CACC 378/98

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL NO.378 OF 1998
(ON APPEAL FROM HCCC NO. 219 OF 1997)

BETWEEN

HKSAR

and

LUI KIN-HONG, JERRY

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Coram: Power, Ag. Chief Judge, H.C., Mayo & Stuart-Moore, JJ.A.

Date of Hearing: 3rd, 4th & 5th February 1999

Date of Handing Down Reasons for Judgment: 26th February 1999

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REASONS FOR JUDGMENT
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Stuart-Moore, J.A. (giving the judgment of the Court):

**The Charge**

On 11th June 1998, following a trial before Yeung J. and a jury, the Appellant was convicted of conspiracy to accept advantages, contrary to section 9(1)(c) of the Prevention of Bribery Ordinance, Cap. 201 and Common Law. The particulars of the offence read that the Appellant:

> "being an agent, namely an officer of Brown and Williamson Tobacco Corporation and British-American Tobacco Company (HK) Limited respectively, both companies being ultimately wholly owned subsidiaries of B.A.T. Industries Public Limited Company, between the 1st day of June 1988 and the 31st day of December 1993, in Hong Kong, conspired with Hung Wing-wah, Chui To-yan, Chong Tsoi-jun, Chen Ying-jen and other persons unknown, without lawful authority or reasonable excuse, to accept advantages namely, gifts, loans, fees, rewards or commissions of sums of

> money, as an inducement to or reward for or otherwise on account of the said Lui Kin-hong, Jerry doing or having done an act in relation to his principal's affairs or business, namely, ensuring the sale and supply of cigarettes from the said British-American Tobacco Company (HK) Limited to Wing Wah Company and/or Giant Island Limited and/or companies or entities associated thereto."

On 25th June 1998, the Appellant was sentenced to 3 years and 8 months' imprisonment. In addition, he was fined $500,000, he was ordered to pay $10,000,000 in restitution and he was ordered to pay prosecution costs in the sum of $11,000,000.

**Outcome of Appeal**

The Appellant has appealed against conviction on ground 1 which involves a question of law alone. There were other grounds of appeal which we have not needed to consider.

On 5th February 1999, having already heard two days of legal argument, this Court indicated that there was merit in the appeal such as to warrant the quashing of the conviction. We indicated at that time that we were satisfied that crucial documents had been wrongly admitted into evidence under section 22 of the Evidence Ordinance, Cap.8 (the Ordinance) for the purpose of establishing the truth of their contents. We now give our full reasons for having coming to this conclusion.

**The Trial**

The case against the Appellant at trial was prosecuted by Mr. John Reading who, together with Mr. Joseph To, now represents the Respondent in this appeal. We have been greatly assisted by Mr. Reading's most helpful

summary outline of the nature of the prosecution's case. We made no apology for adopting much of it to give the flavour of the allegation which was made. Indeed Mr. McCoy, S.C., who did not appear in the court below, but who now appears on behalf of the Appellant, has indicated almost complete agreement with this course. With only a few reservations he entirely accepts the factual background which Mr. Reading has summarised.

The trial took a total of 25 days, including four days of legal argument. In the course of the trial some 29 witnesses gave evidence for the prosecution; the statement of a witness and detailed admissions were admitted in evidence under sections 65B and 65C respectively of the Criminal Procedure Ordinance; a total of 15 bankers' affirmations were admitted and read into evidence in accordance with section 20 of the Ordinance; and the depositions of one overseas witness were also admitted in evidence. A total of 191 exhibits were produced in the course of the trial, of which all but one were documentary exhibits. Some of these documentary exhibits comprised numerous pages. The other exhibit was a video-tape of a television interview with the Appellant in the United States of America.

Despite the detailed admissions, the prosecution was put to strict proof in respect of several issues including, surprisingly, whether or not the Appellant had received payments totalling approximately $23 million which, together with two loans totalling $10 million [the receipt of which was not in issue], constituted the advantages the prosecution alleged that the Appellant had agreed to accept.

Although the prosecution was put to proof on a number of issues, it transpired, by the time the Appellant had decided to testify, that the only real issues were:

(a) who were the true payers of the $23 million to the Appellant?

(b) what was the purpose for which the loans and the payments were made to and accepted by the Appellant?

The payments themselves were obviously not an issue, because the Appellant in his evidence, admitted receiving them.

