FACC No. 3 of 1999

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 3 OF 1999 (CRIMINAL)
(ON APPEAL FROM CACC NO. 378 OF 1998)

Between:

SECRETARY FOR JUSTICE **Appellant**

- and -

JERRY LUI KIN HONG **Respondent**

Court: Chief Justice Li, Mr Justice Litton PJ, Mr Justice Ching PJ, Mr Justice Nazareth NPJ and Lord Hoffmann NPJ

Date of Hearing: 29 and 30 November 1999

Date of Judgment: 14 December 1999

J U D G M E N T

Chief Justice Li :

I have read the judgment of Lord Hoffmann and agree with it. For the reasons he gives, I would allow the appeal and remit the matter to the Court of Appeal to hear the remaining grounds of appeal.

Mr Justice Litton PJ :

I have had the advantage of reading in draft Lord Hoffmann NPJ's judgment where the background facts giving rise to this appeal are fully stated.

The first certified question focuses on s.22 of the Evidence Ordinance, Cap. 8, which is headed: "Evidence in criminal proceedings *from* documentary records". So I ask, in relation to the present appeal, what evidence was the prosecution seeking to adduce *from* the GIL/Pasto documents? Not every business record put forward in a court is relied upon for the truth of the statements found in the document. For instance, the relevance of the document may be in its *form*: That it is a business ledger, purportedly belonging to a particular company, containing particular accounts. Its relevance may not necessarily be in the statements of fact found in ledgers, but in what it does *not* say.

Admissibility, in these circumstances, has nothing to do with s.22 of the Evidence Ordinance and is judged purely by the common law rules regarding admissibility.

The prosecution alleged that the respondent Jerry Lui Kin-hong, as an officer of British-American Tobacco Company (HK) Ltd ("BAT"), was bribed with payments totalling $23 million to favour Giant Island Ltd ("GIL") by ensuring the supply of cigarettes to GIL. The prosecution proved that, during the relevant three years, BAT sold to GIL cigarettes to the value of $5,364 million. This was established, not by hearsay statements contained in disputed documents, but by evidence from the BAT sales records.

As to the allegation of bribes, the respondent did not deny receiving the payments, but he said that those payments had nothing to do with his principal BAT: They were, he said, in return for services rendered to Chen Ying-jen in connection with the sale of Japanese cigarettes to Taiwan. To rebut this, the prosecution called Mr Tull Chu who testified that through his company Solar Best he had a monopoly on the sale of the products of the Japanese Tobacco Company in Hong Kong

but had no business dealings with Chen Ying-jen (whose initials are CYJ).

The relevance of the disputed documents

Up to this point, no fact sought to be established by the prosecution was proved by statements in the disputed documents. What then was the relevance of the GIL/Pasto documents? Why were they put before the jury? In essence, it was (with Mr Grimsdick's expert assistance) to show:

(i) The existence of the "CYJ & Co." account which recorded $5,364 million of purchases from BAT during the relevant three years;

(ii) the fact that the GIL books did *not* show the $5,364 million of purchases from BAT;

(iii) the relationship between GIL and Chen Ying-jen, from which the identity of the true payer of the bribes and the purpose of the payments could be inferred;

(iv) the fact that the CYJ & Co. records did *not* show significant transactions in Japanese cigarettes.

From what is said above, it can be seen that the prosecution was not relying on any statement in the disputed documents as proof of any fact stated therein: Quite the reverse. The prosecution was saying, in effect, that the documents told lies: Insofar as the GIL books, for

example, did *not* record the purchases from BAT, they were false; and insofar as CYJ & Co. purported to have made payments to the respondent, this was a disguise for the bribes paid by GIL. The Court of Appeal in its judgment appears to have lost sight of this fundamental point.

It is perhaps of some significance that when the Court of Appeal was asked by the prosecution to certify a point of law of great and general importance touching upon this issue, it declined to do so. The point was formulated thus:

> "When documents forming part of the business records of a company are tendered on the basis of them being relevant to a fact in issue, rather than as to the truth or otherwise of their contents, is it necessary for the purpose of rendering them admissible for the tenderer to comply with section 22 of the Evidence Ordinance?"

The answer must be "no". But the Court of Appeal did not address this question. If it had, the conclusion would have been inevitable that the trial judge was right to allow the documents to go before the jury. This point alone, in my judgment, is sufficient to dispose of this appeal in the appellant's favour.

