

**IN THE CROWN COURT AT SOUTHWARK**

The Hon. Mr. Justice Field  
21 July 2004

**R v Martin Gibbins**

**OPEN RULING**

**Mr A Mitchell QC, Mr P Martin and Mr S Esprit** for the applicant, Mr Gibbins.

**Mr C Miskin QC and Mr R Pardoe** for the interveners.

**Mr A Temple QC, Ms L Dobbs QC and Mr T Forster** for the Crown.

1. This is an application by Mr. Martin Gibbins for a stay of the criminal proceedings pending against him. On 19<sup>th</sup> April 2004 Mr. Gibbins faced trial with four co-defendants, Mr. Michael Wilson-Smith, Mr. Peter Barnett, Mr. Minesh Ruperalia and Mr. Imdad Ullah on an indictment containing five counts. The most important count was count 1 which charged the five defendants with conspiracy to defraud. The remaining counts charged conspiracies to contravene various provisions of the Theft Act 1968.
2. Under count 1 it was alleged that Mr Gibbins and the four other defendants conspired together and with further persons both named and unnamed to defraud potential investors by carrying out what is variously called “an “advance fee” or “prime bank instrument” fraud. The Crown alleged that various of the defendants at different times induced potential investors to enter into written “access to funds agreements” which the investors understood gave them a realistic prospect of gaining access to large sums of money that could be invested in so-called High Yield Investment Programmes. Under these agreements, an off-shore company, usually connected to Mr Gibbins, contracted to procure the issuance by a bank of a document stating that a specified sum of money was held in a particular account by a particular account holder. In some instances the document stated that a particular sum of money was available to the potential investor. The document issued by the bank (“the issuing bank”) was called a “Proof of Funds Letter” or a “Bank Advice”.

3. Access to the specified sum depended on the potential investor procuring either the issuance of a “bank instrument”, usually a one-year guarantee issued by a bank of a particular description for the specified sum (plus interest at 8% p.a.) in favour of the account holder, or an agreement between the issuing bank and the investor’s bank (“the receiving bank”) that the latter bank would sell to the issuing bank medium term notes, the purchase of which would be funded by the sum specified in the Bank Advice. Where medium term notes were to be purchased, the agreement called for the issuance by the issuing bank both of a Bank Advice and a Pre-Advice, the latter being a document that informed the receiving bank that it could look to the issuing bank for the specified sum if it signified to the issuing bank that it could serve on it a “Purchase Order” for the medium term notes in question.
4. Upon the agreement being executed, the investor paid a fee into an escrow account operated by Mr. Wilson-Smith or Mr. Barnett or Mr. Ruperalia, who were all solicitors. The terms governing the operation of the escrow account provided that the fee was liable to be paid out of the account to the order of the off-shore company once the Bank Advice and/or the Pre-Advice had been duly issued. The fee therefore was payable out of the escrow account regardless of whether access to the specified sum had been obtained or not.
5. The defendants did not dispute that the transactions relied on by the Crown had been entered into or that fees had been paid into escrow accounts and then out again once the bank documentation called for by an agreement had been issued. The principal issue therefore was whether the defendants had acted dishonestly in regard to the transactions. The Crown maintained that all the investor got for his money was the Bank Advice and/or the Pre-Advice which

were documents of no commercial value. The Crown further alleged that the defendants knew that the conditions to which access to the specified sum was subject were never going to be fulfilled. The defendants adamantly denied that they had acted dishonestly. They maintained that the bank documentation called for by the agreements was capable of being of commercial value and the way that the transactions operated was all set out in the documentation so that the potential investors were well aware of the risks.