**Background to the Allegations**

Turning now, by way of background, to those named in the indictment as co-conspirators, Hung Wing-wah is a fugitive and his whereabouts are unknown, Tommy Chui To-yan was murdered in Singapore, Chong Tsoi-jun committed suicide and Chen Ying-jen is believed to be in Taiwan.

At the material time, the Appellant's principal, Brown and Williamson Tobacco Corporation was a wholly-owned (US) subsidiary of British-American Tobacco Industries Public Limited Company, and the Appellant's other principal, British American Tobacco (HK)Limited, was a wholly-owned subsidiary of British-American Tobacco (UK) Company, which in turn was a wholly-owned subsidiary of British-American Industries Public Limited Company. In effect, the Appellant's two principals were wholly-owned subsidiaries of British-American Industries Public Limited Company.

The Appellant was in the employ of Brown and Williamson Tobacco Corporation between August 1988 and 30th April 1993. He was seconded to BAT (HK) Ltd. between 16th June 1990 and 30th April 1993. During this period of secondment, his duties were initially to monitor the sale of the products of Brown and Williamson in China. On 1st January 1992, he was appointed Director of Exports of BAT (HK) Limited, until he resigned with effect from 30th April 1993, to take up a position with Giant Island Limited (GIL).

Although Mr. McCoy indicated the Appellant did not accept that before his appointment as Director of Exports, while the Appellant was working in the export department of BAT (HK) Ltd., he was in a position to influence the decisions to be made by the Commercial Director of BAT (HK) Limited in regard to the supply of Brown and Williamson's products to various regional distributors, including GIL, it was nevertheless an allegation the prosecution was making.

At about the time of the Appellant's appointment as Director of Exports, the post of Commercial Director was downgraded to Director of Exports. The responsibilities of the two positions differed only in that the Commercial Director was a director of the company, whilst the Director of Exports was not a director of the company but effectively a company executive without directorial responsibility. Whereas the Commercial Director would have to deal with matters which could legally bind the company in his capacity as a director, the Director of Exports could not. Further, the Director of Exports would owe no fiduciary duty to the company and would only attend Executive meetings rather than Directors' meetings.

China was a very important market for cigarettes. Marketing of the export products was conducted initially by twelve regional distributors but this number was later reduced to five . Different distributors sold to retailers for the local market. GIL was one of the twelve original distributors of duty free cigarettes, and was retained as a distributor when the number was reduced to five. At all times GIL was the largest distributor in terms of the volume of cigarettes sold by BAT (HK) for re-export.

It was an important duty of the Director of Exports to liaise and deal with these distributors, and to determine and report at Executive meetings the volume of cigarettes to be supplied to each of these distributors.

The distributors could request the supply of Brown and Williamson products, but it was up to the Director of Exports to decide the level of supply, the only restriction being that the proportion of the total cigarettes sold to the distributors had to remain approximately the same, unless the Managing Director and the Board approved a change in those proportions. The Director of Exports had the function, therefore, of controlling the supply of export products, including Brown and Williamson products, so as to ensure that the market was not flooded which would in turn have caused an adverse effect on the price of the products. It was because the market in China was the largest source of profit for BAT (HK), that the post of Director of Exports was so important within the BAT organisation.

By way of admitted facts, it was agreed that as at 18th July 1988, the shareholders of GIL were Hung Wing-wah (55%), Chong Tsoi-jun (10%), Chui To-yan (12.5%), Chen Ying-jen (10%) and Leung Siu-har (12.5%). The shareholders were also directors of the company. On 29th January 1989, Chen Ying-yen (Chen) transferred his shareholding in GIL to Hung Wing-wah (Hung); Hung also acquired the shares of Leung Siu-har (the wife of Hung). As a result, the shareholding was redistributed as follows:- Hung (77.5%), Chong Tsoi-jun (10%) and Chui To-yan (12.5%). The three of them retained their directorships. On 24th April 1990, Hung transferred his shareholding to Merriluck Limited, a BVI registered company, but he retained his directorship at GIL throughout. Between 30th September 1992 and 5th October 1993, the shareholding held by Chui To-yan (12.5%) was taken over by Alba Holding Limited, and Chui ceased to be a director of GIL. The remaining directors of GIL as at 5th October 1993 were Hung and Chong Tsoi-jun.

It was further admitted that Hung was one of the three directors of Pasto Company Limited between 1991 and 1994, and had complete control of the company. The Chinese name for Pasto Company Limited (“Pasto”) was Wing

Wah Hong, and prior to the incorporation of Pasto, Hung (Wing-wah) had traded as Wing Wah Company, an unincorporated business name.

