IN THE SUPREME COURT OF NEW ZEALAND

SC 95/2006

BETWEEN **JOHN ANTHONY REID**

Appellant

SC 3/2007

PETER WILLIAM RUSSEL

Appellant

SC 4/2007

AND **PETER MICHAEL CONNOLLY**

Appellant

SC 7/2007

AND **JOHN DAVID CURRIE**

Appellant

AND **THE QUEEN**

Respondent

Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Hearing: 10 October 2007

Counsel C T Walker and N C Z Khouri for Reid
J R Billington QC for Russel
H Fulton for Connolly
J A Farmer QC and M J Ruffin for the Respondent

CRIMINAL APPEALS

10.03am

Walker May it please the Court the counsel's name is Walker. I appear with Ms Khouri for the appellant Mr John Reid.

Elias CJ Thank you Mr. Walker.

Billington If the Court pleases I appear for Mr. Russel.

Elias CJ Thank you Mr. Billington.

Fulton May it please Your Honours I appear for Mr. Connolly.

Elias CJ Thank you Mr. Fulton.

Farmer May it please the Court I appear with Mr. Ruffin for the Crown.

Elias CJ Thank you Mr. Farmer, Mr. Ruffin. Are counsel are agreed on the seating are they?

Farmer Well no, but it doesn't matter.

Elias CJ Alright, thank you. Yes Mr. Walker.

Walker Thank you. The appeal by Mr. Reid raises two relatively short and straightforward points. The appeal is really only complicated by the fact that the Crown has said in support the decisions on other grounds. You will have my submissions dated 12 September 2007.

Elias CJ Yes.

Walker You will also have nine volumes of case on appeal.

Elias CJ Yes.

Walker The good news is that I am going to be referring in these submissions at least the first volume. Now I don't propose to take you in exhaustive detail through the facts because you will have read my submissions, but there are a couple of points that I wish to highlight, and the first of those is that the precursor to this whole arrangement was the Salisbury scheme in which the accounting firm Gosling Chapman was involved, and if I can ask you to turn please to page 74 of the first volume of the case on appeal. You will see at para.48, and this is the cost judgment, that Justice Fogarty describes Gosling Chapman's role and the genesis of this transaction, and the key point is that it was Mr. Russel of Gosling Chapman that proposed that the transaction be structured along the lines of the Salisbury scheme, and provided the template to do so, and that becomes significant because as you will have seen from the judgments, matters take on a different light when it's understood the

extent of the knowledge that Gosling Chapman has in the facts, and as I say at 10 the Judge considered the Digi-Tech and NZIL schemes in issue here were essentially copies of the Salisbury scheme. Now over at page 3 of my submissions, it is also important to understand the elements of the transaction. We set it out there by reference to a typical $1 million investor. The typical investor would buy a million dollars of shares with the bulk of the purchase price deferred. The bulk being $835,000 to 31 March 2005, and importantly the price didn't reflect the present value of the company, and as the Judge said it was in the nature of a punt. The investor would acquire this loss of profits insurance policy for a premium of one million dollars and the concept was that in 10 years time if the shares were sold for less than $3.00, the insurance would pay out. However the policy also contemplated a purpose trust in an unspecified jurisdiction which would be funded to meet any claims in year 10, and the investor would actually have no further rights against the insurer and important the investor was not actually a beneficiary of this purpose trust and had no rights to sue it. Now the investor could fund 96% of the premium through this non-recourse loan and the loan bore interest so that $2.8 million was repayable in year 10, the remaining 4% of the premium was paid in cash. Now just two points about this arrangement that it's worth noting. The first is that it should have been obvious to anyone that it's unusual for a bank to lend a million dollars to a worthless QC, LAQC I should say. And the one fact that should be added is the fact that the only security the lender had was a mortgage over the rights under the Share Purchase Agreement in the insurance policy. So that should have raised people's eyebrows at the start, and as Justice Fogarty said, commercially it's very unlikely the bank would put its money at risk on such a transaction and nor do insurance companies usually take a bet on a speculative investment, and he made the point that you could work out on the back of an envelop that it wasn't possible to invest $1 million to return $3 million safely in 10 years time and that one of the investors in fact worked that out with some ease. Now that's important

Elias CJ Sorry to interrupt you Mr. Walker. This explanation is addressed to what point? The point that limb 3 was part of the whole assessment by the Judge and not a separate stand-alone

Walker The reason I am emphasising this now

Elias CJ Yes.

Walker It is not so much in respect of our appeal, it's in respect of the Crown's attempts to support the decision on other grounds, so that's why I was highlighting the point. The point being that the Crown's first argument is that it was clear on the transaction documents that a real transaction involving cash involving a real premium and a real loan and no circulatory

Tipping J Where do we find the Crown's notice of intent to support on other grounds, or is that just implied in their submissions?

Walker Well that is a threshold issue that I was going to come to. You will recall what happened when it came to the application for leave. The appellants made their application on the quite limited grounds that you're aware of. The Crown then did two things. It filed its submissions in opposition to that application and under rule 24 that is where the notice of intention to support another ground should be given and essentially what was said in there was that the Crown intends to rely on all the reasons raised in these submissions in opposition, and it is true that actually most of things being argued by the Crown today were raised in those submissions. At the same time the Crown also applied for leave to cross-appeal in respect of two of the appellants. Two of the grounds that were raised are directly raised today again and those are the circulatory issue on the documents in the role of the facade correspondence, and the Court declined leave on the cross-appeal, and if I can remind you of what you said on that – you said 'we do not consider the points which the respondent wishes to advance under the misuse of discretion heading; it raises matters of sufficient general or public importance to warrant a grant of leave'. They are substantially influenced by the particular circumstance of the case and the weight to be given to relevant aspects. They don't raise matters of general principle. In so far as

Tipping J But can we stop them subject to proper notice, seeking to support on other grounds? You don't need leave for that do you?

Walker I can't stop them Sir but I assume that the reason that you're supposed to give notice of your intention to appeal on other grounds, ah, support the decision on other grounds is so that the Court can consider in the same way that they consider the cross-appeal, whether that's appropriate or not, and

Tipping J But wait a moment, I don't understand the rules to say that we've got any control over supporting on other grounds as opposed to cross-appealing.

Walker Well all I can say is that when you gave the leave to appeal you formulated the question, and I think reasonably specifically, it's page 18 of the first volume of the case, so when leave was granted, obviously you had the Crown submissions in front of you, and

Tipping J Those were the grounds on which you were entitled to appeal?

Walker That's right Sir.

Tipping J That says nothing of the question of supporting on other grounds does it? I'm with you in spirit but I don't honestly think I can be with you in strict legal position.

Walker Yes and it may be something that perhaps needs further thinking through. It does strike me as odd that if in the context of a cross-appeal it said that these are not matters that raise sufficient matters of general importance for the Court, so the Court is not interested in getting involved in it. It will still get involved in respect of an attempt to support the decision

Tipping J Well my brother Blanchard knows more about the rules than I do, but I understood that you're entitled to support on other grounds as of right provided those other grounds are properly related to supporting the decision under appeal, but are you suggesting that's wrong?

Walker I'm not suggesting that's wrong Sir, I'm suggesting that the point as far as I'm aware is not clear because there doesn't seem to be provision in the rules for whether leave has to be granted and we may take from that that no leave is required as you say.

Elias CJ Well there has to be an error of principle in the approach that the trial Judge took to costs. Two errors of principle are identified by the majority in the Court of Appeal. I had understood that the appeal was directed at those two errors on principle, which is why I interrupted to find out what the submissions you're addressing to us are directed at. Are they directed to those?

Walker No, my submissions are now directed to our grounds of appeal. All that I was doing was in the course of going through our submissions on the facts I was simply highlighting that fact in anticipation that it will become important in the context of the Crown's response.

Elias CJ Do you want to hear it in reply or now?

Blanchard J I prefer to hear it in reply. See how the Crown gets on with this attempt to raise these matters.

Elias CJ Well you've heard

Walker Yes, no that's fine.

Elias CJ I would be assisted also if you would develop your argument in terms of your appeal.

Walker That's fine, I shall do exactly that. Now the facts as I say are set out in some detail, and I don't need to take you through them - we can pass them immediately to the argument. If I could take you to page 11 of the submissions, and it is important to bear in mind as an appellate Court that Justice Fogarty has obviously the normal benefit of being a trial Judge, but I think he has a particular benefit here given the complexity of the trial and the length taken to examine all of the issues. There was an eight-day pre-trial hearing. You can see that the

particulars of count 1 of the conspiracy charge ran to 165 pages. The trial itself ran for five weeks. There was evidence from 31 witnesses. 60 volumes of documentary exhibits and also video-taped interviews, and you will have seen that Justice Fogarty, over at 43, considered that the Crown's case could be divided into those three elements. The first of which was contention that the transactions were entirely fictional because they were circular and not real loans and real premiums. Second was that they were entirely fictional because the instruments used were deceptive or did not exist, and the third was that dishonest representations had been made that the underlying loan and insurance transactions were real and those representations were supposedly made in letters and memoranda and also in the contractual terms of the agreement. Now His Honour had no difficulty dismissing the first contention, and as you see saw it as an inevitable conclusion based on the mountain of paper presented that the accused believed and understood they were engaged in real albeit artificial transactions faking real rights and obligations. He also rejected the alternative case over at 46 that the transactions were fictitious because they did not take place or were ineptly carried out, and then over at 47, and this is important, he rejected the third limb of the Crown's case and he said that there was first no evidence that the accused actually wrote or spoke to the investors and importantly while there was correspondence which caused difficulties because some of it was deceptive, His Honour pointed to the likelihood that there was complicity by partners of Gosling Chapman, apart from Mr. Russel, in the production of those letters which the Crown was relying on as proof of deceit of Gosling Chapman, and he further found there was no evidence that Mr. McGrath ever used any of this correspondence to reassure or advise investors, and as to the facade correspondence between Mr. Reid and Mr. Connolly, Justice Fogarty found that there was no evidence to satisfy him that this correspondence was written to deceive investors.

McGrath J Towards the end of his acquittal reasons judgment he rather seems to favour, or he rather seemed there might be something in the direct fraud if you like, the third limb, and then as I gathered what he said there was really because of the way the case had been presented that he backed off that, now is that

Walker I don't think that if you'll excuse me is quite accurate.

McGrath J Yes, thank you.

Walker What he said about the third limb was that the Crown had a prima facie case but just on that because there was evidence of dishonest misleading correspondence, but he said that case was ambushed by counsel for Mr. Reid in cross-examination, where he exposed the likelihood in short that Gosling Chapman were actually fully aware of what was going on and that this wasn't being written to deceive them. So

McGrath J Because they'd visited the insurer and things of that kind?

Walker Yes. The template had been provided by Gosling Chapman in the first place. Mr. McGrath had visited at the offices of Epicharmus and as he said anyone who has business in Epicharmus's offices knows what sort of business they conduct, and so he felt plainly implausible that Gosling Chapman were really being deceived by any of this and that's why he said that the third case collapsed as well.

McGrath J Yes, thank you, yes.

Walker Now at 49 Justice Fogarty concluded that he was influenced throughout the trial by the fact that the insurance scheme was obviously artificial, whether there was a real loan or premium or any circularity, and if the investors or their advisers don't ask penetrating questions to understand the whole agreement the promoters might reasonably think that that's because they don 't want to know how it works. Now you will have read the cross-judgment so I won't spend a great deal of time on that but it is important to understand this three limbs point, because it's relevant to the first ground of our appeal. What Justice Fogarty said in essence was that the first two limbs were counter intuitive and weren't a prima facie case and that if the Crown had focused and said on the third limb, for a start the case might have been conducted in a much shorter time and been much simpler and involved less cost, but also it might have led to a different set of events, namely that the Crown might have investigated more carefully the true nature of Gosling Chapman's role and the true nature of the communications between the accused and Gosling Chapman. He didn't say that necessarily that would have meant that the case wouldn't have been brought at all. He allowed as he said treating the prosecution tenderly that a reasonable prosecution might not have exposed the facts as comprehensively as the cross-examination did at trial and as you will be aware that's one of the factors that led him to discount by 50% in respect of the third limb.

Elias CJ Well he really took the view that the Crown didn't concentrate on the question of whether anyone was deceived and whether there was a purpose of deception.

Walker Exactly, and in that sense the first two lines that he said seemed to be counter intuitive and if you like it was a relatively naïve concept that these investors were really thinking that they were getting involved in a real loan and a real insurance because you could work that out on the back of an envelop, so that really only left the representation limb and once you understand who Gosling Chapman are and what their role is in that, that falls away, and importantly there were clues. There was a statement of position in respect of Helvita, where actually some of the inconsistent evidence about Mr. McGrath's visit was there and that wasn't followed up and that was one of the things that the SFO investigator Mr. Bartlett was criticised for.

Tipping J Did the Crown seek to call any evidence from any specific person to say that they were deceived or misled?

Walker The Crown did lead evidence from three or four investors but it was clear on cross-examination that these people had not been deceived and in fact did not understand how the transaction worked or how it would close out in year 10.

Tipping J I thought the case was very thin in that respect. It was crucial respect I would have thought if your conspiracy to deceive or defraud or whatever precisely it was, you'd think you'd have some evidence, some cogency, that people were actually deceived. I mean they don't literally have to be but I mean without that evidence

Walker Yes my impression was that the Crown in a sense went off into a room with the documents and formed their own views about what was happening and because the SFO apparently wasn't liaising closely with the IRD, they made a few leaps that an IRD investigator familiar with the way these things work might not have made, and I think as you say they forgot the crucial step of actually finding people who could convincingly say that they'd actually been deceived about any of this.

Anderson J Deceived in what way? Deceived into thinking that they were actually buying shares rather than avoiding tax or what?

Walker Deceived in the sense that they thought that there was some sort of serious insurer as AXA if you like, that was going to be issuing an insurance policy paid for by a serious lender in the nature of the Bank of New Zealand

Anderson J But to what end ultimately?

Walker To what end, I'm sorry in what sense?

Anderson J Well there were two obvious possibilities. Either this was an arrangement to buy speculative shares because you wanted to make money out of share dealings – alternatively it was just a set up for avoidance purposes. Now if the allegation had been they represented that it was safe from attack by the Commissioner when they knew it wasn't as safe as that, that might be one thing but there's no representation about that.

Walker That's right, I think no one seriously contends that anyone was buying this as a true share purchase. It's common ground that it's an attempt to avoid tax. I don't think any investor could possibly suggest

Tipping J It was sold on that basis wasn't it?

Walker I believe so, by Gosling Chapman that's important to understand, not the accused.

Tipping J Yes. All this talk of templates and so on, we all know what that means.

Anderson J There's just no sense in saying they were alleging certain components were not what they were,

Walker If I may say so

Anderson J Because the conclusion must be that the tax avoider is going to say oh in that case, oh well I won't have a bar of it, but in fact they're falling over themselves to have a piece of it.

Walker Yes I've never been able to understand what sensible investor would have actually got engaged in this and to explain what I mean by that, the Crown relies on an Australian case called *Pearce* and that was a case where there was evidence that the equivalent of the accused actually made positive representations that there would be no circularity and real loans and real premiums in the sense the Crown uses it, but that's the crucial

Blanchard J Because most of the money disappeared into their pockets.

Walker Yes, that's right, but the crucial bit that's missing here is that Gosling Chapman provided the template. The accused fulfilled the template. There were difficulties with the implementation but the Judge has dealt with that and that connection of some sort of representation that there would be no circularity and there would be a real loan and real premium, that is the bit that was missing and the Judge fairly carefully analyses the correspondence where Gosling Chapman gets close to requiring that assurance but doesn't require it, and what that leaves me wondering is how the investors ever really thought – well may be we shouldn't blame the investors – how Gosling Chapman ever thought that this was going to withstand scrutiny and survive as a successful

Blanchard J Well there's been a spirit of optimism in the New Zealand tax avoidance industry for some years.

Tipping J But that is what it was all about, it was tax avoidance, it wasn't deceiving the investors.

Walker Yes, and as the Judge said the SFO missed the significance of the IRD to some extent tolerating these attempts at tax avoidance and at the time there was a less rigorous penal regime in that respect that provided you could come up with some of plausible argument you could escape penalties potentially, but I don't see how anyone could ever have hoped that the IRD would accept this.

Tipping J But it was even more curious than that wasn't it, it wasn't suggested that there was a direct conspiracy to deceive the Commissioner? He was only going to be deceived through the investors in some basis, which I have found great difficulty in grasping the difference between directly deceiving him and deceiving him through other people. But anyway all this I think is just pure background

Walker Yes that's right.

Tipping J The Judge simply saw it in these three heads and has now been accused of sort of doing something that's wholly inappropriate from the point of view of the pleadings or something.

Walker Perhaps we could just deal with that now because I think that

Tipping J Because that's the essence of it isn't Mr. Walker that the Judge has been found to have mis-directed himself in principle by this analysis, which the Judge himself said was correct?

Walker Yes.

Tipping J Which everyone accepts was a fair and reasonable way of looking at the three dimensions if you like of the Crown case.

Walker That's right, there's no dispute that he summarised the case correctly in dividing it into the three contentions. The Court of Appeal agreed with that and I don't take the Crown to be saying anything to the contrary today. The only real question is whether he erred in looking at that for the purpose of awarding costs and I think

Tipping J What he was doing as I understood him was simply using this as a method of assessing quantum of costs.

Walker That's right.

Tipping J Of how if you like the way the Crown's case was presented impacted on the ultimate burden of costs. What precisely do you understand to have been the problem as the Court of Appeal saw it?

Walker Well fortunately the Court of Appeal describes in four paragraphs and I don't mean any disrespect to the majority but I would say that you only have to read the paragraphs to understand what's wrong with it. It's 95 to 98 which is on page 51 of the first volume of the case. So it's important to understand the Court of Appeal accepts that it was a correct analysis of the case that it fell into these three limbs, and if you look at 96 they criticise the Judge because his approach reflects the way in which the cost might be determined in a civil case and then third sentence, on occasion even though a plaintiff may have succeeded overall, some costs will be disallowed on the basis that a particular course of action could not have succeeded etc, and that approach is not

appropriate in a criminal proceeding in which costs do not generally follow the outcome. Well of course in a criminal proceeding if you like succeeds, there's no question of costs because you can't get costs if you've been convicted irrespective of whether the Crown has pursued the case unreasonably or needlessly added cost in the way it's conducted the prosecution. So I think that's the first error that they make. We're not in that situation. The second is they take from s.5(2)(b) of the Criminal Costs Act which if you have our bundle of authorities is tab 2.

Tipping J I found this concentration on the precise wording of s.5(2)(b) a little curious because a Judge in this situation is entitled to take into account all relevant circumstances and in particular

Walker That's right.

Tipping J Then surely it must be relevant if the Crown was firing ineffective bullets into the air so to speak if that substantially lengthened the trial, and there was ultimately an acquittal. I just found the proposition in 97 there a very very narrow approach to the discretion.

Walker I think on both grounds of appeal what you see is that the Court of Appeal thought that in fact there are policies where objectives underline these factors, but in my submission the statute deliberately and very carefully avoids putting in play any sort of particular rule or policy and instead invites the Court to consider anything that's relevant, and all it does in s.5(2) is suggest in particular matters that the Court should have regard to as appropriate, so the Court really improperly treated, the majority I should say, treated 5(2)(b) improperly as some sort of standard that provided there is sufficient evidence to support a conviction on some limb of the case, on some view of the evidence at the outset that that is a fact you're arguing against costs and the Court of Appeal really treated it as a definitive factor in this case and as you say I don't think it's anything of the sort.

Anderson J The Judge was looking at the case and trying to work out quantum on the basis of what aspects of the Crown case were more or less justified in other aspects and therefore more or less vulnerable but perhaps to an award of costs.

Walker That's right.

Anderson J Is it the case that the Court of Appeal said it's wrong to do that?

Tipping J Get it wrong in principle?

Anderson J Yes.

Tipping J I can't see the principle that they are articulating that it's contrary to. I mean it must be irrelevant to consideration.

Walker That's right.

Tipping J And the next step in the reasoning put another way is not putting the point in another way at all; it's positing a different situation altogether.

Walker That's right. It's one thing to say that if you've been convicted you couldn't get costs; it's quite another to say that when you've been acquitted the Judge can't take into account that the prosecution has needlessly complicated the case and put you to additional expense.

Anderson J That's precisely the argument isn't it?

Walker Yes.

Anderson J In a sentence.

Walker Yes, so I think that pretty much deals with, oh except for one point. The Court of Appeal also contradicts itself to an extent because if you turn to paras.38 and 39 of its judgment it recognises that the way that conspiracy charges are drawn caused the case against the accused to be over-complicated, and down at 39, the way in which the two distinct allegations of fraud relied at the indictment was a major source of the problem the Judge experienced in understanding the true nature of the Crown's allegations, and of course the accused had the same difficulty.

McGrath J Could you just help me a bit more with exactly what was considered to be the Judge's problem in understanding the true nature of the Crown's allegations?

Walker Well what the Court of Appeal thinks the problems is that there was this elision between the conspiracy to defraud the Commissioner directly as you say and the Commissioner to defraud the investors.

McGrath J Yes, or by the investors?

Walker Yes.

McGrath J Thank you. So that was the difficulty that it was said the Judge had?

Walker Well they think the Judge had, I don't think that the Judge actually had that difficulty myself because the Crown made clear that it was only alleging indirect

Elias CJ That's not in contention is it, that it was indirect, it was the investors causing Inland Revenue to make a loss?

Walker That's right, except the problem was it wasn't clear in the actual particulars of count 1, the 165 pages. It was clarified – I'll just see if I can find reference if you would excuse me.

Tipping J That must be a world record for particulars.

Walker Well you may be interested to know that there was actually a problem in getting the particulars out of the Crown in the first place. Numerous requests were made and refused by the Crown and eventually an application was made and it was only in the face of the application that the Crown eventually agreed to provide the particulars. I'll find that reference but I believe it was only at trial that it became clear that the Crown was alleging indirect deceit of the Commissioner. But the other paragraph

Elias CJ Only indirect

Walker That's right.

Elias CJ Yes.

Walker And I can show you one reference to that which makes it clearer and that is in the principal judgment towards the very end. It's 202 if I remember correctly, somewhere around there. In fact during the trial the Judge twice suggested to Crown counsel the possibility of exploring an alternative of attempt to defraud the Commissioner, and that would have included the investors in the fraud. It would have been a different case altogether and as the Judge says counsel for the Crown did not pursue that comment, that's 200 on page 155 of the case.

Elias CJ You mean the investors would have been co-conspirators on that theory.

Walker Yes, that's right, yes, quite a different understanding of how the case would have worked.

Elias CJ Yes, quite a different case.

Walker And this was put to counsel for Mr. Reid and he made the point that in fact the Crown had run throughout on the basis that the Commissioner would be defrauded consequentially and the Judge accepted that that was correct.

Elias CJ Well it would have been quite inconsistent with the allegation against the investors so they couldn't have run both.

Walker Absolutely inconsistent

Elias CJ Yes.

Walker Yes that's right. But the other paragraph we need to refer you to is 109 of the Court of Appeal's judgment and that is at page 54 of the first one where at the end of this analysis criticising the Judge for adopting the

three limb analysis and awarding costs, the Court said that for the sake of completeness we had the exercise of the discretion being justified it would have been open to the Judge to apportion costs based on waste of time, which after all is all that Justice Fogarty was doing. Now there's one other point that you do need to understand. It seems that in this first respect the three limb problem, the Court was influenced by its mistaken belief that another case could have been made out that there was fraud in respect of the 4% cash contribution paid towards the insurance premium, so if I ask you to turn to para.58 of the judgment which is at 37 of the volume, and the majority said that if the investors were falsely led to believe that their 4% contribution would be used to pay for an insurance premium, and it could be proved beyond reasonable doubt that two or more of the accused were both promoters and parties to that agreement, the conspiracy charges could have been proved, and what the majority seems to have had in mind is that the investors were either led to believe that their 4% cash was actually going to be used to pay the premium, and if they were led to believe that there might have been a sustainable case of fraud. The other possibility was that the investors knew all along that the 4% was going to reward those who had set up the scheme, in which case there wouldn't be, but the Court didn't realise this third possibility which is actually the cash was used to pay the premium and that is in fact what Justice Fogarty found, so if I could ask you to turn to 31 of the principal judgment which is at page 99 of the case on appeal. What you have to understand is that John Currie who is the solicitor with the Trust Account in Hong Kong is acting for Epicharmus the insurer and is also acting for the reinsurer, Swiss Underwriter Group, and if you look down, six lines up from the bottom of 99, His Honour recorded that similarly the insurer, Epicharmus, would recall as a credit the receipt of the premium in accounts for each individual insurer. Epicharmus, the insurer, would instruct Mr. Currie to pay the cash component of the premium – that's the 4% - to Swiss Underwriters Group – that company held no bank account, so the cash component was held by Currie's solicitors acting as settlement agent. With one exception the cash component was not included in the amount of the endorsed negotiated instrument – that's the TCD that pays the 96%, and as Mr. Currie acted for both the insured and the insurers nominated recipient it appears the latter's right to the sum transferred by the acknowledgement of receipt by the insurer, and obviously there's the world of difference between using the 4% to reward those who put the scheme in place after the insurance premium has been paid.

Tipping J There's no doubt that they got it back, but this was part of the circularity, is that the

Walker Yes, the point is it was an artificial transaction but the 4% was actually used to pay the premium

Tipping J Was actually used

Blanchard J Yes, the insurer could never had denied that.

Walker That's right, well in fact it did the opposite, it confirmed it in a 280-page document, yes.

Tipping J What was it that would have justified the Court of Appeal, even though you've elucidated further by what you've just told us, what was the significance of 58 anyway? I mean the Court of Appeal says if the investors were falsely, but that was never suggested was it? Was there an allegation as part of the Crown case that the investors had been swindled because they were led to believe that their 4% was going to go to pay the premium when in fact it hadn't?

Walker Well I believe that was part of the case.

Tipping J It was part of the case was it?

Walker The 4% had in fact, where it was supposed to go off to pay the premium, in fact it was simply diverted to those who constituted the scheme.

Tipping J Yes, it went into their pockets.

Walker That's right, even though there was as I say evidence from the insurer confirming that it had received 100% of the premium including the cash contribution.

Tipping J So there was some justification for the Court of Appeal speculating if you like on the premise that if such and such had been the case and if something other else it would have been the case, I didn't quite understand what

Walker I don't think so.

Tipping J What the purpose of this was anyway.

Walker I don't think so, because I think actually the Court of Appeal didn't pick up para.31 of the acquittal judgment and I think the Court of Appeal was operating on a mistaken understanding that the 4% hadn't been used.

Tipping J It looks as though they might have been but what was the relevance for the costs issue as to whether this was so or not?

Walker I believe that was a factor that they had in mind in deciding to reverse the decision on costs, that there might have been another case made in respect of the 4%.

