

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

REX

VS

ACRES INTERNATIONAL LIMITED

Accused

Crown's Heads of Argument on the Merits

Introduction:

1.

An evaluation of the evidence as well as any conclusions to be drawn there from would proceed, it is submitted, from the following essential facts which are not in dispute.

- 1.1 Acres first came to Lesotho in the early 80's. After being engaged here for a number of years they were invited to tender for contract 19. After so being invited they engaged the services of ZM Bam as their agent. After a competitive bidding process Acres was awarded this contract.
- 1.2 Under contract 19 Acres provided technical expertise to the LHDA and in doing so its staff members employed in Lesotho effectively became part and parcel of the LHDA.
- 1.3 At the end of 1988 Bam left Lesotho to take up employment with the Botswana Housing Corporation in Botswana. He was to remain there until February 1991.
- 1.4 In April 1989 Acres was told by Sole, the Chief Executive of the LHDA, that it would be invited, on a sole sourced basis, to put in a proposal for the continuation of their services. The new contract would be termed contract 65. This was after a trip to Canada by Sole in March.
- 1.5 Acres then contacted Bam and proceed to negotiate with him over a period of eighteen months a representative agreement in respect of this new contract.
- 1.6 In February the following year Acres was formally invited to submit its proposal. This it did and the contract was negotiated in May 1990, whereafter a memorandum of understanding (MOU) was prepared.

- 1.7 On 24 July 1990 Sole issued to Acres a letter of intent. Acres then mobilized, with Sole authorising such mobilization, and undertaking to pay Acres, on 14 August 1990.
- 1.8 This was done despite the fact that contract 65 had not yet been signed. In fact, important matters such as Acres' fee had not yet even been agreed. This was followed by Acres claiming an advance payment under the unsigned contract in September 1990.
- 1.9 In September 1990 Sole travelled to Canada.
- 1.10 On 23 November 1990 Acres signed a representative agreement with an entity called ACPM whose address was given as that of a bank in Geneva.
- 1.11 On 28 November Witherell, an Acres employee on contract with the LHDA, authorised the payment to Acres of its advance under the unsigned contract on behalf of the LHDA.
- 1.12 On 29 November 1990 the Moloti portion of the advance, M250 000.00, was paid to Acres and on 4 January 1991 the Canadian dollar portion, CAD 1 160 000.00.
- 1.13 On 28 January 1990 Acres paid Bam (not ACPM) CAD 180 000.00.
- 1.14 On 21 February 1991 Sole signed contract 65 on behalf of the LHDA.

- 1.15 Monthly payments from Acres to Bam then followed and Bam proceeded to share this money with Sole on a 60/40 basis with 60% going to Sole.
- 1.16 This arrangement endured until after Sole lost his court challenge against his dismissal in January 1997, whereafter Acres reduced its payments to Bam to approximately 40% of what it had been paying up to then. These payments Bam did not share with Sole. Acres ceased paying altogether when Bam died in 1999.
- 1.17 The monies paid by Bam to Sole were also paid into an account in Switzerland from which account Sole then fed an account in Ladybrand from which account he in turn transferred funds to his account in Maseru. All this is summarised in exhibit "K4".
- 1.18 At the same time as he was receiving these funds from Acres and in turn paying a portion over to Sole, Bam was also receiving funds from other contractors/consultants, namely ABB Germany, ABB Sweden, Lahmeyer, Lahmeyer MacDonald Consortium and Dumez, and also in respect of these payments he shared the proceeds with Sole. This was also done through Swiss bank accounts with Sole also being paid in Switzerland.
- 1.19 The evidence also shows Bam's accounts in Switzerland being used almost exclusively for the receipt of monies from these contractors/consultants and the transfer of portions thereof to Sole.

2.

The only real issue before the Court is then whether or not Acres, when paying Bam, intended for him to share the money with Sole or, if not actually so intending, whether it was reckless as to whether this occurred or not.

3.

In its defence Acres put up a "representative agreement". The main issue canvassed in the evidence was whether this agreement was genuine or not.

4.

The Crown alleges that Sole favoured Acres. The other issue canvassed in evidence related then to whether or not this was so, more particularly in the context of establishing contract 65, and in addition whether, when showing such favour he also acted irregularly.

Corporate Liability:

5.

Section 338 of the CPEA is based on the old provision in the 1917 South African Act. As regards the present South African section 332 the following passage appears in South African Criminal Law and Procedure, Vol. 1, by Burchell and Hunt (1983) at p 395:

“Being an artificial persona, a corporation cannot itself commit an actus reus or entertain mens rea. It follows that a corporation can be penalized for crimes committed only by its agents or servants. In a sense, therefore, when criminal liability is imposed upon a corporate body, it is vicarious. However, the criminal responsibility of a corporate body is much wider than that of the vicarious liability of natural persons; and in truth it rests upon the imputation to the corporation of the crimes of persons acting on its behalf, rather than upon vicarious responsibility. “Their acts and states of mind are the company’s acts and states of mind and it is held liable, not for the acts of its servant, but for what are deemed to be its own acts.”

And at p 397:

“ It will be seen that section 332 (1) removes the obstacle to fixing criminal liability upon a legal persona that since it has no mind it could not be found guilty of a crime requiring mens rea. In terms of the subsection where a corporation is charged with such a crime the mens rea of the director or servant who committed the crime will be imputed to the corporation.

.....

.....section 332 (1) expressly renders the corporate body liable where, committing the crime, the director or servant acted beyond his powers or duties but while " furthering or endeavouring to further the interests of" the corporation. Liability under the section, therefore, extends beyond the normal limits of vicarious responsibility where the principal or master is liable only if the agents or servant acted within the scope of his authority or employment."

6.

It follows firstly that a corporate body can be convicted of virtually any crime requiring mens rea. In R v Bennett and Co. (Pty) LTD 1941 TPD 194 the company was for instance convicted of culpable homicide. The fact that what the servant does was expressly forbidden by the company makes no difference - see R v Booth Road Trading Co. (Pty) LTD 1947 (1) Prentice Hall K.48 (N), provided that in doing so he sought to further the interests of the company.

7.

In a nutshell, provided that Acres money was used, the intention of the Acres employees when paying the money to Bam is the intention ascribed to Acres. If they intended the money or part of it to be paid to Sole or if they were reckless as to whether or not this happened, Acres would have so intended either in the form of dolus directus or dolus eventualis.

8.

The Accused raised as a preliminary issue the manner of Acres' citation. This was in terms of an application brought by Acres on 20 September 2000. In a ruling on 6 March 2001 Cullinan AJ rejected this objection and held that the present manner of citation, namely the company as the Accused in its own name, was perfectly correct.

The Indictment:

9.

The indictment alleges payments between January 1991 and January 1998. In the preamble the background to the payments is described, more particularly the relationship between Acres on the one hand and Bam, Sole and the LHDA on the other. The common denominator here is the fact that Acres was contracting with the LHDA and Sole was the LHDA's chief executive.

10.

A variety of matters are addressed in the request for further particulars. They relate to benefits or potential benefits to Acres in return for the alleged payments, what Sole did or did not do in return for the money and what influence he could or could not exert in return for the money.

11.

The whole issue of a quid pro quo in exchange for the money was resolved by Cullinan AJ's ruling of 13 March 2001.

11.1 In the light of this ruling, namely that the Crown need not prove actual benefit, all the Crown has to prove is payment and receipt with the requisite intent.

11.2 The Crown's case is that the only possible reason why Acres would have wanted to pay Sole was in order to have him look favourably

towards Acres in the context of its contractual relationship with the LHDA. The fact that Sole accepted this money is evidence proving the existence of an agreement to this effect. This in turn constitutes bribery.

- 11.3 Whatever Sole did or did not do thereafter for Acres is irrelevant. Even if he did his duty he, as well as Acres, still committed bribery.

Jurisdiction:

12.

Although the payments were made in Switzerland, the Crown alleges that this Court has jurisdiction. This issue was comprehensively and, it is submitted, correctly dealt with in Cullinan AJ's ruling of 18 May 2001.

13.

In this Court Acres has not pleaded a lack of jurisdiction. Although the money was paid in another country the evidence establishes that this was done in respect of a contract or contracts concluded and executed in Lesotho and the payments were made to a Lesotho public official. See also generally paragraph 21 of the indictment. Quite clearly then the Court has jurisdiction.

Circumstantial evidence and the approach thereto:

14.

The Crown's case against Acres is based on circumstantial evidence. Certainly there is no direct evidence of Acres concluding a bribe agreement with Sole. Instead this is to be inferred from the evidence as a whole.

15.

In many instances circumstantial evidence is more cogent, compelling and probative than direct evidence. For example, evidence of identification by a finger print would be considered more reliable than the direct evidence of a witness who identified the Accused as the person he saw. See S v Shabalala, 1966 (2) SA 297 (A) at 299C and LH Hoffmann and D Zeffertt's The South African Law of Evidence, Fourth Edition, p 589.

16.

The approach to circumstantial evidence in a criminal trial after all the evidence has been led is, by now, well settled. Here any inference that the Crown asks the Court to draw from the circumstantial evidence must be the only reasonable one in the circumstances and it must be consistent with all the proved facts. R v Blom 1939 AD, 188 at pp 202 – 203; S v Sesetse 1981 (3) SA 353 (A) at 369H – 370C.

17.

This approach is to be distinguished from the one applicable in civil cases. In civil cases the inference need only be the most probable among any number of possible inferences. See for instance Govan v Skidmore 1952 (1) SA 732 (N) at 734C – D.

18.

In drawing any inference the Court must look at all the evidence together (S v Ostilly and others 1977 (2) SA 104 (D) at 106H – 107A). In other words the Court must decide whether the inference is the only reasonable one that can be drawn from the complete picture painted by all the established facts. This then means that to find fault with individual witnesses on a piecemeal basis without considering the effect of that criticism on the overall picture or impression is a wrong approach. Where such criticisms, even if valid, do nothing to displace the inference or give rise to no other reasonable inference then the criticisms are of no real value or relevance. Despite lip service to the contrary this is exactly what the defence urged upon the Court in the application for discharge. In this regard the Crown's witnesses were individually criticised but those criticisms did nothing to displace the impression created by the evidence as a whole.

19.

Here it must also be remembered that a distinction must be drawn between inferences validly drawn from the proven facts on the one hand and conjecture, speculation and making assumptions on the other. The former is

in order, the latter impermissible. Cooper and another N.O. v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at 1027F – G.

20.

The two main inferences that the Crown asks the Court to draw are these. That Acres knew very well that it was paying Bam to use its money to bribe Sole. It is the Crown's case that Acres used Bam to camouflage this fact, Acres used Bam to break the chain of evidence relating to the payments between Acres and Sole. The representative agreement then between Acres and Bam was nothing more than a smokescreen. It is analogous to a criminal carefully setting up his alibi before committing his crime so that he is able to fall back on it should the need arise.

21.

These conclusions are inter-related. The one relates to mens rea, the other to the truthfulness of Acres' defence. As to mens rea this has always been a matter of inference. Very seldom is there direct evidence of mens rea – eg the Accused is overheard to say "I am going to murder the bastard". Instead, as a matter of inference, the facts will point to the Accused's state of mind. This is well illustrated in charges involving assault. The presence of an intention to cause grievous bodily harm or to kill or any attempt thereat or to merely commit assault common is established by inferring it from factors such as the nature of the weapon or instrument used, the degree of force, the situation on the body where the assault was inflicted, the injuries actually sustained and so on - S v Mbelu 1966 (1) Prentice Hall H.176 (N). The same reasoning would apply to Acres' mens rea in this matter. Its mens rea is to be ascertained from all the facts.

22.

The Accused bears no onus. The Crown must prove its case against the Accused beyond a reasonable doubt. This proposition is trite. On the Crown's evidence the only inference is that Acres knew that it was paying Bam in order for him to use its money to pay Sole.

23.

This is what on the face of it appears from exhibit "K4", especially when viewed against the background of the water project and Acres' involvement with the LHDA. Exhibit "K4" does not stand on its own. Instead it is surrounded and re-enforced by evidence collectively pointing to guilty knowledge on Acres' part, as well as a strong motive to bribe.

24.

The collective force of all this evidence, standing unanswered, more than satisfies the test in Blom's case. On this evidence the only inference to be drawn is that Acres intended to bribe Sole and indeed did so through Bam.

25.

It is then for Acres to displace this inference. Again, this is not to suggest that Acres bears any onus. Instead the Crown evidence "calls for an answer" and "in the absence of an answer from [Acres, that prima facie proof] becomes conclusive proof and [the Crown] completely discharges [its] onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof, being undestroyed, amounts to full proof".

Ex parte the Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 at 479.

26.

In this case it is submitted that Acres' answer has been shown to be more than just "doubtful or unsatisfactory". Rather that it has on the evidence as a whole been shown to be a manifestly false answer. Certainly, for purposes of the onus in a criminal case, it has been shown that it cannot reasonably be true. See Ntsele v S 1998 (3) All SA 517 (SCA). In particular it has been shown that the representative agreement was concluded not for the purpose that Acres contends for.

Admissions and matters not in issue:

27.

From the admissions contained in exhibit "B" and the plea explanation, exhibit "A", the actual payments (Vol.15, part 7, pp 42 – 44; see also exhibit "L") and the factual background against which these payments were made is not in issue.

28.

In fact, Acres goes further and admits certain additional payments not recorded in the Swiss bank accounts. Here the payment into Bam's Nedbank account is referred to (record p 697/11 – 19; vol. 6, p 1467) as well as the 40% payments to Bam in Switzerland after January 1997. See exhibit "L" as well as vol. 6, pp 1462 – 1465.

29.

It is further common cause that Acres actually used LHDA money it received to pay Bam. Record pp 2/12 – 16, 5/11 - 13. The documentary evidence collected in exhibit "C" is before the Court by consent and on the basis that what is contained therein speaks for itself.

30.

The Swiss bank records contained in vols. 10 – 14 are before the Court in terms of section 246 of the CPEA. In terms of this section the entries in the bank records "shall be prima facie proof ... of the matters, transactions and

accounts recorded in the accounting records". By now there is no dispute about the payments, in fact they are admitted. The prima facie proof then is now conclusive proof.

31.

Also the other bank records relating to Acres, Bam and Sole, both in South Africa and Lesotho, are not in dispute. See exhibits H, J, N, O, R, S, T, U, V, X and Y. From these records appears the following.

- 31.1 The LHDA also paid Acres in Lesotho – see for example exhibit "U", p 41 (the advance of M250 000.00), read with vol. 9, pp 134 – 142, also read with Brown's evidence at pp 1950/18 – 1951/11. See in particular also vol. 4, pp 677 – 679. It also paid Bam in Lesotho (through Lescon, via Lahmeyer).
- 31.2 Sole had bank accounts in Lesotho - exhibits "R", "S", "T" and "O", as well as South Africa – exhibits "X" and "Y".
- 31.3 Acres in fact paid Bam in South Africa - exhibit "C", vol. 6, p 1467.
- 31.4 Bam also had accounts in South Africa - exhibits "H" and "J". Also in Lesotho in the name of Lescon – exhibit "V".
- 31.5 Acres also had bank accounts in Lesotho – exhibits "N" and "U".

32.

All the payments could then have been effected locally as opposed to in Switzerland. Had they been legitimate it is inconceivable that they wouldn't have been.

33.

The payments in Switzerland to Lesotho and South African residents contravened these two countries' Exchange Control Regulations. See also below.

Matters in issue:

34.

It is common cause then that Acres paid Bam. It is further established through the bank records as well as the evidence of Roux that Bam in turn by and large shared the money 60/40 with Sole. All this happened over a number of years.

35.