For most of the relevant period the business premises of Pasto were immediately beside the premises of GIL on the same floor of Vicwood Plaza in Sheung Wan.

**The Allegation**

The Appellant received seven sums of money between October 1988 and 20th January 1993, totalling some HK$23m.

The first payment was made in October 1988 in the sum of US$250,000 (about HK$1.95m). The money was remitted from an account held in the name of Chen with the Hang Lung Bank and was ultimately deposited into an account held by the Appellant and his wife at the Royal Bank of Canada, Guernsey, Channel Islands.

The second, third, fourth and fifth payments for HK$2m, HK$2m, HK$3m and HK$5m took place on 17th February 1990, 3rd April 1991, 20th May 1991 and 22nd August 1991 respectively. These sums were all issued from Chen's account and were firstly paid into the Union Bank of Switzerland of Hong Kong, and then remitted to the Appellant's account at the Union Bank of Switzerland, Luxembourg.

On the day of the second payment, 17th February 1990, the Appellant entered into an account agreement with the Union Bank of Switzerland, Luxembourg. On 28th February 1990, the Appellant applied to open a current account with the bank. There appears on the application a handwritten note:

> "Regional Director of Brown and Williamson Tobacco. Payments (another few million dollars expected) from another tobacco dealer."

The sixth and seventh payments for HK$3.25m and HK$6m took place on 7th April 1992 and 20th January 1993 respectively. These amounts were issued from one of Chen's accounts with the Dao Heng Bank, and were in the end remitted to the account of the Appellant and his wife with the Royal Bank of Canada, Guernsey, Channel Islands.

Officials from the paying and recipient banks confirmed the movement of the seven payments from Chen's accounts into the accounts of the Appellant.

Apart from these payments, it was agreed by way of admitted facts, that the Appellant also received a loan in the sum of HK$3m in favour of himself and HK$7m in favour of a Mr. Luis Arriola, both on 5th May 1993, from Pasto.

GIL's business transactions were conducted using the Chen bank accounts, and there were a large number of these. Even though transactions on the accounts often amounted to millions of dollars, all accounts could be operated by the use of a signature chop or seal, requiring no manual signature.

When GIL purchased cigarettes from BAT, in the vast majority of cases they were paid for by cheques drawn on a Chen bank account. When GIL on-sold cigarettes, in the majority of cases, GIL would require that cheques be drawn in favour of Chen. GIL also purchased and sold duty-free liquor, and again the Chen bank accounts were used to pay for the products, and to receive payments for sales. Chen's accounts were effectively the business accounts for GIL under the control of Chong Tsoi-jun who was in charge of the GIL office and who, from the evidence, it was open to the jury to infer, operated the accounts.

Documents were seized by officers of ICAC at the business premises of GIL and Pasto. The admissibility of these documents forms the subject matter of ground 1 in this appeal.

Accounts' documents seized at the business premises of GIL included CYJ & Co. documents, ('CYJ' being the initials of Chen Ying-jen). These show that with the exception of transactions totalling HK$118, 000, GIL did not record its business transactions with BAT (HK) Ltd. in its books and that transactions amounting to HK$5.364 billion, representing purchases from BAT (HK) Ltd. were recorded in the CYJ & Co. accounts. The products included in these transactions were paid for from the Chen bank accounts. The documents produced also showed that dividends of profits of CYJ & Co. amounting to HK$50m were paid to the shareholders of GIL, including Hung even when he had personally ceased to be a shareholder, in proportion to their shareholdings in GIL, namely 77.5% (Hung), 12.5% (Chui To-yan), and 10% (Chong Tsoi-yun).

On the account opening documents or signature cards in connection with the various bank accounts held in the name of Chen, contact telephone numbers were recorded. These numbers were usually the numbers of GIL or, in one or two instances, the numbers of Chong Tsoi-jun. The correspondence address appearing on the documents was the current address of GIL.

It was in effect accepted by way of admitted facts that the Appellant had an obligation to seek approval for, and to disclose the receipt of, the seven payments and the loan to his principals, but he did not do so.

The prosecution's allegation, set out in the particulars of the offence, was that the HK$23m paid to the Appellant in fact came from GIL in the guise of Chen and that a least one of the explanations for the GIL/Pasto documents having been created in this form was to conceal the identity of the true payers of the sums involved in the conspiracy amounting in all to HK$33m.

The Appellant left Hong Kong for the mainland on 20th April 1994 and, from there, he travelled to the Philippines.