Section 22B(2) of the Evidence Ordinance

But assuming that the prosecution was relying on statements of fact found in GIL/Pasto documents to establish its case and s.22 was therefore relevant, the Court of Appeal, in my judgment, erred in concluding that s.22B(2) precluded the judge from examining the form and contents of the documents to determine admissibility. Whenever a question of admissibility arises in relation to a document, the first thing a judge asks himself is: Where was the document found? What does it purport to be? To answer the latter question, the judge must look at the document for its form and contents. This is the everyday experience of the courts. It would be an extraordinary thing if s.22B, which purports to contain provisions *supplementary* to s.22, should by a side-wind change this elementary rule of practice and require the judge, in determining admissibility, *not* to look at the document for its form and content – or , for that matter, at the "circumstances in which the statement was made or otherwise came into being": see s.22B(2). If the legislature, in enacting s.22B(2), was intending to have commonsense thrown out of the window in this way, it would have required much stronger words than those found in the section. I wholly agree with Lord Hoffmann NPJ's analysis concerning s.22B(2).

Section 22A

I agree with Lord Hoffmann NPJ's observations concerning s.22A and have nothing to add.

Conclusion

I agree that the appeal must be allowed, the orders of the Court of Appeal quashed and the matter remitted to the Court of Appeal to hear the remaining grounds of appeal.

Mr Justice Ching PJ :

I have had the advantage of reading the judgments of both Litton PJ and Lord Hoffmann NPJ. I agree with their reasoning and conclusions and I have nothing to add. I, too, would allow this appeal and remit the matter to the Court of Appeal to hear the remaining grounds.

Mr Justice Nazareth NPJ :

I agree with Lord Hoffmann's judgment.

Lord Hoffmann NPJ :

This appeal raises some important questions about the admissibility of documentary evidence in a criminal trial. Mr Lui was charged before Yeung J. and a jury with an offence against s.9(1)(c) of the Bribery Ordinance, Cap. 201, namely conspiring between 1 June 1988 and 31 December 1993 with four named persons and other persons unknown to accept advantages in the form of fees and loans as a reward for ensuring that the companies by whom he was employed supplied large quantities of cigarettes to companies controlled by other members of the conspiracy.

The companies which employed Mr Lui were two Hong Kong subsidiaries of the British-American Tobacco Group and I shall refer to them collectively as BAT. The companies supplied with cigarettes were Giant Island Limited ("GIL") and Wing-Wah Company, otherwise known as Pasto Company Ltd ("Pasto"). Both were controlled by one of the named conspirators, Hung Wing-Wah ("Hung") and operated from premises in the same building. In 1988 Hung held 55% of the shares in GIL but increased his holding in 1989 to 77.5% by buying out some of the other shareholders. In 1990 he transferred his holding to an offshore company but continued to be a director. By 1993 the only directors were Hung and another conspirator named Chong Soi-Jun

("Chong") who had a 10% interest. The remaining 12.5% was held by Chui To-yan ("Chui"). Pasto was always controlled by Hung. I must also mention, because it became relevant to the defence, that another named conspirator was Chen Ying-Jen ("Chen"), who was originally a director of GIL and had a 10% shareholding. In January 1989 he sold his shares to Hung and resigned as a director. There was no evidence that he had an interest in Pasto.

The case for the prosecution was that Mr Lui was at all material times in a position to influence the supply of cigarettes by BAT and used his influence to secure that GIL, and to some extent Pasto, received large quantities of cigarettes for distribution in the Mainland of China. The evidence suggested that GIL and Pasto were carrying on a clandestine trade, concealed from the authorities both in Hong Kong and in the Mainland of China, but that was not an essential element in the prosecution's case. It alleged that between October 1988 and 20 January 1993, Mr Lui, in return for his services, received payments totalling HK$23 million from GIL and two loans totalling $10 million from Pasto. The money was paid into accounts maintained by Mr Lui in the Channel Islands. At the end of April 1993 Mr Lui resigned from BAT and went to work for GIL.

On 14 April 1994 agents of the Independent Commission Against Corruption ("ICAC") raided the offices of GIL and Pasto and seized a large quantity of documents. I shall call these "the GIL/Pasto documents". On 20 April 1994 Mr Lui left Hong Kong and travelled via the Mainland of China and the Philippines to the United States. There he was arrested on an extradition warrant and eventually returned to Hong Kong on 22 May 1997. The other named conspirators also disappeared. Hung's whereabouts remain unknown. Chong, his co-director at the end of the period, is said to have committed suicide. Chui was murdered in Singapore. Chen is in Taiwan.

The trial opened on 6 May 1998. The nature of the defence had been foreshadowed in a television interview which Mr Lui had given while awaiting extradition in the United States. He did not deny receipt of the HK$23 million. The bank statements showing that the money had been paid into his Channel Island accounts made this indisputable. But he said that the payments had nothing to do with the sale of cigarettes by BAT to GIL. They were private payments by Chen, for whom he had acted as a consultant in connection with the sale of Japanese cigarettes to Taiwan. Chen had made very large profits on these transactions and had

given him a proper reward. The main support for this defence was the fact that the banking records showed that the payments had been made out of an account in the name of Chen. There was no payment which had been made out of an account in the name of GIL. In respect of the Pasto loans, Mr Lui offered a different explanation which does not raise any of the evidential issues which have been debated in this appeal and I shall say no more about them.