This is all summarised by Roux in exhibit "K4". It has then conclusively been proved that Acres money was used to pay Sole. In fact Acres, by not contesting Roux's evidence in this regard (p 703/17 – 19), in effect admit this.

36.

What falls to be decided quite simply is whether at the time Acres paid Bam it knew and intended that Bam was to share the money with Sole (dolus directus) or whether it foresaw this and was reckless as to this happening (dolus eventualis).

37.

It is improbable, even illogical, that Bam would have received all this money from Acres and then paid most of it over to Sole without Acres intending this or not knowing about it. Also, once it is established that Acres' money was used by Bam to pay Sole then common sense dictates that Bam did so on Acres' instruction. Bam would never have paid Sole unless he had a

compelling reason to do so. Here there can be no other explanation for Bam's payments to Sole except that they were bribe payments. If this is so, then it is inconceivable that Bam would not have told Acres what he did with their money.

38.

If he could keep all the money for himself he would surely have done so. There is no suggestion based on any evidence that Bam would have paid Sole out of generosity or some other obligation, contractual or otherwise. Acres certainly haven't offered any sensible explanation for these payments. The extortion theory hinted at before the World Bank is nothing short of fanciful and speculative. So are the various theories advanced by Hare, Brown and Burnett.

39.

The best Acres has been able to do is to suggest that it didn't know that its money was going through to Sole. The question here is whether this is to be believed or not.

40.

Bam could hardly have squeezed so much money out of Acres without persuading Acres that it was worth its while. After all Acres paid Bam some 25% of its mark-up. He could only have achieved this by letting Acres know that Sole was in on the deal. It is only if this is accepted that so many anomalies in the Acres version, like wanting to use Bam as an agent even though he was in Botswana, like paying him so much, allegedly for mere

political intelligence, why it is that most of the services in the representative agreement were not necessary, the fact that no one knew that Bam was Acres' agent, the fact that he was paid in Switzerland, and so on, begin to make sense. In turn it follows that the representative agreement was just a sham.

41.

Acres bases its claim to an absence of mens rea squarely on the representative agreement of 23 November 1990. This is the document which according to Acres shows its bona fides. By relying on this document Acres, as it were, as is the case with an alibi defence, puts all its eggs in one basket. If this defence cracks then the whole proverbial edifice comes tumbling down. Once it is shown that this document is not really what it purports to be then it follows that the document was intended to hide or obfuscate the true position. In the context of the present situation this would largely by itself, that is even apart from any other considerations, establish mens rea.

42.

This is so because there is no other conceivable reason why Acres would want to hide its true agreement or understanding with Bam. The situation is analogous to the man who intends murdering his wife and carefully plans his alibi in advance so that it is in place for if and when he becomes a suspect.

43.

Early on in this trial, on 26 February, defence counsel conceded that this document does not reflect the true agreement. Record, p 398/23 – p 399/7.

The reason is obvious. The incontrovertible facts before this Court do not square with the terms of the agreement. This inevitable concession alone places a huge question mark over Acres' credibility. Why should the Court now believe Acres for instance about "political intelligence" when, if this were true, Acres could have and would have drawn the agreement in these terms? This is something that Hare, who dealt with the agreement, could not satisfactorily explain.

44.

The agreement after all went through various amendments over a period of some 18 months. See vol. 5, pp 1392 – 1456. Yet at no stage were the services provided for in schedule 1 ever amended. Once it is accepted that they were also not required, their retention in the document could only have been intended as window dressing.

The actual payments:

45.

The forensic evidence as embodied in the chart produced by PriceWaterhouseCoopers, exhibit "K"4, by itself compellingly suggests that Acres intended for Bam to pay Sole. The evidence of Roux relating to this chart, namely that Acres money was used to pay Sole, was not challenged in cross-examination. In fact it was accepted. Record p 670/14 – 21. This document almost speaks for itself. Cf S v Mudoti 1986 (4) SA 278 (ZSC).

46.

The 60 / 40 split alone points to an obligation by Bam (to Acres) to pay Sole and is hardly consistent with repeated bouts of generosity. No other plausible reason as to why Bam would be sharing the money with Sole suggests itself from the evidence before the Court. Acres claims that Bam was their agent and as such they must have known him well. In fact this is common cause. Their relationship goes back to 1982 and the airport contract. Had there then been such other reason the Court would no doubt have heard about it.

47.

It appears from the evidence (i.e. that of Hare, p 1717/11 – 24 and Brown p 1905/8 - 16) that Sole was present during the present trial, spoke to Acres people and their lawyers and in fact consulted in Durban. Yet neither Hare nor Brown tells the Court what it is that Sole told them about why he got the money from Bam. Had what Sole told them been exculpatory this Honourable

Court would have been the first to know. Brown's evidence that to broach the question with Sole would have been indiscreet approaches the comical.

48.

Besides the 60/40 split, the very amounts (which the defence conceded were "huge" (p35/18)) suggest that there was a specific and compelling reason why Bam made these payments to Sole.

49.

The fact that they were made secretly in Switzerland also strongly points to a corrupt motive. Nobody knew about these payments. Mrs Mohapi, for instance, didn't even know that Sole had Swiss bank accounts (p 477/ 10 - 15).

50.

Here the Court can have regard to the fact that over the period relevant to the charges there were other contractors/consultants i.e. Dumez, Lahmeyer, Lahmeyer MacDonald Consortium and ABB, also paying large sums to Bam who in turn transferred parts thereof to Sole. The evidence then clearly points to pattern of corruption. R v Katz 1946 AD 71; R v Viljoen 1947 (2) SA 56 (A); R v Gokool 1965 (3) SA 461 (N). See generally LH Hoffmann and D Zeffertt's The South African Law of Evidence, Fourth Edition, pp 52 – 82.

51.

One also has the curious fact that when only the 40% was paid in 1997 Bam did not share this with Sole. By this time Sole had been dismissed by the

LHDA and Mr Marumo had taken over. This change in the payment pattern also coincided with the Honourable Chief Justice's judgement of 7 February 1997 which marked the end of the road for Sole's court challenge to his dismissal. Sole's influence would no longer have been present and there was no risk of him returning to the LHDA. Presumably then there was no longer any need to keep Sole on Acres' side. Also, any "claim" Sole may have had to further payments was hardly enforceable in a court of law. Bam on the other hand could always "be put to good use" again in the future if needed. Here too it must surely also be more than a mere coincidence that Acres payments to Bam ceased after he died in March 1999.

Accused's silence and false testimony:

52.

Once it is shown that Bam was Acres' agent and that he was using Acres' money to pay Sole, then the Court has before it a prima facie case against Acres calling for an explanation.

53.

It has often been said that an Accused's silence cannot be treated as an independent item of evidence capable of curing deficiencies in the prosecution's case. However, where the prosecution has presented a strong case based on circumstantial evidence which the Accused, if innocent, could reasonably be expected to answer or explain, his failure to do so will serve to strengthen any unfavourable inferences which can properly be drawn. There are many authorities in the law reports dealing with this proposition.

54.

One of the earliest is R v Dube 1915 AD 557 where Innes CJ said the following at 563:

"The onus rested upon the Crown to establish her guilt. At the same time the fact that she did not endeavour to explain the circumstances of suspicion which the prosecution had set up was an element which the trial Court was entitled to take into consideration."

55.

The weight to be given to a failure to give evidence was discussed in R v Ismail 1952 (1) SA 204 (A). See especially pp 206 F – H and 209 G – 210 C.

56.

Remote possibilities more often than not remain no more than that, that is until such time as the Accused makes them reasonable ones by introducing them as evidence. See R v Joseph 1964 (4) SA 54 (SR). See especially the quoted judgement at p 57 D – F.

57.

In the present situation the case for the Crown is much stronger in that the Accused has given an explanation, in the form of the representative agreement, which has been shown to be false.

58.

Where an Accused gives false evidence, the Court may infer that there is something he wishes to hide, adding then an element of suspicion to facts which may otherwise have been neutral. See S v Rama 1966 (2) SA 395 (A) at 400 H – 401 B.

59.

As long ago as 1945 the South African Appellate Division held, in R v Bardhu 1945 AD 813, that where an Accused has given a false explanation, such may

be taken into account in arriving at a finding of guilt. In this context Davis AJA held at p 823:

“The Court should not, as it seems to me, find on his behalf some explanation which, if given, might perhaps have been true, but which he himself has not given.”

60.

In Mawaz Khan v Reginam [1967] 1 All E.R. at 81 H – 83 B the Privy Council specifically held that a false explanation constitutes some evidence of guilt.

61.

The effect of a false explanation and the value to be attached thereto in South Africa is authoritatively set out in S v Mtsweni 1985 (1) SA 576 (A). The head note reads:

“The weight to be attached thereto must relate to the circumstances of each case. In considering false testimony by an Accused, the following matters should, inter alia, be taken into account: (a) the nature, extent and materiality of lies and whether they necessarily point to a realisation of guilt; (b) the accused’s age, level of development and cultural and social background and standing in so far as they might provide an explanation for his lies; (c) possible reasons why people might turn to lying, eg, because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency which might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an instance or crime,

however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth”.

62.

When the other circumstances surrounding these payments are added the inference of corruption becomes conclusive.

The evidence:

63.

Most of the evidence before the Court, both documentary and viva voce, is largely common cause and generally sketches the background against which the payments were made.

64.

The main issue canvassed in evidence was the representative agreement between Acres and Bam on which Acres basis its defence namely that it did not intend for Bam to pay Sole and did not know about them. The genuineness or otherwise of this agreement is discussed more fully below under the following headings.

64.1 Background to the payments.

64.2 The alleged agreement of 23 November 1990.

64.3 Timing of the agreement.

64.4 Acres' need for a representative.

64.5 What Bam actually did for Acres.

64.6 Payment amounts.

64.7 Manner of payment.

64.8 Payments after Sole left the LHDA.

65.

The other issue, which was canvassed in evidence, is whether or not Sole actually promoted Acres' cause. Here the Court has the evidence of Hiddema and Molapo on the one hand and Hare and Brown on the other. This evidence must be evaluated in the context of the objective documentary evidence and more particularly exhibit "Z".

Background to the payments:

66.

The three role players, Acres, Bam and Sole, came together in the context of the water project. Sole was the Chief Executive of the LHDA (record p 35/18 – 23) and at all relevant times he was a public official (record pp 89/3 – 90/1).

67.

Acres was a company registered in Canada and was an external company in Lesotho (record p 88/14 – 15 and pp 872/17 – 873/11). Acres' involvement in Lesotho preceded the water project when they became involved with the airport contract in about 1982. Here Acres worked alongside Bam as part of Delcanda.

68.

They then bid for TAC 1, contract 19, and were successful. This happened in 1986. Contract 19 was awarded after a competitive bidding process. Vol.1, p 31, pp 34 – 41.

69.

Under TAC 1 Acres was closely involved with the running of the LHDA. In fact, they were involved in setting up the LHDA and the engineering component of the LHDA was primarily staffed by Acres engineers.

70.

Acres' involvement with the LHDA went right to the top. First Jonker was the assistant to the chief executive (Vol. 1, p55). Thereafter this position was held by Witherell, from 1 October 1989 (Vol.1, pp 387, 392).

71.

Witherell's appointment was under a separate contract, contract 64. He dealt with his own contract on behalf of the LHDA. See Vol.1, pp 305, 384 and 387. Under this contract Witherell had wide powers within the LHDA. Vol.1, pp 389 – 400. Documentation before the Court shows Witherell for instance dealing with contractors on behalf of the LHDA. Vol.1, pp 404 – 407. Witherell even had authority in Sole's absence to authorise payments to contractors. See Mrs Mohapi's evidence, record p 471/1 - 12. He even authorised payments to Acres. Vol.9, pp 189, 193, 296, 271, as well as others. That was after he himself had in some instances signed Acres' invoice on Acres' behalf (record pp 471/23 – 472/1).

72.

The close involvement of Witherell in the LHDA management appears variously from the evidence and is for instance illustrated by the minutes of various management meetings attended by him, i.e. on 6 January 1988, 9 March 1988 and 4 May 1988 (Vol.1, pp 64 – 93, pp 100 – 112). As assistant to the CE both Jonker and Witherell must have had a close working relationship with Sole. In fact Brown admitted this saying that Sole and Witherell even socialized.

73.

The documents before the Court also show Acres personnel working with contractors on behalf of the LHDA, i.e. Brown (Vol.1, pp 171 – 179). The documentation even shows Acres personnel, on behalf of the LHDA, dealing with their own contract, contract 19. Vol.2, p 423.

74.

At the beginning of 1989 it was decided to continue with Acres under TAC 2, which also became known as contract 65. Vol.1, p 146.

75.

The first draft RFP was issued in March 1989. Vol.1, p 121 – 133. Correspondence followed. Vol.1, pp 184 – 185. The RFP was given to Acres in January 1990. Vol.1, pp 186 – 299. In April 1990 Acres' proposal was evaluated. Vol.1, p 310 – 374.

76.

Witherell himself dealt with TAC 2, i.e. as at 23 May 1990. Vol.1, p 303. At that time he had specifically been appointed as Acres' agent in Lesotho. This was on 18 May 1990. Vol.1, p 380. He was at the time also a signatory on behalf of the LHDA. See for instances Vol.1, p 536. In fact, by May 1990 Witherell had been in Lesotho for a considerable period of time. As early as 14 October 1987 he, along with Jonker and Hare, were signatories to Acres' bank account with Barclays Lesotho, account number 811 000 485. See exhibit "U".

77.

On 19 May 1990 the Memorandum of Understanding (MOU) was signed.

78.

This meant that contract 65 was basically in place and Acres mobilized, that is it placed its people in the LHDA under the proposed new contract, as from 1 August 1990. See Sole's letter attached to payment certificate no. 1, Vol.9, pp 139 – 140. This was after Sole issued a letter of intent on 28 July 1990. Vol. 8, p 135. In fact these Acres personnel occupied line positions within the LHDA. See contract 65, appendix B.

79.

All this was done without LHDA board, JPTC or World Bank approval. So much then for the alleged strict approval processes and the proposition (record pp 408/10 – 409/5) that Sole could really not do anything to assist Acres. See record, pp 212/25 – 213/5; 213/22 – 26; 214/26 – 216/8; 228/8 – 12; 230/1 – 2; p 231/15 – 16 (approval must be in writing); p238/23 – 239/12 (the line of authority, manager/DCE/CE/JPTC/funding agency/Board/Minister); 239/12 – 242/1 – 2 (everything was "open, transparent and negotiated").

80.

According to Acres' High Court summons against the LHDA the agreement in respect of contract 65 was reached orally on 28 March 1990 and put into effect on 1 August 1990. Vol.2, p 796.

81.

As from August 1990 Acres claimed payments from the LHDA. Vol.9, pp 134, 139 – 140.

82.

Many of the payment certificates were in fact signed by Witherell, not only on behalf of Acres but also on behalf of the LHDA. Vol. 9, pp 271, 280,296 and 311.

83.

All this then belies Acres' need for Bam's assistance in facilitating payments. Mrs Mohapi also testified that Bam never assisted in this regard (record p 476/5 – 11). In fact she had no idea that Bam was Acres' agent (record p 477/14 – 15).

84.

Although contract 65 was sole sourced, Sole warned Acres on 1 February 1990 that the LHDA would look to other bidders and exclude Acres if negotiations were not successful. Vol.1, p 303 read with p 189. This being the case, Acres would have had every reason to want to keep Sole well disposed towards them.

85.

On 16 August 1990 the World Bank indicated – by then Acres was already working on the new contract - that it had no objection to the LHDA entering into the new contract with Acres. Vol. 1, p 401.

86.