6. Although a jury in waiting was selected on 19 April 2004, the next four weeks were taken up with a number of interlocutory matters. The empanelling of a jury was also delayed because Mr. Gibbins had an outstanding petition for leave to appeal an earlier ruling to the House of Lords and he also applied to the Court of Appeal for leave to appeal another interlocutory ruling.
7. On 14 May 2004 the court heard an application by Mr. Gibbins to exclude part of the evidence that the Crown's expert witness proposed to give. The defendants were not in court, having been given permission not to attend if they so wished. In the course of the proceedings, junior counsel for the prosecution made disclosure of some documents to counsel representing the five defendants. Included in that disclosure was a submission made by the SFO to the Attorney General in February 2001 seeking his consent to the grant of prosecutorial immunity in favour of a Canadian citizen, Mr. William Deluce, who had been involved in a number of the transactions that the Crown wished to rely on. Within that submission was a memorandum from an SFO case controller, Mrs. Linda Heaton, in which she described the case generally that the SFO wanted to bring against Mr. Gibbins and his co-defendants. A section of Mrs. Heaton's memorandum contained information of a secret and

sensitive character which I had ordered should not be disclosed following a PII hearing on 20 and 21 April 2004.

8. It had been the intention of junior counsel for the Crown to ensure that the paragraph containing the sensitive information was redacted before the document was disclosed. Unfortunately, that was not done and the document was passed to counsel for the defendants in un-redacted form. Counsel's mistake was quickly spotted but by this time the sensitive paragraph had been read by both of Mr. Barnett's counsel (but not their instructing solicitor) and by Mr. Gibbins's three counsel and his solicitor. The legal representatives who had not read the sensitive paragraph returned the document to the Crown, and upon being told what had happened I made a temporary order restraining those legal representatives who were "in the know" from making use of the sensitive information in defending their clients and from divulging it to any person, including their lay clients, and in the case of Mr. Barnett's counsel, their instructing solicitor. On 19 May 2004 I perfected my provisional order and extended it so that those in the know were also restrained from making any use of the information whatsoever.
9. On 20 May 2004, the Court of Appeal overturned my order, holding that, not only should those counsel who were in the know be free to tell their lay clients and their instructing solicitors what they had learned, but that also the other defendants and their legal representatives should be given the mistakenly disclosed information. The Court of Appeal continued my order pro tem, however, to allow the prosecution to consider its position.
10. During the continuance of my order, the trial of Mr. Gibbins and the other defendants resumed on 21 June 2004. Mr. Temple QC, leading counsel for the

Crown, told me that the prosecution proposed to call no evidence against Mr. Gibbins's co-defendants. He addressed me in these terms:

My Lord .... may I turn to Section 17. On behalf of the Crown I offer no evidence against four of these five defendants, namely Wilson-Smith, Barnett, Ruperalia, and Ullah and further invite this court to order that verdicts of not guilty under the provisions of Section 17 of the Criminal Justice Act 1967 be recorded against each of these defendants on each of the five counts they currently stand indicted and to which they have entered pleas of not guilty.

My Lord, may I, before sitting down and inviting the court to take that course, make these following observations: this court and those concerned in the case are well aware of the background to events giving rise to the court's order on 19 May and the following proceedings in the Court of Appeal. Put shortly: sensitive material was inadvertently disclosed to those representing some, but not all, of these five defendants. As a result of the Court of Appeal declining to certify any questions of law, the Crown has had to consider differing and competing issues, all of which affect the overall public interest. It is currently wholly inappropriate to develop the detail and, with respect, we decline to do so, but we have further decided, after careful and detailed considerations of all the issues involved, that the only proper course available, despite the nature of the evidence against these defendants, and despite the fact there is an accepted prima facie case against them, the only proper course is to take that proposed, namely the offering of no evidence.

Accordingly, we invite Your Lordship to deal with these four defendants here and now so that they can be discharged without further delay and we also invite the court to reconvene at an appropriate moment to deal with further directions as regards the case against Gibbins.

11. I acceded to Mr. Temple's invitation and directed that not guilty verdicts be entered in respect of Mr. Wilson-Smith, Mr. Barnett, Mr. Ruperalia and Mr. Ullah (referred to hereafter as "the four"). As the prosecution well appreciated, by s. 17 of the Criminal Justice Act 1967, those not guilty verdicts had the same effect as if the acquitted defendants had been tried and acquitted on the verdict of a jury.