In opening the case for the prosecution, Mr Reading SC adverted to the probable defence and explained what evidence would be adduced to demonstrate, by way of rebuttal in advance, that it was untrue. Much of this evidence was admitted without challenge. In particular, evidence of banking records was admitted under s.20 of the Evidence Ordinance , Cap. 8. This showed that all the payments to BAT for cigarettes sold to GIL had been made out of Chen's account, even after Chen had severed his connection with the company. The signature chop which operated the account had been in the control of Hung's co-director Chong, who appears to have run the GIL and Pasto offices. This evidence tended to show that the Chen account was really controlled by GIL and that the money in the account was beneficially GIL's money. The bank statements also showed that over HK$50 million was paid out of the

Chen bank account to Hung, Chong and Chui in the proportions of 77.5%, 10% and 12.5%. That happened to be the proportions of their shareholdings in GIL and suggested that the payments were an informal dividend out of the profits of that company.

To rebut the story of the Japanese cigarettes, the prosecution called Mr Tull Chu, who controlled Solar Best, the Japanese company alleged to have supplied the cigarettes for sale in Taiwan. He said that he had indeed sold cigarettes to Hung and Pasto but had never had any dealings with Chen. Nor did he have any business relationship with Mr Lui which would have enabled him to broker a deal for Chen.

In addition to all this evidence, the prosecution wanted to rely upon certain inferences which they said could be drawn from the GIL/Pasto documents. In essence, the documents were said to confirm that Chen's name had been used as an alias by GIL and that the account out of which the payments to Mr Lui had been made was used for the trade in BAT cigarettes and had nothing to do with Pasto's trade in Japanese cigarettes, let alone any such private trade by Chen. The GIL/Pasto documents were a miscellaneous mass of accounting records,

financial statements, vouchers, agreements, board resolutions and so forth. The jury would not have been able to make head or tail of this raw material. So it was proposed to call an expert forensic accountant, Mr Grimsdick of Ernst & Young, to explain to the jury how the documents supported the prosecution's case.

In the course of the prosecution's opening, Mr Cahill (for the defence) said that he would be objecting to the admissibility of the GIL/Pasto documents and on 8 May 1998, the third day of the trial, the court was invited to rule on the question. Mr Cahill said that the prosecution was proposing to rely upon the documents as evidence of the truth of their contents and could do so only if they could be brought within the provisions for the admissibility of business records in s.22 of the Evidence Ordinance. Otherwise, they would be inadmissible hearsay. Section 22, so far as material, reads as follows:

> "(1) Subject to this section and section 22B, a statement contained in a document shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if -
>
> (a) direct oral evidence of that fact would be admissible in those proceedings; and
>
> (b) the document is or forms part of a record compiled by a person acting under a duty from

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

(c) the person who supplied the information -

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

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

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

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

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

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

...

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

...

> ...
>
> (7) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.
>
> (8) This section does not apply to any document to which section 22A applies."

As appears from the opening words, s.22 is expressed to be subject to s.22B, in which only subsection (2) is material:

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

It will be seen that there are three conditions which have to be satisfied before a document is admissible under s.22 as prima facie evidence of any fact which it states. They are set out in paragraphs (a), (b) and (c) of subsection (1). There was no dispute that (a) was satisfied. As to (b), the only evidence called by the prosecution was to identify the documents as having been found on the premises of GIL or Pasto and a certain amount of evidence which showed that the offices of these companies had been run by Chong and that they employed a Mr See as an

accountant and a Ms Sha as his assistant. Otherwise, the court was invited to infer from the nature of the documents themselves that they were records compiled by persons acting in the course of their employment and that, so far as they stated any facts, the person who supplied the information about those facts could reasonably be supposed to have had personal knowledge of those facts. As to (c), the prosecution evidence was that when the ICAC had interviewed Mr See and Ms Sha, they had (on legal advice) declined to answer any questions and shortly afterwards left the jurisdiction. The conspirators themselves were of course not available either. The judge was invited to find that the persons who had supplied the information to the accountants (or whoever else compiled the records) could not be identified and that all reasonable steps had been taken to identify them.