He was arrested on a US Federal Warrant in Boston on 20th December 1995. The prosecution commenced proceedings for the extradition of the Appellant from the US to Hong Kong for trial. The extradition proceedings took place at the Boston District Court. The Appellant was present with legal representatives throughout these proceedings.

On 22nd May 1997, the Appellant was returned to Hong Kong pursuant to an Order of a Court of the United States of America.

**Defence Case**

The Appellant gave evidence in his own defence during the trial in the court below. He said that he advised Hung and Chen Ying-jen to sell Japanese cigarettes in Taiwan, and he gave a Japanese dealer's contact number to Chen. Chen succeeded in selling Japanese cigarettes in Taiwan and made a huge profit. The Appellant became a consultant to Chen and he gave Chen market information, intelligence and advice, which he had gathered in his position with Brown and Williamson, initially based in Taiwan. It was for the assistance he gave to Chen that Chen gave him the seven payments. The HK$10m had nothing to do with the supply of cigarettes by BAT to GIL and its associated companies. The defence case was that the loan money was obtained from Hung in order to trade in shares in order to make money to cover the initial expenses of a business venture in Subic Bay.

**Evidence of J. Michael Grimsdick**

The account given by the Appellant in the witness box was anticipated by the prosecution. Mr. Reading accepts that the Appellant had given a similar

account to Messrs. Hounan and Mitchell in the course of an interview for a television programme at a time when the Appellant was being held in detention in the United States of America. This interview, however, had a wider significance. In the clear knowledge of what the defence to the charge was likely to be, the prosecution understandably engaged an expert witness in accountancy named J. Michael Grimsdick, a partner in Ernst and Young, to examine the documents seized by ICAC from the offices of GIL and Pasto amongst others, with a view to undermining or destroying the suggestion that the payments received by the Appellant were related to the sale and supply of Japanese cigarettes.

In the result, it was the case for the prosecution that the evidence given by Mr. Grimsdick had achieved that objective, based upon a wide variety of banking records (which it is accepted were properly admitted) and the GIL/Pasto documents which are at the root of this appeal. Again, with Mr. Reading's assistance, it is possible to itemize with precision the documents which are the subject of complaint in this appeal. These were:

Pasto cash book (P1)
Pasto general ledgers (P129 to 131)
GIL general ledgers (P78 to 81 and P110)
CYJ ledger listing (P133, P200 and P201)
CYJ ledger (P199)
CYJ Financial and net worth statements (P135, P170-172)
Chen cheque stubs (P51 to P58, P159 to P164)
Chen cheques (P173 to P185)
Pasto cheques (P77)
GIL invoices (P271 to P273, P297 & P298)
Purchase forms (P115, P116, P274, P275, P295)
Sales notes (P43, P122, P157, P158, P296)
Shipping documents (P114, P117, P118, P120, P121, P125 to P127)
Written resolution of World Glory Holdings (P149)
'High Get' agreement and other loan and related documents (P136 to P142)
Share transfer documents of GIL (P287).

All documents seized were in hardcopy form. Although the documents marked as exhibits 133, 200 and 201 were printouts from a computer, these had also been reproduced in hardcopies and retained by GIL in that form, as part of its business records.

Mr. Reading was able to explain clearly and concisely how these documents were used in the evidence given by Mr. Grimsdick, to "negative", as he put it, the Appellant's version of matters firstly given in the U.S.A., and later confirmed when he gave evidence in the trial, that the payments were for assisting Chen in the Japanese cigarette business. These documents were crucial in the sense that they enabled the jury to infer that the payments were connected to the purchase by GIL of BAT cigarettes, and were not in relation to the Japanese venture which the Appellant was asserting.

**The Ground of Appeal**

These documents are referred to in the ground of appeal which reads as follows:

> "There was a material irregularity in the course of the trial in that the learned trial judge erred in law in admitting into evidence documentary hearsay, the 'GIL/PASTO' records, over objection by counsel for the appellant that the provisions of section 22 of the Evidence Ordinance Cap. 8 governing the preconditions for admissibility of documentary hearsay had not been complied with and thus the appellant was deprived of a fair trial according to law."