12. Mr. Temple also announced that it was the Crown's intention to continue the prosecution of Mr. Gibbins who would be the sole defendant. Mr. Mitchell QC for Mr. Gibbins stated that he wished to apply for the proceedings against Mr. Gibbins to be stayed. I accordingly ordered that the Crown should serve a revised opening note setting out how they proposed to put the case against Mr. Gibbins now he was to be the sole defendant and I heard an application for disclosure in aid of that part of Mr. Gibbins's application that involved reference to the sensitive material.
13. On 25 June 2004 the prosecution served their revised Opening Note and a proposed amended indictment. The only difference between the previous indictment and the proposed new one was that in the new indictment the acquitted defendants were no longer named as defendants. Thus, notwithstanding that at the invitation of the Crown the four had been acquitted of conspiring with Mr. Gibbins to defraud, they were named in the new indictment as having conspired with Mr. Gibbins in precisely the same way as was alleged in the old indictment. The revised Opening Note is also essentially the same as the original Opening Note. Accordingly, it contains many allegations to the effect that the four dishonestly participated in proof of funds agreements. The following are examples.

--- As you can see from the Indictment, Gibbins is said to be dishonestly involved with both named and unnamed persons. Four names in particular will feature heavily in the evidence – Michael Wilson-Smith, Peter Barnett, Imdad Ullah and Minesh Ruperalia. Many others are also dishonestly involved, and they too will be mentioned at an appropriate moment. Before I come to the 4 I have just named, one matter needs clarification. Only Gibbins is on trial before you, and a verdict as to his guilt – Not Guilty or Guilty – will be

required from you. You are not required to bring in verdicts in respect of anyone else. This trial is concerned with the guilt or innocence of one man, and one man alone – i.e. Martin Gibbins. [Develop?]

--- All 5, i.e. the Defendant Gibbins, Wilson-Smith, Barnett, Ruperalia and Ullah, were clever, articulate, and wordly wise, knew of each other, and knew each other's particular business expertise. They also had a well developed understanding of human nature, trading on weaknesses that to one degree or another affect us all. [Develop later.]

--- This case is, of course, concerned with Gibbins and those who joined forces with him. It is the circumstances of the particular dishonest Enterprise that they chose to embark upon that is the subject of this trial, and it is on those matters that we must concentrate.

--- The Crown say that this Defendant, together with other persons, some known, some unknown, (See Indictment), joined and operated an essentially simple, but nonetheless clever scheme to part would be investors from substantial sums of money. In less elegant but down to earth terms, they agreed to cheat, to swindle, those with whom they purported to do business. Each person, the Defendant and those working with him, played their part. They were all "in it together", jointly responsible for all that was done in furtherance of the scheme to which they attached themselves. As will be demonstrated, the scheme was dishonest from first to last, and designed to play on human frailties. The lure of supposedly easy money, misplaced trust, naivety, to name but three.

--- You should understand that not all those involved joined the enterprise at the same time. To give an example, the Defendant Gibbins played a full part throughout, from first to last. By contrast, Ruperalia's participation began at a later stage, in effect taking over and/or supplementing the activities of Barnett and Wilson-Smith. This became necessary since, as will be shown, the participation of a Solicitor was important to further the enterprise, and there came a time when both Barnett and Wilson-Smith were under considerable pressure from the Law Society (who you will remember regulates the affairs of Solicitors) to cease their involvement.

--- As regards this all important & obvious point, it is to be emphasised that so far as the Defendant and his Co-conspirators were concerned, it was never, at any time, their intention that any part of the funds should ever be at the investor's disposal. The money was going nowhere. They accordingly made absolutely sure that the money remained in the account, by designing conditions that could never in practice be fulfilled.

---The Solicitors' role was crucial to the overall success of the fraudulent Enterprise. All three, Wilson-Smith, Barnett and Ruperalia, were extensively involved, [as demonstrated by the Transaction Schedule.] Apart from generating an aura of respectability, the Solicitors' principal role was to liaise with the Investor and receive his money, i.e. fee, in an Escrow Account. The 3 Solicitors –Wilson-Smith, Barnett and Ruperalia, were recruited, and/or recruited themselves, to play a pivotal role. As I have touched upon, their role was essentially two-fold, firstly to receive and hold the investors' money in an Escrow Account, and secondly to impart an aura of trust and commercial probity to the overall transaction. As to the latter, they fully appreciated the standing that they enjoyed, particularly in the eyes of overseas businessmen. Time and again such persons were influenced by the fact it was a Solicitor holding their funds.