Mr Cahill submitted to the judge that it was not permissible to use the documents themselves to prove that the conditions for their admissibility had been satisfied. Until other evidence had been adduced to satisfy the statute, they were inadmissible. “You cannot use an inadmissible document to ascertain or to establish that it’s admissible.”. Nor did s.22B (2) enable the court to use the documents for this purpose, because that subsection applied only to a document which “is admitted in

evidence" under s.22. It could not therefore be used for deciding whether the document should be admitted or not. In fact, the very existence of s.22B (2), permitting such use once the document "is admitted", showed that it could not be used in this way *before* it had been admitted. Otherwise the subsection would be superfluous.

Mr Reading, for the prosecution, did not dissent from Mr Cahill's characterisation of his proposed use of the documents as being to prove the truth of facts which they stated. But he said that the prosecution had satisfied the conditions of admissibility in s.22. He relied upon the English case of *R.* v. *Foxley* [1995] 2 Cr.App.R. 523 as authority for allowing the form and contents of the documents to be taken into account in deciding whether paragraph (b) had been satisfied. And he said that the prosecution had satisfied (c) because it had been unable, despite its best endeavours, to find anyone to "speak to" the documents. The judge asked whether it made a difference that the documents had been found in premises controlled by some of the conspirators. This may have been an allusion to the common law rule that statements made by a conspirator in the course of and in furtherance of a conspiracy are admissible against another conspirator: see *R.* v. *Blake and Tye* (1844) 6

Q.B. 126. But Mr Reading declined the assistance of this line of argument.

The judge ruled that the court was entitled to consider the documents in deciding upon their admissibility and that the conditions of s.22 and 22B had been satisfied. Accordingly, the GIL/Pasto documents were admitted *en bloc*. The jury was not invited to look at them. They were left for elucidation by Mr Grimsdick when he gave evidence some two weeks later. According to a list prepared for the Court of Appeal, they consisted of portions of Pasto's cash book and ledgers, GIL's ledger and ledgers headed "CYJ & Co" which appeared to be annotated computer print-outs. There was also a mass of invoices, cheque stubs, purchase forms, sale notes, shipping documents and similar vouchers. The whole of the documents, of which a sample has been provided for this court, occupied several lever-arched files.

It was only when Mr Grimsdick was called that the exact purpose for which the prosecution intended to rely upon the documents was explained. He had studied not only the GIL/Pasto documents but also the banking documents, to which, as I have said, no objection had

been made. He stated the inferences which he said could be drawn from all this material in a series of "Conclusions", which were illustrated by slides. I need to refer to only some of these conclusions to show the purposes for which the documents were being used.

The most important were the conclusions in relation to the business of GIL, which was alleged to have paid the bribes to Mr Lui. The relevant ones were as follows:

> "Conclusion 1. GIL did not record HK$5,364 million of purchases from BAT HK during the relevant three year period. GIL only recorded HK$118,000 of purchases from BAT HK during this period.
>
> Conclusion 2. CYJ & Co. recorded HK$5,364 million of purchases from BAT HK during the relevant three year period.
>
> Conclusion 3. Payments for BAT HK purchases were made from Chen's bank accounts and were reflected in CYJ & Co's ledger.

In other words, the persons in charge of the accounts of GIL were keeping two sets of books. Only a tiny proportion of the purchases of cigarettes from BAT were recorded in the books of GIL. The vast majority were recorded separately in a ledger headed "CYJ & Co.", which happened to be Chen's initials. And the payments for the

cigarettes which, so far as BAT was concerned, had been sold to GIL, were made out of a bank account in the name of Chen and entered in the CYJ ledger. The jury were therefore invited to infer that Mr Lui had been paid by GIL and that the Chen bank account was no more than a part of the disguise which GIL had adopted for its dealings in BAT cigarettes.

It will immediately be apparent that this inference did not depend upon any fact stated in the GIL/Pasto documents being true. On the contrary, the jury was invited to conclude that the facts purported to be recorded in the CYJ ledgers, namely that an entity named "CYJ & Co." had bought certain cigarettes and made certain payments, was untrue. The ledgers were not being used to prove the sales by BAT to GIL, which were proved by admissible evidence from BAT, nor the payments from the Chen account to BAT, which had been proved by banking documents admissible under s.20. The sole purpose was to prove that GIL had recorded these transactions in accounts which, on their face, related to a separate business in the name of "CYJ & Co." The ledgers were not adduced to prove the truth of their contents but only the fact that certain entries had been made in those ledgers rather than those of GIL. It was

from the fact that such entries had been made that the jury was invited to draw the appropriate inferences.

Viewed in this light, I think it is clear that the conclusions of Mr Grimsdick which I have quoted did not involve using the GIL/Pasto documents for any purpose which infringed the rule against hearsay. The classic statement of the rule is by Mr L.M.D. de Silva in giving the advice of the Judicial Committee of the Privy Council in *Subramaniam* v. *Public Prosecutor* [1956] 1 W.L.R. 965, 970:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

The GIL/Pasto documents were being used for the second of these purposes.

