HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL ASSESSMENT

INSTRUCTIONS TO CANDIDATES

Introduction

The practical assessment is focused on a criminal trial in the Court of First Instance before a judge and jury. Two defendants, Nathan Tang and Manuel Wong, are charged with attempted murder. Nathan Tang is further charged with two counts of blackmail and one count of theft. The indictment is contained in the attached 'Bundle of Evidential Material'.

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; and

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, first, the evidential material presented in the written assessment papers (a copy attached at Annexure A), second, the attached 'Bundle of Evidential Material'.

Your role as solicitor-advocate

When you receive these instructions, you will at the same time be advised whether you will appear as counsel for the prosecution or counsel for the 1st defendant.

As prosecuting counsel, of course, you will rarely, if ever, have sight of the proof of evidence taken from a defendant by his legal representatives. For the purposes of this practical assessment, however, the defence materials are made available to you. This is because there is a limited time within which the required exercises (including examination-in-chief and cross-examination) are to be conducted. Accordingly, it is to be assumed that all witnesses, both for the prosecution and the defence, have given evidence in accordance with their statements except where in examination-in-chief they have diverged from or contradicted those statements. Should there be any such divergence or contradiction, for the purposes of the practical assessment, it is to be taken that they have arisen in the course of the witness's testimony. In cross-examination, therefore, it will be put to the witness that one part of his or her testimony has been contradicted by another part.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while

arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

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 argument. Please note that your arguments must be limited to the authorities which are attached.

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3 pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton argument late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

The application is made by defence counsel and opposed by prosecuting counsel. It is an application made to the trial judge for a permanent stay founded on the assertion that, by reason of a particular publication which appeared on the Internet on the second day of trial, it is no longer possible at this time, nor in the foreseeable future, for there to be a fair trial. That is the principal application made by defence counsel but it may, in the discretion of defence counsel, be supported by an application for alternative relief.

For the purposes of the application, it is to be assumed that the defence to the prosecution case of joint enterprise (i.e. the prosecution case in respect of the charges of attempted murder and blackmail) is founded on the assertion that the first and second defendants do not know each other, have never worked together in any way in the past and did not work together on the night of 1 February 2016. It is in light of this that the Internet article is deemed to be so damaging to the defence case.

The offending article appeared on the second day of trial on the Internet website of *Hong Kong Heyday.* The article has been shown to defence counsel by a 20 year old pupil in his/her chambers. Urgent police action, taken under the direction of the trial judge, has resulted in the removal of the article from the website. However, in the 22 hours that the article was on the website, the site has had 1,500 'hits' within Hong Kong.

Hong Kong Heyday is known to be anti-establishment, attacking established institutions such as the police and the courts. It has been in operation for 18 months and in that time it has gathered a following, mainly of young people, students and the like. Certainly it has attracted other media attention for its satirical and provocative articles. It is not, therefore, an anonymous website.

For the purposes of the application, it is accepted that it is a website growing in popularity.

The relevant portion of the offending article reads –

"Seems our local debt collectors have been taking lessons from the Klu Klux Klan. Now, when they come to tap you for repayment, if the money isn't on the table they lynch your kids. That's the evidence in a trial that started this morning with two accused charged with attempted murder

and blackmail. Seems, if the prosecution evidence is believed, one went to a jewellery shop to demand $7 million, taking a necklace as security, while the other went to the workshop of the same business on the roof of the same building, demanding the same amount of money and, just to make sure the cash came quick, put a rope around the neck of the debtor's daughter and hoisted her up. Thank God daddy had the cash otherwise we would be talking about a murder. Seems the only evidence putting them both at the scene and working in cahoots comes out of the mouth of some prison regular whose own mother doesn't give him the time of day. Our contacts tell us, however, that, if the police bothered to do some leg work for a change, they would find that the two were a long-standing duo with the lynching trick part of their repertoire."

Your oral application will last a maximum of 15 minutes.

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.

There will be no formal reply to submissions.

That being said, you should be prepared to deal with judicial interventions and questions in relation to your submissions or indeed submissions made by your opposing counsel.

THE CONDUCT of Mini-Trial

Witnesses

Only one prosecution witness and one defence witness will attend the mini-trial. You will be advised of the identity of the witnesses by the Secretariat on the day of the assessment itself when you arrive and register. You must therefore be prepared *in a structured and analytical manner* to examine and cross-examine all relevant witnesses.

Prosecution witnesses

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

1. William Wai
2. Natalie Wai
3. Government forensic pathologist
4. John de Freitas

Defence witnesses

The following two witnesses will appear at trial to give oral evidence on behalf of the defendant:

1. Nathan Tang, the first defendant
2. Manuel Wong, the second defendant

You can assume:

1. The witnesses will appear at trial in the order listed above; and
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, and has been, fully in accordance with their statements.

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.

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; and

- 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

- *R v Feltham Magistrates' Court (ex parte Ebrahim)* [2001] 1 WLR 1293

- *HKSAR v Lee Ming Tee & another* [2001] 1 HKLRD 599

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CRIMINAL PROCEEDINGS

THE PRACTICAL EXAMINATION

ANNEXURE A TO INSTRCUTIONS TO CANDIDATES – THE EVIDENTIAL MATERIAL PRESENTED IN THE WRITTEN ASSESSMENT PAPER

The Case

You are a solicitor advocate briefed by Legal Aid to represent a 50-year-old man, Nathan Tang, who has been charged with one count of attempted murder, two counts of blackmail and one count of theft. The case against your client is contained in the document below that is headed „Summary of the prosecution evidence". His defence is contained in the notes of a meeting that you have conducted with him, those notes being headed „Defence notes".

Summary of the prosecution evidence

Background

William Wai (70 years of age) is the owner of a jewellery business which is situated on the ground floor of an old building in Wanchai called Ho Yip Building. His daughter, Natalie Wai (33 years of age) is a jewellery designer and works with him in the business. While William Wai works from the shop on the ground floor, Natalie Wai creates her designs in a workshop on the rooftop of the building. The business, Cascade Creations, has been very popular with Mainland customers. Recently, however, with the Central Government crackdown on corruption, the business has fallen on hard times.

William Wai has always gambled. When the business was doing well he had no trouble paying off his gambling debts but, with the business having fallen on hard times, he has been unable to repay his gambling debts.

As at 1 February 2016, William Wai owed a business debt of $7 million to a supplier of precious gems, Moscow Diamonds, a Russian company with a local

office in Hong Kong. In addition, with interest calculated up to 1 February 2016, he owed $7 million to a Macau loansharking organisation.

The first event: blackmail and theft

Just before 9 PM on the night of 1 February 2016, William Wai was in his shop getting ready to close up when a middle-aged man entered the shop. The lighting in the shop was bright and the two men spoke for several minutes face-to-face. At a later identification parade, William Wai had no difficulty in identifying the man as Nathan Tang.

[It is to be taken that the identification parade was properly conducted and that William Wai identified Nathan Tang.]

Nathan Tang informed William Wai that he had been hired by Moscow Diamonds to collect the $7 million that was owed to the company. He said that the company had been patient but was not prepared to be patient any longer and, if necessary, drastic action would be taken. William Wai asked him: “What type of drastic action?” Nathan Tang replied: “If you don‟t pay you‟ll find out soon enough.” In his witness statement, William Wai said that, although Nathan Tang did not raise his voice, he spoke in a menacing manner.

William Wai said that he did not have the money available at that time, but he was hoping to get some very substantial orders soon and would then be able to pay Moscow Diamonds. Nathan Tang replied: “I told you that the company is not prepared to wait.”

