IN THE HIGH COURT OF LESOTHO

CRI / T / O2 / O2

in the matter between: -

THE CROWN

V

ACRES INTERNATIONAL LIMITED

ACCUSED'S WRITTEN ARGUMENT

INTRODUCTION

1. The Accused is ACRES INTERNATIONAL LIMITED, a company registered both in the Kingdom of Lesotho and in Canada. For the sake of convenience, ACRES INTERNATIONAL LIMITED will hereinafter be referred to as *"ACRES"*.

2. The facts which are common cause between the prosecution and the defence, or at least not seriously disputed by either party, may be summarised as follows:

2.1 During 1981 ACRES was appointed as a sub-consultant to a Canadian company, DELCANDA, the main consultant on the construction project of the Moshoeshoe Airport, Maseru. Another sub-contractor on the project was LESCON (PTY) LIMITED, a company registered as such in Maseru. The managing director of LESCON at the time was one Z M BAM, a South African citizen with permanent residence in Lesotho. The airport project was completed towards the end of 1986. During the period 1980 and 1986, Mr TONY RUSSELL, ACRES' corporate representative on the airport project, got to know Mr BAM well, having worked closely with him on the project.

2.2 During the same period, the Lesotho Highlands Water Project (LHWP) or *"the project"*) was established. The object and purpose of the project was to provide water to the RSA and hydro-electrical power to the Kingdom of Lesotho. The project was described in evidence as one of the biggest dam and hydro-electrical projects in the world. To this end the RSA and the Government of Lesotho (GOL) signed a Treaty

(*"the Treaty"*); the purpose of which is defined as follows in Article 3(1) thereof:

> *"The purpose of this Treaty shall be to provide for the establishment, implementation, operation and maintenance of the project."*

2.3 In terms of Article 6(4) of the Treaty, the GOL was charged with the duty of establishing

> *"… The Lesotho Highlands Development Authority (LHDA) as an autonomous statutory body under the laws of the Kingdom of Lesotho in accordance with the provisions of this Treaty."*

The LHDA was duly established by the GOL in terms of Order No.23 of 1986. In terms of Article 7(1) of the Treaty, the LHDA

> *"… Shall have the responsibility for the implementation, operation and maintenance of that part of the Project situated in the Kingdom of Lesotho, in accordance with the provisions of this Treaty, and shall be vested with all powers necessary for the discharge of such responsibilities."*

2.4 As such, the LHDA had the power, **inter alia**, to appoint consultants and contractors to the Project, but always subject to the provisions of the Treaty. In evidence, the LHDA was often equated to "the client". It should be noted that the LHDA, throughout the project, concluded a vast number of contracts with consultants and contractors; the number of which was estimated to be in the region of 500. These contracts ranged from the appointment of financial consultants such as chartered accountancy firms and economists, to the appointment of environmental experts to undertake environmental impact studies, the appointment of engineering consultants and contractors, to establish the infrastructure of the project. Many of the engineering (consultancy) contracts were of supervisory nature only.

2.5 During the time in question, the LHDA comprised of seven divisions, namely, the Training Division, the Public Relations Division, the Administration Division, the Technical Division, the Environmental Division, the Financial Division, and the Capital Finance Division.[1] Each Division had, at its head, a manager known as the

Divisional Manager. The managers reported, in turn, to the Chief Executive of the LHDA whose functions and duties are described in Article 7 of the Treaty, read with Order No.23 of 1986. The Chief Executive at all relevant times was one E M SOLE (SOLE). The Chief Executive, in turn, reported to the Board of Directors of the LHDA established in terms of the Treaty and appointed in terms of the aforesaid Order.

2.6 During the initial stages of the project (an prior to the establishment of the LHDA), an American company known as TAMS, was awarded the contract as Study Supervisor during the feasibility study phase of the LHWP. During 1986, TAMS was sole-sourced to submit proposals under Contract 19 (C19), which made provision for technical assistance to the LHDA. Effectively, this meant the provision of qualified professional staff to the structures of the LHDA, and more particularly the staffing of various posts in the technical division of the LHDA.