Tipping J And that your clients should be in effect penalised in costs because they'd actually done something very very naughty which the Judge hadn't found against them.

Walker That's right, otherwise I don't really see what the point of 58 is if it's not to have that sort of play in the judgment.

Tipping J It's very illusive isn't it as to what it's, they don't seem to me anyway unless there's something else that I've missed, indicate clearly why they are bringing this to account.

Walker As I say they really only have in mind those two possibilities. One is that if the investors had been falsely led to believe that the 4% contribution would be used to pay the premium then the conspiracy charges could have been proved and the other possibility

Tipping J But what I'm saying really Mr. Walker, I'm sorry to interrupt you, is that this paragraph seems to stand alone as an island in an unrelated sea without any indication as to why they are making this observation. Are you saying that the only logical reason for them saying this must have been that implicitly or unconsciously or whatever they were marking your clients down for what the Court of Appeal may have thought they'd done something naughty which wasn't in any way a finding of the Judge.

Walker No that was contrary to the Judge's express finding.

Tipping J Yes.

Walker Which I just don't think they understood – picked up I should say.

Tipping J Well that's helpful because I had difficulty understanding when going through this judgment what this 58 was there for in the first place.

Walker Yes. So I can take you then to the second point which is the public interest in not inhibiting prosecution of serious crime through disproportionate adverse costs words. I should say that the Crown in its submissions - well I'm sure you have the point that's in issue which is that the majority in the Court of Appeal considered that there were two policies underlying s.5 and perhaps I should take you to that. So if we turn to page 30 of the case. The majority considers that there are two competing policy considerations underlying the factors identified in 5(2) and you can read them there. And so in 28 they become not only policy considerations underlying it but relevant circumstances that the Court has to have regard to, at least in cases of serious crime

Tipping J Apparently these are mandatory.

Walker That's right, at least in serious crime.

Tipping J In spite of the fact that there's a list of almost mandatory and Parliament hasn't chosen to include this.

Walker Absolutely.

Elias CJ But why would there be a difference for serious crime, which is really in the eye of the beholder I suppose, in any event, but why would there be a difference?

Walker The majority's theory was that complex fraud is difficult to investigate and I take it that what they mean by that is that you shouldn't really deter organisations such as the SFO from investigating complex crime where it might be quite difficult to work out what is actually going on.

Elias CJ Oh well complex crime I can understand. You are suggesting that by serious they mean

Walker I think that's right because when they return to the subject they focus more clearly on the difficulties that the SFO faces. This is at 104, page 52 of the case where they say 'serious' or 'complex' fraud, so they seem to be using those as equivalent.

McGrath J The Court of Appeal's idea is not so much deterrence of investigation as to deterrence of laying prosecutions isn't it?

Walker Well they do refer to both.

McGrath J Looking at (b), I know.

Walker And they refer to both at 104.

McGrath J You think the idea includes investigation anyway?

Walker Yes.

McGrath J The Court of Appeal's idea?

Elias CJ Well it's not referred to of course in s.5 is it?

McGrath J No, no, well that's Justice Tipping's point, yes.

Elias CJ Yes, I see.

Tipping J I'm glad to have it supported.

Walker And at 105 you will see that it's in the public interest that serious or complex fraud be identified and prosecuted, notwithstanding the difficulties of proof in many cases, so as I take it there's effectively a license when it comes to serious or complex fraud but to be given the benefit of the doubt if you're the Crown.

Tipping J The reason why it's not included in the mandatory, well almost mandatory list, is presumably that it doesn't normally come out of the pocket of the prosecutor, it comes out of the public funds held by the Secretary for Justice and it's only in certain very defined circumstances that the Court can make it come out of the pocket of the prosecutor.

Walker Well that's right but I think before you get to that point there's a prior point you have to take on board which is that what the majorities improperly trying to do on my submission is have goals or policies that actually drive s.5, and if you look at s.5 the legislature has been extremely careful to avoid imposing any particular standard or rule as to when costs should or should not be granted. In fact it does exactly the opposite and tries to leave matters as open as possible and we've set out the authorities in our submissions which support the conclusion that this is a very open discretion which is subject only to the sorts of appellate review

McGrath J And indeed there is a theme coming through those authorities is there not that you look at the matter through the eyes of the acquitted person rather than through the eyes of the prosecuting agency?

Walker I think the way to put it is that costs should not be taken to be any sort of criticism if you like of the nature of the prosecution and the whole point of the Act 1967 was precisely to move away from that idea and have as you say the focus on the position of the accused as well as the conduct of the prosecutor. And so that's why there's an express provision in 5.5 of the Act that no defendant should be refused costs by reason only of the fact that the proceedings were properly brought and continued. But if you look at 27(a) and (b), these two policy considerations that supposedly underlie 5(2), there are two problems with them. One is

Elias CJ It can't be right in any event to discern a policy simply from s.5(2). You have to construe s.5 as a whole because 5(2) jumps off s.5(1)

Walker And not just 5.

McGrath J As subsidiary to 5

Elias CJ Yes, as subsidiary

McGrath J It takes great pains to emphasise the breadth of discretion is not being restricted and this would be a very restrictive factor. This isn't even in 4(2).

Walker That's right.

Blanchard J The problem with the policies anyway is that they are almost self-cancelling.

Elias CJ On the one hand, on the other – it's balance you know.

Walker So as I say there are two problems with it. One is that actually the whole thrust of the section is not to put policies or principles or goals in place so they aren't actually equivalent to the factors that you see in 5(2) which really leaves matters open and just ask the Judge to consider various potentially relevant matters. But the other problem is that if the Court just seems not to have noticed s.7, which makes clear that as was observed earlier these amounts are to be paid by the Chief Executive of the Department of Courts unless there's been negligence or bad faith.

Elias CJ I just can't see that that's relevant at all. I mean it's helpful in the sense that they've made an error in their reasoning but how can it be relevant who pays?

Walker The relevance is that section was put in specifically to address this concern that if the costs were to be paid by the particular agency it could be a disincentive to them in prosecuting crime. Now since filing our submissions we've actually managed to obtain

Elias CJ You mean this is to prevent any argument about chilling effect?

Walker That's right.

Tipping J Exactly.

Walker That's precisely the goal. Since filing our submissions we actually obtained the original 1966 Report. If you're interested in taking a look it's pretty simple the point but the idea is that that's exactly what they were trying to address.

Tipping J The only possibility for a chilling effect is where you've been negligent or in bad faith.

Walker Yes.

Tipping J But then you have an express ability to impose a degree of chill.

Walker Exactly, you might want to chill them.

Elias CJ Yes.

Walker And what's odd actually is that the Court of Appeal expressly relies on the 1966 Report and then the 2000 Law Commission Report in support of the idea that these are policy considerations underlying the Act, and I take it that the Court can't have had the full report in front of it, it can only have had the sections quoted in the Law Commission's Report in 2000, because if you look

Elias CJ Have you got this?

Blanchard J Yes somebody's already supplied us with it.

Elias CJ I thought we only had partial.

Walker We sent a copy through to the Registry.

Elias CJ Oh you did.

Blanchard J Oh well we've all got them.

Walker Yes fine.

Elias CJ But in any event it seemed to me that this report wasn't in fact implemented in the legislation in full, but you're saying on this point it was?

Walker Yes I believe it was. The recommendation is at page 11, paras.34 through to 36.

Tipping J Would it be a fair encapsulation of your client's point Mr. Walker that the Court of Appeal majority have re-written the legislation?

Walker Yes, and in a way that's entirely inconsistent with a previous authority and quite consistent authority, and it's also fair to say to the Crown that in their submissions they've accepted that if the Court is to be taken as understanding that the costs are to be paid by the Serious Fraud Office, then there's been a blatant error and it's clear that that's what the Court understands because if you look at para.107 of the judgment, which is page 53, if you look down at the third sentence, fourth sentence rather, 'the significant dollar amount of the award combined with the expenditure incurred by the SFO is likely to have a considerable economic impact on the office, so it's clear they just made a mistake and didn't see s.7.

Tipping J I understand this point because if the point had been raised specifically in argument then presumably it's highly likely that some of the learned counsel present might have noticed s.7.

Walker Yes, the criticism may be less relevant now here before you but the fact is neither of these points was actually argued before the Court.

Tipping J You mean neither of the three limbs nor the

Walker The three limbs was raised but not in this context; not in the context of there being some sort of prohibition of conducting that sort of analysis for costs.

Tipping J And this question of chilling wasn't argued at all?

Walker It wasn't argued at all. And what's curious in fact is that the Crown raised a great many arguments, many of them which they are attempting to raise again before you and the Court of Appeal while recording the arguments, implicitly rejectable are those in the sense that it didn't really say why (coughing) and instead found on these two matters which hadn't actually been the subject of argument, and the majority cited as I say the 66 Report, the 2000 Law Commission Report and the Court of Appeal's decision in *Rust* as supporting its view but you only have to read the passages that they're relying on in *Rust* to see that there's absolutely no support at all for those propositions, in fact it's quite the contrary.

McGrath J Sorry where's that in the Court of Appeal's decision, the reference to *Rust*?

Walker Yes, if you

McGrath J 30?

Walker That's right. And all that was said in *Rust* was that there has to be good cause to award costs which is obviously quite a different point.

Elias CJ Do you go so far as to say the potential chilling effect is not a factor that the Court should weigh in the exercise of the discretion because s.7 is enacted to answer that issue?

Walker No I don't think it's necessary to go that far because 5 invites you to take into account all relevant considerations and conceivably there might be a situation where notwithstanding the s.7 rule, you might consider that in the particular circumstances there's a potential of having a chilling effect and it could potentially be relevant. The point is it can't be a mandatory relevant consideration here and the Judge shouldn't probably be criticised for failing to take it into account.

McGrath J So if legitimate it can't be a mandatory consideration?

Walker That's right. It's also worth noting that the Crown did submit before Justice Fogarty that the Crown should be treated more tenderly when it comes to costs, and that submission picks up a line of authority and we've given you that at 99

Elias CJ Where does that come from the statute? Where's that

Walker It doesn't appear in the statute at all.

Elias CJ No.

Walker The only point I'm making is that the submission was in fact made to His Honour that the prosecution should be treated more tenderly because it acts in the public interest and His Honour picked that up and expressly said that treating them more tenderly a reasonable prosecution might not have shown the facts in the way that the cross-examination did at trial. The only reason I'm saying this is that in fact the Court did have in mind while it made this determination, a submission that the prosecution does need to be treated tenderly.

Tipping J And that is the way it was put not don't make any order because that will chill us.

Walker That's right, and there's some dispute in the authorities about whether that's really a valid consideration at all now, the idea that the prosecution should be treated more tenderly and would refer you to some authorities where Justice Hammond is questioned that as being a continuing principle I'm not sure that's something you need to decide, but I thought you should be aware of it.

McGrath J It's 99 of the Court of Appeal judgment you're saying is the closest they get to this matter is it? I'd just like to know which passages Justice Fogarty deals with it and where you say the Court of Appeal came closest to recognising that he had dealt with it.

Walker Yes, it's para.46 of the costs judgment, page 73. If you look down the bottom, the last sentence 'however treating the SFO tenderly, a reasonable investigation here may not have exposed the facts or the clarity achieved by Mr. Gilbert' and as we know that was based on a submission that the Crown made that which we quote at 98, that 'because prosecutions are brought in the public interest they should be treated more tenderly from a costs point of view'.

McGrath J That's not tenderness on quantum, that's tenderness in looking at the judgments they made?

Walker Yes that's right, it's giving them the benefit of the doubt when it comes to the third limb which has obviously a quantum effect in the end.

McGrath J And where was it that you were referring also to the Court of Appeal judgment I thought at 99, but I may have got that wrong.

Walker No, not at 99, it was in the dissenting judgment of Justice Ellen France and is 129 of the Court of Appeal's judgment.

McGrath J Thank you.

Walker And she makes the observation which I've just made to you.

McGrath J Thank you.

Walker And that I believe deals with that point. The last submission at pages 29 and 30 however can be put relatively quickly. What's odd about the Court of Appeal's judgment is that after Justice Fogarty if one may say did a comprehensive and careful job in his cost judgment on these two bases alone, the Court of Appeal decides it should reduce the award from 75% excluding the admissibility issue on the Crown's scale to nothing, and I think that should be a warning to an appellate Court of the wisdom of trying to re-exercise the trial Judge's discretion and importantly in doing that the Court of Appeal clearly misunderstood Justice Fogarty's judgment. The majority thought that – this is 102 – that Justice Fogarty

Elias CJ I'm sorry, what?

Walker Para.102 of my submissions on page 29. The majority thought that Justice Fogarty had found that it was appropriate to prosecute on the basis of the third limb. Well that mis-states what he found. He found that it was inappropriate to prosecute on the first two. If they'd concentrated on the third matters it might have turned out quite differently but treating them tenderly the facts might not have been exposed as clearly as they were at the trial itself which is a much more subtle finding and implicit, well not implicit, involved in that is some criticism that the Judge makes of how Mr. Bartlett in particular conducted the investigation. In short the Judge seemed to be of the view that Mr. Bartlett had spent too much of his time chasing the counter intuitive limbs when he could have spend more of his time chasing up leads that appeared in the IRD statement of position for the company Helvita, and while it's true that Justice Fogarty observed that the Crown case was ambushed by counsel for Mr. Reid, which is one of the factors he took into account in reducing the cost by 50%, as I say he did also criticise the Serious Fraud Office for the way it investigated that third limb, and the Judge has already taken into account that to varying extents the accused brought the charges on their own heads and in my submission you will struggle to find more careful and thorough exercise of the cost discretion in a case as Justice Fogarty's judgment. It's not normal for Judges to have a two-day hearing and to write such a complicated and careful judgment and the Court of Appeal should have been very slow to revisit that and they've done it on two inappropriate grounds and the result is in my submission that Justice Fogarty would not recognise, having actually sat through all of the relevant submissions in evidence. So that's the end of my submissions on Mr. Reid.

Elias CJ Yes thank you Mr. Walker. Mr. Fulton.

Fulton May it please Your Honours, I propose not to address specifically all that is in my written submission. I have heard indications from Your Honours already that those submissions have been understood. I will have some additional comments to make however that may provide some illumination on the questions that we have. Mr. Connolly's

appeal is based on two propositions advanced by the Court of Appeal that there was error on the part of the trial Judge and those are well known. In Mr. Connolly's case I'm going to address them from the point of view of the s.7 point, namely that there is according to the Court of Appeal, a relevant public policy to take into account an assumed economic impact of an award of costs on the Serious Fraud Office as prosecutor and secondly address the so-called failure of the trial Judge to consider justification of the prosecution as a whole by reason of the analysis into three limbs. What the Court of Appeal did is to apply these two errors, one of principle and one policy, separately and that can be seen in the section of the Court of Appeal judgment commencing at para.110. It has the effect of two appellants being affected by the Crown appeal and having their awards reduced – that is my client Connolly, and Mr Currie – on the basis of the s.7 point or the economic impact point. The other error, namely the division of the case into three limbs for determining cost was the ground on which the Court of Appeal removed the orders for costs in respect of Messrs Reid and Russel, and that can be found at paras.116 through to 118 of the Court of Appeal judgment. I suppose what I am saying in other words is that for Mr Connolly's and indeed for Mr Currie's appeal I technically may need to rely only on the first – the economic impact principle, but in case I am mistaken my submissions for Mr Connolly have also dealt with the second ground of appeal.

Tipping J Didn't the Court of Appeal apply both limbs to all but said that the difference was that Reid and Russel were going to get no costs whereas the other two were going to get the handsome sum of $50,000?

Fulton Yes

Tipping J Isn't that the force of the difference?

Fulton Well I don't see that the Court of Appeal has used the second argument against Connolly and Currie so as to reduce them from whatever was there for them.

Tipping J But in any event you're going to without I hope too much repetition support Mr Walker's position on both are you?

Fulton With the greatest of respect I do that thank you.

Tipping J Yes.

Fulton So if I can turn to what I have called 'the economic impact principle', as you've heard it was formulated by the majority of the Court of Appeal which I'll shorthand to just Court of Appeal at para.27, again it developed that marginally in para.29 saying that there is a greater public interest in insuring serious crime is prosecuted without fear of adverse costs or orders. What it was doing was devising this policy to say that there should not be a disincentive or inhibition to prosecutions

by lumping costs onto the prosecutor, and at the same time there was also another intended but this time benefit to an award of costs and that is an incentive for the prosecutor to maintain adequate standards. So there were two reasons for the policy, but whichever way one looks at it, either the penalty aspect or the positive aspect of it being an incentive to maintain standards, the Court of Appeal made reference only to the effect of costs on the prosecutor. There is no reference in the Court of Appeal's judgment to costs functioning as compensation to a successful accused in appropriate circumstances. This focus, as my written submissions address, is as we've seen contrary to the statutory scheme to compensate accused people independently of the prosecution because it comes from the fund provided to the Department for Courts. Some examples of the Court of Appeal focus on the effect of costs on the prosecution are made so that, with the greatest of respect to the Court of Appeal, we can eliminate the somewhat charitable suggestion made by the Crown's submissions before this Court that the principle may yet apply not withstanding the prosecutor is under no liability to pay the costs. So at paras.31 and 32 of the Court of Appeal judgment the Court of Appeal applies its policy to serious fraud in particular, so that is an indication it is looking at the prosecutor in this case, the Serious Fraud Office. At para.32 is the paragraph where it says well a discretion exercised without consideration to the principle we have enunciated will be wrong and they go on to say that only by adopting the principle we have enunciated can s.5 ss.2 be given a purposive interpretation. In other words, and I think as Mr Walker correctly put it, this introduced policy is to drive the interpretation and application of s.5, particularly ss.2. This would mean for example that the incentive of the policy to maintain high standards of prosecution should be exercised only or principally where there has been such a failure on the part of the prosecution and one can add to the policy, the prosecutor needs to be reminded that it has not observed the high standards of prosecution. In my submission that is what the Court of Appeal is leaning towards in the next paragraph 33 of its judgment, where it is held that the s.5, ss.2 factors, and the policy that is being enunciated are, and I quote 'internally inconsistent criteria', therefore the Court of Appeal says care is to be taken that the discretion is not arbitrary. One wonders how an introduced policy can be introduced if it's going to be internally inconsistent with what is in the statute, but be that as it may. My next reference then is over to para.108 of the judgment and the judgment here is talking about the same area of a positive function, or a didactic function of the policy, the Court of Appeal would award costs proportionate it says to the prosecution fault, and here the prosecution fault is the adequacy or inadequacy of the Serious Fraud's Office liaison with Inland Revenue Department. It's creating a proportionality and that is followed at para.115, which is in the direct area of the exercise of the discretion relating to Connolly and Currie. There it adopts a figure or proposes a figure and orders a figure of $50,000 quite arbitrarily in my submission, but that sum it says operates to remind Serious Fraud Office of the need to have adequate

evidence to implicate an accused in an alleged crime. That's at the end of that paragraph 115, and the statement is made because the trial Judge has found that there is no proof at all against Connolly and Currie – a finding that is echoed by the Court of Appeal itself, so that's why it has addressed this I suppose didactic factor to remind the Serious Fraud Office they have got to have adequate evidence to charge somebody at all. The finding that there was no evidence at all against two of the accused is with respect a strong finding. How compensation for costs should be limited to a fraction of the actual costs, even a nominal amount, is nowhere explained by the Court of Appeal.

Anderson J The way that the Court of Appeal has expressed it in para.15 is that the basis for awarding $50,000 is to vindicate the non-involvement finding and as a salutary lesson to the Serious Fraud Office, neither of which are statutory criteria.

Fulton Indeed Your Honour, and it's almost as though the Court of Appeal is proposing that orders for costs should operate as some form of penalty. Either a penalty to say 'you did wrong, you charged people you should not have charged', or, which is another form of penalty, 'you must do better'. Take for example Health and Safety prosecutions. They say to an employer 'you've got to do better'.

Tipping J Mr Fulton are you in effect inviting us to take two views – one that they shouldn't have impugned the exercise by the trial Judge in his discretion at all, and second if they had some justification for doing so their own re-exercise is fatally flawed?

Fulton Yes, absolutely.

Tipping J Yes, but I presume you hope you won't get to the second point.

Fulton Well it's there in reserve if I fail on the first.

Tipping J I see, I just wanted to make sure you were actually engaged on two steps here.

Fulton Yes.

Tipping J Yes.

Fulton Yes, thank you Your Honour.

Anderson J The issue of exemplary awards is dealt with by the ability to award directly against the SFO.

Fulton Yes.

Anderson J Leaving that aside there's no place for it. It's the compensatory exercise to a large extent.

Fulton Absolutely, and that's the whole framework of the Act, particularly with s.7 in mind. I think the Law Commission in 2000 emphasised previous right to say that costs are not costs against the prosecutor, they are costs to compensate the accused.

Blanchard J It's actually in para.36 of the original committee report, and it's there in relation to the principles which in that committee's opinion should govern the award of costs. It refers to a similar approach in England where under the English Act of 1952 costs came out of local funds and they granted to the defendant but not against the Police.

Fulton Yes, yes, thank you Your Honour. That I think was what was being reflected when the Law Commission in 2000 reviewed the legislation and found that there was no reason for there to be any change. I have mentioned that the Court of Appeal has therefore seen in one respect that the costs should be proportionate to a failing of the SFO to liaise with IRD. Certainly the trial Judge described that failing as significant, and so it was. I don't need to emphasise it to any great extent. It was one of a number of failures what the effect of the Serious Fraud not aligning themselves with

Tipping J Aren't you almost inviting a response by the Crown on the matter generally? Wouldn't you be better off concentrating on why you say the two points raised against you by the Court of Appeal are in error? The wider you go the more title there is for the respondent

Fulton Yes, thank you.

Tipping J To engage on all these issues.

Fulton Yes, they're probably much better in reply Your Honour.

Tipping J Well with respect I would have thought so.

Fulton Yes, yes. Let me then turn to paras.99 to 108 of the Court of Appeal judgment. This is where the Court of Appeal is saying that costs should not be a disincentive to a prosecutor to prosecute. Now in this passage the Court of Appeal is directing its attention solely to the Serious Fraud, even to describing its creation in 101, its function, which is not for the first time described in this section of the judgment at say 102, 103, and the nature of its work at 104. It proceeds to say that it is in the public interest that fraud be prosecuted, rather assuming I think in that statement that there is fraud in the first place to be prosecuted. At para.107, as the Court has already noted, the Court of Appeal draws attention to the budget of the Serious Fraud Office itself, and talks about the likely economic impact on that office of awards of costs. Then at para.108, to which reference has already been made, the

Court of Appeal holds there is a possibility of inhibiting the Serious Fraud Office's functions. When it came to dealing with Connolly and Currie at para.115, that is what the Court of Appeal said were the weighty factors in their cases.

Tipping J Are you making any different point here from that made by Mr Walker? I just want to understand what you're saying if it is different from Mr Walker?

Fulton No it's probably just a development of Mr Walker's submission I think. It's not different in any way.

Tipping J Just an elaboration of what he was submitting?

Fulton Yes I hope it is, yes.

Tipping J I see. I mean it's perfectly plain that they must have overlooked s.7.

Fulton Oh yes.

Tipping J And it's perfectly plain they focused on the poverty of the Serious Fraud Office, but is there any more in the point than that? And that is an error you say which they themselves have made, not the trial Judge, but they themselves have made.

Fulton Well the Court of Appeal

Tipping J Is there any more to it than that conceptually? I know there's plenty of flesh that could be put on Mr Walker's bones but is there anything more to it conceptually?

Fulton No there is not Your Honour.

Tipping J No, alright.

Fulton That is the point and it's so simple to state really because

Anderson J Well there's an irony in the fact. They said the Judge was quite wrong – we're going to interfere with his discretion because he was quite wrong not taking these matters into account, and they were not proper to take into account.

Fulton Yes, yes. Perhaps I'll just pass further through without more development other than to draw attention that this part of the judgment is looking perhaps at the penal aspect of costs. It is almost saying at one point that the Serious Fraud Office should be at liberty to prosecute notwithstanding difficulties of proof and costs are in some way a disincentive to that occurring. That sends a very mixed message in my submission that a Serious Fraud Office should be invited to prosecute where there are difficulties in proof and they're somewhat no doubt

excused for doing so. Well finally on this aspect of the matter. The Court of Appeal did take the opportunity to give quite an extensive summary of the High Court judgment of Justice Fogarty. It might have given an adequate summary so as to put in context the policy that it wanted to introduce and thereby overrule the Judge, but in my submission the Court of Appeal still fails to capture the trial Judge's unique advantage in this case to understand its complexity, to understand the direction

Tipping J If the trial Judge has made an error of principle he has no unique advantage.

Fulton Yes.

Tipping J We're talking here about whether he made errors of principle.

Fulton Yes, and if he didn't?

Tipping J If he didn't that's the end of it. The question of his unique advantage is really just flavouring isn't it Mr Fulton? I'm sorry if I appear a little terse but we're here to consider whether the Court of Appeal was right in these supposed errors on principle that they ascribed to the Judge. It's got nothing to do with his unique advantages.

Fulton Except to the extent that if there is any indication that the, and I don't think there is, but in case there is any indication that there was a serious lack of weight given by the trial Judge to any factor, then it is still not identified by the Court of Appeal as being the trial Judge's function and

Tipping J Yes I understand.

Fulton We get quite a lengthy description of Justice Fogarty's judgment by the Court of Appeal and no identification of any real failure other than the introduced policy. I will not refer the length of the second proposition, namely the division of the case into three limbs other than to make one submission that when one turns to the Court of Appeal judgment as Mr Walker did at paras.95 to 98, in my submission the Court of Appeal has failed to demonstrate its proposition by any reasoning or analysis in that section of the judgment to say here is how the discretion was exercised wrongly by assuming this is a civil case. I would have hoped that any reason or analysis would appear in either paras.96 or 97 but the judgment in those paragraphs is really stating propositions without development. Those are my submissions Your Honours.

Elias CJ Thank you Mr Fulton.

Fulton Oh perhaps one point that arose out of the Court's exchange with Mr Campbell. The expression 'treat the prosecution tenderly' came from Lord Justice Devlin as he then was in an English case of *Berry v*

British Transport Commission. It can be found in the Law Commission's 2000 Report at para.25 of the Law Commission's 2000 Report. That's where the Law Commission said that it regarded that expression as out-moded – a view that was reflected I think by Justice Hammond in his case. Thank you.

Elias CJ Thank you Mr Fulton, we'll take the morning adjournment now.

11.31am Court Adjourned
11.48am Court Resumed

Elias CJ Yes Mr Billington.