TAC 2 was signed some six months later on 21 February 1991. Vol.2, pp 430 – 523. This was done without the necessary World Bank approval which was only given on 13 March 1991. Vol. 8, p 192. Nor had the JPTC approved. In fact none of the major milestones leading up to the conclusion of contract 65 were reached with the required prior (p 224/1 – 25; 228/7 – 15) JPTC approval in writing (p 231/15 – 16). This is the evidence of Molapo which is dealt with more fully below.

The alleged agreement of 23 November 1990:

87.

On the face of it this is an agreement (“purports to be” an agreement) between Acres and an entity called ACPM. Acres’ submission to the World Bank that the real contracting party was Bam is not evidence of that fact before this Court. Neither did the Crown concede this. Assuming, for the moment, without conceding, that Bam was the real agent the following submission are then made.

88.

On all the documentation before the Court there is no reference to an entity called ACPM. No one had ever heard of it. It was not registered in any form in Lesotho (pp 873/26 – 874/6). Bam also never operated a bank account in its name, not even in Switzerland. Bam on the other hand was well known in Lesotho as Lescon. Acres certainly knew this. He also operated an account in Lesotho in Lescon’s name. See exhibit “V”. Why Bam all of a sudden should want to conclude this agreement with Acres in the name of ACPM must have raised serious questions for Acres. What is clear is a conscious decision must have been taken. Initially it was contemplated that the agreement be concluded with Lescon (vol. 6, pp 1393 – 1395), whereafter this was changed to ACPM.

89.

In terms of this agreement ACPM was to assist Acres in getting contract 65 and also perform certain services during the life of the contract. For this he

would receive 3.6% of the net value of the contract to Acres. Bearing in mind Acres' mark up of 14.7% this meant that he would get approximately 25% of Acres' profit.

90.

Before the World Bank Acres claims that the LHDA was not made to pay for Bam's services. Vol. 3, p 281. This conflicts with the evidence of Claassens that at the end of the day costs such as these are indirectly debited to the employer, in this case the LHDA. Record, pp 489/5 – 13, p 495/12 – 10, pp 497/1 – 498/15.

91.

Acres, if it is to be taken at its word, presumably wanted a signed contract which it could enforce against its "agent". The monthly payments would also be a constant reminder to those being paid of their obligation to the payer, Acres.

92.

The contract does not describe ACPM, what it is, who or what controls it or even who acts on its behalf. In the event of a breach then, whom was Acres going to sue? Not Bam, because it had no contract with him. Even the Swiss bank accounts were in the name of Bam. If Acres could have no recourse against its "agent", what was the point then of this written document, other than "insurance" or to be produced as an "alibi" if and when needed? Like now.

93.

ACPM had no address except the address of a banker in Switzerland. See p 1456. This too must have raised questions for Acres. They after all were the authors of the previous drafts of the representative agreement. It is inconceivable that an honest and diligent businessman would have accepted ACPM's address, namely a bank in Geneva, for a genuine representative agreement. Even Acres' own documentation relating to payments shows the recipient to be ACPM rather than Bam. See Vol.6, pp 1468 – 1524 where reference is made to ACPM invoices. This despite the fact that Acres must have realised that the accounts it was paying into were those of Mr Bam and Mrs Bam. Interesting enough no ACPM invoices are produced or for that matter any correspondence with ACPM.

94.

Bam's communications to Acres in the context of the representative agreement were sometimes cryptic, even nonsensical in the circumstances. See for example vol. 15, para 6, p 31 where Bam talks about "submissions" instead of payments and "the address for submissions" instead of referring to his bank account. All this must have been cause for considerable doubt for Mr Hare, the person to whom the letter was addressed and the principal driver of the representative agreement.

95.

Also, although these payment documents make reference to invoices against which payment was effected, no such invoicing is produced. The inference is obvious. Either Bam never submitted invoices, or, if he did, Acres is not

prepared to disclose them. In the latter event this must be because their content is damning to Acres. In either event the absence of invoices points to a guilty mind. Assuming the invoices do not exist, the reference to them in Acres' documentation could only have been for the benefit of its auditors or other anxious entities like the World Bank. Any auditor considering these documents would assume that invoices existed and that the payment vouchers were prepared pursuant to them.

96.

Acres claims that its relationship with its "agent" was in its books of account for all to see. The fact of the matter is that on the documentation placed before the World Bank and also this Court an audit would not have revealed the fact that Bam was, as Acres now claims, the actual agent. All that would be revealed is that an entity called ACPM, whose address is a bank in Switzerland, was Acres' agent. And should a diligent auditor call for further documentation, such as invoices, it would have been the easiest thing in the world for him/her to be told "sorry, we just can't find them for the moment..."

97.

In fact, had Bam's Swiss bank records not been discovered, and obviously the intention was that they would not be discovered, then the fact that the actual "agent" was Bam and not ACPM would never have come to light.

98.

By comparison, the other representative agreements put up by Acres in order to demonstrate the genuineness of this one (a conclusion which does not

automatically follow – who knows what these agents in fact did for Acres), invariably show a physical address and they clearly identify the actual agent. Here it will be noted that Bam's alleged first representative agreement under contract 19 is conveniently lost, conveniently that is because other documents from that time assisting Acres' case are remarkably still in existence, even older representative agreements. Although Acres makes mention of an earlier payment to Bam, there is no evidence of such payment having been made in the context of contract 19 under a representative agreement. In the circumstances it is questionable whether there ever was such a representative agreement.

99.

Viewed from whatever angle, this "agreement" of 23 November 1990 simply raises more and more questions about its genuineness and true purpose. This is dealt with more fully under the following headings.

Timing of the agreement:

100.

If the true reason was for Bam to help Acres win contract 65 one would have expected this representative agreement to have been entered into at a time when contract 65 was still in the air. By 23 November 1990 TAC 2 was basically in place. Acres began to mobilise on 1 August 1990, i.e. some 4 months before the representative agreement was concluded. What still had to happen, from Acres' point of view, was for Sole to sign on behalf of the LHDA and for Acres to start receiving payment. The conclusion of the representative agreement on 23 November 1990, certainly for purposes of winning contract 65, was both irrelevant and illogical.

101.

If anything, it was concluded to expedite payment under contract 65 and this is precisely the effect it had. As at that time Acres had been engaged in the proposed TAC 2 since 1 August 1990 and was putting in payment claims shortly after then. See Vol.9, p 134 and 139 – 140. Within 6 days of signing the representative agreement, on 29 November 1990, Acres received its Maloti component of the advance payment – see exhibit "U" p 32, and then soon thereafter it received the Canadian dollars component of the advance, CAD 1 060 000.00, on 4 January 1991. See vol. 9, p 195. All this was expedited by Witherell who signed the necessary payment authorisation. There can be little doubt that this occurred with Sole's approval. Yet none of this had been authorised by the JPTC. Shortly thereafter Acres paid Bam CAD 180 000.00.

102.

All this preceded the signing of contract 65 on 21 February 1991. Furthermore, Acres' payment to Bam of CAD 180 000.00, was not in terms of the representative agreement. Under the agreement the CAD 180 000.00 was supposed to be paid in four instalments of CAD 45 000.00 each over a period of time.

103.

Shortly before the representative agreement was concluded Sole visited Canada. This appears from his passport, Vol. 9, p 360. This also appears from Acres' own documentation, Vol. 6, p 1429 – 1438. Bam on the other hand was in Botswana – Vol.9, p 113. Alternatively both of them were in Canada.

Acres' need for a representative:

104.

It is clear from Acres' involvement in Lesotho as early as 1982 that it was perfectly familiar with the situation in Lesotho. Vol.1, p 131. So also Acres' involvement under TAC 1 from 1987 to 1990. Vol.1, pp 34 – 41. By 1990 Acres had been involved in Lesotho for some eight years. They obviously knew their way around. Tac 1 merged into Tac 2. See Hiddema's evidence, pp 1052/8 – 1054/23. Many Acres staff just carried on working. See Sole's letter, vol. 9, p 139. The services of a representative would clearly not have been necessary.

105.

In any event, Acres' supposed agent under contract 19 was in Botswana. He was already there during the contract period of contract 19, namely from 30 November 1988. Why then use a representative under contract 65 who broke his representative contract with you under contract 19 by going to work in Botswana?

106.

Acres' contention that the use of a representative is accepted international practice may be true for a company going into a foreign country for the first time. But it does not fit well in the context of the facts in the present case. Contract 19 essentially merged into contract 65. Acres clearly did not need a representative to do the usual agent/representative work.

107.

On the one hand one had Bam sitting in Botswana. On the other one had Acres' intimate involvement with the LHDA under contract 19. Jonker was the assistant to the CE under contract 19 (Vol.7, p 2056) and as such had wide powers (Vol.6, p 2065). Witherell took over as assistant to the CE on 1 June 1989 (Vol. 6, p 1675) and went on to become deputy chief executive on 1 August 1991 (Vol. 6, p1774).

108.

Acres then did not have the use of Bam. According to his employment record, vol. 9, pp 112 - 113, Bam never took leave for more than the odd long weekend. The negotiations with Bam in respect of the representative agreement in fact took place while he was in Botswana. Vol. 15, part 6, pp 1 - 39. Acres obviously needed him for something else, moreover something which did not need his physical presence in Lesotho, such as a telephone call to Sole.

109.

As pointed out, as at 23 November 1990 the terms of contract 65 had basically been negotiated. This continued to place Acres within the heart of the LHDA. See the Request for Proposals, Vol. 1, pp 189 and 303 and especially p 276 and Vol. 2, p 496. The MOU came about on 19 May 1990 (Vol. 7, pp 2106 onwards), essentially putting contract 65 in place. In any lawful sense then no assistance was needed to get contract 65.

110.

Apart from getting the contract, Bam was supposed to render certain services. The fact of the matter is that these services, to the extent that Acres needed them at all, were largely covered in contract 65.

110.1 Legal requirements were catered for – Vol. 2, p 451 and p 461.

110.2 So was taxation – Vol. 2, p 507. In fact Acres were reimbursed their taxes and had no need for tax assistance. See Mrs Mohapi's evidence, record pp 474/5 – 475/8, p 483/1 – 9. To the extent that Acres needed help with tax matters they called on their own tax consultant, Mr John Arnedt. See Claassens' evidence, record pp 502/5 – 503/5. Even Sole himself helped. See Vol. 15, (4) p 27 where Sole sorted out tax matters with the Commissioner of Revenue.

110.3 Also provided were support facilities in respect of office accommodation – Vol. 2, p 496, secretarial services – Vol. 2, p 496, accounting – p 447, banking – p 455 and telecommunications – p 496. All these Acres in any event already had under contract 19.

110.4 Mr Lightfoot dealt with processing Acres' payments. Mrs Mohapi, record pp 473/25 – 474/5; Claassen, record pp 501/13 – 502/3. They certainly wouldn't have needed Bam to help here. Witherell as assistant to the CE would also have been far more effective if the need arose.

110.5 Both Jonker and Witherell as DCE's or acting CE's would easily have been able to attend to office accommodation and secretarial services,

to the extent that this was not already provided. In any event, schedule B to contract 65 obliged the LHDA to provide all this.

110.6 Lightfoot and his assistant, Lineo Serobayane, not Bam, attended to bank business and records for Acres. Record pp 1949/ 6 – 1955/11.

110.7 Peat Marwick, not Bam, attended to matters relating to the Registrar of Companies. See exhibit "P".

111.

This leaves keeping Acres informed of developments in respect of its services, keeping Acres informed of general conditions and developments in Lesotho, making Acres known to appropriate agencies, collecting documents and promoting Acres in Lesotho. All this could clearly be done far better by Acres' own personnel inside the LHDA, rather than by an outsider, more particularly an engineer employed by the Botswana Housing Corporation in Gabarone. This is assuming of course that Acres needed these services at all. On the evidence, particularly regarding Acres' prior involvement in Lesotho and their position within the LHDA, they did not need any of these services.

112.

In any event, why would Acres want to use Bam to do this for them under contract 65 when, under contract 19, he disappeared off to Botswana and left them high and dry? (This is of course on the assumption that Acres did indeed have a similar contract with Bam under contract 19 as they claim.) It is inconsistent with logical business practice. Having let them down once, as

a matter of probability, Acres would not use Bam again for this sort of assistance.

113.

The question then reverts back to what Acres really needed Bam for. The answer is quite obvious when viewed against the situation Acres found itself in on 23 November 1990. Two things had to happen, namely Acres were looking to be paid for the work they'd already done and also the advance payment and Sole had to sign.

114.

If this then really is what Bam had to achieve, namely facilitate payments and getting the contract signed, two questions arise: How was he to achieve this? And, why could not Acres do it themselves?

115.

Clearly Bam would achieve these things by assisting Acres to bribe Sole. For this he was paid 40% of the bribe. Using Bam made sense for Acres because by paying through Bam, this dropped a veil between Acres and Sole which, but for the discovery of the bank records in Switzerland, would never have been pierced.

116.

After the representative agreement was signed both came to pass. Acres was paid and the contract was signed. In fact, Acres were paid contrary to the

agreement which provided for the first (advance) payment only upon signature. See vol. 2, p 504, Clause 6 of contract 65. Acres' own man, Mr Witherell, authorised the advance payments on behalf of the chief executive on 28 November 1990, some five days after the representative agreement on 23 November 1990. Vol. 9, p 134. Witherell must have known that this was in breach of the agreement. It is also inconceivable that he would have done this, that is paying his own firm, without the blessing of Sole. He would also have been very much alive to the need to obtain JPTC approval and the fact that it had not been obtained.

What Bam actually did for Acres:

117.

Throughout all the events surrounding contract 65 Bam is conspicuous by his absence. Although known as a local engineer through Lescon and being involved in contracts such as contract 78 (Vol.2, p 600), he was not known to the LHDA or anyone else as being Acres' representative or to act as such. Had he been Acres' agent and more especially had he played the part, senior LHDA officers such as Putsoane and Mrs Mohapi as well as JPTC people such as Claassen, Hiddema and Molapo would have known about it. The fact that key people such as these did not know about it clearly suggests that no one else did. He also took no part in the negotiations relating to contract 65 (record p 500/23 – 502/12). He was in any event in Botswana.

118.

Acres clearly did not need his assistance, in the lawful sense, "in obtaining a contract for.....Technical Assistance Contract Engineering 2" (vol. 6, p 1444).

119.

Here one again has the distinct absence of invoicing showing the work done by Bam. This is perhaps understandable because he was in Botswana at the time. How Acres thought that someone working in Botswana could help them get contract 65 signed is not clear. Here it will be seen that Acres' efforts to secure Bam as their agent goes back to 1989, see vol. 15, part 6, pp 1 - 21, when he was already in Botswana. Unless all he had to do was to confirm to

Sole that the representative agreement had been concluded, and later that the payments had gone through. This he could do by telephone.

120.

Presumably for these reasons one now finds a different tack by Acres at the debarment proceedings before the World Bank. Vol 3, p 276 onwards. Also in this Court. Now Bam is said to have been the eyes and ears of Acres in respect of the political situation and developments in Lesotho, vol.3, pp 293 – 294, and it is for this that he was being paid. This Acres says is also what Bam did for it under TAC 1. Vol. 3, p 455.

121.

On this basis Acres can then seek to explain why no one had heard of Bam being Acres' agent and why he did none of the things stipulated in the contract. The absence of documentation showing the work done by Bam can then also be explained, as Acres did to the World Bank (vol. 3, p 294), as follows: "This intelligence function, clearly a sensitive task, was carried out largely without documentation." Yet one curiously finds in the Acres documentation underlying money transfers to Bam in Geneva numerous references to invoices against which these payments were being made. Vol. 6, pp 1467 - 1524. Yet these invoices are not produced.