14. Having considered the proposed new indictment and the revised Opening Note, I ordered that the acquitted defendants could intervene in Mr. Gibbins's application on terms that they were represented by one set of leading and junior counsel. At the hearing the four were represented by Mr. Miskin QC and Mr. Pardoe. I also received very helpful skeleton arguments from Mr. Rhodes QC and Mr. Aaronberg who represented Mr. Ruperalia.
15. Both Mr. Miskin and Mr. Mitchell argued that it was an abuse of process for the prosecution to obtain acquittals of the four and then to contravert those acquittals in the trial of Mr. Gibbins. Both also submitted that so to proceed involved a breach by the prosecution of the four's rights under Article 6 (2) of the European Court of Human Rights to be presumed innocent of the charges contained in the original indictment until proved guilty.
16. The prosecution offered no evidence against the four because they concluded that this was the only way in which, following the decision of the Court of Appeal, they could salvage anything from the case that had originally been brought against the five defendants. The case against the five involved serious charges the prosecution of which was plainly in the public interest. And it is to

be noted that none of the five had moved to have the charges dismissed. The prosecution's motive in offering no evidence against the acquitted defendants in order to achieve at least the prosecution of Mr. Gibbins was therefore entirely unobjectionable. However, they took this course with the intention of contravening the not guilty verdicts they themselves were seeking, for they intended all along and still intend in the face of this application to allege in open court in the trial of Mr. Gibbins that the four had in fact dishonestly conspired with Mr. Gibbins as alleged in the original indictment.

17. It is clear from the authorities that there can be an abuse of process justifying a stay of the proceedings even though the abusive conduct does not itself render the trial of the defendant unfair; see *Reg. v Horseferry Road Magistrates' Court ex parte Bennet* [1994] 1 AC 42; *R v Latif* [1996] 1 WLR 104 (HL). In the latter case, Lord Steyn said:

The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide there has been an abuse of process, which amounts to an affront to the public conscience and requires criminal proceedings to be stayed: *Reg. v Horseferry Road Magistrates' Court ex parte Bennet* [1994] 1 AC 42.

18. It is plain that the mere fact that one or more conspirators has been acquitted of a conspiracy is no bar to a subsequent prosecution of other persons alleged to have been party to the same conspiracy; see *DPP v Shannon* [1975] AC 717

and s. 5 (8) and (9) of the Criminal Law Act 1977. However, what is involved here is a deliberate tactic by the prosecution to procure the acquittal of the four and then to proceed in open court to assert that they were in fact guilty.

19. In exercising my discretion, I detect no countervailing consideration of policy in this case but there is a countervailing consideration of justice, namely, that it is in the public interest that the serious charges laid against Mr. Gibbins be tried, it having become impossible for there to a fair trial of all the original defendants. However, notwithstanding this countervailing consideration, I regard the intention of the Crown to contravert the not guilty verdicts against the four, verdicts which by s. 17 of the Criminal Justice Act 1967 have the same effect as if the four had been tried and acquitted on the verdict of a jury, as being an abuse of process which should not be permitted. To adopt the language of Lord Nicholls in *R v Looseley* [2001] 1 WLR 2060 at 2069, for the prosecution to blow hot and cold as they propose to do is “so seriously improper as to bring the administration of justice into disrepute.”

20. Mr. Temple QC for the Crown relied on *R v Z* [2000] AC 483 where the House of Lords held that similar fact evidence of previous incidents which had led to acquittals of the defendant for rape could be adduced against him in a trial for a separate rape even though in adducing such evidence the prosecution would be contending that it showed that the defendant had been guilty in the previous trials. Objection to the calling of such similar fact evidence in *R v Z* was based on the famous dictum of Lord MacDermott in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] 483 which Mr. Miskin also relied on in arguing that the prosecution were acting in abuse of process. The dictum is in these terms:

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The Maxim “Res judicata pro veritate accipitur” is no less applicable to criminal than to civil proceedings. Here the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant to his defence.