**Statutory Provisions**

In order properly to understand the nature of Mr. McCoy's submissions, it is necessary to set out the relevant parts of section 22 of the Ordinance under which the documents were admitted, together with parts of sections 22A and

22B. Section 22A was never specifically considered before the trial judge during submissions on admissibility but, as that section deals with documentary evidence from computer records, and some of the records were computer generated, it has also been necessary to consider its terms. The sections read:

"**22. Evidence in criminal proceedings from documentary records**

(1) Subject to this section and section 22B, a statement contained in a document shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if –

(a) direct oral evidence of that fact would be admissible in those proceedings; and

(b) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and

(c) the person who supplied the information –

(i) is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(ii) is outside Hong Kong and it is not reasonably practicable to secure his attendance;

(iii) cannot be identified and all reasonable steps have been taken to identify him;

(iv) his identity being known, cannot be found and all reasonable steps have been taken to find him;

(v) cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information; or

(vi) having regard to all the circumstances of the case, cannot be called as a witness without his being so called being likely to cause undue delay or expense.

…. (3) Subsection (1) applies whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and that subsection applies also where the person who compiled the record also supplied the information.

…. (7) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any occupation in which he is engaged or employed or for the purpose of any paid or unpaid office held by him.

(8) This section does not apply to any document to which section 22A applies."

"**22A. Documentary evidence in criminal proceedings from computer records**

(1) subject to this section and section 22B, a statement contained in a document produced by a computer shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if –

(a) direct oral evidence of that fact would be admissible in those proceedings; and

(b) it is shown that the conditions in subsection (2) are satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1)(b) are –

(a) that the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or individual;

(b) that the information contained in the statement reproduces or is derived from information supplied to the computer in the course of those activities; and

(c) that while the computer was so used in the course of those activities –

(i) appropriate measures were in force for preventing unauthorized interference with the computer; and

(ii) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.

(3) Notwithstanding subsection (1), a statement contained in a document produced by a computer used over any period to store, process or retrieve information for the purposes of any activities ('the relevant activities') carried on over that period shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if –

(a) direct oral evidence of that fact would be admissible in those proceedings;

(b) it is shown that no person (other than a person charged with an offence to which such statement relates) who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities-

(i) can be found; or

(ii) if such a person is found, is willing and able to give evidence relating to the operation of the computer during that period;

(c) the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information; and

(d) at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents,

but a statement contained in any such document which is tendered in evidence in criminal proceedings by or on behalf of any person charged with an offence to which such statement relates shall not be admissible under this subsection if that person occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities …..

**22B. Provisions supplementary to sections 22 and 22A**

(1) Where in any criminal proceedings a statement contained in a document is admissible in evidence by virtue of section 22 or 22A, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document of the material part thereof.

(2) Where in any criminal proceedings a statement contained in a document is admitted in evidence by virtue of section 22 or 22A, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including the form and contents of the document in which the statement is contained.

(3) In estimating the weight, if any, to be attached to a statement admitted in evidence by virtue of section 22 or 22A, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular –

(a) In the case of a statement falling within section 22, to the question whether or not the person who supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and

(b) in the case of a statement falling within section 22A, to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts." (Emphasis supplied.)

## Submissions for the Appellant

With these provisions in mind, we can now look at the way in which Mr. McCoy advanced his submissions which, to a large extent, reflected the arguments which were put before the trial judge on behalf of the Appellant by Mr. Cahill who was one of the counsel then representing him. As we indicated at the conclusion of the hearing, we were satisfied that his submissions were well-founded so that it is now incumbent upon us to summarise the points we have accepted as carrying weight.

Mr. McCoy firstly pointed out that none of the documents in question were made by the Appellant, their provenance was by no means clear and none were adopted by him. In those circumstances, he submits that the only proper basis for their admissibility was that they amounted to documentary records which, although hearsay in relation to the Appellant, became admissible because of the special provisions (set out above) in the Ordinance.

Mr. McCoy submitted that the prosecution made a fundamental error, adopted by the trial judge when he ruled in their favour, by arguing that the English Court of Appeal decision in **R v Foxley, (1995) 2 Cr.App.R. 523**, had opened the way for documents in Hong Kong to speak for themselves without first satisfying the criteria for admissibility in section 22 of the Ordinance.

It is clear from the ruling made by the judge that he also considered section 22B "had been complied with". However, section 22B(2) does not permit reasonable inferences to be drawn from the circumstances, including the "form and contents" of the documents, to *demonstrate* admissibility. The nub of Mr. McCoy's argument is that it is only *after* admissibility has been established that the documents may be considered as to their form and content for the purpose of drawing any reasonable inferences from them.