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[1] **See Exhibit 'FF'.**

2.7 The sole-sourcing of a consultant must be distinguished from the process known as *"competitive bidding"*. Under the process of *"competitive bidding"*, the client invites a number of consultants to submit technical and financial proposals for the services; known in the industry as the *"short-list"* of firms. Under the process of *"sole-sourcing"*, only one consultant is invited to submit proposals. If the proposal or tender is found to be acceptable by the client, the procedure thereafter remain the same, whether under a competitive bidding system or under a sole-sourcing system. Such procedure includes the technical and/or financial evaluation of the proposal; and if found acceptable, an invitation to negotiate the contract; the negotiation process; the preparation of a document known as a Memorandum of Understanding (MOU) based in principle on the agreement reached during the

negotiations; and thereafter the preparation and signature of the final contract, based on the MOU.

2.8 The process of sole-sourcing is accepted in the engineering industry and is internationally recognised; also by funding agencies such as government institutions, the World Bank, the European Union, and other commercial banks.[2] The *"Guidelines"* issued by the World Bank recognise the advantages of the sole-sourcing process and describes the circumstances under which it will be advisable to sole-source a consultant/contractor in preference to an open bidding system.[3]

2.9 It is furthermore customary in engineering practice that if the proposals of a consultant who had been sole-sourced are found to be unacceptable, he is not again invited to submit proposals (short-listed) when the process is changed to the competitive bidding system.

[2] see para 2.02, 2.16 and 2.17 of the World Bank Guidelines, Exh. C. vol 15 section 2 ,pp116, 117 and 118
[3] Exh C. Vol. 15, Section 5 p1,

2.10 It so happened that the proposals of TAMS under C19 were found to be unacceptable by the LHDA and the procedure was changed to a competitive bidding system. Subsequently TAMS was not invited to submit proposals. The consultants invited by the LHDA to submit[4] proposals were ACRES, BECHTEL, HALCROW, and SNOWY MOUNTAIN, Australia. The proposals of ACRES were ranked the highest by the LHDA, and having completed the rest of the process described in paragraph 2.7 above, C19 was awarded to ACRES during April 1987.

2.11 By letter dated 28 April 1989, and in the course of the operation of C19, the Chief Executive of the LHDA, SOLE, advised ACRES that it (the LHDA) had decided to sole-source ACRES in respect of Contract 65 (C65). ACRES was advised, in accordance with the prevailing practice, that,

> *"… should the technical proposal be judged inadequate, or the financial proposal be judged excessive, then LHDA intends to*

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request proposals from a short-list of consultants. This short-list will not include your firm." [5]

(The decision to sole-source ACRES was questioned by a prosecution witness[6] and we will return to this issue again later).

2.12 C65, like C19, provided technical assistance to the LHDA. As such, ACRES was required to provide professional engineering staff to fill various line positions in Planning and Design and Construction Divisions (formerly the Technical Division of the LHDA. In the evidence before Court, C65 was described as *"an extension"* of C19, save that it carried more responsibilities. Whereas C19 was concerned primarily with the tender design, preparation of tender documents and tendering for the main construction works, C65 included the provision of services relating to the establishment and implementation of the construction contract for Katse Dam and the Transfer Tunnel and Delivery Tunnels South.

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[5] Vol.15, Section 5, p.1

[6] Putsoane, Read : Vol 2 p174 lines3 -16

2.13 ACRES' proposals in respect of C65 were found to be acceptable by the LHDA, and it was invited to the negotiation process. Having gone through the process of negotiations, a MOU was prepared which formed the basis of a contract and which contract was eventually signed by the parties on 21 February 1991 in Maseru. ACRES continued to render services under C65 until November 1999.

2.14 Shortly before ACRES finally left the project, an Indictment was served on it and also on a number of other consultants and contractors. In the Indictment, ACRES was charged with two counts of bribery. In the first count it is alleged that during the period June 1991 to January 1998, ACRES paid an amount of CAD493061,60 into the Swiss bank account of Z M BAM who thereafter transferred the said sum, or part thereof, to SOLE. In the second count, it is alleged that on or about 31 January 1991, ACRES paid an amount of CAD180825,48 into the Swiss bank account of M M BAM, the wife of Z M BAM, who

thereafter transferred the said sum to Z M BAM (the evidence tendered by the prosecution establish that an amount of CAD180825,48 was indeed transferred by ACRES into the account of M M BAM, who transferred the said sum to Z M BAM. However, there is no evidence, and this is common cause, that Z M BAM transferred any part of such sum to SOLE. The case for the prosecution in respect of the second count is therefore that Z M BAM *"was supposed"* to pay/transfer such amount, or part thereof, to SOLE).