21. Lord Hutton (with whom the rest of the House agreed) held that the principle of double jeopardy did not operate as widely as Lord MacDermott was suggesting. Rather, it operated to cause a criminal court in the exercise of its discretion (subject to special circumstances) to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier prosecution which resulted in an acquittal or a conviction. Thus, provided a defendant is not placed in double jeopardy as so described, evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which the defendant had been acquitted.
22. Despite its inroad into Lord MacDermott’s dictum, *R v Z* is not, in my opinion, an authority that precludes a finding that the course proposed to be adopted by the prosecution in the instant case is an abuse of process. I say this because the House of Lords were not concerned there with a situation where the Crown for its own purposes had procured acquittals with the intention of contraverting those acquittals in open court in proceedings against a former co-defendant.
23. Mr. Temple also relied on *Hui Ching Ming v Regina* [1992] 1 AC 34. There the prosecution alleged that the appellant was guilty of murder on the basis of

a joint enterprise involving, inter alios, one Ah Poh, who had killed the deceased by hitting him with a metal pipe. Ah Poh was tried separately from the defendant and was found not guilty of murder but guilty of manslaughter. The appellant, who had originally been charged only with manslaughter, was then tried and convicted of murder, notwithstanding Ah Poh's earlier acquittal of that offence. The appellant appealed on two principal grounds: (i) he should have been allowed to adduce Ah Po's acquittal in evidence; and (ii) it had been an abuse of the process for the Crown to have substituted the original charge of manslaughter with a charge of murder, it being the Crown's purpose (so it was alleged) to put pressure on the appellant to plead guilty to the lesser charge. The Privy Council rejected both grounds of appeal. The Board held that Ah Poh's acquittal of murder was irrelevant to any issue in the appellant's trial and was therefore rightly excluded from the evidence. It also held that the Crown had not acted oppressively in substituting for the manslaughter charge the charge of murder. However, in the course of dealing with the abuse of process ground, Lord Lowry, who gave the opinion of the Board, said:

Cases cited earlier in this judgement show that the trial of a secondary offender can proceed although the alleged principal has been acquitted in an earlier trial. In such circumstances abuse of process has not even been suggested: see, for example *Reg. v Luk Siu-keung* [1984] HKLR 333.

24. In my opinion, *Hui Ching Ming* is distinguishable from the instant case on the ground that it was not concerned with the procurement by the Crown for its own purposes of an acquittal which it intended and still contends to contravert in open court, albeit in a trial of a third party. I also think that there is a substantial difference between a situation where a principal party has been acquitted of murder but found guilty of manslaughter and the prosecution

allege in the trial of the secondary party that the principal party had the necessary intent to commit murder, and the situation where, at the behest of the prosecution, there has been a complete acquittal of a co-conspirator who the prosecution then allege to be guilty of the same of conspiracy.

25. Mr. Temple also cited *R v Dyer, Lowry and Field* [1964] Crim LR 297; The Times 12 February 1964. In that case the appellants had been convicted of conspiring to dope racehorses. A co-conspirator, Steward, had been tried separately and convicted but his conviction was quashed on appeal. At the appellants' trial (which came after Steward's successful appeal) the prosecution adduced evidence of the actions of Steward but did not allege that he was a co-conspirator. The appellants submitted on appeal that the prosecution should not have led any evidence that connected Steward with the conspiracy. The Court of Appeal rejected this contention, holding that the prosecution were free to adduce evidence of what Steward did. Through the efforts of junior counsel for the Crown, I was provided with a copy of the transcript of the full judgement of the Court of Appeal. In the course of delivering that judgement, Finmore J. said:

Now of course, two things are elementary. One is that when a man has been acquitted either by a jury or by appeal he cannot again be proceeded against for those matters. The second thing, equally obvious, is if he is the only person with whom the conspiracy is alleged to take place then the accused cannot be convicted. *Of course, he [sc Steward] was not one of the persons alleged in this case to be a conspirator because he was protected by his previous acquittal.* But we are quite unable to accept Mr. Lewis's argument that thereafter he should be, so to speak, put in cold storage and nobody can even refer to him or say what he did. It seems to us that that is using a shield which was properly given to an acquitted man to shelter other accused persons who were not in any way concerned with the previous trial. For that reason it seems to us there is no objection whatever to Steward's name and Steward's exploits being referred to. I think there was plain evidence that he was one of

the men who went over the fence and he was put in for doping Treasure Hunt. If that is the fact the jury were entitled to know it, and while Steward himself could not be put in the dock again and charged, we can see no conceivable reason why his protection should be extended to the people who were acting with him then, according to the evidence, and who were accused in this particular conspiracy. [Emphasis supplied].