Billington If the Court pleases, repeating good points never seemed much to improve them and this case is no exception, so I won't. The Court has with respect identified what are quite serious errors of principle in the Court of Appeal judgment and I'm speaking there of the application of s.5(2). More importantly however is this that if this judgment remains the consequences are these, that for a trial of five weeks where at the end of the trial the Judge finds no evidence at all against an accused person, the sealing is set at $50,000. If however there is some evidence, albeit slander, to justify the bringing of the charge then the accused person is effectively disqualified from obtaining costs at all. That is the practical effect of the application of the judgment in my submission if it remains the law as it is at the moment.

Elias CJ And you say that's contrary to the section?

Billington It's contrary to the Act, and accordingly as I say it in the final sentence of my submissions the role and function of this Court is to put right that error of law so the Act can be properly applied in the proper circumstances. So the question arises that there are two errors in this judgment in my submission – the first is that which I've just spoken of, which is the point the error of principle, and just leaving that alone that is the effect of it so whether it is saved or not by the second point is moot in my submission because it may then be fact specific but it doesn't assist the Courts at first instance in dealing with applications of this nature in the future. The danger however is this that if you go into the second element, that is the three limb test, which after all was a test postulated by the Crown specifically during the trial and the third of those limbs, then in effect it will require a re-visiting of all the fundamental findings of fact made by the trial Judge at the trial, because ultimately it would then be a determination of what was the strength of the case at the start of the prosecution – did that change throughout – and therefore was the prosecution justified, and that's a discretionary matter in terms of s.5(2)(f) but it's a matter that the cost judgment at first instance took into account. What has been overlooked in the discussion, and this is where I'm going to include the

submission now, of that point is this that the Judge directed himself on the law in relation to conspiracy to defraud and afterall that is what the case was about. It wasn't about judgments on sham; it wasn't about whether substance prevails over form; it wasn't about whether s.99 applied or not. What it was about was conspiracy to defraud, not s.310 conspiracy, and the Judge discussed the key elements of conspiracy to defraud in the acquittal judgment and rightly discussed the judgment in *McQueen & Adams* in the Privy Council, and those judgments which are referred to and are seminal judgments, and in particular those passages that relate to a practicing on a fraud by prejudicing the economic right of the third party, and to do so there had to be a fraudulent or false representation to that third part so that party would then act accordingly. The Judge then concluded his acquittal judgment by the express finding that not only were there no false representations; not only was there no intention to defraud, but in fact there were no representations of a falsehood, and they are findings of fact which in my submission cannot be impugned. If there were other errors of law in passing in the discussion of sham, s.99 and Tax Law, and I submit there weren't, but if there were and if they were fundamental to the judgment, which they're not in my submission, then the proper time to attack those was in relation to the points of law that had been reserved by the trial Judge following his acquittal. The appeal against the acquittal on the points of law was not pursued, so to raise those legal issues before the Court of Appeal, had the effect in my submission of leading the Court of Appeal to revisit the third limb, to postulate alternative bases for prosecution and to lead itself astray in relation to

Tipping J Is that possibly another insight into where that, was it para.58 that I was querying

Billington It was 58 I think

Tipping J That sort of thing that stood out from nowhere so to speak.

Billington Yes it does, we could have done it differently. Yes, if the 4% had been this way and investors had believed that and so forth then yes there might have been another basis for prosecution. Well of course there might have been, people don't get charged by accident but nonetheless ultimately there has to be some evidence and it flies in the face of findings of a trial where prosecution evidence ran for five weeks and to revisit

Elias CJ Findings of facts.

Billington Five weeks of facts. There was no defence case called. So to revisit that now is not only a disadvantage from the point of view of the appellants, it's an exercise I submit ought not to be engaging in. So to conclude there are two egregious areas of principle – that which is the statutory interpretation question which has an unfortunate result, not only for these appellants but for accused persons generally in the

application of the Act, and the second is that which revisits the third limb which after all was the Crown's way of putting in a round-about way the three elements of conspiracy to defraud and the Judge is counting those as he did and finding in the case of two accused, they established that point at trial which is what s.5(2)(f) expressly contemplates.

Tipping J So in a sense what you're saying Mr Billington is that the analysis that the Judge is said to have wrongly brought to the cost judgment was simply inherent in the way the relevant ingredients of conspiracy to defraud were portrayed to him by the Crown at the trial?

Billington That's correct Your Honour, yes because if the three points had been standing alone in the judgment as the Crown's three points and the Judge adopted them, perhaps without reference to s.257 as it then was, then you might say well perhaps he's led himself into a pleading, but in fact he clearly directed himself on the three elements of s.257. He then asked the Crown well how do you put the case as a s.257 case and these are the three limbs that we put. Well it seems with respect a reasonable way to deal with the case because that's the way is arguing and articulating it.

Elias CJ I had thought that the purpose of the discussion of the three limbs in the costs judgments was simply because the Judge was acknowledging on the face of the Crown's evidence there was no basis for liability on the first two limbs just on the documents, the notarized documents etc. On the third limb there were clearly misleading documents but it was essential that they had been adopted to mislead. So it wasn't three different causes of action as the Court of Appeal seems to have put, rather the discussion was about whether really from the outset the prosecution should have appreciated how weak their case was and the third limb which superficially seemed to have more legs to it was also found against the prosecution and the suggestion made that the prosecution if it hadn't been so deflected by the other two aspects might have looked more closely at the question of knowledge and who was misled.

Billington I can't make it any better than that Your Honour, that's exactly what was going on and I think with respect both to the prosecuting agency and ultimately the way in which the case was put, it was put on a far too complex basis.

Tipping J The question ultimately was did they have a purpose to mislead and if so, who?

Billington Yes, and this is quite a different

Tipping J It's as simple as that really.

Billington Yes that's right, and the Judge heard from a handful of investors and he clearly analysed and it's not hard to understand the analysis when you look at the judgment of the tax avoidance scheme or the tax scheme and how it could be possibly be anything other than an engaging in a tax minimising exercising on a very large scale. A $1 million in a company has no tax liability which is quite good for those in that position, but obviously not impoverished QCs as Mr Walker would say who couldn't borrow the money on a no recourse basis so that's all I have to say Your Honours, but I do reserve the right to reply obviously if the argument is able to be expanded upon.

Elias CJ Yes, thank you Mr Billington. Yes Mr Farmer.

Farmer Your Honour referred to at the beginning the question of seating arrangements. I wonder if the Court would adjourn for a short while so that

Elias CJ Yes of course. I had expected you to be in the Crown and senior counsel seat Mr Farmer and we're happy to accommodate that.

Farmer Thank you.

Elias CJ Thank you.

11.57am Court Adjourned
12.01pm Court Resumed

Elias CJ Yes thank you.

Farmer Yes if Your Honours please, I'll deal first and I hope fairly shortly with the, oh it's para.115 of the, I'm sorry 117 of the, I'll call them the Court of Appeal but I mean the majority, the Court of Appeal's judgment and in particular the sentence which says the significant dollar amount of the award combined with the expenditure incurred by the SFO, is the likely to have a considerable impact on the Office because of the relatively limited litigation budget. We don't Your Honours support that statement if it be given the apparent meaning that it has and it was not a point that was argued by us at the hearing. What was argued by us at the hearing was that in cases of serious and complex fraud, and serious and complex fraud is as I think you may have noticed a statutory term that's in the SFO Act, that in cases of that kind in particular the prosecution should be treated tenderly in the sense used by Lord Justice Devlin in the *Berry* case and yes it is accepted that the continued applicability of that dictum is controversial that Justice Hammond has taken the view that at least since the 1967 Act was passed it perhaps has no continuing place in the law. Justice Fogarty was quite happy in fact though to treat it as a principle that should guide him under his general discretion in s.5 and he did. So that

was the submission that was made both before him and in the Court of Appeal and so I have to say quite frankly that para.107 was a surprise to us as much to my learned friends no doubt. We have in our written submissions in the summary at para.1, and I think it's the only place that we deal with it, we've done our best to suggest that perhaps

Elias CJ They didn't mean it?

Farmer They didn't mean it quite that way, and actually the origins of it can be found in the Law Commission Report, I think the 2000 one, where very similar wording is used. I've just forgotten, sorry, I've just overlooked the paragraph. The point that I make simply is that it's interesting that Justice Heath who was then Paul Heath QC was actually a member of the Law Commission at the time and party to the report, so it may well be that

Tipping J Echoes are still with him.

Farmer Yes, yes indeed. So that's all I wanted to say about that except in relation to the consequences of it. If there is an error and it seems to be common ground that there is then what is the consequence of that and the difficulty is of course that the Court of Appeal has in fact found two bases for disturbing the judgment of Justice Fogarty and they're set out in para.94, the second of which is the one that we've just been talking about, the public interest, well what they call the public interest ground, but the first one which is quite independent of this is that the Court thought that Justice Fogarty had 'changed the focus of his inquiry from whether prosecution of the conspiracy charges was justified to whether the Crown could have succeeded in proving the charges on each theory of the case', so with respect that's possibly not as elegantly worded as it might be either, but the submission that was made to the Court and which I think that is picking up on is that it's a different question as to whether someone is rightly convicted of an offence which is not a question that can be properly revisited on a costs hearing, that's one question, and we were accused of seeking to revisit that question.

Tipping J When you say you really meant rightly acquitted?

Farmer Yes rightly acquitted. Yes I'm sorry that's what I meant to say if I said something different. So we were as I say accused of trying to revisit the question of whether the accused had been rightly convicted. So that's one question – the other question though is a broader question which is whether the prosecution had, it can be put a whole lot of different ways but I'll just put it this way, had a reasonable basis for bringing and continuing with the prosecution and that as I say is a wider inquiry and for example it allows as happened in this case, reference to be made to evidence that was available to the Serious Fraud Office in the form of videod interviews with the accused but which was not able as a matter of law to be tendered in evidence. Now

there are two kinds of interviews the Court will know this that can be conducted by the Serious Fraud Office. One is a voluntary interview, and there were voluntary interviews, and evidence of those interviews was led and indeed the videos often were played to the Court, and interestingly the Court of Appeal itself called for those videos after the conclusion of the hearing and presumably therefore viewed them and they were quite lengthy interviews. The other kind of interview is a compulsory interview and evidence in a compulsory interview is not admissible at a trial on issues of guilt, but can be properly put into a costs hearing where the issue is that wider one as to whether the prosecution had a reasonable basis to continue with the case. So the focus of the inquiry issue or comment or statement

Elias CJ But was any further evidence put in at the costs hearing, I can't remember?

Farmer Yes it was.

Elias CJ Right.

Farmer So the focus of the inquiry point is as I say a broader one and just precisely what the Court of Appeal meant, because of course what they did was they linked that statement to the Judge's subdividing of the case into the three limbs and I'll come back and I'll deal with that, but what I just want to deal with quickly now is well what happens if Your Honours find, as inevitably it seems you must, that the Court was wrong on its second ground for interfering with the judgment, what do you do about the first? Do you now deal with the first as well and I'm here ready and able to do that and indeed our written submissions that we filed do do that, or do you say well we can't tell from this judgment just how much weight the Court put to ground 1 as opposed to ground 2 and vice versa so we should refer the matter back to the Court of Appeal and say we were wrong on the second round, does that impact on how you exercise your discretion in relation to the first. So I don't know quite what the answer of that is but what I do

Elias CJ But if you fail on both you don't

Farmer Exactly, yes

Elias CJ Yes

Farmer And so I have to deal with the first and I'm going to with the Court's leave and that does mean inevitably that I will have to refer to the findings made by the Judge. My learned friend Mr Billington said to you that the Judge made many findings of fact and that they cannot be revisited, those findings of fact can't be revisited either at any point subsequently and we accept that but the critical point that we argued in the Court of Appeal was this that the Judge actually did make many findings of fact to the effect that there had been dishonest conduct of

one kind and another by the accused, by the defendants, but he ultimately thought that none of those acts of dishonesty were in a sense relevant or led to their guilt and the reason we say, and this is what we argued in the Court of Appeal, the reason we say that he came to that view was because of what was essentially an error of law that he committed in terms of how he construed the contractual obligations that were undertaken with the investors and which were entered into for the purpose of assisting the investors to achieve some tax relief. The point being there may I say immediately, not that there wasn't risk with those transactions

Elias CJ But that was a relevant fact surely.

Farmer Yes this was

Elias CJ That was what the case was about.

Farmer That was the case. This was very much a tax driven scheme, there's absolutely no doubt about that

Elias CJ Yes.

Farmer And that was never argued to the contrary. My point though is that, and nor was it ever at issue that it was one of those tax schemes that might well end up being found to be ineffective, but the point that I make is that in order to have a fighting chance of being found to be effective, in order to have any chance of surviving scrutiny by the Commissioner, the transaction had to be implemented according to its terms and if it wasn't then it simply had no chance of being effective and in that sense the investors were not getting what they had been promised which was if you enter into this transaction you at the very least may or may probably get tax relief and here's an opinion from a learned experienced tax practitioner which says that these transactions probably will survive scrutiny provided that they are implemented according to their terms, and I'll come to that. So the point is that

Tipping J Are you saying it had to be implemented according to its terms, but it wasn't?

Farmer Yes, it wasn't, no.

Tipping J That's the simple point?

Farmer That's right and we, and I'll come to it, but we strongly with respect disagree with my learned friend Mr Walker's adoption of para.31 of the Judge's judgment, initial judgment, acquittal judgment, and I won't take you to it just yet, but you will recall where he said that the premium, the insurance premiums were in fact paid so that the investors got what they had contracted for and we say that that was not the case irrespective of whether according to the way that it was done it

might or might not have been open to the insurer subsequently to argue that it hadn't been paid. The central point was that what was promised, and I'll summarise it very briefly now, what was promised was that the investors' money that was paid over for the express purpose of paying the insurance premium plus the monies that were to be advanced to them by the Bank of New York Intermaritime Branch, Geneva, those monies also would be used to pay the insurance premium and that would thereby entitle the investors to claim a deduction in respect of the interest on borrowings and so forth and so forth and in respect of the premium paid from their own cash resources on the insurance policy, and if their money, the investors' money, both their own resources and borrowed money were not used in fact then there could be no basis at all for claiming a deduction from the Commissioner. So His Honour ultimately, just really trying to summarise this as briefly as I can, His Honour ultimately said well no I rule that, first of all I rule that the investors were only interested in one thing which was tax relief, and I'm quite happy to proceed with it on that basis because if they were only interested in that then it was critical that as I say that the transactions be implemented as they had been formulated and if they weren't and if it never was intended that they be and we could establish easily enough that it was never intended that they be implemented in that way, then there was a fraud on the investors because ultimately they would not be able to obtain the tax relief that had been held out to them.

McGrath J Does this argument focus on the first limb as well as the second?

Farmer Well.

McGrath J Or is it more concerned with the second?

Farmer Your Honour the three limbs in a way could be seen as perhaps different ways of putting the same argument, and they were in a sense, but His Honour did divide them up fairly rigidly and I'm not saying that he wasn't entitled to do that because the Court of Appeal clearly thought he was, and then found that there was at least a prima facie case on the third limb, so I'm happy to deal with it on the basis of the third limb. His Honour also found, and the Court of Appeal have not sought to interfere with this and therefore I can't, that in terms of time wasted so to speak in Court, that the first two limbs account for 50% of the time and the third limb accounts for 50%.

McGrath J I think what I suppose I'm trying to get out Mr Farmer is that when you say that you firmly disagree with the view that the premium was paid, are you saying both it wasn't paid because it was circular or are you just saying it wasn't paid because the transaction wasn't actually implemented competently.

Farmer I'm saying that the documents, the contractual documents required, the investors' cash contribution and actual mortgage monies received from

the bank to be paid over to the insurance company otherwise there could be no reduction. In fact none of that happened because first of all the cash contribution was diverted by Mr Currie who had been appointed by the investors as their agent for the purpose of paying it on to the insurance company, was diverted by him to the benefit of all of the accused back through a series of transactions which were the subject of the so-called money-laundering counts and a number of those were fictitious false transactions in which the Judge found were in effect fictitious or dishonest transactions. So the critical point of examination is what happened when the monies from the investors got to Mr Currie in Hong Kong.

Tipping J They each paid $1 million, 4% from their own, 96% from borrowings.

Farmer They paid 4% of a $1 million which I think is $40,000,

Tipping J $40,000 from their own pockets and $960,000 from borrowing?

Farmer Well yes.

Tipping J Effectively.

Farmer Yes.

Tipping J Now was the case as simple as that money did not go where it had been promised to go?

Farmer Well we say in essence it was

Tipping J Well how on earth can the thing have got so incredibly tortured?

Farmer Well that's a view that the Judges formed and the Court of Appeal has not chosen

Tipping J Well I would have to share it unless there's some very convincing explanation. That is a very very simple proposition which you should

Farmer Yes, Your Honour with respect, it's a simple proposition but to unravel it, to unravel what actually happened and that that didn't happen involves looking at a multitude of transactions

Tipping J But Mr Farmer sorry to interrupt, but what I'm saying is it is conceptually very simple.

Farmer Yes, yes, yes.

Tipping J It may have been quite difficult to uncover but I think part of

Farmer And to prove, and to prove in Court

Tipping J And to prove, yes

Farmer Yes.

Tipping J But part of this trouble that seems to have arisen is that the conceptual approach to the case was so convoluted. All I'm trying to say is if that's the essential allegation that they conspired to achieve that fraudulent result on the investment, that's just simple straightforward

Farmer Well with the benefit of hindsight it looks very simple today

Tipping J Well

Farmer And it always does but

Tipping J But it should have been isolated and from the point of view of presentation if should have been able to be isolated in that form however difficult it was to prove.

Farmer Well Your Honour you've heard that the particulars of the indictment were lengthy but initially there was a foundation conspiracy allegation and then off that sprang the various, quite a large number of money-laundering counts and so looking at it as a whole and bearing in mind as I say the complexity of the transaction, yes it was a very complex and lengthy indictment. Now in terms of the presentation of it and the three ways in which it was put, all of those three different, let's assume for the moment they are different, ways in which the case is put, all sprang from the same evidence

Tipping J Yes I understand that.

Farmer And so I with respect although I have to accept the finding by His Honour that 50% of the time at trial was wasted on what is essentially a legal analysis, it doesn't quite conform with a hearing of five weeks at which probably four weeks were spent on evidence. But anyway there it is so I accept that we'll go with it.

Tipping J There it is, yes.

Farmer Yes. Now so the point

McGrath J Sorry Mr Farmer there's one matter that I still would like to attempt to get clear in my mind but when you say that the money $40,000 perhaps in particular was not used as a basis for a deduction, is that

Farmer It was used because the insurance premium was a deduction.

McGrath J It wasn't used though in a way that would qualify its reduction in terms of what happened as opposed to what was planned or what was indicated should have. What I just want to get clear in my mind is that

argument basically the argument on what Currie did with the money when he got it?

Farmer Yes.

McGrath J Was that really inviting the Court to look at matters in terms of substance rather than form?

Farmer Well it is in this sense and that's why I say that on a costs inquiry what I'm really seeking to establish to the Court is that the argument that we put that what was done did not conform with the obligations was a reasonable argument - it was a reasonably arguable position to take, so we have to accept that the Judge gave a ruling of law which was different and my learned friend was quite right to point out that there was no appeal from that point of view but when it comes to costs then in my submission we are able to look at it from the wider perspective of was the legal argument that was put on the construction of the documents a reasonable position to take, and if it was then all the conduct of the defendants which the Judge found was in effect irrelevant on the view of law that he took, then a very different picture emerges because at that point the conduct becomes quite plainly conduct that was designed to implement the transactions in a way that was different from what was contracted and then therefore the dishonesty is highly relevant to the costs question. Now I do think to

Elias CJ Do you have to take us to the particulars?

Farmer I don't need to take you to the particulars but I do think I need to take you to the primary documents to make out the case for what I've just said.

Elias CJ Why wouldn't you start with the particulars if you're saying that the Crown case was reasonable?

Farmer Well I'm talking about the case as it was presented in the High Court and I'm talking about the case as it was presented as the point was re-argued in the Court of Appeal, and indeed the Court of Appeal judgment again with respect perhaps isn't a model of clarity on this issue but in that paragraph that Your Honour Justice Tipping stood out like a, I've forgotten what words you used

Elias CJ Well something about 'an island in an unrelated sea' or something.

Farmer That was I think para.58 and then 62 was relevant to as well. It said in 58 'the investors were falsely led to believe that their 4% contribution would in fact be used to pay for an insurance premium and it could be proved beyond reasonable doubt that two or more of the accused were were both promoters and parties etc, the conspiracy charges could have been proved'. And at 62 Their Honours said 'although we have articulated an alternative basis in which the Crown case could have

been formulated we make it clear we're not saying that such a case would necessarily have succeeded'. Well with respect it is in a sense an alternative basis but only marginally because what we argued was that both the cash contribution, the 4%, and actual mortgage proceeds from the bank had to be used to pay the premium and that neither of those things

Tipping J I wouldn't have thought it was alternative, I would have thought it was central.

Farmer Well indeed, I mean why I say it's not alternative but the way the Court has reformulated that is to limit it to the 4%, whereas we said

Tipping J The lot.

Farmer That because the whole million was being claimed as a deduction because that was the premium, then the whole million had to be paid by way of cash.

Tipping J Well they haven't understood either have they?

Farmer Well, I mean you'll see just, I'll take you to it, but you'll see in 64 that the submission is recorded that the Judge failed to deal adequately with issues of disentitled conduct. He submitted that the Judge's discretion was tainted by errors of law, particularly as we apprehend it by subdividing the case into three propositions etc. 'On Mr Farmer's contention the extent the Judge found there was at least a prima facie case of dishonest misrepresentation and the accused conduct ought to have disentitled them for an award of costs'. Now that sort of captures it but not as fully as I would with respect have liked and what we have done is actually included in our submissions as tab 2 the quite lengthy notes that we handed up to the Court of Appeal at the beginning of our argument and which set out quite precisely the arguments that we raised, and it's very plain and I'll submit to you that if you look for example at page 5, you can see that the case has been put I hope very clearly and that half-way down the page 'it is submitted that the Judge should have ruled that on the documents there was an obligation to ensure that the investors' cash contributions that were paid to Currie should have been applied along with actual loan funds received from the Bank of New York.

Elias CJ I'm sorry I can't find that, where's that?

Farmer Page 5 of the tab 2.

Elias CJ Yes I see thank you.

Farmer 'The Judge should have ruled that on the documents there was an obligation to ensure the investors' cash contributions that were paid to Currie should have been applied along with actual loan funds received

from the Bank of New York to pay the insurance premium to the insurance company. Both the payment of the insurance premium in fact and the receipt of loan monies in fact were necessary in any event for investors to obtain deductions for interest on the loan and for payment of the insurance premium'. The Judge himself was at pains to point out the investors' real motivation for entering into the transactions was to obtain the tax benefits of deductions for the interest and for the premium. And then the next bullet point 'it is submitted further that had the Judge so ruled he would inevitably have taken quite a different view of the dishonest and deceitful conduct of the respondents that was in evidence and that he himself recognised' and the reason for that is because you will recall he said just taking the charade correspondence as an example, and it's only just an example, that it didn't bite, that that dishonesty didn't bite because it wasn't relevant to the way the transactions on his view occurred and properly occurred.

Blanchard J In commerce Mr Farmer as you will know it's quite common for payments to be made but where there are a number of parties to a transaction through a clearing device where there is somebody acting as agent for everyone and on instructions, was it the Crown case at trial that the documents here precluded that from occurring?

Farmer Yes, but coupled with the fact that the insurance company had to be 'a real insurance company' and not just a paper company, which is what it was.

Blanchard J Well putting aside the nature of the insurance company which I guess is a separate issue, here it would seem that payments were certainly effected via Mr Currie's trust account and in accordance with instructions from, amongst others, the insurer, which recognised that the premiums had been paid by that method, but you're saying that the documents precluded that?

Farmer Yes I am and I think I need to, this is where I need to go, perhaps we could come back to that because I need to take you through some of the detail so you can see what actually happened because para.31, which is really I think what Your Honour's thinking of

Elias CJ At paragraph 30?

Farmer That's para.31 of the original acquittal judgment. My learned friend Mr Walker took me to it.

Elias CJ Yes.

Farmer Where His Honour said well look everything happened the way it should because the monies were received into Mr Currie's account and from there, it was a circular transaction in the sense, there was a series of acknowledgments, of payment and so on that went around in a

circle. The monies never left his account but there was by that method recorded a payment of the insurance monies, and therefore it was free to Mr Currie thereafter to then disperse the monies, the same monies still sitting there, to the various accused by way of various transactions involving fictitious, in fact fictitious commercial transactions that never in fact occurred. So that para.31 is a critical part of the reasoning of His Honour that gives the complete insight into why His Honour found the way he did and our argument was that no it wasn't open to on the documents, it was not open to this to be done that way and to use shelf companies, paper companies, that were not true insurance companies and to do the transactions in a way where there was not ever a proper loan from the Bank of New York.

Tipping J Are you actually saying that or are you not more accurately saying that although you're bound by what the Judge concluded, it was a reasonable view that the position was otherwise?

Farmer I am but I suppose for the purpose of presentation I'm sort of in effect repeating the argument that we put

Tipping J Well yes.

Farmer Which the Judge rejected but what I'm saying is that we submitted to the Court of Appeal that the position that we took was a very arguable position

Tipping J I'm not trying to be pedantic Mr Farmer. I think it is important isn't it to recognise that that argument is not open to you ultimately but the real thrust of this is that this was a tenable.

Farmer Yes, and I hope I indicated that a little while ago.

Tipping J Oh you did but I just wanted to reconfirm it.

Elias CJ Well you can't collaterally attack the verdict.

Tipping J No, no.

Farmer No, no, and that's accepted, yes.

Blanchard J Well ironically you're asking the Judge to attack his own verdict.

Tipping J Well not quite.

Farmer Well not quite

Elias CJ No.

Tipping J No, you're asking the Judge to accept that the contrary view was not unreal or was a reasonable one to take.

Farmer Yes indeed, indeed.

Tipping J But it doesn't come through very clearly in either the costs judgment or in the Court of Appeal does it?

Farmer Well I didn't write it with respect.

Tipping J No, no, I'm not suggesting that you're responsible Mr Farmer, not for this anyway.

Farmer Oh I may be responsible for a whole lot of things.

Tipping J But as a fact this subtle distinction, and it's an important distinction, doesn't seem to come very clear in either of the judgments below.

Farmer Well that's why I said I started with 94(a) of the Court of Appeal's judgment and what's said there is 'by subdividing the Crown case into three limbs the Judge changed the focus of his inquiry from where the prosecution conspiracy charges was justified', that's that key inquiry on a costs argument, to whether the Crown could have succeeded in proving the charges on each theory of the case, and I think that's a rather obscure way of saying what I think we were trying to submit.

Tipping J Yes I appreciate that now, yes thank you.

Elias CJ I've just been looking at your indictment and I'm sorry to keep saying that I'd like to be taken to particulars, but your indictment is wholly unspecific and if you're saying that the argument was, or the gravaman of the case was that the money wasn't paid as it should have been under the arrangements in order to be effective and that therefore the investors were defrauded. I'd like to be sure that that is the case that the accused had to meet in terms of the particulars that were given.