2.15 In respect of both counts, it is alleged that the aforesaid payments were made by ACRES with the intention to pay bribe moneys to SOLE, and that the accounts of Z M BAM and M M BAM were only used as conduits to make payment to SOLE. It is alleged by the prosecution that ACRES used M M BAM and Z M BAM as *"intermediaries"* to make payments to SOLE. It is therefore alleged that, in respect of both counts, ACRES committed the crime of bribery.

2.16 At the commencement of the trial, the prosecutor submitted a document to Court (Exhibit “A”) entitled: The Case for ACRES in the matter R v ACRES.” This document summarises the defence of ACRES to the aforementioned charges, and formed the basis of the defence and of the evidence tendered by ACRES in the trial. In essence, ACRES alleged that, in accordance with standard consulting business practice and custom, recognised internationally throughout the world, it appointed an agent in Lesotho to act as its representative in all matters relevant to the award and the execution of contracts on the project. It alleged that it had appointed a firm, ASSOCIATED CONSULTANTS AND PROJECT MANAGERS (ACPM) of which Z M BAM was its sole proprietor, to act as its representative in Lesotho. It further alleged that all payments made by it to ACPM were made strictly in accordance with such representative agreement. It finally alleged that it had no knowledge of any payments made by BAM to SOLE, and denied that the payments which were made to ACPM were intended as payments to SOLE. It therefore

denied the charges and pleaded not guilty to both counts of bribery.

2.17 The following matters in relation to the representative agreement between ACRES and ACPM/BAM were common cause between the parties, or not seriously disputed:

(i) the need to appoint an agent or a representative by a foreign company operating on foreign soil is recognised by various government agencies, including the Canadian Government and international funding agencies such as the European Union and the World Bank. F.I.D.I.C[7] also issues guidelines in regard to the drafting of consultancy and construction contracts, including representative agreements.[8]

(ii) The document to be found in Exh C **vol.15, section 7, pp. 1 to 10** entitled "*Representative Agreement"* between ACRES and ACPM was signed on behalf

[7] The French Acronym for: ASSOCIATION OF PROFESSIONAL ENGINEERS WORLD WIDE

[8] See the evidence of JEAN PAUL GOURDEAU, Record: vol. 21 pp2066 lines 1 -21*

of ACRES by Messrs HARE and RYNARD; and on behalf of ACPM by Mr Z M BAM. This agreement was signed on 23 November 1990. The document purports to set out the terms of such agreement between the parties.

(iii) The payments made by ACRES to ACPM were made on the dates and in the amounts referred to in Exhibit "L" which document also appears in Exh C **vol.15, section 7, pp.42, 43 and 44.** The expert witness called on behalf of ACRES, Mr STEVE BURNETT, a qualified chartered accountant in the employ of KPMG, testified to the correctness of the figures and transactions referred on Exhibit "L" and his evidence on this issue was not challenged by the prosecution.[9] Furthermore, the entries on Exhibit "L" correspond substantially with the financial reports prepared by Mr J ROUX (not a qualified chartered accountant) in the employ of Messrs PWC, who testified on

behalf of the Crown. Messrs ROUX and BURNETT have agreed that the differences are minor and are attributable to banking costs and charges, and a short delay caused by banking clearance procedure from the date of deposit to the date the transaction is reflected on the bank statement. It seems that Messrs ROUX and BURNETT are agreed on the correctness of such payments.[10]

3. The matters referred to above which are not in dispute between the parties, are not exhaustive and there are a number of other issues in respect of which there is either agreement between the parties, or where the evidence is either not challenged or disputed. Reference will again be made later in this argument to those issues.

