

IN THE HIGH COURT OF APPEAL OF LESOTHO

HELD AT MASERU

In the matter between:

LAHMEYER INTERNATIONAL LIMITED

Appellant

VS

THE CROWN

Respondent

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CROWN'S HEADS OF ARGUMENT: APPELLANT'S APPEAL

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1.

At the time of receipt of Lahmeyer's heads on 30 January 2004 the Crown's heads had largely been completed. This is then the argument that is contained herein. On receipt of Lahmeyer's heads these heads were supplemented to the extent considered necessary. The paragraphs dealing specifically with Lahmeyer's heads are numbered in italics, e.g. *9*. For the sake of convenience Lahmeyer will simply be referred to as such (as opposed to the Appellant) and similarly the Crown.

2.

As stated by Lahmeyer's counsel in the introduction to Lahmeyer's heads, the heads are more in the format of an actual argument rather than the highlighting of such argument. To deal with each and every argument in Lahmeyer's heads would be unrealistic and unworkable. It would also

obfuscate the real points the Crown seeks to make in its heads. Obviously, to the extent that the argument presented by Lahmeyer is at odds with what is contained in these heads the Crown disagrees.

Introduction:

3.

There are a number of matters in the heads of Lahmeyer which the Crown submits need not be dealt with. An example here is the legal concept of payment in chapter 6 which spans almost 50 pages. It goes without saying that when A pays B and B pays C it does not necessary follow that A is paying C. If however B pays C with money provided to him by A and this is what A intended, then this does indeed constitute payment by A to C. Certainly, in the context of a bribery charge this must be so, otherwise every briber can escape the consequences of his acts by simply paying through a middleman.

4.

Similarly, the Crown will only briefly touch upon the legal issues discussed in chapter 4, if only to indicate the extent to which it disagrees with the legal submissions contained therein.

5.

A reading of Lahmeyer's heads shows, with respect, statements of law and legal reasoning which are not correct. With regard to the former one has for

instance the requirement that favour on the part of the bribee must be proved in order to prove bribery. See for instance paragraph 198.5 on p 131 of the heads. This is not the law. In most trap cases the bribee is arrested when he accepts the bribe. One also has examples of the argument elevating a particular piece of circumstantial evidence to an issue standing alone, subjecting it then to scrutiny, finding a (speculative) innocent explanation therefore, which then removes it as a factor a Court can take into account. An example here is the manner in which the heads seek to discount the fact that the account in Switzerland was in the name of ACPM and not Bam. See paragraphs 182 – 184 at pp 116 – 121. This is not how Courts deal with circumstantial evidence.

## 6.

The heads also show a type of reasoning which is, with respect, both legally and logically unsound. An example here is the approach to counts 1 and 2. (These counts are dealt with in more detail later.) What the Lahmeyer heads seek to do is the following. The acquittal on count 1 is elevated from a reasonable doubt to a positive finding that the payment in respect of the Mafeteng Dam was in respect of genuine representative services. This "fact" in turn then makes the relationship between Lahmeyer and Bam a genuine principal/agent relationship. This conclusion is then transferred to count 2. In respect of this count it is then argued that the "fact" that no corresponding payment was made by Bam to Sole (with which the Crown does not agree, but assuming for the moment that this is correct) entitles Lahmeyer to an acquittal on this count (which is legally unsound). The evidence also establishes as a "fact" that this payment was in respect of contract 46 (which the evidence does not show). From which it then follows that the representative agreement in respect of contract 46 was a genuine agreement. From this it then also follows, so the argument concludes, that so were the representative agreements in respect of contracts 51 and 1009. Apart from

the quantum leaps in logic, this reasoning is at odds with both the law and the facts and simply ignores large chunks of evidence.

7.

In these heads the Crown will show that it established a strong prima facie case before the Court a quo which then quite rightly refused a concerted application for discharge at the close of the Crown's case.

8.

Lahmeyer then chose to give evidence in answer to the Crown's case. These heads will then show that the defence put up by Lahmeyer is a carefully put together edifice which on close examination simply does not hold up. In order to keep this edifice from crumbling Lahmeyer seeks to, as it must, elevate each piece of evidence against it to a separate issue which it then holds up against the light and when it can find some innocent explanation therefore it seeks to take it out of the cluster of circumstantial evidence. In these heads the Crown will show that these attempts do not square with the evidence and are at odds with the proper legal approach.

9.

And then there is the question of the sometimes intemperate language. Not infrequently contempt is heaped not only on Crown counsel but also on the Lesotho judiciary. See for instance the last sentence in paragraph 224 at p 163 of Lahmeyer's heads. This is unwarranted and out of place.

The real issue:

## 10.

Lahmeyer was involved in three contracts, contracts 46, 51 and 1009. In all three contracts they were in partnership with others. The profit that the partnerships made from these contracts on Lahmeyer's own figures are as follows:

10.1	Contract 46	-	<u>M1 339 232</u>
10.2	Contract 51	-	<u>M2 374 165</u>
10.3	Contract 1009	-	<u>M 563 011</u>

(Vol 182 p 18835)

(Compare the figures of the Crown witness Monro which are very similar – vol 182 p 18842.)

## 11.

The payments due to Bam as representative under each contract, once again using Lahmeyer's own figures, are as follows:

11.1	Contract 46	-	DM 279 515 and GBP 59 019	<u>M704 691</u>
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(Vol 24 p 2511; see also vol 147 p 15436.)

Using the conversion rates applied to contract 46, they being 1 pound sterling = M4,3503 and 1M = 0,624 DM (vol 103 p 10833).

11.2	Contract 51	-	(vol 24 p 2512)	<u>M1 249 263</u>
11.3	Contract 1009	-	DM80 468 (vol 24 p 2512)	<u>M183 845.23</u>

(Using the exchange rates provided for in Contract 1009, vol 115 p 11958 at p 11986.)

## 12.

What was paid then to Bam as agent under the three contracts, expressed as a percentage of the partnerships' profits, is as follows:

12.1	Contract 46	-	<u>52.6%</u>
12.2	Contract 51	-	<u>52.6%</u>
12.3	Contract 1009	-	<u>32.6%</u>

Note: On the projected profit (as opposed to the actual profit) on contract 46 Emsmann admitted that Bam's representative fee equated to 36.8% of the projected profit – vol 19 pp 2024/18 – 2026/19.

## 13.

Using this comparison, i.e. Bam's fee expressed as a percentage of the partnerships', not Lahmeyer's, profit it is submitted that the fees were very high.

## 14.

At the same time Bam was paid by the partnerships locally (not overseas) for genuine sub-consultancy services. Here partnership/Lahmeyer cheques were

deposited into Lescon's account. See vol 49 pp 5086 onwards. Obviously not all these payments would accrue to Bam or Lescon because no doubt the other partners in ABC received their share. However, the point is that Bam was also earning considerable fees for genuine sub-consultancy work. Here billing rates under contract 46 and 1009 are not available from the record. However, Bam's billing rate under contract 51 was M14 035 per month – vol 113 p 11752. On this contract Emsmann testified that Lescon earned some M10 million – vol 17 p 1785/26 – 1786/6. One would assume that the other billing rates were in the same region, making allowance for inflation and so on. See for instance vol 115 p 11993 (Contract 1009) and vol 103 p 10838 (Contract 46).

## 15.

By way of comparison, for instance, Emsmann said with regard to the preparing of a proposal "it is an extremely expensive exercise" – vol 16 p 1702/21. In the case of contracts 12 and 15 he estimated the cost at some DM250 000 for each proposal. See also Hecker's evidence at vol 15 p 1586/20 – 26. So if one compares this to Bam's fees then the fees are very expensive indeed. Under the contract 46 representative agreement Lahmeyer paid Bam, excluding pounds, DM 279 515, i.e. more than the cost of the proposal.

## 16.

The crux of this case then really is what these overseas payments were for. Were they legitimate remuneration for agency work actually done or were they intended as bribes? In the absence of an answer and in the light of all the other surrounding circumstances, a Court cannot but conclude, it is submitted, that these payments were bribes. If they are held to be genuine, that would explain the payments. If not, that is the end of Lahmeyer's

defence. This was recognised by Lahmeyer's counsel, for instance in his opening where he stated (vol 2 p 175/2 – 4);

“..... in our submission the very crisp question at the end of the day is whether these three representative agreements were simulated or whether they were genuine.”

The Indictment:

17.

The twelve counts allege payments between 21 December 1989 and 10 April 1997. In the preamble the background to the payments is described, more particularly the relationship between Lahmeyer on the one hand and Bam, Sole and the LHDA on the other. The common denominator here is the fact that Lahmeyer was contracting with the LHDA and Sole was the LHDA's chief executive.

18.

A variety of matters are addressed in the requests for further particulars. They relate to benefits or potential benefits to Lahmeyer in return for the alleged payments, what Sole did or did not do in return for the money, what influence he could or could not exert in return for the money, the link if any between payments from Bam to Sole and contractual events, and so on.

## 19.

The thrust of the Crown's case appears inter alia from the following particulars which were supplied to the defence:

a. Paragraph 42.1 of the further particulars dated May 2000 (vol 1 p 57):

"The nature of the decisions which Accused 1 [Sole] was in a position to make or influence are all decisions having a bearing on contracts involving Accused 14 [Lahmeyer] or in which Accused 14 expressed an interest. The exact manner in which he could do so is a matter for evidence".

b. Paragraphs 3.7 and 3.8 of the further particulars dated 2 August 2002 (vol 1 p 76):

"A corrupt agreement between the accused and Bam. The exact terms of when, where and how the agreement was concluded are unknown to the Crown. Also who represented the accused in concluding the agreement. The existence of such an agreement is to be inferred from all the facts of this case. In any event, when making the payments to Bam the accused did so with a corrupt intent. See also paragraph 12 below. All the foregoing also applies to the other counts".

c. Paragraphs 1, 2 and 3 (b), (c) and (e) of the particulars supplied on 7 August 2002 (vol 1 p 85):

"(b) All major contractual events leading up to the award of consultancy contracts and during the life of such contracts required the blessing of Sole when he was the Chief Executive of the LHDA. The events leading up to the award of a consultancy contract are the shortlisting of consultants to be

invited to submit proposals, the evaluation of such proposals, the identification of the preferred consultant, the conclusion of a memorandum of understanding with such preferred consultant, final negotiations and the signing of the contract. Following such signature are variation orders to the contract and claims for interim payments.

- (c) From the fact that the accused was the successful consultant in respect of contract 49, 51, 1009 and 1024, as well as the fact that variation orders were agreed to and interim payments processed, the Court will be asked to infer that Sole, at the time he was Chief Executive and in respect of such contractual events relating to the said contracts that occurred during this time, gave such contractual events his blessing. In so doing he sought to advance the interests of the accused.
  - (d) In so far as contractual events are concerned relating to contract 1009 and 1024 after Sole was suspended and later dismissed as Chief Executive, the Crown's case is that Sole remained influential and was therefore in a position to continue to advance the interests of the accused. The Crown does not know whether or not he indeed did so. There was also the possibility, at all material times to the charges, that Sole could be re-instated in his former position."
- d. As to coincidences to contractual events and payments, this is set out in paragraphs 1 – 12 of the particulars supplied on 7 August 2002 (vol 1 p 87).

Admissions and matters not in issue:

20.

From the plea explanation, Exhibit "A" (vol 23 pp 2322 – 2327), as well as the document containing matters agreed between the Crown and the defence dated 8 August 2002, which is contained in Exhibit "B" (vol 1 pp 98 – 100), the following matters were not in dispute.

21.

The payments in the individual counts made by Lahmeyer to Bam were admitted. See paragraph 3.1 of Exhibit "A" (vol 23 p 2323). It was further common cause that Lahmeyer paid Bam on behalf of LMC in the context of contracts 46, 51 and 1009. Vol 3 pp 220/23 – 221/22). Later the payment in respect of count 1 was removed from this admission. This is dealt with fully hereinafter.

22.

The Swiss bank records contained in vols. 35 – 48 were 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 ....". There was no dispute about the payments, in fact they were admitted. The prima facie proof (of the payments from Lahmeyer to Bam and from Bam to Sole) then became conclusive proof.

23.

The payments by Mr Bam to Sole as testified to by the witness Roux and summarised in Exhibit "E12.1" – vol 69 pp 7201 – 7240, were also not in

dispute – vol 2 p 173/19. Neither was there any real dispute that Bam used money he had received from Lahmeyer in order to pay Sole. This follows from Lahmeyer's failure to use its accountant, Muller, to gainsay anything Roux said. It also follows from the cross-examination of Roux. See further in this regard paragraphs 56 – 68 herein below. (This was after defence counsel had placed on record that the flow chart, Exhibit "C" (vol 24 p 2521), "is heavily in dispute" – vol 2 p 180/9 – 13.)

24.

It was common cause then that Lahmeyer paid Bam. It was further established through the bank records as well as the evidence of Roux that Bam in turn by and large shared the money on a 50/50 basis with Sole. All this happened over a number of years.

25.

This is all summarised by Roux in Exhibit "E12.1" (vol 69 pp 7201 – 7240) and graphically depicted by him in Exhibit "C" (vol 24 p 2521). See also defence counsel's depiction of the money flow in Exhibit "KB", not part of the record, but attached hereto.

26.

Also the other bank records relating to Lahmeyer, Bam and Sole, both in South Africa and Lesotho, were not in dispute. See Exhibits "KA" (vol 165 p 17204) and "F12" – vol 144 p 15036 – vol 145 p 15216 and vol 59 p 6218 – vol 60 p 6353 (Lahmeyer); Exhibit "E vol 48 p 5020 – vol 55 p 5672 (Bam) and Exhibit "E" vol 55 p 5673 – vol 59 p 6217 (Sole).

27.

All the payments could then have been effected locally as opposed to in Switzerland. Lahmeyer's first account in Lesotho was opened in August 1983 (vol 165 p 17204) i.e. well before Contract 46 was concluded or Lahmeyer was even invited to submit its proposal (20/10/1989 – vol 99 p 10378). From 1983 to 1987 Lahmeyer was busy with the Feasibility Study – vol 167 p 17406 – 17408 with Bam doing all the sub-consultancy work – vol 167 p 17414.

Chronology:

28.

The Crown annexes hereto marked "A" a detailed chronology of events which it submits are relevant to this case. The learned Judges of Appeal are urged to pay particular attention to this chronology.

- a. Annexure "A" firstly puts in date order all the important events in this case and does so with references to the record.
- b. More importantly, the chronology puts into perspective the Crown's case and in particular Lahmeyer's defence.
- c. What this case is all about is why Lahmeyer paid Bam so much money. Lahmeyer's defence is that they needed Bam as an agent and in this sense is meant an agent as understood by the engineering/construction industry and bodies like the World Bank. Such an agent's

value comes in at the beginning of the tendering process, namely when invitations are sent out for proposals and even before. This is the evidence also of defence witnesses such as Hecker. Lahmeyer's case is that Bam did a lot of good work for them. The chronology is useful in showing up this defence as not true.

- d. What the chronology also illustrates is that by the time Bam was engaged as agent in respect of the three contracts everything for which an agent could legitimately be used for had already been done.
- e. The representative agreement for contract 46 was for instance signed on 31 December 1990. By then Acres had put in its proposal, was identified as the preferred tenderer, had negotiated the Memorandum of Understanding, was given authority to mobilise, had started work and had submitted its first invoices to the LHDA. All that still had to happen was for the Chief Executive, Mr Sole, to sign the contract. The chronology demonstrates all this.
- f. The fact that Bam was not needed is even better illustrated with reference to contract 51. When the request for proposals was issued, Lahmeyer was on the ground working under contract 46. Moreover, the intention was that contract 46 and 51 would be amalgamated. Also here everything had been agreed by the time the representative agreement was signed on 24 November 1991. Once again all that remained outstanding was Mr Sole's signature.
- g. The position regarding contract 1009 is even clearer despite the fact that the representative agreement is unsigned and undated. There is no evidence as to what exactly was agreed between Lahmeyer and Bam – see Emsmann's evidence at vol 17 p 1791/7 – 15. The fact of the matter is though that by the time Lahmeyer engaged Bam it had been in Lesotho on contracts 46 and 51 for years, and there is no

evidence at all of Bam assisting in the award to Lahmeyer of contract 1009. Again the chronology highlights this.

- h. After Mr Sole finally left the scene Lahmeyer tendered for a very similar design and supervision contract, contract 1017. It was ranked third and the contract went to a Japanese/American consortium – see generally vol 133.

The judgement of the Court a quo:

29.

In a lengthy and detailed judgement (vol 186 pp 19098 – 19199) the Court a quo in convicting Lahmeyer made particular reference to inter alia the following:

- 29.1 The forensic evidence which it by and large accepted -  
pp 19121/4 – 19138/15;  
and on which it placed particular emphasis -  
i.e. p 19131/12 – 18.
- 29.2 The influential position of Sole as Chief Executive -  
i.e. T Putsoane p 19140/21, Mrs Mohapi pp 19147/22 – 19148/11, C  
Putsoane p 19149/23 – 24.
- 29.3 Although Bam, a well-known engineer, was Lahmeyer’s sub-consultant through Lescon and ABCC, those in the LHDA intimately involved with

Lahmeyer and Bam were not aware of this separate relationship in terms of which Bam acted as Lahmeyer's agent -

i.e. T Putsoane p 19141/12 – 19, Mrs Mohapi p 19147/1 – 12, C Putsoane p 19148/12 – 17, Mrs Mathibeli pp 19151/22 – 19152/3.

- 29.4 The fact that Lahmeyer had no need for a (legitimate) local agent -  
i.e. T Putsoane p 19142/10 – 12 and p 19143/16 – 18, Mrs Mathibeli p 19152/3 – 5.
- 29.5 That in these circumstances there was no legitimate role for an agent outside the formal bidding process -  
i.e. T Putsoane p 19142/4 – 9 and /19 – 22, C Putsoane pp 19148/20 – 19149/19.
- 29.6 Confidential information of value to proposers which only someone with inside knowledge can supply -  
i.e. T Putsoane p 19143/11 – 16.
- 29.7 The fact that Bam and Sole clearly knew each other well -  
i.e. Mrs Mohapi p 19147/17 – 22, C Putsoane p 19149/19 – 23, generally pp 19191/23 – 19192/3.
- 29.8 The realisation that despite his dismissal Sole could very well be reinstated by the Court -  
i.e. Mrs Mohapi p 19148/1 – 3, C Putsoane pp 19149/24 – 19150/3.

30.

The Court a quo also dealt in detail with the defence witnesses (pp 19154 – 19170) and by and large rejected their evidence.

## 31.

The Court dealt specifically with the representative agreements (p 19178 onwards) and in this regard:

- 31.1 Compared the ones in issue with others that do not have the “no duck no dinner” clause -  
i.e. p 19179/18 – 20, p 19184/2 – 12.
- 31.2 The fact that these representative agreements do have such a clause and that Lahmeyer did indeed get all three contracts in question -  
i.e. pp 19181/11 – 19182/14.
- 31.3 Placed a question mark over the requirement for Bam to help Lahmeyer maintain a good relationship with the LHDA -  
i.e. pp 19182/15 – 19184/1, p 191/10 – 23.
- 31.4 The total absence of invoices submitted by Bam -  
i.e. pp 19184/12 – 19185/19.
- 31.5 The fact that Lahmeyer did not need the services stipulated in the representative agreements -  
i.e. p 19185/19 – 24.
- 31.6 The secrecy surrounding these agreements -  
i.e. p 19186/4 – 9;  
and the fact that payments were made in Switzerland underscoring such secrecy -  
i.e. p 19192/9 – 10.
- 31.7 The contract being in the name of ACPM instead of Bam, which the Court found was intended to conceal -

i.e. p 19193/1 – 6.

32.

In all the circumstances it found:

32.1 That these representative agreements were not genuine agreements -  
i.e. p 19189/21 – p 19190/1.

32.2 That the agent relationship between Bam and Lahmeyer was brought  
about by the fact that Lahmeyer knew of the close relationship  
between Bam and Sole -  
i.e. p 19194/7 – 12.

33.

The Crown supports these findings and conclusions. It furthermore submits  
that the evidence in fact goes much further. The Crown will in these heads  
deal with the evidence supporting the Court's findings and conclusions as well  
as other evidence having the same effect.

34.

What falls to be decided on all the evidence quite simply is whether at the  
time Lahmeyer paid Bam it intended for Bam to share the money with Sole or  
whether it foresaw that this might happen and was reckless as to whether  
this happened or not. Defence counsel also recognised this as the real issue  
(vol 3 p 232/9 – 24 – the word "expected" in line 18 must clearly read  
"suspected").

35.

This makes the submissions in paragraphs 44 – 53 at pp 29 – 35 of Lahmeyer's heads somewhat superfluous. Also, to the extent that the case law referred to therein is at odds with the Acres judgement, it obviously distinguishable or is no longer good law in Lesotho.

36.

It is improbable, even illogical, that Bam would have received all this money from Lahmeyer and then paid a portion of it over to Sole without Lahmeyer intending this or not even knowing about it. Also, once it is established that Lahmeyer's money was used by Bam to pay Sole then common sense dictates that Bam did so with Lahmeyer's blessing.

37.

It is only when bribery is accepted that so many anomalies in the Lahmeyer version, like wanting to use Bam as an agent even though he was in Botswana, paying him so much, why it is that most of the services in the representative agreement were not necessary and were not performed, the fact that no one knew that Bam was Lahmeyer's agent, the fact that he was paid in Switzerland, and so on, begin to make sense.

38.

Lahmeyer bases its claim to an absence of mens rea squarely on the three representative agreements of 31 December 1990, 24 February 1991 and (undated) in 1995. They appear in the record in vol 24 pp 2492 – 2509. This would then, once a prima facie case has been established, have the effect of narrowing the enquiry, namely to whether this explanation is reasonable or not. See paragraph [16] at pp 21 – 23 of the Acres judgement.

Circumstantial evidence:

39.

There is no direct evidence that when Lahmeyer paid Bam it did so with a corrupt intent. The Crown's case rests on circumstantial evidence. This Court's approach to circumstantial evidence was recently set out in Acres International Limited v The Crown, judgement delivered on 15 August 2003. See paragraphs [12] – [17] at pp 16 – 24 of the judgement.

40.

- 40.1 The circumstantial mosaic which results from the Crown's case as a whole, the individual pieces of which are dealt with hereinafter, strongly point to the payments in question being intended as bribes.
- 40.2 This then placed an evidential burden on Lahmeyer to explain these payments.
- 40.3 By relying on the representative agreements Lahmeyer, as it were, put all its eggs in one basket. Once it was shown that these documents are not what they purport to be then it followed that they were intended to hide or obfuscate the true position.
- 40.4 Lahmeyer then failed to adequately explain these payments and the inference that the payments were indeed bribes became conclusive.

41.

Lahmeyer seeks to extricate itself from this circumstantial web (paragraphs 5 – 20 pp 7 – 17 of the Heads) by isolating counts 1 and 2 from the rest. (This has briefly been touched upon above.) It is then argued that the acquittal on count 1 points to a genuine representative relationship with Bam in respect of

the Mafeteng Dam contract. It then argues for an acquittal on count 2. Once this argument is accepted it then follows, so it is argued, that the representative agreement in respect of contract 46 is shown to have been a genuine one. From all this it then follows, so the argument concludes, that the Crown has also failed to prove that the representative agreements in respect of contract 51 and 1009 were not genuine.

*42.*

Firstly count 1. In its plea Lahmeyer lumped count 1 together with the others and claimed that the payment in respect of this count was also made in terms of a representative agreement relating to the water project. It was only very late in the day, January 2003 – see vol 22 p 2268/12 – 20, that it claimed to have discovered that this payment was in fact made to Bam in respect of the Mafeteng Dam contract. It then led the evidence of the witness Michael Heiland who testified to this effect – vol 22 p 2260 onwards.