There was a diamond necklace on display which had already been sold for $3 million, the customer having paid a deposit of $1 million, the balance to be paid when the customer collected the necklace in the next few days. Nathan Tang asked to have a look at the necklace. William Wai informed him that it had already been sold but, according to William Wai, Nathan Tang insisted on seeing it. Nathan Tang asked if William Wai‟s daughter had created the piece and William Wai confirmed that she had.

While he was admiring the necklace, Nathan Tang told William Wai a disturbing story of a man he knew, an old friend, who had fallen badly into debt and who had not done everything possible to pay his creditors. Nathan Tang told him that, if only his friend had paid up, everything would have ended well. But he chose to be clever. One night he was beaten up. But worse was to come, with everything taken from him, he could no longer afford to pay for tuition for his daughter, a talented pianist. His daughter had fallen into depression and killed herself: by hanging. “Imagine how the father must have felt,” said Nathan Tang, “After all, it was his fault."

Nathan Tang then put the necklace into his jacket pocket. According to William Wai, Nathan Tang said that he would keep it until the full debt had been paid. In his witness statement, William Wai said that he pleaded for the return of the necklace as it had already been sold and tried physically to get it back. But Nathan Tang was far too strong.

Nathan Tang then left the shop.

The shop‟s security camera (black and white film with no sound) recorded Nathan Tang entering the shop and speaking to William Wai. It recorded him examining the necklace and then putting it into his jacket. It recorded a very brief attempt by William Wai to recover the necklace before being pushed away.

There was also a security camera outside the shop (black-and-white film with no sound). It recorded Nathan Tang walking out onto the pavement and being stopped by another man who appeared to be younger, 35 to 45 years of age, wearing jeans and a dark windcheater-style jacket. There was a brief conversation: just 15 seconds. Nathan Tang pointed to the entrance to Ho Yip Building, as if giving directions, and then walked on. The man who he had spoken to walked out of camera view without entering the building.

[It is not disputed that the security camera film was secured by police that same night.]

The second event: attempted murder and blackmail

In his witness statement, William Wai said that he was so upset by what had just happened that he locked up the shop and immediately went up to the workshop on the roof. His daughter Natalie was in the workshop at her table working under a spotlight. There was no other lighting, except the ambient light from surrounding buildings.

William Wai said that he was telling his daughter what had happened when there was a banging on the workshop door. He opened the door. There were two men standing outside, both wearing woollen masks. The men barged into the workshop.

Only one of the two men spoke. He appeared to be about 35 to 45 years of age, medium build, and was wearing jeans with a dark windcheater-style jacket. What struck William Wai the most, however, was what appeared to be the tattoo of a dragon that ran from under his chin and down the front of his throat until it was covered by the man‟s shirt.

The man said that he had come to collect the debt of $7 million. William Wai, very frightened and very confused, asked him which debt this was: the debt due

to Moscow Diamonds or to the Macau loansharking organisation? The question made the man very angry. He said that he wanted the $7 million and wanted it now. William Wai replied that he did not have it.

The man"s companion grabbed Natalie Wai, binding her hands behind her back with masking tape and putting masking tape across her mouth. The man who did all the talking looked around the room as if searching for something. On the work table was some plastic rope. The man climbed onto the table and looped the rope over a wooden beam that was supporting the corrugated iron roof. He then tied one end of the rope around Natalie"s neck, holding the other end in his hand. He shouted loudly at William Wai that he wanted the money or else he would make his daughter "dance".

When William Wai hesitated, the man pulled on the rope, pulling Natalie Wai off the ground. Natalie Wai began to kick her legs and urinated.

William Wai immediately shouted that he would give him all the money he had and the man let go of the rope. Natalie Wai fell to the floor. Her father had to scratch her neck with his fingers to loosen the knot. Natalie Wai appeared to be only semi-conscious. The man said: "Don"t worry, she"ll live."

There was a safe in the workshop, containing $5 million. This was given to the man who said that he would be back within a week for the extra $2 million and warned William Wai not to report the matter to the police.

William Wai was so terrified that his daughter was dying that, immediately after the two men had left, he telephoned the emergency number for police and an ambulance.

William Wai in his witness statement said that the man shown on the security camera film talking briefly to Nathan Tang on the pavement outside his shop appeared to be wearing "the same type of clothing" as the man who a few minutes later entered the workshop and appeared also to be of a similar medium build. William Wai said, however, that the only way he could be certain of identifying the man was by the dragon tattoo on his neck.

Natalie Wai's injuries

Natalie Wai remained in hospital for three days. She suffered deep ligature bruising around her neck. In a statement, she said that when she was pulled off the ground she experienced overwhelming confusion, a hissing noise in her ears and then a loss of consciousness. The report by the forensic pathologist said that loss of consciousness could occur within five seconds. He would therefore estimate that Natalie Wai was suspended for about this period. The forensic pathologist said that hanging by suspension, even momentarily, presented a

grave risk to life and that, if the vertebrae in the neck had been broken, death would have been immediate. Death by asphyxia could also occur within seconds, especially if there was inhibition of the heart. As he put it: “any suspension of the manner described presents a grave risk to life.”

The arrests

Nathan Tang was arrested on 5 February 2016 and charged with the offences of blackmail and theft, these being based on the events that took place in William Wai‟s shop.

Some three weeks later, on 23 February 2016, Manual Wong was arrested by police and charged with the offences of attempted murder and blackmail, these being based upon events that took place in the workshop.

[As will be seen in the „Defence Notes‟, Manuel Wong denied knowing Nathan Tang and denied being the man who entered the workshop on the night of 1 February 2016, stating that he was at home that night nursing influenza.]

On 2 March 2016, Nathan Tang, who was on bail, was arrested for a second time, being accused of acting in a joint enterprise with Manuel Wong, the joint enterprise being to extract money from William Wai and his daughter, the events taking place in the workshop on the rooftop. In this regard, Nathan Tang was charged with attempted murder and blackmail.

The testimony of an immunity witness

On 28 February 2016, a few days before Nathan Tang‟s second arrest, John de Freitas, a prisoner in the Lai Chi Kok Reception Centre, awaiting trial on a charge of drug trafficking in respect of which, if convicted after trial, he would face a sentence of over 10 years, made a witness statement. In that statement, he said, first, that he intended to plead guilty to the charge that he faced and, second, that he was an old friend of Manuel Wong, who, being held in Lai Chi Kok with him, had confided in him that he and Nathan Tang had worked together in the past in Macau collecting debts and had worked together on the night of 1 February 2016 in order to get payment from William Wai. John de Freitas went on to say that Manuel Wong had told him that he and Nathan Tang had used the “hanging trick” on a couple of occasions in Macau and that they had decided to use it again when getting money from William Wai. In his statement, John de Freitas acknowledged that he had received a full immunity from prosecution, subject to the condition that he gave truthful evidence at the trial of Nathan Tang and Manuel Wong.

In his witness statement, John de Freitas acknowledged two previous convictions for wounding with intent, two previous convictions for blackmail and one for drug trafficking.

Defence Notes

In giving instructions to his solicitors, Nathan Tang said that he owned a business called Pacific Credit Protection. Its principal business was giving credit advice and representing companies in collecting outstanding debts.

He said that he had three convictions, two for blackmail and one for receiving stolen property.

