot stand. Nor do the judicial review complaints provide any independent basis for a stay.

F. Prejudicial publicity as the ground for a stay

Before embarking on a discussion of the merits of the stay granted on the prejudicial publicity ground, it is necessary to consider the objections raised by Mr Caplan and Mr Plowman against the attack mounted by Mr Thomas on the Judge's decision on publicity. They contended that it was an attack on the Judge's exercise of discretion and on his approach to the facts which fell

outside the scope of the appeal and was therefore not open to the appellant.

F(i) The scope of the appeal
Section 31 of the Hong Kong Court of Final Appeal Ordinance (Cap.484) (the Court's statute) provides that:

> An appeal shall, at the discretion of the Court, lie to the Court in any criminal cause or matter, at the instance of any party to the proceedings, from:
>
> (a) any final decision of the Court of Appeal;
> (b) any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal.

The words "in any criminal cause or matter" are wide enough to embrace:

> ... a decision by way of judicial determination of any question raised in or with regard to proceedings the subject-matter of which is criminal, at whatever stage ... it arises. (Ex p Alice Woodhall (1888) LR 20 QBD 832 at p.835 per Lord Esher MR; applied Cuoghi v Governor of Brixton Prison [1997] 1 WLR 1346 at p.1350 per Lord Bingham of Cornhill CJ.)

The present appeal, being an appeal by the Government against a trial judge's decision ordering a permanent stay of a prosecution, is rare among those appeals which come to this Court via the s.31(b) route, such appeals usually being those from the Court of First Instance as a court hearing appeals from the Magistrates Court.

There are two bases on which leave can be obtained to bring a criminal appeal to this Court. Both are contained in s.32 of the Court's statute which provides that leave to appeal in a criminal cause or matter to this Court from the Court of Appeal or the Court of First Instance shall not be granted unless:

(p.650)

> ... it is certified by the Court of Appeal or the Court of First Instance, as the case may be, that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done. (s.32(2)).

The "point of law" and the "substantial and grave injustice" limbs are two distinct limbs. Under the "point of law" limb, leave to appeal is to be sought by showing that such a point is involved and is at least reasonably arguable in favour of the applicant.

Under the "substantial and grave injustice" limb, leave to appeal is to be sought by showing that it is at least reasonably arguable that such injustice has been done to the applicant. The difference between these two limbs was explained thus by this Court in So Yiu Fung v HKSAR (1999) 2 HKCFAR 539:

> This Court's primary role in the administration of criminal justice is to resolve real controversy on points of law of great and general importance. For this Court does not function as a court of criminal appeal in the ordinary way. However the "substantial and grave injustice" limb of s.32(2) exists as a residual safeguard to cater for those rare and exceptional cases in which there is a real danger of something so seriously wrong that justice demands an enquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of great and general importance. To obtain leave to appeal under this limb, an appellant has to show ... that it is reasonably arguable that substantial and grave injustice has been done. (at pp.541-542)

If an applicant wishes to rely upon both limbs, application for leave to appeal should be sought on both bases (Zeng Liang Xin v HKSAR (1997-98) 1 HKCFAR 12 at p.22, per Li CJ).

Although it is not necessary to decide the point, there appears to be no reason why the Government cannot obtain leave to appeal under the second limb against the grant of a permanent stay of a prosecution.

In the present case, the Judge certified pursuant to s.32(2) that six questions of law (which he identified) involved in his decision were of great and general importance. When granting leave to appeal, the Appeal Committee refined these six questions into the five certified questions set out in section A of this judgment. Leave was neither sought nor granted on the "substantial and grave injustice" limb.

The respondents submit that, in these circumstances, the scope of the appeal is limited to a determination of the five certified questions and that the Court cannot review the Trial Judge's findings of fact or generally review his exercise of discretion "in all the circumstances". This limitation, so the argument runs, arises from the grant of leave on the "point of law" limb alone and from the absence of any intermediate appeal to the Court of Appeal from a final decision of the Court of First Instance (s.31(b)). The jurisdiction of the Court of Appeal **(p.651)** does not extend to entertaining an appeal from a stay order imposed by the Court of First Instance. Its criminal jurisdiction is restricted to the matters set out in the High Court Ordinance (Cap.4) s.13(3).

In relation to the provisions relating to certifying points of law of general public importance in s.1 of the Administration of Justice Act 1960, governing appeals to the House of Lords in a criminal cause or matter, Lord Denning considered that all points are open on an appeal to the House of Lords as well as the point stated (A-G for Northern Ireland v Gallagher [1963] AC 349 at p.383).