*43.*

The documents that Lahmeyer relied on in this regard, which are to be found at vol 149 p 15595 – vol 150 p 15667, were only produced after the close of the Crown's case which was closed on 18 September 2002. These documents formed part of Exhibit F13. Exhibit F13 was only handed in at the commencement of the defence case. When the trial started Lahmeyer produced only 12 bundles, i.e. Exhibits F1 to F12 (vol 2 pp 169/8 – 170/26). The first reference in the record to Exhibit F13 was on 12 February 2003 (vol 14 pp 1409/26, r.w. p 1408/1). This was two days after the commencement of the defence case – vol 13 p 1325/1. The first mention in the record to the Mafeteng documents (i.e. those in the record at vol 149 p 15595 – vol 150 p 15667) was on 13 March 2003 when Mr Heiland gave evidence – vol 22 p 2265/8.

*44.*

In the circumstances the Crown had no opportunity to investigate this new defence in respect of count 1. It also appeared to the Crown that the charge as formulated would not cover a bribe in respect of the Mafeteng Dam involving as it would a public official other than Mr Sole. In these circumstances the Crown abandoned count 1.

*45.*

This is a far cry from concluding that the payment in count 1 was in respect of a genuine representative relationship. In fact, the circumstances in which this payment was made, namely to ACPM and not Bam and into a secret account in Switzerland, strongly suggest that this payment was also corrupt. The acquittal certainly did not have the effect, as Lahmeyer would have it, of generally legitimising the relationship between Lahmeyer and Bam.

*46.*

In respect of count 2 Lahmeyer argues that because the payment to Bam cannot be linked to a payment by Bam to Sole that an acquittal must follow. Lahmeyer deals with this aspect in paragraphs 68 – 97 at pp 42 – 65 of its heads.

*47.*

Count 2 is dealt with by Roux in his report at vol 69 p 7228 - 7230, paragraphs 4.35 and 4.37 r.w. paragraph 4.39. The effect of this report is that Lahmeyer paid FrF 135 760 into Mrs Bam's account on 8 February 1991. This payment was then co-mixed in Mrs Bam's account with earlier deposits by both Dumez and Lahmeyer. On 4 March 1991 FrF 458 600 was transferred out of Mrs Bam's account into Mr Sole's. Roux then concludes

that this payment consisted both of payments from Dumez and Lahmeyer. Already in his evidence in chief (which is to be found in vol 8 pp 759/8 – 770/15) Roux conceded, at p 764/16 – 17, that it was possible that the payment to Sole of this amount could have been made up of money that did not include the amount of FrF 135 760 paid in by Lahmeyer. In his view, however, and because of the relatively short period of time between the Lahmeyer deposit and the transfer to Sole, he considered that at least part of the amount of FrF 458 600 was made up of Lahmeyer money – vol 8 p 760/5 – 7.

*48.*

Stripped of all excesses, the cross-examination of Roux on this aspect made two simple points, namely that the payment to Sole could have been made up entirely of receipts from Dumez. As pointed out, this had already been conceded by Roux. The second point that was made is that the payment could have been made by Bam having in mind the payment into the account by Acres of CAD 180 000. It was pointed out to Roux that this payment into Mrs Bam's account was made on 31 January 1991 (vol 9 p 879; r.w. vol 69 p 7225 paragraph 4.26) and that the FrF 458 600 which was paid out to Sole equates to CAD 100 000, such then being roughly 60% of the amount received by Bam from Acres, vol 9 p 882, which then, so it was put to Mr Roux, would bring it into line with the general 60/40 split between Sole and Bam in respect of payments made to Bam by Acres. (Note – This 60/40 split in relation to the CAD 180 000 payment by Acres was not detected in the Acres trial. This payment was count 1 in the Acres trial being the count on which Acres was acquitted on appeal.)

*49.*

What all this amounts to is that if Roux is wrong then his red line in Exhibit "C" should have perhaps been a blue line.

*50.*

The defence objected to the Crown's attempts to rely on the payments by other contractors/consultants to Bam as appears from Exhibit "C". By itself now introducing other aspects of Exhibit "C", i.e. in order to make its point with regard to count 2, it cannot now have it both ways. Here Lahmeyer relied on the Dumez payments and the Acres payments to make the point that maybe the payment to Sole in count 2 came from either Dumez money or Acres money. In view of this the Court is now entitled to look at all the evidence in Exhibit "C" and to decide for itself what others were paying Bam for. If on the face of it the other payments could be construed as legitimate agent's fees, this would support Lahmeyer. If on the face of it they look like other bribes then this would strengthen the Crown's case. This is because it would indicate the sort of business that Bam was in. And if that business was to receive and pay over bribes then this makes him a bribe merchant. This fact then also stands to be included in the matrix of circumstantial evidence. And common sense tells one that this is what he would have told Lahmeyer and also reported back to them what he did with their money.

*51.*

Assuming Roux to be wrong about count 2 (vis his red line should have been a blue line) this does not stand in the way of a conviction. As is dealt with in the Crown's submissions in respect of the cross-appeal, paragraphs 293 – 304 below, Lahmeyer's guilt flows from a corrupt intent when the payment was made to Bam. The fact that Bam in turn paid a portion of the money to Sole is simply a piece of evidence, albeit an important piece of evidence, pointing to the conclusion that Lahmeyer's intentions were indeed corrupt. See paragraph [46] at p 54 of the Acres judgement.

## 52.

In support of its contention that a failure to pull the payment through must necessarily result in an acquittal Lahmeyer relies on the Acres judgement. This reliance is, with respect, misplaced. It will be seen from the Acres judgement that the payment in respect of the count on which Acres was acquitted was firstly made to Mrs Bam and not Mr Bam. This payment also fell outside the pattern established by the rest of the payments, i.e. the 60/40 split – see paragraph [48] on p 55. The Court also made mention of the fact that these monies remained in Bam's account for some 7 years until the monies were transferred to an account in London. In other words, there was sufficient to create a doubt that the funds were intended for Sole. None of these considerations apply to the present factual situation. In fact, as pointed out above, the cross-examination of Roux now shows that Sole did indeed receive his 60%. But how Bam went about effecting that payment was not detected at the time.

## 53.

Lahmeyer's defence throughout and in respect of all the counts (even count 1) was that the payments in question were made pursuant to legitimate representative agreements relating to contracts 46, 51 and 1009 and in respect of actual services rendered to Lahmeyer by Mr Bam in terms of these representative agreements. See for instance defence counsel's opening address, vol 2 p 172/7 – 8 and pp 174/15 – 175/4. If the agreements are held to have been genuine, caedit questio. If they were not, then a conviction on all the counts must follow. As defence counsel put it in his opening (vol 2 p 175/2 – 4);

“ ..... in our submission the very crisp question at the end of the day is whether these three representative agreements were simulated or whether they were genuine.”

See also vol 3 p 232

“ ..... If your Lordship finds at the end of the day as a matter of fact that Lahmeyer had the intention in making the payments to Bam, had the intention that Bam should pay Sole, if that is the factual finding that your Lordship will make, then Lahmeyer is guilty. Simple as that.”

*54.*

The argument presented now, namely that a conviction cannot follow without the payment link, is not only at odds with the case made out before the Court a quo but also has no legal foundation. See the Acres judgement, paragraph [46] at p 54, as to the proof of guilt in respect of the alleged briber. It is in this respect that it is submitted that the Court a quo also erred, that is in respect of counts 3, 4, 5 and 8, which counts are then the subject matter of the cross-appeal. See below.

*55.*

It is also argued (paragraph 68.1 at p 42) that the Court a quo erred in convicting Lahmeyer on count 2 in respect of FrF 458 600 instead of FrF 135 760. It is conceded that the amount is incorrect. The Court simply made a mistake and it acknowledged this when dealing with sentence. See vol 188 p 19338. So all that stands to happen on appeal is for this amount to be changed.

The forensic evidence:

56.

The forensic evidence as embodied in the chart produced by PriceWaterhouseCoopers, Exhibit "C" (vol 24 p 2521), by itself compellingly suggests that Lahmeyer intended for Bam to pay Sole. The evidence of Roux relating to this chart, namely that Lahmeyer money was used to pay Sole, was not seriously challenged in cross-examination. This document almost speaks for itself. Cf S v Mudoti 1986 (4) SA 278 (ZSC).

57.

After Lahmeyer's accountant, Muller, gave evidence this was not an issue anymore. See also the analysis of Muller's evidence below. See also the Defence's depiction of the money flow in Exhibit "KB", not part of the record but attached hereto.

58.

The witness Hecker also variously recognised the fact that LHDA money was used to pay everyone i.e. the LHDA paid Lahmeyer who paid Bam who paid Sole – see for instance Hecker vol 14 p 1434/7 – 11; p 1436/20 – 24; pp 1437/6 – 1443/11; p 1475/7 – 9; p 1477/6 – 11; p 1515/5 – 8 and p 1472/1 – 21. See also Emsmann at for instance vol 18 p 1872/5 – 14.

59.

The 50 / 50 split alone points to an obligation by Bam (to Lahmeyer) to pay Sole and is hardly consistent with repeated bouts of generosity. No other plausible reason as to why Bam would be sharing the Lahmeyer money with Sole suggests itself from the evidence.

60.

It is further clear from Lahmeyer's own document (at vol 147 p 15429) that Lahmeyer contemplated that its payments to ACPM would be shared. Here in "calculating the actual fee payable for ACPM", Dr Zimmermann in the relevant letter asks Dr Spiess to discuss the matter "with the respective persons" (plural). Here it will be borne in mind that Lahmeyer's case throughout was that it only had one agent, Bam, and that ACPM was synonymous with Bam. Who could this other person then be, other than the other recipient, Sole? And by Dr Zimmerman not specifying who these persons are one must accept that Dr Spiess knew who they were. Yet neither of these witnesses testified. This is more fully dealt with below.

61.

Roux concludes not only that Lahmeyer money was used by Bam to pay Sole, but that indeed Lahmeyer paid Sole. Roux reaches this conclusion on the basis of his considerable expertise. This expertise he placed before the Court a quo in order to assist it. Looking at Roux's CV, his experience and expertise are clearly such that the Court a quo would derive considerable assistance therefrom. The fact of the matter is, however, that this conclusion is there for all to see. And this would explain why the accountant Muller did not give any expert opinion evidence to gainsay Roux's evidence. He simply could not give such evidence.

62.

Roux was subjected to a lengthy, detailed, repetitive and at times petty cross-examination. The reason for this is clear. An acceptance of his evidence and more particularly his conclusions make for damning evidence. Far from discrediting his evidence, the cross-examination it is submitted rather had the

effect of further demonstrating the incontrovertible logic of his conclusions. And if Roux was wrong, Lahmeyer would surely have shown this through Muller.

63.

The cross-examination of Roux also largely missed the point. This case is not, as the cross-examination would seem to suggest, about the relationship between a banker and his client or the ownership of funds once paid into a bank account and then moved from one account to another or used to extinguish an overdraft. Rather it is about intention and causation. If the payment from A to B made it possible for B to pay C, then causation is established. If this happens on a number of occasions and furthermore in a particular way, i.e. by certain percentages being paid over in turn, then this points to the inference that A intended for B to pay C.

64.

As Roux himself says, at the end of the day it was for the trial Court to reach its own conclusions. And this it did. It will be seen from the judgement that the Court a quo when analysing Roux's evidence by and large came to its own conclusions. Vol 186 pp 19120/1 – 19138/12. In some instances it even made mistakes – see for instance paragraphs 293 – 296 below.

65.

On Roux's evidence read with Exhibit "KB" being the schedule prepared by the defence and with the Court reaching its own conclusions, the following pattern emerges.

COUNT	AMOUNT LAHMEYER PAID BAM	FORENSICALLY PULLED THROUGH – YES OR NO		% SPLIT BETWEEN BAM AND SOLE		COMMENT
		ROUX - AS PER EXHIBIT "C"	DEFENCE - AS PER EXHIBIT "KB"	AS PER ROUX	AS PER EXHIBIT "KB"	
1	FRF34 013,61	NO	NO	--	--	See paragraph 44 above
2	R135,760 (DEM40,000)	YES	YES	NOT SPECIFIED	100%	See paragraphs 46-49 above
3	SAR100 000	YES	YES	50% Vol 69 p 7230, Vol 9 p 888/10 – 15	50%	Subject of cross appeal
4	SAR84 744,20	NO	NO	--	--	Subject of cross appeal
5	DEM 34 000	YES	YES	Not specified	Either 83,5% alt. 45% alt. 38.3%	Subject of cross appeal
6	DEM 24,256	YES	YES	50% Vol 9 p 15/15 - 26	50%	
7	DEM61 870	YES	YES	100% Vol 9 p 916/2 – 10	100%	
8	DEM7 645,26	NO	NO	--	--	Subject of cross appeal
9	DEM 9975.23	YES	YES	50% Vol 9 p 916/21 – 917/5	50%	
10	DEM58801.15	YES	YES	50% of DEM 17 600, the rest not specified. Vol 9 p 917/8 – 929/6	Either 30.2% alt 50% alt 14.91% alt 15.3%	
11	DEM17 600	YES	YES	50% Vol 69 p 7228 Vol 9 p 933/15	50%	
12	DEM47 600	YES	YES	50% Vol 69 p 7228 Vol 9 p 933/15	50%	

*66.*

Excluding count 1 then, the money Lahmeyer paid Bam can be forensically pulled through on all but two of the remaining counts, i.e. 9 out of 11. And, again excluding count 1, when Bam paid Sole he effected 13 payments to Sole. Vol 9 pp 933/18 – 934/5. Out of these on six occasions 50% went through to Sole and on one occasion 100% went through. And arguably on another occasion (count 2) 100% went through. For the remaining two, the precise percentage of the amount that went through to Sole is debatable. However at least some of it went through.

*67.*

Not only does a pattern then emerge, but also that almost without exception it has been shown that Sole was paid out of the proceeds and Bam's receipts from Lahmeyer. These two pieces of evidence vis the pattern and the forensic link in turn from part of the mosaic of circumstantial evidence which shows that Lahmeyer paid Bam with a corrupt intent.

*68.*

When the other circumstances in this case surrounding these payments are added, then in the absence of a really good explanation the inference of corruption becomes all but conclusive.

Payments in Switzerland:

69.

The fact that they were made in Switzerland also strongly points to a corrupt motive. It was after all a notorious fact in the early 1990's that bank accounts in Switzerland were used as receptacles for dirty money.

70.

Lahmeyer's own experts, Muller (vol 22 p 2251/15 - p 2253/5) and Asmann (vol 21 p 2193/12 - p 2194/5), conceded that Swiss bank accounts have obvious money laundering/tainted money reputations.

71.

The very fact that a local engineer receives payment as a local agent not in Lesotho but in Switzerland is suggestive of something underhand, something not intended for the light of day. No amount of whitewashing by various defence witnesses could wish this fact away.

72.

Nobody knew about these payments. Mrs Mohapi, for instance, the LHDA's Deputy Chief Executive, Finance and Administration for a long time (vol 12 p 1237/5 - 26) didn't even know that Sole had Swiss bank accounts (vol 12 p 1245/9 - 19).

73.

At all relevant times Lahmeyer had any number of local bank accounts. In fact according to Exhibit "KA" (vol 165 p 17204), Mr Ntsekhe's spreadsheet,

Lahmeyer had 9 local accounts. From these accounts it met its local expenses which included the payments it made to local sub-consultants such as Lescon, which in turn included Bam's remuneration as engineer. These payments were made from payments which it in turn received locally from the LHDA. Its payments overseas were received in its accounts in Germany - see vol 77 p 8149 – vol 78 p 8277.

## 74.

What is clear from all this is that had Lahmeyer wanted to it could have paid Bam locally. In fact, this is what Lahmeyer says it did in a number of instances, and then it paid in cash – see plea explanation, vol 23 p 2325 paragraph 5 r.w. vol 144 p 15000 - 15010. The fact that these payments were in cash is suspicious in itself, particularly when considering the amounts involved. This cash money was first transferred from Germany to Lahmeyer in Lesotho and then thereafter a cash cheque was drawn, the cheque cashed and the notes handed over to Bam. (Vol 14 p 1470/13 – 1472/21. See also vol 7 p 656/9 – 659/26; vol 16 p 1688/18 – 1689/26.) This is peculiar to say the least, especially in view of the amounts involved. This is also dealt with more fully below.

## 75.

The obvious question is then why would Lahmeyer be paying Bam locally when he does work as an engineer in Lesotho and in Switzerland when he does work as Lahmeyer's representative. From the evidence of Roux it also appears that these Swiss accounts of Bam were opened for this very purpose, namely to receive these monies from Lahmeyer. The entity to which Lahmeyer was paying, ACPM, had no physical address other than the address of a bank in Geneva. See vol 24 at pp 2497, 2504 and 2509. Even Lahmeyer's own accountants were apparently not aware of the fact that ACPM was really Bam - vol 21 p 2237/4 – 2238/16. What is more, nobody in

Lesotho had ever heard of ACPM. Putsoane vol 4 p 373/3 – 10; Mathibeli vol 12 p 1295/13 – 26; C Putsoane vol 12 p 1263/18 – 1264/23; Mrs Mohapi vol 12 p 1241/12 – 1243/13.

76.

Yet Lahmeyer tried to suggest that the payments in Switzerland in the circumstances --were "not at all unusual" – Hecker vol 15 p 1596/1 – 13, vol 167 p 17423 paragraph 36.1. This was clearly not true.

77.

It is argued by Lahmeyer in paragraph 240 at p 176 that the payments to Bam in Switzerland were common cause. That may have been so during the trial. But before that acquiring the bank records involved a legal process which went all the way to the Swiss Federal Court of Appeal. Nothing was common cause throughout this process. Thereafter and when Lahmeyer was first charged it, together with its fellow accused at that stage, refused to admit anything – vol 76 p 8053. Its admission in this trial was also only after the ruling by Cullinan AJ in the Sole case, confirmed on appeal, that the bank records were admissible in terms of the amended sections 245 and 246 of the CPEA.

78.

In paragraph 252 pp 182 – 183 of Lahmeyer's heads, reference is made to a paper trail that could have led the LHDA to the Swiss accounts. This firstly overlooks the fact that the payments were to ACPM and not to Bam. And secondly, the LHDA would not have learnt from this Bam's payments in turn to Mr Sole. Thirdly, if the relationship with Bam was genuine and if Lahmeyer had nothing to hide, why did it not reveal all this to the LHDA in 1997 when it says it stopped paying Bam because it became suspicious of Bam's

relationship with Sole. Instead they kept quiet. This is also dealt with more fully below.

Motive to bribe:

79.

Lahmeyer was in Lesotho to win contracts. They had lost contracts 12 and 15 to the French who were using Mr Cohen as agent (Emsmann vol 18 pp 1872/26 – 1874/25) and in circumstances where they thought they had been cheated by one of the members of the evaluation committee, Mr King. See also below.

80.

Thereafter and once they engaged Bam, and until Sole finally left the scene, they never lost again (Emsmann vol 18 pp 1876/23 – 1877/8).

The position of Mr Sole:

81.

Both the Treaty as well as the LHDA Order confer wide ranging powers on the Chief Executive. The Order for instance obliges him to transact the LHDA's day to day business (section 8 of Order No. 23 of 1986, vol 127 p 13308. See also the Treaty, vol 128 p 1330, articles 7(35) – 7(40)). Inherent in such powers is a discretion which can/might be exercised to the benefit of a particular contractor or consultant. Hecker in effect conceded this – vol 15 pp 1584/1 – 1585/22.

82.

On the evidence, particularly the evidence of Putsoane, Sole as Chief Executive was clearly in a position to influence contractual events from early on right up to and including the signing of the contract. This includes the following.

- 82.1 He had a say in the shortlisting of consultants who stand to be invited to submit proposals as well as who actually submits a proposal.
- 82.2 The committee which evaluates proposals is appointed by him and reports to him. Putsoane vol 3 p 282/7 – 9, 19 – 22. Emsmann admitted this (vol 18 p 1865/5 – 20).

(That things can go wrong at the proposal evaluation stage is apparent from Hecker's evidence. He testified that LMC was cheated out of contracts 12 and 15 by one member of the evaluation committee, Mr King (vol 15 p 1584/5), who misdirected himself, probably deliberately, in evaluating LMC's proposals. The effect of King's workmanship was

that LMC lost out to the French. Hecker and Spiess tried very hard to have the wrong redressed (vol 15 p 1580/18 – 1582/8), but without success (vol 18 p 1872/26 – 1874/25; see also vol 33 pp 3514 – 3520). No doubt, if Sole had been on their side: (i) the King misdirection would never have been allowed to take place; and (ii) if it did take place Sole could easily have taken steps to undo or rectify it. See generally vol 14 p 1508/5, p 1516/9 – 16, p 1584/7 – 26, pp 1584/1 – 1585/22.

- 82.3 The committee negotiating the MOU is appointed by him and reports to him. Putsoane vol 3 p 284/14 – 22, p 285/14 – 18. Sole would obviously then be very much alive to the sticking points – vol 13 p 1380/1 – 26, vol 15 pp 1522/9 – 1524/26. This is where Bam would be useful - “we would need somebody who interlinks with client on a sort of unofficial basis...” (Hecker vol 13 p 1380/16 – 17).
- 82.4 The authority to mobilize and the issue of a Letter of Intent emanate from him.
- 82.5 He presents the preferred consultant to the Board and motivates the choice of that consultant. Putsoane vol 3 pp 282/23 – 283/9. See for instance Sole’s motivation in respect of contract 46 at vol 95 pp 10037 – 10039, as well as Putsoane’s evidence in this regard at vol 5 pp 445/18 – 448/2.
- 82.6 In the case of water transfer contracts, i.e. contracts 46 and 1009, he forwards it and motivates it to the JPTC and the World Bank. See for example vol 33 p 3517.
- 82.7 Finally, he signs the contract on behalf of the LHDA. Putsoane vol 3 p 285/19 – 26. The powers of the Chief Executive at this stage are illustrated by Putsoane who said that he would “not have agreed to

sign it" [contract 1009] if he had learnt of what was going on between Lahmeyer/Bam, and Sole (vol 4 p 364/ 4 –9 r.w. vol 18 p 1855/16 – 25).

See generally the evidence of Putsoane vol 4 pp 365/23 – 368/11.

83.

Sole also held the LHDA purse strings. See the evidence of Mrs Mathebeli at vol 12 p 1280/13 – 20 and Mrs Mohapi at vol 12 pp 1249/13 – 1250/10. See also the Treaty, vol 128 p 13330 article 7(38)(c). As Chief Executive he for instance had to finally approve payments to contractors and consultants. Without his signature on the prescribed payment authorisation form the treasury division would not pay.

84.

Apart from the power and influence Sole had in the process of awarding a contract he was on the evidence generally a very influential person. This influence remained even after he left the LHDA. See for instance the evidence of Charles Putsoane at vol 12 p 1271/5 – 19.

85.

In its presentation to the World Bank Lahmeyer sought to create the impression that Sole's influence in the process of contract award was "extremely limited". See vol 29, pp 3081 – 3082. Emsmann was even more emphatic. He described Mr Sole as "a figurehead" (vol 18 p 1866/1 – 2). He said he could not be influential, "that is what I am saying" (vol 18 p 1866/12 – 13). Later he said "his participation is absolutely minimal. He was a chief administrator, the Chief Executive, nothing more than that" (vol 18 p 1866/17 – 19). See also Emsmann's evidence at vol 18 pp 1886/8 – 1923/2.

86.

This was not only misleading but quite plainly untruthful. Lahmeyer clearly sought to persuade the Court to accept this because then it would presumably follow that Lahmeyer would have no incentive to bribe Sole.

The nature of the agreements between Lahmeyer and Bam:

87.

Lahmeyer put up three agreements, not between Lahmeyer and Bam but between Lahmeyer and an entity called Associated Consultants and Project Managers ("ACPM").

88.

ACPM was not a company (vol 2 p 176/8) or a partnership (vol 2 p 176/13). It was said to be a firm or sole proprietorship (vol 2 p 176/13 – 15). To use defence counsel's words "it was Bam, trading as ACPM" (vol 3 p 221/17-18). Yet Bam's name does not appear in any of the three documents. A deliberate decision to omit Bam's name must have been taken by Spiess and Bam.

89.

These documents are not lightly entered into. The president of Lahmeyer signs them (vol 15 p 1571/16 – 27). This suggests that neither party wanted

Bam's identity to be apparent from the face of these documents. This points to secrecy.

90.