122.

But this new slant on Bam's "duties" makes matters even more problematical for the defence.

123.

Firstly, Bam could never effectively have had his ears to the political ground in Lesotho while he was in Botswana. He was in Botswana from 1 December 1988 until some time in February 1991. See vol. 9, pp 1- 133. Neither is there anything to suggest that he was associated with politically influential people. Sole certainly was, for instance with his own Minister.

124.

Secondly, precisely because Acres personnel held key positions inside the LHDA it is nonsensical to suggest that they would need someone from outside to tell them how they were perceived by the LHDA or for that matter about political developments in general. All this would have been obvious to Acres after many years within the LHDA. That Acres didn't need Bam for political intelligence is also illustrated by the dissatisfaction felt by the Basotho engineers within the LHDA. Things got so bad that they called a meeting with Sole. See exhibit "D" 2. At this meeting grievances relevant to Acres were articulated. Yet there is nothing to suggest that Bam reported to Acres on this issue, or even warn them that there was discontent towards Acres.

125.

From the evidence it also appears that Acres people such as Witherell, Lightfoot and Brown quite adequately filled the role as local agents in this sense for Acres. See Vol.6, p 1708 (Witherell) and pp 1722 and 1776 (Brown). Acres people were also performing the "intelligence" function. The documents before the Court contain numerous examples of this. These relate

to the security situation in Lesotho, the perception of Acres' performance, and so on. See vol. 7, p 1894, p 1935 onwards, p 1985, p 2151 and p 2154. As opposed to Bam, Acres' own people invariably reported in writing.

126.

Finally, and crucially, if this was the real purpose of employing Bam, why was this not stipulated in the contract? This was not simply a pro forma document. It went through a number of revisions. The parties were not uneducated or illiterate persons. In fact the very opposite is true.

127.

The fact that Bam's real duties are not stated in the contract gives the lie to the whole document. When parties sign a written contract which turns out not to reflect their true intention, any inference as to the real intention must perforce be an adverse one.

128.

The inevitable conclusion then is that Acres' present assertions about Bam and his "intelligence" function is just a recent fabrication. It was thought up as an answer to the serious fact that Acres never needed a representative in Lesotho, nor did Bam act as one.

Payment amounts:

129.

In 1990 one Maloti equalled 0.4715 Canadian Dollars. Vol.6, p 1466. In terms of the agreement Bam was supposed to be paid four lots of CAD 45 000.00 over a period of time. This totalled CAD 180 000.00. This equated to M 381 760.33. In 1990 this amount was, by any standards, a fantastic sum. It was far more than the Acres' Maloti advance. Thereafter he was supposed to be paid 69 consecutive monthly payments of CAD 7 826.00 which equals M 16 598.00 per month. This too was a fantastic monthly "salary".

130.

Comparisons with other earnings show the following. Under contract 78 and in 1993 Bam earned M 9 545.00 per month on the basis that he worked the whole month. Vol. 2, pp 600 and 646. At the time he was earning P 2 612.00 in Botswana. Vol. 9, p 41. At the time the Botswana Pula was the equalivant of the Rand or Maloti.

131.

Witherell was the assistant to the CE and he later on became the deputy CE of the LHDA. In 1990 Acres was negotiating a salary for him of CAD 7 250.00. Vol. 8, p 83. As the assistant to the CE he was paid CAD 8 338.00. Vol.2, pp 424, 518 and 531. At that time a senior engineer for Acres was earning CAD 7 579.00. This of course was in respect of full time employment as such in the LHDA. Acres was then prepared to pay Bam, out of its profits,

comparable monthly amounts for information, information moreover which Acres could largely obtain for itself.

132.

This in itself points to an improper purpose underlying the representative agreement. There is no way that Acres would have paid Bam these huge monthly amounts, over and above the CAD 180 000.00, for "intelligence". In fact, even if Bam was in Lesotho working honestly on a full time basis in respect of the representative agreement, it is unlikely that Acres would have paid Bam so much. Also, payments would surely not have been on the basis of a loose retainer but rather in respect of work actually shown to have been done.

133.

These figures must also be compared with LHDA salary scales at the time. Hiddema testified that these would have been known to Acres. Record pp 855/19 – 859/9. Acres was prepared to pay Bam more than even Sole, the CE, was earning. As CE Sole was earning M8 365.18 per month (vol. 8, p336). Bam's CAD 7 800.00 per month equated to M 16 378.91 per month (vol.2, p 512).

134.

Remarkably this fixed amount of some CAD 7 800.00, of which 60% was regularly transferred to Sole, was suddenly reduced to approximately the 40% actually retained by Bam, namely CAD 3 500.00. This happened after January 1997, vol. 6, p 1511 onwards, when the Court challenge came to an

end. This is further evidence that Acres knew of the 60/40 split. Presumably because of Sole's waning influence, it was decided to only pay Bam his share. It is also interesting that Acres could simply ignore or unilaterally vary its own "contractual" obligations under the representative agreement. The evidence relating to and inference to be drawn from exhibit "L" are dealt with separately below.

Manner of payment:

135.

The payments to Bam show Acres' relationship with him to have been cloaked in secrecy.

136.

Acres had local Lesotho accounts. These were used to meet local expenses which would have included local contractors. Bam also operated a local account through Lescon which shows numerous payments by consultants such as Lahmeyer. Even Canadian embassy cheques were deposited into this account – e.g. exhibit "G" p 457. In fact, all Acres' dealings with Bam in the past had been with him through Lescon.

137.

Suddenly Acres now pays Bam from Canada for work he does for Acres, not through Lescon locally but through ACPM in Switzerland. If Acres was genuinely paying Bam for true and honest services it is a matter of overwhelming probability that Acres would have contracted with Lescon and that the payments would have been made locally. As already pointed out, the agreement is structured in such a way that without access to the actual bank records in Switzerland no one would have known that the recipient of the Acres payments was indeed Bam. Vol.6, pp 1468 – 1524.

138.

The other representative agreements put up by Acres in order to show that this was something quite normal clearly show the identity of the agent and give his physical address. Vol. 15, (3) pp 1 - 63.

139.

Other consultants such as Lahmeyer, to Acres' knowledge – they helped run the LHDA with Mr Lightfoot processing invoices - were also paying sub-contractors such as Lescon locally. Clearly Acres knew that Lescon had a local account or accounts. So also Bam – they after all paid him into his account in Johannesburg.

140.

Acres holds itself out to be squeaky clean. The evidence shows otherwise.

140.1 There was a clear conflict of interests in Acres' very association with Bam. Acres was after all supervising consultants on behalf of the LHDA. One such consultant was Lahmeyer. Lahmeyer employed Bam as part of ABC and also used Bam as an agent, to Acres' knowledge. Bam simply could not serve both Acres and Lahmeyer without the potential for compromise. Similarly, Acres could not supervise Lahmeyer and Bam and also use Bam as its agent without the potential for compromise. Besides a common law duty in this regard, conflicts of this nature are clearly dealt with in contract 65. Acres was obliged to avoid them. See vol. 2, p 446, para 3.2.4.

140.2 As pointed out, payments overseas also constituted a contravention of both the South African and Lesotho Exchange Control Regulations. As to South Africa this was the evidence of Roux, an admitted South African Advocate holding an LL.M degree in banking law. See p 750/9 –20. As regards Lesotho, see section 11 (1) (c), read with section 25, of the 1989 Regulations, contained in vol. 5, pp 952, 953 and 959.

140.3 Acres acknowledges that care must be taken also with regard to any legalities before employing an agent. See vol. 3, pp 276 and 298.

140.4 On all the facts no one knew about Acres' payments in Switzerland. Certainly the Lesotho Commissioner for Revenue would not have known. It must have occurred to Acres that it was facilitating tax evasion on Bam's part.

Payments after Sole left the LHDA:

141.

It is common cause that payments through Bam to Sole continued after Sole left the LHDA. One can speculate why this happened. Any number of possible reasons present themselves.

142.

The Court heard evidence about residual loyalty towards Sole and the possibility that he could be returning. He also only lost his Court challenge in the beginning of 1997. As pointed out, Acres shortly thereafter (after May 1997 in fact – see exhibit “L”) only paid Bam his 40%.

143.

The fact of the matter is the arrangement was reached before Sole left the LHDA. Whether the continuation of the payments was the result of a perceived contractual obligation, pressure from either Sole or Bam, or whatever, is not particularly important in the light of what actually happened, on the evidence before the Court.

144.

Once the Court finds that the payments before Sole left the LHDA were corrupt ones it follows as a matter of course that so also were the later ones. After all, the lie told by Acres in respect of the representative agreement permeates all the payments.

145.

At the end of the day the one fact that Acres cannot get away from is that Bam used its money to pay Sole and that it is inconceivable that Bam would have done this if not instructed to do so by Acres.

The evidence of Putsoane:

146.

In his evidence Putsoane confirmed his statement, exhibit D, and his evidence largely was an expansion on this statement. Reference is made to the following.

- 146.1 Acres had no need for the services stipulated in schedule 1 to the representative agreement. Record pp 178/2 – 179/3.
- 146.2 Putsoane knew Bam as a local engineer involved with Lescon and ABC. During all his time as infrastructure manager, acting chief executive and thereafter it was never brought to his attention that Bam was Acres' local agent. Bearing in mind the positions he held and his close working relationship with for instance Witherell, the Court can only conclude that had Bam indeed fulfilled such a role Putsoane would have certainly have known about it. Record, p 178/9 - 21. (So too would Mrs Mohapi and for that matter people on the JPTC like Claassens and Hiddema. Record p 859/10 – 26.)
- 146.3 Putsoane also testified to the influential position of the Chief Executive. Record pp 166/16 – 167/7. See also the evidence of Charles Putsoane, p 795/8 – 15. It was through the chief executive that matters in respect of which the JPTC and the World Bank had to concur were channelled and if he wanted to block them he could. Also, these bodies largely acted on recommendations emanating from him. This influence remained even after his dismissal in October 1995. Record

pp 795/16 – 798/3. Clearly, having built up the LHDA, there would have been considerable loyalty.

146.4 Putsoane also testified to Sole clearly favouring Acres. Record pp 173/8 – 177/18.

The evidence of Roux:

147.

In his evidence Roux confirms his report, exhibit "K"1, the annexures thereto, exhibits "K" 2 and 3, as well as the graphic summary showing the flow of funds, exhibit "K"4. Record pp 541/26 – 542/11, read with pp 634/16 – 17 and 659/7 – 8. This evidence, which forms the crux of the Crown case, was not challenged, more especially the flow of funds from Acres through to Sole as depicted by the red lines on exhibit "K"4.

148.

Roux also testified to the following.

148.1 Apart from a few isolated transactions relating to for instance American Express, as well as a few debits to the accounts which he could not identify because of an absence of documentation, the accounts of Mr and Mrs Bam were used exclusively for the transfer of monies from contractors/consultants to Sole. Record pp 584/10 – 22 and 614/12 – 18.

148.2 The last three payments of CAD 10 500.00 each were remarkable in that they represented some 40% of the earlier ones, such being the share being retained by Bam, and also that in respect of these payments Bam did not in turn pay a portion over to Sole. Record pp 632/20 – 634/14.

148.3 Speaking as a South African Advocate, Roux expressed the view that these transactions in Switzerland involving Bam constituted a

contravention of the South African Exchange Control Regulations.
Record p 750/15 – 20.

Other factors:

149.

That the Bam accounts were nothing more than receptacles for bribe monies, already appears from the chart prepared by Roux, exhibit "K4", and his report in general, exhibits "K"1 – 3.

150.

This conclusion is further fortified by the use to which Bam's Swiss accounts were put. These accounts were used for no other purpose than to receive monies from contractors/consultants on the water project, namely ABB, Lahmeyer, Dumez and Acres, and then to channel a portion thereof to Sole. This is the effect of Roux's evidence, record p 614/12 – 18, and this evidence was not challenged.

151.

This evidence incidentally also gives the lie to Acres allegedly doing a thorough due diligence on Bam before and whilst dealing with him.

152.

The Court must also conclude from all the evidence, it is submitted, that Bam's role as Acres' agent was never disclosed to the LHDA. The evidence to this effect of Putsoane, Mrs Mohapi, Matsoha and Charles Putsoane was not challenged. These were all senior and key staff members at the time. If

Bam's role was not made known to them the Court can safely accept that no – one else in authority was told about this role.

153.

Also that the arrangement with him was not intended to see the light of day. There isn't even a document copied to Bam. The fact that Sole knew can hardly, in the circumstances, be imputed to the LHDA. This makes the work that he did or the tasks that he had to perform clandestine ones.

154.

If then the relationship was not generally known, this would put it into the "red flag" category. See in this regard below.

155.

The same can be said of the sums involved. Bam was paid an enormous amount of money for not doing any of things stipulated in the contract and while he was sitting in Botswana.

156.

Acres refers to a policy against bribery. Vol.3, p 263. It also makes reference to the United States Corrupt Practices Act of 1977. Vol. 3, pp 287 – 291. In this context it also acknowledges that unusually high commissions are "red flags" indicating corrupt practices. Vol. 7,p 300. It acknowledges that "secrecy is the hallmark of improper transactions" (Vol. 3, pp 303 – 304). It goes on to state however that care was taken to include a stipulation against

or prohibiting unauthorised payments or commitments i.e. bribes – vol. 3, p 305.

157.

Having also acknowledged the caution that must be displayed with agents such as these, Acres goes on to contend however that Bam's role was an open one and known to everyone. If this contention is rejected, as it must be, then the inevitable conclusion is that Acres when dealing with Bam knew that there could be a problem and for this reason it sought to keep the relationship hidden.

Issues arising from exhibit "L":

158.

During the cross examination of Roux the defence sought to establish, through exhibit "L", that the payments made to Bam conformed with the representative agreement. The defence thereby presumably sought to give some legitimacy to this agreement and particularly also to dispel the obvious conclusion reached by Roux, namely that the reduction in payments from CAD 7 800.00 to CAD 3 500.00 signifies that Bam was now only being paid his 40% share. But this document does not really assist the defence. In fact it does the opposite.

159.

The defence seeks to establish that the reduction was by reason of the percentage payable to Bam exceeding 3.6%. A perusal of exhibit "L" shows that this is not so. This is also the evidence of Roux, record pp 751/2 – 753/1, 755/4 – 18.

160.

The payment of CAD 180 000.00 is not reflected in the agreement. If exhibit "L" is to be relied upon then CAD 45 000.00 X 4 should have been paid as the following:

160.1 CAD 45 000.00 when Acres receives its advance from the LHDA.

160.2 Three payments of CAD 45 000.00 following receipt of each of the first three monthly progress payments received from the LHDA.

161.

The representative agreement provides for 69 equal monthly payments. The representative agreement also provides for payments which may accumulate at ACPM's option and be paid at three monthly intervals. Exhibit "L" does not reflect this either.

162.

At best for Acres the amounts they paid Bam coincide with the payment amounts, not the payment provisions, in the representative agreement. This, Acres contends, shows that the representative agreement is genuine. This does not follow at all.

163.

The fact that the payment amounts coincide is neither here nor there. Obviously if the Crown's contention is correct namely that this document is not genuine and was used to hide the true intention, then the actual payments would have been incorporated into this document. If for no other reason, this would be done for accounting purposes. All this begs the question as to the real purpose of the payments.

What Sole did for Acres:

164.

In order to establish bribery the Crown does not have to prove a quid pro quo. (Cullinan J's judgement, 13 March 2002, at pp 12 and 10.) Where the Crown is aware of the bribee doing things or omitting to do things favouring the briber it should place this before the Court (S v Lavenstein 1919 TPD 348 at p 353). For this reason several witnesses were called.