Farmer Well count 1 is expressed in relative general terms conspired

Elias CJ But when you give particulars they become part of the indictment.

Farmer Yes they do, they do.

Tipping J All 180 pages of them.

Elias CJ Yes, Mr Farmer you only need to point me to one example.

Farmer Sorry, just excuse me for a moment.

Elias CJ And you can come back to it if it would be more helpful.

Farmer I gather that the particulars are not in the volumes?

Elias CJ I don't know.

Farmer I don't think they are. No they're not, but what is in the volumes in volume 8 is the opening, the Crown's opening, so it may be helpful to look at that, and in particular at the bottom of page – the numbers that are on the page – 1665, beginning I think really at para.17, a reference to the template. 'The first component of the template was the proposed purchase of Digi-Tech share by installments say over a 10-year period structured so that the bulk of the purchase price payable in year 10; the purchase to be made through a loss attributing qualifying company owned by individual investors; most of the agreements purchase $1 million shares. The second component, supposedly to insure the investors obtain value for money, namely the shares would be worth a guaranteed $3 million by the end of year 10 was a loss of profits insurance profits to be arranged by promoters. The third component of the scheme was in respect of the premium payable by each investor for the benefits of the policy, the investor was required to pay $40,000 from his own funds with the balance to be met by a non-recoursed loan – and there's security given for that. And para.20, the immediate benefits of the investment were that the premium being both the 4% cash and the 96% borrowed and interest payments on the loan money is used to fund the installments for the insurance premium could be offset in appropriate tax years from the LAQC to the investors' existing income from other sources, get tax relief. And then 21, what might have been a legitimate, if marginal, tax scheme was however rendered a fraud on the investors by the fact that the insurance and loan transactions were entirely fictional. This is limb one if you like, but the same point is made

Elias CJ Sorry, I've diverted you from your argument. I really just wanted a quite quick

Farmer No, no it's helpful, I'll just keep going a little way if I could.

Elias CJ Well no, is the answer to my question in 22, the third bullet point, is that

Farmer Yes, yes, and I think the second bullet point is. Your Honour Justice Blanchard suggested maybe we could leave the genuineness of the insurance company aside, but the two are related. They can be treated separately but they also are inter-related. So yes para.22 is as good a summary of the case, and so to 23, the nature of the investment was mis-represented and so too was the tax effectiveness of the deductions purportedly available. In respect of deductibility of interest payments which could not be claimed as there was no real loan. In respect of deductibility of the premium which could not be deducted as there was never any insurance premium paid in respect of a genuine insurance company which could meet the policy obligations and in the Denham Martin legal opinion which was given to the investors which said yes this should be tax effective but expressly stated as assumptions that

there was a real payment of the premium and that the proposal did not involve circularity of funds. So that was how it was put and in a sense the three limbs are just alternative ways as we would see it anyway

Tipping J Well that's really all you'd need to say by the way of particulars isn't it? This identifies very sharply the line of reasoning whereby it is said to have been a fraud on the investors and that the people concerned must have conspired to that effect.

Farmer Yes.

Tipping J It sort of seems to have got lost in the wash.

Farmer Well when my friend Mr Walker very fairly said that we were kind of rather forced into particulars, and maybe that doesn't justify 196 pages or whatever it was, but the fact of the matter is that it is one of those cases really where you see it in civil cases as well where defendants push and push for more and more particulars and eventually they get them and then they say oh goodness me.

McGrath J Mr Farmer can I come to para.21 where you were saying the Crown's case was that the insurance in those transactions were entirely fictional and then add that they were circular, is the point not so much that they were circular but that the contracts with the investors did not permit them to be circular?

Farmer The contracts with the investors required their monies, both their own monies and their monies they borrowed to be applied to payment of the insurance premium.

McGrath J Yes.

Farmer That was the case.

McGrath J And are you saying that that could not be by way of any transaction that had circularity if that was the contract?

Farmer That's right and particularly when you've got as I say a situation where, I mean the money has never left Mr Currie's account.

Tipping J But what business was it of the investors on that hypothesis what the insurer did with the premium after receiving it?

Farmer Well the insurer never did receive it.

Tipping J Well that's probably where the battleground is at its most acute.

Farmer That's right. I need to take you to the facts because I can't adequately deal with what you want to push.

McGrath J I think what I'm getting at Mr Farmer is that when you take us to the documents, and I think that this may be an exercise that will take little time, I want to know whether I'm looking for content that will indicate that the obligation was one of substance if you like, not form, was one of real payment of real monies

Farmer To a real insurance company

McGrath J Without circularity

Farmer And to a real insurance company.

McGrath J And to a real insurance company, and are you saying that that on the Crown's case reasonably was the obligation, that form of substance was the obligation, not just to do it in a circular way in a form as it were?

Farmer That's right and what in fact happened as I'll show you is that the defendant's created that the form of the circle was the creation of what were called, were TCDs, transferable certificates of deposit, and of course a transferable certificate of deposit assumes a deposit, assumes

McGrath J I know that's part of the argument, yes.

Farmer Yes, it assumes actual money and the Judge was a bit troubled by that because there was no actual deposit backing the documents, those documents, so what His Honour said was well in reality they were promissory notes and with respect that's a highly contentious and arguable

McGrath J I want to focus on that point. I think what you're telling us now is that when we look at the contractual documents you'll take us to we will find there is an obligation for transactions of a particular kind of substance and which was never going to be discharged by form, pure form, such as circularity.

Farmer That's right, and in fact at this very same time that these documents were being entered into with the investors, Mr Currie was presenting to the Bank of New York what was called a proposal and the proposal contained within it the TCD arrangement and that was rejected by the Bank who said no, if we're going to be lending money and by the way they were lending money not from their own resources but were lending money as a fiduciary lender for monies that the defendants were to arrange from another entity called Asian Group Funds which was another paper company, and the Bank of New York said well if we're going to be putting our name to lending money we require actual money to be put into our account so we can then on-lend it, and that was something of course that the defendants were simply unable to do because they didn't have that sort of money, so what actually happened was the first number of transactions were done without the Bank of

New York at all. They substituted another lender, all unbeknown to the investors, and then later when they got their act together, they did involve the Bank of New York but they did it by establishing what was called a 'daylight facility' with the Bank of New Zealand which was monies borrowed for the day for the Bank of New Zealand which went around in a circle and which was supposedly to be used for the purpose of buying and immediately reselling at a profit certain bonds and that was entirely fictitious, they never existed.

McGrath J I understand what you're saying Mr Farmer but as you go through the documents though for me I think what I'll really be focusing on is what I perceive to be the difference between you and the Judge and the Judge saying no, form was alright because at the time that was seen as a legitimate way of doing transactions, avoidance maybe, but not involving dishonesty and you saying that was not the deal that was promised to the investors and then first it's got something contrary to what they had bargained for.

Farmer Right, and it was critical for the investors as I say if this was to have any chance of passing muster in front of the Commissioner, it was critical that their monies that they both provided and 'borrowed' from the Bank should be seen properly to have been used to pay an insurance premium which provided the basis for the deduction.

McGrath J That may well be but the real issue is what were they promised?

Tipping J The Judge thought that pro forma was alright. Your case at least tenably was that the documents required genuine insurance.

Farmer And to a genuine insurance company.

Tipping J Yes, that's the nub of it.

Blanchard J Did any of the investors apart from investors who were members of Gosling Chapman actually complain about this?

Farmer Well they didn't know.

Blanchard J And say that they were misled?

Farmer They didn't know at the time.

Blanchard J Yes but in hindsight did any of them complain that they had been misled?

Farmer Well a number of them gave evidence to say they had been misled.

Blanchard J Yes well I haven't read that evidence but the impression I have is that they simply said that they really just didn't look into the matter.

Farmer Well some of them, of course many of them in fact, were Gosling Chapman and for instance had been clients of Gosling Chapman for some considerable time, and this is a complication in the case that they to some extent, to a large extent, relied on Gosling Chapman and of course one of the partners of Gosling Chapman, Mr Russel, is one of the defendants in this case and so what His Honour said was well these investors all they were interested in was tax relief and were quite happy to deal with the case on that basis but my point is that if that's what they're interested in then they are entitled to get what they contracted for which were transactions that were done according to the form of the documents.

Tipping J Did they know or care where the money went?

Farmer Well Your Honour they knew or believed that the money was being used to pay the insurance premium.

Tipping J Yes.

Farmer And what happened to it after that of course is irrelevant, I mean it will always be irrelevant what an insurance company does with its earnings. And I think my learned friend Mr Walker put it fairly when he said well there is a critical difference between whether the monies were diverted before an insurance premium was paid, and in fact whenever used to pay an insurance premium, or whether they were in fact used to pay the insurance premium and thereafter in some way found their way back to the defendants among others.

Tipping J So did the Judge find in effect that what was done was within both the contemplation of the documents and within the contemplation of the investors?

Farmer Well it couldn't have been within the contemplation of the investors because they didn't know how it was done.

Tipping J Well that was why I said

Farmer They didn't know how it was done. They believed, presumably on the basis of signing these documents, that the $40,000 they provided, and the $960,000 that they borrowed from the Bank of New York

Tipping J On a non-recourse loan, so they were never going to have to pay it back.

Farmer Yes, yes.

Tipping J So all they had at stake in reality was the $40,000 wasn't it?

Farmer And they also had at stake the possibility of if this thing didn't work

Tipping J Well that was inherent in the whole. No-one was guaranteeing it was going to work.

Farmer No, no-one was guaranteeing it would work but what the Denham Martin opinion said was 'provided there is an actual payment to an actual insurance company and there is no circularity, then we think this should be okay. No guarantees, but it should be okay.

Tipping J Well it can't be a conspiracy to defraud them in relation to the fact that it didn't ultimately work.

Farmer No.

Tipping J It has to be a conspiracy to defraud them out of their $40,000, because that's the only money they had physically at stake, any real money they had at stake.

Farmer Yes, but the representation is that we will use your $40,000 towards paying the insurance premium and we will also arrange for you to borrow the balance needed

Tipping J Non-recourse but

Farmer Yes, and we will apply that

Tipping J Well I wouldn't mind a non-recourse loan Mr Farmer, I wouldn't really be too worried about

Farmer Well you might be worried about it Your Honour if what was behind this were deductions that you were claiming on your tax return and as a result of it not being done the way you thought it was being done then

Tipping J Yes, oh yes, yes I'd be highly aggrieved I'm sure but what I'm saying is that it seems to me that the case has become vastly over-complicated. The only real fraud here was to do with the $40,000 wasn't it, it there was any at all?

Farmer Well in effect that's what the Court of Appeal came to that position probably that's what that para.58 is talking about

Tipping J Well

Blanchard J It smacks more of a negligence than a fraud.

Farmer Well Your Honour if that very time they are promising this is how we will do it and we will apply your money in this way, for that very time they are actually setting up the structure which is doing it quite differently and which is going to put the investment at risk so far as the Commissioner of Inland Revenue is concerned because they've

represented that this is how we are going to do it then with respect Your Honour that is fraud.

Anderson J In a broad sense were they representing a scheme which might be tax effective or a tax avoidance factor, when in reality they were going to implement in the way when it couldn't possibility be tax avoidance effective.

Farmer Yes, absolutely, yes.

Anderson J And for the reasons you've said?

Farmer Yes, and that's where in terms of well who was the fraud committed on, the Judge said well really what you should have been saying is that fraud was committed on the Commissioner of Inland Revenue and we didn't put the case that way, we put the case the way I've just described it. Yes there was a fraud in a sense on the Commissioner of Inland Revenue but because the transaction wasn't done there was no payment of a premium to an insurance company, but it was the investors who were put in the position of

Anderson J It was an unnecessary complication because you only had to prove a fraud on the investors which in itself had a pecuniary benefit for the accused

Farmer Yes it did.

Anderson J But it got deflected interest of some sort of philosophical attack on shams and avoidance scams.

Farmer Well it did and that was a frustrating part of the case that my learned friend was involved in that rather than me but His Honour certainly had the view that we were 'trying to make some new law about sham' and we dealt with that point in a submission, in a footnote actually in our written submissions in the Court of Appeal as I remember and actually that point sort of died away but it was something that agitated or excited the Judge that somehow this is what we were trying to do and we tried to explain that by reference to the Australian decision that my learned friend referred to briefly where the Court in a somewhat similar case uses that term 'sham', not in the sense that it's used in civil cases at all, but more in the sense of the sort of thing that's happening here.

Anderson J Of course the problem you would have faced if it had been pitched at that sort of high level of simple obstruction, that you'd have to prove the appropriate state of mind for it at a time when people then and maybe even now delude themselves into thinking that paper shuffling is something real.

Farmer Yes.

Tipping J Mr Farmer can I just put we adjourn two things to you just to see if I at least have got an understanding of what the dimensions of the supposed fraud was in the conspiracy accordingly?

Farmer Yes.

Tipping J (1) could be related specifically to the $40,000 in that they were cheating them out of that for their own advantage because of this fictionality premise, but (2), more substantially or more widely that they were selling a tax avoidance scheme to personal advantage knowing that in the light of how it was to be implemented it had no hope of being successful.

Farmer Yes, I'm happy with that.

Tipping J But those two dimensions or limbs if you like of what was fraudulent?

Farmer Yes.

Tipping J Yes, well that is helpful, that gives a greater of clarity to the matter than I've had from the first moment that I read the file.

Farmer Yes I thank you for that. Now what I wanted to do was to now go into the facts, and I'm not going to labour this but I'll do it as quickly as I can

Elias CJ But it would be sensible before hefting volumes around to take the lunch adjournment now is that the suggestion?

Farmer All the documents are actually in the one volume thank goodness I think but it would be sensible to take the adjournment now, yes.

Elias CJ Alright we'll do that thank you. We'll resume at 2.15pm.

12.58pm Court Adjourned
2.17pm Court Resumed

Elias CJ Thank you. Yes Mr Farmer.

Farmer The only volume I think I'm going to refer to is volume 5 and I was going to event this by way of taking you through the relevant pages of the Court of Appeal counsel's notes document which I've referred to earlier which is tab 2 of our written submissions and just before I get into the actual documents could I just ask you to turn to page 6 briefly of those notes because there you'll see, I mentioned it briefly earlier, the sham point and the reference to the decision of the Court of Criminal Appeal in Western Australia in *Pearce v the Queen* and you'll see that about a third of the way down that page where in that case the

Court had described various loan agreements that were the subject of charges of conspiracy to defraud as being bogus, fictional and a sham, although not in the technical sense of the term famously referred to by Lord Justice Diplock as he was in the *Snook's* case and Chief Justice Malcolm put it this way 'the element of dishonesty relied upon by the Crown was that the information provided to the prospective investors was calculated, not only to deceive them into making the investment, but also to cause them to mislead the Australian Tax Office', so it's sort of in that sense really that we have presented this case. Going over to page 7 we have a section headed "*What did the promoters of the Digi-Tech product undertake to the investors to do"*, and turning to page in the middle of the page we've made their submission that we make here that if the scheme was not implemented according to its terms there would be no sustainable tax deduction. CWS, wherever you see that is a reference to the written submissions that we filed in the Court of Appeal, so these notes cross-reference throughout back to the written submissions. I make that point because I know that in the written submissions filed in this Court on behalf of Mr Reid there was a suggestion that these notes were like a new case so to speak and we strongly dispute that. Then you'll see immediately following that in the middle of page 8 there is a submission that faithful implementation of the contractual terms was of critical importance, a matter that was underlined in the opinion of Denham Martin attached to Gosling Chapman's letter to investors. Now what actually happened then was that if you look at volume 5 at page 912 near the beginning, you will see a sample letter that was sent in January 1995 to investors which enclosed information memorandum and sample documents of the loan documentation and of the insurance policy that were to be available to investors and on page 2 of the letter, that's 913 of the case, about two thirds of the way down the page there is a reference to an enclosure of an opinion from Denham Martin to ourselves in regard to the taxation issues arising out of the proposed investment and you will find that opinion if you go back to near the beginning of the volume, it begins at page 899 and an opinion was sought in relation to this investment proposal and I won't take you right through it but if you go to 908 there are a number of specific tax issues considered along the way, but the avoidance, the critical avoidance issue which was then dealt with in s.99 of the Act is dealt with at 908, at para.36 and following, and in that discussion in para.38 there's a reference to what was then regarded, and may still be regarded, as the leading decision on tax avoidance in the Privy Council of *Challenge Corporation* and you will see in the second sentence it said by Denham Martin 'in that case the Privy Council characterised tax-avoidance as cases involving circularity, artificiality and 'the incurring of no real expenditure', and over the page there's a discussion of a Purpose Trust which was set up in relation to the application of insurance proceeds after they had been paid and the opinion is expressed at the top of the page that s.99, how it was put 'highly persuasive arguments against the application of s.99 could be advanced for the following reasons - when viewed as a whole the proposal is not circular and involves real expenditure (i.e. the

payment of the insurance premium and the payment for the Digi-Tech shares)', and then further down at para.40, 'a significant consideration in any s.99 analysis is the commercial significance and appropriateness of the policy. It would need to be clearly evident that this was a commercially sound thing for investors to take up as a way of hedging their risk', and then at 41, 'it's impossible to predict definitively how a Court will approach the proposal. Overall I believe technical arguments advanced in the preceding paragraphs are forceful ones and a Court would have some difficulty in rejecting them. The legal position however is not entirely clear given there has been a tendency for the Courts of late, particularly at High Court level, to approach things on a substance basis and to eschew any overly technical analysis. Furthermore if it could be demonstrated the primary or only reason for investors entering into proposals to obtain tax benefits, the prospects of surviving a s.99 attack would be significantly diminished'. So the opinion is certainly hedged appropriately but if you go back to page 2 of the letter which is on 901, para.6 says 'this advice has been prepared in the light of certain assumptions, namely, and the relevant one is 6.2 'a real payment of premium is made by the investors and the proposal does not involve the circularity of funds', so that was clearly seen as a critical premise upon which the opinion was given. Now if we look at

Tipping J Circularity in that sense presumably meant that coming back to the investors.

Farmer Well maybe, maybe not, I don't know, we don't know.

Tipping J Well that's how I would read it.

Farmer You may be right with respect, you might not be, we just don't know. It could well be – anyway.

Tipping J Yes.

Farmer But the critical point I rely on is that there must be a real payment of a premium made by the investors. If we now look at the documents which are really in support of what the proposal is that had been put to Denham Martin and as it was put to the investors, I've listed them at the bottom of page 8 of the notes and the first one that perhaps I can go to is the share purchase application which doesn't say an awful lot. That's on page 973 of this volume. So this is an application to purchase shares in Digi-Tech and this particular example that we have of it is a case where the investor was purchasing 3 million shares. Typically they purchase a million, or in some cases I think half a million, but typically a million. Here the investor was purchasing 3 million shares and para.1 of the application has the words in the second line 'subject only to being granted a loan of just under 2 million US dollars by the Bank of New York Intermaritime Branch, Geneva, and a

loss of profit insurance policy by Epicharmus, along the lines of indicative documentation

Elias CJ Sorry Mr Farmer, what page?

Farmer Oh I beg your pardon, 973.

Elias CJ Oh thank you.

Farmer So 973 is the application to take out shares in Digi-Tech, which was the high-tech telecommunications company

Tipping J And the total of that loan, of the US 1.9 million figure is enough to do both, both fund the shares and the insurance premium, less the $40,000 cash contribution, is that how the thing was

Farmer The cash contribution goes on top of the loan.

Tipping J Goes on top of the loan, yes.

Farmer Yes, now if you have a look you will see on the next page

Tipping J Sorry, I think that's what I really meant, I didn't put it that well.

Farmer Yes, okay.

Tipping J Yes.

Farmer You will see it as I was going to take you to it anyway. On the next page, para.5 it sets out certain steps that were to happen once this application had been accepted and 5, sub.para.5 is 'the purchaser will provide in cleared funds the amount of 79,800 US dollars', so I think the $40,000 was a US dollar figure - I may be wrong on that, but anyway '$80,000 to Milloy Reid Wong and Company to assist in funding the insurance premium'. So that's what the very purpose of the cash contribution was, and then 6 – it is 5, sub.para6, 'John Currie will apply all monies received from the purchaser and from the lender, that's the bank, to pay the insurance premium on the loss of profits insurance policy', and that obligation we'll see recurring again and again throughout the documents as I take you to it, that that was Currie's to apply the monies received both from the investor and from the bank to pay the insurance premium. So the actual application and the actual agreement for sale and purchase of shares in Digi-Tech, you will find a few pages over, at 979. It begins I think at 978 and 979, and I don't think there is anything specifically I need to take you to in that. That's a reasonably straightforward document. The loan agreement, you will find that at 915 – back a bit, and this is in the form annexed in fact to the letter that Mr Russel sent out to the investors that I started out with, and just looking at that document you will see that the lender is described at the Bank of New York Intermaritime Bank Geneva, and

the critical clause is if you go to 918 in the section headed *Loan*, the purpose of the loan is specifically limited. '2.2. – the loan should be used by the borrower for the purpose of paying a loss of profits insurance premium in respect of a policy in a form approved by the lender to be effected with Epicharmus and covering loss of profits on share dealings in relation to shares. The borrower shall not utilise the loan for any other purpose without obtaining the prior written consent of the lender', and in support of that in 2.3 there's a drawdown provision and then 2.4, as part of that and I'll take you to it, 2.3(c) 'an irrevocable authorisation in the form constituting the second schedule - this is where Mr Currie gets drawn into this. '2.4 – the proceeds of the loan drawdown will be paid in the trust account of a solicitor as agreed between the lender and the borrower. The solicitor so agreed shall apply such loan drawdown funds received towards payment of the premium on the policy thereby giving effect to clause 2.3 above'. And I didn't show you 2.3, but that says 'as part of the drawdown there must be evidence that the proceeds of the loan and all other monies required will be applied towards payment of the premium on the policy'. So the solicitor you will see was Mr Currie, so here the covenant is that the solicitor will apply the loan monies and all other monies required towards payment of the premium under the policy. If you go to, still in the agreement, and we'll look at the schedules to it, if you go to 927 first of all, schedule 1, this is the drawdown notice. So this is a direction from the borrower to the bank. Reference in para.1 to the agreement and then in 2, 'the borrower requests the lender (the bank) to advance the sum of X $US subject to the terms of the agreement by cheque or other negotiable instrument made payable to the borrower as follows, and then cheque or other negotiable instrument in favour of John Currie, Solicitor, Hong Kong. So that was how the loan was to be paid, cheque or other negotiable instrument. And then over the next page, this is the payment direction that the borrower gave to both the bank and to Mr Currie – 'Dear Sirs, in accordance with clause 2.3(c) of the Loan Agreement pursuant to which the bank is to make the loan, we are in agreement with using the solicitor, that's Mr Currie so defined, as agent to the parties to receive the loan proceeds and apply these to the payment of the insurance premium. Accordingly we irrevocably direct and authorise you, that's the bank, to pay the proceeds of the loan to the solicitor and for the solicitor, Mr Currie, to apply all monies received from us, that's the borrower, and from you, the bank, in paying the insurance premium to Epicharmus'. So that was the direction that was given to Mr Currie by the borrower, to pay all monies that he received from both the bank on account of the loan and from the investor to pay the premium. Now there is also a limited power of attorney which was given in favour of Mr Currie that I should refer to – that's at the top of page 9 of the notes and you'll find that at page 954, and this is just a sample of one of the powers of attorney given by a borrower by an investor. So Mr Currie is appointed as the attorney of the investor company for the purposes of '(a) opening and acting as sole signatory in respect of a bank account in the name of the borrowing company; (b) accepting a cheque or other

negotiable instrument from the Bank of New York representing a loan to the company of that amount and issuing a valid receipt to the lender and banking this in the account; (c) paying out of this account good consideration to Epicharmus for the purpose of paying an insurance premium pursuant to the policy; and (d), receiving a receipt from the insurer confirming the receipt of the insurance premium'.

Tipping J That way of putting it 'paying good consideration' is that

Farmer Yes, it's a fair question, and our response to it would be that's the only faint reed, sorry I shouldn't say that, the only faint straw that exists for any sort of argument at all that the payment could be otherwise than by cash, cheque or negotiable instrument to the insurance company. But when you look at all the documents as a whole, it's certainly our submission that what was envisaged was payment of monies from those two sources, the bank and from the investor, into Mr Currie's account and payment out of that account of those monies to the insurance company by way of satisfaction of the premium obligation. So that's why from those documents we go on to submit, it's on page 9 of the notes, that we've said here the only proper construction and I should qualify that by saying a reasonable constructions of those documents was that a real loan was being obtained from the bank; that the proceeds of the loan would be in the form of cash-backed negotiable instruments. Now that certainly is correct because the monies coming from the bank had to be by way of cheque or other negotiable instrument payable to Mr Currie as the investors' or the borrowers' agent. That the loan monies were not available for any purpose other than in paying the insurance premium, and that's clearly stated on the documents as I've shown you, and along with that the investors' cash contribution of 4% will also be paid in satisfaction of the premium and would not be available we would say, it must follow from that to be remitted back to the promoters or anyone else prior to payment. They had to be paid and whatever happened afterwards just may be a different question. And so there couldn't be in our submission any circular movement of monies between the lender and insurer. And in the notes at the foot of the page, we've relied particularly on the payment direction to Currie that he was to apply all monies received from us the investors and from you the bank to Epicharmus for the premium.

Tipping J Any failure to observe that would be a fraud on the bank or a breach of trust

Farmer Well it might be that but

Tipping J Towards the bank, but you're saying it's also objectionable vis a vis the investors.

Farmer Yes, because of their belief and expectation on the strength of the documents they had signed that this is how it would be done so that

they would get at least a fighting chance of getting the tax relief that they were seeking.

Tipping J This is all part of the argument in support of the proposition that there was a tenable case that they had

Farmer Yes, yes, that's right.

Tipping J Set it up and then deliberately undermined it?

