THE LAW SOCIETY'S POSITION PAPER ON THE SYSTEM OF REMUNERATION OF SOLICITORS FOR CONDUCTING CRIMINAL LEGAL AID WORK

This Paper discusses some of the issues which have arisen over recent years regarding the remuneration of solicitors who represent legally aided defendants in criminal cases. It does not deal with representation through the Duty Lawyer Scheme nor does it purport to speak for the Bar of Hong Kong.

This Paper draws upon a Paper received from the late John Mullick in 2002 when he was a member of the Bar Association's Special Committee on Legal Aid Reform. A copy of that Paper was sent to the Law Society and is annexed to this Paper as ***Appendix. 1***.

1. Introduction

1.1 The provision of legal representation to defendants who would otherwise be unrepresented is an essential attribute of a civilized and fair criminal justice system. Providing such representation goes some way towards addressing the inequality of arms between the prosecution and the defendant. The defendant in criminal proceedings faces the panoply of the Government's financial and investigative resources. Those resources far outweigh the resources of all but the most affluent. The grave dangers of unjust conviction and imprisonment, even where a defendant is privately represented are amply illustrated by Lau Chi Wai v. HKSAR Final Appeal No. 4 of 2004 (Criminal) [2004] 3 HKLRD 444. The Court of Final Appeal's judgment is annexed to this Paper as ***Appendix 2***.

1.2 The good administration of our system of criminal justice dictates that such an inequality of arms should be redressed. Whilst there is a public interest in ensuring that those who are guilty are convicted, it is much more in the public interest to ensure that those who are innocent are not convicted. There is therefore an overriding public interest in ensuring that the criminal justice system operates fairly and that "due process" is followed to achieve as far as possible the proper outcome of the particular case. The quality of a Legal Aid Scheme must depend upon the extent to which it redresses the inequality of arms between the prosecution and the defence and the contribution it makes to "due process".

2. The Legal Aid Scheme

2.1 Procedure, evidence and practice in criminal cases is governed by the Criminal Procedure Ordinance, Cap. 221 (CPO). The CPO was amended in 1969 to introduce a new section 9A. That section enables the Criminal Procedure Rules Committee ('Rules Committee") established by s. 9 of the CPO, to make rules for the granting and administration of legal aid in the criminal courts. These rules have been made. They are the Legal Aid in Criminal Cases Rules (CPO, sub-leg) ('the Rules") which came into force on 11th January 1970.

2.2 The Rules create a self-contained system for the grant and administration of legal aid. They have changed little over the past 35 years. The Rules do not therefore take account of more recent developments in Hong Kong: alibi notices, advance disclosure of expert evidence, organized and serious crime procedures, complex commercial crimes, vulnerable witnesses, the Hong Kong Bill of Rights Ordinance, Cap. 383 or the Basic Law.

2.3 The Legal Aid Scheme the subject of this Paper applies to the District Court ("DC"), the Court of First Instance ("CFI"), the Court of Appeal ("CA") and the Court of Final Appeal ("CFA"). A separate Duty Lawyer Scheme provides for representation before Magistrates. By definition therefore defendants represented under the Rules are those facing the more serious or more complex charges: those are cases that either cannot be tried before Magistrates or, where they could be so tried, the prosecution has opted for trial in the DC or the CFI because of the complexity of the case and/or the likely penalty upon conviction after trial.

3. The Rules

3.1 The Rules invest the Director of Legal Aid ("DLA") with the responsibility for administering the legal aid system. Rule 3 requires the DLA to prepare and maintain separate panels of barristers and solicitors to represent legally aided defendants. Rule 4 sets out who may be granted legal aid and what that will cover. Under Rule 5 applications for legal aid must be made to the DLA. Rule 6 gives the DLA the responsibility for determining whether or not a person is entitled to receive legal aid and, if necessary, upon what terms. Rule 7 provides that if the DLA is satisfied a person should have legal aid, a legal aid certificate shall be granted.

4. Fee and Cost Levels

4.1 Though the DLA is responsible for the operation of legal aid, the DLA has no authority to create the fee structure of legal aid. That is the responsibility of the Rules Committee. Section 9A of the CPO is silent about how fees and costs should be assessed.

4.2 The Rules Committee apparently plays little part in setting fee and cost levels. "Biennial Reviews" of fees were conducted by the Administration with adjustments of fee levels being linked to the Consumer Price Index. A summary of the "Biennial Reviews" carried out by the Administration over the recent years are as follows:

1998: Despite a recorded increase of 10% in the CPI(C) for the reference period no upward adjustment was made to fees. The explanation was that an upward adjustment could not be made in view of the worsening economic climate and market conditions.

2000: The CPI(C) decreased by 8.8% during the reference period. However, as this more or less offset the CPI(C) increase accumulated in the previous reference period, the Administration chose to freeze fee levels.

2002: Because the CPI(C) declined by 4.3% during the reference period, the Administration proposed a reduction of fees by 4.3%. This was approved by the Finance Committee on 13 June 2003.

2004: The Administration has sought a further 4.4% reduction in the fees following the decrease in the CPI(C) for the reference period.

4.3 Both the Bar and the Law Society have objected to this. Copies of the relevant documentation are annexed to this paper as ***Appendix 3***.

4.4 The proposed 4.4% reduction comes at a time when office rents are again rising and will impose further strains upon those practitioners engaging in legally aided defence work.

4.5 The reality is that fees and costs in real terms have not risen for 20 years. The consequence is that the level of fees paid for criminal legal aid has progressively fallen. At the same time, criminal litigation has become more complex and demanding. There is, for example, greater use of expert evidence, greater use of video taped interviews, surveillance on video tape and more detailed investigation especially by the ICAC and the CCB. The result has been that many practitioners have concluded that it is simply not possible to undertake legally aided

criminal work and sustain a viable legal practice. This reduces the pool of lawyers available to undertake legal aid work and calls into question the overall viability of the legal aid scheme and its effectiveness in redressing the inequality of arms between the prosecution and defendants. It is essential to the system of justice that fees are adequate to provide remuneration to attract the right calibre of person to practise criminal law. The perils of under-payment are well known in undermining the good administration of a system intended to serve the public.

4.6 Issues then arise whether the criminal legal aid scheme as it now stands is consistent with the spirit and/or the letter of Article 36 of the Basic Law:

> *Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.*

4.7 The Article envisages freedom of access to lawyers and timely protection of lawful rights and interests. Where private representation is beyond the means of the litigant then, particularly in criminal law, the Administration is obliged to provide the means for the citizen to be legally represented at trial, for example through a legal aid scheme.

4.8 These issues were addressed by the European Court of Human Rights (Fourth Section) in Steel and Morris v The United Kingdom (Application No 68416/01) a copy of which is annexed as ***Appendix 4***. The case arose out of defamation proceedings commenced against Steel and Morris by McDonalds. Steel and Morris were without means. At that time, defamation proceedings were outside the scope of the United Kingdom's civil legal aid scheme. The proceedings were complex and protracted. The ECHR held that the denial of legal aid to Steel and Morris had "*deprived them of the opportunity to present their case effectively before the (trial) court and contributed to an unacceptable inequality of arms with McDonald's.*" The UK was ordered to pay compensation and to offer Steel and Morris a re-trial.

4.9 The ECHR addressed inequality of arms in the context of civil litigation; its strictures are even more apposite in criminal litigation.

4.10 If a legal aid scheme is to provide "timely protection" and address the too many "inequality of arms" between the prosecution and the defendant it must be effective.

4.11 The scheme will not be effective, in the sense of providing representation for defendants, unless practitioners are adequately remunerated. If work is not adequately remunerated, it may not be done or, if done, done poorly. In the long run, there may well be more cost and expense by prolongation of trials and appeals which might otherwise have been avoided, not to mention the possibility of serious miscarriages of justice. Whilst society may have little time for those who commit crime, our system demands that persons brought before the criminal courts are treated fairly and justly and are convicted only upon due process. A properly remunerated legal aid system is an essential attribute of due process.

4.12 Defendants who are unable to afford to instruct a lawyer privately must not be further disadvantaged by an inadequate legal aid system, nor should the legal system lay itself open to a charge of hypocrisy by purporting to provide legal representation in name but depriving it of substance.

4.13 ***The Contradiction within the Rules***

It is worth noting in this respect that Rule 21(1) refers to fees being assessed 'having regard to the work actually and reasonably done" which implies that all work done under the legal aid certificate will be rewarded provided it is actually and reasonably done. However that is contradicted by the set fees in Rule 21(1) (a), (aa), (ab), (b).

4.14 As well as ensuring that legally aided defendants are adequately represented, measures must be in place to ensure that public funds are used efficiently and properly. This can be achieved by requiring proof that:

a) the work for which remuneration is claimed was done;

b) it was necessary; and

c) was done properly and with reasonable economy.

4.15 Essentially that is what the system of taxation of costs in civil litigation is designed to ensure. Taxation of claims for fees in criminal litigation has attractions and these will be addressed later in this Paper (see paragraphs 21.3 to 21.6).

5. The Solicitor and Legal Aid

5.1 A solicitor representing a defendant under a legal aid certificate has all the responsibilities that are owed to the privately funded client with the added obligation not to waste the Legal

Aid Fund. The solicitor must ensure the particular case is dealt with expeditiously and economically. The requirements for expedition and economy must, however, be viewed in the context both of the solicitor's professional duty to the legally aided client and the case the legally aided client has to face. Work that is done during the retainer may, with the benefit of hindsight, be shown to have been un-necessary. That, however, must not be the criteria in the context of criminal litigation. In the proper preparation of a criminal case, work has to be done in the context of the situation as it presents itself at the time the work was done.

5.2 As an example, it may be suggested that time spent interviewing potential alibi witnesses was un-necessary where the defendant pleads guilty at trial. However that guilty plea may well have come about because the potential alibi witnesses were found wanting when interviewed by the solicitor and the defendant then accepts informed and reasoned advice to plead guilty. Work done by the solicitor interviewing those witnesses has brought about an overall saving of public money but, as will be discussed later on in this Paper, that professionalism is not recognized and therefore is not rewarded.

6. Solicitors' Fees under the Rules

It is appropriate to set out some detail of the present fees.

6.1 Solicitors' (and barristers') fees are governed by Rule 21(1) of The Rules. Rule 21 is annexed to this paper as ***Appendix 5***.

6.2 *The "Brief Fee"*

The Rule essentially provides for a brief fee, a daily fee and certain traveling and out of pocket expenses. The brief fee for cases heard in the CFI is, at present HK$6,790. This covers all the preparatory work undertaken by the solicitor up to the day of the trial and the first day of the trial. The brief fee is fixed by law and takes no account of the time actually and properly spent and the work done in preparing the case for court.

6.3 The brief fee appears to be premised upon an assumption that no, or minimal, work will be, or needs to be, done by the solicitor in advance of the trial. That is unrealistic and takes no account of the solicitor's professional responsibility, the duty to the client, the court and the complexity of criminal trials.

6.4 The solicitor's duty is to ensure that the defendant is not convicted except upon sufficiently cogent and admissible evidence. Pre-trial preparation is inevitable if the defendant's case is to be properly put before the court, which requires preparation and attention to detail. This is essential if the defendant is to be properly represented at trial: as such it should be properly recognized and remunerated.

6.5 ***The "Daily Fee"***

For the second and subsequent days of a trial in the CFI, the fee will range between HK$830 and HK$4,420. These fees are unrealistic. Even though a barrister appears at trial, the solicitor remains responsible for the smooth running of the case. Ideally, the solicitor having the conduct of the case should attend court throughout the proceedings. At the very least the instructing solicitor must ensure a responsible member of staff who is thoroughly conversant with the case attends court each day to assist the barrister. The instructing solicitor should personally attend court on the first day of the trial and be present when the jury is selected and when the defendant makes the decision whether or not to give evidence and, if so, be present whilst the defendant gives evidence and at verdict and sentence. In addition the instructing solicitor must be available to personally attend the trial whenever circumstances require, must keep in touch with the staff member attending the trial and be contactable throughout the trial. The daily refresher does not compensate those responsibilities.

6.6 Where the case will be tried in the Court of First Instance ("CFI") the solicitor has the added responsibility of properly briefing the barrister. It is truism that counsel can only be as good as their papers allow them to be. It is also a truism that solicitors do not discharge their professional responsibilities by simply bundling up papers and passing them to counsel. Adequately instructing counsel invariably means reading and considering numerous statements and other paper exhibits, taking the defendant's instructions on those statement and exhibits and ensuring that counsel is fully appraised of all relevant issues both of fact and of law.

6.7 Solicitors must always be conscious of the consequences, to the defendant and to themselves, if they fall below the high standards which are rightfully expected from them. Those sanctions can include civil proceedings by the client, penalties imposed by their professional body, strictures from the Bench and adverse publicity in the media, all of which can impact upon their professional lives. Representing a client under a legal aid certificate is not therefore a matter to be entered upon lightly or ill-advisedly, nor should a legal aid system place the solicitor in a position where work which is necessary and proper is not done or is done at the expense of the solicitor's practice. Unfortunately the legal aid system as it stands at present does both.

6.8 The CFA's judgment in the recent case HKSAR v Zabed Ali FACC No. 2 of 2003 [2003] 2 HKLRD 849; 6 HKCFAR 192, an appeal against a conviction for murder which is annexed to this paper as ***Appendix 6*** illustrates the complexities of criminal litigation and is but one example of complex issues which must be fully considered before trial.

7. Problems with a Set Brief Fee

7.1 This section of the Paper addresses some of the problems that are regularly encountered by solicitors undertaking legally aided defence work. The system presents as illogical and ill thought out. In reality the work that has to be done if the defendant is to be adequately represented at trial means that the daily fee is expended several times over before the case comes to trial. Legal aid defence work then becomes a pro bono activity but with all the professional responsibilities and obligations of a privately funded instructions.

7.2 The present system of remuneration takes little or no account of the complexities of the case and fails to remunerate work which the solicitor must carry out if the defendant's interests are to be adequately protected. The concern is that the realities of contemporary commercial life will lead to inadequate preparation of cases. In the long run this will be detrimental to the criminal justice system and to society in general. A recent survey by the Law Society of Hong Kong is annexed to this paper as ***Appendix 7*** and illustrates some of the issues of concern.

7.2 Whilst it may be suggested that a solicitor who accepts a legally aided case should not complain if, in the event, the set fee proves inadequate, this overlooks the central issue of the adequacy of the system itself and is tantamount to acceptance that the system as it now stands is defective. Before taking on a privately funded case, the solicitor finds out enough about the case to quote a realistic fee. If, in the event, that fee proves inadequate, the solicitor has no recourse. That is a very different situation to where the solicitor is invited to accept a case without any opportunity of assessing what is involved, let alone making an informed assessment. At the very least the solicitor should have an opportunity to look at the papers and consider what is involved before having to decide whether or not to accept the case.

8. The Illogicality of the system.

A number of problems can arise from the payment of the present very low set brief fee.

8.1 There is little incentive for any in-depth reading of extensive case papers. This could result in inadequate preparation for trial and inadequate protection of the defendant's interests.

8.2 The set fee is payable whether the defendant pleads guilty or not guilty. The implications here are that a defendant might be advised to plead not guilty so that the daily refresher fee is obtained or conversely might be advised to plead guilty as that would bring the same fee for less work. That the system produces such a potentiality is the essential cause for concern.

8.3 There is little incentive to check for unused material. The prosecution has a duty to disclose relevant unused material to the defence. Practicality however dictates that the defence requests disclosure. Where there is disclosure, the material disclosed must be carefully examined. The risk is with a set fee that this examination will not take place or will be done cursorily, again to the detriment of the defendant and indeed to the system.

8.4 There is little incentive to engage experts to counter expert evidence called by the prosecution. This is particularly relevant in view of the additional work required to get the DLA to agree the fees of an expert, to locate the appropriate expert and, if necessary, to arrange for the expert to attend trial, sometimes from overseas.

8.5 Overall the payment of a low set fee may be said to discourage efficiency and does not reward efficiency and excellence. The conscientious solicitor therefore carries out work not because it will be remunerated but because of professional ethics, responsibility and pride in a job well done, to avoid potential detrimental consequences to the defendant and to avoid falling foul of the rules of professional conduct. That, it is suggested, is not the basis upon which a legal aid system worthy of the name should operate.

8.6 An example of the problems which can arise from accepting a set fee case on a take it or leave it basis are illustrated where the defendant will be dealt with in the CFI. The solicitor will generally be instructed only after the defendant has been committed for trial. That committal will invariably have been a short, or paper, committal. In the interest of the defendant the committal papers must be read to consider whether an application should properly be made to a judge for a discharge under s.16 of the CPO, as was done in HKSAR v Yan Pan Yue [2005] 1 HKLRD 648, on the grounds that the evidence disclosed in the documents handed to the (magistrate's) court under s.80C(1) of the Magistrates Ordinance, Cap. 227 is insufficient to establish a prima facie case against the defendant. It may be that the solicitor concludes that no application should be made, but nonetheless the papers must \be read. The solicitor who fails to do that and who fails to advise the defendant about a possible application for discharge is not representing the defendant properly. Time spent on these matters could well exceed the set fee, irrespective of any other preparatory work: again the solicitor's professionalism and attention to detail is not rewarded.

9. Examples of work which is not properly rewarded

- the brief fee is the same regardless of number of documents the solicitor has to read.
- conferences with client.
- conferences with counsel.
- conferences with experts, instructing experts, negotiating fees, obtaining authorization from the DLA for those fees and arranging employment visas for overseas experts to enable them to attend the trial. .
- visiting the police station to view prosecution exhibits (items of real evidence will not be released by the police and it is essential to view these as part of the case preparation).
- visit to scene of crime to assist preparation.
- interviewing potential witnesses: particularly where the defence is an alibi such interviewing is necessary if the defendant's interests are to be protected.
- preparing proofs of evidence of witnesses (which is required by the DLA) and confirming with the witnesses that the proofs are accurate and complete.
- conferences with prosecution to try and agree evidence or resolve issues before trial.
- where the prosecution will rely upon confessions or admissions, considering issues of admissibility and attending a parade to enable the defendant to identify which officers he has accusations against prior to Voir Dire: judges usually require this to be done before the first day of trial to avoid delays.
- following up on unused material disclosed by the prosecution to see if full disclosure has been made or whether, by implication, there is further material which should be disclosed.

10. The complexity of the case

The invariable practice is for the DLA to telephone solicitors inviting them to take on legally aided cases. The solicitor is given very little information about the case before having to decide whether or not to accept it. The brief fee is not negotiable. The solicitor must take it or leave it. By taking it the solicitor enters into an open-ended commitment. The assumption at that stage is that the defendant will plead not guilty. Where a defendant pleads guilty at call over in the DC or has pleaded guilty at committal proceedings before a Magistrate and has been committed to the CFI for sentence, the DLA will usually instruct counsel direct.

11. Comparison with instructions to prosecute

11.1 The position of the defendant's solicitor is very different to that of the solicitor who is instructed to prosecute for the Secretary of Justice.

11.2 The solicitor instructed to prosecute receives very considerable help. The case has been prepared before it gets to the solicitor. The prosecuting solicitor will have a team of police to answer any questions, check evidence, make any further enquiries, get witness summonses and serve them. The Officer in Charge of the Case (OC case) is readily available to provide assistance and clarification.

11.3 The defending solicitor does not receive any assistance but starts completely from scratch: another example of the inequality of arms between the prosecution and the defendant.

11.4 This disparity of approach could be viewed as a deliberate failure to address the inequality of arms issue and is relevant to arguments that the legal aid system as it now operates is not consistent with Article 35 of the Basic Law.

12 Attendant problems of the Set Fee approach

The solicitor assigned to represent a defendant in the CFI or in the DC or on an appeal to the CA or to the CFA may do considerable work and, in the event, not even receive the set fee. In other situations the fee paid to the solicitor does not reflect the work done or the overall costs saving of that work. This can arise in a number of situations.

12.1 *Losing the client*

Defendants in criminal cases often have unrealistic expectations of what the solicitor can do for them. They are variously demanding, concerned, argumentative, in denial, confused and sometimes aggressive. A solicitor may do considerable work, only for the defendant to find the money for private representation near the trial. The solicitor acting under legal aid certificate must then hand over the complete file to the new solicitor. The legally aided solicitor will not receive anything for the work done under the legal aid certificate. Rule 21 only provides a brief fee. As the case has not yet reached trial, no fee is payable under the certificate. The privately instructed solicitor then gets, free of charge, the benefit of all the work done to date.

12.2 *The absconding client*

Defendants fail to appear for trial for a number of reasons. Again a considerable amount of work may have been done. It may be that the defendant will eventually attend court and the

solicitor will receive the set fee and, where appropriate, the daily fee. However there is an element of uncertainty about this and in any event the solicitor has to wait for payment. Similarly where the defendant dies before trial, there will only be a short court appearance to formally dispose of the charge or charges. The set fee may well not reflect the work that had actually been done in anticipation of a not guilty plea. This situation may be alleviated somewhat if the Court can be persuaded to grant a certificate of complexity as discussed below in paragraphs 14 to 14.5 but there is no certainty about that.

12.3 ***Pleading guilty***

It is not unusual for the defendant who has steadfastly protested innocence to plead guilty at trial. There may be a variety of reasons for this. The plea may be after sound advice from the solicitor based upon enquiries the solicitor has made from potential witnesses, from a weakening of resolve as the trial date approaches or from a belated acceptance of guilt. In that event, however much work has been done, the solicitor only receives the set fee, unless the Court can be persuaded to grant a certificate of complexity. Unless that is done no account is taken of the work which underpins the advice to plead guilty. No credit is given for the resultant saving of court time and public money.

12.4 ***Additional Evidence***

Sometimes the guilty plea follows upon notices of additional evidence served by the prosecution. This additional evidence may strengthen the prosecution case to such an extent that the defendant is left with little option but to plead guilty to at least secure a worthwhile reduction in sentence. By that time considerable work may have been done by the solicitor. That work is wasted because of the failure of the prosecution to get its case in order early enough for the defence solicitor to have the full picture: another example of inequality of arms. It is illogical in that situation that work which has been wasted through no fault of the defendant's solicitor should not be properly remunerated. A certificate of complexity might be obtained, but again there is no guarantee. It might be interesting to speculate upon opportunities that might be presented by the Costs in Criminal Cases Ordinance, Cap. 492 to the defendant who is privately represented in that situation.

12.5 ***Reducing or Dropping the charge***

It is not unknown for the prosecution to drop charges before the trial date for a variety of reasons. If the charge is not dropped completely it may be reduced, for example from an attempted murder to a wounding with intent, which may bring about a guilty plea. These situations will now be examined

12.5.1 Private Counsel may be briefed and might take a different view of the strength of the prosecution case. Private Counsel is generally not briefed until relatively close to the trial date, by which time the defence will have done most of its work. The defence cannot afford the luxury of waiting until trial counsel is appointed before preparing its case: to do so would be unprofessional and negligent. Again, unless a certificate of complexity is granted, the legal aid solicitor only receives the set fee. Work that has been properly and necessarily done is not remunerated. Again this presents as an invidious situation and one brought about by the failure of the prosecution to get its house in order early enough.

12.5.2 There may be an offer to plead by one defendant which leads to the prosecution not proceeding against other defendants. The charges may be dropped because the solicitor has negotiated with the prosecution or an offer of a plea to a lesser charge might be accepted. Again the defence solicitor is disadvantaged by the invariable practice of the prosecution not briefing out prosecutions until relatively close to the trial date. Until trial counsel is appointed there is a marked reluctance on the part of the prosecution to negotiate with the defence. Even where Government Counsel will prosecute, trial counsel is assigned only relatively close to the trial date. Until then the prosecution case is controlled by preparation counsel. Preparation counsel is, understandably, reluctant to take responsibility for discussing pleas or other arrangements which might shorten the trial.

12.5.3 The non-appointment of trial counsel until relatively close to the trial date is a handicap to what otherwise could be meaningful negotiation between the defence and the prosecution. New information may have come to light which undermines the prosecution case. It is often in the best interest of the defendant to reveal this to the prosecution in advance of the trial as this might avoid a trial altogether. Indeed this would be consistent with the professional duty to the defendant and the duty to protect public funds. Again, unless a certificate of complexity is obtained only the set fee will be paid.

12.5.4 Where the defence is an alibi, particulars of that must be given to the prosecution before the trial. The prosecution may find the alibi is unbreakable and drop the charges. Unless a certificate of complexity is obtained only the set fee will be paid, irrespective of the amount of work done and irrespective of the overall saving of costs.

13. The Contested Case

No two cases are alike but this section of the Paper sets out some of the matters that will need to be addressed when preparing the defendant's case.

13.1 ***Reading the Paper and Viewing the exhibits***

The prosecution papers must be read before sensible instructions can be taken from the defendant and informed advice given. The prosecution case may be extensive. There may be a considerable quantity of paper exhibits all of which must be read and absorbed if the defendant is to be properly represented. Particularly where the prosecution is relying upon surveillance evidence it will be necessary to view videotapes. These tapes should first be viewed without the client being present to enable the solicitor to form a detached view. The defendant will then be interviewed and shown the video by the solicitor so that instructions can be taken. This assumes that the defendant is on bail. More complications arise where the defendant is in custody.

13.2 ***Taking instructions***

Once the prosecution papers have been read and all exhibits have been viewed, instructions must be taken from the defendant and any defence witnesses.

13.2.1 Witnesses must be interviewed separately and in the absence of the defendant to guard against concoctions and tailoring of evidence and the potentially adverse consequences this could have for the defence case.

13.2.2 Interviewing and proofing witnesses can take up considerable time. Witnesses are, understandably, not able to take time of work to be interviewed: they have to be located and interviewed at their convenience. Proofing witnesses is not the sort of work that can necessarily be delegated to e.g. a trainee solicitor or a junior clerk.

13.3 ***Alibi defences***

This may entail the solicitor undertaking quite considerable work attempting to verify the claimed alibi. Each potential alibi witnesses must be interviewed separately and in the absence of the defendant. Any other procedure is to risk concoction and tailoring of statements with potentially disastrous consequence at the trial. Once all the alibi witnesses have been proofed, the defendant's instructions have to be taken. The defendant must be advised on any issues which arise. If the alibi defence is to proceed, particulars of the alibi must be prepared and served upon the prosecution in advance of the trial.

13.4 ***Expert witnesses***

Expert evidence will often be needed. There may not be a suitable expert within Hong Kong. Time and effort will be expended in locating the expert. The expert then has to be sufficiently briefed so that they can give an opinion. That opinion must then be discussed with the client and with counsel. If the expert is to give evidence at the trial, a work visa will be needed. The

solicitor must attend to that.

13.5 ***Conferences***

Counsel will require at least one conference before the start of the trial. Where expert evidence is involved or the case is complex more than one conference may be necessary. For a variety of reasons the solicitor will need to attend those conferences: indeed counsel may require that attendance.

13.5.1 Apart from the most routine situation, attending counsel at conference cannot be left to trainee solicitors or inexperienced support staff. Allied to conferences attended by counsel, it will generally be necessary to see the defendant several times during the case preparation. If the defendant is in custody there are the attendant difficulties and expenditure of visiting the defendant.

13.5.1 It is worth noting here that Rule 21(f), (g) and (h) provides for additional fees for conferences to be paid to counsel over and above their set fee. The absence of a similar provision for solicitors is anomalous.

13.6 ***Amending charges or serving additional evidence***

It is not unknown for charges to be amended. This can entail considerable extra work for the defence solicitor. Similarly the prosecution may serve Notices of Additional Evidence before the trial. In either event work that has been done may be adversely affected or more work has to be done. Again, through no fault of its own, the defence is put to additional effort and expense. Unless a certificate of complexity is granted only the set fee (and any daily fee) is payable,

14. Certificates of Complexity

The trial judge can grant a certificate of complexity under Rule 21(2) and (3). That certificate enables the DLA to increase the fee payable under Rule 21(1) (a) by such amount as appears to be proper in the circumstances.

14.1 The solicitor must make the case for a certificate of complexity. There is no set criterion for the grant of a certificate of complexity. Essentially it depends upon the view taken by the trial judge based on events in the courtroom. Judges will generally have little or no appreciation of the preparation wok involved. What may, in fact, have been a complex case during the preparation for trial may not appear complex to the trial judge because the quality of the preparation (and co-operation between the defence and the prosecution) enabled the trial to

run smoothly. The more smoothly the trial runs, the less complex it appears. Absent a detailed consideration of the solicitor's file, and there would be obvious problems with the trial judge seeing the file, the trial judge will not have any worthwhile appreciation of the work done. The irony is that a certificate of complexity could be refused because the quality of the preparation anticipated and addressed in advance possible complications at trial.

14.2 There is no appeal from the refusal of the trial judge to grant a certificate of complexity.

14.3 Even if a Certificate of Complexity is granted, the DLA is simply given discretion to allow fees above the Rule 21 levels. There is no obligation upon the DLA to exceed the payments set out in Rule 21. If the DLA decides to exceed the payments set out in Rule 21, the practice is to pay an increased brief fee. This is arbitrary and takes no account of work actually done. Any increased brief fee or daily fee is on a take it or leave it basis.

14.4 There is no appeal from the refusal of the DLA to award fees above the levels in Rule 21.

14.5 Rule 21 (2) in any event imposes a high standard as the reference is to exceptional length or complexity. It is suggested that this is too high a standard and is, in any event, in conflict with Rule 21(1) which refers to work actually and reasonably done. A case which is not of exceptional length and complexity may well merit an additional payment to the solicitor where professionalism and expertise has brought about an overall saving of costs.

15. Work after conviction

It is the professional responsibility of solicitor and counsel to see the defendant after conviction and give preliminary advice on the prospects of an appeal.

15.1 Rule 9 imposes additional duties on the solicitor acting under a Legal Aid Certificate. The solicitor must provide the DLA with a certificate stating whether there is or is not a reasonable ground for appeal and, if there is settle the grounds of appeal and if the legally aided person proposes to appeal, give notice of the appeal or of an application for leave to appeal and attend to any matter preliminary thereto. This is very much an open commitment for which the solicitor is not remunerated.

15.2 The DLA will only grant a legal aid certificate under Rule 11 upon being satisfied that legal aid should be granted. The work referred to in Rule 9 must be done before the DLA considers the application for an appeal aid certificate. The relevant Practice Directions on appeals to the CA and to the CFA, annexed to this Paper as ***Appendix 8***, must be complied with.

Quite extensive work may need to be done, and done quickly, to protect the interests of the convicted person without any remuneration for the solicitor concerned. A further anomaly is that the solicitor who does all this work may not be assigned the appeal.

16. Appeals to the Court of Appeal (CA)

The amount of work that needs to be done will vary from case to case. A solicitor acting under an appeal aid certificate may be confronted with unanticipated, complex and time consuming issues: for example the admissibility of new evidence or issues arising from an apparent failure by the prosecution to disclose relevant unused material in advance of the trial. Whilst a certificate of complexity can be granted by the CA, this is not usually done.

17. Appeals to Court of Final Appeal (CFA)

17.1 There is little in the Rules about appeals to the CFA. Rule 13 refers to appeals to the CFA but only in relation to proceedings involving charges of murder, treason or piracy with violence. There is no mention of the CFA in Rule 21. Appeals lie to the CFA in criminal cases only where "*a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done*". By implication these are complex and involved cases. The CFA is not simply a second Court of Appeal.