165.

The evidence of Putsoane establishes that Sole was certainly well disposed towards Acres (p 177/2 – 4). Putsoane gives a number of examples, one of which being the local engineers being unhappy with the slow progress being made by Acres in the advancement of local engineers (p 176/15 – 177/18).

166.

What is to be noted about the evidence of Putsoane is the line of cross examination taken with him. This was to the effect that all the checks and balances were in place and Sole was but a small cog in a large wheel. See record, pp 238/23 – 243/2.

167.

Hiddema was taken to task in cross-examination because his evidence is largely of a secondary nature (p 904/1 – 905/20). Not so the evidence of

Molapo (p 1067/23 – 25), whose evidence, read with the minutes of the JPTC, exhibit "Z", over the relevant period, establishes the following.

168.

Article 9 of the Treaty requires JPTC approval in writing for any decision by the LHDA, more particularly a decision involving the expenditure of funds (p 1134/19 – 22).

168.1 Although at the relevant time, 1990/1991, there were no formal procedures in place dealing with approval (these were only formalised by Protocol 4 in 1992) all major steps in the contract procuring process had to be approved by the JPTC (pp 1154/6 – 1155/5, pp 1072/9 – 1075/25).

168.2 These include the request for proposals (p 1072/9 – 22) (in the case of a consultant), the MOU(p 1075/10 – 22), the letter of intent (if applicable) the actual contract (p 1075/23 – 25). So also any other decision involving the expenditure of funds (pp 1072/9 – 1075/25).

169.

Molapo sketches a history of Sole not complying with JPTC procedures. In the case of Acres such non-compliance included the following.

169.1 The request for proposals was not approved (p 1076/7 – 23). The importance here is that this document describes the scope of the work to be done (pp 1072/13 – 1073/10).

169.2 Also the MOU did not receive JPTC approval (p 1081/3 – 8).

169.3 The letter of intent of 24 July 1991 was sent out without the approval or even the knowledge of the JPTC (pp 1084/6 – 1086/6). This also applies to the subsequent authority to mobilise of 14 August 1991 (pp 1085/24 – 1086/6). Both these steps had financial implications which for that reason also made prior approval of the JPTC imperative (pp 1086/7 – 16, pp 1087/1 – 15).

169.4 This also applies to the authority to pay out the advance (vol. 9, pp 134 – 142, p 1103/3 – 23), where there was no contract in place yet, hence no funding.

169.5 Finally, the actual contract was signed on 21 February 1991 without JPTC approval (p 1107/14 – 24).

170.

All these irregularities can primarily be ascribed to Sole. They were also not mere formalities. By committing the LHDA the way that he did, particularly when allowing Acres to mobilise and being paid the advance (p 1105/14 – 20) before the contract was signed, Sole placed the JPTC in an impossible situation. It had little choice then but to go along with what he had done. It was faced with a fait accompli. And all this was to the obvious benefit of Acres.

171.

This sort of conduct by Sole not only led to Protocol 4 (pp 1114/25 – 1115/10), but it eventually led to the disciplinary proceedings against him (p 1115/16 – 26), which in turn led to his downfall (pp 1109/1 – 1116/7).

The defence evidence:

172.

The defence witnesses sought to explain what was in effect a res ipsa loquitur situation. The context in which the payments were made, the very amounts, their timing, the manner in which payment was effected, all this irresistibly points to the payments being bribes.

173.

Similarly, the representative agreement when viewed against the situation Acres found itself in 1990 within the LHDA, the status of the negotiations relating to contract 65, the help that Bam could and did legitimately give Acres in respect of this contract, as well as all the other factors enumerated above, overwhelming point to this agreement being nothing more than a cover up.

174.

It is in this situation then that Messrs Hare and Brown were called and their mission clearly was to try to explain the inexplicable, justify what obviously cannot be justified, make seem credible what on the face of it cannot be believed, explain that which appears quite incapable of innocent explanation.

The witness Hare:

175.

Mr Hare when giving his evidence in chief spoke well, gave his evidence very confidently and appeared to have a good memory. In fact, he looked quite impressive in the witness box. However, the substance of his evidence is another matter all together.

176.

In short, his evidence amounted to this. Acres is a company with a proud history which would never even consider doing anything improper. The very thought that Acres could be involved in bribery is quite simply preposterous. Acres has a strong anti-corruption policy to which it strictly adheres. It was in line with this policy that Bam was employed as agent and this was also only done after thorough due diligence. Any suggestion then that Acres would even have suspected that Bam did anything improper is similarly preposterous.

177.

Hare was an experienced engineer, a vice president of Acres and the Acres person responsible for overseas business (p 1265/6 and p 1449/14 – 19). Here he was the director of overseas operations for a concern that is primarily export driven (p 1266 and p 1447/15 – 16). He is obviously a highly experienced and very intelligent person, steeped in working with contracts.

178.

Yet he says it was not intentional to omit Bam's name from the representative agreement and to contract only with the firm ACPM. He says it did not occur to him to include Bam's name in the document and that Bam's provision of a Swiss bank account number at a Swiss bank as ACPM's address for purposes of the agreement did not arouse suspicion in him - this even though Bam changed that address three times. He concedes that in hindsight all this is suspicious but insists that it did not occur to him at the time. Yet he was careful enough to protect Acres by asking Bam to put up a bank guarantee. He even provided Bam with a draft and later a finished version of the bank guarantee. This, it is submitted, demonstrates extreme caution on his part. He even insisted that Acres get paid first by the LHDA before Acres would be obliged to pay Bam.

179.

Besides being improbable in the extreme all this simply cannot be true. This is borne out by the fact that after Hare had prepared the various drafts he would refer them to Rynard, the Chairman of Acres (p 1292/14 – 16), for checking. Apparently, if Hare is to be believed, Rynard also never noticed these curiosities. Again this is non sensical. As Chairman of Acres Rynard was obviously an extremely able, intelligent and experienced man. When he checked he even made amendments to typographical errors. Here he changed "an" to "or". Again it is obvious that Rynard too intended the agreements to be with ACPM without reference to Bam's name, this, because of the real purpose behind the representative agreement, namely that it should be a vehicle to commit bribery.

180.

It is submitted that even an average person would have detected the peculiarities in the representative agreement. The obvious conclusion then is that Hare was being deliberately untruthful on this aspect of his evidence.

181.

In the context of the Zimbabwe agent, Mr Milner, Hare testified that, as far as he was concerned, there was nothing suspicious about what took place in the process of engaging Milner. Again he is simply not being truthful here. It is apparent from Rynard's letter to the Canadian embassy that all Rynard was interested in was confirmation that Milner was very close to Mpala, the Chief Executive of the Zambian River Authority. If Rynard did not have improper intentions this would not have been his only focus. Moreover, Rynard's file note dated 27 February 1991, copied to Hare, shows that Rynard bristled with suspicion in relation to Milner's advances. Clearly honesty and integrity were not uppermost in Rynard's mind when he did his "due diligence" on Milner. Instead "ability to produce". Compare this with what Hare said about what normally happens when a due diligence is performed (p 1285/1 – 25).

182.

Next Hare would have the Court believe that the Chairman of Acres, Rynard (p 1292/14 – 16), was "confused" when he wrote to Milner on 29 April 1991 confirming his appointment as Acres representative in Zambia and telling him that Acres would require an invoice "to match the money paid out, for audit purposes". Hare's evidence that Rynard was confused in this regard is simply not true. Clearly Rynard meant exactly what he said. Rynard took the

trouble to place the words "for services rendered" in inverted commas. This in itself suggests that these words were used to convey to Milner that he would be doing something other than "rendering services". It is also obvious that Rynard wanted invoices from Milner for auditing purposes. The reference to invoices in the documentation relating to the payments to Bam points to this. Hare's suggestion that these were "internally generated invoices" is not only indicative of malpractice but also of an intent to deceive or create a false impression.

183.

Hare said in his evidence in chief that Acres used agents as a matter of course, as part of their business plan for overseas operations in recognition of the fact that they were in unfamiliar territory. "We would [no more] think of entering onto foreign soil to operate without the one or the other." - vis an agent or insurance (p 1268/1 – 15). In this context the defence created the impression that those representative agreements to be found in vol. 15 (3) were just a few random examples and that Acres had "literally hundreds" of other agreements to show the Court (p 1286/9 – 22).

184.

Under cross examination a completely different picture emerged. Now Hare says that although Acres might have as many as 20-30 overseas projects on the go at any one time, of which maybe a handful were large ones (p 1452/1 – 18), they "definitely" don't have agents for all of them (p 1452/19 – 22). Now he said that there were all sorts of exceptions to the almost invariable practice of "using agents as a matter of course"(p 1268/4). Examples were where Acres was a sub-consultant, as with Delcanda on the airport contract

(p 1295/10 – 18 and p 1452/23 – 25), where the project is small, where CIDA contracts were involved, and so on. This evidence was given by him after it emerged in cross-examination that Acres had not used “literally hundreds” of agents but that instead there were agreements for only 28 in total spanning a period of some 22 years of which 21 had expired. Here see exhibit “EE”. Obviously Hare was now constrained to change his earlier evidence because clearly the facts did not square with what was said in chief. What emerged in cross-examination is that representative agreements are only used in exceptional circumstances. It is definitely not Acres’ almost invariable practice. As has become apparent in this case, it is more likely that they are only used when a bribe has to be paid.

185.

Also when Jonker first came to Lesotho, before the airport contract (p 1298/1 – 2), to look for work for Acres (p 1297/21 – p 1298/6), he never engaged an agent. Yet the purpose of engaging an agent was help you “acquire work” (p 1269/9 – 12). To have engaged an agent at this stage would have been harmless because the agent only gets paid once the Acres contract has been concluded and Acres is paid – so the reality in this case belies Acres’ stated policy.

186.

He acknowledged that Acres’ corporate records are of a high standard and that a careful record has to be kept of dealings with representatives, especially “if action was needed” - see generally p 1286/2 - 8. Yet when he was asked about the whereabouts of the records, although acknowledging that there would be a record, he was vague about where the records were

kept, ie in which file. Now there was a need to be discreet - agents do not want to be known as blabber mouths. His own files had been destroyed. Acres' policy was to destroy documents after ten years - yet there are some records which have been produced which relate to Bam's two agency agreements as well as others, such as the Milner records. Clearly Hare did not want to commit himself as to the whereabouts of the files and their content, for obvious reasons. The inference is irresistible that a selective cull of Acres records has been done.

187.

If Hare is to be believed about Acres and the way it conducts business it must surely be the finest example of an ethical company that exists. On Hare's evidence the impression is that Acres is without blemish, incapable of any impropriety, almost a utopian organisation. This evidence simply cannot be correct. The proposition simply has to be formulated to be rejected. There is no such company on earth. Hare's contentions in this regard defy human experience. Examples from Hare's evidence which create this impression are the following: p 1272/11 – 26; p 1282/12 - 1284/18; p 1284/26 – 1285/5; p 1287/12 – 1288/15.

188.

The further difficulty that one has with Hare's above proposition is that his evidence does not square with the facts. He said for example that Witherell, as assistant to the Chief Executive, was given firm instructions not to have anything to do with the establishment of Contract 65. Compare here Brown's evidence which tends to contradict him. Yet he was the principal person in Lesotho responsible for Acres business. He also signed various documents

relating to contract 65. Hare also conceded that Witherell received all communications between the LHDA and the World Bank and the LHDA and the JPTC. Hare insisted that Witherell did not and would not have passed information relating to these on to Acres in Canada. Again this is too good to be true. Not only does it defy human experience but also it flies in the face of Witherell's appointment as Acres most senior employee in Lesotho responsible for looking after Acres' business in Lesotho. On Hare's evidence Witherell was merely an automaton when he signed the various documents. Witherell merely "signed off on behalf of Sole". Yet he signed when he authorised the various payment certificates to Acres itself. Here, having regard to his job description under contract 64, he must have known that neither the JPTC nor the World Bank had approved contract 65. He also must have known that funding was not in place to finance contract 65. But he signed notwithstanding. Obviously Acres was desperate to be paid and Witherell did the necessary to facilitate payment. The assertions of both Hare and Brown that bridging finance was in place is also simply untrue. This is apparent from Molapo's evidence and the document in exhibit "Z", at page 219, where the JPTC said to the LHDA that a plan would have to be made to make payments under 65. This was long after Witherell had authorised the payment certificates.

189.

Another example of Acres not acting in a perfectly ethical manner is apparent from the two Royal Bank of Canada bank guarantees where a deliberately misleading impression was created when it was suggested that contract 65 had been "awarded". Not only was this not true but even on Mr Alkema's construction of the words based on the letter of intent it is apparent that the letter of intent had all kinds of conditions that had to be met. These had not

been met when the bank guarantees were obtained, this obviously to Acres' knowledge. This being so, whichever construction is used, contract 65 had not yet been awarded as at the date of the bank guarantees and Acres knew this. This is not consistent with the ethical concern that Hare tried to portray Acres to be.

190.

A further example of Acres not acting in the perfectly ethical manner is apparent from the way Witherell worked with his own contract, contract 64. Here, see for example, Vol. 1, p 387. If Witherell was to behave consistently then not only would he have avoided dealing with contract 65 but he would also have avoided working with contract 64. This latter contract too was in effect a contract between the LHDA and Acres as was contract 65. Yet Witherell variously worked on his contract.

191.

An even more obvious example. Hare admitted that he knew that Bam and Sole were close (pp 1678/19 - 1679/6) and that Sole had been involved with Lescon. This he knew at the time he negotiated the representative agreements (p 1694/12 - 13, read with p 1297/6 - 11). Yet despite this he used Bam. If Acres was so ethical Hare would not have used Bam because of his unduly close relationship with Sole.

192.

Hare is obviously an intelligent, clever and experienced man. A further example of his veracity or lack thereof is apparent from the following. Small

things that he wanted to remember he could remember clearly. These were things that were either beneficial to Acres defence or not harmful thereto. There are many such examples. Yet he could not remember some of the really important things like for example the proposal he put to Bam at his meeting with Bam in November 1986 which proposal Bam subsequently put to "the relevant parties". Now he contends that these things all happened a long time ago and for that reason he could not remember details. A further example related to the identity of Bam's source or contact within the LHDA. On these important matters Hare's forgetfulness is convenient to say the least.

193.

Hare's evidence in chief was that Acres' invariable practice was to use representatives in foreign countries. Yet the first time they engaged an agent in Lesotho was when they engaged Bam in 1986. But by this time they had been in Lesotho for years and had attempted to get the TAMS technical assistance contract with Wemin, as well as the feasibility study awarded to LMC, which was supervised by TAMS. These, like Tac1, were obviously large contracts. Yet they never used an agent. However the moment they were invited to submit a proposal for under Tac1, they engaged Bam. Yet at this stage, on Brown's evidence, an agent wouldn't have been necessary.

194.

Hare testified that he met with Bam in Maseru at Bam's offices on 10 November 1986. He said that this was just a general discussion type meeting. He used the opportunity to meet Bam when he came to Lesotho for a site visit. Yet he put a specific proposal to Bam, which Bam "again

highlighted" to the "relevant parties" (vol. 15 (4) p 16). He conveniently could not say what this proposal was. He tried to explain it with reference to the Acres' proposal for Tac1. Yet this could not have been the case because Acres' Tac1 proposal had not even been submitted yet. This was only going to be submitted on 19 December 1986. See vol. 15 (4) pp 11 - 12. It follows then that Hare's proposal to Bam at this meeting must have been a separate, improper, proposal. If this were not so there would be no need to highlight it to the relevant parties. That the proposal was improper also explains why Hare has conveniently forgotten what the proposal was. Here too it must be remembered that Acres only engaged Bam as its agent after it had been invited to submit a proposal but before the contract award.