26. In my opinion this authority does not assist Mr. Temple. First, in contrast to what is proposed in this case, it is plain from the words I have italicised that the Crown did not allege that Steward was a co-conspirator of the appellants. Second, the prosecution, far from seeking for their own purposes the acquittal of Steward, had striven to prove and then to uphold Steward's guilt. Third, there is all the difference in the world between adducing evidence as to what an acquitted man did and alleging that he was guilty of the offence of which he has been acquitted. In the case before me it is not disputed that the four participated in the transactions and they and Mr. Gibbins do not suggest that the Crown should be debarred from proving what they did in respect of those transactions. However, that is not what the Crown proposes to do, for to secure the conviction of Mr. Gibbins it has to allege that he dishonestly conspired with the four which necessarily involves the allegation that the four dishonestly conspired with Mr. Gibbins.

27. I turn now to the submission that to contravert the acquittals of the four in the manner contemplated by the prosecution would involve a breach of Article 6 (2) of ECHR, and for that reason the prosecution should be debarred from prosecuting Mr. Gibbins. Article 6 (2) ECHR provides:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty.

28. In *Sekanina v Austria* (1993) 17 E.H.R.R. 22, the applicant was arrested on suspicion of having murdered his wife who had fallen from a window of the matrimonial home. The applicant was subsequently tried for murder before an assize court sitting at the Linz Regional Court (*Landesgericht*) but was acquitted by the jury by 7 votes to 1. Under s. 2 (1) (b) of the Austrian Act on Compensation in Criminal Cases he was entitled to compensation for the period he was on remand if the suspicion that he had committed the offence that had led to his being remanded had been dispelled. The Linz Regional Court and the Linz Court of Appeal held that the applicant was not entitled to compensation for the time he was on remand because, on the ground that, having regard to the prosecution evidence, it was not possible to dispel all suspicions of the offence: indeed, serious grounds for suspecting the applicant of the offence still subsisted. The applicant then sued the Austrian Government in the ECtHR for a breach of Article 6 (2). The Court rejected the the Government's argument that since the applicant's claim for compensation had been made after the criminal proceedings had been definitively concluded by a judgement on the merits, the applicant was no longer a person "charged with a criminal offence". Paragraphs 22 and 30 of the Court's judgement read as follows:

22. Admittedly, The Linz Regional Court gave its decision rejecting the claim on 10 December 1986, several months after the judgment acquitting the applicant on 30 July 1986. In the Court's opinion, Austrian Legislation and Practice nevertheless link the two questions – the criminal responsibility of the accused and the right to compensation – to such a degree that the decision on the later issue can be regarded as a consequence and to some extent the concomitant of the decision on the former. Moreover, as is the case under the legislation of several other European countries in which a right to compensation in respect of detention on remand is recognised in the event of acquittal, the criminal court which tries the case on its merits,

in this instance the Linz *Landesgericht*, albeit composed differently, in principle has jurisdiction in the matter.

Finally, the Austrian Courts relied heavily on the evidence from the Assize courts case file in order to justify their decision rejecting the applicant's claims, thus demonstrating, that in their opinion, there was indeed a link between the two sets of proceedings. The applicant can therefore invoke Article 6 (2) in relation to the impugned decision.

30. Such affirmations [sc. a list of items of evidence drawn up by the Linz Court of Appeal and its view not refuted during the trial]– not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations – left open a doubt both as to the applicant's innocence and as to the correctness of the Assize Court's verdict. Despite the fact that there had been a final decision acquitting Mr Seknina, the courts which had to rule on the compensation undertook an assessment of the applicant's guilt on the basis of the contents of the Assize Court file. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz court of Appeal is incompatible with the presumption of innocence.