17.2 .In practice the DLA contacts the solicitor and offers a fee for preparation and daily refresher. This is again an open-ended commitment. Professional responsibility will likely result in the solicitor accepting instructions because he or she represented the appellant in the court or courts below. Again the fee may well not cover the work that has to be done. The incongruity of CFA appeals being inadequately funded and the element of pro bono work that is consequentially required should be obvious.

18. Unexpected work on Appeals

Appeals are often, or may become, complex. This will be particularly so in appeals to the CFA given the requirements that have to met before the CFA can hear an appeal. Even in what may be termed routine appeals there may, for example, be several appellants, all of whom may be legally aided. For perfectly good reasons separate representation may be essential if individual interests are to be protected. In such cases appeal courts have been known to order the preparation of a common bundle of authorities rather than each party producing its own bundle. That order may well be advantageous to the court but the burden of preparing that bundle will

almost inevitably fall upon the lawyers for the First Appellant. This results not only in additional unremunerated extra work but the incurring of additional costs of photocopying the necessary documentation. In other cases complex issues of the admissibility of new evidence may arise. Even with a certificate of complexity work actually, reasonably and properly done may not be remunerated

19. Legal Aid and the Costs in Criminal Cases Ordinance Cap. 492, (CCCO)

The CCCO brings awards of costs in criminal cases in line with the award of costs in civil proceedings. Though orders for costs are discretionary, costs should follow the event. Costs may be awarded against the prosecution or against the defendant. Those costs are not to be punitive but "*shall be such sums as appear to a court or a judge reasonably sufficient to compensate any party to the proceedings for any expenses properly incurred by him in the course of those proceedings, including any proceedings preliminary or incidental thereto*".

19.1 The Ordinance contains various provisions about the calculation of costs, but the recurrent theme is that costs shall be such sum as a court or a judge considers just and reasonable. Account is therefore taken of the work done in the particular case. Provision is made for the taxation of costs. Where an order for taxation of costs is made, costs in the magistrate's court and in the District Court are taxed by the Registrar of the District Court. Where an order for taxation is made by a judge or by the Court of Appeal, those costs shall be taxed by the Registrar of the High Court.

19.2 The principle that costs under the CCO should be "*such sums as appear to a court or a judge reasonably sufficient to compensate any party to the proceedings for any expenses properly incurred by him in the course of those proceedings, including any proceedings preliminary or incidental thereto*" recognises that there should not be any upper limit on awards of costs and that costs should depend on the quality and necessity of the work actually and properly done in the particular case.

19.3 The CCO has put in place a sophisticated structure for the assessment of costs in criminal cases. That sophistication and the recognition that costs are compensatory is in sharp contrast to the arbitrary and restrictive approach to fees under the Rules. There is an apparent, and serious anomaly.

20. Analysis

The matters addressed in this paper underline the need to give immediate and thorough attention to the question of how legally aided criminal defence work is resourced. The present

system of a set fee and daily fees does not adequately remunerate those who engage in this work. This has serious implications for the criminal justice system. There is a public interest in criminal cases being conducted professionally, efficiently and expeditiously. Legal aid defence is becoming, if indeed it has not already become, a pro bono exercise. The criminal legal aid scheme is funded by the practices of the lawyers assigned to represent the legally aided defendant. In short Hong Kong has a criminal legal aid system on the cheap. The question is how much longer that approach can continue.

20.1 Over the last five years Hong Kong has undergone a period of deflation during which prices have either dropped or remained constant. Indications are that that situation is now changing. There are reports of rents in Central District increasing by over 30% in the last 12 months. Clearly, as is evidenced by 40.96 percent increase in Stamp Duty revenue over the amount in 2003-4, the property market is active. Interest rates are rising. Pressures are building up for wages and salaries to increase. On 10th May 2005 the SCMP carried a report of a landlord in Central raising the rent of a business premises from $38,000 per month to $80,000 per month. The revenue from both salaries and profits tax for 2004-05 has increased by some 20% over 2003-04. Inevitably costs will rise.

20.2 If the criminal justice system is to continue to operate, solicitors must be sufficiently well remunerated that they remain in practice. The current proposal to reduce legal aid fees is unrealistic and illogical against the anticipated all around increase in costs.

20.3 Hong Kong, rightly, takes pride in the rule of law and the openness and fairness of its society. The criminal law brings the citizen into contact with the State. It is therefore a matter of self-interest for the State to ensure that those who are brought before the criminal courts are properly and professionally represented so that justice is seen to be done. That is indeed the spirit of Article 35 of the Basic Law. An efficient and effective criminal legal aid system is fundamental if that spirit is to be adhered to.

21. Suggestions

A number of possible solutions may be considered.

21.1 *Increase the daily fee and the refresher.*

Attractive as this might seem, it is not the answer. It would simply perpetrate the present arbitrary and unsatisfactory system and perpetuate an upper limit on fees. The objective must be to achieve the most effective use of resources by looking at the criminal justice system as a whole. This means taking account of savings that will follow from more efficient use of court

time, more attention to pre-trial considerations and improvements in prosecution practices. Essentially what needs to be achieved is a system that rewards efficiency and excellence so that there is an overall saving of resources. How then might this be achieved?

21.2 ***Assess remuneration "having regard to the work actually and reasonably done"***

Implementation of this principle would, it is suggested, result in a merit based approach to remuneration. Hourly rates for different types of work and for different categories of fee earners might be used as a guideline but the overall approach would be based upon efficiency and upon excellence. The nature and complexity of the case and the way in which it was dealt with by the assigned lawyer would dictate the remuneration.

21.3 ***How might this be achieved?***

There is a long established system of taxation of costs in civil litigation. There is now a taxation process in criminal litigation under the CCO. This system is close to the system of taxation of costs in civil litigation. Whilst costs normally follow the extent, the taxation system enables successful parties to recover only such costs as they can justify to the taxing officer. This makes it incumbent upon solicitors to keep careful records of work done and, more important, to justify that work and the way in which it was done to a taxing officer. The taxing officer is a professional, an officer of the court and is independent of the parties.

21.4 The machinery for taxation of costs in criminal cases under the CCCO could be used to assess remuneration under a legal aid certificate. This would have the merit of tapping into an established system. It could also lead to a unified approach to costs and fees throughout criminal litigation. The legal aid solicitor would put in an itemized claim to the DLA. The DLA could accept that claim or not. If the claim was not accepted then there would be taxation. This would leave the solicitor to justify the claim to the taxing officer. This would bring both transparency and the remuneration of work actually and reasonably done.

21.5 The debit side of going to taxation is that the process can be lengthy. Cash flow is an important consideration and it would be appropriate to consider how taxation procedures might be improved. One possibility might be for a basic payment to be made either when the solicitor is assigned or upon the completion of the trial. A basic payment when the solicitor is assigned would at least go some way towards alleviating the problem of the defendant who arranges private representation shortly before the trial.

21.6 *Extra Resource Implications.*

Almost inevitably a taxation system will lead to solicitors being more appropriately remunerated than they now are. There will however be costs savings to offset that increase. Cases will likely be dealt with more efficiently. There will be some additional taxations but it is not thought that this will overload the existing machinery. The premium will be upon the solicitor justifying what has been done. Any views expressed by the trial judge could be taken into account on taxation. This would be particularly relevant where an apparently complicated or lengthy case has been shortened because of the way it has been dealt with.

21.7 *Practical Considerations.*

Abolition of the daily fee and refresher fees in favour of remuneration on a work actually and reasonably done basis will impose additional burdens upon solicitors. Work that is not actually and reasonably done will not be remunerated. This places a premium upon excellence, professionalism and accurate record keeping. As the claim for costs will only come to the taxing officer if there is disagreement, the views of the DLA about the requested costs will be before the taxing officer and will be the starting basis for the taxation. Work that is not justified to the taxing officer will not be paid for. This is certainly not the creation of an open cheque for solicitors. The disallowance of costs is a powerful sanction. Incompetence or attempts to claim for work that has not been done that might be revealed on a taxation could lead to action by the Law Society, by the DLA removing the solicitor (and perhaps their firm) from the Panel of Solicitors kept under Rule 3(1) or, where appropriate, by criminal proceedings.

21.8 *Orders for Costs*

Under the CCOO costs are at the discretion of the court. As a general principle, costs will follow the event. Where a legally aided defendant is acquitted, the practice is not to award costs, other than the amount of any legal contribution, upon the basis this would simply be a transfer of funds from one Government Department to another. It might be appropriate to re-visit that approach. If the solicitor appointed under a legal aid certificate is to be paid on the basis of work that was necessary, might it not lead to an overall increase in efficiency if upon an acquittal of a legally aided defendant the prosecution were ordered to pay costs. This might entail, for example, the prosecution putting its mind to accepting an offer of a plea to a lesser offence at an early stage in the proceedings. Again there would be an overall saving of costs

22 Conclusions

This paper has shown there are serious deficiencies in the present criminal legal aid scheme. In essence the present scheme does not recognize work properly and efficiently done. It does not reward excellence. It is, in short, a criminal legal aid scheme on the cheap.

22.1 The scheme has only continued because of the professionalism and responsibility of those solicitors who are prepared to take on what is effectively pro bono work. This is a situation which cannot be allowed to continue. As Mr. Philip Dykes SC Chairman of the Hong Kong Bar Association in his address at the Opening of the Legal Year 2005 observed, the adequate remuneration of those engaged in legally aided defence work is a genuine rule of law issue. Though he was addressing the issue from his position as Chair of the Bar, his remarks are no less apposite to the remuneration of solicitors who undertake criminal defence work for legally aided clients.

22.2 Reference has already been made to the EHCRs censure of the United Kingdoms failure to afford legal aid in defamation proceedings to defendants who were without means. The non-availability of legal aid had deprived those defendants of the opportunity to present their case effectively before the trial court and "contributed to an unacceptable inequality of arms" with the plaintiffs. All that was in the context of civil litigation. There is an even greater need to address inequality of arms in criminal litigation. An essential element in addressing that inequality is the adequate remuneration of lawyers engaging in criminal legal aid work.

The Law Society of Hong Kong
1 June 2005

APPENDIX 1

John Mullick
5th Floor, Nine Queen's Road, Hong Kong

Miss Joyce Wong,
Director of Practitioners Affairs,
The Law Society,
3rd Floor, Wing On House,
71, Des Voeux Road,
Hong Kong.

4th December 2002

Dear Miss Wong,

Re: Legal Aid Reform – (Criminal Cases).

I am a member of the Bar Association's Special Committee on Legal Aid Reform. We have been holding several meetings, usually at monthly intervals, to consider ways and measures to improve the legal aid system in both civil and criminal litigation. I believe that contact has been made between Alan Leong, our Chairman, and Patrick Moss on the issue. We have also appeared before a Committee of Legco, which is very much concerned to reform certain aspects of legal aid.

My principal concern on our Committee is to deal with legal aid in criminal proceedings. To this end I have written a paper, which has been endorsed by the Special Committee. The Special Committee also considers it to be sensible for both professions to adopt a 'joint' approach' to the problems of legal aid in criminal proceedings. We are not principally concerned in raising the level of fees, but rather to restructure the system itself, so that it can made fairer and better able to meet the aspirations of the public and the legal professions.

I would be very grateful if you could arrange to have my paper placed before your Criminal Law and Procedure Committee for its next meeting, which I understand is to be held on the 6th January 2003.

I you have any queries please contact me at your earliest convenience. On our part we would like to place our proposals for reform in criminal legal aid before the Criminal Procedure Rules Committee, which is chaired by the Chief Justice.

Telephone: 2521 6338 email: johnmullick@johnmullick.biz.com.hk Fax: 2868 4194

I am the nominated member for the Bar on that Committee. I would be grateful if you be so kind as to advise me who the Law Society's representative is, so that I may communicate directly with him/her.

If we can get everything in place, I would like to be able to requisition a meeting of the Criminal Procedure Rules Committee sometime in the Spring of next year.

I enclose a copy of my paper.

Yours sincerely,

John Mullick.

Enclosure: One (1).

LEGAL AID IN CRIMINAL CASES.

A PAPER.

(The subject of this Paper is the operation of legal aid in criminal litigation, in so far as it affects members of the Bar Association).

1. *INTRODUCTION.*

1.1 From the 1950s until 1970, legal aid in criminal litigation was provided by the judiciary on an *ad hoc* basis. An indigent accused or appellant could apply to the trial or an appeal judge for legal representation, the cost of which would be funded by the Registrar of the Supreme Court. Between 1967 and 1970, legal aid in both civil and criminal litigation was administered through the agency of the judiciary. The first administrator was a district court judge. This was not intended to be a permanent arrangement. In 1971, the Legal Aid Department, ("LAD"), was created, with its own Director. The **Legal Aid Ordinance, Cap. 91**, ("LAO"), had already been promulgated in 1966, it came into force at the beginning of 1967. The purpose of this Ordinance was and always has been to *"make provision for the granting of legal aid in civil actions to persons of limited means and for purposes incidental thereto or connected therewith"*.

1.2 In 1969 the **Criminal Procedure Ordinance, Cap. 221**, ("CPO"), was amended to introduce section 9A. This provision enabled the Criminal Procedure Rules Committee, ("Rules Committee"), to make rules providing for the granting and administration of legal aid in the criminal courts. These rules were given the name of **Legal Aid in Criminal Cases Rules, Cap. 221**, ("The Rules"). The Rules came into force on the 1st January 1970.

1.3 Though there is no statutory provision to this effect, the Judiciary relieved itself of the responsibility of administering criminal legal aid. Instead, The Rules invest the management and administration of criminal legal aid in the DLA. The funding of legal aid fees in criminal litigation is an item in the budget of the LAD. Whereas, according to section 9A(2) of the CPO, the expenses of legal aid granted under The Rules *'shall be met from moneys provided by the Legislative Council"*. In a real sense the DLA acts as the agent of the Judiciary, when disbursing fees and costs to legal practitioners in legally aided criminal litigation. On the other hand, The Rules can be re-cast, amended or otherwise altered by The Committee with the approval of the Legislative Council.

1.4 The Rules Committee, has a complement of eight persons, chaired by the Chief Justice. The Rules Committee include representatives from both the Bar and the Law Society, as well as the Judiciary and the LAD. At the present time, the writer is the Bar's representative. In their form and substance The Rules have changed little during the last thirty years. The system, whereby legal aid is granted in criminal litigation is hermetic: it is entirely self-contained.

2. *THE RULES.*

2.1 These Rules invest the DLA with a number of functions and duties. Some of which are relevant to the subject matter of this Paper. They are listed below:

(i) Rule 3: the DLA is required to "prepare and maintain separate panels of counsel and solicitors".

[Note - by Rule 3(3) counsel or solicitor may restrict the number and type of assignments he is willing to undertake in a given year. The DLA must make an entry to this effect on the appropriate panel. There is no provision in these Rules, or elsewhere, which suggests that the DLA can, unilaterally, restrict the number of assignments he may make to a counsel or solicitor. This is a practice, which the LAD has introduced in recent years. The legitimacy of this policy is questionable.]

(ii) Rule 3(4): the DLA may not include the name of a counsel or solicitor if he is satisfied that good reason exists to exclude him from the Panel.

(iii) Rule 5: an application for legal aid shall be made to the DLA.

(iv) Rule 6: the DLA shall be responsible for determining whether or not a person is entitled to receive legal aid and, if necessary, on what terms, (such as the payment of a financial contribution).

(v) Rule 7: if the DLA is satisfied that a person should have legal aid, the DLA shall grant him a legal aid certificate.

(vi) Rule 21(1): *"Solicitor and counsel fees"*. (This rule has been the cause of more dissatisfaction to the legal profession than any other).

(a) By this Rule the DLA is invested with the responsibility to assess and make payment of fees to counsel and solicitors for *"the work actually and reasonably done...."*

[*Note: The effect of this phrase/formula, which was borrowed from the Legal Aid Act of 1968 (UK), has been used by the LAD to justify paying less or nothing for 'lost days', aborted hearings owing to cancellation of a fixture, days lost because of pleas being accepted by the court and where the prosecution has been withdrawn. No pre-trial payments of fees can be made. Other examples can be provided of the deleterious effect of these words. This phrase is the grounding principle upon which legal aid fees are paid in criminal litigation. It has created inflexibility and rigidity in the thinking of the LAD. However, during the last 15 years or so, in the United Kingdom, a number of reforms have been introduced to mitigate the more adverse effects of this formula.*]

(b) The provisions enabling the DLA to make payment of fees in civil litigation are much simpler, and perhaps fairer. That is, by sections 20 and 20A of the LAO, the DLA will pay fees, in the absence of agreement, on taxation by a taxing master.

(c) The quantum of what the solicitor or counsel will be paid in civil litigation will be decided by the taxing master, acting in accordance with the principles and scales contained in Order 62 of the Rules of the High Court. There is a right of appeal, should the solicitor or counsel be dissatisfied with the quantum of taxation.

(d) It should not be forgotten that though the assessment and payment of fees in criminal litigation is delegated to the DLA, the setting of maximum levels of fees is not. Moreover the DLA has no authority to create his own fee structure, he is no more than one member of the Rules Committee, which is required by statute to provide for the payment of fees to solicitors and counsel. In fact there is nothing in section 9A, of the CPO to suggest upon what basis or bases the quantum of fees should be assessed. The "maximum fee" payment system has prevailed from the very beginning.

(g) On every occasion the exercise has proved to be fruitless. The Finance Branch fiat ruled. The maximum fee level, apparently tied to the prospective rate of inflation. The argument, that fees paid for criminal legal aid work had always been inadequate has been acknowledged by the LAD, though not by the Administration. As far as the writer is aware, no direct approach was ever made to the Rules Committee by the Bar. It was effectively by-passed. At the same time, it should be recognized that if a direct approach had been made, the Rules Committee might well have had to refer the matter to the DLA or another government agency for their responses and input. That being so, it still remains the statutory duty of the Rules Committee to make the decision and then refer it to LEGCO for approval.

(h) There should exist the opportunity for debate within the Rules Committee as to what adjustment, if any should be made to legal fees and costs. What is more important, perhaps, is to recognize that the time has come to question the whole basis upon which legal aid fees in criminal litigation are assessed and paid. It is the responsibility of the Rules Committee to make the decision not the DLA or the Administration.

(vii) Rule 21(1) sub-rules (a) to (p): sets out a table of maximum fees, which can be paid for any given piece of work as referred to therein.

(e) It is the understanding of the writer that the Rules Committee, for many years, has played little if any part in the setting of fee and cost levels. Over the last decade (that is until 1997), there had been "Biennial Reviews" of fees. This is an exercise, which has been entirely managed by the Administration. The maximum fee levels were adjusted upwards on a percentage basis, which was linked to the Consumer Price Index (B). The last general review was in 1997. In 1998 fees for High Court trials and Appeals were reviewed. Fees, in real terms, have not risen for twenty years. The net effect of this historical process is that the level of fees paid for criminal legal aid work has progressively fallen behind those, which are paid for privately funded work.

(f) It seems that these index-linked adjustments are calculated by the Finance Branch, in cooperation with the DLA and the Secretary of Administration. The relevant provisions of Rule 21(1) are then amended and placed before the Finance Committee of LEGCO for its formal approval. The Rules Committee has not, for many years, played any meaningful role in this process. Yet, the Rules Committee is not entirely to blame for this situation. During the last ten years or more, the Bar has drawn up submissions, to be made to the Finance Branch and the LAD for an appropriate upward adjustment of fees. Sometimes, more radical proposals had been made.

(a) Not all work performed by a lawyer in the conduct of a trial or appeal is catered for by these sub-rules. For example, no fee can be paid for preparation work or reading work, or advising on evidence, or the drafting of skeleton arguments and the like. The answer often given by the LAD to such complaints is that 'it is all allowed for in the brief fee'. With respect this is simply not correct. For example, the same brief fee would be paid for a like case, (such as murder), irrespective of whether or not the trial papers, accompanying the brief are 100 or 1000 pages. Like observations can be made for appeal work. The maximum fee payable for drafting Perfected Grounds of Appeal is HK$2830. Low as it is, this fee makes no allowance for reading and research. In fact, criminal appeals are so poorly paid that few senior junior counsel are willing to undertake the work. In recent years, the responsibilities of counsel, in presenting and conducting criminal appeals, have been enlarged. He is required to present detailed grounds and to provide written submissions for the appeal. No allowance for this additional work is provided for in the sub-rules. At the same time, there is no guarantee that appeal counsel will conduct the appeal. It is not unusual for the lay client to "go private" before the appeal is heard. The DLA will not pay his brief fee or the work done in preparing the written submissions. All that appeal counsel is 'entitled' to receive, according to the sub-rules, is the fee for settling the Perfected Grounds of Appeal.

(b) These sub-rules, in keeping with many other provisions of the Rules, are quite primitive and do not fit well into an increasingly sophisticated system of criminal litigation. In fact the sub-rules are rigid and inflexible in their application.

(c) The quantum of any fee paid, as stated in the sub-rules, is what *"appears to the Director to be proper in the circumstances"*. Thus all fees for criminal legal aid work must be assessed after the work has been done. Counsel will accept a brief without having more than a sketchy idea of how much he will be paid. The DLA has never revealed how and on what 'principles' or criteria a fee is assessed. Some years ago, the then DLA did provide a table to the Bar Association, which in broad terms set out bands of the maximum fees, which would be paid, according to the nature and seriousness of the case. In other words, the maximum fee paid for a robbery would be less than that paid for a murder. Regard was also paid to seniority of counsel. This, albeit pallid, attempt at openness has not been repeated. The process and principles/policy, governing the assessment of fees is shrouded in mystery. In modern jargon, the process lacks transparency. For example, in recent years, refresher fees have been cut back. Quite often the full refresher will not be paid, on the ground that the proceedings only occupied part of a day, irrespective of the reason why the hearing went short.

(d) Until about three years ago counsel would receive a full refresher for the Pre-Trial Review, (PTR). This no longer applies. There appears to have been a decision made by the DLA, in recent times, to the effect that fees for PTRs should not exceed 80% of the daily refresher. This fee, it is claimed, is paid for preparation. If that be the case,: why cut it down? It is noted that there is no provision in The Rules to permit the DLA to pay a fee for the PTR.

(e) In fact, for trial work, the fees presently paid are often less than what would have been received 3 years ago. It is probable, that the LAD, like other government departments, has had to cut back on its expenditure, in keeping with the Administration's policy of retrenchment.

(f) Other than requesting the DLA to reconsider his assessment, there is no appeal. This absence of any objective reconsideration of fees assessed has particular relevance to those cases where the trial judge or appeal court has granted a certificate of *"exceptional length or complexity"*. This is because when a certificate is granted there is no maximum limit to the fees, which can be paid by the LAD.

(viii) Rule 21(2) and (3): these sub-rules allows a trial or appeal judge if, in his 'opinion', the case *"is of exceptional length or complexity"* to issue a certificate to this effect. It is likely that this provision was introduced as a concession to the generally held view that fees paid for criminal litigation were inadequate.

(a) It is submitted a judge should not be placed in the position to influence the fee paid to the advocate. Such a situation is fraught with danger. The judge is being placed in the position of deciding what fees should be paid to advocate. This should not be his function.

(b) Different judges have differing views of what is meant by the phrase *'exceptional complexity'*. A judge may not be aware of the full extent of the work done by the advocate/lawyer. He may not be aware that a trial has been shortened by the efforts of the advocate in out of court preparation and negotiation. Some judges apply a very restricted interpretation of this phrase; others take a broader and more flexible view. An element of the unknown is introduced into the equation: the process assumes the character of a lottery.

(c) It is the considered opinion of the writer that the phrase *"exceptional length"* is virtually meaningless.

(d) If a trial is set down for a given length of time, it may often overrun. At the Pre-Trial Review the judge will ask counsel for their estimate of the potential length of the trial. Counsel will do their best to assist the judge. Unfortunately, many unforeseen factors may intervene during the trial; more evidence may be introduced, the client may change his instructions, thus prolonging the duration of the trial. It is the recent experience of trial counsel that judges have become more reluctant to certify that a trial is of exceptional length. The response to an application by counsel is that as he gave the judge an estimate of the likely duration of the trial he only has himself to blame for the overrun. Another factor, which may now have a much greater influence on the mind of the trial judge, is the policy of 'case management'. Judges are now under pressure to ensure that 'no time is wasted' in trials.

(e) At one time, there appears to have been an unspoken rule that if a trial were to run for more than 25 days, this would be sufficient qualification for a certificate of length. This no longer applies, (if it ever did). There are no discernable principles as to what is meant by *'exceptional length'*. Very often a long trial may also be complex. Thus a certificate of complexity would subsume one of length.

(f) Though theses sub-rules allow for an increase in the brief fee and the refresher when a certificate has been granted, it appears now to be the practice of the LAD to enhance the brief fee only. This is contrary to the former practice and ignores sub-rules 21(2)(b) and (3)(b). Thus it would appear that the approach of the fee assessor is to place emphasis on pre-trial preparation than on the trial itself. This change of approach was unannounced and generally serves to reduce the overall fee paid in complex trials. The longer the trial runs the less effect does the enhancement have on the total fee assessed.

(g) The writer believes that serious consideration should be given to questioning the efficacy of these two sub-rules. Should they be retained? If it is the intention to look at the Rules with new eyes there should be no place for these sub-rules. The complexity of a case should be known to an experienced lawyer, (legal aid counsel), from the outset. This is not to overlook the rare occasions when a case can be become more complex during the course of the trial.

(h) The enhancement of fees should be considered by the DLA, without the intervention of the judge. A refusal to enhance, or an inadequate enhancement, can be rectified if trial counsel and solicitors had the right to have their fees taxed by a taxing master.

[Note: In England and Wales, counsel's fees are taxed by the 'appropriate officer' or the registrar of the court. The advocate has the right to have the taxation of his fees 'reconsidered'. The refusal to reconsider the fee can be appealed from to a 'costs judge'].

(i) Then again the formula used in these sub-rules, as elsewhere, is what appears to the DLA to be proper. We need to consider what the word "proper" means in the context of legal aid fees and costs. It is clear that the use of this word is deliberate. It might be useful if the DLA were to be asked to give to the legal profession his understanding of what this word means. Should his understanding take account of such extraneous factors as budgetary concerns? A fair construction of the word "proper" in the context of The Rules should be synonymous with 'reasonable'.

> [*Note: It is likely that the word "proper" in The Rules was borrowed from earlier legislation, and it may owe its origin to the old RSC Order 65 rule 27, (England and Wales), where the phrase "necessary or proper " was used. In Francis v Francis [1955] All E. R. 836, @ 840, Sachs J. concluded that 'necessary or proper' and 'proper' has always been construed as 'reasonably incurred'. He then went on thus:* "Indeed 'reasonable', 'proper' and 'reasonable and proper' are obviously interchangeable expressions in the context under consideration and all include something beyond what is meant by 'necessary'." *In other words, it is submitted that 'proper' means 'reasonable', in the context of The Rules. It is to be noted that the word 'proper' is no longer to be found in Order 62 of the High Court Rules. Indeed, this word is little used in modern legislation.*]

(ix) Senior Counsel: Rule 21 allows the DLA to instruct leading counsel. No maximum is stated for the fees to be paid to Senior Counsel. The rate of fees to be paid is subject to the application of the formula *"as appears to the Director to be proper in the circumstances"*. It is a matter for negotiation. No doubt some leading counsel are better at negotiation, or have more persuasive clerks than others. What fee will be charged is open-ended; there is no limit, subject only to such claims for fees, which would not be acceptable to the notional taxing master.

(a) Whatever fee may be paid to Senior Counsel, it cannot be doubted that it will be several times more than the fee paid to junior counsel; comparing like with like. Very often junior counsel, in trials and appeals, when instructed by the DLA, are opposed by leading counsel, appearing for the Government. It is commonplace for senior juniors to take on work, which in other jurisdictions would be conducted by leading counsel. It is rare for leading counsel to be instructed by the DLA to conduct a criminal trial or an appeal. It is too expensive. There seems to be no logical reason why a scale of fees, appropriate to leading counsel cannot be introduced. The present system, only serves to make it prohibitively expensive to instruct leading counsel. Unfortunately, it is a fact of life that very few leading counsel now make them selves available for legally aided criminal trials and appeals. The question, which must be addressed, is whether there should be such a wide disparity in the fees paid. It is submitted that the Bar should consider supporting the proposition that fees for leading counsel, in legally aided criminal litigation should be specific and tabulated in a published scale, as is the case in the United Kingdom. Another aspect of this discussion is that leading counsel has effectively priced himself out of the market. There is public disquiet over the level of fees presently charged by leading counsel in Hong Kong. In the United Kingdom, the Office of Fair Trading has recently published a report, in which it asks the Bar to justify; (a) why there should be 'silks' system and; (b) if the system can be justified, why should leading counsel be paid so much more than a senior junior counsel.

3. Appeals to the Court of Final Appeal, (CFA).

Rule 21(1)(i) provides for the payment of fees to counsel conducting an application for leave to appeal and the appeal proper in the CFA. This provision first came into existence in 1982. It is the writer's experience, (1986), that his fee was taxed in the office of the Privy Council. However, it is now the practice that all fees for this type of work would be assessed "in-house".

3.1 The DLA is required to pay *"such fees as appears to the Director to be proper in the circumstances."* Thus there is no allowance for taxation. It places complete discretion in the Director. As far as the writer is aware, the LAD has never published a scale of what fees it should pay for work done.

3.2. The basis for the assessment of fees seems to be highly variable and problematical. Sometimes, the fee assessed is simply a percentage uplift of the fees paid for an appeal in the Court of Appeal. Sometimes the hourly-rate method is employed. At present, the hourly-rate is arbitrarily fixed at HK$1130. There is no authority for the setting of this rate. It seems that someone in the DLA decided that this should be the hourly rate, probably by analogy to the maximum hourly rate paid for conferences with the aided client. There are no specifics: it is all very much rule of thumb. It is now nearly four years since the CFA commenced its work. It would appear to be the case that the DLA prefers to let sleeping dogs lie. Or is it simply a desire to keep all the reins in his hands? However, the explanation could be more prosaic: inertia.

3.3 The present situation is wholly unsatisfactory; it must be remedied. Unfortunately, despite some informal suggestions made by the writer in

1996, the LAD has done nothing. This matter has never been raised in the Rules Committee* There should be taxation for such work, by the Registrar of the CFA. This is so in civil appeals. The writer has direct experience of the difficulties in persuading the DLA the pay a 'proper' fee for the work done. For example, the drafting of the Case, let alone the Notice of Motion can be a very complex and time-consuming exercise. It is not without significance that the LAD makes much greater use of juniors in the CFA than it did pre-1997. In those days the DLA, almost exclusively, instructed leading counsel to advise on the merits of an appeal to the Privy Council. It was rare for junior counsel to be solely instructed to conduct such appeals. It is now commonplace in Hong Kong for juniors on the merits and to conduct the appeal proper. In the United Kingdom, legal aid funded appeals to the House of Lords are taxed by the appropriate officer of that tribunal.

4. OTHER ANOMALIES OR INADEQUACIES OF THE RULES.

4.1 A number of anomalies have been created by the inadequacy of the Rules to accommodate the fast moving changes in the administration of the criminal law. As the years pass these anomalies become more obvious and must cause increasing concern. It is with regret that note must be taken of the inability or unwillingness of successive DLAs to address this problem. Again, this lack of response to meet changing circumstances can be put down to inertia. Some of these anomalies are listed below in this Paper; the list is not exhaustive.