195.

The timing of the engagement of Bam as Acres' rep in itself is significant. Having regard to Brown's evidence - and also that of Hare's to the effect that there was nothing that Sole could really do to assist - there would have been, if they are to be believed, no need to engage Bam at all. There was after all, on their evidence, nothing that Bam could do for them. Hare's answers in this regard were vague and unconvincing. The evidence in fact established that there was a lot that Sole could do for Acres. Indeed the evidence also establishes that there was lots that Sole did indeed do for Acres.

196.

Hare was repeatedly asked - also in re-examination - what did Bam do for Acres between April 1989 to February 1991 to lawful assist Acres in relation to contract 65. His answers were always the same, namely Bam performed general intelligence work for them and gave them advice. This answer was

simply vague. Hare could point to no specific things that Bam did for Acres. Hare's vague answers in this regard suggest that Bam really did nothing lawful for them. Instead he was paid to do Acres dirty work for them namely to bribe Sole. If this were not so Acres would have notes of precisely what Bam did and these would have been produced. Furthermore those few notes that Acres have produced are in fact littered with suggestions of irregularity.

197.

Hare testified that when Acres got the instruction to mobilise on 14 August 1990 it believed that all the contractual conditions had been met. This evidence cannot be true because Witherell was the assistant to the Chief Executive at the time. Hare admitted that all World Bank and JPTC communications would pass Witherell's desk. This meant that Witherell would have known that the conditions referred to in the letter of intent had not been met.

198.

Hare, under cross-examination, said a very telling thing. He said after Acres had mobilised Acres was performing contract 65 work but it was not getting paid. He said that Acres was then in effect financing contract 65. This would have been absolutely true since Acres staff was working. Acres was having to pay salaries, mobilisation costs and the like. Yet Acres was not being paid/reimbursed by the LHDA. This was obviously an untenable situation. If allowed to go on too long it had the potential to financially embarrass Acres. Therefore it could not be allowed to go on indefinitely.

199.

Yet Acres had absolutely no leg to stand on. Acres could not invoke any of the protection clauses relating to non or late payment as provided for in contract 65. This was because contract 65 had not even been signed yet. In fact at that stage important contractual considerations, like for instance Acres mark up, had not even been agreed (as at 25 September 1990) - see volume 1, page 402 - 403. It was only after this date that Acres' mark up was reduced from 20% to 14.7%. Acres was accordingly at the LHDA's mercy. More particularly Acres was at Mr Sole's mercy.

200.

All this was put to bed very quickly after the representative agreement was signed. Within days of the representative agreement being signed Acres was paid its Maloti advance of M250 000. Not long thereafter, on 4 January 1991, Acres was paid its Canadian advance. What is clear then is that the conclusion of the representative agreement on 23 November 1990 resolved Acres' difficulty of effectively financing contract 65 on behalf of the LHDA.

201.

In cross-examination and faced with the facts of this case, such as those already discussed, it was only a matter of time before Hare's carefully constructed halo of self-righteousness completely crumbled. And when it did it not only further showed up inconsistencies, contradictions and improbabilities, but it showed Hare's evidence to be quite simply untruthful. A summary of examples is listed below. A mere reading of the passages will

show that they speak for themselves. To the extent necessary, they will be more fully dealt with in oral argument.

201.1 The sudden need for an agent after many years in Lesotho (p 1521/5 – 23), the need for an agent where Acres had been invited to make a proposal (pp 1525/8 – 1526/8), what Bam was specifically going to do for Acres and Bam's contact, PS Mr Makhakhe (pp 1527/11 – 1528/13, pp 1531/10 – 1532/25), the extent of the due diligence and why Acres would be prepared to pay Bam CAD 132 000.00 (pp 1529/7 – 1530/26).

201.2 The particular attraction of Bam and what he was going to do for his money (pp 1533/15 – 1535/18), Bam's contacts inside the LHDA and who they were (pp 1540/2 – 1543/17, p 1544/5 – 9, pp 1546/2 – 1579/25, p 1548/24 – 1549/8).

201.3 Involving the Canadian Embassy (p 1554/6 – 10) and the reason for doing so, i.e. to influence the Minister (pp 1555/18 – 1558/22).

201.4 Actual information Bam obtained from inside sources (pp 1559/16 – 1562/5).

201.5 Whether he discussed Bam with Sole (pp 1562/18 – 1564/5) or Sole with Bam (pp 1564/6 – 1564/6 – 19) and whether Bam mentioned people in high places (pp 1564/20 – 1565/11).

201.6 What precisely it was that Bam did for Acres under contract 19 to earn himself CAD 132 000.00 (pp 1565/14 – 1569/19, p 1571/12 – 15).

201.7 Bam's work in Botswana, what he could do for Acres whilst in Botswana and Hare's attitude (pp 1571/16 – 1575/2).

202.

As to the circumstances in which Bam was engaged in respect of contract 65.

202.1 Whether he had contact with Sole before Acres were invited to submit a proposal on 29 April 1989, bearing in mind that Sole was in Canada in March 1989 (pp 1577/17 – 1580/23).

202.2 Contact with Bam again in April 1989 and what he was supposed to do for Acres in respect of contract 65 (pp 1582/20 – 1586/18), what he in fact did and the loyalty issue (pp 1586/19 – 1588/26).

202.3 Advice from the EDC on the use of agents, control over agents and as this applied to Bam (pp 1589/4 – 1592/6).

203.

The representative agreement (RA) and the various drafts it went through.

203.1 It was not simply a pro forma document (p 1592/14 – 16).

203.2 The "evolution" of Acres' role and also Bam's and why political intelligence was not specifically referred to (pp 1593/17 – 1594/23, p 1595/11 – 22).

203.3 Lescon to ACPM (p 1602/18 – 125), “assisting Acres in” (p 1603/2 – 7), provision of a 25% advance and the bank guarantee in return (pp 1604/21 – 1605/12), the fact that Bam couldn’t get a bank guarantee and the alternative suggested by Acres (p 1606/11 – 23).

203.4 Whether or not Bam was not now dictating terms and who needed whom (p 1605/13 – 22, p 1607/1 – 17, p 1607/13 – 24). Also p 1627/8 – 18.

204.

Other events at the time.

204.1 Mr Sole’s visit to Canada at this time, September 1989 (pp 1607/26 – 1613/18, pp 1614/15 – 19 – 1621/14).

204.2 Payment to Bam on 1 October 1989 in respect of his disbursements in Canada (pp 1621/15 – 1623/2).

204.3 Bam’s fax of 11 October 1989 (pp 1596/7 – 1598/26), why the RA had to be signed before contract 65 was signed and whether or not someone else was a party to this agreement (pp 1599/5 – 1602/2).

204.4 Coupled to this the payment by Acres of Sole’s travel expenses, also in the light of its corporate policy (pp 1623/4 – 1625/23, p 1624/13 – 18).

204.5 Whether or not Sole was well disposed towards Acres at this time (pp 1666/13 – 1667/13).

204.6 Who took over from Mr Makhakhe as Bam's contact and whether or not his identity was disclosed to Acres (pp 1676/20 – 1678/8). Hare not wanting to meet Mr Makhakhe (p 1679/15 – 20).

204.7 Acres' relationship with Bam "not a hidden one", as against not disclosing it to Sole (pp 1678/9 – 1679/6).

204.8 Whether the care relating to intermediaries proposed by government officials applied to Bam (pp 1631/9 – 1633/5).

205.

Circumstances leading up to the RA on 23 November 1990.

205.1 Letter of intent, mobilisation, Sole's hand in this and its effect (pp 1634/1 – 1642/1).

205.2 The terms of the bank guarantee (pp 1642/2 – 2645/15).

205.3 Authorising of the advance payments and the position this put Acres in (pp 1646/13 – 1653/9).

206.

What the RA provided for as opposed to what Bam was needed for.

206.1 Bam's obligations in schedule 1 in respect of services provided for in contract 65 (pp 1653/12 – 1658/24).

206.2 Others, i.e. Witherell and Brown, providing intelligence and other services and not Bam (pp 1658/25 – 1666/6 and 1667/14 – 1669/11).

206.3 Why Bam was not involved in negotiating the MOU (pp 1679/21 – 1680/5).

206.4 Whether the RA was not really a form of insurance for Acres (p 1669/12 – 19).

207.

Acres being above reproach and conflicts of interests.

207.1 Whether or not there was a conflict of interests between Acres and Lahmeyer (pp 1669/20 – 1672/5).

207.2 Double conflict with Lahmeyer being a consultant on the water project (pp 1672/6 – 1673/23).

208.

Sole's influence and powers.

208.1 Kicking out firstly Willet and then Hare (pp 1673/24 – 1676/19).

209.

Payments outside Lesotho, i.e. Switzerland.

209.1 Acres' code of ethics and violations of Lesotho's Exchange Control Regulations and tax laws (pp 1680/6 – 1682/18).

209.2 How many other agents apart from Bam Acres paid in Switzerland (pp 1682/19 – 1683/5).

209.3 The perception that Swiss accounts were untouchable (pp 1683/6 – 1684/17).

210.

The relationship between Bam and Sole.

210.1 That they knew each other well (p 1684/18 – 21).

210.2 An agent selling himself by telling his principal what he can do for the principal (pp 1684/22 – 1685/5).

210.3 Whether in these circumstances Bam would have told Acres that he shared the money with Sole (p 1685/6 – 17).

210.4 Sole's association with Lescon, Acres' knowledge, conflicts of interests (pp 1692/20 – 1699/13).

211.

Contact with Sole after his departure from the LHDA.

211.1 No further dealings with Sole after that (p 1714/20 – 23).

211.2 Sharing lawyers with Sole (pp 1715/10 – 1717/10).

211.3 Consulting with Sole for purposes of this trial (pp 1717/11 – 1718/24).

212.

To deal with each of the topics or sub-topics in Hare's evidence referred to in order to show up unsatisfactory features would unduly clutter these Heads. They are in any event apparent from a reading of the evidence. The point is this. In each one of them there is some or other unsatisfactory feature, ranging from Hare being evasive, displaying a selective memory, contradicting other credible evidence, saying things that are so improbable that they can not be believed to, in many instances, giving evidence which is patently untrue.

213.

His evidence leaves one with the overwhelming impression that Hare did not come to Court to testify to the truth as he knows it. Instead he came to Court to try and extricate Acres from this mess they find themselves in. So much then not only for his credibility but also the bona fidas of Acres itself.

The evidence of the witness Brown:

214.

Hare completed his evidence on 8 May 2002 (p 1756). The matter was postponed for 5 days to Monday 13 May 2002. Despite plenty of time to prepare – he had arrived in Lesotho well beforehand, p 1905/8 – 9 - Brown started his evidence nervously. He initially gave the impression that he was saying carefully rehearsed things. Characteristics of his evidence were long pauses before answers – he obviously thought very carefully before he answered – and then, when he answered, he rambled on and on. The overall impression of this witness was that he was extremely anxious to say all there was that could be said in Acres favour – he admitted “I am certainly always batting for Acres”, p 2026/25 - and here often the truth of what he said was of little importance.

215.

This witness was by no means impressive. He too had a holier-than-thou attitude, yet he was obviously biased in favour of Acres. Besides being repetitive, verbose and argumentative his evidence was in many instances improbable and illogical and often obviously untrue. Examples are the following.

216.

Although in Lesotho at all times material to contract 65 – he arrived in Lesotho on 15 January 1988 (p 1758/14 – 15) and left in August 1994 (p 1885/5 – 7) – he knew little or nothing about Bam relevant to Bam’s

relationship with Acres, other than that he was Acres' agent (p 1938/9 – 15). Yet according to Hare there was a time when Brown would have been Bam's handler (p 1352/13 – 20). Certainly he said nothing in this regard in chief. At no stage did he know where Bam lived (p 1949/3 – 5). He also says he didn't even know if Bam was with Lescon (p 2035/1). Compare this with Meyer's evidence at p 2174/2 – 13. According to Meyer everybody knew of the Bam/Lescon association. If Brown indeed knew little or nothing about Bam then this corroborates the Crown's case that Bam never performed genuine representative services for Acres in the context of contract 65.

217.

He gave extensive evidence "about the period when contract 65 was established" (p 1760/ 17 – 19, see also pp 1958/12 – 2017/25). Despite clear documentary evidence to the contrary – see above – he insisted that "[t] here was nothing that I was aware of during my tenure at LHDA during which Mr Sole's influence appeared to favour Acres and the establishment of contract 65" (p 1876/5 – 58). This was obviously untruthful evidence.

218.

After the obvious power and influence of the Chief Executive was carefully pointed out to him (pp 1880/9 – 1882/11), he begrudgingly conceded that the one person "among everybody in the LHDA to be on your side" would be the Chief Executive (pp 1882/12 – 1883/4, see also p 2017/21 - 25). His reluctance to make this concession illustrates his bias.

219.

Although admitting that the two people comprising the LHDA executive at all times relevant to contract 65 (p 1883/5 – 12) were Sole and Witherell, he wouldn't concede that Witherell was "on Acres side" (pp 1883/13 – 1884/8). Not only is this evidence improbable but again it illustrates Brown's obvious bias in favour of Acres.

220.

In general terms Brown was very much alive to the tension between the JPTC and the LHDA relating to Sole's "not following the Treaty requirements in terms of approvals....." (p 1886/4 – 11). Yet he couldn't bring himself to admit that Sole variously acted without JPTC approval in establishing contract 65 (p 1876/5 – 8).

221.

When questioned about the cash flow chart (exhibit "K4") and the forensic evidence establishing that Acres money was used to pay Sole through Bam "about half a million Canadian dollars" (p 1888/4 – 5) he, despite strong views on all sorts of other matters in chief, was not prepared "to express a view on these limited assertions" (p 1888/23) or "reach any conclusion or view on that very sensitive subject at this time" (p 1888/12 – 13, see also p 1905/8 - 16). For him "[t] here are too many presumptions" (p 1888/20). The prima facie case established by "K4" is obvious. By refusing to candidly acknowledge this Brown again manifested his bias.

222.

When asked why Bam paid Sole "all this money" (p 1890/13 – 14) Brown was quick to venture a possible explanation. Here he suggested that maybe "..... Mr Sole was paid for past services or past assets or something" (p 1890/25 – 26). He conceded that "it is speculation on my part....." (p 1891/9). But when it was pointed out to him that speculation on his part was unnecessary and that it would have been the easiest thing to simply ask Sole because Sole after all "was sitting at the back of this Court" (p 1891/15 – 16) and "speaking to various Acres people" he, after a very long pregnant pause (p 1891/18 – 19) said he didn't regard this as his business to ask such questions. "I do not go around asking sensitive questions like that of anybody" (p 1891/20 – 21: and p 1892/3 – 9, see also p 1905/8 - 16). This is a telling piece of evidence which needs no further comment. It speaks for itself.

223.

As to Brown's opinions he was happy to express these " at the questioning of my counsel" (p 1892/16). Not so to questions asked by counsel for the Crown. These questions were "loaded or mis-directed" (p 1892/21).

224.

When questioned about his handwritten note to Acres in Canada (vol. 7, p 1977), which shows that Sole not only gave Acres advice as to when Acres should submit a particular variation order but also as to the content of their letter – Sole rejected the first two drafts – Brown was more than unconvincing in trying to explain Sole's conduct. He simply couldn't explain

Sole's improper interest in wanting to protect and advance Acres' private interests. See pp 1901/1 – 1911/2. As to this see further pp 1911/2 – 1913/8 where Sole gave Acres advice as to how Acres should protect its interests against competition from Bechtel.

225.