Farmer Yes, and just reminding you again of the way Chief Justice Malcolm put it. The element of dishonesty was that the information provided the prospective investors was calculated, not only to deceive them into making the investment but also to cause them to mislead the ATO, and they would be misleading the Commissioner if they tell the Commissioner 'we have paid these monies, both our own monies and borrowed monies, to payment of an insurance premium with a real insurance company and in fact something different has happened, and because that something different that happened was not something which they had any knowledge as it turned out and what it was that happened is what I want to show you now. Just one another document though before we do that. In the actual insurance policy which is also in this volume, it's page 930, and this was a document also attached to the sample document sent out by Mr Russel to the investors. It begins at 929 which is the form of the policy with Epicharmus and if you go over to 930, para.6, under the heading *Premium*, it said 'in respect of each insured the amount of US$320,000 per 500,000 shares insured in full payable when a firm order is accepted in respect of the issue of the Certificate of Insurance to the insured pursuant to this policy, the premium is non-refundable'. And if it's non-refundable implicit in that also is a clear message that is being given that there will be a premium actually paid and it won't be refundable. So going back to the notes in page 10, we have a heading *'What – inconsistently* with what we've just looked at *Did the promoters in fact do'*, and a lot of the case was of course spent on looking at this and it was complicated evidentially and factually, and I'll just summarise it as best as I can from here. So what we said in the notes to the Court of Appeal was unbeknown to the investors. The Bank of New York – this is the first point, was not actually lending its own funds at all. It wasn't like going to Westpac or the ANZ and saying I want to borrow a million dollars for something and the bank out of its general funds lends you a million dollars. The Bank of New York was to be what was referred to as a fiduciary lender with the funds being provided to it to on-lend, and the funds were going to be provided to it by a company, a paper company, shelf company, whatever you want to call it, purportedly owned by Mr Connolly, so this is how one of the ways, one of the many ways that Mr Connolly is involved with this. That Company Asian Growth Funds was to provide the money which would then be on-lent as I say by the bank to the investors. The bank asked the question eventually. It asked a number of questions actually about Asian Growth Funds as

we'll see, and one of the questions they asked was well who owns this company, and Mr Currie told the bank that it was owned by Mr Connolly. You will see that, it's also in volume 5 at page I think 1035. This was part of as I say a series of questions that were being asked by the Bank of New York about this whole transaction, and

Tipping J Is there in evidence any contractual arrangement between the Bank of New York and Asian Growth Fund Limited apropos of this on-lending?

Farmer Yes there is a fiduciary loan agreement which I'll show you. It's here, it's in this volume.

Tipping J It's here, good.

Farmer So it's part of what's called the information memorandum and I'm going to take you to it shortly. So Mr Connolly was described by Mr Currie to the bank as being the ultimate beneficial owner of Asian Growth Fund Limited and this information memorandum that I've just referred to, if I can take you to that, because this begins at page 1018 and there is other evidence and I don't think I need to take you to it, that first of all in January, at a time that investors were being sent the proposals, there were discussions going on between the Bank of New York and Mr Currie in particular about setting up this facility, and on the 8th February – and you won't find the date here – the evidence is elsewhere, 1995, Mr Currie sent this document called Information Memorandum which was the culmination of the negotiations that had gone on between the bank and him and which in particular set out the agreed terms of which Your Honour has just asked me about – the fiduciary agreement that was to be entered into between Asian Growth Fund Limited and the bank, and so if you go over to page 1020, there in diagrammatical form is set out just exactly how this thing was to work as far as the bank was concerned, and it starts with Asian Growth Fund making a loan of one million dollars in respect of each investor obviously to the Bank. The bank then on lending that loan with security to the borrower, the investor. The borrower then applying those monies to payment of the insurance policy and the insurance policy was then to be provided by way of security back to the bank, so the so-called non-recourse loan actually did have some security backing as far as the bank was concerned in the form of the policy. And then there was also security taken in respect of Digi-Tech shares and so on but I don't think we need to concern ourselves with that, so the essential ingredient is the loan, Asian Growth Fund to the bank and then the on-loan to the investor. Going over the page to 1021, the facility between the bank and Asian Growth Funds is here described, what was required by way of documentation – a fiduciary agreement and we'll look at that in a moment and then a loan agreement as per the bank and the borrowers and a mortgage, and then the security with the loss of profits policy and the share acquisition agreement. So over the page, 1022 *settlement procedures*. Now this page and the next couple

of pages are quite interesting because there seems to be clearly or what became clearly, a divergence of view between Mr Currie on the one hand and the bank as to just how the original monies were to be advanced from Asian Grown Funds to the bank, and if you go to 1025, the actual *Fiduciary Agreement* itself, which clearly has been drawn by the bank, it is absolutely clear that what the bank was anticipating and requiring, looking at clause 2, was a deposit, actual money, real money. The principal, the principal being Asian Growth Funds has deposited with the fiduciary agent, being the bank, the amount of whatever number of dollars as totaled in the attached schedule, it being understood and agreed that such amount will be used by the fiduciary agent to grant the loan to the borrowers in the name of the fiduciary agent, but on behalf of and at the sole risk of the principal. And then there was to be some interest or commission paid on that as well. But if you go back then to 1022 there's there a reference to transferable certificates of deposit and on settlement date it was said 'it is envisaged that a transferable certificate of deposit drawn on the bank but unsigned by the bank will be presented to the bank on settlement date. The unsigned TCD would be drawn in favour of John Currie, and then there's a process set out – John Currie would have already endorsed the unsigned TCD to Epicharmus. Empicharmus would have already endorsed the unsigned TCD to Swiss Underwriters. Swiss Underwriters would have already endorsed the unsigned TCD to Asian Growth Fund. Asian Growth Fund would have already endorsed the unsigned TCD to the bank. And then at the top of the next page it say 'the above ensures no risk whatsoever in settlement of the transaction. The unsigned TCD would be presented to the bank for signing. On signing by the bank TCD then immediately serves as the fiduciary loan made from Asian Growth Fund to the bank. The TCD once signed and therefore valid never leaves the bank. The bank would be its fees'. Well if by that it's meant that there was to be no actual monies advanced from Asian Growth Fund, then that certainly wasn't the view that the bank ultimately took. It did require there to be actual funds on deposit, and that's what as I said before a TCD is, a transferable certificate of deposit, then it had to be actual funds on deposit with the bank from Asian Growth Fund, and then as we saw earlier, those funds had to be paid by cheque or other negotiable instrument, and a TCD would be another negotiable instrument, to Mr Currie, and that was how the loan monies were to be advanced.

Tipping J But what we're looking at at the moment, 1022 is Mr Currie's proposal to the bank isn't it?

Farmer Well that's how I would see it in the light of what then transpired, where it became crystal clear that the bank said

Tipping J The bank said no thanks.

Farmer The bank said not only do we require actual money, a million dollars for each investor to be paid into our account, but we want evidence as to where it's come from, and we

Tipping J Well this proposal and this sort of money-go-round, it was obviously not acceptable to the bank prima facie anyway.

Farmer No, no, that's right, and so

Tipping J But where does that take you Mr Farmer?

Farmer Well I'll show you where it takes us right now because what actually happened, and this is in the middle of my page 10, the bank insisted on cash being deposited in Asian Growth Fund account with it before it would proceed to make the fiduciary loan. Now you'll see as I say there's actually quite a bit of correspondence about it but it's really from page 1033 onwards and you'll note the date is the 21 April 1995. This is an internal bank memorandum from one bank officer to another, and it reads 'further to our yesterday's phone conversation concerning the fiduciary loans for a total of - the total was to be 46 million US dollars, that's you know a number of investors involved at that time, to be granted on behalf of Asian Growth Funds to 41 borrowers, we wish to have some additional information before accepting the deal'. So at this stage as far as the bank was concerned they hadn't actually accepted the deal. Asian Growth Funds opening documents are signed for and on behalf of KAT Services Limited as director of that company. We understand that this account was introduced to you by Mr John Reid who is well-known to you etc. KAT mentions that the beneficiary owner of the account is Mr Peter Connolly presently residing in London. By signing the form KAT ascertains that the beneficial owner of the assets deposited with the bank is Mr Peter Connolly. The question is, is Mr Connolly the real owner of 46 million US dollars? For the reasons stated over the phone we must absolutely be sure of the origin of the funds received before opening any account. Our authorities are very keen on the subject'. Now that may be a possible reference to money laundering of a kind or whatever, but the incredible thing is that they wanted to know that there was going to be 46 million coming in and who the real owner of it was. Mr Connolly was said to be the owner, the beneficial owner of the account, the account in the name of Asian Growth Funds, so they were now asking questions. Now that was responded to, the matter was obviously raised with Mr Currie because you'll see the next document, ah I'm just looking for a date, which is a couple of days later, Mr Currie back to the bank. 'I refer to our recent conversations and attach a draft letter that should clear up any outstanding issues that your Geneva head office may have about the transaction', and if you look at the letter over the page, 1035, Mr Currie writes 'we confirm as follows we are familiar with the whole of the transactions of which the proposed fiduciary loan forms part. All of the funds applied in the transaction are obtained from legitimate and proper business sources.

The transaction is commercially sound. There is no question of the transaction being part of any money-laundering scheme. Mr Peter Connolly of London is the ultimate beneficial owner of Asian Growth Funds'. And then going to the next page, the following day the bank writes back, rather writes to Westpac who come into the picture, oh sorry that's explained on the following page. So looking at these two pages, so on 1036, the 25 April, the Bank of New York advises Westpac in Hong Kong, 'with reference to the meeting between Mr Currie and Mr Kwan we confirm the following – our bank requires evidence of cash being received, cash being received, by Asian Growth Fund Limited's account before our bank is in a position to fund the loans to the borrowers, and there's a procedural way in which that is to be done and on the following page Mr Kwan, who's the bank's representative to Mr Currie, 'as discussed Westpac has altered its position so we will – oh sorry – this is from Mr Currie to Mr Kwan. 'Westpac has altered its position so we will need to revert to settling the transactions in a number of separate steps.

Tipping J Was Westpac going to be the clearing-house that Mr Currie had to become?

Farmer I think I'll come back to that if I can, it's just that I'm not totally clear myself as to just what their precise role was. But just note that document on 1037 is a couple of weeks down the track and it's clear that what went on over quite an extended period was this tooing and throwing with the bank who were just unhappy, or at least not satisfied about whether the monies were coming in cash and where from etc. So actually what then happened was because back in New Zealand the time was moving on and they had to consummate at least the first lot of these deals, the bank was in effect side-lined and you'll see it referred to in the middle of page 10, is what actually they did instead was to substitute in place of the bank as the lender a shelf company, Hong Kong Shelf Company called Mei Shing Trading as a 'temporary lender' and they then did implement this TCD circular transaction but with no monies, no deposit behind the TCD backing it and the Judge described that as in nature or in substance a promissory note because there were no monies behind it and what he said, and this is his paragraph 31 and we'll

McGrath J Just before you go to that Mr Farmer, I take it they did have authority in the documents to substitute the shelf company?

Farmer Ah yes

McGrath J I seem to remember you referring to something along those lines.

Farmer Yes I think later what happened Your Honour was that in later versions of these documents after this time there was a power of substitution and what actually did happen in later transactions was that they, you know some months later, was that they substituted a company called

Armour Fidelity in place of the bank and they did the whole thing via this company called Armour Fidelity, relying on its power of substitution

McGrath J But my question really was this as to whether the substitution of the Mei Shing Trading Company for the New York Bank, that was an authorised transaction was it not?

Farmer No, no it wasn't, it wasn't.

McGrath J It wasn't.

Farmer No, and what actually happened that a month or so later once they'd got things sorted out with the bank, and I'll explain how they did because that also involved subterfuge, was that they then in effect provided back-dated bank documents to the investors because of course their obligation was to provide loan documents from the bank, so what actually happened was that these initial transactions took place through Mei Shing Trading as a 'temporary lender' and then later as I say they provided to the investors Bank of New York loan documents after putting in place the Bank of New Zealand daylight facility which was predicated on false fictitious bond sale and re-purchase transactions, and I will take you to that shortly.

McGrath J Thank you.

Farmer So the investors know nothing of any of this. This is all happening without their knowledge and without their authority.

McGrath J Well that's the key point isn't it without their authority.

Farmer Yes. But just looking at the, oh perhaps I'll deal with that point just a little later. So I've actually summarised in the notes on page 10 what happened with Mei Shing Trading and you will see a description of it on page 1042, and these were the TCDs so called, which were not in fact, true transferable certificates of deposit at all, where the TCD, actually if you look on 1042 there's a diagramme that shows the certificate of deposit being endorsed and transferred in a circle from Mei Shing Trading to Mr Currie, from Mr Currie to Epicharmus, that's the payment of the premium supposedly – on to Swiss Underwriters, also a company owned by Mr Connolly and which under the contractual arrangements which I don't think I need to take the detail of, discharged Epicharmus's obligations under the policy because Swiss Underwriters effectively took them over, but under a purpose trust which is a very complicated animal in itself. I don't think I need to take you into that – and then back again to Asian Growth Fund

Tipping J This is what Mr Currie was originally proposing with Mei Shing substituted for the bank.

Farmer Yes that's right, that's right, and if you look at 1043 you will see the actual TCD – 'Mei Shing Trading will pay to John Donald Currie the sum of 20 million US dollars on the 29 March 1995 upon presentation and surrender of this certificate and will pay him by way of bank cheque, and then on the following page you've got the various endorsements and endorsement schedule which shows the circle the money is going through the TCD supposedly being transferred through the various entities that are described.

Tipping J But did Epicharmus accept that transaction as payment of the premium?

Farmer Yes it did, it did, but that begs the question as to whether what was contemplated

Tipping J Well it may not have been contemplated, but if it discharged the obligation.

Farmer Right, well that's the critical point because let's assume for the purpose of this discussion that as between Epicharmus and Mei Shing Trading that was an effective discharge of whatever obligations existed between them, that is a different questions from whether that was in accordance with what had been contracted with the investors

Tipping J But if it procured the policy, what is the significance of it not being cash but being discharged in a way that the payee accepts is equivalent to cash.

Farmer What's significant about it is that the Commissioner is always looking at substance, not form, and he will drill down into what is happening here and if he finds that the investors' money has not been paid in fact for an insurance policy then he will not allow a deduction.

Blanchard J Yes, but was it done with that intention that the investors would suffer loss? I can well see that this was very foolish; it was undoubtedly a breach of obligations to the investors, but was it done with the intention of defrauding them?

Farmer Well Your Honour

Blanchard J That seems to me a huge step.

Farmer Well it is fraud if monies are paid by investors for a particular purpose and they're not used for that purpose but are used for some other purpose, namely benefiting the individuals.

Blanchard J Well here is alleged to be a fraud on the investors

Farmer Yes.

Blanchard J I can see that it could be some kind of criminal offence perhaps, but I don't know that it's the kind of offence that's been alleged.

Farmer Well.

Blanchard J If they were taking money that was supposed to go to the investors, and putting it in their back pockets as a result of these transactions

Farmer It's supposed to go to an insurance company which would form the basis of the investors being able to claim tax deductions.

Blanchard J Yes but the insurance company did acknowledge that it had received the money, so there was no loss to the investors as a result of that step being taken.

Farmer Well Your Honour there would be a loss to the investors of

Blanchard J There would be a loss to the investors if the Commissioner came in and disallowed it.

Farmer Which he would be likely to do.

Blanchard J But the point is was that something that was intended by these people in the same way as you would intend to take money if you took it out of the drawer and put it in your pocket?

Farmer Well they certainly intended on the case that was presented to take all of the investors' money, the cash contribution, and apply it to their own purposes.

Blanchard J But they weren't intending to cause the investors loss by doing that.

Farmer Well.

Blanchard J It may have had that effect.

Farmer Well one can always get into these difficult questions

Blanchard J I mean I just see this as being a bit, well to call it 'fanciful' is putting it too high, but it just seems such an unlikely proposition.

Tipping J Why were they shooting their own scheme in the foot?

Farmer Their problem was that they had no means of finding the bulk of the premium, which was to be provided by a loan, they had no means of obtaining that loan to pay the premium.

Tipping J But they were defrauding the investors not so much in costing them money as my brother Blanchard has elucidated, but making it that much more likely that the Commissioner would invalidate it.

Farmer Making it certain that the Commissioner would invalidate it.

Tipping J Well making it certain.

Blanchard J But did they see that?

Farmer Well they

Blanchard J I mean if they did they were complete idiots doing it.

Farmer Well Your Honour they must have seen it because the Denham Martin opinion said 'I am giving this opinion expressly on the premise that there will be a real payment of real money to a real insurance company'.

Blanchard J And they thought they knew better.

Farmer Well

Blanchard J I mean it just doesn't seem very plausible that they would do this with a view to hurting the investors. That way lay commercial suicide.

Anderson J Implicit in your approach is that they set up this highly elaborate scheme in order to get the cash out of it that they got out of it. Let's make $600,000 out of this and we've set up schemes all over the world with all sorts of people and we'll make $600,000 out of this for us.

Tipping J And we will so arrange it that we'll make sure that the Commissioner is going to disallow the non-tax avoidance grants.

Farmer Well they set it up to take all the money provided by the investors for their own purpose. Not just set it up to implement the transaction according to its terms and then take out of the proceeds from the insurance company proceeded to take a cut, a fee, a proportion or whatever, they took the lot.

Anderson J So, chartered accountants and merchant bankers and all the rest of them think let's do a scam on investors so we can get their cash out of them, that we eventually got out of them.

Farmer Well there were two lots of

Anderson J That's what

Farmer Well there were two lots of professional people involved in this. There were the professional people, namely Mr Currie and Mr Russel in particular, and if we describe Mr Reid as an investment banker and Mr Connolly, whatever his description was, there were those people, but there were other people who along the way, and including banks, who

acted entirely properly, because on the basis of the documents that they saw there was nothing irregular.

Anderson J I understand that but I'm just trying to get my mind around the inevitable proposition that the accused set up this highly elaborate scheme for the purpose of getting the cash out that they got out for their own purposes - $600,000 in two cases.

Farmer I don't know quite what other view you can take on it to be quite honest because that's in fact what happened.

Anderson J Yes.

Tipping J Is the argument Mr Farmer that although they got acquitted by the means that you've just deployed, they are of such moral turpitude that they should be denied costs?

Farmer No, the argument is not put in that way. The argument is put in this way, that the Judge, and this back in his primary judgment, the para.31 that I referred to but you need to look at the other paragraphs around it as well to get the full picture. The Judge took the view that's been put to me now by one or two of Your Honours, which is that a payment, by the way a book entry, let's call it that, of a premium obligation to an insurance company is in law a payment. Now my point is that under the documents that the investors entered to that was not was contemplated or undertaken to be done, that that is a seriously arguable proposition that we put forward and the Judge rejected it but in looking at the question of costs, the question is whether or not this prosecution was a reasonable prosecution, and that may be an inaccurate way of putting it but it's a shorthand way. Was it a reasonable prosecution brought and continued and the prosecution would have brought and continued on this basis of the arguments that I'm just advancing and if Your Honours say yes that was very seriously arguable, albeit rejected by the Judge, well then that's highly relevant to the question of costs, and if that argument was a reasonable argument then as I said earlier that puts in a totally different context the acts of fictitious transactions and so forth

Blanchard J Well I've got to signal I've got problems with it as an argument of any plausibility because it just seems so unlikely that the substitution was done with the intention of prejudicing the lenders. It certainly was very likely to have that effect and no doubt did have that effect but it just doesn't seem to me likely that it was put in place for that reason. It was done because they wanted to get the deal through for their own purposes, but surely not with the intention of undermining the position of the investors.

Farmer Well then that's getting into the boundaries what is fraud and what is not, and if in fact it was plain, and it must have been plain to them that what they were doing was not in accordance with the contractual

documents, and it must have been equally plain that they were in effect undermining the very position that they had sold to the investors, namely that here is a tax effective deal for you, then that has got to be regarded arguably as a species of fraud.

Anderson J Mr Farmer is the bottom line of your argument that, objectively assessed, the case was stronger than the Judge thought?

Farmer Yes certainly.

Blanchard J Mr Farmer does it help for where you are putting it to focus on where the bulk of the money was going, namely to buy shares which were actually owned by these people? Could that have been the motivation, to enable them to conclude a deal whereby they sold their own shares for a price much greater than they would have got in the market?

Farmer That's certainly a very important part of the total picture and that was

Blanchard J Because that hasn't been mentioned directly.

Farmer Well I took you to the original sale agreement and I haven't given you the figures on that but clearly considerable sums of money were being paid by the investors for shares that were

Blanchard J But has the Crown ever put it the way that I've just put it then?

Farmer No, it has not been put with such clarity for sure, but we need evidence as to what monies were paid by the investors and what it went for. It was a highly speculative investment but what we have not alleged is that there was any fraud involved in selling shares in a company that purported to be something different from what it really was.

Blanchard J Yes I suppose if I thought I could buy shares in a tax effective way that might encourage me to pay a higher price than I would otherwise pay in an ordinary market, but if the Crown has never put the case in this way before it might be a bit late now.

Farmer Well I'm not trying to put it that way

McGrath J Mr Farmer can I go to an aspect of which you put some weight, the Denham Martin opinion. You did take us to a passage at page 909 of the casebook in which really there is a pretty clear warning isn't there that the New Zealand Courts might treat this on a substance basis – it might not be too impressed on form?

Farmer Yes that's true and that links back to the 6.2 'a real payment of premium is made by investors

McGrath J Well in some ways it may water it down. It's almost in conflict with it isn't it?

Farmer Well, just looking at this TCD circle where there was no D in it, there was no deposit, that's if you're going to look at it in terms of substance and form, that's something that would excite the Commissioner very greatly, obviously, because in form it may have been a TCD, in substance it clearly wasn't. Even the Judge said it was more in the nature of a promissory note.

Tipping J It was a promissory note endorsed right around the circle and back to the promissor.

Farmer Yes, yes.

Tipping J I mean it was not real money but ultimately real money came from the bank after this

Farmer Well no it didn't.

Blanchard J No it didn't.

McGrath J That was only the loan wasn't it? The TCD was only for the loan?

Farmer Yes that's right, so now lets look at what happened with the real, well supposedly real loan, because when the Bank of New York came back into the picture

Tipping J Yes, that's what I was interested in.

Farmer And you recall that they had to be satisfied that there was real money being advanced into Asian Growth Fund's account with it

Tipping J With it, exactly.

Farmer Yes, okay. So what happened. If you go to

Tipping J I mean in a sense this interim arrangement is a bit of a distraction isn't it?

Farmer Well yes and no. It's part of the picture, an important part of the picture but let's have a look at what happened then. You go over in fact to page 13 of the notes and this happened a month or two later, there was a daylight facility arranged with the Bank of New Zealand. Now you'll see at 1047 of volume 5, on the 5 May, Milloy Wong wrote to the bank and said we've been working on an opportunity to purchase some fixed rate investments – these are the bonds – and broker them in smaller parcels to clients. To settle these purchases we need assistance in the form of clear funds being available to us for 2 million dollars. Now the 2 million was actually that there was a whole series of daylight facilities, so they were in 2 million parcels if you like because actually the total was a lot more than that. When we settle the purchase

we will have prior arranged for their on-sale to other investors and accordingly funds shall be credited to our account on the same day or possibly on an overnight basis. We've undertaken a similar arrangement previously etc and we want to do it again and we request a facility, settlement to be in Australian dollars, so that's where I think the Westpac comes into it, and going into an Australian dollar call account. Now then

Tipping J Who's MRW Trust?

Farmer Well that's the Milloy Reid Wong, so that's Mr Reid's company alright.

Tipping J Oh I see, sorry that was probably a bit obvious but I had missed it.

Farmer Yes, so that was on the 5 May, so if you go over the same, and there's another letter which I won't take you to on 1049, also to the Bank on the 9 May and then on 1050 there's a Bank of New Zealand memorandum or report which sets out I think what's happening here and then if you go to 1075, it's actually 1073 through to 1075, but just looking at 1075, this is Mr Reid writing to Mr Currie on the 18 May and this is the purported sale and buy back of securities or bonds – 'I concern our agreement to sell the following Australian dollar securities to your clients for a total consideration of 29 million Australian dollars. You will be acting as intermediary for your clients and as far as we are concerned our risk in dealing with you on this transaction is with Grant Thornton Byrne. The securities are, and there you see them all set out. All these are fictitious, they don't exist. As agreed with, settlement will occur as follows – Asian Growth Fund will deliver to you properly signed security transfer forms for the above securities. These transfers are to be in bland and will be completed by you with details of the purchasers once we have completed settlement', and then on the next page, 'when you've received the appropriate security transfer froms with certificates of ownership, please confirm that you hold them in trust for us and title will not pass to your clients until we have been paid for them in clear funds to our Australian dollar account with the Bank of New Zealand. In purchasing these assets from Asian Growth Fund' so Milloy Reid Wong saying we'd bought these securities from Asian Growth Fund, 'we have agreed with them to pay the purchase price in 17 equal instalments of 1.7 million Australian', so that's the 2 million New Zealand, facility **'**for a total of 29 million Australian, this is to be strictly confidential, the sale price agreed with you was reached on the understanding that we would make a profit, Byrne's clients were happy with the price. We've now disclosed to you our profit and as we have agreed we are agreeable to your fee of $25,000. Our profit figure of $293,000 Australian is to remain on deposit with you in Hong Kong, held in trust for us'. Now that is a fictitious profit on a fictitious transaction but those monies were subsequently sent back by Mr Currie to Milloy Reid Wong from the investors' $40,000 that had been paid to him. See what happened is that a diagram at 1066, and this is actually

the bank's understanding of the transaction that was to occur. So step 1, the seller transfers securities to Byrne, that's to Mr Currie's company. Step 2, Mr Currie confirms to Milloy Reid Wong that they hold the securities and that they are in a position to settle. Step 3, the bank transfers the Australian dollars to the seller, and then there's confirmation of that, and then transfer goes back. So the monies go around in circle and then come back to Milloy Reid Wong who repay the bank

Blanchard J So what was this designed to achieve?

Farmer Well what it was designed to achieve was to flow monies through Asian Growth Fund's account, it be the seller of the securities.

Tipping J So it could fund the Bank of New York?

Farmer Yes, yes, that's right. And so the Bank of New York having seen those monies in Asian Growth Fund's account, would pay them on to Mr Currie

Tipping J Did the Bank of New York

Farmer As the fiduciary lender to Mr Currie acting as agent for the borrowers.

Tipping J But did the Bank of New York buy this in the sense of being satisfied that there was actual cash, which backed

Farmer Yes well there was actual cash.

Tipping J Well in a sense.

Farmer Yes, but it was actual cash that went into Asian Growth Funds Account with the bank. The bank then immediately paid it to Mr Currie, thinking it was advancing by way of a loan to investors. Mr Currie then received the money but instead of paying it to Epicharmus by way of the insurance premium, paid it back to Milloy Reid Wong who then paid the Bank of New Zealand back.

Blanchard J Was anybody left out of pocket as a result of this particular piece of the transaction?

Farmer Well I answer the question the same way I've answered similar questions before, all of this is concealing the fact that there never was a real loan from the Bank of New York to the investors which was then applied to payment of insurance premiums.

Blanchard J So it was a façade?

Farmer Yes.

Blanchard J But after the event?

Farmer After which event?

Blanchard J After the event of the investors' transaction having occurred.

Farmer Oh through Mei Shing Trading?

Blanchard J Yes.

Farmer I think yes and no is the answer to that. I think in respect of the Mei Shing Trading things was did happen was that the Bank of New York on the strength of this money flowing through signed the mortgage and loan documentation

Blanchard J Yes, and it stepped into the place of Mei Shing?