During the course of legal submissions in the trial, Mr. Reading (at page 1078N in the Appeal Bundle) expressed the matter in this way:

> "The point is that if we could have complied with Section 22, we would have, but in our respectful submission, we don't have to because of the authority of **Foxley** that this is a situation where documents were seized by officers. As his Lordship said in **Foxley**, the documents effectively speak for themselves and there are inferences to be drawn from the contents of the documents.
>
> If I just might continue in relation to the submission on Section 22, and slightly correct what I said. My Lord, we would have complied with Section 22 in the sense that we would have got a statement from someone who can speak to the records. But our respectful submission is that because of the matters that the evidence will establish, we have complied with Section 22 and **Foxley** effectively is the authority for saying that we are able to comply with Section 22."

Mr. Reading, by his statement "that if we could have complied with s.22, we would have" was apparently referring to the non-availability of a Mr. See and a Ms. Sha who had both worked for GIL until their sudden departure from the jurisdiction following interviews with Mr. Simmons of ICAC. No doubt the prosecution would have otherwise hoped to be able to call them as persons who would have been supplied with information. However, under section 22(1)(C) of the Ordinance, it is not the person who was supplied with information but the person who "supplied" the information whose absence was relevant for these purposes. It seems clear, therefore, that there had not been compliance with section 22.

The judge, when he later made his ruling (at page 1082 in the appeal bundle) said:

> "… bearing in mind the allegation by the prosecution as to the manner in which the alleged co-conspirators paid the defendant and the operation of the various accounts, as well as evidence pertaining to the perpetration of the alleged conspiracy in question, I am satisfied that those account documents are relevant as to the alleged overt act(s) on the part of the alleged co-conspirators in furtherance of the alleged common design on the part of the defendant and those of the alleged co-conspirators ……
>
> I have also considered the relevant sections under the Evidence Ordinance and the leading authority on business record of **Foxley**, [1995] 2 Cr.A.R.523. Bearing in mind the way in which the prosecution failed to secure the account officers of the companies in question to give evidence as set out in the statement of Mr. Simmons, I am satisfied that section 22 and 22B of the Evidence Ordinance have been complied with."

Somewhat ironically, the submissions of Mr. Reading, when he referred to **Foxley**, had, it seems, the very considerable support of what the learned authors in **Bruce and McCoy: Criminal Evidence in Hong Kong** had to say in Issue 6 at Chapter XII paragraph 352 which reads:

> "The court may infer that the compiler of the document had personal knowledge from the document and the circumstances in which the document was found: **R v Foxley, (1995) 2 Cr.App.R. 523, (1995) Crim.L.R. 636**. It is not necessary that the maker of the document be called to give evidence that he has personal knowledge before the document may be made admissible."

Mr. McCoy's reaction to this extract was that it was "plainly wrong" in its application to Hong Kong, and he demonstrated this to be so by close examination of the legislative history of the statutory provisions in Hong Kong for admitting documentary hearsay and by comparing them to the provisions in England which are now significantly different. In short, having compared section 68 of the Police and Criminal Evidence Act, 1984 (PACE) and section 22 of the Ordinance it is apparent that the latter is modelled upon the former. Section 68 reads:

"DOCUMENTARY *EVIDENCE IN CRIMINAL PROCEEDINGS*

***Evidence from documentary records.***

68. (1) Subject to section 69 below, *a statement in a document shall be* admissible *in any proceedings as evidence of any fact stated therein* of which *direct oral evidence would be admissible if-*

(a) *the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and*

(b) any condition relating to the person who supplied the information which is specified in subsection (2) below is satisfied.

***PART VII***

(2) The conditions mentioned in subsection (1)(b) above are-

(a) that *the person who supplied the information-*

(i) *is dead or by reason of his bodily or mental condition unfit to attend as a witness;*

(ii) *is outside* the United Kingdom *and it is not reasonably practicable to secure his attendance;* or

(iii) *cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information*;

(b) that *all reasonable steps have been taken to identify* the person who supplied the information but that he cannot be identified;

and

(c) that, the *identity* of the person who supplied the information *being known, all reasonable steps have been taken to find him*, but that he *cannot be found.*

(3) Nothing in this section shall prejudice the admissibility of any evidence that would be admissible apart from his section." (Emphasis added.)

The italicised sections identify identical language to be found in section 22 of the Ordinance. Admissibility of statements contained in records was made conditional, in both statutes, upon the compiler of the record acting under a duty and the supplier of the information reasonably being supposed to have had personal knowledge of the facts in the documents.