Another example is reflected in the document in vol. 7, p 1811. Brown dealt with this at pp 1913/10 – 1917/22. The document is a handwritten note in Brown's handwriting to Acres in Canada. It relates to the appointment of a technical evaluation team. Acres were interested in having Hugh Reinhardt, an Acres man, appointed. In this memo Brown undertakes to discuss Reinhardt's candidacy with Sole and says "I will test the waters with Sole quietly". Brown admitted that he had the kind of relationship with Sole that enabled him "speak to him off the record" (p 1916/17). He insisted however, "it was not a unique relationship by any means" (p 1916/19).

226.

A further example illustrating Sole's undue interest in advancing Acres' cause is apparent from the memo at vol. 7 p 1812. This document is discussed by Brown at pp 1917/23 – 1924/3. In this memo Brown says to Acres in Canada that "Sole is going to bat for the extension [of Mr Priestman's contract] [against the JPTC] so we have more confidence that it will eventually be approved.....". Notwithstanding that it is obvious that Sole would be advancing Acres' interests in a matter "against the JPTC", Brown insists that this was not so and that instead Sole "is batting for the LHDA" (p 1918/10 – 11).

227.

As to the hierarchy within the LHDA at the commencement of the construction phase of the project Brown conceded that the five top people were Sole, Witherell, Ramollo, Clarke and Brown (pp 1924/16 – 1927/18, especially p 1927/18 – 19). Three of these were Acres appointees.

228.

It is clear from the document at vol. 1, p 171, read with Brown's evidence at pp 1929/17 – 1930/26, that Acres would never have needed a representative for purposes of assisting Acres acquainting itself with conditions in Lesotho. In this document Brown informs potential tenderers for various construction contracts of all they need to know for a site visit to Lesotho, right down to details such as car rental.

229.

In circumstances where Brown admitted that Bam had been Acres' agent in Lesotho from about 1986/1987 onwards (p 1937/3 – 4), he was more than unconvincing on the subject of Acres' conflict of interests arising out of Acres' use of him as their agent in Lesotho in circumstances where they were also supervising contract 45, under which Bam through Lescon was also engaged as a part of LHC. Brown tried to contend that he did not know what Bam's involvement was with Lescon (p 1936/23 – 24). Compare this with, for example, Meyer's evidence at p 2174/2 – 13. Later he presumed that in 1990 Bam was involved with Lescon (p 1937/1 – 2). Notwithstanding he said "I did not see the conflict" (p 1937/10). Yet he believed that Sole knew of Acres'

arrangement with Bam (p 1938/9 – 15). Brown's evidence in this regard simply cannot be true.

230.

Even more unconvincing was Brown's evidence dealing with the conflict arising out of the Bam/Lahmeyer relationship (pp 2027/19 – 2038/1). In particular see p 2035/8 – 19 with pp 1937/5 – 1938/8.

231.

Brown's difficulties with Acres' obvious conflict situation became even more apparent when it was pointed out to him that Acres' conflict also arose by virtue of the provision of clause 3.2.3 of contract 65 – to be found in vol. 2, p 446. By the time he was questioned about this clause he had already conceded that he knew that Bam was Acres' agent in Lesotho at all material times (p 1937/3 – 34 and p 1938/9 – 15). When confronted with Acres' obvious difficulty, at first there was no audible reply (p 1939/10). When it was pointed out to him that he could take as long as he wanted he insisted that "this is a very legal clause and I would like to take a minute to read it" (p 1939/12 – 13). When it was pointed out to him that he is an experienced engineer accustomed to working with engineering contracts, he asked for more time to read it (p 1939/14 – 18). Then he wanted the question asked again (p 1939/ 19 – 20). When he did eventually give a reply he tried to suggest that he didn't know that Lescon was a member of ABCC (p 1940/15 – 19). When pressed, the best he could do was to say that he "did not have enough knowledge of ABCC at the time" (p 1941/16 – 17). This evidence was obviously not true. Compare here what he said at pp 1937/10 – 1938/8.

When this was pointed out to him his answers became increasingly unconvincing (pp 1941/18 – 1942/14 – 26).

232.

Brown was confronted with the fact that an Acres person, Mr Lightfoot, dealt with Acres' contracts on behalf of the LHDA (see generally pp 1943/20 – 1946/24 and in particular p 1944/18 – 19). As far as Brown was concerned this was "nothing unusual" (p 1945/1). Yet the capital finance division had to deal with contract 65 and on Hare's evidence Witherell was given strict instructions to have nothing to do with the establishment of contract 65. Not only is this evidence of Hare grossly improbable but it is also contradicted by Brown who, in re-examination, conceded that when Witherell signed the advance payment he "would have known as a fact that the final terms of contract 65 had not yet been finalised in relation to taxes and fees" (p 2056/11 – 26).

233.

Brown was questioned about Acres' bank accounts in Lesotho (pp 1949/7 – 1958/11). He conceded that Acres' local expenses would have been met through these accounts (pp 1950/18 – 22 and 1958/10 – 11. See further pp 1951/15 – 1952/6). Had Bam been Acres' lawful representative in Lesotho he could and would have been paid through these accounts. Brown could take this aspect nowhere. "That question would have been appropriate to Mr Hare" (p 1954/13 – 17) was the best he could do.

234.

Brown was extensively cross-examined about the failure to obtain JPTC approval in terms of the Treaty for the various milestone steps in the

establishment of contract 65 (pp 1958/12 – 1980/1). The overall impression here is that Brown was more than just disingenuous. In his earlier evidence and in a different context he candidly admitted that there was serious friction between the JPTC and the LHDA regarding the LHDA and Chief Executive's failure to follow JPTC requirements in terms of approvals (p 1886/4 – 11). Yet in the context of contract 65 he was prepared to make no concessions at all. For him there was a difference between "approval" and what he said they did namely "we would consult and we would ask for their concurrence" (pp 1962/26 – 1963/1). For him there was a meaningful difference between the two, albeit a "small difference" (pp 1963/4 – 18 at /12). The distinction as described by Brown is artificial, it is submitted. It is clear that the JPTC's approval had to be obtained before any step involving costs could be taken. Yet he couldn't bring himself to concede that anything improper went on in the establishment of contract 65. When confronted with Molapo's evidence in this regard his view was that "I think Mr Molapo's testimony is being turned a bit....." (p 1964/ 5 – 6).

235.

Brown's main proposition was that the JPTC knew what was going on. This was because they attended meetings, negotiations and the likes. This in turn according to Brown equated to approval (pp 1964/9 – 1965/15). At one stage he even went so far as to say that the "issuing of the letter of intent" didn't require JPTC approval because "in accordance with the Treaty I do not believe it was required" (p 1966/4 - 11).

236.

He even tried to suggest that Claassens, when he attended the contract 65 negotiations leading up to the MOU, was not there just as an observer. When it was pointed out to him that Claassens had no approval powers during the negotiations and that he could not speak on behalf of the JPTC, that he no authority to do that, Brown's answer was "that is not true" (pp 1967/13 – 1968/8). Later when he was pressed on this same issue his answer was "I am trying to think how to answer this M'Lord" (p 1969/15 – 21). He then tried to suggest that it would be "just bad management" to refer matters back to the JPTC (p 1970/1 – 12). He even went so far as to suggest in answer to a question that the LHDA needed JPTC approval before committing itself to money vis a vis Acres, "that is a point at which I think you are stretching it" (p 1979/3 – 6).

237.

He also insisted that funding was in place for contract 65 when Acres got the LHDA to commit itself to contract 65 (p 1980/23 – 25), although this was obviously not the case. He insisted that "the prosecution is way misunderstanding the financial arrangements here" (pp 1980/23 – 1981/8). He insisted that the documentation proved this (p 1984/15 – 17). He appealed to his Counsel to help but his Counsel did "not know which document this witness is referring to" (p 1984/18 – 24). Ultimately the best Brown could do was to suggest that "the point coming out from all these references is there was money and it was available" (p 1988/9 – 10). While money may have been available – after all Acres was paid – this is a far cry from prior JPTC approval in writing. Brown must have known this, yet he would not admit it.

238.

At the end of the day Brown's evidence took the defence case nowhere. He was a patently bias witness who came to Court to "bat" for Acres – he said "I am certainly always batting for Acres" (p 2026/25) - and here he was prepared to say anything, whether it was true or not, logical or illogical, probable or improbable, so long as it was in favour of Acres.

239.

Not only did Brown not help Acres' cause. By having him give the evidence he did Acres has, as it did with Hare, shown its true colours. It is prepared to bend the truth in order to secure an acquittal. A company which is prepared to do this will also not shrink from paying bribes.

The evidence of the witness Gourdeau:

240.

The overall impression of this witness' evidence is that he was clearly not the independent objective witness Acres held him out to be. Whilst purporting to give an overview of engineering practice relating to the use of agents, when confronted with specific situations (clearly with reference to the present facts) he refused to commit himself to a view.

241.

He was perfectly prepared to express views in his evidence in chief when asked to do so (see for example p 2067/7 – 14, p 2068/3 – 20 and p 2069/8 – 26). Yet in cross-examination when asked to express a view which he perceived would rebound against Acres' interests he refused to commit himself. See for example p 2078/10 – 22.

242.

Gourdeau professed not to know too much about the facts of this case (pp 2073/23 – 2074/24). Yet his answers to certain hypothetical situations put to him clearly revealed a far deeper knowledge and understanding of the facts than he would have the Court believe (p 2081/1 – 5). An example is that of an agent leaving the country and going somewhere else. Clearly he was very much alive to the Bam/Botswana situation (p 2083/14 – 24). To him this was perfectly acceptable (p 2084/1 – 11). Another example relates to the timing of the engaging of a representative. When questioned about engaging a

consultant for the first time after having been in the country for some years and in circumstances where that consultant has already been invited to submit a proposal, his answers clearly indicated that he knew what the present facts are and that he was seeking to cover for Acres (pp 2084/12 – 2087/9). A further example relates to the signing of a representative agreement in circumstances where the consultant is already mobilised and the contract is all but signed. He was obviously alive to the facts of the present matter (p 2078/23 – 2079/5). When pressed on this issue he became evasive. A further example relates to his evidence about paying an agent in circumstances where he is not needed. His answers here were equally evasive and even illogical. They were simply inconsistent with normal business practice (p 2079/7 – 2083/13).

243.

A particularly blatant example of Gourdeau covering for Acres during cross-examination relates to Acres paying Bam 25% of its profit. At first he appeared as though he didn't understand what was being put to him. Then the penny dropped (p 2096/12 – 15). Then later he stubbornly refused to commit himself to an answer or an opinion (p 2098/2 – 5) which was self-evident, namely that to pay Bam 25% of Acres profit for nothing more than "intelligence" is ludicrous. Unless there was some other reason for the payments. See generally pp 2092/19 – 2098/5.

244.

Generally Gourdeau's failure to acknowledge that the present circumstances are at least very suspicious – in particular the objective fact that Bam paid Sole using Acres money – makes his evidence, in the light of his international

experience and obvious intelligence, highly unsatisfactory if not downright untruthful.

245.

In certain circumstances Gourdeau had no choice but to concede the obvious, for instance that a consultant would not encourage its representative to, for instance, contravene forex regulations or tax laws (p 2091/15 – 22) or otherwise allow a conflict situation to arise (p 2090/4 – 26). To this extent Gourdeau's evidence rebounds against Acres and contradicts the evidence of Hare.

246.

When confronted with the obvious dilemma of on the one hand paying the agent for results and on the other thereby placing temptation in his way, Gourdeau became vague and argumentative. Instead of acknowledging the obvious and thereby establishing his credibility and objectivity, he tried to fudge the issue. Clearly Gourdeau testified in the manner he did in order to avoid having to concede this very real danger. This then flies in the face of the protests by himself and Acres that they took care to ensure that the representative didn't do what he shouldn't (pp 2098/24 – 2101/4).

247.

There is an inherent contradiction in saying on the one hand that one does a due diligence but then on the other placing temptation coupled by the promise of a huge financial reward in exchange for results under the representative's nose. If Acres were sincere about their integrity and their business ethics, they would never structure agreements in this way.

248.

Another example manifesting Gourdeau's lack of objectivity is to be found in his answers relating to questions about the timing of the conclusion of the representative agreements with Bam and what Bam could lawfully do for Acres (pp 2086/22 – 2089/7). His answers in this regard were vague and unconvincing. Everything that he said the representative could do Acres could have done for itself (p 2089/2 – 6). In any event and assuming Acres couldn't do these things for itself, what he suggested the representative could do would have been improper in the circumstances because this would have entailed giving Acres an unfair advantage over other competitors. This would certainly be so in a competitive bidding situation, like contract 19. In the context of contract 65, because the contract was being sole sourced, it wouldn't have been necessary for Bam to perform any of the services that Gourdeau suggested that Bam might have performed. And Bam was in any event in Botswana.

249.

Gourdeau's evidence to the effect that if you genuinely need a representative and what he does for you is honest and perfectly lawful, then this carries the blessing of the international engineering community, is almost laughably obvious (pp 2074/25 – 2075/24). It is analogous to saying that is perfectly acceptable to use a driver to take one to the bank so that one can draw money from ones account. It is however a totally different situation if, on the facts, the driver is employed to drive one to the bank to effect a bank robbery and for that same driver thereafter to drive the getaway car. It is in this latter context that the witness showed his bias towards Acres. He refused even to commit himself to the obvious (pp 2086/12 – 2087/9) . For example

he refused to acknowledge even at the hypothetical level that a representative agreement could be used to obscure what in truth amounts to a bribe agreement (p 2101/8 – 23).

250.

An aspect of Gourdeau's evidence which rebounds to Acres' disadvantage is his concession that due diligence is an ongoing obligation (pp 2091/23 – 2092/18 at 2092/3 – 4). On the facts of the present matter it would have been obvious to anyone within Acres who knew that Bam was Acres' representative and that he was being paid so well for little or no work, that he was not your normal representative. Yet Acres personnel did nothing to discharge their ongoing due diligence duty. Instead they all pleaded blissful ignorance.

251.

Whatever the international practice concerning the lawful engagement of representatives may or may not be is really irrelevant. If the true practice relates to using them for bona fide lawful purposes then well and good. Whether this always happens, more particularly in this case, is precisely what this Court has to decide. In this regard the witness was manifestly unhelpful as an expert.

252.

What this witness really testified to, namely the acceptable practice of using representatives for lawful purposes, the Court can conclude for itself. Acres however saw fit to call him. What transpires from the witness's evidence

however is that what happened in the present case cannot be explained or justified in terms of such lawful practice. Clearly then this witness's evidence rebounds against Acres.

253.

What also rebounds against Acres is that this witness was held out to be an objective, impartial witness. It transpired that this was not so. This in turn, once again, makes one wonder about Acres' good faith.

The evidence of the witness Gibbs:

254.

It will be remembered that the Crown's case is quite simply that the representative agreement (RA) was a document designed to cover up the fact that the payments were bribes. Whether or not the payments did or did not "comply" with the terms of the agreement is then neither here nor there.

255.

In the course of his evidence Roux pointed out firstly that the payments by Acres to Bam did not always comply with the RA and secondly that there was a remarkable coincidence between Sole losing his court battle and Acres reducing its payments to Bam to approximately 40% of what they had previously been, which amount roughly equated Bam's share, and with Bam then not sharing this amount with Sole.

256.

As part of its defence Acres sought to show that the payments did indeed conform with the RA. When however it was shown that this is not so, i.e. through Roux's report, exhibit "K1", it then sought to explain the deviations from the RA through exhibit "L". To this end presumably Gibbs was called to testify and also to explain the rather embarrassing reduction to CAD 10 500.00 in 1997.

257.