29. *Rushiti v Austria* ( 21 March 2000) was another case decided by the ECtHR that concerned a failure by an Austrian court to award compensation following an acquittal for a period spent on remand. The Austrian Government sought to distinguish this case from *Sekanina* on the ground that in *Sekinana* the court denying compensation had had recourse to the criminal court file whereas in the instant case the court had had recourse to the verdict of the jury and the deliberations contained in the record of the jury's deliberations. In paragraph 31 of its judgement the ECtHR said:

31. In any case, the court is not convinced by the Government's principal argument, namely that a voicing of suspicions is acceptable under Article 6 (2) if those suspicions have already been expressed in the reasons for the acquittal. The court finds that this is an artificial interpretation of the *Sekanina* judgement, which would moreover not be in line with the general aim of the presumption of innocence, which is to protect the accused against any judicial decision or other statement by state officials amounting to an assessment of the

applicant's guilt without him having previously been proved guilty according to law (see the *Alenet de Ribemont v France* judgement of 10 February 1995, series A number 308, p.16, para 35, with further references). The court cannot but affirm the general rule stated in the *Sekanina* judgment that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible. The court, thus, considers that once an acquittal has become final – be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6 (2) – the voicing of any suspicions of guilt including those expressed in the reasons for the acquittal is incompatible with the presumption of innocence.

30. In *Alenet de Ribemont v France* (10 February 1995, Series A no. 308), which is referred to by in *Rushiti* judgement just cited, the applicant's claim for a breach of Article 6 (2) was in respect of remarks made by the French Minister of Justice and senior-ranking police officers which suggested that he had been involved in the murder of a former member of the French Parliament. The applicant's claim succeeded. Paragraphs 35 and 36 of the ECtHR's judgement read:

35. The presumption of innocence enshrined in Paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 6.1 (art. 6.1) (see, among other authorities the *Deweere v Belgium* judgment of 27 February 1980 Series A no. 35 p.30, Para. 56 and the *Minelli* judgment previously cited, p.15, para, 27). It would be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty (see the *Minelli* judgement previously cited, p.18, para. 37).

However, the scope of Article 6 Para. 2 is not limited to the eventuality mentioned by the government. [Sc. the presumption of innocence can only be infringed by a judicial authority and only where at the conclusion of proceedings ending in a conviction, the courts reasoning suggested that it regarded the defendant as guilty in advance].

The court held that there had been violations of this provision in the *Minelli* and *Sekanina* cases previously cited, although the national courts concerned had closed the proceedings in the first of those cases because the limitation period had expired and had acquitted the applicant in the second. It has similarly held it to be applicable in other cases whether domestic courts did not have to determine the

question of guilt (see *Adolf v Austria* judgement of 26 March 1982, Series A no. 49, and the *Lutz Englert and Nolkenbockhoff v Germany* judgments of 25 August 1987 Series A, Numbers 123 – A, 123- B and 123 – C).

Moreover, the Court reiterates that the Convention must be interpreted in such a way as to guarantee rights which are practicable and effective as opposed to theoretical and illusory (see, among other authorities, the *Artico v Italy* judgement of 13 May 1980, Series A No. 37, p.16, para. 33 .....). That also applies to the right enshrined in Article 6 ( 2).

36. The court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.

31. I deduce from these ECtHR decisions three main propositions. First, that for the purposes of Article 6 (2), a person will be regarded as still being charged with a criminal offence where there is a subsequent proceeding following an acquittal which is closely linked to the prior decision. Second, once an acquittal has been entered, the state should not undermine that verdict. And third, a public authority such as the SFO can infringe Article 6 (2) as well as a court.