The other aspect of Mr Grimsdick's evidence was to deal with the sales of Japanese cigarettes. Mr Tull Chu, as I have said, gave evidence that Solar Best had sold Japanese cigarettes to Hung and Pasto. Mr Grimsdick found that such sales had been recorded, but in Chen's

current account in Pasto's general ledger rather than its own accounts. So again there was an attempt to disguise dealings which had been proved by other admissible evidence. Finally, conclusion 7 was that Pasto and GIL (and its alter ego, CYJ & Co.) had different shareholders and there was no apparent link between the Chen current account in Pasto's ledger and the CYJ & Co. ledger. The supporting documents for this last conclusion were said to be the banking documents and Chen bank statements which were separately admissible. Thus none of these conclusions depended upon the facts in the GIL/Pasto documents being true.

The trial ended on 11 June 1998 when Mr Lui was convicted. He was subsequently sentenced to 3 years and 8 months imprisonment. He appealed to the Court of Appeal on a number of grounds, some of which related to alleged irregularities in the summing up. But the Court of Appeal dealt only with ground 1, which was that the admission of the GIL/Pasto documents was a material irregularity. On this point the Court of Appeal accepted the argument advanced by Mr Cahill before the judge and deployed more successfully before them by Mr McCoy SC, that the judge had not been entitled to rely upon the form and contents of the documents for the purpose of deciding whether the requirements of s.22(1) had been satisfied.

By this time someone had also noticed that, as some of the CYJ & Co. ledgers were computer print-outs, they were prima facie not within s.22 at all. Section 22(8) provides that the section does not apply to any document to which s.22A applies. Section 22A applies to "a statement contained in a document produced by a computer." It says that the document shall be admissible as "prima facie evidence of any fact stated therein" if certain conditions are satisfied. These, in short, require positive evidence that the computer was working properly. No such evidence was (or could have been) adduced at the trial. Mr Reading argued that the annotations on the print-outs showed that they had been adopted as business records by GIL and were therefore not simply documents "produced by a computer". But the Court of Appeal said that, by analogy with its ruling on s.22, one could not look at the documents themselves to see whether the requirements for admissibility contained in s.22A had been satisfied. I am not sure that this quite met Mr Reading's point, which was, I think, that s.22A did not apply to the documents at all. But no doubt the Court of Appeal, even if it had accepted this point, would have said that in that case they needed to be admitted under s.22 and the result would have been the same.

Mr Reading made two further points. One, as recorded by the Court of Appeal, was to "suggest" that the documents "need not necessarily have been put in evidence to show the truth of their contents." Mr Thomas SC, who led Mr Reading in the prosecution's appeal to this court, said that Mr Reading made the point rather more firmly. In any event, it was summarily rejected. The Court of Appeal said:

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

I am bound to say, with all respect to the Court of Appeal, that I do not understand these remarks. It is perfectly true that Mr Grimsdick looked at the documents "for what they appeared to state on their face" in the sense that he assumed that they had been produced by GIL and Pasto and not forged by the ICAC. But that is not the same thing as using them to prove the truth of the facts they stated. It would have been more helpful if the Court had identified the assertions in the documents which Mr Grimsdick's reasoning was said to have assumed to be true. Before this court, Mr McCoy was unable to do so. As for the

summing up, neither counsel was able to identify the passages to which the Court of Appeal referred.

Mr Reading's other new thought was to put forward an argument based upon the common law rule about the admissibility of the statements of conspirators against each other, which he appeared to have disclaimed before the judge. The Court of Appeal said that they did not need to consider this argument. I find this rather puzzling, because Mr Reading appears to have been putting it forward as an alternative ground for the admissibility of the GIL/Pasto documents. The Court of Appeal may not have thought it was a very good argument and Mr McCoy says that Mr Reading did not advance it with great enthusiasm. But that does not mean that the Court of Appeal did not need to deal with it. If it was right, the appeal should have failed.

The Court of Appeal therefore allowed the appeal and set aside the conviction and sentence. The prosecution invited them to certify three points of law of great and general importance. They were:

> 1. When documents forming part of the business records of a company are tendered on the basis of them being relevant to a fact in issue, rather than as to the truth or otherwise of their contents, is it necessary for the

purpose of rendering them admissible, for the tenderer to comply with section 22 of the Evidence Ordinance?

2. In determining the admissibility of statements contained in documents, tendered as prima facie evidence of the facts stated therein, in accordance with section 22 of the Evidence Ordinance, is the court entitled to draw inferences from the surrounding circumstances and the documents themselves?