A reading of his evidence shows that Gibbs made heavy weather trying to explain the reduction to CAD 10 500.00 and in particular its timing. In his evidence in chief he seeks to explain it in the context of projections done at the time as to the length of the contract and the total amounts of services Acres expected to perform over this time. See pp 2302/14 – 2305/4.

258.

In cross-examination it is firstly pointed out to him, with reference to the document vol. 15 (6) p 38, that if the intention was to bring down the payments as a result of Acres getting less work this would have logically been done before this date, because Acres' services amounts had already come down. Also that at the time there was a positive variant in favour of Bam that had to be worked down. In this sense then the timing of the reduction was both arbitrary and in fact illogical. Gibbs had great difficulty explaining this and ended up saying that it seemed to be "an opportune time" to do so, particularly when Witherell was coming to Lesotho in any event. See pp 2322/17 – 2327/7.

259.

The other justification for the timing of the reduction was that the percentage being paid to Bam had to be reduced to the agreed 3.6%. Also in this regard it was pointed out to Gibbs that if this was the true reason also here the timing was completely arbitrary. At the time this was done the accumulative percentage stood at 3.49%. Also, if the intention was to bring it down to 3.6% it would have been a simple matter to simply calculate the percentage

on the basis of the actual services. Exhibit "NN" was then shown to him which apply illustrates this. Gibbs' response to all this was simply to say this could have been done but it was not. See p 2327/8 – 25, pp 2359/4 – 2362/4.

260.

In justification of the reduction Gibbs also refers to the inter-office memorandum of 3 July 1997 contained in vol. 15 (6) p 37. This document does not really assist the defence. If the Crown's contention is correct, namely that the RA was a cover-up, then it follows that any reduction to pay only Bam his share would similarly be justified by a memorandum such as this.

261.

What flows from this document is also the following. Acres simply decided to reduce the payments, adding that Witherell should discuss this with Bam on his trip to Lesotho. This amounted to an amendment of the RA. Yet the defence is unable to produce a written amendment to the RA. This despite the fact that initially the RA went through several revisions in the course of which each T was crossed and I dotted. Suddenly in 1997 the contract is drastically amended and yet there is no document showing this. Gibbs' evidence furthermore that there indeed an actual amendment is obviously hearsay.

262.

In the cross-examination of Gibbs that then followed the whole question is debated as to whether Acres had a binding agreement with Bam at all. See pp 2328/26 – 2340/20. Here Gibbs is referred to the payment of CAD 180 000.00 instead of four payments of CAD 45 000.00, the suspension of payments for a year after October 1992, the arbitrary payment of CAD 13 500.00, payments ceasing altogether when Bam died. In respect of none of these deviations from the contract is any documentation produced showing that the contract was indeed amended.

263.

The fact that Acres appeared not to have been too concerned with what the “agreement” stipulated also appears from Gibbs saying thing like “we had a contract with Mr Bam which called us to pay him 3.6% of the services amount. At this particular point in time we had paid him well in excess of that” (pp 2330/19 – 21), “I believe it was just explained to Mr Bam” (p 2333/25 – 26) and “I believe that the representative agreement allowed for the changes of the amount” (p 2339/5 – 6).

264.

Gibbs tried to link the RA to the duration of contract 65 and in that way sought to explain why payments to Bam could be adjusted or even extended beyond the 72 month period. See for instance p 2344/5 – 10. In this regard he states that there was an assumption that contract 65 would last for 72 months (p 2346/18) and that where this did not happen and the contract lasted longer that there was an agreement between Acres and Bam to extend

the agreement. See p 2347/9 – 26. What Gibbs cannot explain is why there is no written document to this effect. Also, what was to happen with regard to the services Bam was to render in terms of the RA.

265.

What all this shows is that the payments by Acres to Bam hardly bare any resemblance to the terms of the RA. Had there been written amendments to the RA Acres would certainly have produced them in this Court. Clearly then the intention was never that Acres would be bound by the terms contained in the so-called representative agreement.

266.

It follows that the reasons for the payments are to be found elsewhere and not in this document.

The evidence of the witness Burnett:

267.

Mr Burnett was called as an expert witness presumably to counter the evidence of Roux and to cast doubt on his opinions as they appear from exhibit "K1". To this end he prepared his own forensic report, exhibit "OO".

268.

In his evidence in chief he then expresses the view that the payments between Acres and ACPM were made in terms of the contractual relationship between them, i.e. the RA, that the payments from Bam to Sole indicated a contractual relationship between the two of them, and that there is no evidence in the documentation that he looked at of any contractual relationship between Acres and Sole or any evidence to support the proposition that Acres paid Sole with the intention of bribing him. See pp 2393/22 – 2394/8.

269.

The first problem with Burnett's evidence is the basis from which it proceeds. This is namely that the RA correctly reflects the relationship between Acres and Bam. See pp 2396/1 – 2400/2. Once this is assumed then obviously the fact that Bam in turn paid Sole is completely irrelevant.

270.

It then also becomes quite clear that Burnett is not the objective expert he holds himself to be. There are a number of examples of this.

271.

He did not address the issues that Roux addressed, namely what these accounts of Bam were used for. The question is why not. When Roux's conclusions in this regard are put to him, i.e. that these accounts were simply used as conduits between the contractors/consultants in question and Sole, he refused to agree to what was obviously the case. See pp 2400/8 – 2401/14. Here it also became embarrassingly obvious that he never actually looked at the accounts themselves and simply assumed that the consultant/contractors involved paid into the same fund. See pp 2401/23 – 2402/2. Even when it is pointed out to him that the Canadian dollar account was only used to receive funds from Acres and in turn to pay funds over to Sole he still refuses to acknowledge that this is indicative of some arrangement whereby Bam is paying Acres money to Sole. See pp 2401/16 – 2405/8.

272.

When questioned about the 60/40 split identified by Roux, i.e. in paragraph 4.29 on pp 24 – 25 of exhibit "K1", Burnett steadfastly refuses to acknowledge that there was indeed such a split. See pp 2411/13 – 2413/5. Even when it is pointed out to him that all the monies paid to Sole emanated from Acres and that, apart from the initial payment of CAD 180 000.00 and the odd payment that was reversed or was a composite of the 60/40 pattern,

that the evidence clearly establishes such a pattern, the witness will still not acknowledge what is after all perfectly obvious. See pp 2416/14 – 2421/15.

273.

As far as Burnett was concerned there could have been many reasons why Bam would have wanted to pay Sole (p 2421/16 – 23). When his attention is drawn to the total evidential picture and he is then asked to venture an opinion as to why Bam would be paying Acres money over to Sole, Burnett simply refuses to draw the conclusion which to anyone else would seem perfectly obvious. See pp 2424/19 – 2426/8.

274.

Nothing in this whole case seems capable of deflecting Burnett from his stand point that everything between Acres and Bam was perfectly kosher. Even the fact that a person from Lesotho was being paid by a Canadian company in Switzerland does not seem strange to him. See p 2428/15 – 22. Or for that matter the fact that the Chief Executive of the water project receives CAD 300 000.00 in Switzerland from someone who in turn received it from one of the contractors on the water project. See p 2429/2 – 10.

275.

Burnett's bias in favour of Acres really comes to the fore when he is invited to speculate as to the reasons why Bam would be using Acres money to pay Sole in Switzerland. The passage in his evidence at pp 2429/16 – 2433/18 firstly makes nonsense of any suggestion that he is an objective witness. But secondly, when looking at the ludicrous examples he give in order to try and

explain why Bam would have wanted to pay Sole, this simply reinforces the conclusion that there is simply no other explanation for these payments other than that they were indeed bribes. Had there been, Burnett would surely have ventured it.

276.

When during the course of cross-examination it appeared that Burnett was criticizing Roux on the basis of bank records that he had not actually seen (pp 2433/19 – 2434/10), it transpired that the witness based his findings on little more than Roux's report. He did not look at the representation by Acres to the World Bank contained in vol. 3 – 6 before the Court (p 2458/10 – 13). He was not aware of the state of negotiations at the time the representative agreement was entered into (p 2461/21 – 23), or that Acres had already mobilised and were already working on contract 65 at the time (p 2461/24 – 26). He was also not told about evidence before the Court that the services specified in the representative agreement were not needed by Acres (p 2462/9 – 11), or that Bam was in Botswana at the relevant time (p 2462/15 – 17). So much then for his "declaration of independence" in terms of which he declares that his report "includes all matters relevant to the issues on which [his] expert evidence is given" (appendix 1 to exhibit "OO").

277.

Burnett even refuses to acknowledge that there was at least something odd about the fact that the payments to Bam dropped to CAD 10 500.00 where this amount equated approximately Bam's share, at a time when Sole had lost his Court challenge to his dismissal, and which payments were then not shared with Sole. Not only does he not find this odd but he is quite happy to

simply assume that this must have been for the reasons given by Mr Gibbs. See pp 2434/11 – 2436/3. Even without Gibbs' say-so he assumes in favour of Acres that this was done in order to bring the payments within the 3.6% provided for. This despite the fact, as pointed out to him through the calculations made by Roux in exhibit "NN", that the timing of this reduction was at best arbitrary. See pp 2436/4 – 2438/14. See also pp 2438/21 – 2439/7.

278.

Even his evidence about the payments to Bam coinciding with the contractual terms in the representative agreement simply does not square with the facts. His evidence that the payments "generally" accorded with the terms of the agreement simply does not stand up to scrutiny when compared to the actual contractual terms. Despite this the witness simply refuses to acknowledge the obvious, namely that it simply cannot be said that the payments "generally" conformed with the agreement. See pp 2440/21 – 2455/8. Interesting, where non-observance with the agreement becomes quite glaring the witness quite conveniently assumes that the contract must have been amended, or it did not mean what it said. See for instance p 2448/18, p 2450/14 – 15, p 2450/21 – 22, p 2451/11 – 13, p 2453/21 – 26 and p 2454/14 – 17. Or that payments were made in error – p 2452/22 – 24.

279.

In the course of all this the witness was at least prepared to admit that if the underlying reason for these payments was not as reflected in the agreement, then the fact that the payments complied with the terms of the agreement would be totally irrelevant. See p 2441/16 – 20.

280.

The fact that Burnett was not able to factually point out anything, apart from one or two minor errors, in Roux's report that was not factually correct further serves to enhance Roux's findings.

281.

Finally the following as to this witness' evidence. The fact that he expressed views quite literally with blinkers on does not say much for his objectivity and his expertise. But it also places a further question mark over Acres' own bona fides. They were after all a party to Burnett entering the witness box with only the benefit of a completely one-sided picture of what really happened in this case.

The evidence of the witness Meyer:

282.

Although in Lesotho at all times material to contract 65 – he arrived in January 1988 (p 2105/22 – 23) and he left in December 1996 (p 2107/9 – 10) – this witness' evidence took the defence case, in fact the whole matter, nowhere. This is so for two main reasons.

283.

Firstly, except for a few disclaimers in cross-examination (pp 2173/17 – 2174/13), he said nothing about Bam and the representative agreement. Clearly he too was blissfully unaware that Bam was associated with Acres. This in itself says a lot. But also it is apparent then that his evidence did not touch upon the real issue in this case, namely what was the true causa for concluding the representative agreement of the 23 November 1990.

284.

Secondly, his evidence essentially related to the various steps leading up to the establishment of contract 65 (p 2111/16 – 18). Through him Acres attempted to show that everything in this regard was regular, procedural and above board. Yet the striking feature of his evidence was that he agreed with everything put to him in chief, but then he also agreed with everything put to him in cross-examination. So everything he said in chief was neutralised by what he said in cross-examination.

285.

Furthermore his evidence was led to counter the evidence of Hiddema and Molapo. Molapo's evidence was essentially to the effect that the important milestone steps leading up to the establishment of contract 65 were reached without JPTC prior written approval. And to the extent that the JPTC did approve it did so retrospectively – the JPTC was playing "catch-up". Everything Molapo said was corroborated by exhibit "Z" being the minutes of the various JPTC meetings. When cross-examined Meyer was taken through exhibit "Z" and, as indicated, he agreed with the various propositions put to him in cross-examination with reference to this exhibit.

286.

The following examples illustrate the fact that his evidence in chief was neutralised by his evidence under cross-examination.

287.

The request for proposal – compare his evidence in chief at pp 2125/14 – 2137/24 especially at p 2134/4 – 17 with his evidence in cross-examination at pp 2186/26 – 2187/21.

288.

Negotiation of the memorandum of understanding – compare his evidence in chief at pp 2140/11 – 2143/20, especially at p 2140/19 – 22 and 2143/10 – 12, with his evidence in cross-examination at pp 2185/17 – 2186/25.

289.

The issue of the letter of intent – compare his evidence in chief at pp 2143/21 – 2144/20 especially at pp 2144/4 – 10 and 2146/20 – 25 – where Meyer’s evidence in chief is damaging to Acres in that he categorically states of the letter of intent that no formal prior approval was given by the JPTC in respect of this document, with his evidence in cross- examination at pp 2200/21 – 2201/26 and pp 2228/1 – 2229/2. Here he even agrees that there wasn’t even “verbal agreement” to the letter of intent. See also p 2230/13 – 22.

290.

The authority to mobilise - compare his evidence in chief at pp 2144/21 – 2156/18, with his evidence in cross-examination at pp 2202/7 – 2205/6. Again here Meyer’s evidence in chief does Acres more harm than good. He testified that mobilisation and the issue of the letter authorising mobilisation took place without JPTC knowledge (p 2202/7 – 19) let alone approval (p 2152/1 – 14, see also p 2153/21 - 25). In fact at the time, as far as he was concerned, contract 65 had not even been “awarded” (p 2151/20 – 21)

291.

The payment of the advance – compare his evidence in chief at pp 2159/22 – 2160/20 with his evidence in cross-examination at pp 2213/5 – 2217/2. Here he says “I can only agree with you” (p 2217/2) that the payment of the advance was “highly irregular” (p 2216/15).

292.

Whether or not funding was in place for contract 65 – compare his evidence in chief at pp 2156/18 – 2163/1 with his evidence in cross-examination at pp 2183/7 – 18 and pp 2206/12 – 2208/24.

293.

The actual signing of contract 65 – compare his evidence in chief pp 2163/7 – 2168/5 with his evidence in cross-examination at pp 2219/22 – 2221/11, where he concedes that the contract was signed without JPTC approval and that when it approved the contract ex post facto “it had no choice...” (p 2221/10).

294.

At the end of the day then, if any weight can be attached to Meyer’s evidence it must be that he essentially endorsed Molapo’s evidence. In short then his evidence was neutral or, if it is to be relied upon, it constitutes corroboration for the Crown’s case. Meyer for example in chief stated “There is no doubt that Mr Sole was a very powerful man with lots of possibility to influence whatever decision” (p 2169/17 – 19). This proposition is of course central to the Crown’s case and something which Acres, with ever decreasing conviction, has tried to contradict. See also pp 2191/7 – 2192/6 and 2197/13 – 23.

Concluding submissions:

295.

The evidence has established that the payments to Bam were intended as bribes. It follows that Acres must be convicted of bribery.

296.

Acres is charged with two counts. The first alleges payments to Bam and the second to his wife.

297.

Once the intention to bribe is established it makes no difference that Acres initially paid to Mrs Bam and later to Mr Bam. Certainly Acres did not draw any such distinction.

298.

The only remaining question then is in respect of what amount Acres should be convicted. On the evidence not all the money can be traced through to Sole. This does not change the fact however that all the money involved was used in order to facilitate bribery and it matters not that a portion thereof remained with Bam for his part in the scheme.

299.

The Crown accordingly submits that the accused falls to be convicted on both counts and in the full amounts contained therein.

GH Penzhorn SC
HTT Woker

14 June 2002