Farmer Yes, in effect, although the bank never knew about Mei Shing. It never knew that this had actually all been done earlier.

Tipping J So what was supposed to be a cash loan from the Bank of New York to the investors was side-lined, if I can use that work, didn't go to the investors at all, you're saying, it actually went to the promoters, but some how or other the promoters managed to get the insurer to accept that the premium had been paid?

Farmer Yes well they did that through the TCD circle

Tipping J Yes.

Farmer And I'll just come back and deal with that in a moment, but just to complete the documentation if you go to 1091 you'll see there how the Bank of New Zealand's daylight facility went simply from Milloy Reid Wong to Asian Growth Fund's account with the Bank of New York, from there to Mr Currie and then from there straight back again on the same day to Milloy Reid Wong used to pay the Bank of New Zealand. So what we say at the bottom of page 13 is that Mr Reid's stated purpose to the Bank of New Zealand that this facility was required to effect this purchase of bonds and to make a profit on it was just simply untrue and that to compound the sin so to speak, the profit that was allegedly made on this fictitious transactions was then remitted back later by Mr Currie to them out of the investors' monies.

Tipping J If the investors' $40,000 was supposed can help buy the insurance and the insurance was effectively bought, what harm is there to the investors in that.

Farmer The same answer I've given before that the harm is that that transaction is never going to stand scrutiny from the Commissioner.

Tipping J Yes, so the real malice of this whole thing is not so much the $40,000, but the making of it almost certain on examination to fail?

Farmer Yes, and it's the $40,000. What the investors were claiming by way of deduction was a million because that was the $40,000 plus the monies lent by the bank supposedly, that was the payment against insurance premium, and then they were also claiming interest paid to the bank under this loan but never occurred, and all of that was at risk.

Tipping J So if it had gone ahead as the documents forecast there would have been a much better chance of it succeeding?

Farmer Yes.

Tipping J Than almost the certainty of it failing, the way they did it?

Farmer Yes.

Tipping J Is that the real gravamen of the case?

Farmer Yes that and allied to that as I've said earlier is the fact that Epicharmus was a paper company

Tipping J Oh yes, yes.

Farmer Owned by, well a lot of that when you look at that charade correspondence which I'm not suggesting I will take you to it, because the Judge did find it was a charade

Tipping J Yes.

Farmer And one of the things that's in it for example is a statement to the effect that Epicharmus was part of or sorry, associated with the Chase Manhattan Group and therefore a very significant substantial company, all of which was untrue.

Anderson J What was the alleged purpose of this fictional correspondence?

Farmer The fictional correspondence really arose, it was possibly initiated by inquiries from Gosling Chapman

Anderson J But the Judge thought it was to cover their backs

Farmer Yes, well it was to cover their backs in two respects, and the way it was put is this, and I'll give you the reference because I think it's quite important we look quickly at that paragraph on page 148 in the Judge's initial judgment. At para.175 at the foot of the page, having previously just further up in the page described the fact that Mr Connolly and Mr Reid both admitted to the SFO in their interviews that it was a façade his Honour said 'I am satisfied that this façade of correspondence was

written either as a pre-emptive paper trail to protect Mr Reid from any future claim by investors or to mislead the Commissioner of Inland Revenue', and Mr Currie, as he indicates was also involved in this sort of trail of various letters. So it was either one or the other. Now if in fact the Commissioner was mislead, and that was the intention to mislead him, well that again was undermining the efficacy of what the investors thought what they were buying and what they had been promised. What

Blanchard J Did they ever use it to mislead the Commissioner?

Farmer No I don't think there was any evidence that was produced to the Commissioner but of course it was there sitting on their files against the day that the Commissioner came with his statutory notice requiring production of things. What the Judge also said though was that it was not essentially proved, that's also in para.175, he said 'I'm satisfied there is more than a reasonable doubt it was essentially not proved that these letters were written to deceive the investors into entering into the scheme'. Now he says that on the basis that a lot of the letters went to Gosling Chapman and he found, and this was the ambush at trial point, he found when Mr McGrath was cross-examined, Mr McGrath being one of the principals of Gosling Chapman, that Mr McGrath had been to Amsterdam and had seen the offices of Epicharmus and had must have therefore concluded that it was not a company that was part of the Chase Manhattan Group, but in terms of intent His Honour certainly found that the intent of that correspondence was to protect Mr Reid from either the claim by investors or to mislead the Commissioner of Inland Revenue. Now as I say His Honour said well all this is very interesting but it didn't really bite, it was all irrelevant to the transactions, but the reason he said that, he held that, was because of the view that he took in para.31 of his judgment that 'using TCD's to satisfy the obligation to pay the insurance premium was perfectly alright' and what we say is that if that wasn't right, or if it arguably wasn't right well then the conduct of Mr Connolly, Mr Reid and Mr Currie takes on a whole different complexion and that strengthens them very much, the submission that was made that they brought the prosecution on their own heads, which is the dictum of Justice Hardie Boys in the *Margaritis* case.

Anderson J Justice Fogarty held that anyway, that's why he discounted

Farmer Well he held in a limited way that two of them had, whereas we say four of them did if you take the broader view of the case or the particular view of the case that we did take it.

Anderson J So didn't he say that they should be discounted by 50% as well then?

Farmer Sorry?

Anderson J They should have had their award discounted by 50% as well.

Farmer Ah well that's what His Honour certainly held based on the wasted time finding.

Elias CJ Well on your argument is it the case that really this discussion puts matters around the wrong way? It wasn't the correspondence was done to deceive the investors, it was that the deceit was in setting up the scheme which didn't entail real payments which required them then to

Farmer To conceal what they were doing.

Elias CJ To conceal

Farmer To cover their tracks, yes.

Elias CJ To cover their tracks

Farmer Yes, yes.

Elias CJ Yes.

Farmer Yes, that's right, that's how we put it. There's only really

Elias CJ So on that argument, yes I see it's evidence of purpose or guilt.

Farmer And really in a way that's, we would like to think, that's what the majority of the Court of Appeal were sort of thinking when they said in those much maligned paragraphs 58 and 62. The only other point Your Honours that perhaps we need to deal with fairly shortly, and I'll get my learned friend to deal with it, is His Honour was much influenced by a sort of separate point which was whether the SFO had been somewhat slack in not appreciating that the Commissioner of Inland Revenue had allegedly changed his position over time and that having started as the Commissioner did from a very strong position that there was not only tax avoidance but that there was fraud which led the Commissioner to actually be a complainant. It was the Commissioner along with Gosling Chapman who initiated this whole thing with the SFO, and His Honour referred to evidence so-called that over time the Commissioner 'became more comfortable' with the Digi-Tech transaction and that the SFO failed to keep up with the Commissioner's thinking and therefore didn't appreciate that maybe the Commissioner had developed a different view of it. Now we say as a matter of evidence in fact that that was not so, but I suppose we say to that that's not necessarily a proper basis anyway for taking the view that he did about costs, but just as briefly as we can, if we can just deal with that factual matter and I'll ask my learned friend to do it

Elias CJ You want him to interpolate?

Farmer Yes.

Elias CJ Right.

Farmer Well it will probably be not interpolating it but I'll come back and answer any questions if you want me to but

Elias CJ You've finished,

Farmer Yes.

Elias CJ Yes thank you, thank you Mr Farmer. Yes Mr Ruffin.

Ruffin May it please Your Honours. Picking up from the written submissions at page 21, para.10, and in the original costs decision, the trial Judge put some importance on the changing views of the Inland Revenue Department. It said there is a section in the costs decision at pages 66 to 69 of the case, being paras.19 to 32, and it's also emphasised again in conclusion at page 77 of the case, para.61, 'I do not think the prosecution was reasonably and properly pursued. Had it been, I do not think the SFO would have pursued a case contrary to the position taken by the IRD, and also in conclusion at para.74, at page 80 of the case, 'I am troubled by the decision of the SFO to pursue this case independently of the developing position within the IRD'. So dealing first of all with the IRD complaint, I can go to volume 6, the IRD complaint to the SFO starts at page 1319 of the case and at page 1320, about two-thirds of the way down the page it's acknowledged that it's in the context of a tax avoidance transaction but the referral is made on the basis that the transactions didn't take place and there was an elaborate system of side transactions being used to give the false impression to investors that loans had been drawn down on their behalf. And further at page 1336, in relation to all the tranches there was no actual drawn-down of the loan and in the first Digi-Tech transaction there were actually five tranches of loans and there were only TCDs located for tranches 1, 2 and 5 nothing for 3 and 4. Also at page 1341, towards the bottom of the page the heading *No money deposited on trust*. So the complaint was the insurer had failed in its obligation to pay sufficient funds to a trust. There is very little real money in the system. Page 1343. posting the question *Where did the money go*. In the middle of the page 'the whereabouts of the remaining 2 million is unclear', and page 1345, half-way down the page the heading *Tax position on the scheme as it occurred*. And again first there was no actual loan provided, therefore no interest was incurred. Second, no insurance premiums were paid and no such expenditure was incurred by the investors'. Now all of that with respect is consistent with how Mr Farmer was explaining the diagram. If I could just go back to volume 5, where we have the diagram at page 1091, which is the first payment for what the Crown alleged was the fictitious bonds transaction. So first of all to set the scene for that diagram, at page 1081 there's the letter of instruction from Asian Growth Fund, May 1995, to the Bank of New York. So it's saying

Tipping J What page I'm sorry?

Ruffin 1081

Tipping J Thank you.

Ruffin So it's saying in terms of the fiduciary agreement at the requested the borrowers - we've got four borrowers that are mentioned at 1082 – who are to be the recipient of the draw-down from this first tranche. So this is the first payment with the first tranche. Then returning to the diagram at 1091, the arrow described payment 1.1 is the Milloy Reid Trust Funds from the BNZ being paid to the Bank of New York at its Westpac Sydney account for the benefit of Asian Growth Fund.

Blanchard J Mr Ruffin I thought you were dealing with the alleged changing position of the IRD.

Ruffin Yes, I just want to set the circumstance of the complaint and that nothing has changed. So in relation to that

Tipping J Wasn't there a letter somewhere, I'm sorry to interrupt your flow, but like my brother I'd quite like to get to the heart of this. Wasn't there a letter from the IRD to somebody saying we've now had another look at it and isn't quite what we thought or something along those lines? Now that presumably is what the Judge was referring to in broad terms.

Ruffin Yes I will come to that Sir.

Tipping J You're coming to that?

Ruffin Yes Sir. Now

Tipping J What was the date of the complaint that you had taken us to a few minutes ago?

Ruffin 1 Novermber 2000 at page 1349.

Tipping J Thank you.

Ruffin So in terms of that payment from the BNZ to the Bank of New York in its Westpac Sydney account, at pages 1088 and 108, sorry, 1087 and 1088 the bank has receipted that as the funding of the Asian Growth Fund Account, then in terms of the second payment to Mr Currie, at page 1089 and 1090, the bank has treated the payment to Mr Currie as the drawn-down from the fiduciary loan to the four named LAQC companies, Asbury Barrack etc

Blanchard J Mr Ruffin I don't want to interrupt you again but I'm afraid I'm lost where we're going at the moment.

Ruffin I was just setting the

Blanchard J You seem to be getting us into a mass of detail rather than dealing with the matter that I thought Mr Farmer said you were going to deal with.

Ruffin Yes, I'll return to the submissions then at page 21. Now para.21 of the costs decision refers to discussions that Mr Reid had with an IRD officer, Mr Keating. I've set out Mr Keating's file note dated 20 December 2000 and it is at pages 1352 and 1353 of volume 6. The third to last paragraph on page 1353 records his note 'I stressed that proof would be required', so that paragraph is inconsistent with the paragraph of the same meeting that Mr Reid had with Mr Keating, and Mr Reid reported with his file note be letter to the Serious Fraud Office, which is at 1354, his letter of the 13 June 2001

Blanchard J But this is six months later?

Ruffin Yes Sir, and page 2 of that letter at 1355 Mr Reid in para.2(i) in 1 to 3 put forward his account of that meeting and attaches his file explanation of the note and that's at 1357 and 1358, and particularly at 1357, two-thirds of the way down the page he records Mr Keating as saying 'Im embarrassed, this is not fraud'.

Tipping J Where's that reference, sorry?

Ruffin Page 1357, two-thirds of the way down the page, Marking Keating 'I'm embarrassed, this is not fraud'. Now that's quite inconsistent with Mr Keating's file note with the same discussion at 1352.

McGrath J 135?

Ruffin 1352, the first one I refer to.

McGrath J Which particular part of that

Ruffin The third to last paragraph at 1353 'I stressed that proof would be required etc. -that's what Mr Keating is saying.

McGrath J Yes thank you I've got that.

Ruffin And I am embarrassed this is not fraud loss. At page 1361 Mr Reid writes by letter dated 11 February 2002 to the Serious Fraud Office. At page 1362, para.6, he again refers to the Keating conversation. That's just repetition. At para.6, Roman little 3, he refers to a discussion with a Mr Jonathan Matthews of Inland Revenue, and there's no evidence about that, but over the last page of the letter at 1363, he refers to the conversation with Mr Lennard in para.6, little Roman 4, described as taking place in January 2002 where Mr Lennard is reported to have said to Mr Nannsted, who's the lawyer who attended Mr Connolly's

interviews, 'the IRD is becoming increasingly comfortable with the Dig-Tech and NZIL transactions now that the IRD understands them a lot better'. The reference immediately under that quote is an email from Mr Milloy – that is at 1364. Context is set and about eight lines down we have 'the increasingly comfortable

Tipping J Who is Mr Milloy, just excuse me for being so lacking in

Ruffin He's the Milloy of Milloy Reid Wong.

Tipping J The same firm?

Ruffin Yes.

Tipping J Yes.

Ruffin So with respect

Elias CJ Is this the source of the increasingly comfortable

Ruffin Yes.

Elias CJ So this is the high-water mark at the shift of position?

Ruffin It's double hearsay, or there's also a reference to the notice of proposed adjustment for one of the LAQCs and I'll come and deal with that next, so this is double hearsay. It's a casual conversation

Anderson J Is it suggested that it's fictional, that it's been created?

Ruffin But in context it's more likely to be Mr Lennard saying to another colleague who used to work at Inland Revenue 'we now know more about it', not 'we condone it or think they are a real transaction'.

Anderson J It's the probative value of it that you were impugned.

Ruffin Exactly. Now in para.22 of the costs decision. We first of all I'll just go back to the conversation with Mr Jonathan Matthews. That's at 1366, and that's Mr Reid's file note, and para.8 at the bottom of page 1366 just says 'Gosling Chapman knew as at March 1995 that the insurer was not a registered insurance company but a private company, and that follows over to the top of 1367 and if Your Honour likes to note that's a reference to a letter which is in case volume 2 at page 360 to 361

Anderson J I'm sorry I've lost the references here after 1364 Mr Ruffin.

Ruffin At 1366 we have Mr Reid's file note of his conversation with Jonathan Matthews. At para.8 there's discussion about the insurer, and all it is is Mr Reid asserting to Mr Matthews that the insurer wasn't a registered

insurance company but a private company and Gosling Chapman knew that in March 1995. The letter actually relating to that date of 23 March 1995 is in volume 2 at page 385, which is a letter from Mr Reid to Mr McGrath saying 'I received overnight the enclosed letter from the insurer and that the insurer confirms that it's a private company that will establish a special purpose trust'. Now the Judge also relied on a page from a notice of proposed adjustment. Now Inland Revenue had issued some standard NOPA'S for all the Digi-Tech LAQCs and at para.22 of the costs decision he specifically referred to page 177 but with the NOPA, but with respect that was taken out of context, and if I can refer first to the NOPA there's an index at page 1375 that goes through to 1381 so that one can see that it's quite a comprehensive document and in the context of that I've selected some pages that are representative of and consistent with the Commissioner's original complaint to the Serious Fraud Office. First at page 1382, two-thirds of the way down the page under the heading *Special Purpose Trust*, para.39.5.3.6 asserts that 'the only real funds that the Commissioner has been able to identify consist of 4% financed by the LAQCs at the time of entering into the arrangement'. So that's the 4% cash provided by the LAQCs, and at page 1383 there's four paragraphs. First 39.5.4.2, 'the money purportedly advanced as per the loan documents was not so advanced. Instead a temporary lender whose identity remains a mystery was interposed'. The next paragraph refers to the notice of nomination where a replacement lender was inserted. Under the heading *Method of Payment* the first paragraph refers to the 96% finance not received in New Zealand by the participants, and the paragraph after that asserts there are strong doubts that these actions were carried out as intended. Pae 1384, three paragraphs, a third of the way down the page, 39.6.4.6 'it is clear that in both Salisbury and Digi-Tech arrangements the loans have taken place if at all in a manner which is different from and with parties who are different from what the actual documents record'. Then under *Circularity* as a heading, 39.6.5.3, a reference to the TCDs. 'The TCDs used to pay the premium under the Digi-Tech arrangement records similar circular transactions with the issuer being Mei Shing Trading Limited, or Armour Fidelity Limited and a series of endorsements back', and at 39.6.5.5 ' to the extent that there is any money in existence at all, it simply went back from the financier to the insurer, to the reinsurer, to the trust if at all, and immediately back to the financier again'. At page 1385 at the top of the page 'the Commissioner in his notices of proposed adjustment and statements of position asserted that the expenses claimed in relation to the arrangement were not deductible and set out the grounds, and the last of those in the form of more than tax grounds and then at page 1386 at the bottom of the page, which was the page that the Judge relied upon in his judgment, and in particular the paragraph right at the bottom of the page 'It is proposed that the expenditure incurred by the LAQCs be denied as a deduction in the year in which they were incurred and that they instead be capitalised and set off against any income derived under the arrangement in 2007. Consequently there would be no net loss available to each LAQC', and

the Crown simply contends one has to put that in the context of its position in the NOPA, but also in the context of the Commissioner's comment at page 1387 immediately following where the Commissioner intends to deny a deduction of all monies paid for the Profits Guarantee Insurance Policy and all interest accrued on the purported loan, and the next paragraph talks of denying the deduction of the 96.5% because this was an NZIL where the percentages were slightly different, but the phrase purportedly financed by borrowing that was used. The Crown simply contends that when it's put in proper context or one looks at the weight to be given to Mr Lennard's hearsay statement, there is no real justification for giving the degree of emphasis that the Judge gave and that the Commissioner had in fact changed his position.

Elias CJ Thank you.

Ruffin May it please Your Honours.

Elias CJ Thank you Mr Ruffin. Mr Farmer I think we'll take the evening adjournment now. The reason being that I have a question about, I mean you've taken us to some detailed criticisms of the way the Judge treated the evidence. I'm not sure where it goes to in terms of the issue for us, which is whether the Judge erred in principle in a way that really would justify this Court in interfering. A lot of your submissions have been directed to how the Court of Appeal dealt with matters and I would like to reflect on the wider picture before asking you some questions if I still have them in the morning, but if that's inconvenient to counsel we could reconsider that.

Farmer No, no, I understood we had tomorrow if we needed it.

Elias CJ Yes, yes we do. Are you all content with that? Yes. Alright then we'll take the evening adjournment now thank you and resume tomorrow at 10am.

4.03pm Court Adjourned

10.05am Court Resumed

Elias CJ Thank you. Yes Mr Farmer.

Farmer If Your Honour pleases there was a reference I wanted to give you yesterday which I couldn't find at the time. You will recall that in the much maligned paragraph 107 of the majority's judgment the statement that the expenditure if the prosecution, sorry, the costs award might have a considerable economic impact on the office, and I said that in the 2000 Law Commission Report which Mr Heath as he then was, was a

member, there was something similar said and I've found that and it's quite interesting if I could just give it to you. You will find in volume 2 of Mr Reid's bundle of cases, tab 24, is the Law Commission's Report on costs of criminal cases and on page 32 there is a section which is read *If costs should be paid by a central Crown Agency, should the Department for Courts remain the responsible agency* because that was the position and the recommendation was that the Department for Courts should remain the agency that actually paid the costs if costs were awarded, and the passage I was thinking of is actually paras.108 and 109. In 108 the Commission said 'it is clear that the cost of conducting prosecutions is a major factor for agencies to consider when deciding which cases will be prosecuted. This is true even for departments of state (such as the Department of Labour). For state-funded regulatory agencies (such as the Commerce Commerce) or for private prosecutors (such as the Society for the Prevention to Animals) the cost of prosecuting is of even greater significance. The more sensitive the agency is to budgetary pressures, the more clear-cut a case has to be before a prosecution is brought', and then they go on to give the Society for the Prevention of Cruelty to Animals as an example of that. Then in the next paragraph, it's 109, 'within the state-funded sector, budgetary considerations are ultimately considerations for the government of the day. However, the Courts need to be aware (or more accurately be properly made aware) of the fiscal constraints agencies have in discharging their regulatory functions and the inhibiting effect on the agencies of the prospect of an aware of costs against them'. So on the one hand it was recognised that the Department for Courts pays the fine, pays the costs I'm sorry, but on the other hand it was said rightly or wrongly that there were fiscal constraints that these state agencies were under and that should be a factor that should be taken into account.

Elias CJ So what do you take from that?

Farmer It doesn't alter our submission that what is said in para.107 can't really be defended

Elias CJ Yes.

Farmer But it perhaps if you look at that Law Commission Report, it I think gives a clearer and rather fuller explanation of what it would seem the majority Judges were thinking when they said what they did

Elias CJ But do you say that this passage somehow affects the meaning to be given to the section?

Farmer No, to the section?

Elias CJ Yes.

Farmer To s.7?

Elias CJ Yes.

Farmer No, no.

Elias CJ No.

McGrath J Isn't this passage at para.109 really geared though to statutory bodies that are not departments of government?

Farmer It may well be.

McGrath J Just looking at the heading for a start.

Farmer Yes, yes, but as I say it's only background but I had mentioned it yesterday and I couldn't find the reference yesterday

McGrath J Well I can understand at a very general level that these sort of factors may be in people's minds but it doesn't seem to me that the Law Commission is actually addressing situation. They're more concerned with as they say, the Commerce Commission and what they call the state-funded sector or regulatory agencies.

Farmer Rather than the Crown

McGrath J The Serious Fraud Office is of course department of government.

Farmer Yes, yes, but I think what it seems to be said on 109 is that agencies at any rate are under fiscal constraints and that there could be if costs are awarded, even though they're not paying them, that could have an inhibiting effect in some way on them. Now I'm not defending that. There's a logical inconsistency in that position but I think it does through some light on what the majority were getting at in their judgment.

McGrath J Referred to it that way by reference to agencies, I take the point, yes.

Anderson J Agencies relates backs to state-funded regulatory agencies referred to in 108. That's what they mean.

Farmer It does, it does, but it may well be that in the majority judgment they were rather thinking of the Serious Fraud Office as if it were akin to say the Commerce Commission, which is not accurate.

Elias CJ Well the heading of course makes that quite clear *Where prosecutions are not conducted by or on behalf of the Crown.* It's not the case here.

Farmer Yes, it's just that the wording is so

Elias CJ Yes I see, yes.

Farmer The discussion in the Law Commission paper in para.107 is so similar albeit that one is directed to the Crown, and the other one is directed to the agencies, that it does seem to be the genesis of Justice Heath's thinking in 107.

Elias CJ Yes.

Farmer Now that may be no help at all but I'd mentioned it yesterday and I just wanted to complete the reference.

Elias CJ Yes.

McGrath J I had a question but it may be that because it relates to Mr Ruffin's submissions it's more appropriate to be directed to him. I'm not sure if he's coming back or if this is a wind-up.

Farmer Well I'm quite happy for him to come back.

Elias CJ Well while you're on your feet though I have a question. My question is really the bigger picture one that I'm fumbling for which is that it's trite that in order for an appellate Court to interfere with the excome back.

Elias CJ Well while you're on your feet though I have a question. My question is really the bigger picture one that I'm fumbling for, which is that it's trite that in order for an appellate Court to interfere with the exercise of discretion as to costs, there must be an error of principle or something that's plainly wrong and so on, and even accepting some of the points that you make, the Court of Appeal purported to identify some errors of principle, you don't really seek to defend the errors of principle that they

identify, so that's left in the position where the points that you make are related to one factor only that the Judge was taking into account, and I'm left a little concerned as to whether there is any basis even accepting your case that the Judge may have minimised the strength of the prosecution case, or may not have fairly appreciated the strength of the case. So what, where does that take this Court in deciding whether there has been an error of an extent that would justify our intervention?

Farmer Well the starting point I think is looking at the Court of Appeal's judgment as 94(a). 94 is where the two errors were identified by the Court and we forget about the second one. So the first one was that the Judge changed the focus of his inquiry from where the prosecution was justified to whether the Crown could have succeeded on each of the three theories of the case, and what we submitted yesterday was that the Judge both obviously in his initial judgment but also in his costs judgment simply took the view that the transactions were all done properly, that is to say that there was adequate discharge of the obligation to pay the insurance premium for example by virtue of the acknowledgements given by the insurance company back to Mr Currie is agent for the investors, and that it didn't matter whether the monies actually flowed in order to discharge that liability or whether it was done by this sort of promissory note type circular transaction, and because the Judge took that view that had a very important flow-on effect, for example to his view with each of the culpability, or the arguable culpability of each of the defendants, so to take Mr Connolly and Mr

Elias CJ But you can't collaterally attack that conclusion that he came to that all was done properly, so that's the basis against you which you have to make the submission that notwithstanding that ultimate conclusion, the prosecution's case was more reasonable and had more strength than the Judge allowed in the costs judgment. That's the area we're arguing in.

Farmer Yes, that's right, and the error that we've identified was his view that on the documents it was an adequate discharge of the obligations under the documents and what had promised as represented to the investors. If the insurance premium was paid in the way that they in fact paid it, as opposed to the submission, the case that we ran was that it had to be paid by way of cash-backed transactions, the cash being the initial contribution of the investors, plus the monies in fact, supposedly, borrowed from the bank. So our position was that what we argued there was a reasonable argument that had reasonable prospects of success, although it in fact didn't succeed. Now as I say the particular ruling that the Judge came to on that issue had major flow-on effects as to the view he then took about the particular individual defence, so I can take the example of Mr Currie and Mr Connolly. What he said was that there was no proof against either of them and for that reason they should be entitled to substantial orders of costs in their favour. Notice I said no proof against. Mr learned friends of some of them I think said yesterday that the Judge had found there had been no evidence against them. Now the wording he used was 'no proof'. Now the significance of that is that, in fact there was all sorts of evidence about what each of those defendants had done, but on the view that the Judge took, what they had done was entirely proper and appropriate or at any rate was not inappropriate or improper, whereas if you change the context in the way that we've argued, namely that the transactions were not done as they ought to have been done, them the role that each Mr Connolly and Mr Currie played takes on a totally different complexion, both in terms for example the charade correspondence, but even in terms to take Mr Currie, and for that matter, Mr Connolly, even in terms of just the way

they facilitated those transactions as they were in fact done, so that, and I won't take you to it, but in our main submissions, written submissions that we filed, we have a section near the end where we identify the role played by each of the defendants, and in Mr Connolly's role which is on pages 19 and 20 of the written submissions, we've listed some 24 things that he did to facilitate those transactions. So if the transactions were not done, excuse me, properly, well then Currie and Connolly were participants in that, and as I say it has a different complexion, whereas if you take the Judge's view of it that there was nothing at all wrong with what was done, well then yes you could say there was no proof against them, so the important point is that the context in which this question of costs is examined is different on our case from the Judge's case if I can put it that way

Elias CJ But even accepting your argument that the Judge failed to appreciate the strength of the case, the Crown case against the accused, that's only directed at one factor that he had to weigh in exercising his discretion under s.5 and it only goes to the weight he gave to that factor.