Nathan Tang admitted going to William Wai's shop in order to collect $7 million due to his client, Moscow Diamonds. He said that William Wai told him he could pay by the end of the month but no sooner. Nathan Tang said that he took the necklace as security only. Initially, William Wai was upset and tried to grab the necklace back but, after being assured that, upon payment of the $7 million he would get it back, he agreed that it should be taken as security. Nathan Tang said that he took the necklace the following morning to the office of Moscow Diamonds where it was placed into a suitably marked packet and then put into the safe.

[The police have recovered the necklace from Moscow Diamonds in a brown packet marked: “Security only, property of William Wai”.]

Nathan Tang said that no documentation was drawn up as the necklace was only to be held until the end of the month.

Nathan Tang admitted telling William Wai the story of an old friend who had fallen into debt and whose daughter had committed suicide. It was, he said, a true story and had affected him very badly at the time. He sometimes recounted the story to debtors as a moral lesson. In his instructions to his solicitors, he said: “It may not have been the most diplomatic thing to say but it was never intended as any form of threat.”

[The debtor, an old friend, is prepared to give evidence in support of Nathan Tang.]

As to the charges of attempted murder and blackmail arising out of his second arrest, Nathan Tang has instructed his solicitors that he does not know Manuel Wong, that they have never worked together to collect debts and that they did not work together on the night of 1 February 2016.

As to the security camera film showing him talking to a man on the pavement outside William Wai"s shop, Nathan Tang has instructed his solicitors that he was approached by a complete stranger who asked him how to get to Ho Yip Building. He told the man that he was now at the building, pointing to the entrance. That, to the best of his memory, was the extent of the conversation.

As to the intended evidence of John de Freitas, the immunity witness, Nathan Tang says that he has never heard of this man either. But it is clear that he has agreed to give false testimony in order to secure an immunity from prosecution.

The defence of Manuel Wong

Manuel Wong denied being anywhere near Ho Yip Building on the night of 1 February 2016. In a cautioned statement he said that he was home that night in his apartment in the Sai Kung area taking medication for influenza. He said that he was the only one at home because his wife was visiting relatives in the Mainland.

Manuel Wong denied any knowledge of Nathan Tang and denied any knowledge of working in any sort of joint enterprise with him.

Manuel Wong does have a tattoo running from under his chin down the front of his neck. He said in his cautioned statement that he had the tattoo done some five years earlier when he was in Australia. He was told at the time that it was fashionable to have a tattooed down the front of the neck. His tattoo was not of a dragon. It was of a mermaid with blonde hair, the mermaid copied on an old Swedish girlfriend.

Manuel Wong has four previous convictions: one for claiming to be the member of a triad society, one for blackmail and two for wounding with intent.

Neutral Citation Number: [2001] EWHC Admin 130

Case Nos: CO/345/2000 & CO/4001/2000

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 21st February 2001

B e f o r e :

LORD JUSTICE BROOKE
and
MR JUSTICE MORISON

- -

REGINA
and
FELTHAM MAGISTRATES' COURT — **First Respondent**
ex parte MOHAMMED RAFIQ EBRAHIM — **Applicant**
Second
DIRECTOR OF PUBLIC PROSECUTIONS — **Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Andrew Smiler (instructed by Pemila & Nathan for Mr Ebrahim)
John McGuinness (instructed by the Crown Prosecution Service for the DPP)
The Magistrates' Court was not represented

- -

	PAUL ALEXANDER MOUAT	**Claimant**
	- and -	
	THE DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**

- -

Ian Wise (instructed by Bhatia Best for Mr Mouat)
Stuart Clarkson (instructed by CPS for the DPP)

- -

Judgment

LORD JUSTICE BROOKE :

1. This is the judgment of the court.

Introductory

2. On 12th January 2001 we heard an application by Mohammed Rafiq Ebrahim for judicial review of a decision by District Judge Day, who was sitting as a stipendiary magistrate at Feltham Magistrates‟ Court on 31st August 1999, when he dismissed an application by Mr Ebrahim for a stay of proceedings against him for common assault on the grounds of abuse of process. We will call this case "the Feltham case".

3. On 16th January 2001 we heard an appeal by Paul Alexander Mouat by way of case stated from a decision of the Stafford Crown Court on 11th August 2000, when dismissing his appeal from his conviction for speeding by the Burton-on-Trent Magistrates‟ Court on 15th June 2000, to the effect that it was not willing to stay those proceedings for abuse of process on the grounds that the police officers in the case had destroyed a video recording of the relevant incident soon after it took place. We will call this case "the Stafford case".

4. In both these cases the original defendant‟s complaint related to the obliteration of video evidence. The facts of the Feltham case are confused, but what seems clear is that when the police officer attended the Tesco store where the alleged assault took place, he went and viewed what he thought was the only available video recording of the scene of the incident and satisfied himself that it showed nothing at all of any relevance. As a result he took no steps to seize or retain any of the videotape or film images used at the store on the day in question, and it all appears to have been reused or otherwise obliterated within about five weeks in the usual course of the store‟s business, long before any inquiries about the availability of video evidence were first made by the defence.

5. In the Stafford case, the court accepted the evidence of two police officers that they had followed the appellant‟s car at a distance of 200 metres for three tenths of a mile and that during this time they had recorded speeds of 90 miles per hour on their calibrated speedometer. They had a video in their car, and when they stopped the appellant and invited him into their car, they played the video back to him. It showed their speed registering at 90 miles per hour and his car in front of them. It also recorded the time as the cars went along. The police officers then served him with a fixed penalty notice and a notice requiring him to produce a document (not in his possession at the time) at a named police station. He said "What am I going to do?" They permitted him to drive off, and so far as the Crown Court was aware, they then reused the videotape in the ordinary course of their duties. Although it appeared from the papers before us that no inquiry about videotape evidence appeared to have been made by the appellant or his advisers until the hearing of the appeal at Stafford Crown Court over ten months after the incident, it was suggested at the hearing in this court that the matter had been raised in correspondence in advance of that appeal. Because this had never been mentioned before, we did not ask to see the correspondence.

6. During the two hearings we were referred to a large number of unreported decisions of this court and of the Court of Appeal in which similar complaints were made about the non-availability of video evidence which in fact showed, or which might have showed, an incident or incidents which were said to be material by one side or the other when the eventual trial took place. None of these unreported decisions established any new point of principle. This, no doubt, was the reason why none of them was reported. Notwithstanding this fact, counsel in the two cases have seized on various phrases in what were probably all

ex tempore judgments as if they established some new point of principle, and a great deal of time was taken up on both occasions, both at the hearing and in pre-hearing reading, in looking at the facts of these unreported cases in an attempt to derive from them some new principle.

7. We therefore decided to reserve judgment in both cases and to prepare this single, reserved judgment in the expectation that in future courts may be spared the prolonged "trial by unreported judgment" to which we were subjected. One of the reasons why we took this course was that devices like CCTV are becoming more and more common, and the proceedings of courts are likely to become more and more disrupted each time the defence complains that what was or might have been relevant videotape evidence has been destroyed and is not available to the defence. There are also procedural matters of general importance to which we wish to refer.

The 1997 Code of Practice and the Attorney-General's new guidelines

8. Since 1997 the police and other investigating authorities have had the benefit of codified guidance relating to the nature and extent of their duty to obtain and retain "material which may be relevant to their investigation" (see below for the meaning of the phrase). In paragraph 2.1 of the Code of Practice published pursuant to Sections 23 and 25 of the Criminal Procedure and Investigations Act 1996, which came into force on 1st April 1997 ("the 1997 code") it is said that:

> "material may be relevant to the investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case."