3. Where statements contained in documents produced by a computer, which have been adopted as part of the business records of a company, are tendered as prima facie evidence of the facts stated therein, is the tenderer required to comply with the provisions of section 22 or section 22A of the Evidence Ordinance."

The Court of Appeal refused to certify the first question. But they did certify the other two.

I shall deal with the two certified questions before considering the other issues which have been debated. First, the question on s.22, which is now the first certified question before this Court. That section states that if the conditions set out in paragraphs (a), (b) and (c) of subsection (1) are satisfied in respect of a statement contained in a document, that statement is, by way of exception to the hearsay rule, admissible to prove the truth of the fact stated. The burden is therefore upon the prosecution to satisfy the judge that the conditions have been

satisfied. But the section in no way restricts the evidence upon which the prosecution may rely upon for this purpose. The only limits are those imposed by the common law. And the only relevant common law rule in this case is the rule against hearsay, which prevents a statement in the document (or any other statement by a non-witness) being used as evidence that it is true. On the other hand, there is nothing to prevent the document itself, or any other document, from being relied upon for any evidential purpose which does not involve the assumption that a statement which it contains is true.

In the present case, as it seems to me, the fact that the documents were business records was plain from their contents, the circumstances in which they were found and the admissible evidence about GIL, Pasto and the nature of their businesses. The ledgers, for example, did not contain statements that they were ledgers. They *were* ledgers, even if every entry which they contained was false. And likewise the other documents. Mr McCoy's superficially logical proposition that an inadmissible document cannot be used to prove its admissibility is fallacious. The hearsay rule never makes a document as such inadmissible. It is only inadmissible for a particular purpose, namely, as evidence that a statement which contains is true. If it is relevant to an

issue in some other way, it is admissible for that purpose. In the present case, the question of whether the documents were records compiled in the course of employment and so forth, within the meaning of s.22(1)(b), was an issue in the case. The form and contents of the documents were relevant to that issue, irrespective of whether anything they said was true. Therefore the documents were admissible at common law for that purpose. And if their form and content and any other admissible evidence persuaded the court that the conditions in s.22(1) were satisfied, the documents became admissible for the *additional* purpose of proving that the statements which they contained were true.

That, in my opinion, is the effect of the general principles of the common law. But problems have been caused by the fact that the legislatures of England and Hong Kong seemed unwilling to believe it to be the case. When the first general statutory exception to the hearsay rule was enacted in England in the Civil Evidence Act 1938, Parliament provided, quite unnecessarily, in s.1(5), that –

> "for the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained or from any other circumstances..."

This provision was unnecessary because, as I have said, there was no rule which prevented the court from doing what the subsection allowed. It was however repeated when the exception for documentary evidence was extended to criminal proceedings in the Criminal Evidence Act 1965 (see s.1(2)) and repeated again when that exception was recast in s.68 of the Police and Criminal Evidence Act 1984 (see paragraph 14 of Schedule 3). Such superfluity might be thought nothing more than caution on the part of the legislature, but, as Professor Smith said in his note on the otherwise unmemorable case of *R.* v. *Feest* [1987] Crim.L.R. 766, 767, "The danger of enacting that common sense may be applied in respect of one matter is the implication that it need not, or must not, be applied in another matter which is not mentioned." For this reason, when the documentary hearsay exception was once again recast in s.23 and 24 of the English Criminal Justice Act 1988, a provision equivalent to paragraph 14 of Schedule 3 of the Police and Criminal Evidence Act 1988 was omitted.

No English case was drawn to our attention in which the court fell into the trap described by Professor Smith. But I am afraid that the Court of Appeal did so in this one. In fairness to the Court of Appeal, I must say that their task was complicated by the obscurity of the

language which the draftsman used in s.22B (2) and the obscurity of the reasoning in *R.* v. *Foxley* [1995] 2 Cr.App.R. 523, the case in the English Court of Appeal upon which the prosecution principally relied.

Section 22B (2) differs from the equivalent English provisions in that it is introduced by the words "where in any criminal proceedings a statement contained in a document *is admitted* in evidence by virtue of s.22 or 22A" instead of the words "*for the purpose of deciding whether* a statement is...admissible..." The Court of Appeal noted this distinction and so decided that "is admitted" must be construed to mean "has been admitted". The subsection therefore applied only when the document had been proved by evidence *aliunde* to be admissible. This would be a plausible interpretation were it not for the fact that it makes the entire subsection even more absurd than its English equivalent. It was unnecessary to give the court a power to draw non-hearsay inferences from the document for the purposes of determining the admissibility of the statements it contained. To confer those powers only when the document had already been held admissible for these purposes was doubly unnecessary. In my opinion, therefore, the legislature was intending s.22B (2) to apply in the same way as the English legislation

and used the words "is admitted", to mean "is the subject of an application to be admitted".