Farmer But our point Your Honour is that that factor is a fundamental starting point in this analysis and indeed constituted an error of law by him on our case. He simply misconstrued the contractual obligations and the nature of the representation

Tipping J But that is an attack on the substantive judgment isn't it? There is a subtle line here Mr Farmer, a subtle line.

Farmer There is because I'm not asking Your Honours to convict the accused. They are properly acquitted.

Blanchard J You can dodge that legitimately by saying we're not attacking that finding. What we're arguing is that at the point when the prosecution was being done it was reasonable for the prosecution to take a different view.

Farmer Yes.

Tipping J Yes well that's the key.

Blanchard J That's the argument I understood you were advancing yesterday.
Farmer Absolutely.

Tipping J As long as you keep with that I'm comfortable, but I think you're sliding.

Elias CJ I'm asking you to say that even if we accept that the Judge under-estimated the fact that the prosecution was reasonably brought, why does that justify us in interfering with his discretion?

Farmer I think Your Honour is perhaps maybe with respect not giving full weight to the fact that our case at the heart of it was a point of law and if our point of law was a reasonably arguable point of law then the Judge should have when considering costs given us credit for that, because points of law are different from what sort of weight you give to a piece of evidence and if he committed on our case an error of law, or arguably did

Elias CJ And the error of law was, just explain it again?

Farmer He misconstrued the nature of the obligations under the documents, the obligation being to pay the monies that were advanced and that were borrowed to pay those monies which I'll call 'cash', to use that cash to pay the premium to a real insurance company, which was necessary in order to secure the tax deductions.

Blanchard J The problem with that line Mr Farmer is that it really isn't the nub of the case. What the prosecution had to establish was that the departure from what you say was the proper construction, was a fraudulent departure.

Farmer Yes, and it's quite clear on the evidence that

Blanchard J So even if the Judge was actually wrong about the construction of the documents, that could be beside the point?

Farmer Well if it was simply a breach of contract and nothing more, yes I would agree, but the evidence is clear and I took you to the information memorandum, but it was never intended by the defendants that the insurance premium obligation would be met by way of using the investors' cash, both advanced and borrowed, to pay that, they always intended to do it another way completely and that other way was one that in our submission meant that there was simply no prospect of the investors ever obtaining the tax relief that had been held out to them as a basis for investing.

Blanchard J So are you saying that indicates that the departure from what the documents required was dishonest?

Farmer Yes, yes.

Blanchard J Okay.

Tipping J I would just like to pursue that a little further for myself Mr Farmer. Is it the proposition that at least for proposition purposes there was a sufficiently strong inference that they knew that they were departing from their legal obligations and for their own private advantage so to speak?

Farmer Yes, because the monies that the investors had advanced came back in total to the defendants. They were not applied in any way to the venture that the investors believed they were entering into. So pointed another way, the defendants or the promoters of the scheme effectively treated the monies advanced by the investors as some kind of fee that was theirs in total, as opposed to earning some reward in some other way either by taking a percentage via the insurance company once the premium had been paid or whatever, commissioned back, or however it might be done, or in Mr Reid's case by the monies that he was also receiving or that the company that were selling the shares of which he had an interest, was also receiving from the investors by way of the initial payments that were made for those shares. Because you will know that there was a ten-year programme for payment

Tipping J I have a distinct impression which I think I should put to you that this is putting it more sharply, clearly and perhaps persuasively than it was ever put at trial.

Farmer Well by the time you get to the fourth time of arguing something I hope you would be able to put it more clearly.

Tipping J It may be it is understandable Mr Farmer but this articulation of it now cannot have been

Farmer Well with respect that's not so and I mean the only notes I've given you are the one's that in the Court of Appeal level, but

Tipping J I think it's starting to sharpen in the Court of Appeal.

Farmer Well it's in the Crown's opening and the Crown's closing, but of course at that stage you do have to necessarily deal with an awful lot of evidence which not only the fundamental transactions that were done, but all the money laundering thing and so

Tipping J I know but it's senior counsel's skill to put the thing in a sharp spike and cut through all the mass of evidence and tell the Judge exactly what is the kernel of the allegation.

Farmer Well the very sharp point in relation to the point of difference between what the view the Judge took about the discharge of the obligation to pay the insurance premium, that was a matter that was certainly vigorously argued, argued by my learned friend with the Judge. The Judge came back to it a number of times so that was at the heart of the thing and there was no doubt that was a matter of vigorous debate in the Court.

Tipping J Alright, well you may or may not have persuaded me, but I just thought it fair to put that on the table.

Farmer Yes, but certainly it's true. I mean we see it when we go to the Privy Council. By the time you get to the Privy Council or you get to this Court you sort of hopefully have learned how to better express it.

Tipping J It's not a criticism with the way it's been presented in this Court Mr Farmer, it's just a slight rumination about how cases evolve I suppose.

Farmer Well I suppose my point Your Honour in response is that that would be true of almost every case that I've ever been involved with anyway.

Tipping J Well fraud cases really have to be put very shortly and succinctly otherwise everything gets lost in a massive laundry.

Farmer I wouldn't disagree with that but unfortunately at the High Court level you have a lot more. You spend five weeks in Court on a case, whereas in this Court we spend a day and a half.

Elias CJ I'm not sure that you've answered the point that I was putting to you about even excepting that the Judge didn't sufficiently appreciate how reasonable the prosecution case was – how reasonable it was to pursue and maintain the prosecution. Where does that leave you? You answered perhaps slightly glibly that there was a point of law behind it all but it doesn't matter if there was a point of law. Where his failure

Farmer Well that's the error.

Elias CJ No, because

Farmer Error of principle.

Elias CJ No, the error of principle has to be in the application of the discretion. That may have been because he didn't appreciate the strength of the case. That could have been because he didn't appreciate the strength of the facts or because of some legal argument that was put, but you start with the position that he didn't sufficiently appreciate the strength of your case. Getting to that point, where does it take you because how are we to assess the weight that that factor was given in the assessment overall of the application of s.5?

Farmer Well if there is discretion and the exercise of discretion will always be invalidated if it is based on a false premise.

Elias CJ Well it's not on a wholly false premise because

Farmer Well no, arguably false premise which is what we

Elias CJ Well it's not because ultimately he was not persuaded by the prosecution case and you're not seeking and you can't seek to get around that fact, so it's only a question of how reasonable your case

was which is only one of the factors properly to be taken into account in deciding whether an award of costs is appropriate.

Farmer Well the way that the Court of Appeal approached it in that para.94(a) and the other discussion around it was that what they said was that the Judge changed the focus of his inquiry from whether the prosecution was justified. That was the key question on a cost exercise of discretion, was the prosecution

Blanchard J But how do you establish justification without examining whether there was any likelihood that the Crown could succeed?

Farmer Well that's what I've been trying to argue is that there was a likelihood or a reasonable prospect that the Crown could succeed based on its argument about the correct construction of the obligations contained in the documents.

Blanchard J The Judge clearly took the view that the Crown case wasn't a reasonable one. It was never a goer.

Farmer But you can asses that with respect from – I've taken you through those documents – and if Your Honours think that the arguments we put to you are persuasive, namely that there's a very reasonable argument as to the nature of those obligations and that it's clear that the way it was implemented was not in accordance with the nature of those obligations, well then you do get into this dichotomy that's in 94(a), the distinction that the Judges of the Court of Appeal drew between whether the prosecution was justified or whether the way the Judge approached it, could the Crown have succeeded in proving the charges on each theory of the case. The Judge sort of ultimately said well none of those theories of the case could they have succeeded on, and what the Court of Appeal said was well having heard all the same arguments and taken them to the same documents, said well no we don't agree with that.

Tipping J Mr Farmer I think we should look quite carefully at para.46 of the costs judgment of the trial Judge, because I think it's there that the Judge's, and I may be wrong, it may be in other places too, but I get the flavour of it from there. He says you were really pretty hopeless on the first two limbs but you did have a prima facie case. He adds but just on this so-called limb and it's all in the context of trying to sort of apportion the time and the amount of time spent on various things. I get this more in the context of assessing quantum than assessing whether the appellants should have costs at all.

Farmer Yes.

Tipping J It's difficult to disentangle those two issues of course.

Farmer Well, but the threshold question should they have costs.

Tipping J Should they have costs.

Farmer And then if the answer to that is yes well then you do, without well how much time do we waste.

Tipping J Well he must have been entitled to the view that they should have some costs.

Farmer Well, well

Tipping J I mean even if he was completely wrong, as you're inviting us as to the weight of your case. I mean this is part of the Chief Justice's point, but he hasn't said you've got a completely hopeless case. He said it wasn't too flash on the first two limbs and you were criticised there for not liaising with the IRD, which might have

Farmer Well we dealt with that

Tipping J Yes well Mr Ruffin dealt with that.

Farmer Yes.

Tipping J But he says as to the third limb that you did have a prima facie case.

Farmer But just.

Tipping J But just, alright, well we might be able to debate that a bit. Even if you did have a prima facie and we strike out the word 'but just', I mean we're tinkering.

Farmer Well if we had a prima facie case then on the face of it, you would not expect a cost

Elias CJ Why not?

Tipping J No, no.

Elias CJ It's not dis-entitling.

Tipping J This is the fundamental difficulty I have that the Judge has given you quite a lot of credence, albeit on your third limb, but he's weighed that and he's said but nevertheless in the whole pot I think it's a case for costs and I'll try and reflect all the different stands in my quantum.

Farmer But nowhere in his judgment does he actually give, um he doesn't with respect to him really grapple with this fundamental legal point that's at the heart of this case and

Elias CJ But ultimately it's not a fundamental legal point. It's a question of fraudulent intent and he wasn't with you on that.

Farmer Well because right at the beginning he took a different view of the nature of the obligations.

Elias CJ Well

Anderson J It's arguably an available view.

Farmer Well yes, to the Judge, of course it was and he came to the view that he did, but equally it was if you like to put it this way, an available view to the prosecution and a highly reasonable view as well.

Elias CJ Well that's why he says you had a prima facie case.

Farmer Well

Tipping J May I also put this to you, that if, and I say if we reject the Court of Appeals two alleged errors of principle, it seems to me that all we're left with is tinkering on matters of weight.

Farmer Well yes if you reject both of them, yes that must be right.

Tipping J Do you agree with that do you?

Farmer Well of course, I mean

Tipping J Well I thought you were in effect saying that even if we lose on those two we've still got this further argument that

Farmer Well I think, no the argument that I've been presenting is really in the context of the focus of inquiry point.

Tipping J Well the Court of Appeal's second one we all agree is not on, so it's very near the first one this business about the three limbs and how you're not allowed to do that in a costs case in crime which I find with respect a very strange proposition when what the Judge is doing is substantially assessing his quantum by means of that three limb approach. That's how I read it and I think that's how Justice Ellen France effectively read it.

Farmer Well if you go back in the Court of Appeal's judgment to pages 37 to 39 of the case, paras.58 through to 62, and that's really a very important part of the judgment because in the middle of that you have in para.60 the three limbs point

Tipping J Yes.

Farmer But if you look at what goes before it in 58, which has been commented on quite a bit already, but there the Court articulates quite clearly in a way our case except that they've limited it to the 4% contribution and haven't added in the further part of it which was that there would be a loan of monies by the bank to the investors which would then be applied to payment of the insurance premium. And 58 is then picked up again in 62 where the Court somewhat in a puzzling way refers to this an alternative basis. They say although we have articulated an alternative basis in which the Crown case could have been formulated, and that's the 4%, we make it clear we're not saying that such a case would necessarily have succeeded. All we're saying is that a prosecution based on that premise would have been brought reasonably based on the investigations that the Serious Fraud Office had undertaken. Now that is actually what we did except as I say we also had the mortgage

Tipping J But the Judge said you had a prima facie case, therefore he must have brought it reasonably to that extent.

Farmer Well the Court of Appeal are obviously taking a somewhat stronger position.

Tipping J Well it's weight, that's just sort of uplift of a bit better prima facie case. I with great respect think we've been invited to tinker on matter of weight.

Farmer Well I suppose you then go through to, I mean you'll find in 64 of our submission that the second sentence that the Judge's discretion was tainted by errors of law and a reference to the three propositions, and then you go back to 94(a) and the focus of inquiry, so we're here defending those aspects of the Court of Appeal's judgment.

Tipping J Yes, quite. Well thank you Mr Farmer that's helpful.

Elias CJ So in answer to what I was putting to you, your answer is that we have to be with you in supporting the Court of Appeal reasoning on 94(a) that you erred in the approach you took before we would be justified in intervening with his exercise of discretion?

Farmer Yes, well we certainly haven't argued anything independently of 94(a).

Elias CJ No.

Farmer Maybe it's been articulated, obviously it has been I hope rather than more fully

Elias CJ Yes, well

Farmer Maybe more clearly if I can give myself credit for that than may appear here, but 58 and 62 are quite important paragraphs in that judgment

because they do go to the heart of our whole case which was that the obligation was to apply the investors' monies to the payment of the premium to a real insurance company.

Anderson J Mr Farmer could you point me to a document that deals with how the 4% is to be applied? You mentioned yesterday one relating to the loan and particularly at page 918, but is there one relating to the 4% contribution somewhere?

Farmer Oh yes sorry I did take

Anderson J Was the scheme ever set out in writing for investors.

Farmer Yes, yes indeed and it's in Mr Russel's initial letter to investors, inviting them to invest, attached

Anderson J The opinion?

Farmer Well it's been called the template. Also the documents, the insurance policy, the form of loan with the bank and also next to those of course were the directions to Mr Currie as to what authority given to Mr Currie, and it's there that you find the obligations also that Mr Currie. The clearest one is probably 928 of volume 5

Anderson J Yes, yes I got them to mark it thank you.

Farmer Yes.

Anderson J The other matter if you could help me with is how did the IRD documentation go before the Judge? I mean was it produced by someone or discussed by someone or put up in a bundle of documents, or what?

Farmer The IRD documentation?

Anderson J Yes, the ones that Mr Ruffin referred us to yesterday.

Farmer Mr Reid's counsel tendered them in evidence yes.

Anderson J Thank you.

McGrath J Can I now have a word with Mr Ruffin?

Farmer With pleasure.

Elias CJ Thank you Mr Farmer.

McGrath J Mr Ruffin I just want to try to get it a bit clearer in my mind how the costs hearing and submissions went and I'm really starting at page 67 of volume 1 with that part of Justice Fogarty's judgment that deals with

the matter which we were looking at. Can I perhaps first ask you – I take it there were victims' submissions on costs?

Ruffin Yes Sir.

McGrath J And you actually made more than one submission? I just say that because in para.23 there's a reference to your first set of submissions.

Ruffin Yes, they were filed in accordance with the timetable and then Mr Farmer had a sort of summary of counsel's notes

McGrath J So did you have two separate written sets of submissions filed on different days?

Ruffin Yes.

McGrath J Yes, well what I'd to gather is that we had at the top of that page the Judge saying that Mr Gilbert in his submissions, and I presume that's in his written submissions, was relying on this questions of discussion with Keating in late December 2000, Mr Keating of IRD, and that's one of the particular aspects with which you take an exception in your submissions. What I want to know is did you filing submissions later, did you direct the Judge to the Keating memorandum at page 1353 and your response to that?

Ruffin Um

McGrath J That's the document that expressed proof would be required.

Ruffin Yes, but I can't recall Sir.

McGrath J No. It's just that the way the Judge is looking at it your response, and he quotes from the written submissions, your response seems to be focussing on the relevance of the IRD attitude in any event and I'm just wondering whether you took issue with the point that was being made apparently strongly by Mr Gilbert, that Mr Reid was of the view that IRD would backing down.

Ruffin Yes, but the NOPA as a document is facing on the avoidance provisions

McGrath J I'll come to the NOPA in a minute, but if we can just look at the first document which is Mr Keating's memorandum. It seems to me that if that sentence towards the bottom of page 153 wasn't point out to the Judge in submissions at the costs hearing, it's hardly surprising he didn't take it into account. It wouldn't have been central to the question of innocence or guilt that he was deciding, it's really primarily relevant to costs and I'm wondering whether it was put before him?

Ruffin Yes, I can't recall and there was simply no direct affidavits obtained by the Crown from any IRD person, so all of these

McGrath J But this document was obviously there before the Judge but it might have disappeared into 'as the needle in the haystack' as it were.

Ruffin Yes, I'm sorry I can't recall.

McGrath J No, well you've raised the NOPA and I was also interested in that regard because the Judge really as you pointed out to us yesterday, he picked out one passage of the NOPA at page 1386 and you were pointing us to earlier passages – 1384 for example.

Ruffin Yes.

McGrath J I'm wondering, did you refer to those in your written submissions again in response to what Mr Gilbert was saying?

Ruffin No, it was a general submission as set out in para.23 of the costs decision at page 67 'that the NOPA in itself is focusing on the avoidance nature of the transactions and what was required by the Commissioner to counteract the tax advantage

McGrath J Yes.

Ruffin And so it was put at that general level that the NOPA itself in that context had no relevance to the allegations of whether there was a reasonable case of implementing the transactions dishonestly.

McGrath J Yes, well the Judge obviously took that into account and I can see that you don't agree with it, but he did at least have that argument before him. What I'm not quite so sure is whether the matters you were taking us to yesterday were before him

Ruffin No, it was dealt with at a general level

McGrath J As a general proposition

Ruffin Yes, yes.

McGrath J Alright.

Ruffin So it was only dealt with in the degree of detail that I did yesterday before the Court of Appeal and before Your Honours.

McGrath J If you come to the Court of Appeal then, when you were speaking to us yesterday you had of course your own submissions in this Court. Were any of the matters I've been covering with you this morning in relation to the NOPA or the earlier questions of what was said by IRD to Mr Reid back at the end of 2000 or shortly after, were any of those taken

up in your submissions in the Court of Appeal in a way which you can point me to directly in your notes, and pardon me if it was pointed out yesterday and I just overlooked it, but I would just like to know if there was anything about this in the Court of Appeal? In other words I want to know the basis on which you challenged Justice Fogarty's conclusions on these points in the Court of Appeal.

Ruffin Yes, the notes that my learned friend Mr Farmer referred to yesterday are annexed

McGrath J Yes.

Ruffin Were his counsel's notes. The Crown also filed submissions that were 67 pages long and those submissions included basically the same submissions that are before Your Honours.

McGrath J Yes, so the written submissions in the Court of Appeal as opposed to the notes that you've taken us to do include this?

Ruffin Yes and it's in the Court of Appeal submissions, para.15, pages 60 going on to page 67, almost verbatim.

McGrath J That's helpful thanks and in terms I suppose I'm not sure we would want to do this, but to find out more about how it got dealt with in the High Court subject to anything Mr Walker can say to assist us with, we'd have to call for those written submissions, but they are presumably on a file somewhere.

Ruffin Yes.

McGrath J Okay, thank you, that's helpful.

Ruffin May it please Your Honours.

Elias CJ Thank you Mr Ruffin. Now Mr Billington did you want to be heard?

Billington If the Court pleases, if it's necessary to go into the detail of the transactions, Mr Walker will deal with those, but I arrived in reply if the Court pleases to where Her Honour the Chief Justice got to this morning, and that is this that notwithstanding the argument yesterday, in my submission what you have before you is this. You have two clear errors of principle in the judgment of the Court of Appeal – one's agreed. By contrast there are no errors of principle in my submission in the judgment of the Court at first instance. There are two matters to be said in relation to Mr Farmer's submission. If his submission is correct that as a matter of law the funds were to be applied as he submitted yesterday, and they were not, and if that was fundamental to the case, then the time to argue that was in challenging the acquittal because if it was fundamental to the decision then it would be fundamental to the decision that the trial Judge made as to the

obligations that each of the accused bore to the investors whose funds which they were dealing.

Tipping J Was it one of the points reserved that was not pursued?

Billington Well they weren't reserved specifically because in fact the Judge gave his decision immediately at the end of counsel's submissions. He called on Crown counsel; he called on Mr Gilbert; he did not call on counsel for the other accused; he delivered a verdict. Mr Ruffin asked for points to be reserved in the written decision as I recall and I think the written judgment was then delivered later and the appeal was filed as I recall but then abandoned. So the points that in fact Mr Farmer made yesterday have never been articulated, and so there was no appeal filed. So the argument has never in fact been ventilated in the sense that what weight would it have and would it have a fundamental weight in terms of upsetting the primary finding. The primary finding of course being that there was no breach of s.257 of the Crimes Act, and that's a point that I took you to yesterday.

Blanchard J Are you saying that the Crown was in a position if we wanted to do so to have challenged these points by some form of appeal against the Judge's decision to acquit?

Billington Yes.

Blanchard J By

Billington On a question of law, on a question of law, because if the legal decision, if it is a legal decision, as opposed to part of the judgment was fundamental and fundamentally wrong so that it impacted as a matter of law then on the primary finding under s.257, and we can't lose sight of that, then in my submission there will be a tenable argument in the Court of Appeal that the verdict could be impugned on a question of law, because what it carries with it is a legal obligation and a legal obligation is one of the elements of the fraud that's encapsulated in

Tipping J Well knowing departure from a legal obligation is the classic stamp in fraud.

Billington That's the test.

Tipping J Yes.

Billington Yes.

Anderson J And the legal obligations arising out of the arrangements would be matters of law which could be tested by way of case stated.

Billington That's exactly correct. So the best that can be said now is that the legal finding, which has not been argued and it's very difficult to argue it in reply in this Court, is that perhaps there was a tenable basis for the prosecution as a matter of law as the prosecution saw it prior to the commencement of the trial, and I think that's the point Justice Tipping with respect got to this morning that there was perhaps a prima facie case in terms of what were the obligations under the documentation and were they carried through, and when you then examine what His Honour did at I think it was para.49, the weight exercise, the three limbs, he then said well if the SFO they didn't understand properly limbs one and two and they should have discarded that as not being a proper avenue of inquiry, that is whether it was real transactions or not, but rather focused on whether the accused knew at the time they promoted this scheme that they had these obligations and that they deliberately decided to either breach them or ignore them, and that was what the SFO should have thought about the Judge's saying prior to arrest, or prior to trial, and had the SFO focused its attention on that aspect of the case and ignored the other there would have been two consequences. Either the accused would not have been charged at all because the SFO would have then interviewed Mr McGrath who was fundamental having been to the offices in Holland. They would have re-interviewed Mr Sydenham, who wrote the tax opinion, and taken him to his interviews that he had given to the Inland Revenue where he had conceded or discussed certain matters he had discussed with John Reid, and exploration of those matters might have led the prosecuting agency to a different view as to whether or not they proceed. But they didn't do that and the Judge didn't mark them down for it. What in fact occurred was that not having made that inquiry, the trial started on the broad basis, not articulated as it has been this morning, but rather on the basis that what occurred was a series of fictional transactions that would have no commercial or tax effect and it was at that point that His Honour picked Crown counsel up and that is where the discussion of sham arose because Crown counsel had put in as an attachment to his opening submissions the cases on sham. *Mills and Dowdell, Peters* and the others I don't now recall, but they are seminal cases on sham and the opening then turned into a discussion of sham or not and whether these documents were a sham because they were described as being fictional and not actually recording the transactions that would have a tax or commercial effect, and that is picked up from para.23 at page 67 of the costs judgment which is the paragraph we were looking at a short time ago where Mr Ruffin reiterated the Crown's position. It's then set out in quotes that 'the gist of the charges is that the structure was circular, that is non-independent and non-commercial'. That was always the prosecution case, and the circularity drove off the interpretation that what Mr Sydenham had been writing in his opinion, and Your Honour Justice McGrath picked this up yesterday, was that the circularity wasn't in fact the offshore circularity but rather the circularity on the part of the investors, whether they in fact were spending money that was coming back to

them through other form, which would be a classic indicia of tax evasion or tax avoidance.

Tipping J They probably wished it was circular now.

Billington I'm sure, some of my colleagues certainly think so. So when Your Honour Justice Tipping said was the case articulated as clearly, Mr Farmer was right, the case has improved with the passage of time from the Crown's perspective. That is always the course of the case, but I'm sure even as defence counsel had I heard it articulated in the form that was articulated this morning then the approach to it might have been somewhat different, but equally the charges would probably have been different as well, in the sense that there would be abuse of documents; s.229(a) was available – the whole raft of other possible offences, but it wasn't put that way, it was put on the basis that this was not a tax effective scheme and that is where the debate eventually found itself. But all that aside ultimately what His Honour did was say well the SFO went about this miasmic sort of investigation - it had three points – the prosecution ran on the same basis – I was left with this five week trial, and out of all of that there was at least a prima facie case possibly in relation to whether the representations were made at the time the investment was made and whether they were carried through. Now that then meant that the trial got off the ground and during the course of the trial much time was spent largely on Mr Gilbert and in a very skilful fashion the Judge acknowledges this and dismantled that aspect of the case, driving the Judge to the conclusion that he ultimately came to that what he was looking at was the setting up of in the ultimate device of a tax avoidance scheme in which all of the parties who were involved, the professionals, the investors, and the promoters, were willing participants and knowing participants, and that's captured ultimately in the IRD position in the NOPA which of course sets out a number of its reasons for disallowing the scheme and of course investigative participation and knowledge, or an unwillingness to find out is the other way it expressed which he equally counts against the taxpayer. So in terms of where I took you yesterday, it's important the Judge direct himself at the trial on the essential ingredients of the charge, and that's fundamental. He applied it, he then discussed a variety of alternative approaches to what might or might not be fraudulent or deceitful conduct. He discounted each one of them and in the course of that he made some findings of law that were not fundamental to the decision and if they were they could have been challenged, and ultimately reached the fundamental proper decision that he was not looking at fraud. There had been no deceitful representations, breach of duty or otherwise. There hadn't been such representations and as a consequence there was no breach of s.25

Tipping J If there had been a departure from what the documents in law required as is now, it would have been fundamental wouldn't it that the Crown prosecution had to show (a) that the accused knew they were departing

from their legal obligation and (b) that they were doing so for a fraudulent or dishonest purpose.

Billington Dishonest purpose, yes that's right.

Tipping J Yes.