Lord Goddard (at p.369) seemed to be of a similar opinion as was Lord Reid who stated (at p.368) that "the section does not limit this House to the question certified and matters consequential on its decision of that question". But his Lordship expressly reserved the question whether it was open to an appellant to raise matters wholly unrelated to the question certified. Lord Tucker considered (at p.370) that once the lower court certified that a point of law of general public importance was involved in the decision and leave to appeal was granted, there was nothing to limit the jurisdiction, though it was a matter for the House of Lords' discretion whether to allow a point wholly unrelated to the certified point of law to be argued.

The views expressed by their Lordships against an appeal restricted to the question certified were based on two propositions. The first was that the certificate provision in s.1 simply defined the conditions on which leave could be granted and that once leave was granted its purpose was spent. The question, as with s.32(2) of the Court's statute, was certified as being involved in the decision to be appealed from. It was not certified as a question for the opinion of the House of Lords.

The second proposition was that the section authorised the House of Lords, in dealing with the appeal, to exercise any of the powers of the Court below. The same comments may be made about the legislation in the present case: see s.17 of the Court's statute.

The one distinguishing feature in the present case is the absence of an intermediate appeal to the Court of Appeal. This circumstance as well as the Privy Council's unique position as an ultimate court of appeal dealing with appeals by special leave from various jurisdictions led to the statement made by Lord Woolf in A-G of Hong Kong v Charles Cheung Wai Bun [1993] 1 HKCLR 249 at p.252, [1994] 1 AC 1 at p.5 that the Privy Council does not act as a court of appeal in relation to findings of fact made by a trial judge on an application for a stay order. See also Sattar Buxoo v The Queen [1988] 1 WLR 820.

Like the Privy Council, this Court does not usually act as a general court of appeal in relation to findings of fact on an appeal from an order granting or refusing a stay of a prosecution. However, in accordance with the approach taken in A-G of Northern Ireland v Gallagher [1963] AC 349, this Court has jurisdiction to determine all questions which are related to the points which have been certified. The Court therefore has jurisdiction to review findings of fact in exceptional cases when those findings are related to the certified points.

(p.652)

In determining whether to grant or refuse a stay of prosecution, the trial judge exercises a judicial discretion. The discretion will be reviewed on appeal, if the judge acts on a wrong principle (as Pang J has been held to have done in relation to the alleged abuse of power by the Inspector), if he mistakes the facts, if he is influenced by extraneous considerations or fails to take account of relevant considerations. And if it should appear that on the facts the order made is unreasonable or plainly unjust, even if the nature of the error is not discoverable, the order made will be reviewed. See House v The King (1936) 55 CLR 499 at p.505; see also Evans v Bartlam [1937] AC 473; Wade and Forsyth, Administrative Law (8th ed.) 926 et seq.

Failure to give weight or sufficient weight to relevant considerations will also vitiate the exercise of a judicial discretion but only if that failure is central to the exercise of the discretion: Charles Osenton & Co v Johnston [1942] AC 130 at pp.138, 142 and 147; or in other words, where it amounts to a failure to exercise the discretion entrusted to the court (Mallet v Mallet (1984) 156 CLR 605 at pp.614, 622).

It is never enough to justify the review that the appellate court itself would have exercised the discretion differently. Error on the part of the primary judge is an indispensable condition of review.

Question 5 is specifically directed to the principles according to which the judicial discretion to stay a prosecution was to be exercised in the circumstances of this case. The other questions relate to other matters relevant to the exercise of the discretion.

It follows that in this appeal against the Trial Judge's order for a permanent stay, the Court has jurisdiction to determine whether the Judge's discretion was exercised in accordance with law and this jurisdiction extends to deciding whether the Trial Judge misapprehended the facts.

F(ii) The approach to prejudicial pre-trial publicity

As pointed out in section C of this judgment, the Court approaches stay applications where a fair trial is said to be impossible regarding "fairness" in practical rather than absolute terms and placing its faith primarily in the efficacy of measures available to overcome any potential unfairness. It will only consider granting a permanent stay as a last resort.