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* *It is submitted that the Rules Committee could create a scale of fees and/or taxation principles for CFA work: see Rule 21(1)(i).*

4.2 To put the issue in context, the principal anomalies and inadequacies of the Rules can be described as follows, (they are in addition to those already mentioned):

- No **pre-trial** payment is made for research and reading under The Rules. Payment must wait until the conclusion of the trial. Indeed, there is no provision in the Rules, which allows for any payment for such work, unless a "certificate" is obtained after the trial is concluded. Even then the issuance of a certificate is problematical, it must rest on the "opinion" of the trial judge. It would not be sufficient for counsel to receive advance assurances from the LAD, (which are never given), or the judge, which though encouraging, leaves the last word with the DLA: to assess what he considers to be the appropriate fee.

- If current practice is anything to go by, such preparatory work will not be assessed as a separate item. In a large and complex fraud, which may involve perusing several dozens of box files of documents, taking several weeks to absorb; advising on evidence; and many conferences, not only with the lay client, but with accountants and other experts, nothing can be allowed, until after the conclusion of the trial. The trial may not commence for several months. If there is no certificate, there will be no payment for reading or research or even preparing schedules, PTR statements and general preparation. Payment will be confined to fees for conferences and the PTR hearing and the trial itself. As already mentioned, the quantum of what counsel may receive is left at large. It rests entirely on a post-case assessment, the bases of which are not revealed to him or to anyone else outside the DLA.

- Though this example may be regarded as exceptional, it is by no means out of line with many other cases. In a many-handed trial, (many defendants, for the uninitiated), the quantity of paper can be enormous. In the United Kingdom, there is now what is called "Evidence Uplift", which allows payment for reading the trial papers at so much a page.

  [*Note: In a recent case, which was handled by the writer, the total number of pages of written material came to about 4000. Trial counsel did not even consider making an application for a reading fee, (which can be given in a fiat prosecution), for the obvious reason that The Rules do not allow for such payment. Moreover, experienced counsel did not even consider making an application for a certificate, because he did not believe the case to be 'exceptionally complex'.*]

- No provision is made in the Rules for what have been called "*cracked trials*". A "cracked trial" is one where the proceedings have been brought to a premature end, either before or after the trial has commenced because, generally, (not exclusively), a plea has been accepted or the prosecution has decided not to proceed with the case. In Hong Kong, all that counsel will be paid for is the work "*actually and reasonably done*". This gives the lie to the assertion, often made by the LAD, that the brief fee in part, is payment for preparation. By way of an aside, it is submitted that the word "*reasonably*" does not sit well with a situation, where counsel has lost several days of work and his diary has been compromised, without financial recompense. He receives no payment for lost days. It could be argued that the effect of The Rules, as presently framed, might well encourage the advocate to refrain from sufficiently preparing his case; or to advise his client not to enter a suitable plea; or not to negotiate for a "deal" with the prosecution; or even to 'drag' on the case. There is no incentive in The Rules to

induce the advocate to resolve the issues in a trial more expeditiously.

- No provision is made in The Rules to recompense the advocate, when he has been obliged to return his brief, or the trial cannot commence on the due date, for example, because (a) the lay client has withdrawn his instructions, or (b) his present case has overrun, or (c) the court is not available, or (d) he or his opponent, or the lay client is indisposed, or (e) the lay client has absconded, or even (f) a vital prosecution witness is not immediately available. The list of such adventitious events is endless.

- In such circumstances all the advocate will receive is payment for what he has done, not for what he has lost. In the United Kingdom, there has been some attempt to adjust the legal system to deal with such situations. In Hong Kong the advocate receives no payment for 'lost days'.

4.3 It is submitted that the appropriate body, to which these anomalies and inadequacies – (and any others which may occur to members) - should be addressed, is the Rules Committee.

5. THE "SCOTT" REPORT.

In 1985, the Chief Secretary set up an internal Working Party of the Administration under the chairmanship of Mr. Allan Scott, then Deputy Chief Secretary. The ensuing report of the Working Party came to be known as the "Scott" Report.

5.1 In Chapter VI of the Report, an examination was made of the structure and of the level of fees then paid for criminal legal aid work. In paragraphs 6.4 to 6.12 of Chapter 6 of the Report the Working Party examined the level of fees and, what it termed the *"inadequacies of the criminal legal aid system"*. The Report, in paragraph 6.8, summarised the major criticisms made of the system by the legal profession.

5.2 In particular, reference was made in the Report to three areas of complaint. Firstly, (and most obviously), the fees paid were too low, secondly, there was a lack of any appeal regime against the assessment of fees made by the DLA and, thirdly, the payment of fees was too heavily weighted in favour of court attendance. There was thus a disincentive to conduct adequate preparatory work. None of these complaints has been remedied to date. The authors of the Report, make this statement, at the end of paragraph 68: *"There can be little doubt that time spent properly in preparation can substantially reduce time taken during the trial, and expenditure reduced as a result."*

5.3 In paragraph 6.9 the Report refers to a suggestion that advocates should be paid on an hourly rate, and that he/she should be paid during necessary adjournments. Such a system would encourage skilled advocates to increase their productivity. In Paragraph 6.10 the authors of the Report expressed the view that the criminal legal aid fee structure requires reform, so as to, *"to remedy the inadequacies of the existing system"*. It was suggested that there should be greater flexibility in deciding the fee level and there should be provision for properly remunerating the advocate for preparatory work.

5.4 In paragraph 6.11 it is recommended that there should be a *"procedure for taxation by a Taxation Master of fees claimed by Counsel or Solicitor dissatisfied by an assessment made by the Director of Legal Aid"*. In paragraph 6.12, the authors of the Report note that these matters were not *"specifically"* within the terms of reference of the Working Party. On the other hand it was recommended that they should be referred to the "Advisory Committee on Legal Aid", when it was set up.

5.5 This Advisory Committee was never set up, nor was the Legal Aid Commission: both recommended reforms of the legal aid service made by the Working Party. In fact, save for some marginal tinkering, none of the major proposals of the Working Party ever saw the light of day. One suggestion, in so far as it concerns the assessment of criminal legal aid fees, seems to have been taken on board by the LAD. And that was the need for a more comprehensive case report form, (see paragraph 6.10), which was designed to assist the person responsible for assessing the fees to be better informed as to the work done. Counsel now has extra work to do without it making the slightest difference to the quantum of his fees. (*Should the LAD suggest otherwise, the DLA can be asked to give examples of any increase he may have paid to counsel, because his Report Form was more comprehensive than another, who was in the same case, and doing the same work).* This proposed reform was intended to accompany other reforms suggested in the same paragraph. This is a classical example of a government department picking and choosing those recommendations, which it considers will cause the least expense and inconvenience to itself, thus ignoring the real underlying purpose for setting up the Working Party in the first place.

5.6 What is ironical is that the Working Party was the creation of the Administration of the day; all its members were civil servants, or employed by the Government. The then DLA was a senior member of the Working Party. There appears to have been no registered dissent/s to the Report. Despite such a weighty provenance, the Report had little if any impact on the Administration. In this regard it must be understood that the Administration believes that the legal aid service needs no or very marginal improvement. The recommendations of the Legal Aid Services Council, that the LAD should be independent of Government, were dismissed out of hand in 1999, despite incurring considerable expenditure in commissioning an independent firm of consultants to make a detailed report on the subject. The Bar should be prepared to receive an immediate negative response from the Administration and the DLA to any proposal for reform of the LAD or its practices.

6. BUDGET AND FINANCIAL IMPLICATIONS.

6.1 In very broad terms, any reform to the present system will cost money. It might therefore, be useful to make a brief examination of how much the legal aid system does cost the taxpayer, and would reforms impose an unnecessarily high extra burden on the tax-payer. It is the submission of the writer, which is supported by government statistics that, in real terms, the cost of criminal legal aid has actually fallen during the last 5 years. It is likely that the budget for the provision of criminal legal in the financial year 2001/2002 will be less than the previous financial year.

6.2 To give an historical perspective to this subject, in 1984 the budget for the Legal Aid department was $80 million, allowing for the claw back of costs received by the LAD in its civil litigation, the net cost to the public for legal aid was $60 million. Of this sum $31.5 million was attributable to "departmental expense", (salaries of the LAD staff).

6.3 In 1994/95, the gross total bill for the provision of legal aid in Hong Kong was $376.835 million, (deducting from this sum the item 'costs recovered' and aided persons contributions), the net total was just over $300 million. In the year, 1998/99 the gross total was $741.676 million, (less costs and contributions), the net figure was $485.144. During the same period, departmental expenses, including salaries, increased from $124.766 million in 1994/95 to $211.106 million in 1998/99. In the same six years, the costs, (solicitors and counsel), of criminal legal aid, remained static; on average, about $130 million per annum.

6.4 The approved provision total costs for the LAD for the year 2000-2001, (including salary and departmental expenses: which is $232.425 million), is $951.208. From this figure should be deducted the LAD estimate of revenue, $300 million. The actual revenue could be more and the total costs less. There is a natural tendency for government departments to emphasise costs and diminish potential revenue when creating its budget and seeking financial provision from the Treasury. The total financial provision for criminal legal aid for the same year was $143.400 million. However, it is highly probable that when the figures come in after 1st April 2001, the expenditure on criminal legal aid will be less than this figure and less than the previous year. So far, that is up to the 31st December 2000, only $53.112 million had been disbursed under this heading.

6.5 To summarise: it can be demonstrated that the cost of criminal legal aid to the taxpayer, has fallen during the last 7 years. At the same time, the cost of running the LAD has increased substantially. It should be noted that "departmental expenses" do not include office rent and pensions.

6.6 It is the writer's belief, that without any incremental increase in fees during the next two years, there will be a palpable reduction in criminal legal aid cost expenditure.

7. THE TIME FOR ACTION.

7.1 It is the writer's opinion that the time is right for a radical re-think of the structure and operation of legal aid in criminal litigation. At the present time, the number of counsel on the Panel is 483. This is a substantial number. Two complementary market forces are causing much difficulty for criminal law practitioner. On the one hand there are many more advocates available for work and on the other hand there is less work to go around. The LAD finds itself in a *buyers' market*. Thus it will claim that the present system "serves us well", and should not be altered. Moreover, the DLA can truthfully contend that there are more than enough advocates around to do the work for the fees offered and paid.

7.2 With respect, the Bar Association might consider concentrating its attention on reforming the system rather than focussing too much on the level of fees. If some of the reforms, suggested in this Paper were to be implemented, there is likely to be a meaningful increase in income.

7.3 The writer has received a memorandum, dated the 16th March 2001, from the Hong Kong Bar Association. In particular, reference is made to paragraph 4 thereof. It would seem that the Bar is already moving towards the idea that there should be a general overhaul of the system. However, with profound respect, the reforms proposed in the memorandum appear to amount to no more than mere tinkering with the problem.

7.4 The idea of *marked briefs* has been around for a long time, and has never been acceptable to the Administration. It is unlikely to result in increased fees, though it would give the advocate the opportunity to know what he will be paid, before the trial commences. Counsel on the Panel, are obliged to accept a legal aid brief, if he is available, irrespective of the brief fee. If a similar regime, to that which operates in the United Kingdom, were introduced in Hong Kong, with appropriate adjustments, this might remove the need for marked briefs. For the reasons, which have been given, the writer agrees that the judge should be excluded from having any influence on the level of fees to be paid to counsel.

John Mullick
20.iv.2001.

To:

The Chairman of the Bar Association, Hong Kong.

KNIGHT & HO

Solicitors & Notaries
Agents for Trade Marks, Designs and Patent.
祿得基 何福康 律師行

Partners:
Christopher Knight 祿得基律師
B.A.(Hons)
Notary Public

Consultants:
Ferdinand F.H. Ho 何福康律師
B.Sc.(Hons), Dip.Ed., Dip. M.S., M.B.A., Dip. Ch. Law
(Not Ordinarily Resident in Hong Kong.)

Wong Kam Chuen 黃錦泉律師
B.A.(Hons), LL. B. (Hons)

Assistant Solicitors:
Margaret Y.F. Chan 陳綺芬律師
M.B.A., LL. B. (Hons)

Lincoln S.Y. Ho 何善恩律師
B.A.(Hons), Dip. Ch. Law

Josephine Au Yeung 歐陽淑祝律師
LL. B. (Hons)

Your Ref.:
Our Ref.:

Date: 6th May 2003

Mr. John Mullick, Esq.
Barrister-at-law
Room 501A,
9 Queen's Road Central,
Hong Kong.

BY FAX & BY POST
(2868 4194)

Dear John,

Review of Criminal Legal Aid

I have read your paper once more on Legal Aid in Criminal Cases. I agree with the points you have made.

I would make the following comments from the point of view of solicitors involved in legally aided criminal cases :

CRIMINAL TRIALS

The Legal Aid in Criminal Cases Rules made under the Criminal Procedure Ordinance only make provision for a brief and refresher fee; with no account given to the number of hours actually spent in preparation prior to the first date of trial. The maximum amount that a solicitor can be paid is fixed by law; irrespective of the number of hours that have been properly spent in preparing the case for court. This amount is presently HK$7,100; for the brief fee to cover all preparation and the first day of trial. For the second and subsequent days of trial, the fee will range between HK$870 and HK$4,620. The Director of Legal Aid has no discretion to pay more than these maximum amounts even though he may think this is justified because of the amount of work carried out for an accused person.

10th Floor, Ritz Building, 625 Nathan Road, Kowloon, Hong Kong.
香港九龍彌敦道六二五號麗斯大廈十樓
Document Exchange No. 文件交匯編號：DX-535003 Mongkok 1
Telephone 電話 : 2332 5773, 2780 5287
Facsimile 圖文傳真 : 2770 1331, 2782 5525 & 2626 9054

It is a fallacy to say that preparation work is properly provided for in the brief fee. It is not. Cases vary enormously in the time required to prepare for trial. The maximum scale fee for preparing a trial that will last for two months is the same as for a trial that will last two days.

The nature of the work required to prepare a case for trial has evolved since the present system of remuneration was introduced. The police and the ICAC now make far greater use of video recorded evidence. Interviews under caution are now more likely than not to be recorded on video, as are constructions of events at the scenes of crimes. The police now routinely record events they are policing when they suspect trouble might occur. The Immigration Department murder and arson case is an example of this.

Reviewing video taped evidence takes much longer than reading a witness statement of someone present at the event. A three hour video tape will take three hours to examine; at least on a first viewing. It may have to be viewed again for several times. And yet the present system makes no allowance for the time a solicitor spends doing this necessary work.

The system also penalises shortening trials by agreeing evidence. It penalises the solicitor who advises a client to plead guilty in cases where the prosecution evidence is strong. The practitioner will not be compensated for the preparation work other than being paid a brief fee for the first day of trial.

The only circumstances where the Legal Aid Department is given a discretion to go beyond the statutory maximum fees is where the trial judge grants a certificate confirming that the case was one of either exceptional length or exceptional complexity, or both.

This is, however, a highly unsatisfactory system :

- There is no discretion to pay fees for preparation work, but only to increase the fee for the first day of trial and the daily fee for subsequent trial days.
- It does not cover the vast majority of cases but only exceptional cases. Therefore in most cases no proper allowance can be given for the amount of preparation work properly carried out.

- Judges tend to assess complexity by examining how complex were the legal issues raised in court during the trial. However, a relatively straightforward case in terms of the law may involve the instructing solicitor interviewing a great number of witnesses, visiting the scene of the crime or obtaining opinions from expert witnesses; none of which will usually be sufficient to persuade the trial judge that the case was of exceptional complexity.
- Judges often have no idea how much preparation work has had to be undertaken to make the case ready for trial. He will not examine a solicitor's preparation file before making a decision on whether to grant a Certificate. Nor indeed would this be a desirable practice.
- Where Judges have granted certificates of both length and complexity, the Legal Aid Department has adopted the practice of paying solicitors on "Brief Fee" for the first day which is twice the amount of the maximum fee regardless of how much preparation work has been done but then paying less than the maximum amount for the second and every subsequent day of trial.

The situation is worse when solicitors are requested by the Legal Aid Department, acting on behalf of the Secretary for the Civil Service, to represent government servants, such as police officers, facing criminal charges to be heard in the magistrates' courts. A Magistrate has no power to grant a certificate of complexity. In all of these cases the matter is serious, because in the event of a conviction, the officer would lose his reputation, his career and his pension rights. Practitioners often spend many hours preparing a defence which is never properly reflected in the Brief fee.

In many cases preparation for trial cannot be responsibly delegated by the solicitor assigned to act. Failure to modify the existing system of payment will encourage cases to be assigned to inexperienced solicitors or even worse to members of staff who are not legally qualified. This cannot be in the interests of legally aided clients.

It may be argued that if solicitors are unhappy about the fees payable, they should not accept Legal Aid cases. However, in the vast majority of cases the solicitor assigned will know practicably nothing about the case when requested to the act. It would neither be practicable nor in an accused persons interest, for solicitors to insist on seeing the case papers first before accepting instructions.

KNIGHT & HO
Solicitors & Notaries

CRIMINAL APPEALS

The same criticisms apply to legally aided criminal appeals. In addition the Rules do not provide any framework for fees for appeals to the Court of Final Appeal. They provide for simply " ... such fees as appear to the Director to be proper in the circumstances". There is no appeal from the Directors of Legal Aid's decision.

CONCLUSION

The system which decides remuneration in civil legal aid cases should be extended to cover criminal cases. Solicitors acting in legal aid matters should be paid at an hourly rate appropriate their experience. If the Legal Aid Department considers the fees claimed by the solicitor to be excessive, then the matter should be decided by the Registrar, in a taxation hearing, with the solicitor having to justify the amount claimed.

Remuneration should be on the basis of work actually and properly carried out. If standards are to be maintained, the present system must be changed.

Kevin Steel and I would welcome the opportunity to meet with the representatives of the Bar to try and form a united front in this matter. Please note however that the views expressed in this letter are my own and the stance to be adopted by the Law Society would have to be approved by the Council.

Yours truly,

Christopher Knight
KNIGHT & HO

CK/cw
c.c. Mr. Kevin Steel
and
Ms. Christine Chu
Law Society of Hong Kong

APPENDIX 2

FACC No. 4 of 2004

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 4 OF 2004 (CRIMINAL)

(ON APPEAL FROM HCMA NO. 39 OF 2003)

Between:

LAU CHI WAI	Appellant
and	
HKSAR	Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Litton NPJ and Sir Anthony Mason NPJ

Date of Hearing and Decision: 7 October 2004

Date of Handing Down of Reasons: 18 October 2004

JUDGMENT

Mr Justice Bokhary PJ :

1. At the conclusion of the hearing we allowed the appeal, quashed the conviction and awarded the appellant his costs to be taxed of the trial, the intermediate appeal, the proceedings before the Appeal Committee and this appeal. We said that we would hand down our reasons later, and we now do so, our reasons being those given by Mr Justice Litton NPJ for the Court.

Mr Justice Litton NPJ :

Background facts

2. This appeal arises from events which occurred over 2½ years ago. They centre around Nicholas Tse, then aged 21, a performer much idolized by the popular media.

3. In the early hours of 23 March 2002 Nicholas Tse was driving home in his powerful sports car, a Ferrari. He was alone. As he was going up Cotton Tree Drive in Central, on his way to Old Peak Road, he lost control; his car collided with the railing bordering the squash centre. Part of the railing was damaged and so was his car; it rested immobilized across the nearside lane of the carriageway. Tse was uninjured. The time was then about 6 a.m. The sky was dark and there was heavy rain.

4. Tse contacted by mobile phone a man called Shing Kwok-ting at home,arousing him from his bed. Shing was employed as a driver by the Emperor Entertainment Group, with whom Tse had a contract as an "artiste". Shing had often acted as driver for Tse. Tse told Shing that there had been a car crash, that he was uninjured, no-one else was injured and a railing had been damaged. Shing told Tse to leave the scene. He was concerned at the time, as he subsequently testified in court, to protect Tse's reputation.

5. Shing got changed, called a towing company to tow away the car, and went by taxi to Wanchai to collect a car belonging to the Emperor Entertainment Group. On his way Shing received a second call from Tse asking whether he had arrived. Shing said he was on the way. Shing collected the car in Wanchai and drove to the scene of the accident. On the way, he received another phone call from Tse. In the course of this phone call Shing asked Tse if he had been photographed at the scene. Tse said no. Upon arrival at Cotton Tree Drive Shing found there were already police officers present.

6. So far, what has been recited above is undisputed between the parties : What happened thereafter was hotly contested in the courts below.

The charge

7. The charge which led to these proceedings was a charge of conspiracy to pervert the course of justice, involving Tse, Shing, an employee of Tse's called Chow Chu-fai, and also a police constable Lau Chi-wai (the appellant) who had arrived at the scene of the accident at around 6.40 that morning. The plot, as alleged by the prosecution, and on which Tse and the appellant stood convicted after trial in the magistrates' court, was "to pervert the course of public justice by allowing Shing ... to falsely present himself, in substitution for ... Tse ... as the driver of [the] private car ... in the police investigation of [the] traffic accident ...".

The appellant

8. The appellant was, at that time, a police constable attached to the accident investigation unit at Central Police Station. He was a married man, aged 28, having been in the police force for nearly 10 years. He was part of Team 7 stationed at Central Police Station, the team comprising a senior inspector and three police constables. The appellant had gone on duty at 11 pm the previous night; he had been working on three other traffic cases right through the night when, shortly after 6 am on 23 March, he received a call on his radio to investigate the accident at Cotton Tree Drive. He was on his motorcycle at Wong Chuk Hang, on the south side of Hong Kong island, when he received the order. He arrived at the scene at around 6.40 am. By that time a police vehicle was there, with blue lights flashing, diverting traffic from the nearside lane of Cotton Tree Drive. A number of police officers were present, as were about 8 to 10 reporters : Their vehicles were parked also on the side of the carriageway, uphill from the crashed Ferrari.

The appellant's version of events

9. As far as the appellant was concerned, this was a routine investigation. The only unusual feature was this : When he arrived at the scene and asked one of the officers there (a PC50063) what the situation was, PC50063 pointed to Shing and said : "This guy returned after the event and said he was the driver" : Shing had returned to the scene of the accident in a seven-seat vehicle, which was also parked on the side of the carriageway, uphill beyond the crashed Ferrari : Shing was walking down the

road towards the police officers when he was pointed out as the driver by PC50063.

10. The appellant's version of events, as he stated in court, was this : He looked at Shing and asked : "Are you the driver" and Shing said yes. He asked Shing to step aside and the appellant then proceeded with his routine investigations at the scene : He took a few photographs, did a rough sketch, made some inquiries and then asked Shing how the accident had happened. Shing said he was driving uphill and skidded, crashing into the railing. The appellant made no note of the conversation as it was raining heavily at the time. Then, in accordance with standard procedure, he told Shing he needed to have a breath test : Shing could either wait at the scene for the equipment to arrive, or go to Central Police Station in the police vehicle to have the test done there. (There were officers from the Enforcement and Control division, carrying breathalysers on their motorcycles, cruising around the island, who could have been asked to attend at the scene.) There were reporters milling about at that time : Shing said he would do the test at the police station. When the appellant asked Shing to board the police vehicle, Shing said he had a car himself. The appellant then asked : "How come there's a car after you just had a car crash?". Shing said he did not have a phone with him when the accident occurred so he returned to Old Peak Road to collect a phone and the car. The appellant then asked Shing to follow him back to the police station.

11. When the appellant arrived at the compound of the police station he put through a radio call to the traffic central console to ask for an officer from the Enforcement and Control division to help with the breathalyser test : That officer had earlier, to the appellant's knowledge, escorted a driver back to Central Police Station for a test with a "large machine" : One that recorded the data collected. That radio call was tape-recorded and a transcript of that portion of the tape was subsequently produced in court as Ex D5A : It proved conclusively that the appellant had, indeed, sought assistance with the breathalyser test, as he claimed in the witness box. As it turned out, that officer was unable to help that morning.

12. The appellant brought Shing to the floor where Team 7 was located :

It was a large space used by many different officers. Shing was asked to sit on a bench whilst the appellant went to the duty officer to collect a breathalyser and, in the meanwhile, he went to the computer to retrieve information about the car owner and the driver; he also checked to see if the car had been reported lost and whether the driver was a wanted person. He then returned to the room where Team 7 was located, to remove his helmet and raincoat and report to the senior inspector. His two other colleagues (the other two police constables) were also there : He remarked to these two, in conversational tones, that "that guy" (meaning Shing) "only returned afterwards and said he was the driver"; he also mentioned that Shing had subsequently turned up at the scene in a seven-seat vehicle, and said that Shing looked fishy : He made that remark, he said, because he saw Shing talking on his cell phone, using his hand to cover the phone. He then reported to the senior inspector. Senior Inspector Lo subsequently testified in court as a prosecution witness and, in effect, corroborated this portion of the appellant's story : That, in reporting to her, the appellant told her that the driver had left the scene of the accident and later returned; the driver had been brought back for a breath test.

13. The appellant then went through the standard procedure for a breath test : He took out a form, explained the procedure to Shing, gave him a standard "section 39B" warning, and then conducted the test : It registered zero. The appellant showed Shing the result on the meter. Shing was asked to sign on the breath test form. Senior Inspector Lo subsequently testified in Court that, later, with the help of an engineer, she checked the computer records and ascertained that a test was done at 7.15 that morning : she did this, presumably, after doubts had arisen concerning the test conducted by the appellant.

14. A little later that morning the appellant handed to Shing a notice requiring identification of the driver which Shing completed, identifying himself as the driver. The appellant also gave Shing a form to be handed to the registered owner of the car to complete. He then asked Shing to make a statement concerning the accident, but Shing said he was very tired : The appellant told him he would be contacted later, and an appointment would be made for him to make the statement.

15. The appellant was, in fact, very busy at that time and had 30-odd other files to handle : He knew, even before reaching the scene of the accident, that he would not be the "I.O." (meaning investigation officer) and that the follow up would be assigned to someone else. That turned out in fact to be the case. This part of his evidence was also corroborated by Senior Inspector Lo : She said that although the appellant was the one sent to the scene he was not the one assigned to be the investigation officer. She added that the decision as to who would be the I.O. rested solely with her.

16. In the course of that morning Senior Inspector Lo, with the appellant in attendance, made a verbal report to her superior, a Superintendent Pang : In the course of that report the appellant told Superintendent Pang that Shing had returned to the scene in another car, a seven-seat vehicle.

17. The matters stated in paras.8 to 16 above comprise, as far as the appellant was concerned, the sum total of his involvement with the accident concerning the Ferrari on the morning of 23 March 2002. His file was then handed over to PC33246 Chiu Shun-kei as the I.O.

18. There was nothing inherently improbable in the appellant's story : If it was possibly true, a finding that he was a party to a plot to "deflect or frustrate an anticipated police inquiry ... and possible consequential prosecution" (an expression used by the trial magistrate and the appellate court below) would have been perverse.

The sequel

19. On 29 March 2002 PC Chiu, the I.O. assigned to follow up on the case, phoned Shing and asked him to go to the police station to make a statement. Shing went and PC Chiu began taking the statement at 12.05 pm on that day. This took place in one of the cubicles which had been partitioned off in the interview room. The statement was completed at 12.30 pm. In his statement (Exhibit P4) Shing claimed that he was the driver of the Ferrari on 23 March and had skidded in going up Cotton Tree Drive, resulting in the crash. At the time when PC Chiu was taking the statement from Shing, the appellant was engaged, as he asserted in his testimony, in taking a statement from a taxi-driver surnamed Mak : This was, he said, a

particularly troublesome case for him as the taxi driver had made a complaint against him to CAPO (the Complaints Against the Police Office) : Hence he took particular care to put down the details whilst interviewing the taxi driver : That interview went from about 11.55 am to 12.40 pm when the interview was suspended at the taxi driver's request : This was in fact a longer span of time than the half hour during which PC Chiu was engaged in taking the statement from Shing : This aspect of the appellant's testimony was never challenged by the prosecutor and must therefore be accepted as an established fact. The significance of this will become apparent as the story unfolds.

20. It will be recalled that on 23 March, at the police station, Shing had been handed a form of notice to be completed by the registered owner of the Ferrari. The name and address of the registered owner, Tse Brothers Hong Kong, had already been typed on the form. Shing said in evidence that on 5 April, after he had driven Tse home from the airport, he raised this matter with Tse. Tse had just then returned from Taiwan with his personal assistant Chow Chu-fai. At Tse's home on that day Shing filled in the particulars, putting himself forward as the driver (with his own address, driver's licence number and phone number) : Tse was playing video games at that time. Shing went upstairs to fetch the company chop for Tse Brothers (Hong Kong) Co Ltd and got Chow Chu-fai to sign the form. He had no idea if Chow was authorized to sign for the company or not. The form was sent back to the police.

The proceedings

21. On 12 April 2002 Tse was arrested by officers of the Independent Commissioner Against Corruption (the "ICAC"), as were Shing and Chow Chu-fai. On the same day, the appellant was interviewed by ICAC officers.

22. On 24 April Shing pleaded guilty to the charge of conspiracy to pervert the course of public justice and was sentenced to 4 months' imprisonment by the magistrate.

23. The trial against Tse (D1) and the appellant (D2) opened on 19

September 2002 before Mr A.J. Wyeth at the Magistrates' Court at Western. Chow Chu-fai had been granted an immunity from prosecution and testified as a prosecution witness, but his evidence did not directly implicate the appellant. The prosecution case against the appellant was based therefore entirely upon the testimony of Shing (PW1). His evidence was to this effect :

(1)When he arrived by car at the scene of the accident there were already several police officers present. He alighted from his car and approached one of the officers. He asked him directly whether it was all right to have someone to stand in. That officer replied by saying it was none of his business and pointed to the appellant, an officer from the accident investigation unit. Shing asked the appellant whether it was all right to get someone to stand in, whereupon the appellant replied : "Do you have an audio recorder on you?". Shing did not answer.

(2) The appellant then walked away to investigate the scene of the accident. Later, he returned and said to Shing : "You won't hand him over, right?"

(3) The appellant asked Shing to follow him to the police station.

(4) At the police station the appellant said : "It's all right to let someone stand in." Shing then said to the appellant : "But I need my licence for my livelihood" and the appellant replied : "Probably it won't happen. There may be some warning only."

(5) Shing told the appellant that he had consumed some alcohol at 10 pm the previous night : So the appellant did not ask him to do the breathalyser test : He merely showed Shing the meter : It read zero. The appellant said the test had been completed. He signed the form relating to the test.

(6) At one point Shing phoned Tse to tell him the police had agreed to let him stand in, but he was thinking that someone else called Bo Chai might be allowed to stand in instead. Tse said "All right". He added that this

conversation was not in the hearing of any police officers.

(7) He was then handed another form, which he filled in, stating that he was the driver.

(8) He then asked the appellant how he was to explain the presence of two vehicles at the scene : The appellant provided the answer. He said that at the time of the crash he (Shing) had no mobile phone to report to the police, so he took a taxi to Tse's home to collect the seven-seat vehicle in which the phone had been left and on returning to the scene the police were already there, so there was no need to report.