9. That the extent of the duty of investigation should be proportionate to the seriousness of the matter being investigated is evident from paragraph 3.4 of the code:

> "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances."

10. Paragraph 3.5 describes the extent of the investigative duty when it is believed that other persons may be in possession of material that may be relevant to the investigation:

> "If the officer in charge of an investigation believes that other persons may be in possession of material that may be relevant to the investigation, and if this has not been obtained under paragraph 3.4 above, he should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain the material in case they receive a request for its disclosure ... However, the officer in charge of an investigation is not required to make speculative enquiries of other persons: there must be some reason to believe that they may have relevant material."

11. Paragraph 5 of the code identifies the duty to retain material obtained in a criminal investigation which may be relevant to an investigation (5.1) and the length of time over which that duty will continue in effect (5.6-5.10). Paragraph 5.3 provides:

> "If the officer in charge of an investigation becomes aware as a result of developments in the case that material previously examined but not retained (because it was not thought to be relevant) may now be relevant to the investigation, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required."

12. These provisions of the code preserve and amplify common law rules which were prescribed by the judges before the code came into force. We mention this fact because the investigations in some of the cases to which we were referred took place before 1st April 1997. In one of them, *Reid* (unreported 10th March 1997 CACD), Owen J said, in effect, that

(i) There is a clear duty to preserve material which may be relevant;

(ii) There must be a judgment of some kind by the investigating officer, who must decide whether material may be relevant;

(iii) If he does not preserve material which may be relevant, he may in future be required to justify his decision;

(iv) If his breach of duty is sufficiently serious, then it may be held to be unfair to continue with the proceedings.

13. In both the present cases reference was also made to the Guidelines issued by the Attorney-General on 29th November 2000 in relation to Disclosure of Information in Criminal Proceedings, even though the police investigations, such as they were, in each case predated the publication of those guidelines. We were referred in particular to paragraphs 1, 6, 20, 21, 37 and 40(iv) of the guidelines. These paragraphs are concerned with the disclosure of material obtained and retained by investigators, and not to the process which leads to material being obtained and then retained, except for paragraph 6 which reads:

> "In discharging their obligations under the statute, code, common law and any operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant."

14. In the Stafford case it is said that the investigators had obtained the relevant video evidence which they were obliged to retain pursuant to their duties under paragraph 5 of the 1997 code (see paragraph 11 above). In this context paragraph 1 of the new guidelines observes that fair disclosure to an accused is an inseparable part of a fair trial (as guaranteed under Article 6 of the European Convention on Human Rights), and paragraph 5 tells investigators that they must be fair and objective and that a failure to take action leading to proper disclosure may lead to a successful abuse of process argument.

15. In paragraph 20 of the new guidelines prosecutors are told that in deciding what material should be disclosed they should resolve any doubt they may have in favour of disclosure (subject to a proviso which is irrelevant in the present context). In the course of a discussion

of the obligations of primary disclosure in paragraph 37, prosecutors are warned that they should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. One of the examples that is given (see paragraph 37(iii)) relates to any material which may cast doubt upon the reliability of a confession. During the discussion of secondary disclosure in paragraph 40, express reference is made in sub-paragraph (iv) to "video recordings made by investigators of crime scenes".

16. So much for the duty to pursue all reasonable lines of inquiry, and the duties to obtain, retain and disclose relevant material. When a complaint is made on an abuse application that relevant material is no longer available, the first stage of the court"s inquiry will be to determine whether the prosecutors had been under any duty, pursuant to the 1997 code and the new guidelines, to obtain and/or retain the material of whose disappearance or destruction complaint is now made. If they were under no such duty, then it cannot be said that they are abusing the process of the court merely because the material is no longer available. If on the other hand they were in breach of duty, then the court will have to go on to consider whether it should take the exceptional course of staying the proceedings for abuse of process on that ground.

The jurisdiction of a court to stay criminal proceedings for abuse of process

17. We think it may be helpful to restate the principles underlying this jurisdiction. The Crown is usually responsible for bringing prosecutions and, *prima facie*, it is the duty of a court to try persons who are charged before it with offences which it has power to try. Nonetheless the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of their process. This power is "of great constitutional importance and should be ... preserved": per Lord Salmon in *DPP v Humphrys* [1977] AC 1 at p 46C-F. It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, 643G.

18. The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court"s jurisdiction are (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried. We derive these two categories from the judgment of Neill LJ in *R v Beckford* (1996) 1 Cr App R 94 at p 101. He observed that in some cases these categories may overlap. There may, of course, be other situations in which a court is entitled to protect its own process from abuse, for example where it considers that proceedings brought by a private prosecutor are vexatious (see *R v Belmarsh Magistrates' Court ex p Watts* [1999] 2 Cr App R 188), but we are not here attempting to carry out an exhaustive review of this jurisdiction.

19. We are not at present concerned with the second of these two categories (which we will call "Category 2" cases), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant"s detriment. In some of these cases it is this court, rather than any lower court, which possesses the requisite jurisdiction (see *ex p Watts* per Buxton LJ at p 195B-D).

20. In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutors‟ conduct it would be unfair to him if the court were to permit them to proceed at all. The court‟s inquiry is directed more to the prosecutors‟ behaviour than to the fairness of any eventual trial. Although it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all.

21. Neill LJ gave three examples of this type of case in his judgment in *Beckford* at p 101D - 102A. In all such cases - and one hopes they will be very rare - the court has to make a value judgment about the character of the prosecutor‟s conduct. If it is satisfied that it would not be fair to allow the proceedings to continue, the court does not then concern itself with the possibility that any ensuing trial might still be a fair one, because it will have formed the prior view that it would not be fair to the defendant if it were to take place at all.

22. This, in our judgment, is the type of situation which Sir Roger Ormrod, sitting in this court with Lord Lane CJ in *R v Derby Crown Court ex p Brooks* [1985] 80 Cr App R 164 had in mind when he said at p 168-9 that it may be an abuse of process if:

> "the prosecution have manipulated or misused the process of the court so as to deprive a defendant of a protection provided by the law or to take unfair advantage of a technicality."

23. In one of the unreported cases we were shown, it was said that there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities for this ground of challenge to succeed.

24. The first category of case (see paragraph 18 above: we will call these "Category 1 cases") is founded on the recognition that all courts with criminal jurisdiction, including magistrates‟ courts, have possessed a power to refuse to try a case, or to refuse to commit a defendant for trial, on the grounds of abuse of process, but only where it is clear that otherwise the defendant could not be fairly tried. An unfair trial would be an abuse of the court‟s process and a breach of Article 6 of the European Convention of Human Rights. In these cases the focus of attention is on the question whether a fair trial of the defendant can be had.

25. Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:

> (i) 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 defendant and the prosecution, because 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.
>
> (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

26. We have derived the first of these principles from the judgment of Sir Roger Ormrod in *R v Derby Crown Court ex parte Brooks* at p 168 and the second from the judgment of Lord Lane CJ in *Attorney-General's Reference (No 1 of 1990)* at p 644B-C. The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between. The power of a court to regulate the admissibility of evidence by the use of its powers under Section 78 of the Police

and Criminal Evidence Act 1984 is one example of the inherent strength of the trial process itself to prevent unfairness. The court‟s attention can be drawn to any breaches by the police of the codes of practice under PACE, and the court can be invited to exclude evidence where such breaches have occurred.

27. It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.

28. In relation to this type of case Lord Lane CJ said in *Attorney-General's Reference (No 1 of 1990)* at p 644A-B that no stay should be imposed:

> "... unless the defence 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."