This approach very much applies to stay applications based on prejudicial pre-trial publicity. In a society where the press is free it is inevitable that the reporting of crime will, in some sections of the media, be lurid and sensationalist, sometimes even at the risk of punishment for contempt. The more heinous or shocking a particular crime, the more it is likely to be given notoriety and to receive potentially prejudicial reporting. Jurors will therefore almost certainly have been exposed to some degree to such media coverage, prejudicial to the accused. Plainly, it is not in the public interest to permit this in itself to abort the prosecution of a person accused of such serious crimes.

(p.653)

This was dramatically illustrated in R v West [1996] 2 Cr App R 374, a case of alleged serial murders which stimulated intensive and repeated sensationalist press reports which were highly prejudicial to the applicant and to her deceased husband (who had committed suicide whilst in prison awaiting trial). Lord Taylor LCJ stated:

> The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. (at p.386)

In some cases, adverse publicity may require an adjournment of the trial or a change of venue (possibly, on the prosecution's application, to the District Court) or, on appeal after conviction, it may lead the appellate court to order a re-trial. However, a permanent stay, leading to the accused being discharged, is exceedingly rare. In most cases, while acknowledging that special care must be taken to counteract the possible effects of prejudicial publicity, the court places its faith in the jury, properly directed, to secure a fair trial for the accused.

This was the approach of the Court of Appeal in R v West [1996] 2 Cr App R 374 (at p.386) and also the approach adopted by the Australian High Court in The Queen v Glennon (1992) 173 CLR 592:

> The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. (Mason CJ and Toohey J at p.603)

In the Scottish case of Stuurman v HM Advocate [1980] JC 111, a trial was allowed to continue and leave to appeal against that ruling refused, notwithstanding the fact that a newspaper and a radio station had pleaded guilty to and been punished for contempt of the "gravest character" in relation to their prejudicial reporting of the case. The test applied, similar to that applied in many of the cases and in many jurisdictions, was as follows:

> ... whether the risk of prejudice is so grave that no direction of the trial Judge, however careful, could reasonably be expected to remove it. (Lord Justice-General Emslie at p.122)

Reliance on the integrity of the jury and its ability to try the case fairly on the evidence, to put aside extraneous prejudice and to follow the directions of the judge is fundamental to the jury system itself. Thi**(p.654)** was emphasised by Mason CJ and Toohey J in The Queen v Glennon (1992) 173 CLR 592:

> In Murphy v The Queen (1989) 167 CLR 94 at p.99, we stated: "But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury". The matter was put this way by the Ontario Court of Appeal in Reg v Hubbert (1875) 29 CCC (2d) 279 at p.291: "In this era of rapid dissemination of news by the various media, it would be naïve to think that in the case of a crime involving considerable notoriety, it would be possible to select twelve jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence." To conclude otherwise is to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge. (at p.603)

This also reflected Lord Avonside's views in Stuurman v HM Advocate [1980] JC 111 (at p.117):

> It must be assumed that jurors will behave with propriety and that they will exclude from their deliberations all matters which were not given in evidence in court in the course of a trial. If this assumption is not made then trial by jury would be meaningless in this sense, that if it were accepted that directions in law might be disregarded or disobeyed the justification for trial by jury in indictment proceedings would collapse.

There is good sense in regarding a jury, properly directed, as able to overcome prejudicial publicity in the vast majority of cases. First, with the passage of time, any recollection that a juror may have of adverse publicity can be expected to fade, lessening its prejudicial effect. This was a factor taken into account, for example, in Stuurman v HM Advocate [1980] JC 111, where the publications occurred less than four months before the start of the trial. Lord Justice Justice-General Emslie stated:

> In considering the effect of these publications at the date of trial the Court was well entitled to bear in mind that the public memory is notoriously short and, that being so, that the residual risk of prejudice to the prospects of fair trial for the applicants could reasonably be expected to be removed by careful directions such as those which were in the event given by the Trial Judge. (at p.123)

The curative properties of a lapse of time were acknowledged by Lord Hope in the recent decision of the Privy Council in Montgomery v HM Advocate (unrep., 19 October 2000), where he stated:

(p.655)

> The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard. (Internet transcript at p.34 of 42)

Secondly, the jury may sensibly be credited with the ability to overcome any pre-trial prejudice because of the nature and atmosphere of the trial process itself. Whatever impression of the case members of the jury may have gained beforehand, at the

trial, they are given direct, first-hand access to the actual evidence in the case, presented systematically and in detail, with live witnesses tested by cross-examination and exhibits tendered for inspection. They are addressed as to the significance of such evidence by counsel on both sides and guided by the impartial summing-up of the judge. Many jurors will already harbour a healthy scepticism about certain kinds of press reporting. They can be credited with the intelligence to realise that whatever may have been reported, they are far better placed at the trial to make up their own minds on the evidence, with the help of the judge's direction. It is well-recognised that in such circumstances, immersed in what Lawton J called "the drama of a trial" (R v Kray (1969) 53 Cr App R 412 at p.415), the residual effects of any prejudicial pre-trial publicity on the minds of the jury are likely to be minimal.