32. In my view, although the four will not be defendants in the prosecution of Mr. Gibbins, the trial of Mr. Gibbins is sufficiently linked to the proceedings that gave rise to the acquittal of the four for the four to be regarded as persons still charged with a criminal offence. There is a sufficient link because: (a) the case against Mr. Gibbins is a continuation of the proceedings that were originally brought against the four and Mr. Gibbins; (b) the court which returned the not guilty verdicts against the four is the same court in which Mr. Gibbins is to be tried; and (c) continuation of the case against Mr. Gibbins depends both on the

four being acquitted (this being the inevitable result of offering no evidence against them) and on the Crown contraverting those acquittals and alleging, as it did in the first proceeding, that the four dishonestly conspired with Mr. Gibbins.

33. Plainly: (a) the prosecution are a public authority that must comply with Article 6 (2); (b) the four have not been proved guilty of the charges contained in the original indictment; and (c) an allegation by the prosecution that the four are guilty of the original charge would be directly contrary to the presumption of the four's innocence. Accordingly, I find that to allege in the trial of Mr. Gibbins that the four are guilty of the conspiracy alleged against them in the original indictment would be to act in breach of the right conferred on each of the four by Article 6(2) ECHR.

34. Mr. Temple, who argued the Crown's case with commendable skill and moderation, did not suggest that the case against Mr. Gibbins could be presented in any way that did not involve alleging that the four had dishonestly conspired with Mr. Gibbins. He also accepted that it would be infeasible not to refer to the four by name in the course of Mr. Gibbins's trial. In these circumstances I think that a stay of the proceedings against Mr. Gibbins is the only way of preventing what I have held amounts to an abuse of the court's process and a breach of the four's Article 6(2) rights.

35. Finally, I deal with a separate and discrete contention advanced on behalf of Mr. Gibbins which went as follows: (a) Mr. Gibbins only finds himself being prosecuted alone because of the gross negligence of the prosecution in disclosing sensitive material; (b) the Crown should not be allowed to take any advantage and Mr. Gibbins should suffer no disadvantage resulting from this

negligence; (c) compared with a prosecution where Mr. Gibbins was prosecuted together with the four, a prosecution of Mr. Gibbins alone puts him at a serious disadvantage and confers a corresponding advantage on the Crown; (d) it follows that the Crown should not be allowed to prosecute Mr. Gibbins alone as they propose to do.

36. Mr. Temple took issue with (c) but not with the other components of Mr. Mitchell's submission.

37. Mr. Mitchell argued that Mr. Gibbins would be significantly disadvantaged if he were prosecuted alone because he would be deprived of four supporting defences that would have been vigorously advanced by four professional men anxious to explain and justify their actions. More importantly, Mr. Gibbins would also be deprived of the opportunity to cross-examine the four who would most likely have given evidence if there had been a joint trial. In connection with this latter submission, Mr. Mitchell told me (and I accept) that the four have declined to give evidence on Mr. Gibbins's behalf and have declined to provide him with their proofs of evidence. Mr. Gibbins could subpoena the four but he would not know what they were going to say in advance and would have to accept their evidence unless they were declared hostile. And without their proofs of evidence, the chances of having them declared hostile would be remote and even then would not do Mr. Gibbins much good. Mr. Mitchell also argued that a good deal of what the prosecution witnesses have to say concerns their dealings with the four rather than Mr. Gibbins, because it was the four who dealt with the potential investors and their advisers, with Mr. Gibbins remaining in the background. Thus, without the four giving evidence, Mr. Gibbins would not be in a position to contradict

or otherwise deal with what the prosecution witnesses will say about such dealings.

38. On balance, I think that there is substance in Mr. Mitchell's submissions. In my judgement, Mr. Gibbins is more likely to be disadvantaged than not if he is prosecuted alone. And Mr. Gibbins only finds himself in this position because of the mistaken disclosure made by the prosecution, something in respect of which he is blameless.

39. It may be that if this was the only argument available to Mr. Gibbins in support of a stay, it would not, when weighed against the public interest of having the serious charges laid against Mr. Gibbins tried, be insufficient to justify a stay. This, however, is not the position because there are other reasons for a stay that I have identified. The significance of Mr. Mitchell's submission is therefore that it reinforces the grounds that I have already held justify a stay of these proceedings.

#### Conclusion

40. For the reasons I have given, Mr. Gibbins's application succeeds. I accordingly order that the criminal proceedings pending against him be stayed.