There is no direct evidence concerning the conclusion of these agreements. The Crown made it clear from the outset "we do not accept [the genuineness of] these agreements for one minute" (vol 3 p 220/9 – 21). The evidence in this regard, i.e. that of the witnesses Emsmann and Hecker, is hearsay. See for instance vol 19 p 1949/8 – 15. This is more fully dealt with below.

91.

The Court a quo was concerned with the real intention behind these documents. This could only be testified to by the actual parties who negotiated the contracts, i.e. Spiess and/or Zimmermann (and Bam of course, but he is deceased – vol 76 p 8054). The witnesses Hecker and Emsmann could not testify to this and the Court accordingly had to look at the documents in their factual context in order to determine the real intention behind them and the corresponding payments to Bam.

92.

The Court a quo did not draw an adverse inference against Lahmeyer for the failure to call either Spiess or Zimmermann. Vol 186 p 19196/13 – 14. Here it is submitted that the Court erred. Where all the evidence points to the conclusion that these agreements are not what they purport to be, the failure to place before the Court direct evidence by those actually involved as to the real intention behind these agreements must perforce reflect negatively on Lahmeyer.

93.

On all three occasions Bam is appointed for the purposes of obtaining the contract in question for Lahmeyer. The first agreement dated 31 December 1990 was for Bam to obtain contract 46, the second agreement dated 24 November 1991 was for him to obtain contract 51 and the third (unsigned) agreement was for him to obtain contract 1009. What is more he was appointed on the basis that if the contract was not obtained he got paid nothing. The understanding was "no duck no dinner".

94.

Lahmeyer variously makes reference to a so-called "industry practice" in trying to justify its use of Bam. The relevant pages have not been included in the appeal record. This was then also the evidence of Emsmann, whose evidence is dealt with below.

95.

This practice must firstly be seen in the context of the caution expressed by Cullinan AJ in the Sole judgement, which it is submitted is particularly apt in the present context:

"If a consultant is bribing a public official, then he is doing so for a purpose: either he is securing confidential information leading to an award of a contract, or he is securing such award outright. Surely, in that case, the results produced by the consultant speak for themselves? How can a principal be unaware of the consultant's activities, particularly where they are extended over a period?" (p 203)

"Where many tenderers are involved, vying with one another for the award of a contract at an undisclosed sum, there is little basis for

confidence, and any agreed undertaking by consultant to secure the award, is then surely suggestive of bribery on the part of both consultant and principal: indeed it suggests that the consultant has already prepared the ground for such undertaking." (p 204)

96.

Secondly, what the industry practice appears to sanction is the use of a local representative who knows the country and the language to keep you informed, since "most consultant business occurs very early in the project cycle; at the identification and preparation stages; before much detail is available for publication" (vol 11 p 1087/7 – 1088/18). The use of a local agent in such circumstances may, one supposes, be quite innocuous. He is then not used in order to circumvent the competitive bidding process or to gain a secret advantage over the other bidders or to obtain the contract through other means. Instead he is used at an early stage and before the level playing fields are put in place. And certainly not on a "no duck no dinner" basis.

97.

This is a far cry from employing an agent to obtain the contract outside the bidding process and in fact when the bidding process has largely been completed. The very fact that Bam was engaged to obtain the contracts tells the story. Had Bam been engaged as agent for genuine, lawful purposes, the representative agreements would not only have been concluded much earlier but their provisions would have read very differently. Here the attached chronology clearly illustrates how illogical the timing of the conclusion of the representative agreements were in relation to contract establishment. The chronology shows that the representative agreements were concluded when only one item of business remained outstanding namely signature of the contracts.

98.

Emsmann tried to suggest that the wording of the three representative agreements was just an unfortunate oversight on Lahmeyer's part (vol 18 p 1826/2 – 8). He said he'd bring the mistake to the attention of management (vol 18 p 1847/24 – 27). This evidence was disingenuous. The agreements were not pro forma documents (vol 18 p 1825/18 – 20). They went through several amendments (vol 18 p 1825/21 – 26). There was nothing inelegant about the wording of these representative agreements. They meant exactly what they said.

99.

In the case of all three contracts there was a competitive bidding process. The playing fields were level. How then was Bam to get the contract for Lahmeyer, outside the bidding process that is? The answer to this question speaks for itself. Especially since his mandate was on a "no duck no dinner" basis.

100.

In terms of Schedule 1 to the contract 51 representative agreement Bam was also supposed to get variation orders for "additional remuneration" for Lahmeyer. Quite clearly he could not do this in a legitimate way. There was simply no scope for any legitimate assistance by him in a situation where the consultant itself identifies the additional work to be done and then agrees with the employer to do this work and the basis upon which it will be remunerated. See the evidence of Putsoane at vol 12 pp 1265/9 – 1270/1.

The amounts involved:

101.

These have already been referred to. See paragraphs 10 - 15 above. The very amounts paid to Bam are suggestive of corruption. As pointed out, engineers such as Bam when working as sub-consultants on the water project earned professional fees. In the case of Bam in respect of contract 51 for instance he was paid at a billable rate of some M14 035 per month. See vol 87 p 9210. (According to Emsmann in total for contract 51 Lescon was paid some M10 million – vol 17 pp 1785/26 – 1786/8.) And he was paid this, overtly, in Lesotho. Quite clearly then he was prepared to work at this rate of remuneration and Lahmeyer knew this. Why then pay him these enormous additional sums and do so secretly overseas and in circumstances where he wasn't needed? After all, if Bam was not paid these representative fees then Lahmeyer could have kept these fees for itself. This latter point cuts right across Lahmeyer's justifications relating to the size of the fee – see Lahmeyer's heads, paragraph 239 at p 176.

102.

This money which was paid to Bam and also Sole came from the LHDA. See vol 144, pp 15000 – 15035, especially at 15012, 15022 and 15032, r.w. the evidence of Mrs Mathibeli vol 12 p 1291/21 – 1295/21. See also Emsmann (vol 18 p 1872/5 – 14) and Lahmeyer's heads, paragraph 239 p 176.

103.

What did Lahmeyer think Bam was going to do with all this money where he had to secure the contract for Lahmeyer? The very amounts involved, on the facts of this case, by themselves established a prima face case of an intent to

bribe. Lahmeyer was at the very least reckless as to what Bam would do with the money in order to secure the contracts.

104.

The evidence of both Emsmann vol 16 pp 1663/13 – 1664/7 and Asmann vol 20 p 2112/17 - 23 that the 5% paid is reasonable because it is within the normal range has a distinctly hollow ring to it, particularly when viewed in the context of what he actually, that is lawfully, did for Lahmeyer. Besides Lahmeyer would obviously have preferred to pay nothing and thereby keep the whole 50% for itself. And here even Emsmann admitted, for contract 1009 that “the request of Mr Bam was too high” – vol 19 p 1944/2 – 7. So the 5% was not reasonable.

105.

Before the World Bank Lahmeyer conceded that Bam was expensive. In justifying the fee paid to Bam before the World Bank Lahmeyer stated the following (part of the original record but not part of the appeal record):

“54. It is difficult to place a value on a representative’s services. The scarceness of a service governs its price. A scarce service requiring special talents and special experience is expensive.”

106.

In the context of Lahmeyer’s involvement in the water project and its use of Bam to secure these contracts, what was it that made Bam’s services “scarce” and “requiring special talents and special experience” which made it so expensive? Not the fact that he was a competent engineer. For this his professional rate was, as pointed out, some M14 000 per month. Furthermore, on the defence evidence he only really gave them advice and

information. See also Lahmeyer's plea, vol 23 p 2326/3 - 8. This they could have got for themselves (see for instance Hecker vol 16 p 1618/14 – 16 and Emsmann vol 18 pp 1853/11 – 1854/13. See also the RFP for contract 46 at vol 99 p 10367 at p 10370; the RFP for contract 51 at vol 110 p 11398 at 11400 – 11402 and 11403 onwards; the RFP for contract 1009 at vol 148 p 15441 – 15447. Note that these pages are not arranged in their proper order in the record).

107.

The fact that the payments may have been properly accounted for and in that sense "accord" with the agreements is neither here nor there. See Lahmeyer's Auditor's Report of July 2000, vol 144 at p 15000 and Muller's evidence at vol 21 p 2220 onwards. If the payments were legitimate, they would be properly recorded. If they were made as part of a cover-up, they too would be recorded in order to give the impression of legitimacy and for accounting purposes.

Payments in cash:

108.

Large amounts were also paid to Bam, according to the defence evidence, in cash (see the references in paragraph 74 above and paragraph 216.10 below and Hecker, vol 14 p 1433/1; p 1434/7 – 11; pp 1470/22 – 1471/9). This is by itself highly unusual. The Court a quo had no way of knowing whether any of this money ended up with Sole. Lahmeyer simply has not produced its

records. Hecker's evidence is that records do exist – vol 15 p 1599/24 – 1600/5. If the payments into Bam's accounts in Switzerland, where there are records, are anything to go by, then it is more probable than not that some of these cash payments did indeed end up with Sole. This inference is also supported by the reference to "the respective persons" in Zimmermann's letter to Spiess referred to in paragraph 60 above.

109.

What the Court can also infer is that at some stage discussions must have taken place between Bam and Lahmeyer where it was agreed that Bam would be paid lots of money in cash in Maseru. If this didn't raise questions in Lahmeyer's mind then nothing would. It is more probable that Lahmeyer knew exactly what was to become of the cash.

The timing of the agreements:

110.

If Lahmeyer's need for a representative was bona fida, and if Lahmeyer's version is to be believed, the representative agreements for contracts 46 and 51 would have been concluded before the time it was requested to submit its respective proposals, in late 1989 (vol 99 p 10369) for contract 46 (and not 31 December 1990) and in the first quarter of 1991 for contract 51 (vol 110 p 11400) (and not 21 November 1991). The last one was never even concluded. Generally see the chronology attached.

## 111.

The earlier two agreements, in respect of contracts 46 and 51, were both entered into when the bidding process had been completed. In other words, there was no need for any pre-contract award services or information which Lahmeyer claims would "enable the best proposal to be put forward" – vol 23 p 2326 paragraph 6. They had already won. What remained was for Sole to sign the agreement. It was at that stage that Lahmeyer contracted with Bam to secure for them the contract in question.

## 112.

Lahmeyer's case is that:

112.1 The moment the Business Development Department learns of a project in a foreign country it goes to that country and identifies a potential representative (vol 13 p 1387/12 – 20). A verbal agreement is then concluded (vol 13 p 1387/20 – 24).

112.2 The terms of this "gentlemen's agreement" (vol 13 p 1387/25) are very specific (vol 13 p 1388/1 – 6; p 1384/17 – 22).

112.3 If Lahmeyer obtains the contract for the project a representative agreement is then entered into (vol 13 p 1386/10 – 13). This agreement "enters into force, in that way we set up maybe a payment schedule..." (vol 13 p 1384/21 – 22).

(That this is illogical is apparent from Lahmeyer's own documents at vol 147 p 15429 – 15439. These documents make it perfectly clear that there is no certainty regarding the payment schedule.)

## 113.

If this is to be believed (and the agent is engaged for lawful purposes) then the whole arrangement has two fundamental anomalies or contradictions.

113.1 The wording of the agreements is illogical in that it engages the agent "for purposes of obtaining the contract". But on this version by now Lahmeyer already has the contract. The agent has done his work. Therefore, if Lahmeyer's version is to make any sense the representative agreement would record that fact, perhaps in a preamble, namely that the agent had already obtained the contract for Lahmeyer. The actual wording of the representative agreements can only make sense if the representative is to obtain the contract in the sense that he must get the contract signed. This is indeed in effect what happened.

113.2 The emphasis of the representative agreement would then be on post-award services, like setting up office, clearing stuff through customs, identifying homes for staff etc. None of this is in the contract.

## 114.

Here it must also be remembered that these representative agreements must have been carefully prepared. They went backwards and forwards to Germany for checking and the like – vol 168 p 17468 paragraph 30; vol 16 p 1688/11 – 17. They were signed by senior Lahmeyer directors (vol 13 pp 1384/23 – 1385/6). In fact, according to Hecker, it is the president of Lahmeyer himself who signs representative agreements (vol 15 p 1571/16 – 27). There can therefore be no question of silly mistakes.

115.

These agreements are then not what they purport to be. The time when they are concluded in itself points to this.

116.

In the words of the agreements themselves, Lahmeyer was concluding the representative agreements and paying Bam at this late stage in order for him to secure the contracts. It did so knowing that what remained to be done to secure the contract was for Sole to sign. It did so knowing that Bam would not earn his fees unless Sole signed. Clearly then Lahmeyer was at least reckless as to what Bam would do with the money in order to secure the contracts. And this recklessness encompassed payments to Sole.

Lahmeyer's need for Bam's services and Bam performing such services:

117.

There may be a ring of truth to Hecker's evidence that when "you start up... a very important and big contract, in an unknown country you need a lot of assistance at the beginning" (vol 13 p 1358/24 to p 1359/1; see further vol 13 p 1371/6 onwards).

118.

At the same time however Hecker testified that you do not engage a representative if you do not need one, like for example in Chile where he was currently engaged because Lahmeyer already had a strong presence in Chile (vol 13 p 1365/22; p 1366/5). See also Hecker's evidence at vol 14 p 1466/1 – 21 where he testified that Lahmeyer never used Bam as Lahmeyer's representative in Lesotho in 1985 to secure a technical assistance contract with WEMIN "because we did not require from him any activity...". The same goes for the Lahmeyer contract with the JPTC in terms of which Dr Meyer was seconded by Lahmeyer to the Lesotho delegation of the JPTC. Compare this however with the Oxbow contract which Lahmeyer tried but failed to win. For this proposal they used Bam as agent even though Hecker admitted that they didn't need him (vol 13 pp 1402/24 – 1403/18, vol 16 pp 1642/7 – 1643/12). On this reasoning Lahmeyer would surely not have engaged Bam as representative at least for contracts 51 and 1009 because, after all, they already had a strong presence in Lesotho. And they would not have needed him for contract 46 either. They only left Lesotho in June 1987 (vol 14 p 1430/8). By this time they had been in Lesotho for some 4 years. They accordingly knew Lesotho.

119.

Justifying the use of an agent such as Bam, Lahmeyer tells the World Bank (vol 30 p 3102/17 - 18):

"Early access to comprehensive and reliable information is a precondition for success in a competitive field."

This will be achieved by using a clandestine agent (vol 30 p 3103 – old page 570):

“Consultants and contractors generally do not publicize their representatives. Normally, they are known only to those persons with whom they have official contacts.”

Bam’s role appears then from the following passage (again at vol 30 p 3102/18 – 21):

“Consultants also have to establish an atmosphere of confidence between themselves and clients, which is only possible through a representative who is himself already entrusted with this confidence through his personal standing with local clients and authorities.”

120.

If this is what an agent is all about, you would only engage him after a careful due diligence. You would certainly want to satisfy yourself as to his “pull” as well as the person whose power and influence he could draw on. By the time contract 46 came up Bam’s relationship with Sole would have been well known to Lahmeyer through their work on the Feasibility Study – see generally paragraphs 262 – 270 below.

121.

Hecker testified in great detail to “the categories of work which a representative is required to do” (vol 13 p 1366/13). He said there were essentially three such categories (i.e. periods), namely:

121.1 The period up to the signing of the contract (vol 13 pp 1366/15 – 1371/5).

121.2 The period from the signature of the contract until the completion of the services (vol 13 pp 1371/6 – 1372/23).

121.3 The period after closure of the contract (vol 13 p 1382/24).

Hecker described in great detail what the representative is expected to do at each stage.

122.

The problem with the representative agreements is that they do not provide for any of these services. Bam could for instance have refused to help with houses for staff, office accommodation, sourcing furniture and office equipment, closing down the office after contract completion, etc, because none of these are provided for in the services. Furthermore, in all Lahmeyer's proposals as well as in the contract documents for contract 46, 51 and 1009 Lahmeyer employed an office manager whose job it was to perform these very functions. See for instance Exhibit "J2" (vol 161 p 16728) and Exhibit "U" (vol 172 p 17897). This is dealt with in more detail below.

123.

In their evidence Putsoane, Mrs Mohapi, vol 12 p 1242/22 – 1243/13; Mrs Mathibeli, vol 12 p 1295/13 – 1297/5; and Charles Putsoane, vol 12 p 1262/21 – 1270/1, deal with the services Bam was supposed to have performed as set out in Schedule 1 to the respective agreements. Their evidence is that they never came to know of Bam performing any such services. Nor is there any reliable evidence such as documentary evidence of Bam having performed any of these services. Bearing in mind the various positions Putsoane held, including that of acting Chief Executive, the Court can accept that had Bam performed any such services Putsoane would certainly have come to know of them. For a long period of time Bam was not even in a position to perform them because he was in Botswana.

124.

Also Lahmeyer clearly did not need any of these services. This is dealt with in the following paragraphs.

The contract 46 representative agreement:

125.

Lahmeyer's need for the services listed in Schedule 1 to the agreement of 31 December 1990 and relating to contract 46 is dealt with by the witness Putsoane and the effect of his evidence is that these services were not needed at all. Largely they were also supplied by the LHDA in terms of their contractual obligations or otherwise. Furthermore this is precisely what an office manager/clerk would do. The services with commentary on each is as follows.

125.1 Keep LMC fully informed of all developments with respect to the services. See the evidence of Putsoane vol 4 p 370/3 – 14. Lahmeyer would know as well as anyone about developments regarding its services. Also, in terms of the contract between the LHDA and Lahmeyer there were mechanisms in place to deal with problems arising out of Lahmeyer's service – vol 102 p 10693 paragraphs 7.1 and 7.2. In any event, Bam would have had an interest as sub-consultant in performing this function.

- 125.2 Keep LMC informed of general conditions and development in the Kingdom of Lesotho which could affect LMC's interest in undertaking the services or which could have adversely affected LMC's ability to complete the services in an fully effective manner. See Putsoane vol 4 p 370/15 – 21. Lahmeyer was in Lesotho and would know about conditions and developments. They could ask the German embassy (vol 13 p 1399/17 – 25) with whom Lahmeyer had a good relationship (vol 13 p 1357/18 – 24), or their own Dr Meyer who was seconded by Lahmeyer to be a member of the JPTC. Again Bam as sub-consultant could have performed this service.
- 125.3 Inform and assist LMC in obtaining necessary local licences and registrations with the appropriate authorities and competent organisations in Lesotho. See the evidence of Putsoane vol 4 pp 370/22 – 371/8. This was also an LHDA obligation. See vol 102 pp 10688 – 10689 paragraph 5.1. See also vol 102 pp 10700 – 10701, paragraph 5.1. This is also precisely what an office manager would do.
- 125.4 When requested by LMC, collect appropriate documents and information to be forwarded to LMC. 5. Promote LMC's interests in the Kingdom of Lesotho by presenting brochures and other publicity materials to appropriate people. See Putsoane vol 4 p 371/15 – 23. Lahmeyer could also do this by simply sending a clerk. Here see also Emsmann's evidence vol 18 pp 1853/11 – 1854/13, where he said that all information was available and that they were entitled to it. Lahmeyer therefore could get it for itself. And Bam in terms of the exclusivity agreement would have had every reason to promote Lahmeyer. This is dealt with more fully below.
- 125.5 Assist LMC while seeking, negotiating and securing a contract in the Kingdom of Lesotho. This clearly was the real purpose for securing Bam's services, which makes the rest window dressing. Also, how was

he going to do this whilst sitting in Botswana? Here a mere telephone call to Sole would do it. This service is in any event precisely what he would have had an interest in doing in terms of the exclusivity agreement.

125.6 Inform and assist LMC in the conduit (sic) of business and other related affairs in the Kingdom of Lesotho to duly fulfil corresponding legal and fiscal requirements in the Kingdom of Lesotho as well as favourable local taxation. See Putsoane vol 4 p 372/1 – 14. The LHDA was also contractually obliged to help – vol 102 p 10688, paragraph 5.1. Also this is precisely what an office manager would do. Again Bam would have had incentive enough under the exclusivity agreement to perform this service.

125.7 Assist LMC in maintaining with all project related Authorities in Lesotho and in particular with LHDA a good business relationship and assist in expediting payments due to LMC as agreed and stipulated in the contract documents. See Putsoane p 372/15 – 21. See also vol 102 p 10689 r.w. p 10692 paragraph 6.2 (c) (I) – (III) about payments due to LMC. See also the evidence of Mrs Mathibeli vol 13 pp 1296 – 1297. The point about the exclusivity agreement also applies here.

126.

Any suggestion by Lahmeyer that it needed Bam for legitimate assistance for purposes of winning contract 46 should also be assessed in the light of what they say in their very own proposal for contract 46. This proposal was Exhibit "J1" and "J2" and is to be found in vols 158 – 165 of the record. This proposal was submitted to the LHDA on 7 February 1990 – vol 158 p 16424. It is very detailed and was carefully put together. There are a number of significant facts which are extraneous to the proposal itself which also bear on Lahmeyer's need for Bam's help.

127.

First of all, by Lahmeyer's own admission, it together with its joint venture partner (vol 158 p 16433) had "direct experience of the major considerations governing the Lesotho Highlands Water Project, having completed the feasibility study in 1986. This experience will be utilised to the fullest extent ..... and members of that original team will be available at all times to advise the design and construction supervision staff" – vol 158 p 16445. Here it will be remembered that the feasibility study was conducted between 1983 – 1986 – vol 158 p 16445.

128.

Secondly, when the proposal was put together Bam was engaged in Botswana by the Botswana Housing Corporation on a full-time basis. He commenced work there on 1 December 1988 and stayed there until 20 February 1991 – vol 31 p 3221 – vol 32 p 3353. That is the same day that contract 46 was signed – vol 34 p 3539. Also here it is to be noted that Lahmeyer mobilised under contract 46 on or about 18 September 1990 – vol 34 p 3536, i.e. 5 months before the contract was signed. Lahmeyer's first invoice in respect of contract 46 was submitted on 8 October 1990 – vol 83 p 8726. So the whole of contract 46 was established and Lahmeyer mobilised while Bam was in Botswana. They therefore never needed him for any of the start-up type services that Hecker testified about.

129.

Furthermore, in putting together the proposal Lahmeyer envisaged that "[t]he LMJV will work in association with the appointed Lesotho consultant as their local partner, who will provide the Basotho staff input (professional and non-professional) for the project. The present proposal contains staff nominated

by the ABC, a professional association” – vol 158 p 16432/24. With regard to the participation of ABC staff “the projected technical man months to be assigned to Basotho staff” would be even higher “than the minimum requirement of 20% given in the request for proposals” – vol 158 p 16438/42. Therefore having teamed up with Lahmeyer these Basotho’s (which obviously included Bam) would have had as much incentive to win the contract as Lahmeyer had. This is particularly true in view of Lahmeyer’s evidence about the exclusivity agreement concluded at Frankfurt airport. See further below. This being so a representative in the form of Bam would have been unnecessary, particularly since his representative agreement was signed months after Lahmeyer (and his own firm as sub-consultant) commenced work on contract 46.

130.

Next, despite specific reference to the names of specific ABC staff in the proposal there is no mention at all of Bam, not as representative or as a member of ABC staff. See for instance vol 159 p 16537.

131.

Finally, in the proposal for contract 46 itself Lahmeyer envisaged that “on receipt of the notice to proceed we shall establish the project manager’s office and our design office in Maseru. The team which initially mobilises will comprise:

- a. project manager
- b. chief design engineer, and design team engineers
- c. contracts, planning and programme, and quality assurance engineers
- d. office manager.”

Vol 159 p 16524.

What exactly this initial team would do is carefully set out. See vol 159 p 16524 onwards.

132.

Significantly, an office manager/project accountant, Richard Evans, being a man with "over 20 years experience as a chartered accountant and administration manager on large construction and development projects" – vol 160 p 16688, was envisaged. "He has particularly strong experience in the establishment of administration, financial and staff training programmes and procedures and has been responsible for the production of a standard manual on project procurement" – vol 160 p 16688. His particular responsibilities are carefully detailed – vol 161 p 16728. Most if not all of the services that Bam was supposed to have rendered under the representative agreement are covered. In addition he was to be "supported by a Basotho office administrator who will remain in the Maseru design office ..... who will be assigned full time to the project from shortly after mobilisation until the middle of month 71" – vol 161 p 16728, i.e. he would be employed for some 6 years. The office manager in turn was to report to the project manager. The project manager's responsibilities are summarised in vol 160 p 16691. Overall responsibility for everything fell to the project manager.