(9) On 29 March he received a phone call from a police officer surnamed Chiu asking him to return to the police station to make a statement. He went. At the police station the appellant taught PC Chiu what to write : He (Shing) did not say anything. That was the statement (Ex P4) in which he said he was driving the Ferrari which skidded in Cotton Tree Drive, crashing against the railing.

(10) He went back to Tse's home with a copy of the statement and read it over to Tse, telling him (Tse) to drive more carefully in future. Tse said : "Police are helpful. I know that. All right."

(11) On 5 April he fetched Tse and his assistant Chow Chu-fai from the airport : At Tse's home the form requiring the registered owner Tse Brothers Hong Kong Co Ltd to disclose the particulars of the driver were filled in by him; the company chop was fetched from upstairs and applied on the form; Chow Chu-fai signed it. Tse was playing video games downstairs.

(12) On 12 April he was arrested by the ICAC.

Outstanding features of the prosecution case

24. Leaving aside for the moment the defence case, a number of curious points concerning the prosecution case spring immediately to mind :

(1) The magistrate said that the evidence led irresistibly to the inference that Tse was in agreement with Shing, at least, that Shing would

"present as the driver in place of the true driver ... in order to deflect or frustrate an anticipated police inquiry". The appellate judge Beeson J referred to this as the "initial agreement". This was, on the facts, a proper – and perhaps inevitable – finding : Once the tacit agreement had been reached, resulting from the first three phone conversations between Tse and Shing, that Tse should flee the scene and Shing should present himself as the driver, the common intention to deflect or frustrate the police inquiry would have been formed. It was bizarre then for one of the conspirators to draw the police into the criminal net when the object of the conspiracy was aimed at the police itself.

(2) The notion that Shing went up to the first police officer he met at the scene and asked him whether it was "all right to have someone stand in" was inherently improbable : It was tantamount to saying : "Is it all right for me to commit a crime?" In fact, that officer was, with the aid of a press photo taken that morning, identified at the trial as PC50063. This must have been known to the prosecution at the outset. It is an odd feature of the case that the prosecution did not call him as a witness : It would have been bizarre if that officer had corroborated Shing's story.

(3) The notion that PC50063 would have deflected Shing's request to the appellant by saying it was none of his business is equally improbable : It was tantamount to saying : "I can't tell you if it is all right for you to commit a crime, but that officer might ..."

(4) Shing's evidence was to the effect that, shortly before leaving the scene, the appellant had said to him : "You won't hand him over, right?" There was no other exchange between them when, back at the police station, the appellant then said "It's all right to let someone stand in". This is, on its face, bizarre. Why a police officer of 10 years' standing would casually allow a serious crime of that nature to be committed by a total stranger, and join in it himself, was never satisfactorily explained at the trial. In fact this allegation – that the appellant had said "It's all right to let someone stand in" – had appeared in none of the statements made by Shing to the ICAC, and was later retracted by him at the trial : A point which featured prominently in

the appellant's appeal before Beeson J. This matter will be examined in greater depth later on in this judgment.

Overall view of the case

25. The magistrate described Shing as "being somewhat uncomfortable as a witness" : No wonder. In his misguided attempt to "protect Tse's reputation" and shield him from the consequences of his traffic accident on 23 March he had landed Tse in far greater trouble : Arrest and prosecution by the ICAC. If he was to continue to shield Tse, he had every reason to minimize Tse's role in the affair and inflate that of others.

26. To an extent it can be said that Shing had succeeded. At the trial, Tse was represented by an experienced senior counsel. The main point advanced by counsel on Tse's behalf was that Tse was an "inactive on-looker" and that his underlings were working to avoid his being involved in possible prosecution – without any active participation on his part. The magistrate rejected those submissions, but nonetheless concluded that Tse played a less active role than the other conspirators; having regard to his age and other attributes, the magistrate sentenced him to 240 hours of community service. The appellant was sentenced to six months' imprisonment.

The magistrate's reasons for verdict

27. The sole basis for the conviction was that the magistrate accepted Shing's testimony. As to the appellant he said :

"I did not believe the evidence of D2 (the appellant). Features of his evidence were illogical and inherently improbable. Even on his own account, his actions included odd irregularities and unlikelihoods. I simply did not believe him."

The only "irregularity" in the appellant's story apparent from the magistrate's findings is what the magistrate said in his statement of findings, made pursuant to s.114(b) of the Magistrates Ordinance, Cap. 227, after the appeal had been lodged. It referred to the way the appellant handled the notice to be completed by the registered owner of the Ferrari, Tse Brothers (Hong Kong) Co Ltd : The form was not sent by post; it was handed to Shing who was not an office holder of the company : This would not have constituted "service" of the notice on the registered owner.

28. Assuming this was an irregularity in procedure – it was never put to Senior Inspector Lo in court and no-one testified in court to this effect – it was hardly sufficient to discredit the whole of the appellant's evidence.

29. At the hearing before us, counsel for the respondent was invited to point out to us the features of the appellant's evidence which were "illogical and inherently improbable" and was given an adjournment for that purpose. When the hearing resumed, counsel informed us that he had no submissions to make.

Shing's retraction of evidence

30. As mentioned in para.24(4) above, Shing retracted in court his assertion that, at the police station, the appellant had said to him "Is it all right to let someone stand in". This retraction was important : If in truth the appellant never said that, then his participation in the conspiracy, on the basis of Shing's evidence, could only be inferred by conduct. The magistrate in his reasons for verdict said that this "seeming" retraction, coming after robust cross-examination, was "due to a temporary petulance born of natural discomfort and frustration". He gave it little account. This was plainly untenable : In re-examination, Shing had confirmed that he was no longer maintaining that aspect of his evidence. The retraction was unequivocal.

31. This was conceded by counsel for the respondent at the hearing of the appeal before Beeson J, who nonetheless dismissed the appeal because she thought that, "even without that item of evidence there was sufficient evidence from which the agreement could be inferred". With that piece of evidence gone, how the rest of Shing's testimony fell into place was never explained by the judge.

The appeal before Beeson J

32. Much of the appeal before Beeson J was focused on the case for Tse who was the first appellant in that court, appealing against his conviction. When it came to dealing with the evidence against the appellant (the second

appellant in that court) the judge referred to the principle that the magistrate was in the best position to assess credibility; an appellate court would only interfere if there were exceptional circumstances. She then added :

"All the undesirable features complained of by the Appellants were made known and were obvious to the Magistrate. The significance of the retractions of evidence were known to him and dealt with by him. The fact that the Appellants were unhappy with the conclusions he reached is not any justification for interfering with his findings of fact."

On this basis, the appellant's appeal was dismissed.

Features pointing to appellant's innocence

33. It is not clear what the judge meant when she adverted to "undesirable features complained of by the appellants". Quite apart from the inherent probabilities referred to earlier, which strongly favoured the appellant, there were, in fact, solid pieces of evidence pointing to the appellant's innocence, which were hardly touched upon by the magistrate. They are :

(1) *The appellant's involvement at the outset in the investigation* : He knew that he was not going to be the investigating officer for the case : He knew that, after his involvement on the morning of 23 March, the file would be passed to another colleague. This was also the evidence of Senior Inspector Lo, a prosecution witness.

(2) *The whole body of evidence concerning the breathalyser test* : Ex D5A, the transcript of the taped radio call, proved conclusively that the appellant had sought help for the test. It would have been extraordinary if he had, at that time, conceived the idea of faking a test. The senior inspector's evidence tended to show a test was indeed conducted. On the basis of this evidence, Shing's assertion of a faked test was false.

(3) *The reporting procedure* : The appellant had related to his superiors – Senior Inspector Lo and Superintendent Pang – the unusual circumstances of the case : That the driver had returned to the scene, in a separate vehicle.

(4) *The statement taken from Shing on 29 March* : The appellant

could not have been "coaching" PC33246 Chiu on that statement as Shing alleged because he was interviewing a very awkward taxi driver at the time : In fact, Shing partially retracted his allegation on this as well : What counsel for the respondent, at the hearing before the judge, described as "dilution of the evidence".

(5) *The defence witness PC34537 Li Tit-kwan* : He testified to this effect : (i) On the morning of 23 March 2002, when the appellant returned to the Team 7 room, he said that the man he (the appellant) had just brought back to the station was "fishy"; the appellant then went to report to the Inspector; PC34537 subsequently learnt from the newspapers that the man was Shing. (ii) He saw the appellant conducting the breath test on Shing, and heard the sound of the tube being blown.

(6) *The defence witness PC33246 Chiu Shun-kei* : He took the statement from Shing on 29 March 2002. He received no help from anyone.

34. As to (5) and (6) above, the magistrate said that their evidence "included inherent improbabilities" and "strained credulity to breaking point". He questioned how they could have recalled details of "events that took place on a hectically busy morning shift months ago". The appeal judge did not deal with this evidence at all : Possibly, both courts overlooked the fact that in the week following 23 March the popular press had several articles on the accident, speculating as to who the driver of the expensive Ferrari was : a sports car bearing the "prestigious" number plate 450. And then barely 3 weeks later, on 12 April, the appellant was taken for interrogation by the ICAC : There was every reason for the two police constables, members of Team 7, to recall the event.

The magistrate's conclusion : upheld by the judge

35. The magistrate, in his reasons for verdict, gave himself a pro forma reminder concerning Shing's status as an accomplice, but never mentioned the width of the accusations Shing seemed prepared to make in order to shield Tse : Not only did he impeach the appellant's conduct : PC50063, the first officer he met at the scene, was implicated as well; as was PC 33246, the officer who took the statement from him on 29 March.

36. The magistrate concluded his reasons for verdict in this way :

"The potential benefit from this conspiracy of D1 (Tse) is obvious enough. The potential benefit to D2 (the appellant) is less clear. It may have been a simple matter of taking a shortcut in his duties in processing the purported driver rather than commence a proper enquiry into the identity and whereabouts of the real driver, a potentially bigger task. The evidence does not make D2's motive clear."

37. It is not clear what the magistrate meant by the appellant commencing "a proper enquiry into the identity and whereabouts of the real driver". The appellant had a very specific task, as ordered by his superior officer, that morning : To investigate at the scene, to start the file, to report, then hand the file over to PC33246. On his story, he did just that. He had not been given a wider task. If he harboured suspicions concerning Shing being the real driver, that would have been based upon the fact (i) that the driver had fled the scene and (ii) Shing had returned in a separate vehicle. Those two facts were known to his superiors, and to PC33246 who took over the file from him. If a wider investigation was to be commenced, that would have been ordered by his superiors : It was hardly for the appellant, one of the three police constables in Team 7, to "commence" such an investigation.

38. The material before us is silent as to how the ICAC investigation had started, or why. As mentioned earlier, soon after the accident, the popular press was full of speculation as to who was the real driver of the Ferrari : It is not surprising that, soon after the form for disclosure of the driver had been lodged by the registered owner, continuing the deception, the arrests were made. A "proper enquiry into the identity and whereabouts of the real driver" had clearly been started soon after the events of 23 March : The pity was that the "enquiry" had swept a hapless police constable into its net.

Conclusion

39. Plainly, on what is said above, a substantial and grave injustice has occurred.

40. It hardly needs repetition that, in a criminal trial, the burden of proof rests at all times with the prosecution and that, unless the case is proved beyond reasonable doubt, upon the whole of the evidence, the accused is

entitled to be acquitted. The defence carries no burden of proof.

41. This case never turned on the demeanour of witnesses : And if it did, the prosecution would have begun with a handicap because it's star witness Shing was found to be "somewhat uncomfortable" in the witness box. The inherent probabilities were strongly against the prosecution; the chief prosecution witness had retracted an important assertion and had "diluted" another. The appellant's version of events was inherently credible; the defence was able to demonstrate by solid pieces of evidence that Shing's testimony was false in vital parts. What else, then, was left of the case?

42. There has been a grievous failure of process in the trial court, not corrected on appeal. This Court does not function as a court of criminal appeal in the ordinary way (see the discussion of the "substantial and grave injustice ground" in *So Yiu Fung v. HKSAR* (1999) 2 HKCFAR 539 at pp 541-543 and more recently in *Chong Ching Yuen v. HKSAR* [2004] 2 HKLRD 681 at 689). The present case however demands our intervention because the verdict is demonstrably perverse. A hard working police officer of spotless character, in the discharge of his normal duties, found himself caught up in a web of sycophancy and deceit, not of his own making. The nightmare began for him in April 2002; he has in the meanwhile served his 6 months' sentence and has expended large sums in legal fees. The order we made on 7 October has at last cleared his name, but would regrettably have only partially recompensed him for all that he has suffered in the meanwhile.

43. Morale in the police force must have received a severe blow as a result of this case. We have by our judgment done our best to redress the injustice. It is now up to other bodies to do the rest.

(Kemal Bokhary)	(Patrick Chan)	(R A V Ribeiro)
Permanent Judge	Permanent Judge	Permanent Judge

(Henry Litton)
Non-Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Mr Allen Lam (instructed by Messrs C.L. Chow & Macksion Chan) for the appellant

Mr B.M. Ryan and Mr Gary Lam (of the Department of Justice) for the respondent

APPENDIX 3

THE
LAW SOCIETY OF HONG KONG
香 港 律 師 會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
CENTRAL · HONG KONG DX-009100 Central 1
香港中環德輔道中71號
永安集團大廈3字樓

TELEPHONE (電話) : (852) 2846 0500
FACSIMILE (傳真) : (852) 2845 0387
E-MAIL (電子郵件) : sg@hklawsoc.org.hk
WEBSITE (網頁) : www.hklawsoc.org.hk

Our Ref Criminal
Your Ref CSO/ADM/CR 7/3221/89(03)
Direct Line

30 August 2004

BY FAX (25015779) AND BY POST

Mr. Chan Yum-min, James
Government Secretariat
Room 1211,
Central Government Offices
(West Wing),
Lower Albert Road,
Hong Kong.

Dear Mr. Chan,

REVIEW OF CRIMINAL LEGAL AID FEES, PROSECUTION FEES AND DUTY LAWYER FEES

Thank you for your letter dated 9 July 2004 proposing to effect a 4.4% reduction in the above fees following the decrease in the Consumer Price Index ("CPI") for the previous 2 years.

The Society noted the proposal with grave concern and would like to put on record its strong objection to the proposed reduction in fees.

Whilst the Prosecution Fees and the Duty Lawyer Fees are both based on the Criminal Legal Aid Fees prescribed in Rule 21 of the Legal Aid in Criminal Rules ("the Rules"), practitioners doing criminal legal aid cases have, for a long time, expressed discontent about the criminal legal aid remuneration system. Government's latest proposal to cut fees in line with the CPI will thus make it increasingly difficult for practitioners to apply proper professional standards in carrying out criminal legal aid assignments.

To highlight the major deficiency of the system, we would point out that the Rules provide for solicitors to be paid in the same manner as a barrister by: a brief fee and daily refreshers. However, under the Rules, barristers are also paid for conferences at an hourly rate (see Rule 21(1)(f), (g) and (h)). There are no similar provisions for solicitors. Yet the main task of an instructing solicitor is to prepare a case for trial. This requires the solicitor to have conferences with the barrister, and most importantly, with the client, to get proper instructions.

Cases very enormously in how much preparation work is needed. The maximum brief makes no provision for the amount of preparation work the solicitor has properly done.

This is not only unfair, it works against professional standards. Practitioners understand that in criminal cases, clients' interests are served by:

- thorough preparation including reading all the case papers and "unused material"
- advising the client to plead Guilty when the prosecution evidence is overwhelming
- agreeing non-controversial evidence so as to present the defence case as clearly as possible

Logically, however, the only way that many cases could be made financially worthwhile would be: to do little or no preparation, to encourage the client to plead Not Guilty, and to refuse to agree evidence so as to extend the length of the trial.

You can see from the above that solicitors who do fulfill their professional duties are already left with no compensation for their efforts. Accordingly, a further reduction in fees resulting in exceptionally low fee levels would discourage solicitors, particularly the more experienced ones, from accepting cases.

A counter-argument may be that if you don't like the fees, don't accept the case. However, solicitors will know very little about a case when they are offered an assignment. The amount of preparation that will be required will be unknown.

All illustration of how the present system is illogical is when a case is prepared for trial, and at the last moment the defendant pleads Guilty. The solicitor who has prepared the case for a Not Guilty plea is paid no more than if the case had been prepared for a plea of Guilty. When the fixed fee is divided by the hours spent is preparation; the solicitor can end up being paid at ridiculously low rates.

There are further objections to the system, such as:

- the system is inflexible with the maximum amount that a solicitor can be paid being fixed by law. Irrespective of the number of hours that have been properly spent in preparing the case for court, the Director of Legal Aid has no discretion to increase fees over the maximum limit even though he may think this is justified.
- there is a general lack of right to lawyers to appeal against any assessment of costs

The Committee has indeed set up its internal Working Party to conduct an in-depth review of the system. Short of reviewing the system, the Society objects to the piecemeal review of fees based purely on the movement of the CPI over the previous years; particularly when the economy is seen to be recovering. The most recent two-year period had the very exceptional effect of SARS depressing the index. Further, the extended period of deflation has now come to an end this year, which means that prices generally, which will be reflected in rents and office overheads for solicitors, will be rising. This current adjustment thus seems to be at the bottom of the price levels. If at present the system is at crisis point, that will be exacerbated as prices rise but fees stay fixed at the lowest point of the index.

We note in this regard that it has not been a tradition for the Government to follow the CPI trend in every fee review. In the 1998 review, despite a recorded increase of 10% in the CPI(C) for the reference period, the Government did not make any upward adjustment to fees in view of the worsening economic climate and market condition at the time of review. In the 2000 review, despite the CPI(C) having decreased by 8.8% for the reference period, as this more or less offset the CPI(C) increase accumulated in the previous reference period, the Administration chose to freeze the fee levels. Given that the fee level has already been adjusted downward by 4.3% in the last review exercise and in view of the recovering economy, it does not seem to be justifiable for the Government to just follow the CPI to request for a fee reduction at this stage.

In the light of what we have said above, we would urge the Government to seriously re-consider its proposal on fee reduction. We look forward to receiving your comments and shall be pleased to meet with you to explain our position, if you consider this to be helpful.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

c.c.: Mr. Michael Lintern-Smith, President
The Finance Committee, LegCo
The LegCo Panel on Administration of Justice and Legal Services
Mr. Andrew Bruce, c/o the Hong Kong Bar Association

P.47

I: No.73976

HONG KONG BAR ASSOCIATION
Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

(received on 6 Sept. 2004)

30 August 2004

Mr. James Chan Yum-min
for the Director of Administratio
Room 1211
Central Government Offices (We
Government Secretariat
Lower Albert Road
Hong Kong

Post-it® Fax Note 7671	Date 6/9	# of pages ▶ 4
To Ms. Christine Chu	From Rani Kumaran	
Co./Dept.	Co. HKBA	
Phone #	Phone # 2869 0210	
Fax # 2845 0387	Fax # Pls let you know	

Dear Mr. Chan,

Re : Response to the proposal to reduce Legal Aid fees and fees paid by the Department of Justice in connection with criminal proceedings

On 9 July 2004, you wrote to the Hong Kong Bar Association informing us that it is proposed to reduce fees paid by the Director of Legal Aid to Council in relation to the conduct of criminal proceedings and by the Department of Justice for prosecutions on Fiat. The amount of the proposed reduction is 4.4%. You invited our comments.

In substance, your letter puts forward two justifications for the proposed reduction. The first one is that over the last two years the consumer price index known as CPI(C) has gone down by an average of

4.4%. The second justification put forward is that neither the Director of Legal Aid nor the Department of Justice believes that they will have any difficulty retaining counsel at these reduced rates.

The first justification put forward is seriously flawed. The first and most obvious point to make is that what is proposed is that fees from a point of time in the near future and for an indefinite time will be fixed by reference to economic data which reflects an average of one of the consumer price indices over the past two years. This carries with it the unstated assumption that economic conditions will remain approximately the same in the future. Recent movements in the consumer price indices of Hong Kong, including but not limited to CPI(C), would demonstrate that we are certainly in for a return to inflationary economic conditions. A fair reading of recent reports on this topic would seem to suggest that the Government actually welcomes this.

Even assuming that CPI(C) was a proper way to determine changes in fees paid by the Director of Legal Aid or the Department of Justice, the reality is that just as the cost of living is going up it is proposed that fees will be going down. There is no guarantee, as recent changes in the levels of fees paid by the Director of Legal Aid and the Department of Justice demonstrate, that CPI(C) will be used for increases in fees. The evidence demonstrates that changes in fee levels over the past 10 or 15 years and changes in levels of inflation do not always coincide.

Further, whatever value that the use of CPI(C) as a guide to the payment of salaries of counsel in the Department of Justice may be, it is most assuredly not a very good indicator in relation to the determination of fees of those in private practice. Using CPI(C) overlooks the fact that barristers in private practice are, unlike their colleagues in the Department of Justice, engaged in a business and while

it might be fair to use a consumer price index as an assessment of net income, it is wholly unfair and makes little economic sense as a determinant of the total income of a barrister who accepts instructions to conduct criminal proceedings from the Director of Legal Aid or from the Department of Justice. It ignores the facts that barristers have to pay the wages of staff and pay rent for Chambers. Barristers are required to practise from Chambers under the rules of the Bar. They are not permitted to practise from their home.

Presumably as inflation returns, other services that barristers use will doubtless go up in price. Barristers are already seeing substantial pressure for upward movements in rent. Second, recent seminars on wage costs would suggest that employers are gearing themselves up for increases in wages in 2004 of the order of 5%. Services and utilities will doubtless follow this movement too. In short, you are proposing a decrease in part of many counsel's gross fees at a time when the cost of earning those fees is going up.

The substantive effect of your proposal has nothing to do with simply adjusting income according to prices. The substantive effect will be to reduce the real income of barristers. This is unacceptable especially at a time when many of my colleagues are finding the economic aspects of legal practice very difficult.

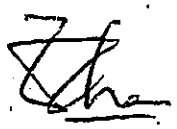
The second justification advanced in your letter is also unjustified. We make the point that even if it is true that in terms of retaining counsel who is *technically* qualified to accept instructions either from the Director of Legal Aid or the Department of Justice, there is a real risk that the quality of counsel thus retained will be diminished. As a Bar Association, leaving aside the narrow interests of our members in retaining or increasing levels of fees, we have an interest in ensuring that counsel retained for both the prosecution and the defence are of an appropriate standard for the case in which they are retained. This is true

in relation to both the prosecution and defence of criminal proceedings. We assume - or at least sincerely hope - that you share the concern for quality of representation. If you do share that concern there is every reason to carefully revisit what you propose.

In relation to those counsel instructed by the Director of Legal Aid, it is important that you do not overlook the guarantees of equality before the law and the right to counsel which are provided both under the Basic Law and the International Covenant on Civil and Political Rights. If we are right in our view that there is a real risk in the diminution of quality of counsel who are prepared to accept instructions from the Director of Legal Aid, then well established principles of equality of arms and the quality of justice are put at risk. The danger is that in serious and complex cases that inexperienced counsel will be appointed and the implications for the advancement of Justice are obvious for all to see.

On behalf of the Hong Kong Bar Association, I urge you to reconsider this ill-advised proposal.

Yours sincerely,



Edward Chan, SC
Chairman

APPENDIX 4

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF STEEL AND MORRIS v. THE UNITED KINGDOM

(Application no. 68416/01)

JUDGMENT

STRASBOURG

15 February 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Steel and Morris v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 7 September 2004 and 25 January 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 68416/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Helen Steel and David Morris ("the applicants"), on 20 September 2000.

2. The applicants, who had been granted legal aid, were represented by Mr M. Stephens, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that defamation proceedings brought against them had given rise to violations of their rights to a fair trial under Article 6 § 1 of the Convention and to freedom of expression under Article 10.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 6 April 2004, the Court declared the application partly admissible.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 September 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	D. WALTON, Foreign and Commonwealth Office,	*Agent*,
Mr	P. SALES,	*Counsel*,
Mr	A. BROWN,	
Mr	D. WILLINK,	
Mr	R. WRIGHT,	*Advisers*;

(b) *for the applicants*

Mr	K. STARMER,	*Counsel*,
Mr	M. STEPHENS,	*Solicitor*,
Mr	A. HUDSON,	*Junior Counsel*,
Ms	P. WRIGHT,	*Adviser*.

The Court heard addresses by Mr Starmer and Mr Sales.

7. Following the hearing, both parties submitted information which had been requested by Judge Bratza at the hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The leaflet

8. The applicants, Helen Steel and David Morris, were born in 1965 and 1954 respectively and live in London.

9. During the period with which this application is concerned, Ms Steel was at times employed as a part-time bar worker, earning approximately GBP 65 per week, and was at other times unwaged and dependent on income support. Mr Morris, a former postal worker, was unwaged and in receipt of income support. He was a single parent, responsible for the day to day care of his son, aged four when the trial began. At all material times the applicants were associated with London Greenpeace, a small group, unconnected with Greenpeace International, which campaigned principally on environmental and social issues.

10. In the mid-1980s London Greenpeace began an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" ("the leaflet") was produced and distributed as part of that campaign. It was last reprinted in early 1987.

11. The first page of the leaflet showed a grotesque cartoon image of a man, wearing a Stetson and with dollar signs in his eyes, hiding behind a "Ronald McDonald" clown mask. Running along the top of pages 2-5 was a header comprised of the McDonald's "golden arches" symbol, with the words "McDollars, McGreedy, McCancer, McMurder, McDisease ..." and so forth superimposed on it.

12. The text of page 2 of the leaflet read as follows (extract):

> **"What's the connection between McDonald's and starvation in the 'Third World'?**
>
> THERE's no point feeling *guilty* about eating while watching starving African children on TV. If you do send money to Band Aid, or shop at Oxfam, etc., that's morally good but politically useless. It shifts the blame from governments and does nothing to challenge the power of multinational corporations.
>
> **HUNGRY FOR DOLLARS**
>
> McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries, sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people.
>
> The power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. *Out of 40 of the world's poorest countries, 36 export food to the USA - the wealthiest.*
>
> **ECONOMIC IMPERIALISM**
>
> Some 'Third World' countries, where most children are undernourished, are actually exporting their staple crops as animal feed - i.e. to fatten cattle for turning into burgers in the 'First World'. Millions of acres of the best farmland in poor countries are being used for *our* benefit - for tea, coffee, tobacco, etc - while people there are *starving*. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat.
>
> **GROSS MISUSE OF RESOURCES**
>
> GRAIN is fed to cattle in South American countries to produce the meat in McDonald's hamburgers. Cattle consume 10 times the amount of grain and soy that humans do: one calorie of beef demands ten calories of grain. Of the 145 million tons of grain and soy fed to livestock, only 21 million tons of meat and by-products are used. *The waste is 124 million tons a year at a value of 20 billion US dollars.* It has been calculated that this sum would feed, clothe and house the world's entire population for one year".

The first page of the leaflet also included a photograph of a woman and child, with the caption:

> *"A typical image of 'Third World' poverty - the kind often used by charities to get 'compassion money'. This diverts attention from one cause: exploitation by multinationals like McDonald's."*

The second and third pages of the leaflet contained a cartoon image of a burger, with a cow's head sticking out of one side and saying "If the slaughterhouse doesn't get you" and a man's head sticking out of the other, saying "The junk food will!" Pages 3-5 read as follows:

"FIFTY ACRES EVERY MINUTE

EVERY year an area of rainforest the size of Britain is cut down or defoliated, and burnt. Globally, one billion people depend on water flowing from these forests, which soak up rain and release it gradually. The disaster in Ethiopia and Sudan is at least partly due to uncontrolled deforestation. In Amazonia - where there are now about 100,000 beef ranches - torrential rains sweep down through the treeless valleys, eroding the land and washing away the soil. The bare earth, baked by the tropical sun, becomes useless for agriculture. *It has been estimated that this destruction causes at least one species of animal, plant or insect to become extinct every few hours.*

Why is it wrong for McDonald's to destroy rainforests?

AROUND the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development for one hundred million years, supporting about half of the Earth's life-forms, including some 30,000 plant species, and producing a major part of the planet's crucial supply of oxygen.

PET FOOD AND LITTER

McDonald's and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fast-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny per cent of it is. The truth is it takes *800 square miles* of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of 'developed' countries.)

COLONIAL INVASION

Not only are McDonald's and many other corporations contributing to a major ecological catastrophe, they are forcing the tribal peoples in the rainforests off their ancestral territories where they have lived peacefully, without damaging their environment, for thousands of years. This is a typical example of the arrogance and viciousness of multinational companies in their endless search for more and more profit.

It's no exaggeration to say that when you bite into a Big Mac, you're helping McDonald's empire to wreck this planet.

What's so unhealthy about McDonald's food?

McDONALD's try to show in their 'Nutrition Guide' (which is full of impressive-looking but really quite irrelevant facts & figures) that mass-produced hamburgers, chips, colas & milkshakes, etc., are a useful and nutritious part of any diet.

What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals - which describes an average McDonald's meal - is linked with cancers of the breast and bowel, and heart disease.

This is accepted medical fact, not a cranky theory. Every year in Britain, heart disease alone causes about 18,000 deaths.

FAST = JUNK

Even if they like eating them, most people recognise that processed burgers and synthetic chips, served up in paper and plastic containers, is junk-food. McDonald's prefer the name 'fast-food'. This is not just because it is manufactured and served up as quickly a possible - it has to be *eaten* quickly too. It's a sign of the junk-quality of Big Macs that people actually hold competitions to see who can eat one in the shortest time.

PAYING FOR THE HABIT

Chewing is essential for good health, as it promotes the flow of digestive juices which break down the food and send nutrients into the blood. McDonald's food is so lacking in bulk it is hardly possible to chew it. Even their own figures show that a 'quarter-pounder' is 48% water. This sort of fake food encourages over-eating, and the high sugar and sodium content can make people develop a kind of addiction - a 'craving'. That means more profit for McDonald's, but constipation, clogged arteries and heart attacks for many customers.

GETTING THE CHEMISTRY RIGHT

McDONALD's stripy staff uniforms, flashy lighting, bright plastic décor, 'Happy Hats' and muzak, are all part of the gimmicky dressing-up of low-quality food which has been designed down to the last detail to look and feel and taste *exactly* the same in any outlet anywhere in the world. To achieve this artificial conformity, McDonald's require that their 'fresh lettuce leaf', for example, is treated with *twelve* different chemicals just to keep it the right colour at the right crispness for the right length of time. It might as well be a bit of plastic.

How do McDonald's deliberately exploit children?

NEARLY all McDonald's advertising is aimed at children. Although the Ronald McDonald 'personality' is not as popular as their market researchers expected (probably because it is totally unoriginal), thousands of young children now think of burgers and chips every time they see a clown with orange hair.

THE NORMALITY TRAP

No parent needs to be told how difficult it is to distract a child from insisting on a certain type of food or treat. Advertisements portraying McDonald's as a happy, circus-like place where burgers and chips are provided for everybody at any hour of the day (and late at night), traps children into thinking they aren't 'normal' if they don't go there too. Appetite, necessity and - above all - money, never enter into the 'innocent' world of Ronald McDonald.

Few children are slow to spot the gaudy red and yellow standardised frontages in shopping centres and high streets throughout the country. McDonald's know exactly what kind of pressure this puts on people looking after children. It's hard not to give in to this 'convenient' way of keeping children 'happy', even if you haven't got much money and you try to avoid junk-food.