In any case, whether the powers which s.22B (2) purports to confer upon the court apply before or after the document has been admitted, the subsection is purely permissive. It does not prohibit the court from doing anything it would otherwise be able to do. And, as I have said, the drawing of non-hearsay inferences from the form and contents of the document is something permissible at common law. The Court of Appeal said that if this were the case, s.22B (2) would be otiose. So it is. On any view, whether it applies for the purpose of determining admissibility or after the document has been admitted, it must be otiose. This was the point made by Professor Smith. But I think it is unrealistic to construe a statute on the assumption that the legislature never says anything otiose. The fact that the legislature may not have understood the limited scope of the hearsay rule is no reason for saying that it has impliedly prohibited the use of evidence which is admissible at common law.

The other handicap under which the Court of Appeal suffered was the reasoning in *R.* v. *Foxley* [1995] 2 Cr.App.R. 523. Properly understood, this case is a decision that provisions like paragraph 14 of Schedule 3 of the Police and Criminal Evidence Act 1984 or s.22B (2) of the Evidence Ordinance are unnecessary because they only purport to permit the court to do what it has always been able to do. Therefore the fact that an equivalent provision was not included in the Criminal Justice Act 1988 made no difference. But the judgment certainly gives the impression that this power is not something which exists at common law outside the Act of 1988 but is derived, in a wholly unspecified way, from the provisions of the Act itself. And these, as the Court of Appeal rightly pointed out, are in some respects different from the earlier provisions of the Act of 1984 which still forms the basis of the Hong Kong legislation. Matters are not made any clearer by the statement in *Foxley*, almost in passing (on p. 537) that the documents were not being used as hearsay statements at all and therefore presumably required no statutory provisions to justify their admissibility. But so far as the decision deals with the application of the statutory hearsay exception, the true ratio decidendi is in my opinion to be found in a passage which the court (at p. 537) quotes from the unreported judgment of Pill J. in *R.* v. *Dobson*:

> "Inferences can be drawn for the purposes of section 24...notwithstanding the absence of a provision supplementary to section 24 corresponding to that in Schedule 3 paragraph 14 of the [Act of 1984]..."

This power exists not by virtue of anything in s.24 but at common law.

I would therefore answer yes to the first certified question. If one applies that answer to the facts of the case, I think there was ample evidence on which the judge was entitled to find that the GIL/Pasto documents formed part of business records compiled by persons in the course of their occupations as accountants or bookkeepers for which they were employed. Indeed, I think that any other conclusion would have been perverse. Likewise, and particularly in view of the correspondences between the entries in those documents and all the known facts proved by other admissible evidence, the judge was entitled to find that the information recorded in the documents was supplied by persons who might reasonably be supposed to have had personal knowledge of the facts. Finally, I think that the judge was entitled to find that the evidence of the interviews with Mr See and Ms Sha and their subsequent disappearance, together with the other conspirators, showed that despite all reasonable steps having been taken, the suppliers of the information could not be identified. The Court of Appeal said that the judge had misunderstood s.22(1)(c): it was not the absence of Mr See or Ms Sha,

the receivers of the information, which had to be accounted for. It was the suppliers. That is true but I do not think that the judge made a mistake. What he meant was that the prosecution could not be expected to identify the suppliers of the information in the absence of anyone, like Mr See or Ms Sha, who could have told them who they were. I think he was entitled to reach this conclusion.

That brings me to the second certified question, which concerns s.22A. This is a remarkable provision. It lays down the conditions upon which a statement contained in a document produced by a computer must be admitted as prima facie evidence of any fact so stated. In some respects these conditions resemble s.69 of the English Act of 1984 and in others they are more restrictive. For example, the computer must have been used for the purpose of activities carried on by any body or individual and the statement produced by the computer must be derived from information supplied in the course of those activities: subsection 2(a) and (b). Subsection (c) requires evidence that the computer was working properly. But, unlike s.22, the section contains no requirement that the person who supplied the information had, or might reasonably be supposed to have had, personal knowledge of the facts. I do not understand the rationale for this distinction. The fact that a statement

was generated by a computer is no guarantee whatever of its accuracy. If wrong information was fed into the computer, wrong information will come out. It is true that there was also no such requirement in s.69 of the Act of 1984. But s.69 was an *additional* requirement which had to be satisfied by statements produced by computers, as well as any conditions which might have to be satisfied to come within an exception to the hearsay rule: see *R.* v. *Shephard* [1993] A.C. 380. Section 22A, on the other hand, is an independent exception.