133.

The point is that every conceivable responsibility provided for in Bam's representative agreement was also the responsibility of the project manager alternatively the office manager. The office manager was in turn supported by an office administrator who was a Basotho. In the circumstances none of the services provided for in the representative agreements would have been required of Bam.

The contract 51 representative agreement:

134.

The position with regard to the services in Schedule 1 under the representative agreement of 24 November 1991 relating to contract 51 is the following. Lahmeyer was largely in the same position as under contract 46, except of course that the need for an agent was now even less than before because it had been working in Lesotho and with the LHDA under contract 46. Again there is no reliable evidence that Bam performed any of these services. The evidence of Putsoane referred to in the context of contract 46 also applies to this contract.

134.1 Keep LMC fully informed of all development with respect to the services. As with contract 46 Lahmeyer would know as well as anyone about the development of its services, particularly where they had been in Lesotho under contract 46. Also this contract provided for the amicable settlement of disputes – vol 112 p 11609 - 11610. See also vol 112 p 11632 paragraph 45.2. And Bam as sub-consultant would have had incentive enough to perform this service.

134.2 Keep LMC informed of general conditions and development in the Kingdom of Lesotho which could affect LMC's interest in undertaking the services or which could have adversely affect LMC's ability to complete the services in an fully effective manner. Once again, Lahmeyer was there and had been for some time and would know about conditions and developments or it could ask the German embassy or Dr Meyer. Here one also has the obligation of the LHDA to supply information and documents – vol 111 p 11582 paragraph 8.2. And Bam as sub-consultant could also do this.

- 134.3 Inform and assist LMC in obtaining necessary local licences and registrations with the appropriate authorities and competent organisations in Lesotho. This was also an LHDA obligation as it was under contract 46. See vol 111 p 11582 paragraph 9. Lahmeyer also had an office manager for contract 51 – see Exhibit “U”.
- 134.4 When requested by LMC, collect appropriate documents and information to be forwarded to LMC. 98.5 Promote LMC’s interests in the Kingdom of Lesotho by presenting brochures and other publicity materials to appropriate people. Also here the LHDA was obliged to supply documents and information. See vol 111 p 11582 paragraph 8.1. Also here it could simply send a clerk to the LHDA to obtain documents. Here see Emsmann’s evidence vol 18 pp 1853/11 – 1854/13.
- 134.5 Assist LMC while seeking, negotiating and securing a contract in the Kingdom of Lesotho. As pointed out under contract 46, this was the real point of the contract. Once it is found that the rest of the services were not really required or rendered then this again emphasises the point that all this was no more than window dressing. Also, and as with contract 46, at the time of signing the agreement all that could be done (legitimately) in this regard had been done.
- 134.6 Assist LMC in seeking amendments to the Contract for additional numeration. This relates to variation orders. Examples can be found at vol 89 p 9334 – 9528. This duty imposed upon Bam clashed with Lahmeyer’s duties towards the LHDA. See vol 111 p 11583 paragraph 10.4, p 11585 paragraph 12. See also vol 112 p 11595 paragraph 26. The very notion that Lahmeyer employs a third party, who moreover is its sub-consultant, to obtain additional work for it where the sole criteria for such work is the need for it, which need has to be determined between Lahmeyer and the LHDA, smacks of a conflict of

interest and indeed of corruption. See here generally the evidence of Putsoane at vol 4 pp 374 – 375 and Charles Putsoane, vol 12 p 1265/9 – 1267/15.

134.7 Inform and assist LMC in the conduit (sic) of business and other related affairs in the Kingdom of Lesotho to duly fulfil corresponding legal and fiscal requirements in the Kingdom of Lesotho as well as favourable local taxation. Also here the LHDA was obliged to help, i.e. with local laws – vol 111 p 11582 paragraph 9. Taxes are also catered for in the contract – vol 112 p 11629 paragraph 35.27. The reimbursement of customs duties is also catered for in vol 112 p 11630 paragraph 35.28. Again all this would be attended to by an office manager – see Exhibit “U2”.

134.8 Assist LMC in maintaining with all project related Authorities in Lesotho and in particular with LHDA a good business relationship and assist in expediting payments due to LMC as agreed and stipulated in the contract documents. Here payments are provided for in the contract – vol 112 pp 11601 – 11602, article 35, r.w. p 11604, which caters for interest in the case of payments being delayed.

135.

Similar considerations as with contract 46 arise out of Lahmeyer’s proposal for contract 51. This proposal was Exhibit “E12” in the Court a quo and is to be found in vols 61 – 68 of the record. This proposal was submitted to the LHDA on or about 31 May 1991 – vol 61 p 6363. Again it is a very detailed and carefully put together piece of work.

136.

At the time of submission of this proposal for contract 51 Lahmeyer was "currently involved in the delivery tunnels south" – vol 61 p 6363, i.e. contract 46. For this reason, Lahmeyer proposed "a combined management scheme" for both contracts 46 and 51 – vol 61 p 6363. Here it will be recalled that Lahmeyer had by then mobilised under contract 46 some 8 months earlier on 18 September 1990 – vol 34 p 3536.

137.

Also by this time Bam had left Botswana. Now for contract 51 it was proposed that Bam would be part of the "consortium management" – vol 63 p 6611. Arguably it was envisaged that he would be more senior than even the project manager – vol 62 p 6536 and p 6542 – 6544. It was envisaged that Bam would be responsible for managing the sub-consultants. "It is expected Mr Bam will be influential in ensuring the proper performance of the LMC/ABCC sub-consultancy agreement ....." – vol 62 p 6544. Drs Zimmerman and Emsmann were also part of the 5 man consortium management team – vol 63 p 6611. Clearly then they must have known Bam well.

138.

The proposal for contract 51 also envisaged "a much higher participation ..... from ACP countries than requested in the RFP. The participation reaches almost 50% in man months and we have given clear preference to Basotho staff." – vol 61 p 6364. By the time the proposal for contract 51 was submitted the members of ABCC – here see vol 62 p 6524 – had committed themselves to Lahmeyer – vol 62 p 6516 – 6525. This included Lescon and through it Bam – vol 62 p 6519, who was now contractually obliged to support Lahmeyer's proposal and no-one else's. This was on 3 May 1991.

139.

Having now teamed up with Lahmeyer not only as part of ABCC but also as part of its management team, Bam would have had as much incentive to win contract 51 as Lahmeyer. Also he was obligated to Lahmeyer under the exclusivity agreement. To now also engage Bam to get Lahmeyer the contract in terms of a very expensive representative agreement simply did not make commercial sense.

140.

Also, the representative agreement with Bam was only signed on 24 November 1991. By this date Lahmeyer had, on 13 September 1991, already received instructions to mobilise under contract 51 – vol 131 p 13609. And it had, on 13 October 1991, commenced work under contract 51 – vol 139 p 14564. Also, by the date of signature of the representative agreement, Lahmeyer had already submitted two invoices for payment, being the invoices for the initial payment – vol 89 p 9318 – 9323 and vol 131 p 13609 and invoice no 2 for October 1991 – vol 89 p 9325. (Also by this time Bam was renting Mr Sole's house – vol 76 p 7979.)

141.

As at 24 November 1991 Lahmeyer could never have needed Bam, as agent, to help it lawfully obtain contract 51. Lahmeyer would have been entitled to expect that help from Mr Bam as part of its management team (and of course as its sub-consultant and also under the exclusivity agreement).

142.

Nor would Lahmeyer have needed Bam for any of the other services provided for in the representative agreement. It had been working under contract 46 since September 1990 already – vol 34 p 3536. It was only 6 months later, in March 1991 – vol 137 p 14275, that the RFP for contract 51 was issued. Contract 46 and 51 were therefore running in parallel. Assuming for a moment the legitimacy of the contract 46 representative agreement, why pay Bam to do the same under contract 51?

143.

The proposal for contract 51 once again envisaged an office manager – vol 67 p 7080. Here Mr Gambrill – a man with “many years experience as an office manager/accountant [who] is currently filling this role on [contract 46]” – vol 67 p 7081, was envisaged. He in turn, it was proposed, would be supported by a Basotho office administrator – vol 67 p 7085, who was an employee of Lescon – vol 67 p 7088.

144.

Yet Lahmeyer insists, as it did when first confronted in 1999 with suggestions of bribery, that these payments were for “professional services rendered to us in Lesotho” – vol 34 p 3600. See also Emsmann’s unsatisfactory evidence about this at vol 19 pp 1958/26 – 1961/24. Yet, and not surprisingly, no documentary evidence in support was ever produced.

The contract 1009 representative agreement:

145.

Against this background, when contract 1009 came along Lahmeyer had been in Lesotho for years. The RFP prohibited contact with ABCC of which Bam was its head. Yet Lahmeyer engaged him. This in circumstances where they, on their version, hardly used him (see Lahmeyer's heads paragraph 204 p 140 r.w. paragraph 204.8 p 144 and paragraph 213.6 p 153 – see also Emsmann's evidence where he said of Bam's services for contract 1009 "there was only little involvement", vol 17 p 1791/16 – 17) and "the request of Mr Bam with his fee was too high" – vol 19, p 1944/2 – 8.

146.

As to the services stipulated in Schedule 1 to the undated and unsigned document (there is no evidence that these are in fact the terms) in 1995 relating to contract 1009, once again the position is largely the same as with contact 46 and 51, but for the sake of completeness the following. (Contract 1009 can be found at vol 114 pp 11791 onwards).

146.1 Keep LMC fully informed of all developments with respect to the services. Once again LMC renders the services and would therefore know. Alternatively, it could do its own intelligence or, for that matter, ask Dr Meyer.

146.2 Keep LMC informed of general conditions and development in the Kingdom of Lesotho which could affect LMC's interest in undertaking the services or which could have adversely affect LMC's ability to complete the services in an fully effective manner. By now Lahmeyer has been in Lesotho continuously for some 5 years.

- 146.3 Inform and assist LMC in obtaining necessary local licences and registrations with the appropriate authorities and competent organisations in Lesotho. Also with this contract this was an LHDA obligation. See vol 114 p 11834 paragraph 5.1. In any event this is what an office manager would do.
- 146.4 When requested by LMC, collect appropriate documents and information to be forwarded to LMC. This also fell in the ambit of assistance to be rendered by the LHDA. See vol 114 p 11818 paragraph 5.4. Again, this is what an office manager would do. Even a clerk could do it.
- 146.5 Promote LMC's interests in the Kingdom of Lesotho by presenting brochures and other publicity materials to appropriate people. The same applies here as it did with regard to contracts 46 and 51. Also, this is what an office manager would do.
- 146.6 Promote LMC's interest in having LHDA taking up the option to continue the services in Stage 2. Lahmeyer could surely do this for itself. In terms of the contract it had its own "authorised representative" dealing with the LHDA for purposes of this contract. This person happened to be Dr J Zimmermann. See vol 114 pp 11829 – 11830. Why would Lahmeyer in addition to Dr Zimmermann need Bam to help it get contract 1009 extended? And how was he going to do it? See also vol 114 p 11810 paragraph 3.1.1. which obliges Lahmeyer to act as faithful advisor to the LHDA and safeguard the LHDA's interests.
- 146.7 Assist LMC while seeking, negotiating and securing a contract in the Kingdom of Lesotho. Bam was part of ABCC and in terms of the letter of invitation to consultants Lahmeyer was specifically prohibited from communicating with ABCC in regard to their proposals for this contract.

This prohibition was imposed “so that all proposals are based on comparable information” – vol 148 p 15448.

146.8 Inform and assist LMC in the conducting business and other related affairs in the Kingdom of Lesotho to duly fulfil corresponding legal and fiscal requirements in the Kingdom of Lesotho and to secure local taxation advantages. See vol 114 p 11818 paragraph 5.1 which also obliges the LHDA in terms of this contract to assist. See also vol 114 p 11834 paragraph 5.1 which deals with assistance relating to visas, residents permits, etc. This is also what an office manager would do.

146.9 Assist LMC in maintaining with all project related Authorities in Lesotho, and, in particular, with LHDA and assist in expediting payments due to LMC as agreed and stipulated in the contract documents. Once again Lahmeyer could do all this for itself. In any event, as with the other contracts, this was a contractual obligation resting on the LHDA, namely to make prompt payments. Vol 114 pp 11821 – 11822 paragraph 6.2.

147.

There is also no reliable evidence such as documentary evidence that Lahmeyer rendered any of these services. This is not surprising because he simply was not needed.

What Bam did for Lahmeyer – the defence version:

*148.*

The issue of what Bam is alleged to have done for Lahmeyer is exhaustively dealt with at pages 140 – 165 of Lahmeyer's heads. Here one finds repeated references to so-called exclusivity agreements with Bam. This is something that came up for the first time during the defence evidence. These were not mentioned in the plea explanation, Exhibit "A", vol 23 pp 2322 – 2327, which sought to explain the services by and payments to Bam only in terms of the three representative agreements. Now the services (but not the payments) are explained in terms of the exclusivity agreements. The reference to these agreements and the reliance thereon is then not understood.

*149.*

The first reference to an oral agreement between Lahmeyer and Bam was testified to by Hecker. His evidence was to the effect that it was agreed by him and Bam that Bam would render services without pay on the understanding that he would eventually be engaged as a representative for remuneration if and when Lahmeyer won another contract. This was firmed up in a meeting in March 1987 when Dr Spiess came to Lesotho. (All this is dealt with in the analysis of Hecker's evidence herein – see paragraphs 213 and following below.) This 1987 agreement with Bam was apparently still extant in 1990 when contract 46 was being established. Vol 19 pp 1940/9 – 1942/2.

*150.*

In summary Lahmeyer's version as set out in its heads at pp 140 onwards appears to be as follows:

150.1 In 1986 – 1987 already for purposes of Lahmeyer’s proposal for LHDA contracts 12 and 15 Bam concluded an exclusivity agreement with Lahmeyer – nothing in writing – in terms of which he would reserve himself/Lescon for Lahmeyer’s proposal alone, i.e. Lescon would only be available to Lahmeyer for purposes of the proposals to be submitted by all consultants for contracts 12 and 15. The other foreign consultants, like the French for instance, proposing for these contracts would not be able to include Lescon as part of their proposals. In terms of this exclusivity agreement he would refuse to co-operate with any of them.

150.2 Despite this exclusivity agreement Lahmeyer lost contracts 12 and 15 to the French and “Lescon was financially severely prejudiced by [this]” see Lahmeyer’s heads page 141. See also vol 168 p 17471, paragraph 35.

150.3 Notwithstanding, when contract 46 was rumoured to be in the offing – but before the RFP was issued (vol 19/4 – 20 r.w. vol 99 p 10369) Lahmeyer met Bam at the Frankfurt airport as Bam passed through en route from one international destination to another where two main issues were dealt with namely:

150.4 Bam again agreed to reserve Lescon exclusively for Lahmeyer’s proposal – again nothing in writing, not even a follow up confirmatory letter; and

150.5 Bam promised to find out for Lahmeyer if it would be worth Lahmeyer’s trouble to submit a proposal at all.

Note: This meeting did not include any discussions involving using Bam as a representative – vol 168 p 17470, paragraphs 34 – 38; vol 16 p 1700/10 – 1704/14; vol 19 p 1940/9 – 1942/2.

151.

Comment on paragraphs 150 1. – 150 5.

1. Firstly, as to 150.5 above, why Bam would be engaged for this purpose is curious. At the time he was employed by the Botswana Housing Corporation (vol 31 p 3221). A far better person to gauge this would have been Dr Meyer, Lahmeyer's own man in Lesotho seconded to the JPTC. This is particularly so in view of what Emsmann himself said about the JPTC in this context, namely that it "had considerable influence" (vol 168 p 17470 paragraph 34). And this is also something they could in any event do for themselves. After all, by now (1989) the likes of Hecker and Emsmann knew for instance Sole, Mochebelele and Molapo well from the feasibility study days. And they were on Lahmeyer's side – vol 168 p 17453 paragraph 7. And Emsmann testified, surprisingly, that he himself established the mood of the South Africans towards Lahmeyer (they were apparently opposed to Lahmeyer) – vol 16 p 1703/9 – 1704/1. He himself also visited the LHDA. Vol 16 p 1708/1 – 12.
2. As to 150.4 above the Crown, for obvious reasons, could lead no evidence to gainsay what allegedly happened at the Frankfurt airport. On the probabilities it is unlikely that Bam would have agreed to the exclusivity agreement without more because of the financially severe prejudice that resulted from the previous exclusivity agreement, i.e. the one for contracts 12 and 15. See here also Emsmann's evidence – vol 16 pp 1701/24 – 1702/7. If Bam did indeed enter into an exclusivity agreement – which is unlikely in the terms testified to for the reason mentioned – he would only have done so;
  - a. If he could be sure that Lahmeyer with Lescon as sub-consultant would win contract 46; and

- b. If he was promised something in exchange therefore. Here Lahmeyer says he wasn't.

If bribery was also for instance discussed and agreed then everything makes sense. The stop over at Frankfurt would have been worth it, and so too the exclusivity agreement. Bribery would almost certainly ensure that Lahmeyer with Lescon as sub consultant would win contract 46 and Bam stood to get something in exchange, namely his cut of the bribe. The exclusivity agreement without more would have made no sense at all in circumstances where Bam anyway, through Lescon, was going to get his slice of contract 46 as sub-consultant as part of the 20% local content component of contract 46. Put differently, whoever the foreign consultant was that won contract 46, Lescon was going to be involved as part of ABC. The exclusivity agreement by itself therefore had no benefit or advantage for Bam. It would also have been too risky. See further in this regard paragraphs 282 – 292 below.

*152.*

After the meeting at Frankfurt airport Bam (and Emsmann) then ascertained that there would be no bias against Lahmeyer if it participated in the bidding process and after the RFP was issued, Bam assisted with "technical information" and "particulars of the local component of Lesotho personnel such as their CV's, their experience, their skills and their rate of remuneration" – see paragraph 204.2 of Lahmeyer's heads. Vol 16 p 1704/15 onwards.

153.

Comment on paragraph 152

Again the Crown for obvious reasons could not lead evidence to gainsay this. Here, concerning the technical information that Bam is alleged to have supplied, Emsmann pointed to nothing except the draft report relating to access roads (vol 148 p 15509 – vol 149 p 15592) that Bam is alleged to have supplied. Emsmann's evidence is extremely vague on this issue – vol 16 p 1708/15. And this draft report relating to access roads was in any event supplied in the context of preparing proposals for contracts 12 and 15, not contract 46 – see paragraph 182 below. In a word, there is not a document that Lahmeyer can point to which supports Emsmann's evidence. See generally in this regard paragraphs 176 - 189 of these heads. In the Crown's submission, the very absence of documentation tending to show that Bam furnished technical information in itself shows that Bam never furnished such information. Moreover, everything that Lahmeyer might have required was either furnished by the LHDA itself (here Emsmann admitted that the LHDA "couriered a complete set of the tender documents as they were received by the contractor ....." vol 16 p 1709/1 – 13 – contract 46 involved supervising the contractor – vol 102 p 10661), or the documentation was available from the LHDA. Emsmann admitted this too – vol 16 p 1710/8 – 15. This aspect is also dealt with above at paragraphs 125 to 146. So it is difficult to accept that Bam was needed for technical information.

154.

As to the particulars of the local component of the Lesotho personnel, it would not be surprising in the least if this information was obtained with assistance from Bam. This is not to say that Lahmeyer could not get this information itself. It certainly could. Vol 11 p 1147/16 – 18. But if it was provided by Bam, this would not be surprising because, if Lahmeyer is to be

believed, Bam had stuck out his neck under the exclusivity agreement. He therefore had every reason to co-operate. The representative agreement, on Lahmeyer's evidence, had not even been discussed yet, except loosely with Spies in 1987 (vol 19 p 1940/9 – 1942/1, vol 168 p 17470 paragraphs 34 – 38, vol 16 p 1700/10 – 1704/14), i.e. at least 2 years before.

*155.*

And then Bam is alleged to have also furnished Emsmann with the final figures of the engineer's estimate. See paragraph 204.3 of Lahmeyer's heads.

*156.*

Comment on paragraph 155

Now this information would not have been available to Lahmeyer. Also it would have been valuable. Lahmeyer's case is that Bam supplied this information but Lahmeyer never asked about where it came from. This was while Bam was working full time in Botswana. The Crown accepts that Lahmeyer probably got this information from Bam. But certainly not for free. And certainly not before agreement had been reached on inter alia how much it would cost and how Bam would be paid for it. Lahmeyer would have the Court believe that this information, which was supplied before the proposal was submitted and so that the proposal could be prepared, was supplied by Bam without payment and without the details of a representative agreement having been ironed out. For Bam to have agreed to this would have been naïve of him. What if Lahmeyer subsequently won the contract and simply refused to pay, or a dispute arose concerning the amount of the representative fee, for instance whether it be 3% or 5%, the "usual range" – see vol 168 p 17457 paragraph 15.2. This is exactly what happened with contract 1009 where Lahmeyer was not prepared to pay what Bam was demanding. This was Emsmann's evidence – vol 19 p 1944/2 – 14. But all

this once again begs the question if what Bam did he did under an exclusivity agreement because under such an agreement, according to Lahmeyer, no fees were payable.

*157.*

Before dealing with what Bam is alleged to have done for Lahmeyer, under contracts 51 and 1009, it is necessary to deal with the heading in Lahmeyer's heads entitled – Excursus – Basotho component.

*158.*

Here Lahmeyer tries to elevate this aspect into something that it is not, vis "a crucial aspect of the case" – see paragraph 205 of Lahmeyer's heads. It is not the Basotho component in any proposal that is crucial. This was a given namely 20% or 30% as the case may be. What is crucial is evidence of Bam having done work as representative for Lahmeyer. Of this work, other than the mere vague sayso of Emsmann, there is no actual evidence.

*159.*

It is stressed over and over again in the Lahmeyer's heads that to include a good Basotho component in your proposal is a very good thing. This the Crown recognizes. Here it is axiomatic that the more impressive the Basotho component in your proposal the better your proposal will be received.

*160.*

But as to what Bam actually did, there is no reliable evidence. Lahmeyer says that Bam provided; "their experience, their skills and their rate of remuneration ..." – Lahmeyer's heads p 142 paragraph 204.2. See also p 150 paragraph 212.1. This is elevated to something extremely important, difficult

to do and worth lots of money. But even if Bam did provide this information, it is really a very simple task. The engineering community in Lesotho was small. This was also true of the Basotho technical community. So to collect the relevant information would have been no big deal. It was just a matter of obtaining the relevant CV's. This was also what Putsoane said – vol 11 p 1147/16 – 18. Furthermore, many if not all of these people would have been known to Lahmeyer from its days when it worked on the feasibility study. Lahmeyer virtually says as much – paragraphs 96 and 99 of its heads. Also again Dr Meyer quite properly could have helped Lahmeyer at least with the contact particulars of the local technical community. So this aspect was no major obstacle for Lahmeyer. It certainly did not justify the money paid to Bam.

*161.*

It is true that other foreign consultants who were interested in proposing for contract 46 asked questions about meeting the local content requirement at the pre-proposal meeting – vol 80 p 8443. However these are exaggerated in paragraph 211.1 of Lahmeyer's heads. It is also true that Putsoane testified that "either in contract 46 or 51" ... the proposers ... in their proposals "they actually commented that they were not able to get any co-operation out of ABC" – vol 11 p 1038/20 – 22. Compare this with vol 88 p 9243/11 – 18 where the evaluation committee for contract 51 speaks about a proposer being "unable to obtain the necessary information from a local consulting firm ...".

Whatever the position, the Crown accepts that there was an unwillingness to co-operate with other proposers and that this was presumably in terms of an exclusivity agreement between Lahmeyer and Bam and/or ABC. But the Crown does not accept that it was in terms of the exclusivity agreement that Lahmeyer testified about. Instead it would have been on the basis of a promise of something in exchange. Bam would never have agreed to the

exclusivity agreement without more in the circumstances. The exclusivity agreement on its own had not worked out for him under contracts 12 and 15 and there was no guarantee (unless bribery was also included) that it would work for contract 46.