TOY FOOD

As if to compensate for the inadequacy of their products, McDonald's promote the consumption of meals as a 'fun event'. This turns the act of eating into a performance, with the 'glamour' of being in a McDonald's ('Just like it is in the ads!) reducing the food itself to the status of a prop.

Not a lot of children are interested in nutrition, and even if they were, all the gimmicks and routines with paper hats and straws and balloons hide the fact that the food they're seduced into eating is at best mediocre, at worst poisonous - and their parents know it's not even cheap.

RONALD'S DIRTY SECRET

ONCE told the grim story about how hamburgers are made, children are far less ready to join in Ronald McDonald's perverse antics. With the right prompting, a child's imagination can easily turn a clown into a bogeyman (a lot of children are very suspicious of clowns anyway). Children love a secret, and Ronald's is especially disgusting.

In what way are McDonald's responsible for torture and murder?

THE menu at McDonald's is based on meat. They sell millions of burgers every day in 35 countries throughout the world. This means the constant slaughter, day by day, of animals born and bred solely to be turned into McDonald's products.

Some of them - especially chickens and pigs - spend their lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement. Their deaths are bloody and barbaric.

MURDERING A BIG MAC

In the slaughterhouse, animals often struggle to escape. Cattle become frantic as they watch the animal before them in the killing-line being prodded, beaten, electrocuted and knifed.

A recent British government report criticised inefficient stunning methods which frequently result in animals having their throats cut while still fully conscious. McDonald's are responsible for the deaths of countless animals by this supposedly humane method.

We have the choice to eat meat or not. The *450 million* animals killed for food in Britain every year have no choice at all. It is often said that after visiting an abattoir, people become nauseous at the thought of eating flesh. How many of us would be prepared to work in a slaughterhouse and kill the animals we eat?

WHAT'S YOUR POISON?

MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders. When animals are slaughtered, meat can be contaminated with gut contents, faeces and urine, leading to bacterial infection. In an attempt to counteract infection in their animals, farmers routinely inject them with doses of antibiotics. These, in addition to growth-promoting hormone drugs and pesticide residues in their feed, build up in the animals' tissues and can further damage the health of people on a meat-based diet.

What's it like working for McDonald's?

THERE must be a serious problem: even though 80% of McDonald's workers are part-time, the annual staff turnover is 60% (in the USA it's 300%). It's not unusual for their restaurant-workers to quit after just four or five weeks. The reasons are not hard to find.

NO UNIONS ALLOWED

Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal.

To improve this through Trade Union negotiation is very difficult: there is no union specifically for these workers, and the ones they could join show little interest in the problems of part-timers (mostly women). A recent survey of workers in burger-restaurants found that 80% said they needed union help over pay and conditions. Another difficulty is that the 'kitchen trade' has a high proportion of workers from ethnic minority groups who, with little chance of getting work elsewhere, are wary of being sacked - as many have been - for attempting union organisation.

McDonald's have a policy of preventing unionisation by getting rid of pro-union workers. So far this has succeeded everywhere in the world except Sweden, and in Dublin after a long struggle.

TRAINED TO SWEAT

It's obvious that all large chain-stores and junk-food giants depend for their fat profits on the labour of young people. McDonald's is no exception: three-quarters of its workers are under 21. The production-line system deskills the work itself: anybody can grill a hamburger, and cleaning toilets or smiling at customers needs no training. So there is no need to employ chefs or qualified staff - just anybody prepared to work for low wages.

As there is no legally-enforced minimum wage in Britain, McDonald's can pay what they like, helping to depress wage levels in the catering trade still further. They say they are providing jobs for school-leavers and take them on regardless of sex or race. The truth is McDonald's are only interested in recruiting cheap labour - which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already."

The leaflet continued, on pages 5-6, with a number of proposals and suggestions for change, campaigning and activity, and information about London Greenpeace.

B. Proceedings in the High Court

13. Because London Greenpeace was not an incorporated body, no legal action could be taken directly against it. Between October 1989 and January or May 1991, UK McDonald's hired seven private investigators from two different firms to infiltrate the group with the aim of finding out who was responsible for writing, printing and distributing the leaflet and organising the anti-McDonald's campaign. The inquiry agents attended over 40

meetings of London Greenpeace, which were open to any member of the public who wished to attend, and other events such as "fayres" and public, fund-raising occasions. McDonald's subsequently relied on the evidence of some of these agents at trial to establish that the applicants had attended meetings and events and been closely involved with the organisation during the period when the leaflet was being produced and distributed.

14. On 20 September 1990 McDonald's Corporation ("US McDonald's") and McDonald's Restaurants Limited ("UK McDonald's"; together referred to herein as "McDonald's") issued a writ against the applicants and three others, claiming damages of up to GBP 100,000 for libel allegedly caused by the alleged publication by the defendants of the leaflet. McDonald's withdrew proceedings against the three other defendants, in exchange for their apology for the contents of the leaflet.

15. The applicants denied publication, denied that the words complained of had the meanings attributed to them by McDonald's and denied that all or some of the meanings were capable of being defamatory. Further, they contended, in the alternative, that the words were substantially true or else were fair comment on matters of fact.

16. The applicants applied for legal aid but were refused on 3 June 1992, because legal aid was not available for defamation proceedings in the United Kingdom. They therefore represented themselves throughout the trial and appeal. Approximately GBP 40,000 was raised by donation to assist them (for example, to pay for transcripts: see paragraph 20 below), and they received some help from barristers and solicitors acting *pro bono*: thus, their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the Statement of Claim (see paragraph 24 below). They submitted, however, that they were severely hampered by lack of resources, not just in the way of legal advice and representation, but also when it came to administration, photocopying, note-taking, and the tracing, preparation and payment of the costs and expenses of expert and factual witnesses. Throughout the proceedings McDonald's were represented by leading and junior counsel, experienced in defamation law, and by one or two solicitors and other assistants.

17. In March 1994 UK McDonald's produced a press release and leaflet for distribution to their customers about the case, entitled "Why McDonald's is going to Court". In May 1994 they produced a document called "Libel Action - Background Briefing" for distribution to the media and others. These documents included, *inter alia*, the allegation that the applicants had published a leaflet which they knew to be untrue, and the applicants counter-claimed for damages for libel from UK McDonald's.

18. Before the start of the trial there were approximately 28 interim applications, involving various issues of law and fact, some lasting as long as five days. For example, on 21 December 1993 the trial judge, Mr Justice Bell ("Bell J"), ruled that the action should be tried by a judge alone rather than a judge and jury, because it would involve the prolonged examination of documents and expert witnesses, on complicated scientific matters. This ruling was upheld by the Court of Appeal on 25 March 1994, after a hearing at which the applicants were represented *pro bono*.

19. The trial took place before Bell J between 28 June 1994 and 13 December 1996. It lasted for 313 court days, of which forty were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history. Transcripts of the trial ran to approximately 20,000 pages; there were about 40,000 pages of documentary evidence; and, in addition to many written witness statements, 130 witnesses gave oral evidence: 59 for the applicants, 71 for McDonald's. Ms Steel gave evidence in person but Mr Morris chose not to.

20. The applicants were unable to pay for daily transcripts of the proceedings, which cost approximately GBP 750 per day, or GBP 375 if split between the two parties. McDonald's paid the fee, and initially provided the applicants with free copies of the transcripts. However, McDonald's stopped doing this on 3 July 1995, because the applicants refused to undertake to use the transcripts only for the purposes of the trial, and not to publicise what had been said in court. The trial judge refused to order McDonald's to supply the transcripts in the absence of the applicants' undertaking, and this ruling was upheld by the Court of Appeal. Thereafter, the applicants, using donations from the public, purchased transcripts at reduced cost (GBP 25 per day), 21 days after the evidence had been given. They submit that, as a result, and without sufficient helpers to take notes in court, they were severely hampered in their ability effectively to examine and cross-examine witnesses.

21. During the trial, Mr Morris faced an unconnected action brought against him by the London Borough of Haringey relating to possession of a property. Mr Morris signed an affidavit ("the Haringey affidavit") in support of his application to have those proceedings stayed until the libel trial was over, in which he stated that the libel action had arisen "from leaflets we had produced concerning, *inter alia*, nutrition of McDonald's food ...". McDonald's applied for this affidavit to be adduced as evidence in the libel trial as an admission against interest on publication by Mr Morris, and Bell J agreed to this request. Mr Morris objected that the affidavit should have read "allegedly produced" but that there had been a mistake on the part of his solicitor. The solicitor confirmed in writing to the court that the second applicant had instructed her to correct the affidavit, but that she had not done so because the error had not been material to the Haringey proceedings. The applicants submitted that they assumed that the solicitor's

letter would be admitted in evidence, and that Bell J did not warn them that it was inadmissible until the closure of evidence, so that they did not realise they needed to adduce further evidence to explain the mistake. The applicants' appeal to the Court of Appeal against Bell J's admission of the affidavit was refused on 25 March 1996.

22. On 20 November 1995, Bell J ruled on the meaning of the paragraph in the leaflet entitled "What's so unhealthy about McDonald's food?", finding that this part of the leaflet bore the meaning:

> "... that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (Sodium), and low in fibre, vitamins and mineral, and because eating it may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald's know this but they do not make it clear; that they still sell the food, and they deceive customers by claiming that their food is a useful and nutritious part of any diet".

23. The applicants appealed to the Court of Appeal against this ruling, initially relying on seven grounds of appeal. However, the day before the hearing on 2 April 1996 before the Court of Appeal, Ms Steel gave notice on behalf of both applicants that they were withdrawing six of the seven grounds, and now wished solely to raise the issue whether the trial judge had been wrong in determining a meaning which was more serious than that pleaded by McDonald's in their Statement of Claim. The applicants submitted that they withdrew the other grounds of appeal relating to the meaning of this part of the leaflet because lack of time and legal advice prevented them from fully pursuing them. They mistakenly believed that it would remain open to them to raise these matters again at a full appeal after the conclusion of the trial. The Court of Appeal decided against the applicants on the remaining single ground, holding that the meaning given to this paragraph by the judge was less severe than that pleaded by McDonald's.

24. In the light of the Haringey affidavit, McDonald's sought permission from the court to amend their Statement of Claim to allege that the applicants had been involved in the production of the leaflet and to allege publication dating back to September 1987. The applicants objected that such an amendment so late in the trial would be unduly prejudicial. However, on 26 April 1996 Bell J gave permission to McDonald's for the amendments; the applicants were allowed to amend their Defence accordingly.

25. Before the trial, the applicants had sought an order that McDonald's disclose the notes made by their enquiry agents; McDonald's had responded that there were no notes. During the course of the trial, however, it emerged that the notes did exist. The applicants applied for disclosure, which was opposed by McDonald's on the ground that the notes were protected by legal professional privilege. On 17 June 1996 Bell J ruled that the notes

should be disclosed, but with those parts which did not relate to matters contained in the witness statements or oral evidence of the enquiry agents deleted.

26. When all the evidence had been adduced, Bell J deliberated for six months before delivering his substantive 762 page judgment on 19 June 1997.

On the basis, principally, of the Haringey affidavit and the evidence of McDonald's enquiry agents, he found that the second applicant had participated in the production of the leaflet in 1986, at the start of London Greenpeace's anti-McDonald's campaign, although the precise part which he played could not be identified. Mr Morris had also taken part in its distribution. Having assessed the evidence of a number of witnesses, including Ms Steel herself, he found that her involvement had begun in early 1988 and took the form of participation in London Greenpeace's activities, sharing its anti-McDonald's aims, including distribution of the leaflet. The judge found that the applicants were responsible for the publication of "several thousand" copies of the leaflet. It was not found that this publication had any impact on the sale of McDonald's products. He also found that the London Greenpeace leaflet had been reprinted word for word in a leaflet produced in 1987 and 1988 by an organisation based in Nottingham called Veggies Ltd. McDonald's had threatened libel proceedings against Veggies Ltd, but had agreed a settlement after Veggies rewrote the section in the leaflet about the destruction of the rainforest and changed the heading "In what way are McDonald's responsible for torture and murder?" to read "In what way are McDonald's responsible for the slaughtering and butchering of animals?"

27. Bell J summarised his findings as to the truth or otherwise of the allegations in the leaflet as follows:

> "In summary, comparing my findings with the defamatory messages in the leaflet, of which the Plaintiffs actually complained, it was and is untrue to say that either Plaintiff has been to blame for starvation in the Third World. It was and is untrue to say that they have bought vast tracts of land or any farming land in the Third World, or that they have caused the eviction of small farmers or anyone else from their land.
>
> It was and is untrue to say that either Plaintiff has been guilty of destruction of rainforest, thereby causing wanton damage to the environment.
>
> It was and is untrue to say that either of the Plaintiffs have used lethal poisons to destroy vast areas or any areas of Central American rainforest, or that they have forced tribal people in the rainforest off their ancestral territories.
>
> It was and is untrue to say that either Plaintiff has lied when it has claimed to have used recycled paper.
>
> The charge that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat,

sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result, and that McDonald's know this but they do not make it clear, is untrue. However, various of the First and Second Plaintiffs' advertisements, promotions and booklets have pretended to a positive nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match.

It was true to say that the Plaintiffs exploit children by using them as more susceptible subjects of advertising, to pressurise their parents into going into McDonald's. Although it was true to say that they use gimmicks and promote the consumption of meals at McDonald's as a fun event, it was not true to say that they use the gimmicks to cover up the true quality of their food or that they promote them as a fun event when they know that the contents of their meals could poison the children who eat them.

Although some of the particular allegations made about the rearing and slaughter of animals are not true, it was true to say, overall, that the Plaintiffs are culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food.

It was and is untrue that the Plaintiffs sell meat products which, as they must know, expose their customers to a serious risk of food poisoning.

The charge that the Plaintiffs provide bad working conditions has not been justified, although some of the Plaintiffs' working conditions are unsatisfactory. The charge that the Plaintiffs are only interested in recruiting cheap labour and that they exploit disadvantaged groups, women and black people especially as a result, has not been justified. It was true to say that the Second Plaintiff [UK McDonald's] pays its workers low wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that the First Plaintiff [US McDonald's] pays its workers low wages. The overall sting of low wages for bad working conditions has not been justified.

It was and is untrue that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers."

28. As regards the applicants' counter-claim, Bell J found that McDonald's allegation that the applicants had lied in the leaflet had been unjustified, although they had been justified in alleging that the applicants had wrongly sought to deny responsibility for it. He held that the unjustified remarks had not been motivated by malice, but had been made in a situation of qualified privilege because McDonald's had been responding to vigorous attacks made on them in the leaflet, and he therefore entered judgment for McDonald's on the counter-claim also.

29. The judge awarded US McDonald's GBP 30,000 damages and UK McDonald's a further GBP 30,000. Mr Morris was severally liable for the whole GBP 60,000, and Mr Morris and Ms Steel were to be jointly and severally liable for a total of GBP 55,000 (GBP 27,500 in respect of each

plaintiff). McDonald's did not ask for an order that the applicants pay their costs.

C. The substantive appeal

30. The applicants appealed to the Court of Appeal on 3 September 1997. The hearing (before Lord Justices Pill and May and Mr Justice Keene) began on 12 January 1999 and lasted 23 days, and on 31 March 1999 the court delivered its 301 page judgment.

31. The applicants challenged a number of Bell J's decisions on general grounds of law, and contended as follows:

> "(a) [McDonald's] had no right to maintain an action for defamation because:
>
> - [US McDonald's] is a 'multinational' and [US and UK McDonald's] are each a public corporation which has (or should have) no right at common law to bring an action for defamation on the public policy ground that in a free and democratic society such corporations must always be open to unfettered scrutiny and criticism, particularly on issues of public interest.
>
> - the right of corporations such as [McDonald's] to maintain an action for defamation is not 'clear and certain' as the judge held ... . The law is on the contrary uncertain, developing or incomplete ... . Accordingly the judge should have considered and applied Article 10 of the European Convention on Human Rights ...
>
> (b) the judge was wrong to hold that [McDonald's] need [not] prove any particular financial loss or special damage provided that damage to its good will was likely.
>
> (c) the judge should have held that the burden was on [McDonald's] to prove that the matters complained of by them were false.
>
> (d) the judge was wrong to hold that, to establish a defence of justification, the [applicants] had to prove that the defamatory statements were true. The rule should be disapplied in the light of Article 10 of the ECHR.
>
> (e) it should be a defence in English law to defamation proceedings that the defendant reasonably believed that the words complained of were true.
>
> (f) there should be a defence in English law of qualified privilege for a publication concerning issues of public importance and interest relating to public corporations such as [McDonald's].
>
> (g) the judge should have held that the publication of the leaflet was on occasions of qualified privilege because it was a reasonable and legitimate response to an actual or perceived attack on the rights of others, in particular vulnerable sections of society who generally lack the means to defend themselves adequately (eg. children, young workers, animals and the environment) which the [applicants] had a duty to make and the public an interest to hear."

32. The Court of Appeal rejected these submissions.

On point (a), it held that commercial corporations had a clear right under English law to sue for defamation, and that there was no principled basis upon which a line might be drawn between strong corporations which should, according to the applicants, be deprived of this right, and weaker corporations which might require protection from unjustified criticism.

In dismissing ground (b), it held that, as with an individual plaintiff, there was no obligation on a company to show that it had suffered actual damage, since damage to a trading reputation might be as difficult to prove as damage to the reputation of an individual, and might not necessarily cause immediate or quantifiable loss. A corporate plaintiff which showed that it had a reputation within the jurisdiction and that the defamatory publication was apt to damage its goodwill thus had a complete cause of action capable of leading to a substantial award of damages.

On grounds (c) and (d), the applicants' submissions were contrary to clearly established English law, which stated that a publication shown by a plaintiff to be defamatory was presumed to be false until proven otherwise, and that it was for the defendants to prove the truth of statements presented as assertions of fact. Moreover, the court found some general force in McDonald's submission that in the instant case they had in fact largely accepted the burden of proving the falsity of the parts of the leaflet on which they had succeeded.

Dismissing grounds (e)-(g), the court observed that a defence of qualified privilege did exist under English law, but only where (i) the publisher acted under a legal, moral or social duty to communicate the information; (ii) the recipient of the information had an interest in receiving it; and (iii) the nature, status and source of the material, and the circumstances of the publication, were such that the publication should be protected in the public interest in the absence of proof of malice. The court accepted that there was a public interest in receiving information about the activities of companies and that the duty to publish was not confined to the mainstream media but could also apply to members of campaign groups, such as London Greenpeace. However, to satisfy the test, the duty to publish had to override the requirement to verify the facts. Privilege was more likely to be extended to a publication that was balanced, properly researched, in measured tones and based on reputable sources. In the instant case, the leaflet "did not demonstrate that care in preparation and research, or reference to sources of high authority or status, as would entitle its publishers to the protection of qualified privilege".

English law provided a proper balance between freedom of expression and the protection of reputation and was not inconsistent with Article 10 of the Convention. Campaign groups could perform a valuable role in public life, but they should be able to moderate their publications so as to attract a defence of fair comment without detracting from any stimulus to public

discussion which the publication might give. The relaxation of the law contended for would open the way for "partisan publication of unrestrained and highly damaging untruths", and there was a pressing social need "to protect particular corporate business reputations, upon which the well-being of numerous individuals may depend, from such publications".

33. The Court of Appeal further rejected the applicants' contention that the appeal should be allowed on the basis that the action was an abuse of process or that the trial was conducted unfairly, observing as follows:

> "Litigants in person who bring or contest a High Court action are inevitably undertaking a strenuous and burdensome task. This action was complex and the legal advice available to the [applicants] was, because of lack of funds, small in extent. We accept that the work required of the [applicants] at trial was very considerable and had to be done in an environment which, at least initially, was unfamiliar to them.
>
> As a starting point, we cannot however hold it to be an abuse of process in itself for plaintiffs with great resources to bring a complicated case against unrepresented defendants of slender means. Large corporations are entitled to bring court proceedings to assert or defend their legal rights just as individuals have the right to bring actions and defend them. ...
>
> Moreover the proposition that the complexity of the case may be such that a judge ought to stop the trial on that ground cannot be accepted. The rule of law requires that rights and duties under the law are determined. ...
>
> As to the conduct of the trial, we note that the 313 hearing days were spread over a period of two and a half years. The timetable had proper regard to the fact that the [applicants] were unrepresented and to their other difficulties. They were given considerable time to prepare their final submissions to which they understandably attached considerable importance and which were of great length. For the purpose of preparing closing submissions, the [applicants] had possession of a full transcript of the evidence given at the trial. The fact that, for a part of the trial, the [applicants] did not receive transcripts of evidence as soon as they were made does not render the trial unfair. Quite apart from the absence of an obligation to provide a transcript, there is no substantial evidence that the [applicants] were in the event prejudiced by delay in receipt of daily transcripts during a part of the trial.
>
> On the hearing of the appeal, we have been referred to many parts of the transcripts of evidence and submissions and have looked at other parts on our own initiative. On such references, we have invariably been impressed by the care, patience and fairness shown by the judge. He was well aware of the difficulties faced by the [applicants] as litigants in person and had full regard to them in his conduct of the trial. The [applicants] conducted their case forcefully and with persistence as they have in this Court. Of course the judge listened to submissions from the very experienced leading counsel appearing for [McDonald's] but the judge applied his mind robustly and fairly to the issues raised. This emerges from the transcripts and from the judgment he subsequently handed down. The judge was not slow to criticise [McDonald's] in forthright terms when he thought their conduct deserved it. Moreover, it appears to us that the [applicants] were shown considerable latitude in the manner in which they presented their case and in particular in the extent to which they were often permitted to cross-examine witnesses as great length.

> ...[We] are quite unpersuaded that the appeal, or any part of it, should be allowed on the basis that the action was an abuse of the process of the Court or that the trial was conducted unfairly."

34. The applicants also challenged a number of Bell J's findings about the content of the leaflet, and the Court of Appeal found in their favour on several points, summarised as follows:

> "On the topic of nutrition, the allegation that eating McDonald's food would lead to a very real risk of cancer of the breast and of the bowel was not proved. On pay and conditions we have found that the defamatory allegations in the leaflet were comment.
>
> In addition to the charges found to be true by the judge - the exploiting of children by advertising, the pretence by the respondents that their food had a positive nutritional benefit, and McDonald's responsibility for cruel practices in the rearing and slaughtering of some of the animals used for their products - the further allegation that, if one eats enough McDonald's food, one's diet may well become high in fat etc., with the very real risk of heart disease, was justified. ..."

35. The appeal court therefore reduced the damages payable to McDonald's, so that Ms Steel was now liable for a total of GBP 36,000 and Mr Morris for a total of GBP 40,000. It refused the applicants leave to appeal to the House of Lords.

36. On 21 March 2000 the Appeal Committee of the House of Lords also refused the applicants leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Defamation

37. Under English law the object of a libel action is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication of defamatory statements concerning him or her.

38. The plaintiff carries the burden of proving "publication". As a matter of law, (*per* Bell J at p. 5 of the judgment in the applicants' case):

> "any person who causes or procures or authorises or concurs in or approves the publication of a libel is as liable for its publication as a person who physically hands it or sends it off to another. It is not necessary to have written or printed the defamatory material. All those jointly concerned in the commission of a tort (civil wrong) are jointly and severally liable for it, and this applies to libel as it does to any other tort".

39. A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities. It is no defence to a libel action to prove that the defendant acted in good faith, believing the statement to be true. English law does, however, recognise the defence of "fair comment", if it can be established that the defamatory statement is comment, and not an

assertion of fact, and is based on a substratum of facts, the truth of which the defendant must prove.

40. As a general principle, a trading or non-trading corporation is entitled to sue in libel to protect as much of its corporate reputation as is capable of being damaged by a defamatory statement. There are certain exceptions to this rule: local authorities, government-owned corporations and political parties, none of which can sue in defamation, because of the public interest that a democratically-elected organisation, or a body controlled by such an organisation, should be open to uninhibited public criticism (see *Derbyshire County Council v. Times Newspapers Ltd* [1993] AC 534; *British Coal Corporation v. NUM (Yorkshire Area) and Capstick*, unreported, 28 June 1996; and *Goldsmith and another v. Bhoyrul*, [1997] 4 All ER 268).

B. Legal aid for defamation proceedings

41. Throughout the relevant time, the allocation of civil legal aid in the United Kingdom was governed by the Legal Aid Act 1988. Under Schedule 2, Part II, paragraph 1 of that Act, "[p]roceedings wholly or partly in respect of defamation" were excepted from the scope of the civil legal aid scheme.

42. The Access to Justice Act 1999 ("AJA 1999") came into force on 1 April 2000, after the proceedings in the present case had concluded. It sets out the current statutory framework for legal aid in England and Wales, administered by the Legal Services Commission ("the Commission"), and made a number of reforms; for example, introducing the possibility for conditional fee agreements. Under the AJA 1999 the presumption remains that civil legal aid should not be granted in respect of claims in defamation (paragraph 1(a)(f) of Schedule). However, the Act contains a provision (section 6(8)) to enable discretionary "exceptional funding" of cases which otherwise fall outside the scope of legal aid, allowing the Lord Chancellor *inter alia*, to authorise the Commission to grant legal aid to an individual defamation litigant, following a request from the Commission.

The Lord Chancellor has issued guidance to the Commission as to the types of case he is likely to consider favourably, stressing that such cases are likely to be extremely unusual given that Parliament has already decided in the AJA 1999 that the types of case excepted from the legal aid scheme are of low priority. As well as financial eligibility for legal aid, the Commission must be satisfied either that "there is a significant wider public interest ... in the resolution of the case and funded representation will contribute to it", or that the case "is of overwhelming importance to the client", or that "there is convincing evidence that there are other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings,

or the lack of public funding would lead to obvious unfairness in the proceedings".

43. The normal rule in civil proceedings in England and Wales, including defamation proceedings, is that the loser pays the reasonable costs of the winner. This rule applies whether either party is legally aided or not. An unsuccessful privately paying party would usually be ordered to pay the legal costs of a successful legally aided opponent. However, an unsuccessful legally aided party is usually protected from paying the costs of a successful privately paying party, because the costs order made against the loser will not usually be enforceable without further order of the court, which is likely to be granted only in the event of a major improvement in the financial circumstances of the legally aided party.

C. Mode of trial

44. The Supreme Court Act 1981 provides in section 69:

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue -
>
> a claim in respect of libel, slander ...
>
> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

D. Damages

45. The measure of damages for defamation is the amount that would put the plaintiff in the position he or she would have been in had the wrongdoing not been committed. The plaintiff does not have to prove that he has suffered any actual pecuniary loss: it is for the jury (or judge, if sitting alone) to award a sum of damages sufficient to vindicate the plaintiff's reputation and to compensate for injury to feelings.

46. The Civil Procedure Rules (RSC, Ord. 46, rule 2(1)(a)) provide that leave of the court is required in order to enforce a judgment after a delay of six years or more. Leave to issue execution is usually refused after the expiration of six years from the date on which the judgment became enforceable (see *National Westminster Bank plc v. Powney* [1991] Ch 339, [1990] 2 All ER 416, CA, and *W.T. Lamb & Sons v. Rider* [1948] 2 KB 331, [1948] 2 All ER 402, CA).

COMPLAINTS

47. The Court declared a number of the applicants' complaints inadmissible in its partial decision of 22 October 2002. The remaining complaints are, under Article 6 § 1 of the Convention, that the proceedings were unfair, principally because of the denial of legal aid, and, under Article 10, that the proceedings and their outcome constituted a disproportionate interference with the applicants' right to freedom of expression.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

48. The applicants raised a number of issues under Article 6 § 1, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The applicants' principal complaint under this provision was that they were denied a fair trial because of the lack of legal aid. They also alleged that unfairness was caused as a result of the trial judge's ruling to admit as evidence an affidavit sworn by the second applicant, his refusal to allow adjournments on a number of occasions and his grant of permission to McDonald's to amend their pleadings at a late stage in the proceedings.

A. Legal Aid

1. The parties' submissions

(a) The applicants

49. The applicants pointed out that this was the longest trial, either civil or criminal, in English legal history. The entire length of the proceedings, from the issue of the writ on 20 September 1990 to the refusal by the House of Lords of leave to appeal on 21 March 2000 was nine years and six months. Before the trial started there were 28 pre-trial hearings, some of which lasted up to five days. The hearing before the High Court lasted from 28 June 1994 until 13 December 1996, a period of two years and six months, of which 313 days were spent in court, together with additional days in the Court of Appeal to contest rulings made in the course of the trial. The High

Court proceedings involved about 40,000 pages of documentary evidence and 130 oral witnesses. The appeal hearing lasted 23 days. Overall, the case included over 100 days of legal argument. The transcripts of the hearings exceeded 20,000 pages.

50. The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality. At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately USD 30 billion in 1995), whereas the first applicant was a part-time bar-worker earning a maximum of GBP 65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater. McDonald's were represented throughout by Queen's Counsel and junior counsel specialising in libel law, supported by a team of solicitors and administrative staff from one of the largest firms in England. The applicants were assisted by lawyers working *pro bono,* who drafted their defence and represented them, during the 28 pre-trial hearings and appeals which took place over 37 court days, on eight days and in connection with five applications. During the main trial, submissions were made by lawyers on their behalf on only three occasions. It was difficult for sympathetic lawyers to volunteer help, because the case was too complicated for someone else just to "dip into", and moreover the offers of help usually came from inexperienced, junior solicitors and barristers, without the time and resources to be effective.

51. The applicants bore the burden of proving the truth of a large number of allegations covering a wide range of difficult issues. In addition to the more obvious disadvantages of being without experienced counsel to argue points of law and to conduct the examination and cross-examination of witnesses in court, they had lacked sufficient funds for photocopying, purchasing the transcripts of each day's proceedings, tracing and proofing expert witnesses, paying the witnesses' costs and travelling expenses and note-taking in court. All they could hope to do was keep going: on several occasions during the trial they had to seek adjournments because of physical exhaustion.

52. They claimed that, had they been provided with legal aid with which to trace, prepare and pay the expenses of witnesses, they would have been able to prove the truth of one or more of the charges found to have been unjustified, for example, the allegations on diet and degenerative disease, food safety, hostility to trade unionism and/or that some of McDonald's international beef supplies came from recently deforested areas. Moreover, the applicants' inexperience and lack of legal training led them to make a number of procedural mistakes. Had they been represented, it is unlikely that they would have withdrawn all but one of their grounds on the interim appeal (see paragraph 23 above) or that the Haringey affidavit would have

been admitted in evidence (see paragraph 21 above), and it was mainly on the basis of the mistake contained in that affidavit that the second applicant was found to have been involved in the publication of the leaflet.

(b) the Government

53. The Government submitted that the Court should be slow to impose a duty to provide legal aid in civil cases, in view of the deliberate omission of any such obligation from the Convention. In contrast to the position in criminal proceedings (Article 6 § 3(c)), the Convention left Contracting States with a free choice of the means of ensuring effective civil access to court (the Government relied on *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26). States did not have unlimited resources to fund legal aid systems, and it was therefore legitimate to impose restrictions on eligibility for legal aid in certain types of low priority civil cases, provided such restrictions were not arbitrary (*Winer v. the United Kingdom*, no. 10871/84, Commission decision of 10 July 1986, *Decisions and Reports* 48, p. 154, at p. 171).