Cases in which these principles have been applied

29. We turn now to the facts of a number of cases in which courts have been concerned with applications to stay a prosecution for abuse of process when CCTV or video evidence has not been available at trial. We can summarise their effect, to which we have appended our comments, in this way:

> (i) Violent disorder broke out at a night club. The judge was satisfied that a video camera was trained on an area of the club where an incident occurred prior to the arrival of the police and where part of the incident of violent disorder took place. Police officers viewed the video but its existence was not revealed to the defence in spite of their specific requests for unused material, and by the time of the trial the videotape had disappeared. The judge ordered a stay.
>
> This was a Category 1 case. It was not a case of the prosecution deliberately manipulating or misusing the process of the court, but the police had actually viewed the video and decided not to retain it because it did not assist their case, without performing their duty of considering whether it assisted the defendant‟s case. The court considered that the trial would not be fair. (*Birmingham* [1992] Crim LR 117).
>
> (ii) Violence broke out at a chemist‟s shop. The jury heard evidence from three independent witnesses. A police officer told the court that he saw a video film which contained nothing of relevance, and that one of the cameras did not cover the particular area. He said that if the recording had been relevant it would have been seized. The trial judge refused a stay, and the Court of Appeal dismissed a challenge to his decision. It asked itself whether it was unfair that

those video pictures had disappeared, and since the judge accepted the police officer‟s evidence he was entitled to find that there had been no unfairness.

This was neither a Category 1 case nor a Category 2 case. There was nothing unfair and nothing exceptional about it. (*Reid*, 10th March 1997, CACD transcript).

(iii) In a rape case, the complainant said that she had been raped close to a bridge over a railway line. The jury heard evidence from a number of independent witnesses. Video cameras were mounted on the bridge, but the detective constable in charge of the investigation was told by British Transport police that the cameras were not switched on. In fact they were working, but the police did not ascertain this fact until a month later, by which time the film had been destroyed. The trial judge refused a stay, and the Court of Appeal dismissed a challenge to his decision. It directed itself that before there could be any successful allegation of an abuse of process based on the disappearance of evidence, there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities.

The court considered that that there was no bad faith and no serious fault on the part of the police and that it was possible to have a fair trial. It suggested, *obiter*, that a lackadaisical failure on the part of the police to make proper investigation might in certain circumstances be held, in effect, to give rise to a Category 2 case, but those circumstances did not exist in that case. (*Swingler*, 10th July 1998, CACD transcript).

(iv) The police were called to licensed club premises following an incident. They complained that during the course of their inquiries the defendant had used threatening words or behaviour and that he had also assaulted them in the execution of their duty. The incident in which the defendant was involved had taken place at the entrance of the premises and in the area just outside the door. A CCTV camera covered the foyer and three steps down to the street, and gave a reasonably good image of people‟s faces. Police viewed the video but formed the opinion that it was of no use. They returned it to the club, and it was subsequently reused. The stipendiary magistrate stayed the proceedings for abuse of process on the grounds that since the camera covered the doorway and the surrounding area anything shown on it might well affect the assault charges This court refused to quash her decision, holding that it was well within the limits of her judgment to take the course she did, because it could not be shown that the videotape evidence would have had no effect on the trial at all. It said that the difference between this case and the *Birmingham* case, where it was established beyond doubt that the destroyed video evidence had shown the *locus in quo* of the alleged offences, was a difference of degree and not of substance.

This was a borderline Category 1 case. Most courts would have refused the stay. In *Stallard* (below) the Court of Appeal said that if it had to choose between the reasoning in *Chipping* and the reasoning in *Swingler*, it preferred the latter (*R v DPP ex p Chipping*, COT 11th January 1999).

(v) A CCTV camera was operating in a street where a robbery took place, and it was so positioned that it was at the very least possible that something of the robbery might have been filmed. The jury received compelling evidence from two independent witnesses. A police officer looked at the film and formed the opinion that it showed nothing of value. He did not preserve the tape, which was then reused. The Court of Appeal upheld the judge, who had refused to stay the proceedings for breach of process. It said that in *Chipping* there was simply a refusal to hold that the magistrate had acted outside the generous ambit of her discretion. It was recognised that in cases where evidence had been tampered with, lost or destroyed it might well be that a defendant would be disadvantaged, but it did not necessarily follow that [a Category 1 or Category 2 case] was established. There would need to be something wholly exceptional about the circumstances of the case to justify a stay on the ground that evidence had been lost or destroyed.

In this context, the use of the word "wholly" adds nothing to the word "exceptional". A fair trial was possible, and this was not a Category 2 case. (*Medway*, 25th March 1999 CACD transcript).

(vi) A purse was stolen in a shop. Video cameras were operating, which each showed a different picture and all the pictures appeared on one tape. A compilation tape was them made and retained, and the original tapes were destroyed in accordance with routine practice. It then turned out that the compilation tape began too late and ended too soon, and did not show the whole of the story. The Court of Appeal upheld the judge"s refusal to stay the proceedings for abuse of process. It held that there was nothing on the facts of the case to approach the kind of serious fault [in a Category 2 case] that would be required before the court could begin to consider whether the continuation of the proceedings were an abuse of its process. It had earlier dismissed the possibility of this being a [Category 1 case] by saying that it did not see how it could properly be said that the appellant could not have a fair trial without the video.

This case is a good example of the way in which these cases should be analysed. (*Stallard*, 13th April 2000, CACD transcript).

(vii) A woman was arrested, following a road traffic accident, and charged with driving a motor vehicle whilst unfit through the consumption of drugs. Although a police officer at the scene, who did not attend court, had circled in his note book the response "yes" to the question whether there was any video evidence, it was entirely speculative as to how any video evidence, assuming such existed, was or might have been relevant to any issue in the case. The defendant

had persuaded the magistrates that in some unspecified manner she had been disadvantaged, and the proceedings were stayed for abuse of process. This court held that in taking this course the justices had exceeded any reasonable exercise of their discretion.

A fair trial was clearly still possible, and there was no question of any misbehaviour at all. (*Garrety*, 11th December 2000, Administrative Court transcript)."

30. *Chipping* is the only decision which it is difficult to reconcile with the principles we have stated. It must be remembered, however, that all that that case showed was the higher court being unwilling to interfere with the exercise of the decision of the lower court on the basis that it was clearly wrong. There is no hint in the judgment of Buxton LJ, with whom Collins J agreed, that he thought that the magistrate was clearly right.

31. Before we turn to the facts of the present cases, there is one further point of general importance we need to mention. If a defendant is convicted and then appeals to the Crown Court, he will gain nothing by inviting the Crown Court to stay the proceedings for abuse of process. If the proceedings in the Crown Court are merely stayed, his conviction will stand. It appears to us, in these circumstances, that his appropriate course, if any unfairness cannot be corrected in a fresh hearing on appeal, will be to invite the Crown Court to allow his appeal and quash the conviction on the grounds that, even if he made no complaint at the time, the trial in the magistrates" court was not a fair one, and that any such unfairness is irremediable.

32. We turn now to the facts of the two cases with which we are concerned.

The Stafford Case

33. The case stated by Judge McEvoy QC is in the following terms.

34. On 5th October 1999 Paul Mouat was driving his car out of Burton-upon-Trent when he was stopped by police officers. He was informed that he had been exceeding the speed limit and was given a fixed penalty ticket. The police officers took him into their vehicle and showed him a video recording of the incident.