I can, however, leave these matters for consideration in due course by the legislature because it is accepted that the computer-generated documents in this case did not satisfy the conditions of s.22A. The submission of Mr Thomas was that they did not have to. He relied upon the fact that some of the documents contained manuscript ticks and alterations. This, he said, showed that someone had gone through the documents after they had been printed out and adopted them as records of GIL. They were therefore not documents "produced by a computer" within the meaning of s.22A. Their computer-generated origins had become irrelevant to their evidential status. Mr Thomas drew the analogy of a letter produced by a word processor which is put before the author and signed. It would be absurd to regard such a letter as falling within the

special provisions of s.22A. The evidential effect of the document derives from the fact that the author has acknowledged it as his utterance and it is irrelevant whether the text was produced by a word processor or a scribe with a quill pen.

In principle I would accept Mr Thomas's submissions. But I do not see how they can be applied to the facts of this case. The fact that some unknown person put ticks against some figures and altered others is in my view an insufficient foundation for inferring that he adopted every statement in the computerised ledger as his own utterance. There was no evidence about the meaning of the ticks. The figures which have been entered in manuscript are not of course statements produced by the computer. But Mr Thomas was quite unable to explain the significance of these manuscript figures or what relevance they had to Mr Grimnick's conclusions. I therefore consider that the computer print-outs, so far as they were being used as evidence of any facts stated in them, did have to comply with s.22A and did not do so.

Section 22A(11), however, says that nothing in the section is to affect the admissibility of a document produced by a computer where it is tendered "otherwise than for the purpose of proving a fact stated in it." For the reasons which I have already explained, I do not think that the documents were being used for the purpose of proving any fact which they contained and s.22A therefore did not affect their admissibility.

In view of these conclusions, I can deal briefly with Mr Thomas's alternative submissions on the common law rule about statements by conspirators and s.17A of the Evidence Ordinance. The conspiracy rule requires that the statement should relate to an act done in furtherance of the conspiracy: see Cross and Tapper on *Evidence* (8th ed. 1995), p. 654. I am not satisfied that any of the statements contained in the GIL/Pasto documents were in furtherance of the conspiracy to procure supplies by corrupt means which was charged against Mr Lui, as opposed to being in furtherance of the general purposes of those running GIL and Pasto to conceal their dealings in those supplies from the tax and customs authorities. As for s.17A, there has been little argument on its application and in the end Mr Thomas did not press it. The section may also be declaratory of the common law, although such a conclusion might involve this court in declining to follow the heavily criticised majority

decision of the House of Lords in *R.* v. *Kearley* [1992] 2 A.C. 228. But I need say no more because in my opinion there was no need in this case to rely upon it.

The result is that in my judgment the GIL/Pasto documents were admissible for the purpose for which they were relied upon by the prosecution. As this conclusion depends principally upon my opinion that the use of the documents did not infringe the hearsay rule, it may be said to differ from the ground upon which they were admitted by the judge. Mr McCoy said that the accused was prejudiced because if the judge had been told that the documents were being tendered as non-hearsay, he would have warned the jury that they could not be relied upon to prove the truth of their contents. But this objection seems to me fanciful. It was the prosecution who were contending that the jury should regard the documents as being untrue in the only respect in which they were material, namely in asserting that the purchases and payments had been by Chen. Mr McCoy also said that although the court had jurisdiction to allow the appeal on grounds which fell outside the certified questions (compare *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349), as a matter of discretion the court should not do so. It would be unfair to allow the prosecution to reinstate the conviction on grounds

which were not before the judge. For my part, I do not see any unfairness. The judge ruled the documents admissible on the only ground argued before him and on that point he was correct. The fact that the documents would in any case have been admissible did not matter. The point about the computer print-outs was taken by the defence for the first time in the Court of Appeal and one of the answers given by the prosecution was that they were in fact original evidence. On that point too the prosecution was correct. On the arguments put to the Court of Appeal, the appeal should therefore not have been allowed. I would therefore allow the appeal to this court and remit the matter to the Court of Appeal to hear the remaining grounds of appeal.

Chief Justice Li :

The Court, being unanimous, allows the appeal and remits the matter to the Court of Appeal to hear the remaining grounds of appeal. As to costs, the parties should make written submissions to the Court within 14 days copied to the other party.

(Andrew Li)
Chief Justice

(Henry Litton)
Permanent Judge

(Charles Ching)
Permanent Judge

(G.P. Nazareth)
Non-Permanent Judge

(Lord Hoffmann)
Non-Permanent Judge

Mr Michael Thomas SC (instructed by the Department of Justice), Mr John Reading SC and Mr Joseph TO Ho-shing, SGC (of that department) for the Appellant

Mr Gerard McCoy SC, Mr Raymond Pierce and Ms Vandana Rajwani (instructed by M/s C.L. Chow & Lam) for the Respondent