54. The Convention organs had considered the non-availability of legal aid in defamation cases under English law in six cases, and had never found it to be in breach of Article 6 § 1 (see *Winer*, cited above; *Munro v. the United Kingdom*, no. 10594/83, Commission decision of 14 July 1987; *H.S. and D.M. v. the United Kingdom*, no. 21325/93, Commission decision of 5 May 1993; *Stewart-Brady v. the United Kingdom*, nos. 27436/95 and 28406/95, Commission decision of 2 July 1997; *McVicar v. the United Kingdom*, no. 46311/99, ECHR 2002; and *A. v. the United Kingdom*, no. 35373/97, ECHR 2002).

55. The Court should not depart from this consistent jurisprudence in the present case, which, in the Government's submission, fell far short of the kind of exceptional circumstances where the provision of legal aid was "indispensable for effective access to court" (see the *Airey* judgment, § 26).

56. First, the Government argued that the law and facts at issue in the litigation were not so difficult as to make legal aid essential. The applicants' conduct of their defence and counter-claim, and their success in proving many of the allegations made in the leaflet, demonstrated that they were capable of mastering any complexities of the law of defamation as it applied to them.

57. Furthermore, the Government contended that it was relevant that the applicants received advice and representation *pro bono* on a number of occasions, particularly for some of their appearances in the Court of Appeal and in drafting their pleadings. It appeared that the applicants also raised at least GBP 40,000 to fund their defence and that they received help with note-taking and other administrative tasks from volunteers sympathetic to their cause. Both Bell J and the Court of Appeal took into account the applicants' lack of legal training: Bell J, for example, assisted the applicants

by reformulating questions for witnesses and did not insist on the usual procedural formalities, such as limiting the case to that pleaded; the Court of Appeal took note in its judgment of the need to safeguard the applicants from their lack of legal skill, conducted its own research to supplement the submissions made by the applicants and allowed them to introduce the defence of fair comment at the appeal stage, even though it had not been raised at first instance. The applicants intended the case to achieve maximum publicity, which it did. The hearings before the High Court and Court of Appeal took so long because the applicants were afforded every possible latitude in the presentation of their case; their evidence and submissions took up the great bulk of the time.

58. In the Government's submission it could not be assumed, in any event, that had legal aid generally been available for the defence of defamation actions, the applicants would have been granted it. The Legal Aid Board (as it then was, now the Legal Services Commission) would have had to make a decision, as it does in civil cases where legal aid is available, based on factors such as the merits of the case and whether the costs of litigation would be justified by the likely benefit to the aided party. The applicants published defamatory material without prior justification, and the tax payer should not have been required to pay for the research the applicants should have carried out before publishing the leaflet, or to bear the burden of placing the applicants in a position of equality with McDonald's, which was estimated to have spent in excess of GBP 10 million on legal expenses.

2. The Court's assessment

59. The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, § 24). It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court (ibid.) and that he or she is able to enjoy equality of arms with the opposing side (see, among many other examples, *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, § 53).

60. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure (see *Airey*, § 26 and *McVicar*, § 50).

61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance

of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively (*Airey,* § 26; *McVicar,* §§ 48 and 50; *P., C. and S. v. the United Kingdom*, no. 56547/00, § 91, ECHR 2002-VI; and also *Munro v. the United Kingdom*, no. 10594/83, Commission decision of 14 July 1987, Decisions and Reports 52, p. 158).

62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings (see *Munro*, above). Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary (see *De Haes and Gijsels*, cited above, § 53, and also *McVicar*, §§ 51 and 62).

63. The Court must examine the facts of the present case with reference to the above criteria.

First, as regards what was at stake for the applicants, it is true that, in contrast to certain earlier cases where the Court has found legal assistance to have been necessary for a fair trial (for example, *Airey* and *P., C. and S.,* both cited above), the proceedings at issue here were not determinative of important family rights and relationships. The Convention organs have observed in the past that the general nature of a defamation action, brought to protect an individual's reputation, is to be distinguished, for example, from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family (see *McVicar,* § 61 and *Munro*, both cited above).

However, it must be recalled that the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention (see paragraph 87 below). Moreover, the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant. McDonald's claimed damages up to GBP 100,000 and the awards actually made, even after reduction by the Court of Appeal, were high when compared to the applicants' low incomes: GBP 36,000 for the first applicant, who was, at the time of the trial, a bar-worker earning approximately GBP 60 a week, and GBP 40,000 for the second applicant, an unwaged single parent (see paragraphs 9, 14 and 35 above). McDonald's have not, to date, attempted to enforce payment of the

awards, but this was not an outcome which the applicants could have foreseen or relied upon.

64. As for the complexity of the proceedings, the Court recalls its finding in the *McVicar* judgment (cited above, § 55) that the English law of defamation and rules of civil procedure applicable in that case were not sufficiently complex as to necessitate the grant of legal aid. The proceedings defended by Mr McVicar required him to prove the truth of a single, principal allegation, on the basis of witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He had also to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts, in the course of a trial which lasted just over two weeks.

65. The proceedings defended by the present applicants were of a quite different scale. The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing lasted 23 days. The factual case which the applicants had to prove was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with a range of scientific questions, such as nutrition, diet, degenerative disease and food safety. Certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The detailed nature and complexity of the factual issues are further illustrated by the length of the judgments of the trial court and the Court of Appeal, which ran in total to over 1,100 pages (see, *inter alia*, paragraphs 18, 19, 30 and 49 above).

66. Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue, including the meanings to be attributed to the words of the leaflet, the question whether the applicants were responsible for its publication, the distinction between fact and comment, the admissibility of evidence and the amendment of the Statement of Claim. Overall, some 100 days were devoted to legal argument, resulting in 38 separate written judgments (ibid.).

67. Against this background, the Court must assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid. In the above-mentioned *McVicar* case (§§ 53 and 60), it placed weight on the facts that Mr McVicar was a well-educated and experienced journalist, and that he was represented during the pre-trial and appeal stages by a solicitor specialising in defamation law, from whom he could have sought advice on any aspects of the law or procedure of which he was unsure.

68. The present applicants appear to have been articulate and resourceful; in the words of the Court of Appeal, they conducted their case "forcefully and with persistence" (see paragraph 33 above), and they succeeded in proving the truth of a number of the statements complained of. It is not in

dispute that they could not afford to pay for legal representation themselves, and that they would have fulfilled the financial criteria for the grant of legal aid. They received some help on the legal and procedural aspects of the case from barristers and solicitors acting *pro bono*: their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the Statement of Claim (see paragraph 16 above). In addition, they were able to raise a certain amount of money by donation, which enabled them, for example, to buy transcripts of each day's evidence 25 days later (ibid.). For the bulk of the proceedings, however, including all the hearings to determine the truth of the statements in the leaflet, they acted alone.

69. The Government have laid emphasis on the considerable latitude afforded to the applicants by the judges of the domestic courts, both at first instance and on appeal, in recognition of the handicaps under which the applicants laboured. However, the Court considers that, in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel (compare *P., C. and S.*, cited above, §§ 93-95 and 99). The very length of the proceedings is, to a certain extent, a testament to the applicants' lack of skill and experience. It is, moreover, possible that had the applicants been represented they would have been successful in one or more of the interlocutory matters of which they specifically complain, such as the admission in evidence of the Haringey affidavit (see paragraph 21 above). Finally, the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's (see paragraph 16 above) was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal.

70. It is true that the Commission declared inadmissible an earlier application under, *inter alia*, Article 6 § 1 by these same applicants (*H.S. and D.M. v. the United Kingdom*, no. 21325/93, Commission decision of 5 May 1993, unreported), observing that "they seem to be making a tenacious defence against McDonald's, despite the absence of legal aid ...". That decision was, however, adopted over a year before the start of the trial, at a time when the length, scale and complexity of the proceedings could not reasonably have been anticipated.

71. The Government argued that, even if legal aid had been in principle available for the defence of defamation actions, it might well not have been granted in a case of this kind, or the amount awarded might have been capped or the award made subject to other conditions. The Court is not,

however, persuaded by this argument. It is, in the first place, a matter of pure speculation whether, if legal aid had been available, it would have been granted in the applicants' case. More importantly, if legal aid had been refused or made subject to stringent financial or other conditions, substantially the same Convention issue would have confronted the Court, namely whether the refusal of legal aid or the conditions attached to its grant were such as to impose an unfair restriction on the applicants' ability to present an effective defence.

72. In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of Article 6 § 1.

B. Other complaints under Article 6 § 1

73. The applicants also alleged that a number of specific rulings made by the judges in the proceedings caused unfairness in breach of Article 6 § 1. Thus, they complained that the circumstances surrounding the admission in evidence of the Haringey affidavit (see paragraph 21 above) had been unfairly prejudicial, as had Bell J's refusal to grant adjournments on a number of occasions and his decision to allow McDonald's to amend their Statement of Claim (see paragraph 24 above).

74. The Government denied that any unfairness had been caused by these rulings, which had instead struck a fair balance between the opposing litigants.

75. To the extent that these particular complaints have merit, the Court considers that they are subsumed within the principal complaint about lack of legal aid, since, even if it had not led to a different result, legal representation might have mitigated the effect on the applicants of the rulings in question.

76. In view of the above finding of a violation of Article 6 § 1 based on the lack of legal aid, the Court does not consider it necessary to examine separately the additional complaints.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

77. The applicants also complained of a breach of Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicants

78. The applicants emphasised the inter-relationship between Articles 6 and 10 and claimed that the domestic proceedings and their outcome were disproportionate given, *inter alia,* that, without legal aid, they bore the burden of proving the truth of the matters set out in the leaflet.

79. This burden was contrary to Article 10. The issues raised in the leaflet were matters of public interest and it was essential in a democracy that such matters be freely and openly discussed. To require strict proof of every allegation in the leaflet was contrary to the interests of democracy and plurality because it would compel those without the means to undertake court proceedings to withdraw from public debate. The reasons under English law for permitting wider criticism of government bodies applied equally to criticism of large multinationals, particularly given that their vast economic power was coupled with a lack of accountability. In this regard, the applicants prayed in aid the principle in English law that local authorities, government-owned corporations and political parties could not sue in defamation (see paragraph 40 above).

80. Moreover, it was significant that the applicants were not the authors of the leaflet. It was almost impossible for campaigners to prove the truth of the contents of a campaigning leaflet dealing with global issues that they were merely involved in distributing. In any event, the matters contained in the leaflet were already in the public domain and had, with only minor amendments, been set out in a leaflet printed and distributed by Veggies, to which McDonald's did not object (see paragraph 26 above). The applicants bore no malice against McDonald's and genuinely believed that the statements in the leaflet were true.

81. Finally, the applicants submitted that the damages awarded were excessive and quite beyond their means of paying. It was contrary to the freedom of expression for the law to presume damage without the need for McDonald's to show any loss of sales as a result of the publication.

2. The Government

82. The Government contended that the applicants in the present case were not responsible journalists, but participants in a campaign group carrying out a vigorous attack on McDonald's. There had been no attempt on their part to present a balanced picture, for example by giving McDonald's an opportunity to defend itself, and there was no suggestion that the applicants had carried out any research before publication. Domestic law was not arbitrary in allocating the burden of proving justification on the defendant. On the contrary, it reflected the ordinary principle that the party who asserts a particular fact should have to prove it. In many cases it would be unreasonable to expect a plaintiff to have to prove a negative, that a given allegation was untrue. Having taken it upon him or herself to publish a statement, it was not unreasonable to expect that the defendant should bear the limited burden of having to adduce evidence which showed, on the balance of probabilities, that the statement was true.

83. The Government rejected the applicants' argument that the ability of multinational corporations, such as McDonald's, to defend their reputations by bringing defamation claims amounted to a disproportionate restriction on the ability of individuals to exercise their right to freedom of expression. They denied that there was a parallel to be drawn with the position under domestic law whereby government bodies and political parties are unable to sue for defamation: this bar was justified for the protection of the democratic process, which required free, critical expression. The reputation of a large company might be vital for its commercial success; and the commercial success of companies of all sizes was important to society for a variety of reasons, such as fostering wealth creation, expanding the tax base and creating employment. Furthermore, the applicants' proposal that "multinational companies" should have no legal protection for their reputations was unworkably vague and it would be difficult to draft and operate legislation to that effect. Their alternative suggestion, that multinationals should have to prove loss, was also misconceived. The vindication of a plaintiff's reputation was a legitimate aim in itself and it would place enormous evidential burdens on both sides if economic loss were to become a material issue.

84. It was irrelevant that certain of the defamatory statements had already been published, for example in the Veggies' leaflet. A statement did not become true simply through repetition, and, even where a statement was in wide circulation and had been published by a number of authors, the defamed party must be free to take proceedings against whomever he, she or it chose.

B. The Court's assessment

85. It was not disputed between the parties that the defamation proceedings and their outcome amounted to an interference, for which the State had responsibility, with the applicants' rights to freedom of expression.

86. It is further not disputed, and the Court finds, that the interference was "prescribed by law". The Court further finds that the English law of defamation, and its application in this particular case, pursued the legitimate aim of "the protection of the reputation or rights of others".

87. The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles relating to this question are well established in the case-law and have been summarised as follows (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, § 46):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which – as the Court has already said above – must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... . In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ... ."

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement,

since even a value judgment without any factual basis to support it may be excessive (see, for example, *Feldek v. Slovakia*, judgment of 12 July 2001, *Reports* 2001-VIII, §§ 75-76).

88. The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of. First, it notes that the leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. The Court has long held that "political expression", including expression on matters of public interest and concern, requires a high level of protection under Article 10 (see, for example, *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, and also *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, § 47).

89. The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment (see, *mutatis mutandis*, *Bowman v. the United Kingdom*, judgment of 19 February 1998, *Reports* 1998-I and *Appleby v. the United Kingdom*, no. 44306/98, ECHR 2003).

90. Nonetheless, the Court has held on many occasions that even the press "must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, ..." (see, for example, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/03, § 59, ECHR 1999-III). The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (*Bladet Tromsø*, § 65), and the same principle must apply to others who engage in public debate. It is true that the Court has held that journalists are allowed "recourse to a degree of exaggeration, or even provocation" (see for example *Bladet Tromsø* § 59 or *Präger and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, § 38), and it considers that in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected. In the present case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgments.

91. The applicants deny that either was involved in the production of the leaflet (despite the High Court's finding to the contrary: see paragraph 26

above) and stress that they genuinely believed the leaflet's content to be true (see the High Court's finding in paragraph 28 above). They claim that it places an intolerable burden on campaigners such as themselves, and thus stifles public debate, to require those who merely distribute a leaflet to bear the burden of establishing the truth of every statement contained in it. They also argue that large multinational companies should not be entitled to sue in defamation, at least without proof of actual financial damage. Complaint is further made of the fact that under the law McDonald's were able to bring and succeed in a claim for defamation when much of the material included in the leaflet was already in the public domain.

92. As to this last argument, the Court notes that a similar contention was examined and rejected by the Court of Appeal on the ground either that the material relied on did not support the allegations in the leaflet or that the other material was itself lacking in justification. The Court finds no reason to reach a different conclusion.

93. As to the complaint about the burden of proof, the Court recalls that in its *McVicar* judgment it held that it was not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements (see *McVicar*, cited above, § 87). The Court there recalled its *Bladet Tromsø* judgment, in which it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements (ibid., § 84).

94. The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, § 75). However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Markt Intern Verlag GmbH and Beerman v. Germany*, judgment of 20 November 1989, Series A no. 165, §§ 33-38).

95. If, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and

equality of arms is provided for. The Court has already found that the lack of legal aid rendered the defamation proceedings unfair, in breach of Article 6 § 1. The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10. As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 44, *Bladet Tromsø* § 64, *Thorgeir Thorgeirson* § 68). The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.

96. Moreover, the Court considers that the size of the award of damages made against the two applicants may also have failed to strike the right balance. Under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (see *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A, No. 316-B, § 49). The Court notes on the one hand that the sums eventually awarded in the present case (GBP 36,000 in the case of the first applicant and GBP 40,000 in the case of the second applicant) although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants. While accepting, on the other hand, that the statements in the leaflet which were found to be untrue contained serious allegations, the Court observes that not only were the plaintiffs large and powerful corporate entities but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication of the "several thousand" copies of the leaflets found to have been distributed by the trial judge (see paragraph 45 above and compare, for example, *Hertel v. Switzerland*, cited above, § 49).

97. While it is true that no steps have to date been taken to enforce the damages award against either applicant, the fact remains that the substantial sums awarded against them have remained enforceable since the decision of the Court of Appeal. In these circumstances, the Court finds that the award

of damages in the present case was disproportionate to the legitimate aim served.

98. In conclusion, given the lack of procedural fairness and the disproportionate award of damages, the Court finds that there has been a violation of Article 10.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

100. The applicants claimed that, had their rights under Articles 6 and 10 been adequately protected by the Government, they would not have had to defend themselves throughout the entire defamation proceedings, which continued over nine years. They claimed payment for the legal work they had to carry out, at the rate applicable for litigants in person under the Civil Procedure Rules, namely GBP 9.25 per hour, plus reasonable travelling expenses. Using this rate, they calculated that they should each be reimbursed GBP 21,478.50 in respect of the 387 days each spent in court, together with GBP 100,233.00 each for preparation. Their total, joint claim for domestic legal costs therefore came to GBP 243,423.00, to which had to be added GBP 31,194.84 for expenses and disbursements such as photocopying, transcripts, telephone calls and travelling.

101. The applicants also asked the Court to ensure in its judgment that if McDonald's were ever successful in enforcing the GBP 40,000 award of damages against them, the Government should be required to reimburse the sum paid.

102. The Government commented that the amounts claimed by the applicants in respect of their court appearances and preparatory work did not reflect costs actually incurred by them or money actually lost as a result of the alleged violations of Articles 6 § 1 and 10. Had the applicants been awarded legal aid for their defence, the legal aid monies would have been paid to their legal representatives; on no view would legal aid have constituted financial remuneration for the applicants themselves. As for the expenses claimed by the applicants, it was a matter of pure speculation whether and to what extent, if legal aid had been available, these expenses would have been covered by public funds.

103. As for the applicants' request for a "rider" to cover their liability should McDonald's decide to enforce the claim for damages, the

Government submitted that this was not a concept known to international law and that such an order would be contrary to the parties' legitimate interest in the finality of litigation.

104. The Court notes that the applicants have not presented any evidence to suggest that the time they spent preparing and presenting their defence to the defamation proceedings caused them any actual pecuniary loss; it has not been suggested, for example, that either applicant lost earnings as a result of the lack of legal aid. They have filed an itemised claim in respect of expenses and disbursements, but they do not allege that their expenses exceeded the amount which they were able to raise by voluntary donation (see paragraph 16 above). The Court is not, therefore, satisfied that the sums claimed represented losses or expenses actually incurred.

105. It further notes that, because of the period of time that has elapsed since the order for damages was made against the applicants, McDonald's would need the leave of the court before it could proceed to enforce the award (see paragraph 46 above). In these circumstances, despite its finding that the award of damages was disproportionate and in breach of Article 10, the Court does not consider it necessary to make any provision in respect of it under Article 41 at the present time.

106. In conclusion, therefore, the Court makes no award in respect of compensation for pecuniary damage.

B. Non-pecuniary damage

107. The applicants claimed that during the period of over nine years they were defending the defamation action against such a powerful adversary they suffered considerable stress and anxiety. They felt a responsibility to defend the case to the utmost because of the importance of the issues raised and the necessity of public debate. In consequence, they were forced to sacrifice their health, personal and family lives. Ms Steel provided the Court with doctors' letters from March 1995 and March 1996 stating that she was suffering from stress-related illness aggravated by the proceedings. Mr Morris, a single parent, was unable to spend as much time as he would have wished with his young son. Ms Steel claimed GBP 15,000 under this head and Mr Morris claimed GBP 10,000.

108. The Government submitted that, in accordance with the Court's practice in the great majority of cases involving breaches of Article 10 and procedural breaches of Article 6, it was not necessary to make an award of compensation for non-pecuniary damage. There was no evidence that the applicants had suffered more stress than any individual, represented or not, involved in litigation and it was a matter of pure speculation whether and by how much the stress would have been reduced if the violations of Articles 6 and 10 had not taken place. In any event, the amounts claimed were

excessive when compared with other past awards for serious violations of the Convention.

109. The Court has found violations of Articles 6 § 1 and 10 based, principally, on the fact that the applicants had themselves to carry out the bulk of the legal work in these exceptionally long and difficult proceedings to defend their rights to freedom of expression. In these circumstances the applicants must have suffered anxiety and disruption to their lives far in excess of that experienced by a represented litigant, and the Court also notes in this connection the medical evidence submitted by Ms Steel. It awards compensation for non-pecuniary damage of EUR 20,000 to the first applicant and EUR 15,000 to the second applicant.

C. Strasbourg costs and expenses

110. The applicants were represented before the Court by leading and junior counsel and a senior and assistant solicitor.

Both counsel claimed to have spent several hundred hours on the case, but, in order to keep costs within a reasonable limit, decided to halve their hourly rates (to GBP 125 and GBP 87.50 respectively) and to claim for only 115 hours' work for leading counsel and 75 hours' work for junior counsel. In addition, leading counsel claimed GBP 5,000 for preparing for and representing the applicants at the hearing on 7 September 2004, and junior counsel claimed GBP 2,500 for the hearing. The total fees for leading counsel were GBP 19,375 plus value added tax ("VAT"), and those of junior counsel were GBP 9,062.50 plus VAT.

Despite having invested approximately 45 hours in the case, the senior solicitor claimed for only 25 hours and halved his hourly rate to GBP 175. He also claimed GBP 2,000 in respect of the hearing. The assistant solicitor claimed to have spent over 145 hours on the case, but claimed for 58 hours' work, at GBP 75 per hour, half her usual rate. She claimed GBP 1,500 for the hearing. The senior solicitor's total costs came to GBP 6,375 plus VAT, and those of the assistant solicitor came to GBP 5,850 plus VAT.

In addition, the applicants made a claim under this head for some of the work they had carried out in connection with the proceedings before the Court, namely 150 hours each at GBP 9.25 per hour: a total of GBP 2,775.

Finally, they claimed a total of GBP 3,330 travelling and accommodation expenses for the hearing in respect of the four lawyers and two applicants.

The total claim for costs and expenses under this heading came to GBP 46,767.50, plus VAT.

111. The Government considered the use of four lawyers to have been unreasonable and excessive. They submitted that the costs and travelling expenses of senior counsel and one of the solicitors should be disallowed. The applicants were not entitled to claim any costs in respect of the work

they had carried out, since this part of the claim did not represent pecuniary loss actually incurred.

112. The Court recalls that only such costs and expenses as were actually and necessarily incurred in connection with the violation or violations found, and reasonable as to quantum, are recoverable under Article 41 (see, for example, *Şahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003). It follows that it cannot make an award under this head in respect of the hours the applicants themselves spent working on the case, as this time does not represent costs actually incurred by them (see *Dudgeon v. the United Kingdom (Article 50)*, judgment of 24 February 1983, Series A no. 59, § 22 and *Robins v. the United Kingdom,* judgment of 23 September 1997, *Reports* 1997-V, § 44). It is clear from the length and detail of the pleadings submitted by the applicants that a great deal of work was carried out on their behalf, but in view of the relatively limited number of relevant issues, it is questionable whether the entire sum claimed for costs was necessarily incurred. In all the circumstances, the Court awards EUR 50,000 under this head, less the EUR 2,688.83 already paid in legal aid by the Council of Europe, together with any tax that may be payable.

D. Default interest

113. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the time of settlement:

(i) EUR 20,000 (twenty thousand euros) to the first applicant and EUR 15,000 (fifteen thousand euros) to the second applicant in respect of non-pecuniary damage;

(ii) EUR 47,311.17 (forty-seven thousand, three hundred and eleven euros and seventeen cents) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President

- **CAP 221D LEGAL AID IN CRIMINAL CASES RULES**
  - Rule 21 - Solicitor and counsel fees - 04/07/2003

Rule Num:	21	Version Date	04/07/2003
Heading	Solicitor and counsel fees	Back to Individual Section Format	

(1) The fees payable to a solicitor or counsel assigned under these rules to represent an aided person shall be determined by the Director having regard to the work actually and reasonably done and, subject to this rule, in accordance with the following- (L.N. 414 of 1981; L.N. 115 of 1985)

(a) to a solicitor assigned under a legal aid certificate in respect of proceedings in the Court of First Instance a fee of $6790 and additionally if the trial is not concluded on the day on which it started, a daily fee of not less than $830 and not exceeding $4420 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 25 of 1998 s. 2; L.N. 174 of 2003)

(aa) to a solicitor assigned under an appeal aid certificate in respect of an appeal from the Court of First Instance to the Court of Appeal a fee of $9160 and additionally if the appeal is not concluded on the day on which it started, a daily fee of not less than $1150 and not exceeding $5910 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; 25 of 1998 s. 2; L.N. 174 of 2003)

(ab) to a solicitor assigned under an appeal aid certificate in respect of an appeal from the District Court to the Court of Appeal a fee of $7330 and additionally if the appeal is not concluded on the day on which it started, a daily fee of not less than $910 and not exceeding $4760 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(b) to a solicitor assigned under a legal aid certificate in respect of proceedings in the District Court a fee of $4840; and additionally, if the trial is not concluded on the day on which it started, a daily fee of not less than $1160 and not exceeding $2900 in respect of the second and every subsequent day; (L.N. 70 of 1973; L.N. 289 of 1979; L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(c) to a solicitor assigned under a legal aid certificate to act as advocate as well as instructing solicitor in respect of proceedings in the District Court a fee not exceeding $16800 and additionally if the trial is not concluded on the day on which it started, a daily fee not exceeding $9310 in respect of the second and every subsequent day; (L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(d) to counsel assigned under a legal aid certificate in respect of proceedings in the Court of First Instance a fee not exceeding $20410 or in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances and additionally if the trial is not concluded on the day on which it started, such daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; 25 of 1998 s. 2; L.N. 174 of 2003)

(da) to counsel assigned under an appeal aid certificate in respect of an appeal from the Court of First Instance to the Court of Appeal a fee not exceeding $27210 or in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances and additional if the appeal is not concluded on the day on which it started, such daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; 25 of 1998 s. 2; L.N. 174 of 2003)

(db) to counsel assigned under an appeal aid certificate in respect of an appeal from the District Court to the Court of Appeal a fee not exceeding $21760 or in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances and additionally if the appeal is not concluded on the day on which it started, such daily fee not exceeding one half of the fee allowed under this sub-paragraph as appears to be proper in the circumstances; (L.N. 101 of 1991; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; L.N. 174 of 2003)

(e) to counsel assigned under a legal aid certificate in respect of proceedings in the District Court, a fee not exceeding $13600 or, in the case of Senior Counsel, such fee as appears to the Director to be proper in the circumstances; and additionally, if the trial is not concluded on the day on which it started, a daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; L.N. 174 of 2003)

(f) to Senior Counsel assigned under a legal aid certificate in respect of proceedings in the Court of First Instance, District Court or an appeal aid certificate, fees for such consultations approved by the Director at such hourly rate as appears to the Director to be proper in the circumstances; (94 of 1997 s. 20; 25 of 1998 s. 2)

(g) to counsel, other than Senior Counsel, assigned under a legal aid certificate in respect of proceedings in the Court of First Instance, or an appeal aid certificate, fees for such conferences approved by the Director at such hourly rate, not exceeding $1080 per hour, as appears to the Director to be proper in the circumstances; (L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; 25 of 1998 s. 2; L.N. 174 of 2003)

(h) to counsel, other than Senior Counsel, assigned under a legal aid certificate in respect of proceedings in the District Court, fees for such conferences approved by the Director at such hourly rate, not exceeding $880 per hour, as appears to the Director to be proper in the circumstances; (L.N. 83 of 1987; L.N. 87 of 1990; L.N. 101 of 1991; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; 94 of 1997 s. 20; L.N. 174 of 2003)

(i) to counsel and solicitors assigned under an appeal aid certificate in respect of appeals to, or applications for leave to appeal to, the Court of Final Appeal, such fees as appear to the Director to be proper in the circumstances; (L.N. 122 of 1982; 39 of 1999 s. 3)

(j) (Repealed L.N. 182 of 1993)

(k) to counsel and solicitors to whom an application or matter has been referred under rule 13A, such fees as appear to the Director to be proper in the circumstances; (L.N. 122 of 1982)

(l) to counsel or a solicitor assigned under a legal aid certificate to act as advocate in respect of a preliminary inquiry, a fee not exceeding $8160 and additionally, if the inquiry is not concluded on the day on which it started, a daily fee not exceeding one half of the fee allowed under this sub-paragraph in respect of the second and every subsequent day as appears to be proper in the circumstances; (48 of 1983 s. 5; L.N. 83 of 1987; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(m) to a solicitor assigned under a legal aid certificate to instruct counsel in respect of committal proceedings (including a preliminary inquiry), a fee of $2210 and additionally, if such proceedings are not concluded on the day on which they started, a daily fee not exceeding $1810 in respect of the second and every subsequent day as appears to be proper in the circumstances; (48 of 1983 s. 5; L.N. 83 of 1987; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(n) to counsel or a solicitor assigned under a legal aid certificate to act as advocate in committal proceedings otherwise than by way of a preliminary inquiry, a fee not exceeding $8160 and additionally, if such proceedings are not concluded on the day on which they started, a daily fee not exceeding $4080 in respect of the second and every subsequent day as appears to be proper in the circumstances; (48 of 1983 s. 5; L.N. 83 of 1987; L.N. 87 of 1990; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(o) to counsel or a solicitor settling a notice of appeal, other than grounds of appeal settled under rule 9(a), such fee not exceeding $2710 as appears to the Director to be proper in the circumstances; (L.N. 204 of 1984; L.N. 83 of 1987; L.N. 351 of 1992; L.N. 154 of 1994; L.N. 119 of 1995; L.N. 235 of 1997; L.N. 174 of 2003)

(p) to any lawyer engaged under rule 7(1A), such fees as appear to the Director to be proper in the circumstances. (L.N. 157 of 1986)

(2) If in the opinion of a judge before whom a trial or appeal is heard the case is of exceptional length or complexity, the judge may so certify and thereupon-

(a) the fee payable to counsel under paragraph (1)(d); and

(b) the fee payable to a solicitor under paragraph (1)(a), may be increased by such amount as appears to the Director to be proper in the circumstances, and the daily fee provided for in paragraph (1)(a) or (d), as the case may be, may be increased proportionately. (L.N. 115 of 1985)

(3) If in the opinion of a District Judge before whom a trial is heard the case is of exceptional length or complexity, the judge may so certify and thereupon-

(a) the fee payable to counsel under paragraph (1)(e) or to a solicitor in respect of his advocacy under paragraph (1)(c); and

(b) the fee payable to a solicitor under paragraph (1)(b), may be increased by such amount as appears to the Director to be proper in the circumstances, and the daily fee provided for in paragraph (1)(b), (c) or (e), as the case may be, may be increased proportionately. (L.N. 115 of 1985)

(4) In addition to the fees payable under paragraph (1), there shall be payable to a solicitor-

(a) expenses actually and reasonably incurred by himself and his clerk in travelling to or from the court and to and from any place visited for the purpose of preparing or conducting any trial or appeal; and

(b) any other out-of-pocket expenses actually and reasonably incurred.