35. He did not pay the fixed penalty, but asked for a Magistrates" Court trial. He wished to put forward a defence of duress. He would say that he was travelling in the outside lane of a dual carriageway, overtaking several vehicles, including large lorries. He was not exceeding the speed limit at that point. An unidentified vehicle then came up behind him at speed and proceeded to travel only a few inches from his bumper. He was extremely frightened and intimidated by this action. He felt that the vehicle was too close for him to be able to safely slow down. He could not pull to his left due to vehicles on his inside. He therefore increased his speed to avert the danger.

36. He was shocked to discover that the vehicle which had behaved in this way was a police car.

37. He was not represented when he appeared for trial at Burton-upon-Trent Magistrates" Court on 15th June 2000. A police officer, whilst giving evidence, conceded that the video recording of the incident had been destroyed. The issue of fairness of trial does not appear to have been raised.

38. He was convicted. The magistrates imposed a fine of £90 and endorsed his driving licence with 3 penalty points. He was ordered to pay £65 towards the cost of the prosecution.

39. He appealed against his conviction to Stafford Crown Court. That hearing took place on 11th August 2000. He was represented by counsel.

40. Counsel argued that proceedings should be stayed as Paul Mouat could not have a fair trial as the video evidence had been destroyed. The court‟s attention was drawn to the cases of *R v Birmingham* (1992) Crim LR 117 and *DPP v Chipping* (1999) unreported.

41. The Crown argued that Mr Mouat could receive a fair trial. Police officers would give evidence to the court in respect of the incident. It is routine practice for video recordings of this nature to be wiped off unless the motorist has made some protest at the time of the incident.

42. The prosecution‟s position so far as the video evidence was concerned was that it was never originally intended to produce it in court in order to prove the speeding offence. Proof of the offence was to be achieved by evidence of following the offending vehicle at the constant distance for 3/10 of a mile and that the police speedometer was in proper working order. A video was to be used to illustrate to the motorist that an offence had been committed. The vascar capability had not been activated but the speed of the police vehicle was recorded on the video.

43. Both police officers said that the appellant when shown the video did not dispute the contents of it, ie that he was speeding at 90 mph and when given the fixed penalty ticket he is recorded as saying “what am I going to do”. Both officers said that if he had done or said anything to dispute the video evidence it would have been retained (it would not have been possible to use the fixed penalty procedure).

44. Mr Mouat‟s evidence was to the effect that he asked what would happen to the video and the police replied that they kept it should he try and contest the case. He asserted that he told the police that the only reason he went 90 mph was that the police car was up his backside or words to that effect. He did admit that the speed of 90 mph was registered on the video.

45. The court found the appellant not to be a credible witness. The circumstances of watching a video of the driving and saying “what am I to do” amounted implicitly to admitting to the offence and the police were entitled to regard it as so. Moreover under Section 34 of the Criminal Justice and Public Order Act 1994 the court was entitled to draw such inferences as appeared proper from the appellant‟s failure to mention the facts he relied upon at the hearing.

46. At the end of the hearing the court delivered an ex tempore judgment which sets out the facts and reasons for dismissal of the appeal. It was found that in the circumstances the police were entitled to re-use the video and the appellant was not prejudiced or prejudiced to the extent that he could not have a fair trial. The court exercised its discretion and refused to stay the case. A copy of the court‟s judgment was attached to the Case .In those circumstances the court asked the following questions for the opinion of the High Court:

(i) Could a fair hearing take place given the fact that the police had destroyed the video recording of the incident?

(ii) Should Paul Mouat‟s silence at the time of the incident be considered relevant to the police‟s duty to retain evidence?

47. It appeared to us on the hearing of the appeal to this court that something had gone wrong in this case. The video tape in the police car contained material which might be relevant to the police‟s investigation of the speeding offence, and they were not entitled to assume that Mr Mouat would simply pay the penalty required by the fixed penalty notice. Indeed, the law allowed him a 21 day "suspended enforcement period" in which he could decide whether he wanted to be tried at a court for the offence specified in the notice (see, generally, the statutory scheme set out in Part III of the Road Traffic Offenders Act 1988).

48. Mr Clarkson, however, told us in his skeleton argument that "financial considerations would mean that it would be impractical for there to be a new tape every time a speeding car is stopped and the driver disputes, or may in the future dispute, any fact contained therein. In fact it would mean that all such video tapes would have to be kept".

49. It appeared to us that this claim of impracticality revealed a willingness to ignore the clear requirements of the 1997 code. We could not understand why, at the very least, it was impractical for the police to keep the relevant tapes at least until the suspended enforcement period had expired (or until trial, if the motorist exercised his right to require a trial). We therefore asked counsel for the prosecution to make further inquiries about police practice before we delivered judgment. We are grateful to them and their solicitors for undertaking this task.

50. Mr Clarkson in due course told us, after inquiries had been made of seven police forces in England and Wales, that there were no national guidelines for the police which related to the retention of video recordings taken of suspect vehicles from video recording equipment in police vehicles. The policy of the Staffordshire force was expressed in the following terms (with occasional comments about the practice of other forces):

> "The Staffordshire force has 14 video recording units although fewer would be on the road at any one time. That seems to be a reasonable average for police forces. The videos are 3 hours long, although other forces use shorter tapes. Some operators keep them running nearly all the time; others only turn it on if there is something interesting or illegal happening at the time.
>
> If no offences are revealed they are kept for 28 days and then wiped clean. If offences are revealed they are kept for 12 months following conviction; if there is an acquittal they are wiped shortly after the trial. If a fixed penalty notice is given they are kept for 12 months. That applies to all forces except Gwent which keep the tapes for 7 years following conviction.
>
> The Staffordshire force also keeps a back-up tape called a shift tape onto which all offences, or potential offences are transferred in any one shift. That is kept for 12 months."

51. Mr Mouat‟s solicitors had made inquiries whose results were rather less illuminating. A representative of the Home Office, when approached, knew nothing about any police guidelines. Two representatives of the Association of Chief Police Officers ("ACPO") were contacted. They both said that they believed ACPO had published guidelines, but neither of

them was able to find them. A representative of the Nottinghamshire Police (policy unity and legal section) said that the Nottinghamshire Police Force followed ACPO guidelines, but they, too, were unable to produce a copy of them.

52. At the very least it appears that the Crown Court was misled, no doubt unwittingly, by the Crown when inquiries were made about police practice at the time of Mr Mouat‟s appeal. It was told (see paragraph 41 above) that it was routine practice for video recordings of this nature to be wiped off unless the motorist made some protest at the time of the incident. We now know that in Staffordshire policy dictates that all these tapes are kept for 28 days, and that if they reveal an offence they are retained for 12 months following a conviction (and for 12 months if a fixed penalty notice is given). Mr Mouat‟s appeal was heard well within both these periods. There should also have been the back up shift tape, which should also have been kept for 12 months.

53. Because we do not know why, despite the Staffordshire policy, the videotapes in the police car were reused, or what happened to the shift tape, if any, which ought to have been preserved for 12 months, and because the Crown Court appears to have been misled, it appears to us that the decision of that court cannot stand, and the case must be remitted for the appeal to be heard again by a differently composed court. The answers to the questions posed by the court are:

(i) In the light of the further evidence received in this court we do not know if a fair hearing took place or could take place. This must be a matter for a new court to decide in the light of the principles we have set out in this judgment.

(ii) No. He was entitled to consider during the suspended enforcement period whether he wished to contest his liability in court, and the police were under a duty under the Code of Practice to retain the video tapes until after that period expired, at the very least.