*162.*

So on the strength of the exclusivity agreement without more it is improbable in the extreme that Bam would have collected all the personnel information that Lahmeyer used to prepare its proposal. However, if this is indeed what Bam did then he would have done so not as representative but by reason of having stuck his neck out under the exclusivity agreement. If the exclusivity agreement did not pay off, he might be out of work for contract 46 as he was for contracts 12 and 15.

*163.*

In respect of contract 51, Lahmeyer alleges that Bam rendered similar services to those rendered for contract 46. These are dealt with in paragraphs 204.5, 204.6 and 204.7. They are:

- 163.1 under the exclusivity agreement (note, not the representative agreement) he furnished Lahmeyer with names, CV's, skills and rates for the Basotho input; and
- 163.2 he furnished Lahmeyer with technical information;
- 163.3 he obtained the bulk numbers relating to the engineering estimate in respect of contract 51.

*164.*

In order to assess the truthfulness of these assertions, it is necessary to consider them in the historical context.

*165.*

Lahmeyer was invited to propose for contract 51 on 21<sup>st</sup> March 1991 (vol 111 p 11568, vol 88 p 9248, vol 110 p 11401, vol 137 p 14274), the notice to pre-qualify having gone out some four months earlier on 7<sup>th</sup> December 1990 (vol 110 p 11401).

*166.*

By the time the RFP for contract 51 went out on 21<sup>st</sup> March 1991, Lahmeyer was already working in Lesotho on contract 46, the authority to mobilize having been given by LHDA on 18<sup>th</sup> September 1990 – vol 34 p 3536. See also generally, the Crown's chronology annexed to these heads.

*167.*

Lahmeyer's proposal for contract 51 was submitted on 31<sup>st</sup> May 1991 – vol 111 p 11568; vol 88 p 9248.

*168.*

So Lahmeyer's contentions about the help Bam is alleged to have given them in respect of contract 51, help which cost M1 249 263, must be evaluated against the back drop of the fact that Lahmeyer was already working in Lesotho under contract 46 with a local Basotho component as sub-contractor that they were by now familiar with. They had been working with them for some six months. Lahmeyer concluded its sub-consultancy agreement with Bam on behalf of ABCC during or about November 1990 – vol 156 p 16286 r.w. 16284. Lahmeyer therefore would not have needed Bam to provide CV's,

skills, rates etc. As to ABCC rates see here again vol 156 p 16298. These would have been known and in any event have been available already from the contract 46 proposal. To the extent that still further CV's etc may have been required, Lahmeyer's office manager could have procured these for free instead of at a cost of M1 249 000.

*169.*

Nor would Lahmeyer need technical information. They were themselves after all on the rock face. What is more there is no documentary evidence in this regard. Only the bald assertion by Emsmann that such technical information was supplied. And even if Lahmeyer did need further technical information, this is something that Lahmeyer legitimately could have acquired for itself.

*170.*

And then regarding the bulk numbers relating to the engineer's estimate, these would also already be known to Lahmeyer. The figures had been remitted to the JPTC (where Dr Meyer worked) in October 1989 already, along with the cost estimates for contracts 46 and 45 – see vol 104 p 10889. The figures for contract 51 were prepared at the same time as those for contracts 46 and 45. They were also then available at the same time that the contract 46 figures were available. And even if they were not but were instead furnished by Bam, this would have been irregular. See in this regard the analysis of Emsmann's evidence herein – paragraphs 220 – 230 below. And this would certainly not have been supplied for free under the exclusivity agreement.

*171.*

In context then, it is simply not believable that Bam rendered any services in respect of contract 51 as alleged. Not only would Lahmeyer not have needed

any of those services but also all the information was already available to Lahmeyer.

*172.*

Lastly and at the risk of repetition, the following. The representative agreement was only signed once everything had been done and all that was left was for Sole to sign the contract. Also, all these services were rendered under the exclusivity agreement in respect of which Bam was not paid, so what is the relevance of all this if the real issue is whether the payments which according to Lahmeyer were made under the representative agreements were justified in terms of services actually rendered under the exclusivity agreement?

*173.*

Only in the second part of the argument on this topic do the Lahmeyer's heads touch upon services allegedly rendered under the representative agreements. See paragraph 216 p 156 onwards. Even here assistance in the negotiations would presumably have been received under the exclusivity agreement because the representative agreement had not been concluded yet or even discussed.

*174.*

In respect of contract 1009 the assertions as to what Bam is alleged to have done must again be assessed in their proper historical context. Lahmeyer was invited to submit its proposal for contract 1009 on 8<sup>th</sup> June 1994. Here the RFP was issued inclusive of the ABCC pre-qualification document – vol 121 p 12664; vol 93 p 9753; vol 114 p 11793; vol 118 p 12236 – the ABCC pre-qualification document having been submitted in March 1994 already – vol 140 p 14565 at 14566. By June 1994, Lahmeyer had been in Lesotho

working under contract 46 and later contract 51 since September 1990 already. So when Lahmeyer says it needed and received Bam's help and advice with regard to suitable personnel, CV's, rates etc, this is simply incredible. Lahmeyer had been in Lesotho for four years by then working with many local technical staff as their sub-consultants. Lahmeyer itself then would have known who was suitable and what their capabilities were as well as their rates of remuneration. What these were was in any event apparent from the ABCC pre-qualification document which accompanied the RFP. Also the pre-qualification document prohibited Lahmeyer from contacting Bam in this regard. Yet apparently they asked him for information which they in any event already had. In a word then Lahmeyer's version simply cannot be true. It is a fabrication in an effort to try to show that Bam actually did some work for the money he was paid.

*175.*

Concerning the bulk number of the engineer's estimate this was available at least as early as 24<sup>th</sup> April 1994 already. See vol 92 p 9653. It is possible that this might have been obtained for Lahmeyer by Bam. But the Crown again does not accept that this was obtained legitimately and more particularly for free. Rather it was obtained in a bribery context involving Lahmeyer. See in this regard Zimmerman's letter to Spiess dated 18<sup>th</sup> May 1994 (i.e. a few weeks before the RFP for contract 1009/1024 was issued on 8<sup>th</sup> June 1994 – vol 121 p 12664; vol 93 p 9753) concerning the payments to ACPM in respect of contract 46 and 51 in which Zimmerman specifically requests Spiess ... "We kindly ask you to discuss with the respective persons " .... the actual fees payable to ACPM – vol 147 p 15429. (If the fee could indeed be varied, what was the point of the agreement?) The inference is unavoidable that here, just before the RFP for contract 1009 went out, Bam and Lahmeyer were sorting out how much Bam and Sole were still due under the contracts 46 and 51 representative agreements. And notwithstanding

having paid the ceiling amounts due (see also here Emsmann's evidence, vol 16 p 1698/23 onwards), Lahmeyer was still prepared to pay more!

Documentary evidence showing the relationship between Lahmeyer and Bam:

176.

Among the thousands of pages of documentary evidence placed before the Court a quo, much of it put up by the defence, Lahmeyer could point to not a single document that convincingly points to Bam ever having acted as Lahmeyer's lawful representative. (During the trial the parties agreed that any document could be placed before the Court without formal proof. See also the pre-trial agreement, vol 1 p 98.)

177.

According to the defence witnesses Bam acted as Lahmeyer's agent from August 1983 (vol 13 p 1392/2 – 7) until at least April 1997 when payments to Bam were suspended because, so Lahmeyer alleges, it became suspicious of his relationship with Mr Sole (vol 17 pp 1794/20 – 1795/20). (It just so happened that this suspension of the payments also coincided with the dismissal of Mr Sole's Court challenge against his dismissal – vol 17 p 1794/22 – 1795/20 and vol 75 p 7928).

178.

Over these 14 years Bam is alleged to have rendered extensive and valuable representative services to Lahmeyer. Here when he was engaged in 1983,

after Mr Montsi “disappeared” (vol 13 p 1359/8), he did the following: He cleared stuff through customs, he found housing for LMC staff, he found schools for children, he found office space, he acquired quotes for office equipment and motor vehicles, he assisted with visas, work permits, drivers licences and so on. See vol 13 p 1392/25 onwards. All this he did for free (vol 14 pp 1500/25 – 1501/4), even though a contingency fund existed (vol 15 p 1609/3 – 11). He also closed down Lahmeyer’s office in June 1987 after the feasibility study (vol 15 pp 1551/8 – 1552/6). Thereafter for contracts 46, 51 and 1009 he obtained information and so on, although for contract 1009 “there was only little involvement” (vol 17 p 1791/16 – 17).

179.

Despite all this work over all this time there is not an invoice or a letter or a fax or a telex or a claim for disbursements or a memorandum or a report or anything else tending to show that Bam actually worked qua representative. When the Court raised this issue with Hecker he went so far as to say that Bam never generated any documents in his capacity as representative (vol 13 p 1393/12 – 26). Emsmann’s evidence on the subject is equally unconvincing – vol 19 pp 1985/19 – 1987/26.

180.

The best Lahmeyer could do was to point to two LHDA documents which show that Bam was present at two meetings, one in 1987 for contracts 12 and 15 (vol 33 p 3504 – 3513 and vol 14 p 1420/11 – 1423/24), and one in 1991 for contract 51 (vol 152 p 15849; vol 16 p 1674/17 – 1676/24).

181.

These documents, at best for Lahmeyer, show that Bam on both occasions was present as part of a LMC delegation and not that Bam was there in his

capacity as representative pursuant to a representative agreement which had not even as yet been concluded. They are also LHDA documents, having been obtained by those representing Lahmeyer from LHDA records for purposes of the trial. See further in this regard paragraph 196.10 below as well as defence counsel's concession at vol 17 pp 1788/6 – 1789/7.

182.

The other document that Lahmeyer relies on is a draft report relating to access roads (vol 148, pp 15509 – vol 149 p 15592) which was also only produced for the first time late in the trial. This document relates to the water transfer and hydropower contracts (vol 148 p 15510), i.e. contracts 12 and 15. These are the contracts that Lahmeyer lost to the French before Bam was even engaged as a representative. Emsmann's evidence was that he received them from Bam through Hecker for purposes of preparing the proposals for contracts 12 and 15 – see vol 168 p 17453 paragraphs 9 and 10. The document is therefore of no relevance to contracts 46, 51 and 1009 and reliance on it as evidence of the kind of work Bam did for Lahmeyer is a real makeweight.

183.

Emsmann's evidence about this engineering report is also thoroughly unconvincing (vol 16 pp 1648/2 – 1650/26). He says he received it in response to a request by him while preparing a proposal for contracts 12 and 15. The document itself is obviously a draft. Bam himself on the document says it needs thorough editing. For purposes of preparing a "winning proposal" it is inconceivable that an expert like Emsmann would rely on a draft such as the one in question. Instead he would have rather used a final document. The report in question then is just another makeweight to try to

create the impression that Bam did indeed do some representative work for Lahmeyer.

184.

Also, if it was furnished by Bam he would probably have provided it as sub-consultant or in terms of the exclusivity agreement – vol 14 p 1412/24 – 1415/26; vol 13 p 1338/2 – 10; vol 19 pp 1945/23 – 1946/20; vol 19 pp 1955/24 – 1958/9. After all, a representative agreement had not yet even been entered into. This only came in March 1987, i.e. well after the proposal had been submitted in January 1987 – vol 33 p 3504.

185.

According to the defence witnesses, except for the witness Muller and maybe also Emsmann (vol 19 pp 1986/13 – 1987/19; but see vol 168 p 17456 paragraph 13), as to which see below, documents had to be kept for revenue purposes for 6 years after the completion of a contract. According to Mrs Mathibeli's spreadsheets contracts 46, 51 and 1009 were still ongoing. They had not been finalised (vol 33 pp 3432 – 3445, vol 12 pp 1288/2 – 1291/20). This is also apparent from Lahmeyer's own correspondence with the LHDA after the present corruption scandal broke. This correspondence points to Lahmeyer still being owed money under at least two of the contracts (vol 34 p 3600, pp 3606 – 3608). This is evident from the fact that in this correspondence Lahmeyer is demanding payment.

186.

So the contracts were not finalised. In terms of the 6 year rule documentation relevant to the representative agreements should therefore still be available. In fact Lahmeyer on 26 August 1999 in so many words said documentation was available (vol 34 p 3600, paragraph 3). This is even more

so in view of Dr Emsmann's hearsay evidence that in April 1997 payments to Bam were suspended because they became suspicious of Bam's relationship with Sole (vol 19 p 1953/13 – 17). Lahmeyer was accordingly alerted then already. Certainly contracts 46, 51 and 1009 were not complete as at that date. Even if only to protect their own interests in case something went wrong Lahmeyer would have kept all documents. Yet not one document was produced. Here too Emsmann was an unconvincing witness – vol 19 pp 1988/1 – 1989/6. The documents were apparently thrown away in 1998, i.e. after Lahmeyer was alerted – vol 168 p 17456 paragraph 13.

187.

Either documents did not exist – tending to show that Bam never acted as representative – or they do/did exist but Lahmeyer could not afford to produce them by virtue of their content. Whichever way, an adverse inference arises and here Lahmeyer's excuse for the absence of documents (in particular that they had been destroyed because Lahmeyer had moved offices – vol 168 p 17456 paragraph 13) has a particularly hollow ring to it. If this were true then the three representative agreements as well would have been destroyed.

188.

That Lahmeyer has held documents back is apparent from the payment schedule to the contract 1009 representative agreement placed before the Court a quo only for the first time on 26 February 2003. Full details in this regard are set out in paragraph 228 below. This schedule (vol 152 p 15900 – 15901) was also not placed before the World Bank (see vol 30 pp 3177 – 3178). Also that documents were not destroyed is also apparent from the Mafeteng Dam documents which were produced also very late in the trial. See vol 149 pp 15595 – vol 150 p 15667. These documents are dated March 1990 (vol 150 pp 15664 – 15665). If Lahmeyer's version is true that

old/irrelevant documents were destroyed when Lahmeyer moved offices then these Mafeteng Dam documents too would have been destroyed. Yet they were produced for the first time towards the end of the defence case and their production ensured Lahmeyer's acquittal on count 1. See further in this regard paragraphs 43 and 44 hereinbefore. Further, as is apparent from Muller's audit report, vol 44 p 15001, the cash vouchers were also held back. Clearly such vouchers existed. See in this regard Hecker's evidence, vol 15 pp 1599/9 – 1600/5.

189.

Both the LHDA and the World Bank asked Lahmeyer for its records. Lahmeyer never furnished them. Throughout Lahmeyer never once stated that they did not have records anymore. Instead they declined to release them because of an alleged concern that they would come into the hands of the Crown prosecutors – vol 34 p 3614.

Conflicts of interest:

190.

All three LHDA contracts have, as would be expected, conflict of interest provisions, i.e. vol 102 p 10682, clause 3.2.4 (contract 46) and vol 121 p 12682, clause 3.2.4 (contract 1009). In other words Lahmeyer was forbidden to do anything in conflict with its duty of the utmost good faith towards the LHDA. Lahmeyer obviously knew this. Clearly Lahmeyer paying Bam as its agent out of LHDA money in respect of services on the project where Bam is

at the same time the managing director of Lahmeyer's sub-consultant Lescon is a violation of these provisions. Even Lahmeyer's version, namely that Bam was getting secret information for Lahmeyer (see for instance vol 11 pp 1162/12 – 1166/12, and vol 17 pp 1800/1 – 1802/16) involved such a conflict. Also making the LHDA pay Bam's representative fees without full disclosure in this regard involved such a breach.

191.

The point is that in a competitive bidding process Lahmeyer was not above getting its own hands dirty. Lahmeyer clearly understood the concept of a conflict of interest. It was, for instance, according to Lahmeyer, unacceptable for Bam to do anything giving rise to a conflict vis-à-vis Lahmeyer – (see Hecker's evidence vol 14 pp 1467/14 – 1468/13; see further vol 14 p 1477/12 – 23; Emsmann vol 17 pp 1795/20 – 1796/6).

192.

Also Asmann, Lahmeyer's expert says it would be wrong to use Dr Meyer as Lahmeyer's representative because he was indirectly a Lahmeyer man – vol 21 pp 2143/26 – 2145/4. But at the same time it was fine to use Bam who was also Lahmeyer's sub-consultant – vol 21 pp 2147/7 – 2151/6. The inconsistency is apparent.

Knowledge that Bam represented Lahmeyer:

193.

Why, when the use of agents such as Bam was an industry practise recognised even by the World Bank (vol 130 p 13546), and when there was supposedly no secret about his affiliation with Lahmeyer, was there this scheme whereby Bam as agent was now paid in Switzerland, moreover in the name of an entity which would have the effect of further cementing in the secrecy of this arrangement? The answer seems obvious. There was something odious about this whole relationship which both Bam and Lahmeyer did not want known.

194.

The defence case was that the fact that Bam was Lahmeyer's agent was there for all to see. As defence counsel put it, "it was not a secret" (vol 2 p 178/15 – 17). This is of course important to the defence case in as much as an admittedly hidden relationship with Bam is suggestive of something improper, i.e. corruption.

195.

The actual evidence contradicts defence counsel's contention. Hecker's evidence was that throughout all his time in Lesotho (May 1983 – June 1987) he never let it be known to anyone that Bam was also Lahmeyer's agent (vol 14 pp 1503/25 – 1504/4).

196.

The evidence of Emsmann that it was known to the LHDA that Bam was Lahmeyer's agent/representative was clearly a recent fabrication (vol 16 pp

1673/15 – 1676/24, see also vol 168 p 17462 paragraph 24.). This is apparent from the following.

- 196.1 On 28 July 1999 the LHDA wrote to Lahmeyer calling for an explanation for Lahmeyer's payments to Bam in Switzerland. By letter dated 26 August 1999 Lahmeyer wrote back (see vol 130 p 13596). In a two page letter Lahmeyer explained that its payments to Bam in Switzerland "were for professional services rendered on the basis of our contract with APCM, represented by Mr Bam." Nowhere in this letter did Lahmeyer allege that this was to the knowledge of anybody, let alone the LHDA or the JPTC. See here also Emsmann's evidence at vol 19 p 1964/19 – 24.
- 196.2 After being indicted in Lesotho, Lahmeyer on 7 December 1999 was given the opportunity to make a warning statement to the investigating officer. This would have been a further opportunity for Lahmeyer to disclose that Bam was paid pursuant to the representative agreements and this to the knowledge of the LHDA. Lahmeyer elected to remain silent. (See the warning statement vol 76 p 8053.)
- 196.3 Thereafter in debarment proceedings before the World Bank in March 2001 (vol 25 p 2561) the World Bank specifically averred that nobody in Lesotho knew that Bam was Lahmeyer's representative (see vol 25 p 2547 paragraph 51). Lahmeyer responded to this paragraph at vol 30 p 3103. It did not deny the averment. In fact elsewhere in its response (at vol 30 p 3103 at paragraph 52) Lahmeyer specifically stated that consultants generally do not publicise their representatives.
- 196.4 Thereafter, at the commencement of the trial on 19 August 2002 Lahmeyer in its detailed plea explanation (Exhibit "A" – vol 23 p

2322 – 2327) set out its defence. Nowhere in this document does Lahmeyer allege that the LHDA, the JPTC or anybody else in Lesotho knew that Bam was Lahmeyer's representative.

196.5 Thereafter the Crown called its witnesses. Each of the Crown witnesses who could comment, like Mr Tsebang Putsoane, Mr Charles Putsoane, Mrs Mohapi, Mrs Mathibeli, was asked if he/she knew that Bam was Lahmeyer's representative in Lesotho and each of them said they did not. This was for instance the evidence of Putsoane. See vol 4 p 351/2 – 26. This also applies to the time when contract 1009 was established, during which time Putsoane was the acting Chief Executive. Vol 4 p 373/3 – 10, see also vol 5 p 441/21 – 22. This was also the evidence of Mrs Mohapi, vol 12 and pp 1242/22 – 1243/17. See also her cross-examination at vol 12 pp 1250/10 – 1252/22. This was also the evidence of Charles Putsoane, vol 12 pp 1262/1 – 1265/8, and Mrs Mathibeli, vol 12 p 1295/13 – vol 13 p 1296/22. When each was cross-examined it was not put to them that he/she was not being truthful or that perhaps other people within the LHDA knew. Instead, it was put to them that there would have been no need for them to know and that there was accordingly no duty on Lahmeyer to tell them.

196.6 Before the Crown closed its case there was before the Court vol 128. In this document at vol 128 p 13416 onwards Lahmeyer put up certain sample representative agreements. In all of these the identity of the representative had been tippexed out. Obviously this was to keep the identity of the respective representatives confidential, even after all this time. This then too suggests that Lahmeyer did not want to disclose the identity of its representatives. This aspect is dealt with in Hecker's evidence at vol 14 pp 1447/5 – 1448/11. The thrust of his evidence confirms this.

- 196.7 In these circumstances then the Crown closed its case. At no stage prior to the close of the Crown's case was it ever alleged by Lahmeyer that the LHDA knew that Bam was Lahmeyer's representative. This is something which was suggested for the first time during the defence case at vol 16 pp 1673/15 – 1674/16.
- 196.8 It was also not the evidence of the defence witnesses that anybody in Lesotho knew that Bam acted as representative. Mr Hecker for instance said in no uncertain terms that he never told anybody (vol 14 pp 1503/25 – 1508/10). Nor could Bam actually be held out as such because Bam had not even been appointed as representative except in terms of Mr Hecker's so called gentleman's agreement. This was Hecker's evidence – vol 14 pp 1421/15 – 1422/11, p 1419/21 – 26. Lahmeyer therefore could not rely on the document dated 15 January 1987 relating to the tender opening ceremony for contract 12 and 15 (see vol 33 pp 3504 – 3513, see also vol 168 p 17462 paragraph 24), as evidence that Bam (overtly) acted as its representative on that occasion. Hecker specifically disavowed this. Here Hecker's evidence was that not only did he never tell anybody that Bam was Lahmeyer's representative but also that he had not been officially appointed as such as at 15 January 1987. This only came later in March 1987 when Dr Spiess came to Lesotho for this purpose – vol 15 p 1546/18 – 22.
- 196.9 As regards the evidence of Emsmann, he said the following "... we did not tell other people that he [Bam] was our representative..." (vol 16 p 1673/18) but "we made no secret of it, against the client" (vol 16 p 1674/1) – although "we did not talk about that much either..." (vol 16 p 1674/5 – 6).

196.10 As far as the contract 51 documents are concerned that Lahmeyer relied on to show that Bam acted as representative (vol 152 pp 15847 – 15854) these were only produced for the first time on 21 February 2003 (vol 17 p 1788/6 – 24), i.e. months after the close of the Crown's case. What's more Bam was obviously not present as representative. Instead he was present as part of Lahmeyer's proposal. Compare record vol 16 pp 1675/2 – 1678/8 r.w. vol 152 pp 15847 – 15849 and Exhibit U1 p 5.

So when Emsmann testified that "I would not understand that statement" (vol 16 p 1676/23) when asked to comment on the suggestion that the LHDA did not know that Bam was Lahmeyer's representative this evidence was an obvious lie.

*197.*

In dealing with this question of secrecy, paragraphs 227 – 238 at pp 165 – 175 of Lahmeyer's heads, the few points made here, even if notionally valid, do not dislodge the overwhelming evidence presented by the Crown that Bam's second role, in other words his role as Lahmeyer's agent as opposed to his role as its sub-contractor, was not known by the people who should have known. To the extent that Lahmeyer through Emsmann tried to suggest that the LHDA did know, this was untruthful evidence.

*198.*

The fact that Acres may or may not have known that Bam was Lahmeyer's agent (paragraph 231.1 pp 166 – 167), and here there is no evidence either way, does not mean that the key persons within the LHDA, i.e. those that would have been told had the relationship been genuine, knew of this relationship. Putsoane for instance as Acting Chief Executive of the LHDA when he signed contract 1009 did not know.