This view accords with that expressed by Lord Hope in Montgomery v HM Advocate (unrep., 19 October 2000):

> The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict. (Internet transcript at pp.34-35 of 42)

A similar approach was adopted by the Court of Appeal in HKSAR v Yip Kai Foon [1999] 1 HKLRD 277.

Mr Caplan placed considerable emphasis on the fact that here, the source of the prejudicial publicity was not the media, but a high public official whose views were likely to be more influential. Whether or not a potential juror would draw such a distinction, the point does not make any significant difference.

F(iii) The Judge's exercise of discretion vitiated

The Judge quite rightly criticised the Financial Secretary's decision **(p.656)** to publish the report. It was unprecedented both in Hong Kong and in the United Kingdom and had, until the last moment, faced persistent objection from the Attorney-General's Chambers and the Inspector's solicitors.

As is accepted by Mr Thomas, even in its abridged version, the report was prejudicial to the respondents, especially the first respondent. It would have been clear, for example, to all concerned that the issues at trial would include the question whether and to what extent the first respondent had known and approved of certain unlawful transactions. In several places, the abridged report expressed the Inspector's opinion attributing relevant knowledge to him. As Pang J pointed out:

> After making numerous adverse findings regarding the credibility and the activities of the defendants, the Inspector concluded ... by stating that as a result of the investigation, he was of the opinion that the activities of [both respondents] tend to show that criminal offences had been committed.

The spectacle of a Financial Secretary pressing for publication and calling a press conference to publicise the report, knowing that a prosecution was intended but willingly taking the risk that the trial might be prejudiced is unedifying. This is all the more so since his decision to publish appears to have been almost wholly driven by the politically-motivated desire of deflecting criticism by members of the Legislative Council as to the cost of the inspection directed at himself. The notion that this was in aid of governmental transparency does not bear examination. Such transparency is laudable, but no one could reasonably suggest that it should be pursued at the risk of prejudicing a person's criminal trial on a serious charge. Publication could in any event have taken place after the trial.

The reasons given by the SFC for publication do not bear scrutiny either. Prior to publication, the police raids on Allied Group offices had received widespread publicity. The Group's shareholders and creditors, the Stock Exchange and the investing public in general were already fully aware that suspicion of wrongdoing had fallen on the Group's management. They did not need the abridged report to tell them of that fact or to show that suspected financial wrongdoing would be pursued.

The report should never have been published before the trial was over.

However, despite all these considerations justifying his criticism of the authorities, it does not follow that the Judge was right to stay the prosecution on the ground of the report's publication. The power to stay does not involve the court's exercising any disciplinary jurisdiction over public officials who may have provided the grounds for the stay application.

Bearing in mind the principles governing stay applications in general and pre-trial prejudicial publicity in particular, it is clear, with **(p.657)** respect, that the Judge erred in his decision to grant a permanent stay on the prejudicial publicity ground.

Having considered the facts, Pang J stated his conclusion on the abuse of power ground as follows:

> ... not only was the Inspector ultra vires, the way in which he subsequently responded to the challenges by the first and second defendants in the judicial review proceedings, and the orchestrated drama with the police clearly shows that he was

in abuse of his powers.

This led to his view that:

> The series of co-ordinated events must have created an indelible impression of guilt to those who had any form of exposure to the media.

He stressed the seriousness of the fact that the prejudice emanated, not from the press, but by the conduct of publication "with the sanction of top Government officials", concluding as follows:

> Looking at the events in its proper context, the publication of the report, the press conference and the police raid were co-ordinated moves by the authorities and calculated to achieve maximum publicity ... It would be ironical now for the authorities to argue that the carefully orchestrated objective of the authorities to bring about maximum adverse publicity has not been attained at the time or had since faded with the passage of time.