The Feltham case

54. These proceedings arose out of an incident at a Tesco superstore in Hayes Road, Southall on 17th October 1998 when it is alleged that Mr Ebrahim punched the complainant Mr Chopra, who was another customer in the store. The store was fitted with closed circuit television. The concern of Mr Ebrahim and his advisers was directed to the possibility that an earlier incident at the store, when Mr Ebrahim says that he was assaulted by a number of people, including Mr Chopra, when he first entered the store, was recorded on videotape. They complained that this videotape, if any, had been destroyed by Tesco during the course of the proceedings.

55. Form 86A, which is confirmed in evidence by the applicant‟s solicitor, shows that the application to the magistrate to stay the proceedings was based on the contention that a store security video, which was essential to the defence case and for which a witness summons had been obtained, had been destroyed, and that without this video the applicant could not have a fair trial.

56. The background facts were set out in Form 86A in the following terms. Mr Ebrahim is of good character, and he maintains that he was threatened and abused by a group of people when he entered the Tesco store to do some shopping. A little later one of these people became involved in an argument with him, and he believed that he was about to be struck. He therefore grabbed at this man in order to restrain him in self-defence. At the time of his

arrest the arresting officer viewed only one of the numerous video cameras in the store and did not seize any of the tapes. Mr Ebrahim was not interviewed himself, and it is said that he therefore had no proper opportunity at the time to explain about the events which occurred prior to the incident for which he was arrested.

57. It appears that a pre-trial review on 11th February 1999 was adjourned after defence counsel had requested the CPS‟s help in obtaining a tape which showed the earlier incident when Mr Ebrahim entered the store, because it was thought at that time that this tape was held by the police. It then became evident that the Crown did not possess this tape, and on 25th March the defence applied successfully for a witness summons against Tesco for its production. This summons was duly served, but it did not elicit the production of the tape, and the Tesco manager did not appear at the trial on 10th June despite the summons. It appears that he had told the Crown in April that he would not be attending, presumably because he had nothing to produce, but this information was not passed on to the defence or to the court.

58. It was then stated in Form 86A that it had transpired, after further enquiries, that the videotape had been destroyed by Tesco on about 19th May 1999, some weeks after the service of the summons, and after the store manager had notified the Crown that he did not wish to attend court. The defence complained that no effort appeared to have been made to preserve the tape or to comply with the summons.

59. Evidence has been adduced by the Crown in response to this application to the effect that PC Webster, the officer in the case, gave evidence at the hearing on 31st August 1999 that before arresting Mr Ebrahim he had gone to the CCTV room at the store and had ascertained that the location of the alleged assault had not been recorded on film by any of the CCTV cameras. In those circumstances he had not seized any of the substantial quantity of videotapes which were being used at the time of the incident. In the statement which represents his evidence in the criminal proceedings he says that he went to view the video on monitor 7 of the area where the incident was alleged to have taken place, and that the monitor did not cover the scene.

60. We also received in evidence three affidavits by Tesco‟s customer service manager at this store, Mr Jeff Graham, by way of explanation of the siting of the CCTV cameras in this store. He is responsible for all security issues at the store, and he produced a big plan of the store which identified the location of the different security cameras. He said that they had not been moved since the store was opened.

61. They are all connected to a video recording room, where eight video recorders simultaneously record various parts of the store. The recording switches from one camera to another in a pre-programmed order. The sequence could be overridden manually if there was a need to concentrate on one particular camera and its vision.

62. The plan shows a 360 degree camera (Number 8) in the vicinity of the National Lottery counter which was the scene of the alleged assault and another one (Number 9) which could be directed towards the entrance of the store. Some difficulty arose over numbering. The cameras (at least 37 in number) have one set of numbering, and the video recorders and their monitor screens have another. In his witness statement PC Webster said he went to view the video on monitor 7. In his first statement Mr Graham said that the video recorder No 7 covered the camera No 10, although it could be, and would be, switched to another camera if the need arose. In his second statement he said that “monitor No 7 does not exist and did not exist at the time of the incident”. In his third statement he said that the National Lottery counter was positioned in front of camera 8 and that it was viewable from Monitor No 8 in

the security room. He had earlier said that the image from the camera at the entrance to the store was continuously recorded on recorder No 6.

63. During the course of the hearing we were given the original plan which was before the magistrate on 27th August 1999. The position of the cameras is indicated in manuscript on the plan, and it usefully illustrates the layout of the relevant part of the store in relation to the cameras.

64. We also received in evidence a statement by Mr Roger Coe, a senior Crown prosecutor, who had appeared for the prosecution in the lower court. He told us that he had first become involved at a hearing on 10th June 1999, at which PC Webster had been instructed to obtain a statement from Mr Leon Anthony relating to the status of the video. This statement, which was faxed to the court that day, is not mentioned in Form 86A or in the applicant‟s evidence. It reads:

> "I am a security officer employed by Capital Security Services and working at Tesco, Hayes, Balsbridge. Our CCTV system runs on a system based with 247 video tapes. These tapes are used daily at the rate of 7 tapes per day. This would give approx. 5 weeks of recording before all tapes would be taped over again. Also I would like to add that I destroyed over 300 video tapes so the store could start using new video tapes, therefore all recordings before the 19th May 1999 are now destroyed."

65. Mr Coe tells us that this evidence formed the underlying basis for the argument before the magistrate on 31st August, when the hearing lasted three hours. He told us that at that hearing “PC Webster gave evidence that he had viewed the video, it contained no relevant evidence, and that he had viewed it following receipt of the allegation and having spoken to the witnesses. It was clear from his evidence that no cameras covered the location of the incident alleged at the time”.

66. Mr Smiler, who appeared without a representative of his solicitors in attendance at the court below, did not take a note of PC Webster‟s oral evidence. We see no reason to disbelieve Mr Coe‟s account of what took place.

67. Because we do not have a full note of PC Webster‟s oral evidence, it is necessary to refer to his original witness statement in order to understand what he did by way of investigating the alleged offence when he was called out to the Tesco store at 11.30pm that evening. His witness statement reads:

> "On Friday 16th October 1998 at about 23.30hrs I was on duty in full uniform in a marked police vehicle in company with PC 156TX Hedley. Due to a call received on our personal radios, we attended Tesco Superstore, Balsbridge Industrial Estate, Hayes Road, Southall.
>
> On arrival we were met by Store Security who showed me just inside the store, where I met two Asian males. The first I now know to be Mr Rhajinder Singh Chopra. The second I now know to be Mr Mohammed R Ebrahim. In the presence and hearing of Mr Ebrahim, Mr Chopra said „I was queuing at the Lottery counter to buy a ticket, when this man pushed into my wife for no reason. He did not apologise, so I said „Why did you push my wife?‟ He then turned and

> punched me in the face and started to shout and swear for no reason. I said to Ebrahim „You have heard what this gentleman has had to say, what do you have to say? He replied „I never punched him, I have witnesses, she stuck two fingers at me".
>
> I then left both men with my colleague PC 156TX and went to the CCTV room to view the video on monitor seven of the area where the incident was alleged to have taken place. The monitor did not cover the scene. I then returned and spoke with an independent witness, Mr Mark Lawrence, the Duty Manager of Tesco's. I said „Can you tell me what you have seen?" He replied „I was stood by the Lottery desk, when I saw this man pointing to Mr Ebrahim. He punched into that man's wife for no reason. When asked for an apology he punched him in the face. He was only sticking up for his wife". I then noticed the inside bottom lip of Mr Chopra which appeared to be swollen. I advised him to contact his doctor.
>
> At about 23.50hrs, I said to Ebrahim „I'm reporting you for the offence to be considered of prosecuting you for Common Assault" and cautioned him to which he became very irate and began to shout and swear."