Section 68 (and section 69 which dealt with evidence from computer records) of PACE did not stand alone. Section 68 was supplemented by the provisions of paragraphs 13 and 14 in Part III of schedule 3. These paragraphs read:

"*PROVISIONS SUPPLEMENTARY TO SECTIONS* 68 AND 69

13. *Where in any proceedings a statement contained in a document is admissible in evidence by virtue of section* 68 above or in accordance with section 69 above *it may be proved-*

(a) *by the production of that document; or*

(b) (*whether or not that document is still in existence) by the production of a copy of that document, or of the material part* of it,

authenticated in such manner as the court may approve.

14. For the purpose of deciding whether or not a statement is so admissible *the court may draw any reasonable inference-*

(a) *from the circumstances in which the statement was made or otherwise came into being; or*

(b) *from any other circumstances, including the form and contents of the document in which the statement is contained."* (Emphasis added.)

Again, the italicised sections from paragraphs 13 and 14 (above) reflect the identical wording which has been adopted in the Ordinance, when compared to sections 22B(1) and (2) respectively.

The terms of paragraph 14 are particularly important as this provision enabled the court *"for the purpose of deciding whether or not a statement is so admissible"* to draw reasonable inferences from the circumstances in which the statement was made or from other circumstances including the form and contents of the document in which the statement is contained. As Mr. McCoy, in the view of this Court, correctly points out, not only is this provision wholly absent from the Ordinance, but also the terms of section 22B(2) seem to be saying the exact opposite by the use of the phrase "where in any criminal proceedings a statement contained in a document *is admitted in evidence* by virtue of section 22 or 22A", the court may draw reasonable inferences from the circumstances in the terms earlier set out of this section. Paragraph 14 in the third schedule to PACE permitted the drawing of inferences as part of the process of deciding upon admissibility whereas section 22B(2) only allows inferences to be drawn once a document has been admitted into evidence. Furthermore, if section 22 permitted the drawing of reasonable inferences to decide admissibility, section 22B(2) would be otiose.

Mr. McCoy was also able to demonstrate that the law in England and Wales has moved on considerably since PACE with the **Criminal Justice Act, 1988 (C.J.A. 1988).** Hong Kong has been left, as he put it, in the "Bronze Age" by comparison. There has been no modernisation and there have been no further amendments to the Ordinance which would permit the evidence of documentary records to be received in criminal proceedings to reflect the provisions of the C.J.A. 1988. As Mr. McCoy rightly summarised the situation, section 24 of the C.J.A. 1988 (which replaced and abolished section 68 of PACE) expanded the admissibility parameters by permitting the admission of

documents created or received in the course of a trade, business, occupation, profession or a paid or unpaid office; there is now no requirement that such documents be, or be part of, a record; there is no requirement that the creator or receiver of the document be shown to have acted under a duty; and there is no general requirement that the person who supplied the information should be effectively unable to give oral evidence.

The terms of section 24(1) and (2) of the C.J.A. 1988 are:

"**24.** – (1) Subject-

(a) to subsections (3) and (4) below;

(b) to paragraph 1A of Schedule 2 tot he Criminal Appeal Act 1968; and

(c) to section 69 of the Police and Criminal Evidence Act 1984,

a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied-

(i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and

(ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Subsection (1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it-

(a) in the course of a trade, business, profession or other occupation; or

(b) as the holder of a paid or unpaid office ….."

The real significance of section 24 of the C.J.A. 1988 in the matter presently before us is that **R v Foxley (above)**, upon which the prosecution, and ultimately the judge, relied as authority for admitting the documents which are the subject of this appeal, was a decision which relates to the legislation in England which although superficially similar, is, when closely examined, quite different to that which endures in Hong Kong under section 22 of the Ordinance. Roch L.J. cited with approval in **Foxley** a passage from **Cole, (1990) 90 Cr.App.R. 478 (at 486)** in relation to sections 23 to 26 of the C.J.A.:

> "The overall purpose of the provisions was to widen the power of the Court to admit documentary hearsay evidence while ensuring the accused receives a fair trial."

In **Foxley,** (at page 538C), the English Court of Appeal also made reference to the legislative intention behind sections 24 and 25 of the C.J.A. 1988 by saying:

> "The court may, as Parliament clearly intended, draw inferences from the documents themselves and from the method or route by which the documents have been produced before the court."