(5) Where a solicitor or counsel (other than Senior Counsel) represents 2 or more accused persons or 2 or more appellants to whom he has been assigned by the Director and who are tried together or whose appeals are heard together- (94 of 1997 s. 20)

(a) the fee, including the daily fee, payable to a solicitor under paragraph (1)(a) or (b), may be increased by such amount as appears to the Director to be proper in the circumstances;

(b) the fee, including the daily fee, payable to-
(i) a solicitor under paragraph (1)(c) in respect of his advocacy;
(ii) counsel (other than Senior Counsel) under paragraph (1)(d) or (e), (94 of 1997 s. 20) may be increased by 10% for each additional accused person or appellant so represented up to a maximum of 50% where 6 or more accused persons or appellants are so represented. (L.N. 414 of 1981)

(6) Where in the Court of First Instance counsel represents 2 or more appellants to whom he has been assigned by the Director and whose appeals are heard on the same day, there shall be payable to counsel, in respect of all the appeals, such fee in accordance with paragraph (1)(d) as appears to the Director to be proper in the circumstances. (L.N. 83 of 1987; L.N. 87 of 1990; 25 of 1998 s. 2)

(7) A claim for fees shall be submitted to the Director in such form and manner as he shall require. (L.N. 87 of 1990)

APPENDIX 6

FACC000002/2003

FACC No. 2 of 2003

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 2 OF 2003 (CRIMINAL)

(ON APPEAL FROM CACC NO. 401 OF 2000)

Between:

HKSAR	Respondent
AND	
ZABED ALI	Appellant

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Clough NPJ and Sir Anthony Mason NPJ

Date of Hearing: 11 June 2003

Date of Judgment: 11 June 2003

Date of Handing Down Reasons: 27 June 2003

JUDGMENT

Chief Justice Li:

1. At the conclusion of the hearing, the Court allowed the appeal, quashed the conviction and ordered a re-trial, with reasons to be handed

down later. This judgment sets out the Court's reasons for taking that course.

The Conviction

2. After trial by judge (Sakhrani J) and jury, the appellant was convicted of the murder of Razzack Mohammed Abdur "the deceased" and was sentenced to life imprisonment.

The prosecution's case

3. On 28 June 1999, the deceased was found dead inside a room in a guest house in Mirador Mansion, Tsim Sha Tsui. The deceased's face, including his eyes, nose and mouth, were covered with multiple layers of black plastic and adhesive tape. And his body and hands were tied with steel wire and adhesive tape. The likely cause of death was suffocation.

4. The prosecution's case was that the appellant had committed the murder either alone or with others. It was essentially based on circumstantial evidence which consisted of the following:

(a) The appellant was the person who rented the room in question using a false name on 26 June 1999.

(b) Fibres from a pair of the appellant's shorts were found to match those taken from debris from parts of the deceased's body and from the mattress in the room.

(c) DNA evidence strongly suggested that the appellant had drunk from a soft drink bottle found in the room and that the appellant's blood was on the deceased's jeans.

(d) The appellant's fingerprint was found on one of the rolls of adhesive tape used to tie up the deceased's arms.

(e) Testimony from Mohammed Al Rabby with the nickname of Omar ("Omar") of his conversation with the appellant some 10 days before the murder. ("Omar's evidence")

Omar's evidence

5. The admissibility of Omar's evidence is the crucial issue in this

appeal. Both Omar and the appellant came from Bangladesh and they were acquaintances. In summary, Omar's evidence was that during their conversation some 10 days before the murder, the appellant said that his father had been killed when he was a child by the Sharbahara Party in Bangladesh, that he was going to kill someone in revenge and that he had a fixed target whom the appellant did not name. But later in the conversation, the appellant said that he was just joking. The relevant parts of Omar's evidence should be set out:

"One day I asked him what does his father do. He said that his father was killed by a party called Sharbahara Party in Bangladesh, or something like that, when he was young."

"Then later he said that, 'I also have ... I also want to take revenge. I want to kill somebody ...'"

"He said that 'I want to take a revenge of my father's killing and I would ...'"

"I have a promise to myself that I would get back to ... I would take revenge of my father's killing. I would also kill somebody."

"When I asked him, he answered me the question, and I later asked him 'who had killed your father?' Then I asked him 'Why do you want to commit a murder?' Then later he said that, 'No, I just joked.'"

"No, he said that, 'I have a fixed target', but later he told me that he just joked."

"He was very sad, as if he was about to cry."

6. The deceased also came from Bangladesh. According to the evidence of the deceased's brother who was called by the prosecution, neither he nor the deceased was involved in politics. There was no evidence that the appellant and the deceased knew each other. The prosecution evidence was that the deceased came to Hong Kong from time to time to purchase items for resale in Bangladesh. He transacted his business in cash and carried large sums of cash. Shortly before his death, he had agreed to purchase goods worth some HK$72,300 and would take delivery and pay cash on 28 June 1999, the day his body was found. None of the money which the deceased was believed to be carrying (which may have been in excess of US$30,000) was recovered.

7. In his opening address, counsel for the prosecution said that whoever did this must have wanted something from the deceased. Counsel adverted to the possibility of a revenge attack of some kind "for reasons we do not know" but dismissed it immediately, saying: "There [is] simply no evidence as to

that." In his closing address, he put to the jury that the motive was robbery. He suggested that they could "draw a proper inference that this was a robbery which basically went wrong". It is clear that the prosecution invited the jury to consider the case as one of murder committed in the course of robbery. At no stage was the jury asked to consider it as one of revenge killing.

The defence case

8. The appellant gave evidence. He claimed that he was not a party to the killing and only came upon the body of the deceased after death. He accepted the scientific evidence and sought to explain it away. His version was in brief as follows. He had rented the room with two friends Babor and Kayum so that they could chat and have snacks. Babor told him that one of his big brothers had promised a reward of HK$60,000 if he could seize a key and papers from a man called Raju. But the appellant told them he did not wish to participate. He became intoxicated and went to sleep. After leaving the room in the morning, he later returned to it with Babor, having collected a duplicate key to the room from the reception. Babor had represented to him that Raju had gone to the room, and that they had already got the papers from Raju but had left the key which they needed to retrieve in order to collect the reward. On returning to the room, he and Babor found the dead body. They used tape to tie it up and put it away from open view. At this stage, he saw that he had cut one of his fingers which was bleeding. As to the conversation with Omar, the defence case was that it did not take place and that Omar was a dishonest witness.

The judge's ruling

9. Before the trial began, on the basis of Omar's deposition, the defence objected to the admissibility of his evidence. Counsel for the prosecution argued that his evidence was relevant to the appellant's state of mind and "as to whether [he] was capable of forming the intent to kill". Counsel for the defence argued that the evidence was "entirely prejudicial and non-probative". The judge ruled that the evidence was admissible. In his ruling, the judge simply said that he was satisfied that Omar's evidence was relevant to the prosecution's case and he was not satisfied that its prejudicial effect outweighed its probative value. He did not state why the evidence was

considered to be relevant.

The judge's summing up

10. In the closing address, counsel for the prosecution invited the jury to consider Omar's evidence as showing that the appellant was "capable of harbouring an intention to kill someone". This was the same basis as that put to the judge when admissibility was argued. However, in his summing up, the judge did not explain the relevance of Omar's evidence. He was sceptical of it and told the jury that "you might think that his evidence does not really assist you in this case and that you should ignore it." But he did not go so far as to direct the jury to disregard it. The relevant part of the summing up was as follows:

"You will have to examine Omar's evidence with great care. Is he the sort of person whom you should believe? Is he telling you the truth about what happened? Do you think that the defendant, who was not even a close or a good friend of his, would have told him what he said he was told by the defendant, namely, that he wanted to take revenge for his father's killing and that he wanted to kill somebody? You may well ask yourselves why someone would tell an acquaintance something like that. And who was this fixed target? There was no mention of the deceased or anyone else. There is no evidence that the defendant even knew the deceased at that time. Is Omar a reliable witness? If you accept what he said, do you think that the defendant was joking about it when he spoke to Omar? Bear in mind, members of the jury, that people sometimes do say that they wish so and so were dead, or that they would like to kill someone, but do they really mean it? It is for you to say whether you accept or reject what the witness said but you might think that not much reliance can be placed on what he said. You might think that his evidence does not really assist you in this case and that you should ignore it."

The Court of Appeal

11. Before the Court of Appeal, the prosecution conceded that Omar's evidence was not admissible but maintained that as the judge had virtually invited the jury to ignore it, the evidence had no impact on the verdict. It was argued that the proviso that no miscarriage of injustice had been caused by the irregularity should be applied and the conviction should be upheld. See the Court of Appeal's judgment **HKSAR v Zabed Ali** [2002] 4 HKC 349 at paras 49, 106 and 126.

12. The Court of Appeal by majority (Mayo VP and Yeung JA, Stock JA dissenting) upheld the conviction. Notwithstanding the prosecution's concession, Mayo VP and Yeung JA held that Omar's evidence was admissible. But their reasoning was different. Mayo VP held that the

evidence was relevant to whether the appellant had the intent to kill. He considered that the evidence "established that in certain circumstances, the [appellant] was prepared to form an intent to kill another person. Even though the case which was being run by the prosecution was that the killer or killers were committing the offence for financial gain, it was a relevant factor that there might be evidence that the [appellant] would be prepared to kill for some other motive". (See paras 53 to 55).

13. Yeung JA held that the evidence was admissible on the basis that the evidence of an expression by the appellant of an intention to kill someone shortly before the murder took place "tends to connect" the appellant to the charge. (See para 97). Yeung JA expressed the view that if contrary to that conclusion, the evidence were inadmissible, the proviso could not be applied and the conviction should be quashed.

14. Stock JA dissented. He considered that Omar's evidence was inadmissible as in the circumstances of the case, it was mere propensity evidence. The appellant's comments to Omar only evidenced a potential propensity to kill. In his view, the proviso could not be applied and the conviction should be quashed.

Leave to appeal

15. The Appeal Committee granted the appellant leave to appeal on the substantial and grave injustice ground.

The prosecution's concession on appeal

16. On the appeal before the Court, Mr Reading SC for the respondent, ("the prosecution"), who did not appear before the courts below, retracted the concession made in the Court of Appeal and argued that Omar's evidence was admissible. But he made a different concession. He accepted that even if the evidence were admissible, the judge failed to give a proper direction to the jury on its relevance. Accordingly, he conceded that the appeal should be allowed and the conviction should be quashed, with an order for a re-trial. Although it was common ground that this should be the result, the proper basis for allowing the appeal remains an issue. This turns on the question whether Omar's evidence was admissible. The question, being one of

admissibility, is one of law.

The principles

17. In considering the principles in this area of the law of evidence, Lord Herschell's well known statement in **Makin v. The Attorney-General for New South Wales** [1894] AC 57 at 65 is often cited, as it was in two of the judgments in the Court of Appeal in the present case.

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

However, in referring to the **Makin** statement, it is fundamental to recognise that the common law in this area has since been extensively developed.

18. The first part of Lord Herschell's statement sets out the exclusionary rule rendering inadmissible evidence tending to show that the accused has been guilty of other criminal acts *for the purpose of* leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. The statement focused on the evidence in issue in **Makin** which was evidence tending to show other criminal acts by the accused. But it is well established that the exclusionary rule is not so confined. The evidence subject to the exclusionary rule has been described as:

"...evidence of the character or of the misconduct of the accused on other occasions (including his possession of discreditable material), tendered to show his bad disposition ..."

See *Cross and Tapper on Evidence* (9th ed.) 335.

19. The second part of Lord Herschell's statement refers to the circumstances in which evidence of bad character or propensity may be admissible. The effect of the statement is that *if* the evidence is relevant to an issue in the case, *for reasons other than* to show a mere propensity to commit another offence, it may be admissible, notwithstanding that it also shows

propensity. See **Attorney General of Hong Kong v. Siu Yuk-shing** [1989] 1 WLR 236 at 240E-F. The evidence may be admissible for the purpose of proving a matter in issue and not for the purpose of showing mere propensity. Whilst the evidence *may* be admissible, whether it should be ruled admissible as a matter of law would now depend on the application of the test laid down in the leading authority of **DDP v. P** [1991] 2AC 447.

20. In that case, Lord Mackay (at 460E-F) held that the essential feature of admissibility of evidence of bad character or propensity:

"is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused ..."

His Lordship went on to say:

"Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."

21. The well established exclusionary rule remains to be applied and the test in **DPP v. P** would not be applicable to evidence excluded by the rule. The rule excludes mere propensity evidence. This is evidence of the accused's bad character or propensity whose *only* purpose is to show that the accused is likely by reason of his bad character or propensity to have committed the offence. As the law has developed, the rationale of the exclusionary rule is that whatever probative value mere propensity evidence may have, it should be excluded because of its prejudicial effect.

22. In **Makin**, Lord Herschell observed (at 65) that in applying the principles, "it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other". It has been persuasively argued that:

"many of the difficulties experienced by the courts in their attempts to apply Lord Herschell's remarks in *Makin* might have been eliminated if his two famous sentences had been delivered in the converse order, making it clear that the second was not so much an exception to the first, as the first to the second."

See *Cross and Tapper on Evidence* (9th ed.) 339. See also *Schiff: Evidence in the Litigation Process* (4th ed.) Vol.2 1187 and *McNamara: Dissimilar*

Judgments on Similar Facts (1984) 58 ALJ 143. The approach suggested is that the relevance of the evidence to the issues in the case should first be considered. After all, relevance is the cardinal test in the law of evidence. One should then apply the exclusionary rule to bar evidence which is mere propensity evidence. This approach was in fact adopted by Stock JA in his judgment in the present case (para. 116).

23. The argument in favour of this approach has considerable force. On this approach, taking into account the test in **DPP v. P**, the question of admissibility should be considered along the following lines.

(1) The matters in issue which the prosecution has to prove to establish guilt, having regard to the charge, must first be identified. For this purpose, the defences open to and any specific defence raised by the accused would be taken into account. However, in the well known words of Lord Sumner in *R v. Thompson* [1918] AC 221 at 232:

"The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Obviously, if a fact which the prosecution has to prove is accepted by the defence, it would not be in issue.

(2) The evidence the admissibility of which is in question should be focused on.

(3) The following questions should then be asked: what is the matter in issue to which the evidence is said to be relevant and why, that is, what is the reason for saying that the evidence is probative of that matter in issue?

(4) If in answer to those questions, it is concluded that the evidence is relevant to a matter in issue for reasons *other than* to show mere propensity on the part of the accused to commit the crime in question, that is, it is not mere propensity evidence, then the test in *DPP v. P* has to be applied in deciding as a matter of law whether it is admissible: whether its probative force in support of an allegation against the accused is sufficiently great to make it just to admit it, notwithstanding that it is prejudicial to the accused. It is only where the test is satisfied that the evidence would be ruled admissible as a matter of law. If it is not satisfied, the evidence would be ruled

inadmissible. But if in answer to the above questions, it is concluded that it is mere propensity evidence, then it would be inadmissible on the basis of the exclusionary rule.

24. This appeal is only concerned with the question of admissibility. But it should be observed that if the evidence of bad character or propensity is admitted in accordance with the principles discussed above, it would be necessary for the judge to give an adequate direction to the jury as to how to approach the evidence. The jury should be directed as to the matter in issue to which such evidence might be relevant and how it might be relevant. And the jury should be told that the fact that the accused has a bad character or the propensity as shown by such evidence does not mean he is guilty of the offence charged. See *Archbold* (2003) para. 13-41.

25. If the evidence is ruled admissible as a matter of law, whether the judge still has a residual discretion to exclude the evidence on the ground that its prejudicial effect would outweigh its probative value is a much debated question. See *Archbold* (2003) para. 13-27a, *Cross and Tapper* (9th ed.) 374, *Phipson* (15th ed.) para. 17-48. Some argue that the judge still has such a discretion. Others argue that no such discretion remains as the test for admissibility in **DPP v. P** already provides for the balancing exercise between probative value and prejudicial effect. This question does not arise in the present case and no view is expressed on it.

Omar's evidence

26. Having discussed the relevant principles, the admissibility of Omar's evidence can now be considered. The appellant was charged with the murder of the deceased. The prosecution had to prove that the appellant killed the deceased with intent to kill or cause grievously bodily harm. The prosecution's case, based on circumstantial evidence, was that it was a murder committed in the course of robbery. As prosecution counsel put it to the jury, "this was a robbery which basically went wrong". The defence case is that the appellant had nothing to do with the killing and he only came across the body of the deceased after death.

27. On Omar's evidence, during a conversation with him some 10 days

before the murder, the appellant said he was going to kill someone in revenge for the killing of his father by the Sharbahara Party and that he had a fixed target who was not named, although later on he said that he was just joking.

28. What is the matter in issue to which Omar's evidence is said to be relevant and what is the reason for suggesting that the evidence is probative of that issue? Mr Reading SC relies on two matters.

29. First, it is submitted that Omar's evidence is relevant to the appellant's motive for killing the deceased. The argument is that evidence of the appellant's statements to Omar that he was going to kill someone in revenge for the killing of his father and that he had a fixed target goes to show that his motive for the killing of the deceased with which he was charged was revenge. This may be what Yeung JA had in mind when he held that an expression by the deceased of an intention to kill someone shortly before the murder "tends to connect" the appellant to the charge.

30. This argument of relevance to motive must be rejected. Although the establishment of motive is not an essential ingredient of the offence of murder, it is usually part of the prosecution's case that the defendant had a motive. Here, the motive alleged by the prosecution was robbery. The prosecution's case was that it was a murder committed in the course of robbery. Indeed, revenge was disavowed by the prosecution during opening when the possibility of a revenge attack was adverted to but immediately dismissed with the statement that there was simply no evidence as to that. That being so, the statements made by the appellant to Omar that he was going to kill in revenge were simply not relevant to motive. The motive on the prosecution's case was robbery and these statements concerning revenge were not probative of the motive of robbery.

31. Even if the prosecution had alleged revenge as a motive for the murder, either instead of robbery or on the assumption that it is properly open to the prosecution, as an alternative to robbery, it is doubtful whether on the evidence as presented at the trial, Omar's evidence of the appellant's statements that he was going to kill in revenge would have any probative value in relation to the motive of revenge. It must be noted that there was no evidence to indicate that the deceased was a possible target or within a class

of persons who were possible targets. For example, there was no evidence that the deceased had any connection with politics, let alone with the Sharbahara Party. On the contrary, the deceased's brother gave evidence that neither he nor his brother was involved in politics. Further, had the prosecution alleged revenge as a motive, even if Omar's evidence of the appellant's statements could be said to have any probative force, it is even more doubtful whether any probative force would be sufficiently great to make it just to admit it, notwithstanding its prejudicial effect on the accused, so as to satisfy the test for admissibility in **DPP v P**.

32. The second matter relied on by Mr Reading SC to which Omar's evidence is argued to be relevant is the appellant's intent to kill and that he did kill the deceased, as opposed to coming across the dead body innocently. In the Court of Appeal, Mayo VP accepted that the evidence was relevant to whether the appellant had the intent to kill. Although the intent to kill and the killing are two separate issues, as Mr Reading accepts, they should be treated together in the context of this case for the purpose of considering the admissibility of Omar's evidence.

33. This argument must also be rejected and can be disposed of shortly. It is important to examine why on this argument, Omar's evidence of the appellant's statements that he was going to kill in revenge and that he had a fixed target is said to be relevant. The argument in support of relevance is that the appellant's statements that he was going to kill made it more likely that he had the intent to kill and did kill the deceased as charged. In other words, the evidence tends to show propensity on the part of the appellant to commit murder. The purpose and the only purpose of admitting the evidence is to show propensity. This is *mere* propensity evidence which must be excluded as inadmissible by the exclusionary rule.

34. For the reasons set out above, at the conclusion of the hearing, the Court allowed the appeal and made the orders referred to at the commencement of this judgment.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(Philip Clough)	(Sir Anthony Mason)
Non-Permanent Judge	Non-Permanent Judge

Representation:

Mr James McGowan (instructed by the Legal Aid Department) for the appellant

Mr John Reading SC and Mr Vincent Wong (of the Department of Justice) for the respondent

APPENDIX 7

CONFIDENTIAL

THE LAW SOCIETY OF HONG KONG

RESULTS OF THE SURVEY ON CRIMINAL LEGAL AID REMUNERATION SYSTEM

Report of the Assistant Director of Practitioners Affairs

[February 2005]

INDEX

RESULTS OF SURVEY ON CRIMINAL LEGAL AID REMUNERATION SYSTEM

A. Background

1. The Criminal Law and Procedure Committee ("the Committee") has considered the way forward with its review of the criminal legal aid remuneration system in December 2004 and resolved to invite the President to liaise with the Chief Justice (as the Chairman of the Rules Committee set up under the Criminal Procedure Ordinance)[1] to urge for an overall review of the system.

2. To facilitate the President's approach upon the Chief Justice, the Committee intends to formulate a paper outlining the problems with the existing system and to support the paper by examples of (a) cases with very low fees paid to solicitors despite consideration preparatory work being conducted; and (b) firms giving up legal aid work because of low fees. In this regard, the Committee has further resolved to first conduct a survey among the general membership to canvass their views on and experiences with the existing system.

B. Response Rate

3. Pursuant to the Committee's decisions, a total of 675 questionnaires were issued to firms[2] on 28 December 2004 imposing a response deadline of 31 January 2005. 133 responses were received with a response rate of about 19.7% of firms. **Appendix A** is a sample letter to all firms with the enclosed questionnaire.

4. According to the information available, these 133 firms have 1117 members[3] accounting for at least 24.8% of the total 4500 members practising in these firms. This is quite good for a survey conducted by the Law Society, considering that not all firms engage in criminal law practice.

C. Data about the Responding Firms

5. The majority (about 87%) of the responding firms confirmed that criminal law work forms part of their firms' practice. 18 firms stated that criminal law work is not part of their firm's practice. It is however interesting to note that one of these 18 firms then went on to confirm in the questionnaire that they have one solicitor on the Legal Aid Panel ("LA Panel") who has received criminal legal aid

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1 or more appropriately the Chief Judge of the High Court upon the enactment of the Statute Law (Miscellaneous Provisions) Bill 2005 which proposes, inter alia, the transfer of the chairmanship of the Rules Committee established under the Criminal Procedure Ordinance from the Chief Justice to the Chief Judge of the High Court

2 The questionnaire was only issued to firms but not in-house members

3 This figure has not taken into account the number of members in 16 firms which have returned the questionnaire on an anonymous basis

assignments for the past 2 years. For the purpose of the present analysis, we shall regard this firm as a firm with criminal law practice in this paper making the total number of firms with and without criminal law practice to be as follows:

Criminal law work forms part of the firm's practice	No. of firms
Yes	116
No	17

6. Of the 116 firms that have criminal law as part of their practice, the percentage that criminal work accounts for the total work of the firms varies. Most (83%) responses are from firms with less than 25% of the firm's work being criminal law work with only less than 3% with criminal law practice being the major work of the firms. The following gives a better idea on the amount of criminal law work of the responding firms:

% of work of the firm being criminal law work	No. of Firms responding	% of Responding Firms with Criminal Law Practice
10% or less	71	61%
11 – 25%	26	22%
26 - 50%	11	10%
Over 50%	3	2.6%
No answer given	5	4.4%

7. 88% of the firms with criminal law practice (i.e. 102 firms) confirmed they have solicitors on the LA Panel to undertake criminal legal aid work. The number of solicitors on the LA Panel in these responding firms are as follows:

No. of solicitors in the firm being on the LA Panel to undertake criminal legal aid work	No. of Firms
Nil	14
1	50
2	25
3	15
4	5
5	3
6	1
No answer given	3

8 Of the 102 firms that have solicitors on the LA Panel to undertake criminal legal aid work, 91 firms (i.e. 89%) were assigned criminal legal aid work for the past 2 years leaving 11 firms with no assignment at all. The number of assignments to these 91 firms for the past 2 years varies. The data in **Appendix B** are analyzed respectively according to the number of assignments per firm and solicitor and the types of assignments in question.

9. 11 firms with solicitors on the LA Panel have not been assigned any criminal legal aid work for the past 2 years. Most of them indicated they did not know the reason for the lack of assignments. Of the reasons given in the questionnaire form, only one firm have chosen "*unappealing credentials*" as the reason for their lack of assignments. 2 firms have put forward similar reasons as "*solicitor on the Legal Aid Panel only recently joined the firm for 8 months*" and "*new firm and newly qualified staff*". One firm believed that this has something to do with their previous complaints against the present DLA (when he was Deputy DLA). Another firm (with 3 solicitors on the LA Panel) remarked that for some unknown reasons, solicitors in their firm have never been assigned to criminal works since the date of their enlistment on the panel (August 1988) and that their firm has also never received any criminal legal and assignment since the date of our commencement of business in August 1997. The following are the responses to question 5 of the questionnaire:

Reasons for no Assignments	**No. of Firms**
Previous refusal to take up Legal Aid Assignments	0
Unappealing Credentials	1
Previous Complaint by Aided Persons	0
Others	10

10. A summary of the data of the 133 responding firms appears below:

<table>
<tr><th></th><th rowspan="2">Firms with no criminal law practice</th><th colspan="3">Firms with criminal legal aid practice</th><th rowspan="2">Total</th></tr>
<tr><th>no solicitor on LA Panel</th><th>with solicitors on LA Panel but no assignments</th><th>with solicitors on LA Panel and have assignments</th></tr>
<tr><td rowspan="3">Number of Firms</td><td rowspan="3">17</td><td rowspan="2">14</td><td>11</td><td>91</td><td rowspan="3">133</td></tr>
<tr><td colspan="2">Sub-total 102</td></tr>
<tr><td colspan="3">Subtotal : 116</td></tr>
</table>

D. Satisfaction with the Existing Criminal Legal Aid Remuneration System

11 89% (i.e. 104) of the 116 firms with criminal law practice indicated they are **not** satisfied with the existing criminal legal aid remuneration system. Of the 12 firms which have indicated otherwise, 7 firms did not give any view. These 7 firms include 6 which do not have solicitors on the LA Panel and one with a solicitor on the LA panel but did not receive any criminal legal aid assignments for the past 2 years.

12. 5 firms confirmed they are satisfied with the present system. These are one firm with no solicitor on the LA Panel and 4 firms with solicitors on the LA Panel. The following gives some data about these 4 firms:

	Firm A	**Firm B**	**Firm C**	**Firm D**
% of firm's work being criminal law work	2%	5 – 10%	10%	2 to 3 cases per year
No. of solicitor on LA Panel	1	1	1	1
No. of criminal LA assignments for the past 2 years	2 Court of First Instance trials	10 plea and sentence cases in the District Court	Nil	Nil

13. Notwithstanding their satisfaction with the system, it is observed that 2 of these 5 firms (including the one with no solicitor on the LA Panel and Firm D above) nevertheless confirmed their support in Question 14 to the proposal for the Law Society to seek for a complete review of the system.

14. To complete the picture, the views of the 17 firms with no criminal law practice are as follows:

Satisfied with the System?	**No. of Firms**
Yes	1
No	4
No answer given	12

E. Problems with the Present System

15. 105 firms have indicated under question 7 what they considered to be the problems with the present system. The details of these 105 firms are as follows:

Firms	No. of Firms
Criminal law not being part of firm's practice	4
Criminal law being part of firms' practice	
• firms with no solicitor on LA Panel	6
• firms with solicitors on LA Panel but with no assignments for the past 2 years	7
• firms with solicitors on LA Panel and received assignments for the past 2 years	88
	101

16. The answers given by these 105 firms are summarized in the following table:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Failure to remunerate pre-trial preparation work	4	6	6	87	103
Inability to increase fees over the maximum limits fixed by law even if warranted by the circumstances of the case	4	3	6	59	72
Lack of right for solicitors to appeal against any assessments of costs	3	2	5	37	47
Others	0	0	1	3	4

17. Problems advanced by the firms apart from those specified in question 7 of the Questionnaire are:

- works have been assigned to only a small circle of solicitors' firms and not on rotation basis
- instructing solicitor's involvement in pre-trial conference is not counted
- unreasonably low fees as prescribed by the LA Department (2 firms)
- rigid application or archaic rules failing to recognize and reward specialty

F. Problematic Cases

18. 45 firms indicated under Question 8 that they could provide examples of cases with very low fees paid to their solicitors despite considerable preparatory work being conducted. These are all firms with solicitors on the LA Panel and received criminal legal aid assignments for the past 2 years. However, only 40 firms actually proceeded to give some comments or real life examples, which are being reproduced in their original format in **Appendix C**.

19. In answer to Question 9, only one firm indicated that they have come across criminal appeals which they believe were brought about because of inadequate preparation by LA assigned lawyers. The firm has solicitors on the LA Panel with assignments received for the past 2 years. Unfortunately, it did not give any details of the cases in question.

20. In answer to Question 10, 12 firms indicated that they have come across cases for which they think a certificate of exceptional length or complexity under Rule 21(2) and (3) of the Legal Aid in Criminal Cases Rules should have been granted by the Judge but refused. All these 12 firms have solicitors on the LA Panel but one of them does not receive any criminal legal aid assignments for the past 2 years. .

21. When further asked under Question 11 what the difficulties are in obtaining a certificate under Rule 21(2) and (2), 8 of these 12 firms gave the following remarks:
    - there is no clear definition of "*exceptional length or complexity*"
    - arbitrary refusal by judge
    - trial judge not easily convinced that a certificate ought to be issued and/or not fully aware of long preparatory work
    - Judge views only the complexity of legal issues involved in trial, not work solicitor is required to do
    - the Judge believed, despite indication from the LA Department itself to the contrary, the case was simple
    - whilst the background and the case are very complicated but are well prepared by the solicitors, when the case is brought to the Judge, the Judge would think that the case is not so complicated.
    - in one case, the defendant sought to adduce in evidence of lots of Chinese documents for which English translations are required. Certificate was not available
    - objection by the LA Department

    It seems from the above that the major problem encountered is the difficulty to convince the Judge of the "*complexity*" of the case.

G. Giving Up of Criminal Legal Aid Work

22. 18 firms indicated under Question 12 that their solicitors have given up criminal legal aid work because of dissatisfaction with the remuneration system, totalling about 24 solicitors. The composition of these 18 firms are as follows:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Firms with solicitors giving up criminal legal aid work	1	3	nil	14	18

23. 57 firms confirmed under Question 13 that their solicitors would consider giving up criminal legal aid work in case there should be further reduction in the maximum fee levels prescribed under Rule 21 of the Legal Aid in Criminal Cases Rules. According to the information provided by these firms[1], this would mean that at least 70 solicitors would be considering giving up criminal legal aid work. The composition of these 57 firms is provided in the following chart. It should be noted however that the figure includes 3 firms with no solicitor on the LA Panel:

	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Firms with solicitors intending to give up criminal legal aid work	1	2	4	50	57

24. Some of the firms indicating either that solicitors in their firms have not given up or are not considering giving up criminal legal aid work made various remarks which are summarized below:
- because of the bad economy, they need to bear with the system for survival and being paid less is better than none
- they wish to remain on the LA Panel:

[1] 14 firms have not specified the number of solicitors in their firms considering giving up legal aid work in case of reduction in fees

(a) in order to keep up with the experience hoping that there will be a change in the near future
(b) as criminal cases are amongst the majority of time spent by or available to the firms, they would not mind to take up though priority may not be given

- legal aid is considered to be part of public service

H. Support for a Complete Review of the Present System

25. The majority being 88% of the responding firms supports the move by the Law Society to seek for a complete review of the criminal legal aid remuneration system. Only 2 firms stated they did not support such move. These are firms being satisfied with the present system. The following chart provides more details of the responses received:

Move by the Society to seek for a complete review of the criminal legal aid remuneration system	Firms with no criminal law practice	Firms with criminal legal aid practice			Total
		no solicitor on LA Panel	with solicitors on LA Panel but no assignments	with solicitors on LA Panel and have assignments	
Support	9	9	10	89	117
Not support	0	0	1	1	2
No answer given or N/A	8	5	0	1	14
Total	17	14	11	90	133

I. Suggested Ways to Improve the Present System

26. 53 firms have put forward suggestions to improve the present system. These are being reproduced in their original format in **Appendix D**.