The Judge mentioned submissions made about the efficacy of the Judge's directions to counteract prejudice. However, he did not indicate why such measures might not be effective in the present case. He merely focussed on the suggestion that, if necessary, potential jurors could be individually questioned and vetted to ensure that they had not been prejudiced and rejected it stating:

> I am of the view that any exercise of jury vetting is counter-productive. Even if such a course is taken at the trial, it would still leave the defendants at risk. On a broader front, the prosecution should not be permitted to invoke the exceptional remedies in Andrews [regarding jury vetting] where the prejudice is created by the authorities themselves. It was a deliberate violation of the defendants' rights to a fair trial in order to justify the expenses incurred in the inspection. I find that on the balance of probabilities; there can no longer be a fair trial of the issues of this case.

It was fundamental to the correct exercise of the Judge's discretion that he should not only assess the seriousness of the prejudice that might **(p.658)** weigh on a jury at the time of the trial but also give full consideration to whether, with proper direction by the jury, any residual prejudice could be overcome.

Unfortunately, the Judge evidently took his statement that "indelible" prejudice had been caused as his starting point. That prejudice is "indelible" is not a finding of fact but a conclusionary judgment which cannot justifiably be made unless and until all relevant factors bearing on the possibility of a fair trial have been given full consideration.

It appears, however, that the Judge's approach to the possibility of a fair trial was heavily coloured by his finding that there had been a deliberate abuse of power by the Inspector and the Financial Secretary, resulting in a failure properly to exercise his discretion. He also found that there had been deliberate "orchestration" of the police raids and the report's publication to maximise the adverse publicity against the respondents. While it is true that the events overlapped in time, there was no evidence to justify any finding of "orchestration" and Mr Caplan did not seek to support it. That finding, however, led the Judge into regarding the publicity itself as the intended result of a further abuse of power, making him further disinclined to rescue the officials from what he saw as the consequences of their own misconduct.

In the result, the Judge did not approach, in conformity with principle, the question of whether a fair trial was still possible. What is most striking in the present case is the fact that the relevant adverse publicity was generated in January 1993 which meant that if the trial was allowed to proceed after the stay application, it would not take place until more than seven years later. Yet Pang J did not address the critical question whether, given such a substantial lapse of time in a case that had not attracted lurid or sensational coverage, the residual prejudice from that publicity would necessarily deprive the respondents of a fair trial notwithstanding proper direction by the judge. Instead, he commented dismissively that it would be "ironical" for the blameworthy officials now to try to rely on such an argument.

Pang J's comments on jury-vetting and his failure to consider the general curative role of proper direction by the trial judge are in the same vein. They also reflect the dim view that he had taken of the official behaviour concerned. His suggestion that, because the prejudice was caused by the officials, the prosecution "should not be permitted to invoke the exceptional remedies" of jury-vetting suggests that he was applying a "disciplinary" approach and giving wholly inadequate weight to the importance of curative measures to any decision regarding the impossibility of fairness at the trial.

In these circumstances, the Judge's exercise of discretion was vitiated. Bearing in mind the facts and circumstances already discussed above, I would exercise my discretion against a stay on either the abuse of power or prejudicial publicity ground. There is every reason to believe that the respondents will be able to receive a fair trial by an unprejudiced jury properly directed.
(p.659)

G. Conclusion

I would in the circumstances allow the appeal, set aside the Judge's order for a permanent stay and remit the matter to the Court of First Instance for the respondents to be tried before a different judge.

I would also make an order nisi that the respondents pay the appellant's costs in the Court of Final Appeal and give leave to any

party wishing to address submissions to the Court on the question of costs, to do so in writing, such submissions to be served on the other parties and filed with the Registrar of the Court of Final Appeal within 14 days after the date when this judgment is handed down. If such submissions are served and filed, I would grant the other parties liberty within 14 days thereafter to serve and file written submissions in reply. If no submissions are filed with the Registrar within 14 days as aforesaid, I would order that the costs order nisi thereupon take effect as an order absolute.

Sir Anthony Mason NPJ
I agree with the judgment of Mr Justice Ribeiro PJ.

Li CJ
The Court unanimously allows the appeal, sets aside the Judge's order for a permanent stay and remits the matter to the Court of First Instance for the respondents to be tried before a different judge. Further, the Court unanimously makes the order nisi and gives the directions referred to at the conclusion of Mr Justice Ribeiro's judgment.

HKSAR v LEE MING TEE & ANOTHER [2001] 1 HKLRD 599 Final Appeal No 8 of 2000 (Criminal), 21-23, 26-28 February and 22 March 2001, (Court of Final Appeal), Li CJ, Bokhary, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