*199.*

In paragraph 231.2.3 at pp 168 – 169 of Lahmeyer's heads reference is made to a contract document in 1987 showing some interaction between Lahmeyer, Bam and the JPTC. This document is annexed to an affidavit which was handed in at the time of sentence. The purpose of this document was to show the absence of knowledge of the present Lahmeyer personnel of the crimes of their predecessors. None of this alleged role of Bam was suggested to the Crown witnesses in order for the Crown to investigate this and to deal with it. One does simply not know precisely what role Bam played here. All this is untested and in any event does not ascribe knowledge to the LHDA. One should also bear in mind here the exclusivity agreement and his commitment thereunder to assist Lahmeyer.

*200.*

The submission in paragraph 234.1.1 at p 172 that Bam acted as Lahmeyer's representative in respect of the bid for contract 12 and 15 is in conflict with Lahmeyer's own witness, Mr Hecker. See paragraph 196.8 above.

*201.*

The reference in paragraph 234.1.3 at p 172 to the names of representatives supplied to the LHDA for contract 51 was quite clearly in the context of Bam representing the sub-contractor, Lescon. See paragraph 196.10 above.

*202.*

Finally, the reference to the Mafeteng contract as evidence that the LHDA knew of the relationship (paragraph 234.5 p 173) is not understood. This

contract was not with the LHDA. The client was the Department of Water Affairs.

The defence case:

203.

In dealing with the case so far, the Crown has frequently dealt with the evidence of the defence witnesses. In making submissions hereafter with regard to the defence case, and more particularly the defence witnesses, the Crown will seek to avoid duplication.

204.

The picture that emerges from the defence evidence is one of witnesses seeking to defend the indefensible and saying whatever had to be said in the defence of Lahmeyer.

The unavailability of Spiess and Zimmermann:

205.

The two witnesses who could actually testify about the representative agreements were Spiess and Zimmermann. The reason for saying so is dealt with in paragraph 228 below. Spiess' alleged unavailability was canvassed with Mr Hecker. From Hecker's evidence as well as the defence case as a whole it is clear that these two crucial persons have certainly not been shown to be unable to give evidence. Rather the overwhelming impression is that they did not wish to give evidence and that Lahmeyer too did not wish them to give evidence.

206.

At the very commencement of the defence case objection was taken to hearsay relating to what Spiess said and did (vol 13 p 1353/10-12). In fact the Crown's attitude towards the 3 representative agreements was made very clear during the Crown's opening address – "We do not accept these agreements [as being genuine] for one minute" – (vol 3 p 220/9-21).

207.

When Mr Hecker was questioned in chief about the availability of Spiess he said the following:

- a. "Spiess is retired I think" – (vol 13 p 1353/17);
- b. "he is at home he does not work anymore" – (vol 13 p 1353/21);
- c. he was specifically questioned in chief by defence counsel about Spiess' health. The evidence reads (at vol 13 p 1353/ 22 – 24):

"Do you know what his state of health is?... Pardon me?

Do you know what his state of health is?.... Health, I do not know him personally, so I do not have any idea about that"

- d. Hecker was then pressed on Spiess' availability - "To your knowledge is he going to testify in this case?" – (vol 13 p 1353/25). Hecker's answer was "You see, I talked to him recently, I called him and asked him about that. He told me that it would be very difficult for him due to health reasons and due to the fact that all these things are too many years back, he does not remember anymore. So he would not accept to be present here as witness" – (vol 13 p 1353/25 – 1354/5);

- e. Hecker testified that he spoke to Spiess "about two weeks ago" (vol 13 p 1354/8-9). That is two weeks before his evidence commenced i.e. two weeks before 10 February 2003 (vol 13 p 1325/1).
- f. By the time Hecker was cross-examined his evidence concerning Spiess' health had firmed up considerably. Now Spiess was "very sick" (vol 15 p 1562/21 – 26). "Cancer or something like that" (vol 15 p 1562/25 – 26) was now the diagnosis.

208.

Defence counsel placed on record in clear terms that "... the position is that Spiess will not come and testify" (vol 13 p 1355/1-2). Although put on notice that a proper basis had to be laid for explaining why Spiess would not give evidence (vol 13 p 1354/10-21), defence counsel in no uncertain terms stated "... I am not going to bring or place other evidence before your Lordship with regard to the reasons why we are not going to call Dr Spiess" (vol 13 p 1355/14-16). Later defence counsel said "he is available" (vol 15 p 1561/25 – 26), however ... "he will not come" (vol 15 p 1561/25).

209.

Eventually the Court itself put to defence counsel that Hecker "is merely saying he will not come to testify (vol 13 p 1356/1)..." "he is not saying why he will not come to testify." (vol 13 p 1355/26) Defence counsel's response to this was "Yes, that is quite right". (vol 13 p 1356/2)

210.

No reasons were furnished for Zimmermann's failure to testify. He only retired "two years ago" (vol 17 p 1783/20 – 23). There was nothing to

suggest that he was ill. Lahmeyer was able to get witnesses from Chile (Hecker), Egypt (Emsmann), Germany (Heiland, Muller), Mauritius (Asmann) and South Africa (Botha). Yet Zimmermann was not produced. And Emsmann consulted with Zimmermann "now" in preparation for this case – vol 19 p 1954/6 – 11.

211.

There was of course no obligation on the defence to call witnesses if it did not wish to. It bears no onus. But when the only witnesses that can properly deal with the crucial issue before the Court are not called in circumstances where they are available then the necessary inference must inevitably be an adverse one.

212.

When dealing for instance with the evidence of Hecker, the Court a quo recognised that much of his evidence regarding the representative agreements is secondary and that Hecker could not speak for Dr Spiess – vol 186 p 19156/16 – 18. As pointed out above, the Court a quo however drew no adverse inference against the defence for not calling these two gentlemen. With respect, it should have and it is submitted that this Court should do so.

The evidence of the witness Hecker:

213.

The Court a quo analysed Hecker's evidence – vol 186 pp 19154/9 – 19160/3 and rejected it. Its reasons for doing so are, it is submitted, sound. In fact, there are many more criticisms to be added to those mentioned by the Court a quo in its judgement.

214.

Hecker joined Lahmeyer on 2 September 1962 (vol 13 p 1345/12). His first overseas assignment started in 1963 (vol 13 p 1346/13-14). His first assignment as a Project Manager was in 1968 (vol 13 p 1346/24-25). Therefore by the time he got to Lesotho in 1983 he was an experienced Project Manager. He first became involved in the Lesotho Highlands Water Project "in 1982 when [Lahmeyer] asked me if I would accept to be included in the proposal for the LHWP as Project Manager. I accepted" (vol 13 p 1347/2-6). He came to Lesotho in May 1983 (vol 13 p 1347/6). Not long thereafter "in mid 1983" he was introduced to Mr Montsi by Dr Spiess (vol 13 p 1352/16-18). Montsi was apparently Lahmeyer's representative in Lesotho at the time. Hecker left Lesotho in June 1987 (vol 14 p 1430/8). On his own evidence then he was based in Lesotho for a full 4 years.

215.

In some respects Hecker's evidence supported the Crown's case, for instance:

215.1 The French won contracts 12 and 15 when Cohen was their agent. Cohen lived in the Royal Suite at the Lesotho Sun where he kept a woman for use by Government officials (vol 15 p 1573/19 - 1574/12). This is to be read in conjunction with Hecker's evidence that Mr King, a

member of the evaluation committee for contract 12 and 15, caused them to lose contract 12 and 15 (vol 14 p 1516/16 and vol 15 p 1583/7 – 1584/6). What is clear then is that winning contracts in the engineering consultancy industry is not always easy. Good proposals by themselves are not always enough.

215.2 The timing of Spiess' visit to Lesotho – namely March 1987 (vol 13 p 1401/25 – 26). Despite what Hecker said, as a matter of overwhelming probability, this coincided with unofficial reports that the French had won contracts 12 and 15 (vol 15 p 1572/3 – 1573/18, p 1579/25 – 1583/5, vol 15 p 1583/17 – 23). Obviously Spiess came to Lesotho to salvage contracts 12 and 15. This is obviously the time when Spiess laid the groundwork for engaging Bam as "representative" for the future. Thereafter Lahmeyer never lost again.

215.3 The fact that Lahmeyer, through its mark-up made the LHDA pay for the representatives fees and hence the bribes (vol 14 p 1515/5 – 8, 1477/6 – 11). The forensic link between the LHDA and Bam was certainly admitted.

## 216.

In many respects Hecker's evidence was both unsatisfactory and improbable.

216.1 When asked about the wording of the various representative agreements relating to the need for there to be a causal connection between the agents efforts and the award of contracts 46, 51 and 1009 to Lahmeyer he was unconvincing – vol 14 p 1449/4; p 1475/19 - 21.

- 216.2 His evidence that as project manager he would not know the details of Bam's representative agreement apparently concluded between Spiess and Bam in March 1987 is improbable.
- 216.3 His evidence that Bam performed representative services for Lahmeyer between '83 and '87, let alone for free (vol 13 p 1389/24 – 1391/20, p 1400/8 – 10 and p 1401/1 – 12) is improbable. If he did indeed act it would have been in his capacity as sub-consultant (vol 13 p 1389/12 – 22, p 1392/9 – 16) and any costs/disbursements associated with this work would have been paid by LMC and not Bam/Lescon as Mr Hecker would have the Court believe.
- 216.4 On the assumption that Bam did act, his evidence that there were no funds to pay Bam for his services, even his disbursements (vol 15 p 1608/21 – 1609/24) is improbable. According to Hecker he worked without one cent, not even disbursements – vol 14 p 1432/1, p 1436/5 – 9, p 1461/13 – 16. Hecker would have the Court believe that Bam worked for free out of a sense of patriotism (vol 14 p 1499/18 – 25).
- 216.5 His evidence that an agent would perform the kind of post contract - award work that Hecker testified to is improbable. Instead this would be done by a clerk or office manager, whereas clearing things through customs or other specialised work would have been done by a clearing agent, lawyer or the likes – see references in paragraphs 131 and 132 above. Compare Hecker's denials here with the office manager's job description in for instance Exhibit J2 and Exhibit U.
- 216.6 His evidence that he, Hecker, would have gone to Bam for political intelligence type information (vol 13 p 1382/1 – 23; pp 1397/25 –

1400/5) is improbable. After all, where was Bam going to get this type of information from? It is more likely that Hecker would have gone to the German Embassy (vol 13 p 1399/17 – 25). Hecker “had a good relationship to the German Embassy” (vol 13 p 1357/18-24). The German Embassy would have contacts with the Lesotho Government and its intelligence apparatus. Intelligence type information from the Embassy would be far more reliable than anything that Bam might come up with (vol 13 p 1400/1 – 5). See further, vol 15 p 1533/2 – 24, vol 16 p 1617/11 – 17.

216.7 Lahmeyer performed the Feasibility Study and was also involved in drafting the Treaty and the LHDA Order. It is inconceivable then that Lahmeyer would need Bam’s help to acquire “basic information” for purposes of preparing their tenders for contracts 12 and 15 – see paragraph 32 of Hecker’s statement – vol 167 p 17421. When Lahmeyer commenced the feasibility study “we received about three cubic metres of paper”. (vol 15 p 1611/8 – 13). Lahmeyer therefore had all the basic information. Hecker was in Lesotho all the time. He heard that contract 12 and 15 were close to tender in early 1986 (vol 13 p 1400/20). He specifically said that he had a good working relationship with the “two old men from TAMS” (vol 13 p 1397/14). He also said he “very often” got information himself (vol 16 p 1618/14 – 16). Lahmeyer therefore never needed Bam for “basic information”.

216.8 His evidence that Bam would have arranged meetings with the Prime Minister, Cabinet and the King etc is improbable. Instead it is more likely that these were official engagements – (vol 13 p 1378/10 – 1379/9). See further vol 14 p 1499/10 – 17, p 1500/18, p 1502/1 – 12 and vol 15 p 1612/4 – 13.

- 216.9 It is also improbable that the rigid lines within Lahmeyer between the Technical Division, the Business Development Division and the Administrative Division were as rigid as Hecker makes it out to be. He creates the impression that the one hand did not know what the other hand was doing. Here see generally paragraph 3.2 of Hecker's statement (vol 167 p 17403 and Hecker's evidence, vol 13 pp 1387/12 – 1389/2, vol 15 p 1540/14 – 24, p 1548/6 – 24). This may be how different government departments function but not how a world class engineering company operates.
- 216.10 Hecker's evidence about payments in Switzerland not being unusual in the circumstances is simply untrue (vol 14 p 1432/3 – 26, vol 15 pp 1595/19 – 1596/22). So too is his evidence that the huge cash payments to Bam were not suspicious – see paragraph 36 of his statement – vol 167 p 1743. See further vol 14 p 1433/1 – 1434/7, pp 1470/13 – 1471/9 and p 1598/22 – 1600/5).
- 216.11 His evidence is improbable that if one is using a representative for legitimate purposes that you'd keep his identity a secret (vol 14 pp 1447/5 – 1448/18). The French for instance apparently never kept Cohen's identity a secret. In the nature of things if the representative acts in a lawful capacity it would then very quickly become public knowledge that he is acting for you. It would be impossible for instance to keep an agent's identity confidential if he was introducing you to schools, acquiring houses for staff, clearing stuff through customs, closing down your office, collecting payment on your behalf etc.
- 216.12 Hecker testified that confidential information like the engineer's estimate (vol 14 p 1482/20 – 1483/14, vol 15 pp 1519/5 – 1525/10), the evaluation committees marks for contract 12 and 15 (vol 15 p 1587/11 – 15) and so on he got from Bam. He testified

that he wasn't interested in how or from whom Bam got the information. In fact he testified that at no stage did he ever ask who Bam's contacts were – vol 15 p 1525/9 – 10. This was also Emsmann's evidence (vol 17 p 1816/9 – 1818/8). This is not only improbable but in all likelihood an outright untruth. Natural curiosity is such that Hecker would have asked after Bam's source unless he already knew. Also Hecker would have wanted to know the source to satisfy himself that the information is reliable.

## 217.

In certain instances Hecker's evidence simply cannot be true. The following are examples.

217.1 That Spiess came to Lesotho in March '87 before Hecker heard formally of the award of contracts 12 and 15 to the French (vol 15 p 1546/18 – 22, pp 1579/25 – 1580/17). This can't be true, because on the defence case, the consummation of the representative agreement only takes place after Lahmeyer is certain that it will be awarded the contract i.e. after the letter of intent or authority to mobilise has been given (vol 15 pp 1579/25 – 1580/6). Hecker would have the Court believe that Spiess came out in March 1987 because Bam was nagging him and he was feeling guilty (vol 15 p 1572/2 – 11). What nonsense from a hardened project manager! It is far more probable that Spiess came out to try to rescue contracts 12 and 15 from the French – vol 15 p 1572/12 – 20.

217.2 Hecker specifically testified that in "early 1986 when I learnt that new contracts were close to tender, I called Spiess and said Dr Spiess it is urgent that you make with Mr Bam a definite sort of agreement that he also now feels and knows from your side that he is our representative here" (vol 13 p 1400/19 – 23). Yet despite the apparent urgency Dr

Spiess left things for a year. According to Hecker, Spiess came to Lesotho in March 1987 "with the only purpose to talk to Bam and sort out this representative situation....." (vol 13 p 1402/2 – 4). Yet Hecker also said that Bam and Spiess had already reached an agreement "by late 1986 by phone" (vol 15 p 1560/14 – 23). There was clearly no need for Spiess to come to Lesotho for this purpose.

217.3 His involvement in contract 12 and 15 (see for instance vol 14 p 1508/14 – 1509/15). Here he testified that he had nothing to do with Lahmeyer's efforts to win these contracts. The evidence shows that he was very much involved. He collected the short lists; transmitted them to Germany; brought the tender documents back to Lesotho from Germany after his annual leave; attended the tender opening (vol 14 p 1505/1 – 26); complained to the LHDA and the World Bank about the irregularities in the tender evaluation process; had his ear to the ground and got the tender evaluation mark sheets through Bam and so on (see generally vol 15 pp 1576/7 – 1588/7 and pp 1568/23 – 1569/24). He was obviously very much involved.

217.4 Bam being present at the tender opening for contract 12 and 15 on 15 January 1987 as Lahmeyer's representative on behalf of LMC. It is more probable than not that he and Bam attended as representatives of LMC's consortium inasmuch as in LMC's proposal Bam was included as sub-consultant. He in any event contradicted this evidence under cross-examination. This is dealt with elsewhere in these heads.

217.5 The Feasibility Study only being completed in mid 1987 (vol 13 p 1402/15 – 23). In fact the final report was published in April 1986 (vol 15 p 1568/5 – 9) and the Treaty and the LHDA Order were finalised on 24 October 1986 (vol 127 p 13307). In fact, according to Emsmann "the outcome of the feasibility report was a Treaty" (vol 16 p 1639/21). Hecker obviously stayed on in Lesotho after these events to try to win

contracts 12 and 15. When Lahmeyer failed he left. This was in June 1987 (vol 14 p 1430/8 – 16).

217.6 The amounts which were paid to Bam which he said were not large amounts.... "quite normal...". The amounts for C46 and C51 for instance equated to 52.6% of the partnership's profits – see paragraphs 10, 11 and 12 above. Clearly by any standards the amounts were staggeringly large.

## 218.

Further aspects of Hecker's evidence which point to him not being truthful are to be found at the following references in the record.

- 218.1 Vol 14 p 1448/13 – 18: Where he said "I do not know...", why Lahmeyer doesn't generally publicise its representatives.
- 218.2 Vol 14 p 1454/16 – 12: Where he said that in his 40 years experience he has "never heard...that an agent did something unlawful".
- 218.3 Vol 14 p 1458/6 – 14: Where he said that it has never occurred to him that an agent may pass some of his 5% fee on to someone else, "I never thought about that, no".
- 218.4 Vol 14 p 1462/19 – 25: Where he said "I do not know" if there are records relating to Bam's work as representative.
- 218.5 Vol 14 p 1465/4 – 12: Where he said he doesn't see anything extraordinary in engaging a representative to "take necessary actions to obtain the contracts".

- 218.6 Vol 14 p 1482/11 – 14 r.w. vol 15 p 1525/1 - 10: Where he said he never asked Bam “what contacts he has in government, and who those contacts are...” he said “No”.
- 218.7 Vol 14 p 1484/23 – 26: Where he said about Lahmeyer’s sub-consultant Lescon, “I even did not know at that time if he was the owner of Lescon or who was Lescon”.
- 218.8 Vol 14 p 1487/24, r.w. p 1488/15 – 17, r.w. p 1493/23 - 26: Where he said of Montsi – he didn’t know why Lahmeyer paid him or what percentage Lahmeyer paid him or how much Lahmeyer paid him. Or even if there was an agreement.
- 218.9 Vol 15 p 1528/5 – 8: Where he said “I do not have time to...ask people about information”.
- 218.10 Vol 15 p 1537/1 –11: Where he said he trusted Bam more than the German embassy when it came to political intelligence...“the person I had to trust in most was Mr Bam as our local representative..”.
- 218.11 Vol 15 p 1541/1 – 9: Where he said that although Lahmeyer had been in Lesotho for some years when the tenders for contract 12, 15 and 19 were coming up... “this [was] clearly a situation where you need an agent on site because the project management .... does not have time or the obligation to worry about these new contracts”. Compare this evidence with his evidence at vol 14 p 1466/1 – 11 – you don’t use a representative if you don’t need one.
- 218.12 Vol 15 p 1546/1 – 7: Where he said “I do not know” whether Bam and Spiess signed a written document in March 1987. This evidence is to be compared with his evidence at vol 15 p 1553/26,

p 1556/5 – 7, p 1571/16 – 27, where he obviously contradicted himself.

218.13 Where he said “the debarment of the World Bank [is] already closed” – vol 15 p 1566/7 – 8. This is obviously not true – see the World Bank letter at vol 146 p 15217.

218.14 Vol 15 pp 1568/23 – 1569/24: Where he said he had nothing to do with contracts 12 and 15 – “Definitely not”. See also paragraph 217.3 above.

## 219.

The Crown makes the following submissions with regard to the evidence of Mr Hecker.

219.1 His evidence does not rebut the inference that the payments to Bam were bribes. He was not involved in the agreements with Bam. He left Lesotho in 1981 after the Feasibility Study, i.e. long before contracts 46, 51 and 1009. He does not know what the real agreements were. A reading of his evidence shows it to be peripheral to the real issue before the Court.

219.2 What is more, a reading of his evidence gives one the distinct impression, it is submitted, that he was sent in, as it were, to do a job of work, vis to bolster the defence case as best he could. In the process he gave evidence which was improbable, he showed himself to be unduly protective of Lahmeyer’s interests and in doing so gave evidence which was often palpably untrue.

219.3 All this, it is submitted, does little to rebut the prima facie case against Lahmeyer.

The witness Emsmann:

220.

The witness Emsmann's evidence is dealt with in the judgement of the Court a quo at vol 186 pp 19160/4 – 19165/22. It will be seen that the Court observes that Dr Emsmann, to a large extent, confirms the Crown's case. To the extent however that he contradicts it the Court found his evidence to be unreliable and self-contradictory and it rejected it. The Crown submits that the reasons given by the Court a quo for rejecting the evidence of this witness are sound. In addition the Crown makes the following submissions.

221.

One fact that emerges particularly from Emsmann's evidence is that Lahmeyer, for purposes of contracts 46, 51 and 1009, was quite happy to "sail close to the wind" and even act unfairly and unlawfully in its endeavours to win these contracts. On the evidence Lahmeyer was for instance happy to use Bam to get information which they knew they were not entitled to like for instance:-

- a. the evaluation results for contracts 12 and 15 (vol 15 p 1521/15 – 26, vol 16 p 1652/10 – 1653/12).
- b. the engineer's estimate (or at least the final figures) for all three contracts (vol 104 p 10890 and vol 92 p 9653 r.w. Emsmann's admission at vol 17 p 1806/18 – 23) see also Emsmann's unsatisfactory evidence on this aspect at vol 18 pp 1882/7 – 1883/7;
- c. unofficially discerning the LHDA's attitude during negotiations (vol 13 pp 1380/9 – 1381/7 and vol 15 p 1522/9 - 12);

- d. using Bam as representative for contract 1009 where communications with Bam through ABCC had been specifically prohibited by the RFP (vol 140 p 14565 – p 14567 r.w. vol 148 p 15441 at 15448/20);
- e. using Bam to get information which Lahmeyer could get for itself but they were not prepared to wait for. Here they were happy for Bam to obtain these unofficially (vol 16 p 1672/3 – 23);
- f. making the LHDA pay their “agent” without telling them by hiding the huge “representative” fees in the staff mark up factor. (Hecker vol 13 pp 1376/7 – 1377/10, vol 16 pp 1664/7 – 1668/10, pp 1659/8 – 1661/4).

222.

As to where and how and from whom Bam acquired the information, Lahmeyer did not care. Lahmeyer adopted a “ask no questions, hear no lies” approach. See for instance the following references in the record: vol 14 p 1454/16, p 1456/4 – 15, p 1463/1 – 19, p 1479/22, p 1482/1, p 1482/15 – 19, p 1483/15, vol 15 p 1526/1 – 5, p 1545/8 – 17, p 1599/9 – 26, p 1612/14 – 26, vol 16 p 1672/6 – 23). If this is the case, this then amounts to a fraudulent diligence in ignorance which the law will not countenance. R v Myers 1948 (1) SA 375 (A) at 382. A particularly good illustration of this is to be found at vol 18 pp 1878/17 – 1881/19. Here Emsmann is testifying about this subject in the context of Lahmeyer’s own man on the JPTC, Dr Meyer.

223.