68. It will be evident from this statement that while PC Webster received a version of events from both the participants before he went to see if there was any relevant video evidence, he did not make any further inquiries of Mr Ebrahim about the course of events that night. The outcome of such inquiries might have identified the importance of seeing if there was video evidence of the earlier incident at the entrance to the store. According to Mr Graham, any such evidence, if it existed, would have been available on recorder No 6.

69. We were told that the magistrate gave no reasons for his ruling when he dismissed the application for a stay. District Judge Day (as he now is) has very helpfully filed a short statement in response to this application. It reads:

> "On 31st August 1999 at Feltham Magistrates' Court I tried an information against Mohammed Rafiq Ebrahim alleging common assault upon Rajinder Singh Chopra at Tesco Superstore, Hayes Road, Southall, Middlesex on 17th October 1998, contrary to section 39 Criminal Justice Act 1988.
>
> I was asked at the outset to stay the prosecution as an abuse of the process of the court on the ground that a video recording of an earlier incident in the store in which the accused claimed to have been abused and jostled by a group including Mr Chopra was not available.
>
> Because [Mr Ebrahim] had not been interviewed at any time, the nature of his defence (namely self-defence) and the consequent significance of the earlier encounter and any video record of it was not known until the pre-trial review on 4th February 1999.
>
> It was not clear to me that any such earlier incident would definitely have been captured on video but what was clear was that no such recording was available despite the issue of a witness summons

against the relevant staff member at the store. Indeed the staff member did not even attend court.

I was of the opinion that although the conduct of Tesco appeared cavalier, that did not alter the fundamental basis upon which I should decide the application. The only issue was whether the defendant would receive a fair trial.

I based my decision on the following factors:

1. There was no certainty that the earlier incident had been recorded.

2. Para 3.4 of the Code of Practice (CPIA 1996) did not in these circumstances, months after the incident, impose a duty upon the police to search through all the recordings. That would go far beyond what was reasonable.

3. My experience is that such recordings were unlikely still to be available after such a period.

4. The decision to stay a prosecution is a matter of discretion for the court. The destruction of evidence may prevent a fair trial but does not automatically do so (*R v Beckford* [1996] 1 Cr App R 94). The discretion should be used sparingly (*R v Medway* [2000] CLR 415).

5. The defence to be raised by Mr Ebrahim was not dependent upon the existence or production of video evidence, although obviously if such evidence had existed it would have been of assistance, assuming it was as Mr Ebrahim claimed it to be. He was perfectly well able to give his account of that earlier incident in exactly the same way as if it had occurred in a place where there was no suggestion of the existence of video cameras. The situation is more similar to that dealt with in the case of *R v Stallard* mentioned at p 347 Justice of the Peace (13.05.2000) than the case of *Birmingham* referred to in the applicant"s argument.

Accordingly, I declined to find that there was an abuse of the process of the court and adjourned the case to allow the matter to be dealt with by way of judicial review at the request of the defence."

70. It appears to us that the magistrate directed himself impeccably. He focused correctly on the extent of the police officer"s investigative obligations pursuant to paragraph 3.4 of the Code of Practice, and on the guidance in that paragraph to the effect that the extent of the duty of investigation should be proportionate to the seriousness of the matter being investigated (see paragraph 9 above). PC Webster had no reason to believe that his investigations should encompass what had occurred elsewhere in the store an hour earlier, so that paragraph 3.5 of the code had no relevance (see paragraph 10 above). He made a reasonable investigation to see if there was any video evidence of the assault which was the subject of his investigation and he was satisfied that there was none. On the evidence available to us, we cannot

disentangle the muddle in the witness statement over the non-existent Monitor No 7: if the lawyers in court had made and retained a reliable note of the police officer‟s oral evidence on 31st August 1999 this would no doubt have removed any confusion about what he in fact saw. Any video recording of that earlier incident was therefore obliterated in the ordinary course of Tesco‟s business five weeks later.

71. This was not a Category 2 case because there was no evidence of any improper practice by the police. Nor was it a Category 1 case, because even if PC Webster should have asked some further questions of Mr Ebrahim before going off in search of relevant video evidence, the magistrate was satisfied, on reasonable grounds, that it was still possible to have a fair trial. No doubt at that trial Mr Ebrahim‟s representative will press PC Webster as to the reasons why he did not give him a better opportunity to give his full account of what happened that night before he went off to the video recording room, but cross-examination of this type is the very stuff of a criminal trial of this type. There is certainly no reason to stay the proceedings on this ground. We would therefore dismiss this application.

72. We would not wish to leave the Feltham case without expressing some concern about the way this judicial review application was presented. The "grounds of relief" on Form 86A give, in paragraphs 10-12, a very garbled version of what happened at the hearing on 10th June. No mention is made of Mr Anthony‟s statement being faxed to the court that day, or of the fact that it showed that the contents of the relevant video tape (showing the entrance to the store) would have been obliterated within five weeks of the date of the incident, and not, as stated in paragraph 12, some weeks after the service of the summons. Neither PC Webster‟s oral evidence on 31st August, nor the content of the magistrate‟s ruling that day, are mentioned in Form 86A, and the misleading "facts" stated in that form are verified by a statement of a partner in the firm of solicitors acting for the applicant, who was never present at court, and who confirms, without identifying her source of information, but merely referring to "file records", that the facts stated in the Statement of Grounds were true to the best of her knowledge and belief.

73. If a proper statement of the facts of this case had been placed before Mitchell J we doubt very much if he would have granted leave. At the very least, he would have given the prosecutor an opportunity to state his version of the events before directing that there should be a substantive judicial review hearing.

Conclusion

74. We would suggest that in similar cases in future, a court should structure its inquiries in the following way:

(1) In the circumstances of the particular case, what was the nature and extent of the investigating authorities‟ and the prosecutors‟ duty, if any, to obtain and/or retain the videotape evidence in question? Recourse should be had in this context to the contents of the 1997 code and the Attorney-General‟s guidelines.

(2) If in all the circumstances there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground.

(3) If such evidence is not obtained and/or retained in breach of the obligations set out in the code and/or the guidelines, then the principles set out in paragraphs 25 and 28 of this judgment should generally be applied.

(4) If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. The test in paragraph 23 of this judgment is a useful one.

75. We would add the following two matters by way of procedural guidance:

(5) If a complaint of this type is raised on an appeal by a defendant from his conviction on the magistrates‟ court, he should not apply for the proceedings to be stayed. He should apply for an order allowing his appeal and quashing his conviction on the grounds that the original trial was unfair and the unfairness was of such a nature that it cannot now be remedied on appeal.

(6) If a ruling on a stay application is made in a lower court, the court should give its reasons, however briefly, and it is the professional duty of the advocates for the parties to take a note of these. If the decision is to be challenged on judicial review, this court will expect to see a note of the lower court‟s reasons before deciding whether to grant permission for the application to proceed. If any relevant oral evidence was given, this court will hope that an agreed note can be prepared, summarising its effect.

ORDER:

1. Application in Ebrahim dismissed. legal aid taxation.

2. Appeal in Mouat allowed with costs in appeal and court below, to be paid out of central funds. Legal aid assessment.

(Order does not form part of approved Judgment)

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

[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

(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, espeeially, 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 whieh 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 aetions. 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 aetion 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 eourage 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 suffieient 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 Aet 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(I), 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 inpinge 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] I 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 "peremial 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. This (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, f 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