This was said in spite of the fact that paragraph 14 to the third schedule was not reproduced in the C.J.A. 1988 but, as the judgment in **Foxley** makes clear, from its citation at page 537E of a passage from the unreported case of Dobson:

> "Inferences can be drawn for the purposes of section 24 and notwithstanding the absence of a provision supplementary to section 24 corresponding to that in Schedule 3 paragraph 14 of the Police and Criminal Evidence Act 1984 as supplementary to section 69 of that Act."

Mr. McCoy has submitted, and we are again satisfied that he is right in so doing, that the conclusions in **Foxley** were not relevant to any determination of admissibility under section 22 in the face of unambiguous statutory provision to the contrary to be found in section 22B(2).

The computer records, which formed a small portion of the records the trial judge admitted into evidence were, it is accepted, never considered under section 22A at all.

Mr. Reading submitted that they did not need to be, as they were obviously part of the adopted records of the business to be seen from the manual amendments which are apparent from the face of the hardcopy documents under this category. However, in our judgment, the same argument must apply in that these documents had firstly to be admitted under the strict terms of the

Ordinance, to be found in section 22A, before any inferences could be drawn from them. This is made plain from the opening words of sections 22 and 22A of the Ordinance, which are identically phrased, that these provisions are "subject to this section and section 22B", before a "statement contained in a document shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein ……"

We emphasise again that it appears clear to us that section 22B(2) only permits the court, after the document has been admitted, to "draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances ….."

We have therefore not felt able to accede to Mr. Reading's argument that even if, as he accepts, section 22B(2) is available for the determination by a tribunal of fact of the weight of the evidence *after* it has been admitted, sections 22(1) and 22A are sufficiently broadly drafted to have permitted the judge to draw inferences when determining whether the requirements under section 22 or 22A had been met. This argument would have had merit had it not been for the qualification that sections 22 and 22A were subject also to the provisions of section 22B. For this reason alone, **Foxley** could not properly be relied upon in support of the proposition that the principles to be applied where section 24 of the C.J.A. 1988 is concerned are equally applicable to section 22 of the Ordinance, despite the similarities in both pieces of legislation. The two legislative schemes are different in reality. General principles give way to a specific, unambiguous statutory provision which in this case precluded the court from drawing inferences from the documents in the process of deciding their admissibility.

**Alternative approach advanced by the Respondent**

We have not needed to consider in any depth the alternative approach Mr. Reading invited us to take to the introduction of this documentary evidence. During the course of argument, he submitted that the GIL/PASTO documents were capable of being introduced, without the need to resort to section 22, as relevant evidence of the alleged overt acts on the part of the co-conspirators named in the indictment which tended to show them as the "true payers" of the advantages alleged to have been accepted by the Appellant in the course of his agreement with them. The trial judge, from the ruling he gave (cited earlier), also had this in mind as one of the limbs under which he allowed the evidence to be introduced. Equally, we have not had to consider a further five grounds of appeal, which were formulated by Mr. McCoy midway through the appeal, to meet this alternative approach when Mr. Reading suggested that the GIL/Pasto documents need not necessarily have been put in evidence to show the truth of their contents.

It is quite clear that the prosecution at trial were in reality relying upon the documents as evidence of their truth and, for this purpose, had to establish their admissibility. A simple demonstration of this is that a significant part of the case for the prosecution was the evidence given by Mr. Grimsdick, who had looked at the documents for what they appeared to state on their face, in order to interpret the documents to the jury. The summing up was also on the basis that the documents were evidence of their truth which enabled the jury to consider their contents in arriving at their verdict.

**Conclusion**

For the reasons we have given, we allowed the appeal, we ordered that the conviction should be quashed and that the sentence and all consequential orders should be set aside. Applying the principles in **R v Holgate No.2, (1996) 3 HKC 324**, we refused to make an order for a re-trial. We granted the Appellant the costs of his appeal.

We would say finally that the appropriate authorities may wish to review the legislation in the light of our decision. It seems to this court that legislation modelled upon section 24(1) of the C.J.A. is long overdue and is now required with the utmost speed if the difficulties encountered in this case are not to be allowed to recur.

| (N.P. Power) | (Simon Mayo) | (M. Stuart-Moore) |
|---|---|---|
| Ag. Chief Judge, H.C. | Justice of Appeal | Justice of Appeal |

Mr. John Reading, S.A.D.P.P. & Mr. Joseph To, S.G.C. for D.P.P./Respondent
Mr. Gerard McCoy, S.C. & Mr. Raymond Pierce instructed by Messrs. C.L. Chow & Lam for Applicant.