Dr Emsmann testified in chief that “we did not care where [Bam] go it [his information] from – vol 16 p 1672/6 – 23 at line 23. Having regard to Dr Emsmann’s training, experience and obvious intelligence he must have foreseen that information was coming from Sole. Under cross-examination he

conceded that he did foresee that Bam might be obtaining information by improper means (vol 17 p 1802/6 – 21) and that the information may have come from Sole (vol 17 p 1809/26, r.w. pp 1808/ 6 – 1809/5). Here however he averred that, in his mind, this was just one possibility. It was more likely that the information came from others (vol 17 p 1809/12 – 18). Again this simply cannot be true. For the reasons dealt with above Lahmeyer obviously knew that Bam and Sole knew each other well. Lahmeyer accordingly did know that Lahmeyer's needs were being met from within the LHDA and, at best for Lahmeyer, most probably by Sole through Bam. Here, to the extent that Emsmann tried to distance Lahmeyer from Sole he simply lied. He for instance in this context even tried to suggest that "... and I can only say it was not known to us that Mr Sole was a fellow engineer to Mr Bam" (vol 17 p 1808/13 – 15). Later he said "I cannot imagine that Bam went to Sole, we had no indications that he had any relationship to Sole" – vol 17 p 1809/16. In this regard see vol 33 p 3460. This document shows that Sole and Emsmann were formally introduced to each other by 29 August 1983 already i.e. at the commencement of the feasibility study.

224.

In evidence-in-chief Dr Emsmann was never once evasive. The impression he created was that he was a carefully prepared witness who was able to answer every question in chief with no difficulty. Everything he said accorded substantially with his statement. In fact the impression was that he knew the question even before it had been completed. In cross-examination a totally different picture emerged. Dr Emsmann was frequently evasive and in many instances it became clear that when questioned about difficult matters he tried to steer the debate in a direction where he was more comfortable.

225.

The defence case is essentially a “confess and avoid” type defence. Here Lahmeyer concedes the payments to Bam but seeks to explain them by reference to the representative agreements. Besides this they also try to set up answers to all the facts which tend to point to the falsity of the representative agreements. Here the timing of the conclusion of the representative agreements, the amounts they paid Bam, the secretive nature of their relationship with Bam, the payments in Switzerland and so on spring to mind. Lahmeyer’s answers to all these issues are simply too good to be true.

226.

During argument at discharge stage many features of the defence’s case amounting to weaknesses were highlighted. When Hecker and Emsmann gave evidence all sorts of clever answers to these were forthcoming. Yet many of these were not put to the Crown witnesses. Also, all sorts of new defence documents were produced. See for instance vol 17 pp 1788/6 – 1789/22. The Crown was never given an opportunity to deal with these as part of the Crown’s case. Nor were the Crown’s witnesses cross-examined on them.

227.

Bam was engaged in all three instances “for purposes of obtaining” the contracts. Yet Lahmeyer’s witnesses would not concede this. Lahmeyer’s witnesses tried to suggest that what these words meant was that Bam was being engaged to help Lahmeyer. This he was to do by collecting information which he, Bam, was to pass on to Lahmeyer so that Lahmeyer could use the information to prepare a proposal so that it could win the contracts itself on the strength of a winning proposal. This interpretation cannot be read into

the plain words of the agreements. The defence witnesses were thoroughly unconvincing in this regard and would not even concede the obvious.

228.

The real witness or witnesses who can speak to the representative agreements viz. Spies and Zimmerman haven't given evidence. Instead Lahmeyer's main witness in this regard was Dr Emsmann. His evidence comprised mostly inadmissible hearsay – see for example vol 16 p 1652/11 – 19 and p 1653/8 – 12. Here, when it suited him, he purported to speak from his own personal knowledge. See for instance vol 19 pp 1938/19 – 1939/13. Again, when it suited him he adopted a – “Don't ask me, you must speak to the Business Development people” – approach. See for example vol 19 pp 1940/9 – 1941/23. Another example of this relates to the late disclosure of the payment schedules for the contract 1009 representative agreement (vol 17 pp 1786/11 – 1787/2). Obviously a deliberate decision was taken to hold these documents back (vol 17 pp 1791/ 19 – 1794/3). The fact that they had all along been available is apparent from Lahmeyer's accountant's report (see vol 144 p 15002/20 – 30). Yet it was not produced until the dying moments of Dr Emsmann's evidence in chief on 26 February 2003 (vol 17 p 1782/1 r.w. pp 1786/11 – 1787/2). When challenged about this he pleaded ignorance suggesting that Zimmermann should be asked about this (vol 17 pp 1788/6 – 1791/18). Another example of Emsmann testifying to inadmissible hearsay are to be found at vol 17 p 1795/18 – 19 – Zimmermann told him what he knew about why Bam wasn't paid the last instalment of DEM 17 600.00 in 1997. And so on.

On the subject of hearsay Dr Emsmann was specifically asked “..... did anybody every ask Mr Sole ..... Why did [Bam] pay all this money?”. In other words he was invited to testify to hearsay. His answer was “I do not remember that there was any contact with Mr Sole from Lahmeyer's side” – vol 19 p 1943/11 – 26.

229.

Lahmeyer's inherent hypocrisy is apparent from the fact that it was acceptable to Lahmeyer that Bam could obtain even confidential information from wherever, whoever and however (vol 16 p 1672/3 – 23, vol 15 p 1586/2 – 21, p 1587/16 – 24). Yet Lahmeyer itself would never go to their own man on the JPTC, Dr Meyer, for information. To do so would be completely unacceptable – vol 18 pp 1878/17 – 1881/19.

229.1 Another obvious unsatisfactory feature of Lahmeyer's evidence is Dr Emsmann's stubborn refusal to concede the obvious namely that Sole was in a position of great power and influence and that he was the obvious person within the LHDA to have on your side for purposes of winning contracts and the like – vol 18 p 1866/1 – 19. (This aspect of Emsmann's evidence has also been dealt with above.) Yet for purposes of another possible inference which Lahmeyer contends for, namely that Bam paid Sole in exchange for Sole increasing the amount of work allocated to ABCC, here "Sole was in the position to influence the identity of the subcontractors and the evidence already before you is that he favoured ABC in the process and we will suggest to your Lordship that the obvious favouring of ABC in proposals of the LHDA, may have been the cause for the payments from Bam to Sole" (vol 13 p 1329/22-26). So when it suits Lahmeyer Mr Sole was impotent; when it suits Lahmeyer he was very influential. Compare Emsmann's evidence here as to when and where the sub-consultancy agreements were concluded – vol 16 p 1677/12 – 27. His direct evidence was that it had nothing to do with the LHDA. So ironically, on their version in the one situation where Lahmeyer suggest Sole was powerful, he wasn't.

230.

In summary with regard to the evidence of Dr Emsmann, the Crown submits the following.

230.1 Once again his evidence is largely along the periphery of the main issue namely why Bam was really engaged. On this issue he could only speak to hearsay. To this extent then he doesn't really help Lahmeyer in discharging the evidential burden on it. The people that should (and could) have been called, vis Spiess and Zimmermann were never called.

230.2 In seeking to protect the interests of Lahmeyer Dr Emsmann showed himself to be a partisan witness who often stooped to the level of giving evidence which, with respect, was untruthful. This does not stand Lahmeyer in good stead.

The witness Dr Asmann:

231.

This witness was called by the defence as an expert to testify generally concerning the practise of using representatives. The intention obviously was to try to get independent expert corroboration for the many anomalies in the defence's case such as the amounts paid, the no duck no dinner arrangement, the wording of the three representative agreements, the

payments in Switzerland, the timing of the conclusion of the written representative agreements and so on.

232.

It is submitted that Asmann's evidence did nothing to prop up the defence's version. This is so for the following reasons.

233.

Dr Asmann, although he never worked for Lahmeyer and had no personal knowledge concerning the three representative agreements in issue – vol 20 p 2120/13 – 17), led up an organisation, VUBI/VUBIC, whose objective it was to advance the cause of German export orientated consulting firms – vol 20 p 2106/2 – 26. It is only natural therefore that his inclination would be toward bias in favour of just such a firm, namely Lahmeyer – see also vol 21 p 2212/14 – 26. In addition he was an independent consultant who gave evidence for Lahmeyer on an all-expenses-paid basis – vol 20 p 2126/16 – 2127/2. This kind of arrangement hardly lends itself to objective, dispassionate and fair comment.

234.

Asmann conceded that it is possible for a representative to be used as a bribe merchant. He made this concession in the context of the US Foreign Corrupt Practices Act which specifically contemplates corruption through intermediaries – vol 21 p 2169/11 – 2171/9. He went further and acknowledged in reply to a question by Mr Monyane that he was even aware of specific instances where such scandals involving bribery through a representative received considerable press coverage – vol 21 p 2212/5 – 8. So Asmann came to Lesotho to give evidence knowing full well what this case was all about. The issues must have been perfectly apparent to him. Yet he

saw nothing out of the ordinary in Lahmeyer's behaviour, particularly in his evidence in chief. He did not even qualify or limit in any way any of his opinions in chief. For this reason he was on the defensive throughout his cross-examination. His bias variously manifested itself. Examples are:

234.1 Although conceding that it was on the high side, he said that a success fee of 5% for a consultancy contract "is normal and usual". Here he sought to establish this by comparing it to, for instance, an estate agents' commission and the kind of commission paid on a life insurance policy – vol 20 p 2112/17 – p 2113/19. Yet when it was pointed out to him that on the facts of this case the 5% fee translated into breathtakingly large sums and, for instance, 36.8% of Lahmeyer's fee for contract 46 he could not deal with this. Vol 21 p 2177/4 – 9; see also vol 21 p 2181/16 – 26.

234.2 Asmann testified that most of the documentary evidence, like for instance even the cash flow chart Exhibit "C", was never shown to him before he gave his evidence. Vol 20 p 2121/6 – 2125/20. It was clearly improper of Lahmeyer to only avail Asmann of those documents and facts which it deemed appropriate. This kind of "keep-the-witness-in-the-dark" approach is hardly consistent with a genuine defence and innocence. It was also unfair to the witness.

234.3 Asmann would not qualify his evidence in chief that a 5% fee is "normal and usual". The impression he created is that it is normal and usual in the industry. Vol 20 p 2112/17 – 23. Clearly this cannot be so. Lahmeyer did not even need Bam especially not for contracts 51 and 1009. Even Hecker conceded that you don't use an agent if you don't need one. See vol 14 p 1466/1 –14 where he said that Lahmeyer didn't require Bam as agent for the technical assistance contract they were awarded with WEMIN. Lahmeyer also did not need a

representative for purposes of placing Dr Meyer with the JPTC. In fact for contract 1009 Lahmeyer was prohibited from communicating with Bam at all other than through the LHDA. Yet they were prepared to pay Bam 5% for contract 1009. There is nothing normal or usual about this in the circumstances.

234.4 He said that for him there was nothing really surprising about a representative wanting to be paid in Switzerland. For him this wouldn't "cause [the principal] any concern" – vol 20 p 2116/3 – 19. Elsewhere in his evidence he however conceded that Swiss bank accounts have notorious money laundering/secretcy reputations – vol 21 p 2193/12 – 2194/1. Even Hecker who has been with Lahmeyer for some 40 years knew of no other agent besides Bam who was paid in Switzerland (vol 14 p 1469/5 – 9). Yet when it was suggested to him "that any consultant acting properly in a due diligence type situation, the red light would go on for you if a [representative] wants to be paid in Switzerland" – vol 21 p 2194/2 – 4. His reply was that it would not – vol 21 p 2194/5. This is not your objective and dispassionate expert witness who is simply concerned with assisting the Court.

234.5 When it was pointed out to him that a lot of the money Lahmeyer had paid Bam was passed on to Mr Sole he refused to concede that this gives rise to suspicion. "I completely disagree with your point of view" – vol 21 p 2198/6. Instead he came to Lahmeyer's defence insisting that Lahmeyer wouldn't have known about this – vol 21 p 2197/25 – 26.

234.6 He also testified that although the principal would want to know that the information his representative is furnishing is reliable the principal would never ask – in order to satisfy himself in this regard – where the information is coming from – vol 21 p 2138/18 – 2141/2. This evidence defies logic and human experience. Obviously, for instance,

the four or five bottom line figures out of the engineers estimate that Emsmann testified about are crucial. The consultant would want to be satisfied that the figures are reliable before preparing a financial proposal with them in mind. And this he would do by establishing that the source of the information is reliable. How Asmann could say as a fact that generally principals would never want to know the source of the representative's information is startling to say the least – vol 21 p 2141/4 – 20.

234.7 Asmann conceded that none of the institutions that he spoke about like the World Bank, the European Union, the African Development Bank, VUBIC and FIDIC put out a model representative contract document, let alone in terms which make it a “no duck no dinner” type agreement – vol 21 pp 2198/18 – 2199/18. The reason why these reputable institutions would not do so is obvious. As Cullinan AJ in Rex v Sole, pointed out, to structure your representative agreement on a “no duck no dinner” basis is to invite the representative to act corruptly. Yet for Asmann there was nothing uncomfortable about the wording of these three representative agreements – vol 21 p 2134/12 – vol 21 p 2137/22.

234.8 Bam operated a bank account in Lesotho. So did Lahmeyer. Lahmeyer sometimes transferred the monies to Lesotho telegraphically from Germany. This is what was put to Mrs Mathibeli and was testified to by Hecker – vol 14 pp 1433/17 – 1434/11. This money was then withdrawn from Lahmeyer's bank in Lesotho and paid to Bam in cash. The payments could just as easily have been effected telegraphically directly from Germany to Bam's account in Lesotho. This whole cash arrangement then is not only un-businesslike but also both dangerous and suspicious. Even Lahmeyer's own account, Mr Muller, recognised that what happened is not normal – vol 21 pp 2246/13 – 2247/21; vol 22 p 2250/1 – 8. So too did Hecker recognise this. He said “I send

two drivers [to draw cash] that they do not get robbed..." (vol 14 p 1471/9 – 10). Yet for Asmann this was all in order – vol 21 p 2201/5 – 23.

235.

The impression from all this is that Asmann was just a witness who came to Lesotho to do a job of work for Lahmeyer. There are numerous other lesser criticisms.

236.

It was pointed out to him that the French were using Mr Cohen in Lesotho as their representative (see generally vol 15 pp 1573/19 – 1574/12) and although he conceded one would have to "fight fire with fire" he would not concede that maybe Lahmeyer had done so. He could also barely bring himself to concede that a character like Cohen would not be a suitable representative – vol 21 p 2145/5 – 22.

237.

For him it was not noteworthy that Bam's experience as a representative for a number of consultants/contractors over a number of years involving huge earnings did not appear in his curriculum vitae. His explanation was that maybe Bam did not deem it necessary for purposes of the contract he was trying to secure – vol 21 p 2199/19 – 2201/14. Again a simple concession that there is this curiosity would have demonstrated even-handedness. He couldn't bring himself to make even this concession.

238.

He accepted that there are various categories of persons one would not properly use as a representative, like Dr Meyer, a Lahmeyer man on the JPTC - vol 21 p 2144/18 – 2145/4. But for him it would not be a problem for Lahmeyer to use Bam as representative who happened to be very close to the Chief Executive, of the very organisation Lahmeyer was trying to get contracts from – vol 21 p 2154/13 – 2155/9.

239.

There was also nothing anomalous or contradictory for Dr Asmann in using your very own sub-consultant and the person with whom you had also concluded exclusivity agreements as your representative to get the contracts – vol 21 p 2147/16 – 2149/14. Common sense dictates that in the circumstances the sub-consultant would have just as much of an interest in obtaining the contracts for Lahmeyer as Lahmeyer had, especially where an exclusivity agreement is in place. Even Hecker impliedly conceded this (vol 15 pp 1570/19 – 1571/2). After all Bam had thereby closed the door on himself to teaming up with other foreign firms for purposes of winning the contracts. This was Hecker's direct evidence (vol 14 p 1412/10 – 1413/26 at 1413/21 – 26). Bam therefore quite independently of the representative agreements would have had a profound reason for wanting to ensure that Lahmeyer won the contracts. There was accordingly no need to use Bam as representative at all. Yet Asmann had no inherent difficulty with any of this – vol 21 p 2147/16 – 2151/16.

240.

All this renders Asmann's opinions and the rest of his evidence completely untrustworthy. Even his factual evidence as to what is normal in the engineering industry must then be viewed with scepticism.

241.

Indeed, the Court a quo in its judgement was not impressed with this witness' evidence and rightly so. It found him to be biased in favour of Lahmeyer. See vol 186 p 19166/1 – 10.

The witness Helmut Muller:

242.

This witness did Lahmeyer's cause more harm than good. His evidence is dealt with in the judgement vol 186 pp 19166/11 – 19167/4.

243.

He was a chartered accountant and Lahmeyer's lead auditor for many years, more particularly since 1983. He was therefore perfectly positioned to testify:

243.1 to the facts pertaining to Lahmeyer's operations with particular reference to agents/representatives; and

243.2 as an expert concerning the flow of money from the LHDA to Lahmeyer and from Lahmeyer to Bam and from Bam to Sole. He was therefore perfectly positioned to contradict Roux's evidence, particularly with regard to the forensic flow and the payment pattern.

244.

He did neither.

245.

As to the facts pertaining to Lahmeyer's operations he testified that he merely acted on his very limited mandate which was to check and certify that the payments to Bam were accurately reflected in Lahmeyer's accounting records. He did this exercise and he could confirm this – vol 21 p 2220/19 – 2221/21; vol 2229/20 – 23.

246.

This exercise was a futile one. It would be surprising if the various payments to Bam were not reflected in Lahmeyer's accounting records. This is so whether the payments were corrupt or not. The issue is not whether Bam was paid. The issue is why he was paid. This question Muller probably cannot answer. He conceded this – vol 21 p 2230/10 – 14. He also conceded that he wouldn't be able to tell from the documents whether the representative agreements were bribe agreements or not – vol 21 p 2245/11 – 14.

247.

If Lahmeyer were innocent and had nothing to hide then Muller would have been given access to all and any documentation.

248.

Lahmeyer apparently only furnished Muller with the documentation appearing in paragraph one of his audit report (see vol 144 p 15001), not all

documentation relating to Lahmeyer's relationship with Bam. Significantly, however, Muller was given "vouchers for cash payments (original or copies) made out [by] the cashier on site in Lesotho" (vol 144 p 15001). Hecker also testified to the existence of such vouchers (vol 14 pp 1470/22 – 1471/9). Yet these vouchers were not placed before the Court. Muller's report was dated July 2000 (vol 144 p 15003) and his audit was conducted in the same month (vol 144 p 15001). Previous witnesses sought to suggest that all documents were destroyed in 1998. Yet the cash payment vouchers were still available. So Lahmeyer was not only selective with regard to the information it supplied to Muller but also the documents it placed before the Court.

249.

It will be recalled that Lahmeyer severely criticized Mr Roux because he was not a chartered accountant, only a forensic auditor. Muller was a chartered accountant and could have dealt with Roux's evidence. Yet Lahmeyer chose not to lead him in this regard. This in itself in the circumstances is anomalous. Lahmeyer obviously did not want Muller to deal with Roux's evidence. The inference is inescapable that Muller could not gainsay Roux's evidence and Lahmeyer knew this.

250.

This is particularly so since it is Lahmeyer's own case that their representative is only paid after Lahmeyer is paid. It is obvious that Lahmeyer used their LHDA earnings to pay the representative and that this is so is also apparent for Mrs Mathibeli's evidence that the accounts in Germany that Lahmeyer used to pay Bam were the same accounts that Lahmeyer used to receive payments from the LHDA. So the LHDA paid Lahmeyer and Lahmeyer then paid Bam. It so turns out that Bam then used the money he received from Lahmeyer to pay Sole and this was Roux's evidence. The flow of money is therefore clear. In short the LHDA's money was used to pay everyone

including Sole. Muller could never dispute this (vol 21 p 2243/18 – 2245/14 and that is why he was not lead in this regard. The flow of money is in any event apparent from the defence's money flow chart, Exhibit "KB". Hecker also recognised this (vol 14 p 1434/7 – 11, p 1436/20 – 24, pp 1437/6 – 1443/11, p 1475/7- 9, p 1477/6 – 11, p 1515/5 – 8, p 1472/1 – 21.) See also Emsmann vol 18 p 1872/5 – 14, vol 16 pp 1659/8 – 1661/4.

251.

Besides these fundamental criticisms Muller's evidence is also of doubtful value for the following additional reasons.

252.

Firstly he was frequently evasive. He was questioned about the complete absence of any documentation pointing to Bam having acted as a genuine representative for contract 46, 51 and 1009. Here by comparison documents dating back to March 1990 relating to the Mafeteng Dam project (to found in vol 150 pp 15662 – 15667) were brought to his attention. It was pointed out to him that these documents relating to that contract go back to March 1990. Yet they could be recovered. Yet nothing relating to the representatives services of Bam under contracts 46, 51 and 1009 could be found. He was asked to comment. His answers were vague and inconclusive – vol 21 p 2233/1 – 2238/18. It was plain he did not want to say anything adverse about Lahmeyer.

253.

He was questioned about Lahmeyer's payments to other representatives in Switzerland; in particular whether this happened and how frequently it happened. He repeatedly evaded this question. Eventually when pressed his answer was "I can't remember" – vol 21 p 2246/4 – 11. Clearly there was no

other example. Even Hecker acknowledged this. Yet he wouldn't just come out and say it. He was also evasive when asked if he didn't think it suspicious that an agent in Lesotho was being paid in Switzerland – vol 22 p 2252/5 – 15. Eventually he admitted – “most probably it is unusual .....”. (Vol 22 p 2252/25 – 26).

254.

He was evasive about the cash payments that Lahmeyer paid Bam in Lesotho. He was asked whether this had happened before and in particular if he was aware of any instance where Lahmeyer made a DEM 100 000.00 cash payment in Germany. His answer was that he couldn't recall – vol 21 p 2246/13 – 2247/21. Surely he would have known.

255.

He also contradicted Hecker's evidence about keeping large sums of money in petty cash. Muller's obviously truthful evidence was that for security reasons one does not keep large sums of money in petty cash – vol 22 p 2250/5 – 7. Yet Hecker's evidence was that this was normal and a quite acceptable practise (vol 14 pp 1470/22 – 1471/9) although Hecker did concede that he'd send two drivers to the bank to draw the cash.

256.

His evidence was also thoroughly unconvincing, concerning other curiosities in Lahmeyer's version. For instance, why Bam was paid in Switzerland, what he made of Bam's address in Switzerland, the fact that Bam's name did not appear in the representative agreements and so on. Any objective, independent observer would regard these features as flashing red lights. Instead of just admitting this Muller refused to commit himself – vol 22 p 2241/2 – 2243/12.

257.

Muller's evidence on a neutral issue, namely the period for which companies in Germany are obliged by law to retain their records, gave the lie to the evidence of Hecker/Emsmann that records are only kept for six years. Muller's evidence is that they are kept for ten years – vol 21 p 2233/12 – 17. If Muller is correct then Lahmeyer must still have had records but was withholding them.

Dolus eventualis:

258.

In Lahmeyer's heads some 27 pages are devoted to this topic, paragraphs 291 – 316 pp 207 – 234. In these paragraphs Lahmeyer tries to suggest that it did not know that it was at risk of being convicted on the basis of dolus eventualis. In these heads the Crown will confine itself to the following submissions.

259.

Every charge involving intention as a matter of law encompasses both direct and indirect intent. This is with respect trite. In every murder case for instance, the accused can be convicted on his own evidence, if for instance he testifies that he did not intend to kill the deceased but concedes that he foresaw that the inflicted injury could have caused death.

*260.*

In this case the accused Lahmeyer through its lawyers had access to every document the Crown intended to rely on and the statement of each and every witness. From this it would have been palpably clear that the Crown intended also to rely on recklessness on the part of Lahmeyer when it paid Bam.

*261.*

With all these documents in their possession those representing Lahmeyer requested further particulars, further and better particulars and even better further and better particulars. See vol 1 pp 15 – 97. And even at the pre-trial conference Lahmeyer was still requesting further particulars – vol 1 p 99 paragraph 2. If in these circumstances the defence sought not to touch on the topic of recklessness or *dolus eventualis* then it is because it chose not to do so. Here see the following paragraphs in the pleadings – indictment paragraph 22 (at p 8); the request at p 72 paragraph 17.3, and the reply at p 18 paragraph 17; then the request for even further and better particulars at pp 82 and following. It will be seen that this issue is studiously left alone.

*262.*

The Crown made it clear throughout that its case rested on the intention with which Lahmeyer paid Bam. It could never have been understood by the defence that the Crown here confined itself to Lahmeyer actually intending for Bam to pay Sole. See also defence counsel's opening at vol 3 p 232/9 – 1

“ ..... had Lahmeyer known or had they expected [suspected?] that he was going to act unlawfully, they would have stopped the relationship”.