Billington And those are the two key features

Tipping J Which is not awfully difficult to articulate. I mean in the sense

Billington Well it's the fundamental cornerstone of a fraud prosecution.

Tipping J Yes.

Billington Those are the two things you have to show and those are the two things you have to meet in every fraud prosecution. Was there a legal duty and was the legal duty breached

Tipping J Knowingly breached.

Billington Knowingly breached and with a dishonesty overlay, and that was the context in which fraud cases were then argued under s.257 and s.229(a), and if you couldn't argue that

Tipping J It's all a bit different now isn't it under the new sections?

Billington It is. I'm not sure it's any better.

Tipping J Well that's another matter.

Billington J But no one's asked me about that so I'm not going to comment on it. But that's all the fraud case was about on either side and that's what the Judge dealt with on both sides and what he said was he couldn't find any evidence, legal duties or otherwise that satisfied that test and he was very clear on it, so clear he didn't call on defence counsel, bar one, at the close of the case. He had reached a decision sitting as a tryer of fact. Now on the cost situation he then dealt with that in applying the relevant discretions and he's discussed every element of s.5, which he's applied correctly and he's given the prosecution due weight and given Mr Farmer's argument such weight as it can be given that there was a tenable basis to proceed, he's done so in two ways by allowing a discount because of the third limb, which is effectively another way of looking at Mr Farmer's argument and discounted the costs as against those two accused who were affected by it, and in the last element of that of course he's fixed costs at Crown solicitors' rates as opposed to the actual commercial rates that were charged

Tipping J That's actually an uplift from the rates in the Act isn't it?

Billington More significantly.

Tipping J I mean that's just ludicrous.

Billington The rates in the regulations are very

Tipping J They still apply do they Mr Billington?

Billington They still apply but I think the test is the case a matter of importance or complexity which takes it beyond the scale and I can't think there's ever been a case where the scale was applied once the Judge decided that costs were appropriate. So in the specific sense there are no errors of principle in His Honour's judgment at first instance. There are errors of principle which can't be cured in my submission on the appeal. As the Court rightly says at best it's a matter of weight and then you are then tinkering with a discretion which you would not do in any appellate jurisdiction if you give more weight to Mr Farmer's argument today than the Judge at first instance did. There is so much flexibility what His Honour did in any event in terms of the rate and the discounts it's all in there.

Tipping J If he'd said on the third limb look this was a hopeless case from the start that might have been objectionable

Billington Yes.

Tipping J But he's given them credence for being a viable case if analysed on the third limb.

Billington Yes.

Tipping J That seems to me to be the pretty crunch point in all this.

Billington It is the crunch point with respect. The other thing not to be overlooked and it's trite to say so and therefore I shouldn't say but it is trite, you've dealt with it really in an hour the whole case and it's very easy to say well that's because it's like a television show, we've had one hour of the case best put by New Zealand's leading case. There was a five-week trial – there were other complexions and it was demolished in a significant way. I don't recall much of it now because it was so long ago and I've done other things since, but clearly the Judge thought it was demolished and it was demolished as to its fundamental key points, so it's very risky now to say well the case really was as Mr Farmer puts it, it's clearly they are strong points, they are good points, they are good legal points, but perhaps they weren't put as well and certainly weren't as obvious at the time to Crown counsel then prosecuting or to the trial Judge. And Justice Priestly heard the *Salisbury* prosecution based on similar allegations earlier this year and he too acquitted on similar grounds, that he wasn't driven to draw the inferences from the shoddy putting together of documentation

that they were fraudulent and that picks up a point that Justice Blanchard made yesterday that at the best it may have been negligent to the way the documents were put together, but it's counter-intuitive to think that a fraudster is going to spend a whole lot of money to transfer funds around and put up a whole series of structures where in fact the fraudster has the money in Hong Kong that can't be traced, and that's what the Judge concluded that these people were doing their best in fact to make the structures fit their obligations and counted as well and that's a similar conclusion to that reached by

Tipping J They've got their obligation to try and avoid tax.

Billington To try having the shareholders avoid tax, because the irony is that Mr Russel was in fact a shareholder in this scheme defrauding himself, so that's a minor matter. So that's a case of *Deem* which was decided in the High Court in Auckland earlier this year. Now unless there are any matters I can specifically assist you with there really isn't anything that I could add.

Elias CJ Thank you Mr Billington. Yes Mr Fulton.

Fulton Yes may it please Your Honours. I suppose if Mr Connolly, and for that matter Mr Currie's case, comes down to one short essential proposition it is this that if

Elias CJ Are you representing Mr Currie?

Fulton No, I'm not, but because

Elias CJ Oh yes, but the cases are the same, yes.

Fulton Because he just falls naturally into the grouping that the trial Judge had for both of them, so I don't think he would mind my going into bat for him.

Elias CJ No I'm sure he wouldn't.

Fulton If we are bound as it looks like we are at this stage of the hearing to the single proposition that there was only just a sufficient case on limb three for the Crown to bring a prosecution, then the Connolly/Currie position is that the Judge did not include them in that proposition because he said there was no proof at all, I inadmittedly said evidence yesterday then the true expression that the Judge made was that there was no proof. Now if there as my learned friend for the Crown submits, if there was a basis on which the documents might be said to contain some form of representation in the way the transaction was both presented to them and in the way it was conducted, it is correct as Your Honours have said this morning that the next question must be well which of the accused had any knowledge and intention to depart from that scheme of the documents, and this is where I think the trial

Judge, and with the approval of the Court of Appeal, has said there was no proof at all in respect of Connolly and Currie. The Judge turned his mind specifically to the need for there to be an intention coupled with the documentary representation if I can call it that way, and it appears in the acquittal judgment in a number of places but particularly para.185 where he's talking about the construction of the master insurance policy and the construction of the now clause in clause 9, because that was the end quote of the Crown's prosecution. All the other parts of the case at trial had failed and my learned friend Mr Ruffin made the submission that this was the construction that had to be put to this document. Concentration on the other documents that we've heard in this Court was not apparent but certainly this was one example. And so the Judge says at 185 this construction had to be relied upon as reasonably obvious to be proof by the Crown that relevant persons of the accused did believe that the now clause and clause 9 of the insurance policy required the insurer to fund the trust or believe that that is how they would be understood by the investor, or if the accused or the relevant member of the conspiracy does not have this belief then the subsequent failure to fund the purpose trust ab initio could not be dishonest. What the Judge has done in other parts of the judgment is to hold that both Mr Connolly in particular and Mr Currie, who least have always said have a case to answer if one was going along that line. But there was no proof that they knew any of thus construction or representation to the investors or incidentally to the Commissioner of Inland Revenue. Both Currie and Connolly were offshore. Connolly was in London, Currie was in Hong Kong. Connolly wrote deceptive correspondence, but the Judge made it quite clear that he accepted Connolly's explanation given at an interview with, or interviews plural, with the Serious Fraud Office, that he knew only as much as he was told, and he didn't have the overall perspective of what this transaction was about. This is clear in the Judge's finding at para.174 of the acquittal judgment, and the Judge draws the conclusion at 176 – 'there is no evidence in any of this material to satisfy me on any criminal standard of proof that Messrs Connolly and Currie were party to any dishonest disagreement to deceive the investors via correspondence'. Now my learned friend Mr Farmer has submitted this morning that if these documents were construed as the Crown would have it, that they do contain a representation that there is to be a present payment that is not circular, then it changes he says the whole context of Connolly and Currie's role, and he referred Your Honours to para.9.7 of the Crown written submissions. There seems to be an attempt to say that that catalogue of 24 items is not the charade or façade correspondence that the Judge is referring to in para.174 of the acquittal judgment. That submission in my respectful submission is wrong and it shows perhaps the risk today of trying to retry what the Judge had heard and determined over a period of five weeks plus his reading and understanding of copious documents, including interviews and seeing video portrayals of the interview itself. That schedule that appears in the Crown's submissions in this Court at para.9.7 is if anything a slightly abbreviated catalogue that the Crown has used now

for the third time, if not the fourth time. It used it twice before Justice Fogarty, both in final submissions and on the costs application. It used it in the Court of Appeal and now it uses that same catalogue again today. What the Crown would say at some point is that well there are two letters in that where Mr Connolly is referring to the implementation of payment of monies, because he gives some authority to do so. I don't want to detail a submission now to show that that can be misconstrued. All I will say is that those two letters were written again by Mr Connolly but on request, this time for one of them, the main one, written at the request of the firm of Grant Thornton Burn that Mr Currie had left. The continuing partner wanted some authority after a payment had been made and procured Mr Connolly to write the letter on that invitation, but there is nothing to show in that kind of evidence that Mr Connolly was implicated in any misrepresentation or deception arising from these transaction documents that were in use in New Zealand. So I suppose to come back to what has already been observed from Your Honours is that in substance what Your Honours have heard from the Crown has all been heard before, perhaps only with a difference in emphasis. The rhetorical question I suppose that can be asked is if the Crown has by error interpreted this document to mean something that was not upheld by the Judge why then should the accused be denied or limited their costs because of an error made by the prosecution? The approach that the Judge took with respect was a sensible one. He looked at all the surrounding facts; he looked at the overall objective of the transaction, and he was taken to the documents to show that, and it could be seen that it did not make commercial sense. It could be seen also that circularity was probable in the sense that not the investors being part of the circle, but the money not remaining in the hands of say the insurer or the special purpose trust for any length of time at the point of time as at 1995 is distinct from 2005 or 2006, and so it could be seen that that's when the payment and the reckoning was going to occur in year 10 or 11. The Judge then, having found that that was the aim and objective of the transaction, then looked to see if the documents were to the contrary, and it was his interpretation on the documents as a whole against that matrix that led him to the conclusion in my submission that the documents did not require a present and real payment of cash. I did have a note but it's probably unnecessary for me to refer to it as to the second object of the Crown's submission and that is moving from the point of whether the Crown had a reasonable to prosecute, did the accused bring this on their own head? That has not been emphasised so I merely make the observation with regard to that, that the Judge again has considered that and considered it in some detail. Particularly in respect of Mr Connolly it was a considerable focus of Justice Fogarty that there was deceptive correspondence that justified an investigation, so the Judge had very clearly in mind whether that investigation should have been taken further to a prosecution and rejected the proposition. Now without perhaps I hope amounting to a diversion, then my final point is this. The Judge sat as a Judge-alone and was obliged as he explained to give some reasons for his judgment

at the end of the day. He was of course sitting both as a finder of fact as well making pronouncements on the law. When it comes to the construction of a document as he had to do and did particularly with regard to the master policy, because that was the document that was submitted to him, it is my submission he does not do so purely as a matter of law. He does it as a matter of mixed fact in law. If this was a trial before a jury, the Judge may well have had to give some directions on law relating to the document but in my submission it would have been wrong for the Judge to have directed the jury that this document amounted to a representation in law that the jury had to follow that direction in law. Why I'm submitting this is because on this second appeal it is now being contended that this was strictly a question of law and of course therefore immediately amenable to appellate correction.

Tipping J If an issue in a fraud trial is whether someone has departed from their legal obligations, let alone knowingly, they have to have departed as a first step, surely it is for the Judge to direct the jury what their legal obligations were.

Fulton The Judge in my submission can give rulings on law as to matters such as that, but whether in the end result there was a departure from their legal obligations, should be the province of the jury. The analogy that I have with me, and I'll provide Your Honours with a copy of the case, is perhaps not a good one and I preface this by saying I hope it is not a distraction.

Anderson J I think it's rather novel to suggest that the construction of documents is a mixed question of fact and law.

Fulton Well it's the

Tipping J I honestly think it's a distraction Mr Fulton. I really don't think you need to go here, speaking for myself, but if other members of the Court want you to of course I'll listen with interest.

Fulton The authority for it is a forgery case and it's in the *King v Clark* in 1946 and it was a case where what was a material part of a document. The document was a petrol voucher which *Clark* signed but he used a fictitious name in signing it, and the Judge tried to direct that that was thereby a false document and wouldn't leave the question to the jury. The report contains a very exciting and courageous exchange between Judge and counsel for the accused – no other than the then Mr Trevor Henry – who wanted to have the whole matter left to the jury and the Judge would not allow it so in effect the judge gave a direction for a guilty verdict to be returned. On appeal the Chief Justice, Sir Michael Meyers said, and this is at page 538 to 539 'it is the fundamental duty of the Judge in every criminal case to explain the law to the jury as far as may be necessary for the purposes of the case. It is equally the fundamental duty of the jury to apply the law as explained or laid down by the Judge to the evidence but it is for the jury and the jury alone to

determine the facts. In the present case it was the duty of the Judge to inform the jury of the requisites laid down by the statute to make up the crime of forgery. He should have explained to them the definition of false document and what is meant by a material part. It was then for the jury to determine on the evidence whether the signature was a material part and whether or not the licences were false documents. Instead of doing that the learned Judge purported to find the facts and directed the jury to accept his findings as findings of law', and then

Tipping J Did the Judge direct that the signature was a material part?

Fulton Yes.

Tipping J And the Court of Appeal said he should have explained what a material was and then said to the jury you decide whether this was a material part.

Fulton Yes, absolutely.

Tipping J Well that is the view of purest.

Fulton I was certain that that's where we are. I'll provide Your Honours with a copy of the case in case it's of assistance. I have a copy with me.

Tipping J I think I've got the point Mr Fulton.

Fulton Thank you Your Honours.

Elias CJ Thank you Mr Fulton. Yes Mr Walker.

Walker Yes may it please Your Honours. I have some written submissions prepared in case that assists you. I don't need to spend time on paras.1 and 2, because we've already addressed that this morning, so I'll start straight into the Crown's first contention - it's under para.3. Now in the written submissions the point was made that Justice Fogarty had supposedly made an error or law in construing the transaction documents and it was that that led him to err in sensing the significance of the other evidence of dishonesty, and the Crown said that the documents required a real payment of premium with no circularity of funds between the lender and insurer and then as a subsidiary point, even if the Judge did correctly construe the documents, that in the context of costs application is relevant as to whether it was a reasonable position for the Crown to take. But as I understand it the argument was clarified yesterday and this morning as not being based on error of law but being based on the idea that Justice Fogarty failed to take a relevant matter into account, or sufficiently into account at least, namely that it was reasonable for the prosecution to make those contentions and further that the accused had defrauded the investors by delivering something less which made it virtually certain that the investors' claims for tax deductions would be disallowed and the gain

to the accused was the 4% cash portion which Mr Farmer said the accused had the whole of that 4%. And in response to questions from Justice McGrath, Mr Farmer made it clear that what he would be showing is that the transaction documents required no circularity. And then there was a subsidiary point where in response to a question from Justice Blanchard, Mr Farmer said that the transaction documents prohibited the use of a clearing account and you will recall that that was in the context of the 4% being paid by the money going to Currie's account and because Currie also acted for the insurer and reinsurer and the insurer acknowledged receipt of the 400% of the premium. His Honour was of the view at para.31 of his judgment that the insurer had been paid, including the 4% cash contribution. Now Mr Farmer yesterday and today presented this as a defence of the first ground upon which the Court of Appeal allowed the appeal, and he also acknowledged that if he couldn't defend the two grounds in the Court of Appeal that was effectively the end of the matter, but in my submission what's been argued yesterday and today has very little to do with what the Court of Appeal was saying in 94(a), and if I just take you to it. So this is the case on appeal, page 50 of volume 1. 'So the majority's contention was that by sub-dividing the Crown case into three limbs he changed the focus of the inquiry from where the prosecution from whether was justified to whether the Crown could have succeeded in proving the charges on each theory of the case'. Now what the Court means by that, as we saw yesterday, is explained in 95 to 98 over the page, and they were really making a quite different point which is that in a criminal prosecution it's not appropriate to proceed as if there are different causes of action, and in effect provided the prosecution was right in pursuing one evidential limb of its case that should in effect count against costs, and I personally struggle to see how that really relates to the contention that Justice Fogarty failed to take a relevant matter into account, namely the relative strength of the prosecution's position.

Elias CJ But that's not really being put because he clearly did take it into account. It's that he got it wrong and therefore failed to attribute sufficient weight to the strength of the Crown case.

Walker Well yes I accept that's the way of formulating it but the point I'm trying to make at the moment is that even on that formulation that's not what the Court of Appeal's dealing with at 95 to 98.

Tipping J The Court of Appeal is purporting to say that the Judge was distracted in his cost judgment from whether the prosecution was justified to whether the claims on each limb had been established. Now I find that conceptually quite difficult to reconcile with the whole point of the costs judgment which was the Judge said 'well I'm satisfied there was a prima facie case on this but not on the other one', and that's what he was doing.

Walker Absolutely. My point is this, it's been presented as a defence of the first ground of the submissions we've heard this morning and yesterday, but if you look at 95 to 98 it's actually a completely different point the Court of Appeal was making. Now it doesn't mean I'm not going to address Mr Farmer's case but my point is this is really an attempt to support the decision in the Court of Appeal on other grounds. So if turn

Elias CJ Would it be convenient to take the adjournment and would it be convenient for us during the adjournment to read these written submissions, would that help?

Walker Yes, absolutely.

Elias CJ Alright, well we will do that, so we might take a slightly longer adjournment but we'll let you know when we are ready to come back.

11.33am Court Adjourned
11.59am Court Resumed

Elias CJ Thank you. Mr Walker we've skimmed through your submissions and so if you want to elaborate on any of the points or emphasise anything please go ahead and do so.

Walker Well in that case I'll try to be quite brief. The first point that I wanted to make is that what was set out was that there would be a showing that the documents required the absence of circularity. Really the best you can say is that the documents seemed to contemplate cash, but of course cash can be circular just as much as a TCD. I make the next point which the Denham Martin opinion really doesn't take things much further because that wasn't part of the transaction documents and it wasn't actually something that was given to Mr Reid, and as you've already observed, the point is the Crown's legal argument really misses the point in a fraud trial – this is at para.18 of the submissions. It's not as a strict matter of law what the documents mean as the Chief Justice observed, it's whether that meaning is so clear that departing from it can be an inference of dishonesty, and the Judge looked at it - it's been suggested in various ways I should add that the Judge made some sort of clear finding that these transactions were done in accordance with the documents. He was a little more circumspect than that. What he did was he took the Crown's arguments onboard, in particular about the purpose trust, noted some difficulties with it, but then passed to what he saw as the real point which is whether the construction that the Crown was so clear that the departure from it was evidence of fraud and there was where he focused his judgment, so in a sense the point of law argument really misses what this case was about. And the Crown also doesn't take into account the other documents at the time outside the transaction documents which made perfectly clear that there was no

intention cash would flow around and be put into the purpose trust in year one, which was the whole point of cash being there on the Crown's argument that it would be invested in the purpose trust ready to be paid out in year 10, because there was communications at the time which made clear that Epicharmus certainly didn't think it would be investing funds into the purpose trust in year one and that's correspondence that took place with Gosling Chapman before the transactions were entered into, and that's 20(a) of my submissions. And the bigger point is that the Crown really does miss Fogarty Js overall conclusion about this, which is that the whole thing doesn't make sense in terms of a real loan with a real premium and no circularity, and you probably have got this onboard already but you only have to look at the way that the transaction closes out in year 10. What's supposed to happen if the shares aren't worth the $3.00, is that the investor goes off and pays the remaining $835,000 to get the shares and clear the mortgage off those shares that's held by the lender, then goes and tries to sell them in the market and at the same time has to pay 2.8 million dollars in respect of the loan, and this is all in the hope that if they don't manage to sell the shares in the market for the $3.00, the insurer will pay out. So there are two problems. Potentially you are paying $650,000 more than you're going to get from the insurance in order to claim on the insurance and your other problem is that you can't sue the purpose trust because it's a purpose trust, and that is the whole point. This is the craziness of the whole scheme. The reasons they have that arrangement is to avoid the accrual regime, because the idea is that you've already done your money in year one, because you can't actually recover anything necessarily in year 10 because you have no rights in respect of these funds, and so the real point that Justice Fogarty was making was once you understand this the idea that you're looking for representations about a real lender, a real insurer, and no circularity in the documents is slightly farcical. Well he didn't put it in those terms but I will.

Blanchard J They should have been certified thinking that they would get away with tax on this sort of scheme.

Walker Absolutely, and the idea that there would be any sort of real vendor, real bank that would lend money to a worthless LAQC on the security of the mortgage is again slightly ludicrous.

Tipping J Well if you bear the actual economic costs of the transaction as it professes to be there is no tax avoidance. The whole point of tax avoidance is that you get the deduction without bearing the economic cost.

Walker That's precisely what His Honour said. He said what the investors want is a scheme that looks commercial but really isn't because there's no such thing as 'risk free' tax advantage in that sense. I did note that my learned friend slightly mis-described the facts as to what actually happened in terms of implementing the transaction, and the way he

described it, it looked a bit more like there had been some sort of negligence or something you might suspect, dishonestly on the part of the accused, and what it was based on was 24 of my submissions. Mr Farmer took you to a letter in April 1995 where the Bank of New York was apparently requiring a deposit before it would make the fiduciary loan and he indicated that it was after that that Mei Shing Trading was involved. Well that's not quite right. The transaction for the first tranche was actually settled in March 1995 before that letter for the end of the tax year and as His Honour found what actually happened was that the Bank of New York was lined up and my understanding is they were lined up to use TCDs in March but then as he said on the eve of settlement for 31 March they pulled out because they didn't have the necessary documentation, and that's why Mei Shing Trading was involved and the curiosity about that is they put Mei Shing Trading in obviously because the settlement had to be done before the end of March so that the investors could claim their deductions for that year, which is slightly inconsistent with the idea that they were trying to defraud them to making false applications for deductions. And it's also important to understand that they did try to put Bank of New York into the transaction and that's the whole point of the bond trade, and it was suggested that the investor didn't get the money in the bond trades, but as I note there Mr Currie was actually acting as agent for the investors. That was his role in this transaction and there would have been no point circulating the money through the Bank of New York their account if it wasn't to put the money to the investors and implement the transaction, and again you might ask yourself why they would go to all that trouble if they were really trying not to implement the transaction. And you've already observed the point yourself that this is all slightly beside the point because Justice Fogarty actually gave the Crown the benefit of the doubt and said they had a prima facie case on the third limb, which is the limb that we're talking about. And now the change in the IRD's position. I think it's a relatively simple point. There was material before Justice Fogarty that would justify him in taking the view that the IRD's position was changing, and you should remember his criticism wasn't just they were pursuing a position different from the IRD, he was also criticising their apparent unwillingness to find out what the IRD thought of the prosecution and the contentions that they were making. What's more Mr Reid actually put all of this to the SFO before the trial and I won't take you to the documents but you can see the references there. Those are references to letters where Mr Reid is actually reporting to the SFO that he's had these conversations and with a view to the SFO following them up and investigating. And the SFO wasn't particularly interested when Mr Reid sought discovery of NOPAs, the reply came back that they wouldn't be discovered because they're not relevant, and there's also documents in the case which indicate that there were some breakdown in relations when it came to try to find out what the IRD's view was about

Tipping J I presume the NOPAs would have been pretty good evidence of the IRD's then current approach to the transaction.

Walker Absolutely.

Tipping J Yes.

Walker And then the SFO didn't call any IRD witnesses at trial and it is significant, Mr Ruffin yesterday criticised the Judge relatively tenderly I must say for taking the view that the SFO was pursuing a different line from the IRD and in my submission that's slightly unfair to Justice Fogarty. The reason he said that is because as we noted earlier Mr Ruffin expressly said that they were entitled to take a different view from the IRD which rather supposes that their views were different.

Elias CJ Well it also may simply mean that he was adhering to the position taken by IRD was irrelevant.

Walker That's right, yes.

Elias CJ Yes.

McGrath J Can you help me with the point I put to Mr Ruffin – was there any great emphasis put on Mr Keating's own memo in relation to the conversation in December 2000?

Walker Yes what happened, it didn't receive any great attention at trial but the costs were dealt with there was a memo from the accused, from each of the accused and there were submissions from the Crown and then there was a two-day hearing, and in the written submissions there is a brief response on the part of the Crown to that point, saying that the thing could be interpreted a different way. I wasn't counsel in the costs hearing but my understanding from Mr Gilbert is the matter didn't receive any great attention in the costs hearing in terms of the dispute about what the IRD's position was.

McGrath J Thank you.

Walker Which goes to the point that there was actually a reasonable amount made by the applicants, and particularly Mr Reid, of this IRD position in the application for costs, and you have that application, it's in volume 2 of the case on appeal. There were some submissions in response but there was no material put in to contradict any of this and in those circumstances I submit the Judge was perfectly entitled to take the views that he did. Just one clarification over at 44. I'd like to avoid any suggestion that particulars were given and then the accused sought further particulars which is what I understood Mr Farmer to be suggesting yesterday. Actually all there was was the indictment itself which more or less repeats the terms of the offence and it was only after repeated requests by the accused that the particulars were

provided and those particulars were the ones we've been discussing, the 165 pages. And to clarify one point, Justice Tipping asked the question about whether the loan was used to fund the share purchase element as well as the premium, it was only used for the premium. It was to fund 96% of the premium on the policy. Now the Crown makes a number of other arguments in its written submissions but it hasn't pressed those orally so I don't propose to take you through the rest of that unless you would like me to - you can read it for yourself, but I would make one final point which is that the Crown, if we go back to the first contention which is that Justice Fogarty didn't take sufficient account of the relative strength of the Crown's argument, that contention was actually made to Justice Fogarty in the costs hearing. It's para.26 of the Crown's submissions. You don't have these but I can read it to you.

Elias CJ Sorry, Mr Walker I'm just thinking because this does crop up from time to time, are you responding to the Crown's arguments in this written document rather than in opening your argument?

Walker I'm sorry.

Elias CJ Well you've addressed the Crown's written submissions now, whereas I would have expected you to do that when you developed your argument initially.

Walker I had understood from our discussion that you wanted me to deal with that in reply.

Elias CJ Oh I see, this is just only on the evidence stuff?

Walker That's right.

Elias CJ Yes, I see, yes I'm sorry.

Walker So the point I was making is that the Crown actually made the argument to Justice Fogarty that he should take into account, even though he disagreed with them, that there was at least the basis for serious argument, that a fraud was being perpetrated on the IRD and hence on the investors who would not obtain the benefit of what they thought they were contracting for, which is the same point that's being made today. So it's not even as if this wasn't put to Justice Fogarty. He had it in front of him and he found that they had a prima facie case that was destroyed at trial. Those are my submissions in reply.

Elias CJ Yes thank you Mr Walker. Mr Farmer was there anything arising out of the elaboration of the argument not put that you wanted to

Farmer Well to be frank I don't think there is a lot of point in having to go through that sort of detail.

Elias CJ I think the issues have been closed on by both sides, but because of the course we invited Mr Walker to take, I didn't want you to be prevented from responding if there was any new material.

Farmer No I don't think so.

Elias CJ Right thank you. Alright, well we'll take time to consider our decision in this matter. Thank you counsel for your assistance.

12.14pm Court Adjourned