J. Summary

27. In summary, a survey met with a response rate of at least about 25% of the total membership indicates that of those responding:
(a) the majority is not satisfied with the present system
(b) the majority considers failure to remunerate pre-trial preparation work as the major problem of the present system
(c) only one firm has come across criminal appeals which they believe were brought about because of inadequate preparation by the LA assigned lawyers

(d) 12 firms have come across cases for which they think a certificate of exceptional length or complexity should have been granted by the Judge but refused. The major problem encountered appears to be the difficulty to convince the Judge of the "*complexity*" of the case

(e) 24 solicitors have given up criminal legal aid work because of dissatisfaction with the present system and at least 70 more would consider doing so if the fee levels are to be further reduced.

(f) the majority supports the Law Society seeking for a complete overhaul of the present system.

Prepared by:
Christine W. S. Chu
Assistant Director of Practitioners Affairs
The Law Society of Hong Kong

15 February 2005

APPENDIX A

Sample Letter to All Firms with a Questionnaire enclosed

Dear Senior Partner / Sole Proprietor,

QUESTIONNAIRE ON CRIMINAL LEGAL AID REMUNERATION SYSTEM

The Society's Criminal Law and Procedure Committee is conducting a review on the criminal legal aid remuneration system.

Section 9 of the Criminal Procedure Ordinance, Cap. 221 empowers the Criminal Procedure Rules Committee, of which the Chief Justice is the Chairman, to make rules and orders regulating the practice and procedure under that Ordinance.

The Rules Committee prescribes the Legal Aid in Criminal Cases Rules. Rule 21 governs the costs payable to lawyers in legal aid assignments in criminal cases and provides a set of maximum fees, which can be paid for any given piece of work referred therein. Both the Department of Justice and the Duty Lawyer Service adopt the same basis on remuneration for the lawyers they instruct in criminal cases.

The present remuneration system dates back to the 1970's when the Legal Aid Department will invariably act as the instructing solicitor to instruct barristers to represent defendants in the majority of criminal cases. Only in very rare instances would the case be assigned to private firm of solicitors. However, as the volume of legal aid cases grew, the Department increasingly instructed private firms of solicitors to prepare the defence. The system seeks to remunerate solicitors on a similar basis as barristers instructed by the Legal Aid Department: a brief fee for the first date of trial and a smaller refresher fee for each subsequent day in court. However, the maximum fees for solicitors are set at much lower levels than barristers and the latter is also additionally remunerated for attending conferences with clients when solicitors are not.

Our main objections to Rule 21 are:

- the system fails to properly remunerate solicitors for their preparation work, such as reading the case papers, interviewing and taking instructions from defendants, attending conferences with barristers, etc.
- the system is inflexible with the maximum amount that a solicitor can be paid being fixed by law, leaving the Director of Legal Aid with no discretion to award any fees over the maximum limit, even though he may think this is justified, unless the judge should certify the case to be one of exceptional length or complexity.
- a general lack of right to lawyers to appeal against any assessment of costs

Over the years, the Administration has conducted "*biennial* reviews" of the maximum fees set out in Rule 21 by making reference to changes in the Consumer Price Index. The fee levels were adjusted downward by 4.3% in July 2003 and the Administration is presently seeking a further downward adjustment of 4.4% to take effect some time in 2005.

We do not support the proposed reduction in fees. Instead of the piecemeal review, we consider a complete review of the whole fee system is necessary. The current system was designed to deal with 30 years old practice and procedures. Many anomalies have become apparent.

We are considering making appropriate representations to the Chief Justice for a complete overhaul of the system, and information on members' experience with the existing criminal legal aid remuneration system will be very helpful in enabling us to formulate proposals to press our case.

We invite you to spare some time to complete and return the attached Questionnaire by 31 January 2005. Even though criminal law may not be an area of your firm's practice, your assistance will still be relevant as it will enable us to interpret the data, namely, that some firms are not interested in taking up criminal law because the fees are too low or because it is not an area of practice for the firm.

We appreciate that you may regard the requested data to be sensitive information of the firm and would like to assure that any information received by us will be treated in the strictest confidence. Alternatively, **you may choose to return the attached questionnaire on an anonymous basis. However, if you do so, please only return the hard copy of the attached questionnaire** to ensure that any information received by us will not be duplicated.

We look forward to hearing from you.

Yours faithfully,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

Encl.

Questionnaire on Criminal Legal Aid Remuneration System

To: Ms. Christine Chu [Fax No. 28450387]
Assistant Director of Practitioners Affairs

1. Does criminal law form part of your firm's practice?

   ☐ Yes. Please specify %: _____
   ☐ No

2. Are any solicitors in your firm enlisted on the Legal Aid Panel to undertake criminal legal aid work?

   ☐ Yes. Please specify no: _____
   ☐ No

3. If yes, has any solicitor in your firm been assigned criminal legal aid work for the past 2 years?

   ☐ Yes
   ☐ No

4. If yes, what is the respective number of cases assigned to solicitors in your firm in the following area(s) of criminal legal aid work for the past 2 years?

	No. of Cases Assigned
☐ Committal Proceedings (as solicitor advocate)	
☐ Committal Proceedings (as instructing solicitor)	
☐ District Court Proceedings (as solicitor advocate)	
☐ District Court Proceedings (as instructing solicitor)	
☐ Court of First Instance Trials	
☐ Magistrate's Court Appeals	
☐ District Court Appeals.	
☐ Court of First Instance Appeals	
☐ Court of Final Appeals	
☐ Others	

5. If your answer to Question 3 is no, what do you think are the reasons for the lack of criminal legal aid assignments to your firm?

- ☐ previous refusal of taking up assignments by legal aid.
- ☐ unappealing credentials
- ☐ previous complaint by aided persons
- ☐ others. Please specify*.

6. Are you satisfied with the present criminal legal aid remuneration system prescribed in Rule 21 of the Legal Aid in Criminal Cases Rules?

- ☐ Yes
- ☐ No

7. If not, what do you think are the problems with the present system?

- ☐ failure to remunerate pre-trial preparation work
- ☐ inability to increase fees over the maximum limits fixed by law even if warranted by the circumstances of the case
- ☐ lack of right for solicitors to appeal against any assessment of costs
- ☐ Others. Please specify*.

8. Can you provide useful examples of cases with very low fees paid to solicitors of your firm despite considerable preparatory work being conducted?

- ☐ Yes. Please give details of the cases in a separate sheet
- ☐ No

9. Have you come across any criminal appeals which you believe were brought about because of inadequate preparation by Legal Aid assigned lawyers?

- ☐ Yes. Please give details of the cases on a separate sheet
- ☐ No

* Please use a separate sheet if insufficient space is provided here

10. Have you come across any cases for which you think a certificate of exceptional length or complexity under Rule 21(2) and (3) of the Legal Aid in Criminal Cases Rules should have been granted by the Judge but refused?

☐ Yes.

☐ No

11. If yes, what are the difficulties in obtaining a certificate under Rule 21(2) and (3)?*

12. Has any solicitor in your firm ever given up criminal legal aid work because of dissatisfaction with the remuneration system?

☐ Yes. Please specify no: _____

☐ No

13. Will any solicitors in your firm consider giving up criminal legal aid work in case there should be further reduction in the maximum fee levels prescribed under Rule 21 of the Legal Aid in Criminal Cases Rules?

☐ Yes. Please specify no: _____

☐ No. Any particular reasons? Please specify*

14. Do you support the move by the Law Society to seek for a complete review of the criminal legal aid remuneration system?

☐ Yes

☐ No

15. In what way(s) do you suggest the present system should be reformed?*

_____

[Name of the firm]

* Please use a separate sheet if insufficient space is provided

APPENDIX B

Data about Criminal Legal Aid Assignments to Responding Firms

Chart I – Assignment to "Firms"

No. of criminal legal aid assignments to the firm for the last 2 years	No. of firms	No. of solicitors in those firms in the middle column on the LA Panel
Not specify	6	
1	9	1 – 2
2	6	1 – 5
3	7	1 – 4
4	6	1 – 3
5	4	1 – 3
6	6	1 – 3
7	1	6
8	4	1 - 2
9	3	1- 2
10	5	1 - 4
11	1	1
12	2	1- 2
13	1	1
14	2	1 - 4
15	3	1 - 3
16	2	1
17	5	1 – 3
20	5	1 - 5
21	3	2 - 3
22	1	2
26	1	1
27	1	3
30	1	2
31	1	3
35	2	4 – 5
39	1	2
48	1	2
58	1	4

Chart II – Assignments per "Solicitor"[1]

No. of criminal legal aid assignments per solicitor		No. of solicitors		% of solicitors with legal aid assignments
1 – 5	around 1	36	96	61%
	around 2	13		
	around 3	11		
	around 4	26		
	around 5	10		
6-10	6	5	38	24%
	7	11		
	around 8	5		
	around 9	7		
	10	10		
11-15	11	3	14	19%
	12	1		
	13	1		
	around 14	5		
	15	4		
16-26	16	2	9	6%
	17	2		
	around 20	3		
	24	1		
	26	1		

1 These data are obtained based on the assumption that the total number of assignments to each firm are being averaged out among their solicitors on the LA Panel

Chart III –Types of Cases Assigned

Types of Cases	No. of Cases Assigned	No. of Firms	No. of solicitors on LA Panel in such firms
Committal Proceedings (as solicitor advocate)	1	4	1 - 2
	2	2	3
	3	1	2
	4	1	3
	5	1	2
	19	1	4
Committal Proceedings (as instructing solicitor)	1	1	1
	2	2	3 & 5
	3	3	2 - 3
	5	2	1 & 2
	10	2	2 & 4
District Court Proceedings (as solicitor advocate)	1	4	1 – 2
	2	4	1 - 4
	3	2	2
	4	3	2 - 3
	5	3	1 - 3
	6	3	1 - 4
	7	1	1
	8	2	1
	10	7	1 - 3
	11	2	3 & 5
	12	2	2 & 3
	13	1	1
	14	1	2
	15	2	1 & 2
	16	1	5
	20	3	1 & 4
	26	1	2
District Court Proceedings (as instructing solicitor)	1	8	1 - 3
	2	11	1 - 3
	3	8	1 - 3
	4	8	1 - 5
	5	11	1 - 4
	6	4	1 - 3
	7	3	3 - 6
	8	4	1 - 2
	9	3	1 - 4
	10	2	1 & 2
	12	1	4
	14	1	5
	15	1	2
	30	2	2

Types of Cases	No. of Cases Assigned	No. of Firms	No. of solicitors on LA Panel in such firms
Court of First Instance Trials	1	17	1 - 4
	2	6	1 - 2
	3	7	1 - 3
	4	2	3
	5	4	2 - 3
	6	1	3
	7	1	5
	8	1	1
	10	1	4
	11	1	3
Magistrate's Court Appeals	1	5	1 - 3
	2	1	4
	3	1	3
	4	1	2
District Court Appeals	1	6	1 - 3
	2	1	Not specify
	3	1	1
Court of First Instance Appeals	1	10	1 - 3
	2	3	1 - 3
	3	2	2 & 5
Court of Final Appeals	1	2	3
	4	1	4
	5	1	3
Others (e.g. bail applications)	1	3	1 - 3
	2-3	1	1
	3	1	1
	5	1	3
	13	1	4

APPENDIX C

Examples provided by Firms on the Low Pay under the Present System

[This document is confidential and regrettably cannot be provided.]

APPENDIX D

Suggested Ways to Improve the Present System

A. ***Suggestions by Firms with no Criminal Law Practice***

Firm 1: to bring in line with civil legal aid rates (at least) and to enable assigned solicitors to charge similar rates to barristers

Firm 2: I refer to my nominal replies to the attached questionnaire as sent with your letter of 28th December. As a Sole Practitioner with no assistants I do not conduct, and never have conducted, any litigation, either civil or criminal, and at my age I regard it as inappropriate that I should consider starting now.

Based entirely upon the statements in your letter 28th December, I support the move by the Law Society to seek a complete review of the criminal legal aid remuneration system, but I have some qualifications to that support, which suggest that wider review might be more appropriate.

First, while I support the principle that parties to court proceedings, whether civil or criminal, should be entitled to legal representation, in practice public funds available for that purpose cannot be treated as unlimited. As is patently the case with publicly funded medical treatment, it is simply not possible to provide to all who want them the best services that could be provided at any price. Accordingly very difficult decisions have to be made, first by Government and the Legislative Council in setting and approving budgets for healthcare and legal representation (and similarly for other public expenditures), and secondly, and probably with more sensitivity to human hardship, by the administrative staff deciding on the application of available funds. The private sector, and in this case the Law Society, must appreciate the financial limitations of the public sector, even if the Law Society feels justified in representing that the legal aid application should be a larger slice of the available total of public sector funding. I am not sure whether a Law Society campaign at this time would gain a lot of pubic sympathy.

Further on the allocation of public funds, while it is easy to feel sensitive about the potential loss of liberty of a criminal accused, and to believe that therefore criminal defence representation should be given priority, I venture to question whether and how far the community at large would support that priority. It seems to be an acknowledged and established fact that in civil litigation the richer party has a huge advantage in relation to the actual outcome, regardless of the legal merits. Because of that the wealth, livelihood, and sometimes health of a party to civil litigation may be irrevocably damaged, regardless of the merits of his case, and I think that very often a party with a sound legal case has to be advised that he is in practice unable to bring it or

defend it because he is not eligible for legal aid and cannot otherwise afford the costs.

However, while in one sense the comments in my last paragraph suggest that if one part of the legal aid system is to be reviewed then all parts of it should be reviewed, my comments in the previous paragraph suggest that more fundamental steps are necessary to try to ensure that adequate legal representation is available on a wider basis for litigants and potential litigants generally.

On that, the most obvious priority for attention appears to be the drive to increase the accessibility of justice by simplifying the processes of the administration of justice. While not practicing in the area, I am aware that quite extensive steps have been taken over recent years, but I suspect that considerably more is always possible.

Next, although partly related to the same point, I wonder as an objective observer whether the allocation of public funds made available for the administration of justice (including the judiciary, the justice department and legal aid) always represents the best interests of the community. As two examples of that:

i) Is the expenditure of huge amounts of public funds on the conduct of prosecutions for commercial crimes well managed and justified? In several cases over the last 20 years or so it appears that the conduct of government or of the government case in these matters has been open to material criticism and has been directly responsible for massive escalation of expenditure on the cases. How much better value to the community as a whole could have been achieved by allocating to more routine legal aid cases at least the excess expenditure attributable to mishandling of the matters within Government? If the Law Society shares that concern, surely it is a very relevant point to make to Government.

ii) Just as is applicable in most other areas of community life, where things have to be done as well as they can be done within an available budget, is there a way in which the courts could contribute by adoption of short form processes designed to fit the budget of a party who does not have unlimited resources? That would not necessarily be limited to legal aid cases, but to focus on those for the purpose of this letter, if the Legal Aid Department decides for instance that the maximum legal aid amount available for a given case is $50,000, then could there not be procedural rules by which the length of written and/or oral submission is rationed to both parties on a basis calculated within the available fees, with the explicit understanding that the judge will enforce the set limits and that the judge or jury will make the best decision practicable on the case as presented by each party with the allotted time? (There might be a

qualification that the judge would be entitled to refer the matter back to Legal Aid for reconsideration if he felt that the complexity of the case justified that.)

Combining those two examples, I believe that Government, the judiciary and the professions should co-operate in achieving a better balance between economic reality and ideals of justice. I further believe that that might often result in fairer trials, as the more powerful party would lose its built in advantage and time-wasting would be eliminated.

In a different direction related to the availability of legal services, I put forward a memory from fairly extensive experience of working in France and with French lawyers about 30 years ago. Following the same spirit of community service as I believe is incorporated in the international baccalaureate, all French lawyers were required to give their services to the community, I think for one or two days each year. There was probably an upper age limit, but even senior partners were subject to the requirement, though there were available arrangements for a firm to reallocate the aggregate number of days of service required between its qualified staff; I conceptualise that that would actually have been of mutual benefit, as it could allow a lawyer to be available on a pro-bono basis for a case lasting several days. I believe also that there were arrangements whereby for instance those lawyers who for one reason or another were not suited to representing clients in court contributed their services in other types of *"duty lawyer"* service. While I admire the significant number of lawyers here who give their time to various duty lawyer and other free advisory plans, it occurs to me that making such contributions obligatory could be expected to provide a material additional pool of legal representation for criminal defendants, and thus to ease the pressure on legal aid funding, as well as to provide useful experience. As a supplemental observation, if there was also introduced a requirement that some CPE attendance in the early years after qualification should be in workshop training in civil or criminal representation, that might be a further advantage in several directions.

I appreciate that most or all of my above suggestions are likely at first reading to be regarded as completely impractical or inappropriate. However, occasionally the objective views of someone not involved in the detail of a problem may have merit, however far fetched those views appear at first. I dare to hope that that might apply in this instance.

B. Suggestions by Firms with Criminal Law Practice but no solicitor on the LA Panel

Firm 3: to increase the fee level for solicitors so that the quality can be retained

Firm 4: solicitors should be remunerated according to the time spent by them

C. ***Suggestions by Firms with solicitor on the LA Panel but with no Criminal Legal Aid Assignment for the Past 2 years***

Firm 5: There should be a fair distribution of work base on competence, experience and standing of the assigned solicitor.

Firm 6: Each solicitor with 5 years' post admission upon application should be qualified as panel solicitors. Time charge of not less than HK$2,000 per hour should be paid to the handling solicitor for his attendance.

Firm 7: The present system should be reformed so that eventually, solicitors and barristers shall be remunerated on the same terms and conditions as I do not see there will be any difference between solicitors and barristers if they are assigned the same job by the Legal Aid Department. The present system amounts to discrimination against solicitors.

Firm 8: criminal legal aid works should be assigned to all law firms on a rotation basis, same as the Duty Lawyers Scheme.

D. ***Suggestions by Firms with solicitor on the LA Panel and with Criminal Legal Aid Assignment for the Past 2 years***

Firm 9: pre-trial preparation should be appropriately remunerated.

Firm 10: Pre-trial preparation work should be appropriately remunerated

Firm 11: pre-trial preparation work should be assessed and remunerated

Firm 12: pre-trial preparation work (including conferences and legal visit) should be remunerated

Firm 13:
- remuneration on preparatory work plus attendance to court
- remuneration on legal visit and taking instructions.

Firm 14: there should be fees payable to legal visits and conference.

Firm 15: The present remuneration system for solicitors should be reviewed. Actual hours of work spent by instructing solicitors in the preparation for trial should be remunerated.

Firm 16: The present system should be reformed so that instructing solicitors are paid a reasonable hourly rate for all necessary preparation work prior to trial. The brief and refresher system is antiquated outdated and unfair to solicitors.

Firm 17: Solicitors should be rewarded for work done. The system needs to be reformed. In the meantime, as an interim measure, they should at least be paid for conferences just as Counsel are paid

Firm 18: the fee should reflect the solicitor's effort on the case.

Firm 19: The fees should reflect more closely on the works and responsibility assumed.

Firm 20: to pay according to the work done for the time and effort spent in particular, not necessarily on the result achieved.

Firm 21:
- sufficient fees be payable for pre-trial preparation works for instructing solicitors, in particular, when the aided person is in custody.
- the standards and rules in assigning criminal cases should be more transparent.

Firm 22: We consider out of court attendances should be paid as it can involve situation where a lot of preparation works are done and in the end the aided person plea guilty to the charges leaving only one or two days of court hearing

Firm 23: all the time so spent by the instructing solicitor must be paid, to be taxed and/or assessed if not agreed

Firm 24: simply allow fees for consultation time with clients and witnesses. As per barrister allowances

Firm 25: Instructing Solicitors should be paid more adequately and realistically to ensure they are able to provide sufficient time and service to the aided Defendant

Firm 26: pre-trial preparation work should be reasonably remunerated.

Firm 27: provide different range (i.e. no of hours of work) to remunerate pre-trial preparation work.

Firm 28: subject to justifications, the preparatory work should be allowed or solicitor should be remunerated as counsel

Firm 29: such as use hour rate, but on a fixed rate/hour

Firm 30: we suggest the present system should be reformed to the fees of Solicitor be awarded on hourly basis

Firm 31: either hourly with a cap or a scale for each stage of preparation.

Firm 32: remuneration on hourly basis

Firm 33: A time scale basis with a cap on the hourly rate of the assigned solicitor

Firm 34: time charge

Firm 35: Time costs incurred basis with taxation by Legal Aid Department with a right of appeal to Master of High Court or District Court on a de novo basis.

Firm 36: pay solicitors for same way as Counsel are paid i.e. pay for their conferences with aid persons.

Firm 37:
- barristers and solicitors to enjoy equal pay for equal work
- Instructing solicitors to be remunerated at reasonable scale or time spent basis.

Firm 38: The simplest way would be to apply the fees scale of Counsel to assigned solicitors so that pre-trial preparation works are remunerated.

Firm 39: there should be fair distribution to various solicitors.

Firm 40:
- Monitoring the number of assignment to the solicitors on panel
- reviewing the maximum limit of Rule 21
- Allowing costs to be taxed by the court, if so required.

Firm 41: A complete review of Rule 21 there should equality in treatment between solicitors and barristers on remuneration.

Firm 42:
- solicitor advocates should be remunerated on the same basis as barristers
- there should be more flexibility to allow fees to reflect the amount of work done by way of preparation.

Firm 43: fees should be increased to a reasonable level

Firm 44: increase fee

Firm 45: fees should be upward adjusted according to the solicitor's seniority. Instructing solicitors should be remunerated for pre-trial preparatory work if justified. Instructing solicitors should be remunerated for court attendance

Firm 46:
- sparing distribution, not only on number of cases but on complexity as well.
- paid for legal visits and conference with Defendant and/or Counsel

Firm 47: solicitors are to be paid at hourly rate say $800 - $1200 for pre-trial preparation depending on the post qualification experience and such costs be subject to taxation.

Firm 48: increase the remuneration to a level which is compatible with the remuneration private practice.

Firm 49: As suggested, we would like to review the maximum fees to be assessed on a time basis so that the costs as awarded will be justified

Firm 50: The attitude must be changed. Judges think solicitors do not deserve to earn a reasonable fee

Firm 51: Discretionary power should be given to the Director of Legal Aid to award costs in merited circumstances

Firm 52: at least cover disbursement like traveling, photocopying etc.

Firm 53: Please refer to the letter from John Ku as per Firm 40 in Appendix C

APPENDIX 8

PRACTICE DIRECTION - 4.2

CRIMINAL APPEALS TO THE COURT OF APPEAL

PART I - TITLE OF APPEALS

1. Any application for leave to appeal and any appeal to the Court of Appeal will carry the same title as that which obtained in the Court of First Instance.

2. This means that the prosecutor will be shown first as such in the title, whether he is the appellant or respondent in the appellate court.

3. The Hong Kong Special Administrative Region will appear first, whether it is appellant or respondent.

PART II - PROCEDURE

4. ***Initial Grounds***

Where there are "reasonable" grounds of appeal, the solicitor or counsel who was present at the trial, if instructed, should give advice on the prospects of an appeal. He should be in a position to formulate "initial grounds" immediately after the conclusion of the case and without waiting for the transcript of the evidence, of the summing-up or of the reasons for verdict or sentence and to advise the applicant on the filing of the required notice. These grounds are termed "initial grounds" in contrast with "perfected grounds" and should be signed by the drafter and accompany the notice of application for leave to appeal.

If the lay client is not given advice, and is unrepresented during the period limited for the bringing of appeals against either conviction or sentence, officers of Correctional Services will assist him by the provision of the required forms and the forwarding of them to the Registrar, High Court.

5. Where solicitor or counsel settles grounds of appeal, it is his duty to ensure that—

(a) (i) grounds are only put forward where he has satisfied himself that they are arguable; it is not h duty to put forward grounds merely because the appellant wishes him to do so;

(ii) grounds are not put forward unless they are "reasonable", that is, they afford some real chance of success;

(iii) grounds are not put forward unless they are supportable by oral argument and are particularised; and

(iv) the grounds put forward are settled with care and accuracy.

(b) It is not sufficient merely to state that "there was no or no sufficient evidence to ground the conviction". While greater latitude will be given to applicants in person such grounds risk the application being treated as invalid.

(c) If leave out of time is sought in respect of either conviction or sentence, a grounding affidavit from the applicant personally should be filed with the application setting out in detail the reasons for it.

6. ***The Appeal Papers***

(a) Once a notice of application for leave to appeal has been lodged with the Registrar, the

Clerk of Appeals will obtain from the judge' s clerk the "appeal bundle".

This will consist of—

(i) in Court of First Instance cases—the indictment, a transcript of the summing-up, the shorthand note of the verdict and the criminal record, if any, and where appropriate the transcript of sentencing and copies of any reports called for by the judge;

(ii) in District Court cases—the charge sheet, the summary of facts, the criminal record, and the reasons for verdict or, where appropriate, the reasons for sentence and any reports called for by the judge; and

(iii) in all cases any statement of agreed facts introduced at the trial will also be required.

(b) The Clerk of Court will send copies of the appeal bundle to the applicant or his solicitors or, if legal aid has been applied for, to the Director of Legal Aid and to the Secretary for Justice and will submit one set to a justice of appeal for directions. If the Directions Judge considers any additional papers are necessary, he will so direct and the Clerk of Court will arrange for them to be prepared and sent to the parties.

(c) If an applicant or his legal advisers, or the Secretary for Justice, consider that additional papers are necessary, he or they should apply in writing to the Registrar, High Court, marked for the attention of the Clerk of Court, stating precisely what papers are required and giving detailed reasons for the application. The application will then be referred to the Directions Judge.

(d) It should be clearly borne in mind by those requesting further papers that transcripts are expensive and take a long time to prepare. Only those portions of the transcript necessary for the purpose of arguing the initial grounds should be requested.

If it should become apparent that further papers are required before the perfection of the grounds, a fresh application should be made.

The above also applies to documentary exhibits.

(e) When the portions of the transcript or the additional papers requested have been received by the applicant's solicitors or the Director of Legal Aid, they should, without delay, be sent to counsel who should be instructed to "perfect" the grounds of appeal. When this has been done, the solicitor should send the perfected grounds, settled and signed by counsel, to the Clerk of Court and to the Secretary for Justice, with a copy to the applicant.

7. ***Perfected Grounds***

(a) Perfected grounds of appeal should contain in respect of each ground:

(i) the references by page number and letter, if applicable, to all relevant passages in the transcript;

(ii) the reference to any authority on which counsel intends to rely; and

(iii) clear identification of any document referred to by exhibit number or otherwise.

(b) Perfected grounds should consolidate all the grounds of appeal in one document. If it is found necessary to amend or vary perfected grounds, then a further document to be entitled "amended perfected grounds" should be filed in substitution for the original and with the amendments or variations underlined in red. This document will then constitute the grounds of appeal to be argued at the hearing.

(c) Before perfected grounds are filed, instructed solicitors or the Director of Legal Aid should ensure that counsel, both for the applicant and the respondent, are consulted as to the estimate of the length of time likely to be required for the hearing. At the time of the filing of the perfected grounds an agreed time estimate if at all possible should be provided to the Clerk of Court. If there is a difference between the parties on the estimate, this should be stated.

(d) Should there be any application for the reception of fresh evidence by the Court of Appeal such application should be made by way of a separate notice.

8. ***Lists of Authorities***

Separate lists of the authorities intended to be relied upon at the hearing should be supplied to the Clerk of Court, and not by fax, by both the applicant and the respondent two clear days before the date of hearing. At the same time each should exchange his list with the other.

9. ***General***

(a) Applicants and their legal representatives are required to take all the steps necessary to bring on an application with due diligence. Delay should be avoided and undue delay may be considered a dereliction of duty by the counsel or solicitor concerned.

(b) All applications will be monitored by the Directions Judge to ensure that they proceed with expedition and he may from time to time give directions to effect this. Upon the filing of perfected grounds or where perfected grounds have not been filed in the time stipulated, the Directions Judge will where necessary give directions as to the time allowed for oral argument and as to the filing of written argument. Directions as to written argument in applications for leave to appeal against sentence will be given only in applications of particular complexity.

(c) All communications by or on behalf of the applicant, or the respondent to any application, which are sent to the Clerk of Court' s office should be copied to the other side.

10. ***Callovers***

The Directions Judge will, as required, list criminal appeals for callover at 10 a.m. each Monday. Solicitors requiring directions may upon application to the Clerk of Court to list cases for callover. Parties who consider adequate time has not been allowed for oral argument must list the application for callover.

11. The powers to be exercised by the Directions Judge as mentioned above may also be exercised by the Registrar of High Court.

12. This Practice Direction consolidates and supersedes the Practice Directions now appearing at pages 10.7, 10.8, 10.9 and 10.11.

13. This Practice Direction shall take effect on 1 February 1999.

Dated this 31st day of December 1998.

(Andrew Li)
Chief Justice

PRACTICE DIRECTION - 2.2

CRIMINAL APPEALS TO THE COURT OF FINAL APPEAL

1. Section 33(1) of the Hong Kong Court of Final Appeal Ordinance provides that an application for leave to appeal to the Court of Final Appeal ("the CFA") should be made within 28 days from the date of the decision of the Court of Appeal or the Court of First Instance as the case may be.

2. Section 32 of the Ordinance as interpreted by the CFA [see [1997] HKLRD 1204] provides that leave to appeal shall not be granted by the CFA unless:

(a) it is certified by the Court of Appeal or the Court of First Instance that a point of law of great and general importance is involved in the decision. Where they decline to certify, the CFA may so certify and grant leave; or

(b) it is shown to the CFA that substantial and grave injustice has been done. This is a matter for the CFA alone.

3. Applications for a certificate to the Court of Appeal or the Court of First Instance that the decision involves a point of law of great and general importance should be made *immediately after* the judgment is given from which the appeal is to be brought.

4. The applicant should provide the court with a written statement of the point of law involved. Submissions on the application will then be heard and determined.

5. If either party requests for time to prepare the written statement or submissions and obtains an adjournment, an early date will be fixed for the resumed hearing.

6. A failure to make the application in accordance with these directions may make it difficult or impossible for parties to comply with the time limit for applications for leave to appeal to the CFA.

7. This Practice Direction shall take effect on 1 January 1998.