## 263.

The issue was then also canvassed with Emsmann in his evidence in chief. See for instance vol 16 p 1672/6 – 26.

## 264.

Also, Emsmann was specifically cross examined on this issue, namely that Lahmeyer was reckless as to what Bam would do with the money that it paid him – see vol 17 pp 1796/12 – 1818/17. Had the defence held the view that the Crown had confined itself to direct intent it would have objected to this line of questioning. At pp 1805 – 1810 Emsmann variously recognises that the possible source of information inside the LHDA was Sole. He however keeps repeating that although Sole was a possibility, he was one of many and indeed a remote one. See for instance pp 1806/10 – 17, 1807/2 – 6, 1809/14 – 18, 1812/14 – 17, 1813/12 – 19 and 1818/9 - 17. These answers were given in response to questions aimed at establishing Lahmeyer's frame of mind, i.e. *dolus eventualis*. This stock answer suggests a well prepared witness very much alive to the issue. After reading the cases quoted in paragraph 293 at p 212 of Lahmeyer's heads one almost gets the feeling that Dr Emsmann had also read these cases before he gave his evidence.

## 265.

The Crown contends that it has proved a direct intent on the part of Lahmeyer to bribe Sole. What the Crown also contends, however, is that even on the defence version *dolus eventualis* has clearly been established. Establishing intention is of course a matter of inference on the established facts – S v Mbelu 1966 (1) P.H. H 176 (N).

266.

Preparing a proposal is an expensive exercise (vol 13 p 1369/6-17). Sometimes the procedures for the establishment of a contract are just a farce. Lahmeyer experienced this "several times in Latin America" (vol 13 p 1368/23). It is a farce because the client has already selected his consultant. The proposal procedures are then just adhered to "to fulfil the requirements of the financiers" (vol 13 p 1368/21-26).

267.

Because of this possibility Lahmeyer does not prepare a proposal unless it is satisfied that its proposal "has a reasonable chance" (vol 13 p 1369/18-19). The monies spent on the proposals ..... "we want this to be protected" (vol 13 p 1371/4-5). Bam, as engineer, would have known about this. Lahmeyer would also have been at pains to highlight it to Bam.

268.

Despite what Hecker said about the representative having to be "there at the place" (vol 13 p 1370/2), for this purpose this is obviously something that Bam could have done for Lahmeyer from Botswana over the telephone. Here the engineer's estimate for contracts 46 and 51 (vol 104 p 10890; see further vol 13 p 1370/5-21), if the defence version is to be believed, the four or five totals that Emsmann testified to could easily be conveyed by Sole to Bam in Botswana over the telephone. Concerning these figures Hecker volunteered in his evidence in chief .... "it is very important to know that [i.e. the engineer's estimate]" (vol 13 p 1370/12-19).

269.

The evidence shows that Bam and Sole obviously knew each other well. Both were overseas trained local engineers in a small engineering community. Bam lived in Sole's house. He played squash with Sole and visited him in his office. Bam took over Lescon from Sole in very curious circumstance (Putsoane vol 5 pp 438/4 – 439/24). Besides this, according to Hecker, in Maseru everybody knew everybody (vol 14 pp 1502/16 – 1503/17). It is inconceivable that Lahmeyer, at least, through Emsmann and Hecker (Spiess was also the project manager in Lesotho for some time, i.e. vol 156 p 16284), would not have known about this close relationship.

270.

The obvious person to get on one's side in seeking to secure contracts on the water project was Sole. Everything revolved around him. See generally paragraphs 81 – 86 above. Nothing could get to the Board without his say so, or for that matter to the JPTC. Everyone involved on the LHDA's side in the bidding process owed his appointment to Sole and reported to him. Lahmeyer would have known all this.

271.

For contracts 46, 51 and 1009 the obvious person that Lahmeyer would have instructed Bam to talk to was his friend Mr Sole. Although not mentioning anybody's name Mr Emsmann's evidence was that he did indeed request Mr Bam to make enquiries to ensure that if Lahmeyer prepared a proposal Lahmeyer would have a reasonable chance (vol 16 pp 1700/15 – 1704/6 and vol 16 p 1708/1 - 14).

272.

Lahmeyer certainly knew Bam "very well" (vol 16 p 1618/11 – 13 see further vol 14 p 1460/18 – 20; 1484/6 – 11; 1502/16 – 1503/7; p 1503/17; 1516/10 – 11; and vol 15 p 1524/20 – 25).

273.

As Lahmeyer's project manager for the Feasibility Study, Hecker, over the period 1983 to 1987, would have had considerable contact with Sole. Sole after all was one of only four Basotho engineers with WEMIN (vol 14 pp 1502/13 – 1503/8). WEMIN was small (vol 14 p 1499/14) and WEMIN was Lahmeyer's client. It is the project manager's job to have "direct relationships to the client" (Hecker vol 13 p 1346/18). And Hecker's further evidence was that he had contact with WEMIN "on a daily or weekly basis" (vol 13 pp 1395/26 – 1397/24 at 1397/16). So Hecker must have known Sole well.

274.

At the time Bam, through Lescon, was Lahmeyer's sub-consultant on the Feasibility Study (vol 15 p 1524/20 – 25, vol 14 p 1496/13 – 15). In addition, if Hecker's evidence is to be believed, Bam was also Lahmeyer's representative. Hecker testified that he, during the Feasibility Study, saw Bam a "minimum two times per week, minimum" (vol 13 p 1400/6 – 7).

275.

Hecker accordingly over the period of the Feasibility Study would have got to know both Bam and Sole well.

276.

As a matter of overwhelming probability, Lahmeyer would have known, or at the very least foreseen, that Bam's contact person within the LHDA was Sole. Hecker after all knew, as already pointed out, that Bam had a reliable source. See also Emsmann's evidence (vol 17 p 1818/7 – 8). This for the purposes of winning contracts for Lahmeyer, for purposes of soliciting variation orders for additional remuneration, for other improper purposes such as obtaining engineer's estimates (vol 14 p 1482/20, vol 15 p 1519/14), assisting behind the scenes during negotiations (vol 13 p 1380/1- 26, vol 15 p 1522/9 – 11) and the like. After all, to quote Hecker, an agent "sells" his knowledge (vol 15 p 1525/20 – 22). Here it is significant that Emsmann admitted that he foresaw the possibility that Sole was Bam's informant (vol 17 p 1818/9 – 17, pp 1805/25 – 1810/5). And so must Hecker. Sole after all stood out as the one person a bidder would have liked to have had on his side. Both Hecker and Emsmann were extremely evasive when this was debated with them.

277.

Here Lahmeyer's evidence to the effect that because a representative does not disclose the identity of his informant within the client's organisation, Lahmeyer would never ask about this, simply cannot be true. See vol 16 p 1672/6 – 25. There is no way that Lahmeyer would have promised to pay Bam such huge sums to obtain for instance the engineer's estimate without wanting to be absolutely sure that the information was reliable. Having regard to the huge costs involved in preparing a proposal (see for instance vol 15 p 1586/20 – 26) and the risks of not winning contracts, an organisation like Lahmeyer would never prepare its financial proposal on Bam's verbal assurances alone. They would have wanted to know his source.

278.

When Hecker and Emsmann then testified that they never asked they were not being truthful (vol 17 pp 1816/9 – 1817/26). See further the following references to the record: vol 14 p 1430/17, p 1454/16, p 1456/4 – 15, p 1463/1 – 19, p 1479/22, p 1481/1, p 1482/15 – 19, p 1483/15, vol 15 p 1526/1 – 5, p 1545/8 – 17, p 1599/9 – 26, p 1612/14 – 26.

279.

Alternatively, if they are to be believed, then clearly they did not want to know and this amounts to “a fraudulent diligence in ignorance” – see R v Myers 1948(1) SA 375(A) at 382:

“[A] belief is not honest which, though in fact entertained by the representor may have been itself the outcome of a fraudulent diligence in ignorance – that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe”.

280.

Emsmann’s evidence that he foresaw the possibility that the information may be coming from Sole itself establishes *dolus eventualis* (vol 17 p 1818/9 – 17, pp 1805/25 – 1810/5). His qualification of this admission that he regarded this possibility however as a remote one is simply, on the evidence as a whole, not true. Sole was Bam’s obvious point man within the LHDA and once Emsmann entertained the possibility that it could have been Sole, then

everything else must have fallen into place in his own mind – the fact that they knew each other well, the fact that Bam was so successful, and so on.

281.

In order for Lahmeyer to satisfy itself that it has a reasonable chance Hecker testified that it gets its representative, *inter alia*, to talk to “friends in the different Ministries who know about that ...” (vol 13 p 1369/24-26).

The defence theories as to other possible reasons why Bam paid Sole:

282.

Lahmeyer argues, heads pp 183 – 232 that other possible and reasonable inferences exist for the Bam payments to Sole, that is possibilities not pointing to bribery on the part of Lahmeyer. In the trial it was conceded by Lahmeyer’s counsel that “those reasons are all speculative of nature” – vol 13 p 1326/23 – 25. See also vol 13 p 1329/22 – 26. But the second rule in Blom’s case “ ..... does not license speculation as to facts not proved by the evidence, nor does it mean that the State is obliged to close every avenue of escape which might otherwise be open to an accused.” (Essay by H. C. Nicholas quoted with approval by this Court in the Sole appeal, paragraph [81] at p 46.)

283.

Other possibilities must also have an evidential basis for the Court to entertain them. See LH Hoffmann and D Zeffertt's The South African Law of Evidence, 4<sup>th</sup> edition, p 589; Ex parte Minister of Justice, in re R v Jacobson and Levy, 1951 AD 466 at 478; S v Veldthuisen, 1982 (3) 417 (A); R v Joseph, 1964 (4) 54 SA (S.R., A. D.); R v Slabbert and Prinsloo, 1944 TPD 32 ; R v Mthetwa, 1972 (3) SA 766 (A).

284.

On the face of it Bam, when using Lahmeyer money to pay Sole, did so on Lahmeyer's instruction (or at the very least with its knowledge). Bam would also have told Lahmeyer what he did with the money. Also, when Sole received this money he must have known it came from Lahmeyer (Bam would surely have told him) and he as a matter of probability would then have acknowledged this to Lahmeyer.

285.

The suggestion (vol 13 p 1329/22 – 26) that perhaps Bam was paying Sole to, for instance, advance the cause of ABCC is simply inconsistent with the facts. Bam didn't pay Sole using ABCC earnings. He used Lahmeyer's money. This alone discounts the ABCC possibility. So too does the 50/50 split of Lahmeyer money between Sole and Bam. Also the fact that ABCC earnings were received in Lesotho (see variously the Lescon bank account – vols 50 – 55 at for instance vol 53 p 5436) whereas Bam paid Sole in Switzerland where he (himself that is) was paid by Lahmeyer. Furthermore, the ABCC earnings were earned by inter alia Lescon as part of ABCC whereas the representative agreements' earnings were earned by ACPM i.e. Bam in his personal capacity. See the Court's judgement at vol 186 pp 19166/11 – 19167/4.

286.

Furthermore, the suggestion that Bam may have been bribing Sole for his own benefit as part of ABCC can be discounted because ABCC was always going to be a part of contracts 46, 51 and 1009 no matter which overseas company won these contracts. Lescon/Bam was a partner in ABCC (vol 2 p 176/19 – 20) and Bam was MD of Lescon (vol 2 p 176/15 – 19). The extent to which ABCC was to be involved was pre-determined in the tender documents and this was also the evidence of Emsmann, namely 20% or 30% local participation (vol 16 p 1671/9 – 18; see also Lahmeyer's heads paragraph 206 p 145). This is to be compared with, for example, contracts 12 and 15 where there was no such requirement (Hecker, record vol 14 p 1413/1 – 11; vol 19 p 1957/18 - 22). Notwithstanding, Lahmeyer was anxious even for contracts 12 and 15 to use local engineers and skills because it believed this would enhance Lahmeyer's prospects of winning the contracts (Hecker, vol 14 p 1413/1 – 4). Here too, when Lahmeyer submitted its proposal for contract 51 it was at pains in its letter accompanying the proposal to point out that they proposed "almost 50% local participation" – see vol 61 p 6363 – 6364. There is no evidence that they did this under duress. Rather it is plain Lahmeyer believed this would enhance its chances of winning contract 51. See here even paragraphs 207 and 208 at pp 146 – 147 of Lahmeyer's heads. Also to use locals was cheaper – paragraph 209 p 147 of Lahmeyer's heads. This then reduced the cost of the proposal thereby making it more competitive.

287.

It was also for the consultant itself to determine how the sub-consultant was to be constituted. Put differently, Lahmeyer itself – and not Sole – could decide which local engineers it would use to do what as part of the sub-consultancy. And this aspect was fully dealt with in each of Lahmeyer's proposals. See parts 4, 5, 6, 8 of Exhibit J2 for contract 46 (vol 160 p 16619

– vol 163 p 17001) and see parts 4, 5, 8 of the proposal for contract 51 (vol 62 p 6516 – vol 67 p 7094). See vol 115 p 11999 for contract 1009. Only after the consultancy contract is awarded to Lahmeyer does Lahmeyer actually constitute the sub-consultancy. To quote Emsmann - "Afterwards we are going and make a contract with Mr Bam, this is a totally separate thing. Also that does not take place at the LHDA, that takes place in our offices" (vol 16 p 1677/18 – 20).

288.

In a word then it was not Mr Sole's business. Also Dr Emsmann's evidence is confirmed by the facts. Mobilisation under contract 46 took place on 18 September 1990 (vol 34 p 3536). The contract 46 sub-consultancy agreement was concluded at least 6 weeks later. See vol 156 p 16285 r.w. p 16284. And for contract 51 the position of ABCC as sub-consultant was cemented in in the proposal for contract 51 already. See here paragraphs 138 - 141 above. And under contract 51 Lahmeyer commenced mobilising on or about 13 September 1991 – vol 89 p 9320 r.w. vol 32 p 3412, while the LMC/Lescon sub-consultancy agreement was only concluded some 7 months later on 15 April 1992 – vol 139 p 14548.

289.

So no matter what, ABCC and therefore Lescon would be involved. It was just a matter of who they would be sub-consultants to, i.e. the French, the Germans or whoever. This Lahmeyer acknowledged – vol 13 p 1328/20 – 24. And here because of Lahmeyer's exclusivity agreements with Bam, this too was pre-determined namely that Lescon would team up with Lahmeyer and no one else. See vol 13 p 1338/2 – 10; vol 19 pp 1945/23 – 1946/20; vol 19 pp 1955/24 – 1958/9. See here too, for example, Lescon's undertaking dated 4 June 1991 to be found in the proposal at vol 61 p 6389 and vol 62 p 6519. Also, having reserved Lescon for itself it was a matter of agreement between

Lahmeyer and Bam as to the extent of Lescon's participation as sub-consultant.

290.

All this had nothing to do with the LHDA or Sole. It was something that went into Lahmeyer's proposals. What's more, at least for the contract 51 representative agreement, 3 % of the ABCC earnings was its share of the fee payable to Bam in terms of the representative agreement. (See vol 146 p 15244; vol 147 p 15434). Here Lahmeyer received ABCC earnings from the LHDA and paid these over to ABCC. So part of the ABCC earnings were retained by Lahmeyer and went to pay Bam under the representative agreement. This is hardly consistent with Lahmeyer's present theory. Instead it is more consistent with Lahmeyer insisting that at least a part of the bribe monies that had to be paid under the representative agreement had to come from Bam's earnings.

291.

There is not a tittle of evidence that Sole, or for that matter anyone else in the LHDA, insisted that Lescon be given more of the sub-consultancy pie. See Emsmann, vol 19 p 1955/24. So ABCC/Bam would have had no motive to bribe Sole. Bam had to compete with no-one. The opposite is true for Lahmeyer. Lahmeyer had to compete with other international consultants to team up with ABCC (Hecker vol 14 p 1413/12 – 22). Lahmeyer would therefore be the one making the overtures to Bam/ABCC. And not Bam to Sole via Lahmeyer through Lahmeyer's representative agreement.

292.

One also has the curious coincidence that Lahmeyer stopped paying Bam in April 1997 (vol 144 p 15006), which happens to coincide with Sole finally

losing his Court challenge against his dismissal. Lahmeyer obviously stopped paying after Sole lost his Court challenge because there was no longer any prospect of Sole ever returning to a position of influence within the LHDA. Here see Emsmann's somewhat unguarded remarks about influence – vol 19 pp 1951/2 – 1953/2. The explanation that Lahmeyer stopped paying because of rumours of an unhealthy relationship between Bam and Sole is an obvious recent fabrication. It cannot be true because the Swiss bank records only became available in June/July 1999 – vol 19 pp 1953/19 – 1954/5. So the foundation for the rumour was not in place yet. Somehow Lahmeyer had to explain the obvious correlation and this was the best it could do. This also negates the ABCC influence theory. And this evidence about Lahmeyer's reason for stopping "the last payment under 1009" (vol 19 p 1953/13 – 17) is also all inadmissible hearsay (vol 19 p 1954/5 – 12). Zimmermann told Emsmann all he testified to in this regard. Zimmermann should have given this evidence.

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THE CROWN'S CROSS APPEAL

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Count 5:

293.

The basis for the acquittal on this count is the finding (vol 186 p 19125/10 – 13) that it was not proved that the money was intended by Lahmeyer for Bam.

294.

But this payment and the fact that it was made by Lahmeyer and intended for Bam was admitted by the defence, both in terms of its plea explanation, Exhibit "A" (vol 23 p 2322 paragraph 3.1, r.w. p 2324 paragraph 4.1) and defence counsel's opening address (vol 2 p 172/7 – 8). See also Lahmeyer's heads, paragraph 25 at p 18, where the admission is again made.

295.

In addition the Court found it not proved that the amount of USD 10 007.98 and USD 8 500.00 paid by Bam to Sole can be linked to the payment by Lahmeyer to Bam of DM 34 000.00 (vol 186 p 19127/7 – 9). The witness Roux's evidence is discussed elsewhere in these heads (see paragraphs 65 – 68 above) and it is submitted that the Court wrongly rejected his evidence in regard to the linking of these payments (vol 186 p 19125/13 – p 19127/6). Roux's evidence is that the money could be pulled through. Also in terms of Exhibit "KB". Even if this money cannot be pulled through to Sole, the Crown refers to its submissions in respect of counts 4 and 8.

Count 3:

296.

Also here the Court a quo found (vol 186 p 19136/3 – 20) that it was not satisfied that the transfer to Bam emanated from Lahmeyer. As was submitted with regard to count 5, that it was Lahmeyer's money and that it transferred the money to Bam was common cause. As with count 5, this was also the evidence of Roux which on this aspect was not challenged – vol 9 p 888/10 - 15. Further, from a reading of Exhibit "KB" it was common cause that this Lahmeyer money was shared 50/50 between Bam and Sole. Here Lahmeyer paid Bam R100 000 and thereafter Bam paid Sole R50 000 – see paragraph 65 above.

Counts 4 and 8:

297.

In respect of both these counts the Court a quo found that because the payments from Lahmeyer to Bam could not be forensically pulled through to Sole, Lahmeyer stood to be acquitted (vol 186 p 19137/1 - 14 – count 4; p 19132/7 – 13 – count 8). Although the factual finding was correct (see paragraphs 65 – 68 above), in this respect the Court a quo with respect erred.

298.

Once it is found that the representative agreements are disguised bribe agreements it must follow that these payments were made to Bam with a

corrupt intent and that is with respect the end of the matter. After all, the whole crux of the Courts reasoning was that it did not believe the defence witnesses when they claimed that these were genuine agreements.

299.

The defence also linked all the payments to the representative agreements (Exhibit "A", vol 23 p 2324 paragraph 4.1). In his opening, defence counsel also linked the legitimacy or lawfulness of these payments to the genuineness of the representative agreements (vol 2 p 172/7 – 8; p 175/2 – 4). Once it is found that the representative agreements were not genuine, Lahmeyer stood to be convicted on all the counts except count 1. This was common cause. See the judgement at vol 186 p 19196/5 – 9. See also defence counsel's remarks at vol 3 p 232/10 – 13. Here too it is conceded that the payments reflected under counts 2 – 12 were made pursuant to the representative agreements – Lahmeyer's heads p 18 paragraph 25.

300.

The Court accordingly erred in this regard and the error stems from its approach to evidence. Here the Court a quo found that among the facts to be proved by inference in order to establish Lahmeyer's guilt was that Bam in turn paid Sole with Lahmeyer's money (vol 186 p 19187/15 – 19; p 19189 / 15 – 17).

301.

This is with respect a misdirection. What the circumstantial evidence needs to show is that when Lahmeyer paid Bam it did so with a corrupt intent. The fact that Bam paid some of the monies over to Sole is no more than evidence pointing to this conclusion.

302.

The fact that the payments cannot be pulled through is irrelevant because Lahmeyer admits that the payments were made pursuant to representative agreements. And if these agreements were corrupt then the payments pursuant thereto are also corrupt because they were made with an intent to bribe.

*303.*

It is argued by Lahmeyer (paragraphs 317 – 320 at pp 234 – 236) that these counts are not appealable in that the appeal relates to questions of fact and not questions of law. This is with respect not so.

*304.*

In acquitting Lahmeyer on these counts, the Court a quo expressly stated that it was doing so by applying the case law. See vol 186 pp 19189/18 – 19190/12. And for the reasons dealt with above having found as a fact that the representative agreements were simulated the legal conclusion was a conviction on all counts, not a conviction on some and an acquittal on others.

Sentence:

305.

It is axiomatic that each case must be dealt with on its own facts. Having said that, however, a comparison with the sentence in A cres is inevitable. Both cases arise from the water project, involve the Chief Executive of the employer, span approximately the same time periods and involve a similar modus operandi. Both accused companies were engineering consultants, the

difference being that Acres supplied engineering manpower to the LHDA whilst Lahmeyer's engineers acted as the LHDA's consultants in respect of construction contracts. In both cases however, there existed a relationship of trust.

306.

The Courts, it is submitted, whilst obviously not slavishly following sentences in previous cases, will, it is submitted, want to show consistency in sentencing. This not only as a general principle, but also in these very unusual circumstances where the bribe amounts are enormous and involve international engineering consultancies employed on a multi-billion Maloti water project. Consistency in sentencing in these circumstances will not only set a guideline for future similar cases (not only in Lesotho but for instance in South Africa), but will also demonstrate this Court's firm determination to stamp out conduct of this nature by international companies that involve themselves in Lesotho.

307.

In this regard it will not go unnoticed that these cases have attracted enormous international interest. Here mention is made in particular of donor agencies who would want to support similar projects in Lesotho in the future.

308.

Acres was sentenced on appeal to a fine of M15 million. It was convicted on one count of bribery involving CAD 493 168 paid over the period June 1991 to January 1998. This was in respect of one LHDA contract, contract 65, valued at CAD 20 million. There was one representative agreement with Mr Bam.

309.

Lahmeyer on the other hand was convicted on seven counts of bribery paid over the period February 1991 to April 1997. These payments related to three so-called representative agreements in respect of contracts 46, 51 and 1009, the value of these contracts being M53 716 441 (vol 167 p 17358), M61 413 117 (vol 167 p 17373) and M13 801 249 (vol 167 p 17397), respectively. The amounts involved in respect of the seven counts are FrF 135 760 (count 2), DEM 24256 (count 6), DEM 61 870 (count 7), DEM 9975 (count 9), DEM 58 801 (count 10), DEM 17 600 (count 11) and DEM 47 600 (count 12).

310.

Compared to Acres then Lahmeyer, in a word, got off lightly. Putting it in legal terms and using the sentence in the Acres case as the standard set by this Court (obviously on those particular facts), the fine of some M10.6 million imposed in this case is startlingly or disturbingly inappropriate. See for instance S v Narker 1975 (1) SA 583 (A). Certainly in the eyes of the international community Lahmeyer looks far less blameworthy than does Acres, when in truth it is at least, if not more blameworthy.

G H Penzhorn SC

H H T Woker

26 February 2004