4. **THE ISSUE**

4.1 It follows from the aforesaid that the issue in this case concerns the legitimacy of the representative agreement signed by the parties on 23 November

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[9] Record: vol. 21 pp2372 lines 10 -17
[10] Record: vol. 7 pp. 710 lines 10 –20,p714 lines 19 –24, p715 lines 1 –3, p716 lines 7 –11 ,p747 lines 3 -10

1990. If the payments by ACRES to ACPM/BAM were made in terms of a legitimate representative agreement, then such payments are destructive of an inference of bribery and corruption.

4.2 On the other hand, if (as the prosecution allege) the representative agreement is simulated and there was no intention on the part of either BAM or ACRES that effect should be given to such agreement, then it follows (and is conceded by the defence) that the only reasonable inference from the payments by ACRES to BAM is that those payments were intended as the payment of bribe monies for onward transmission to SOLE. The Crown indeed contends that no effect was given to the representative agreement and that the true intention of the parties was to channel moneys through the accounts of Mr and Mrs BAM to SOLE. The prosecution's case is that ACPM/BAM was merely used as an *"intermediary"* by ACRES and that its true intention was to pay bribe moneys to SOLE. It should be noted that the payments from BAM to SOLE are not disputed by ACRES and are common cause between the parties.

4.3 The gravamen of the case is therefore quite clearly whether the representative agreement between ACRES and ACPM/BAM dated 23 November 1990 is legitimate or whether it constitutes a simulated agreement. If the former, ACRES is entitled to an acquittal; and if the latter, ACRES should be convicted at least on Count 1 (reference will be made later to Count 2).

5. **ONUS**

5.1 It is trite that the onus to prove the falsity of the representative agreement rests upon the Crown and there is no onus on ACRES to prove its legality.[11]

5.2 The mere fact that ACRES have peculiar or intimate knowledge of the circumstances surrounding the conclusion of the representative agreement, and of the services which BAM rendered in terms thereof, does not cause the onus of proof to alter. Further, the issue of intent was formally placed in issue by ACRES even

[11] **S v Mothlaping and Another 1988 (3) SA 757 at 758B-E**
S v Bhamjee 1993 (SACR) 627(W)
S v Phuravhatha 1992(2)SACR 544(v) at 554(a)-(b

before the prosecution presented its case[12], and the onus remains on the Crown to negate the defence based on the representative agreement and to prove that the payments were made with the intention to bribe.[13] The onus of proving the unlawfulness of the payments from ACRES to BAM therefore remains on the CROWN, and this it can only do by proving that the representative agreement was simulated.

6. **THE EVIDENCE**

The attack by the Crown on the validity of the representative agreement is threefold, namely:

(a) the circumstances surrounding the conclusion of the representative agreement, and the alleged implementation of the terms thereof, allegedly show that the agreement is simulated;

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[12] Exhibit "A" (The Case for ACRES)

[13] Rex v Cohen 1933 (TPD) 128 at 133-134
approved in Gericke v Sack 1978 (1) 821A at 827D-F
R v Ndhlovu 1945 (AD) 369 at 386 – 387
R v Churchill 1959 (2) 575

(b) the alleged non-compliance with the approval requirements of the Treaty in relation to the establishment of C65, allegedly show that ACRES was favoured by SOLE in return for the payment of bribe monies; and

(c) The payments from ACRES to BAM are “linked” to the payments from BAM to SOLE allegedly showing direct payments from ACRES to SOLE.

7. The aforesaid three-legged attack by the Crown on the legality of the representative agreement, and the evidence in support thereof, will be discussed in more detail hereunder and under the same headings referred to above. However, for present purposes it is important to note:

(a) The Crown relies exclusively on circumstantial evidence in support of the conclusion that the representative agreement was simulated and therefore not genuine; and

(b) the Crown relies, on the main, on the evidence tendered on behalf of ACRES in support of its contention that the agreement constitutes a simulated contract.

8. The test of what constitutes *"circumstantial evidence"* differ between criminal and civil cases.[14] In criminal cases the *"two cardinal rules of logic…"* when reasoning by inference, were formulated as follows by WATERMEYER C J in the leading case of **Rex v Blom 1939 AD 188 at 202-203:**

> *"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:*
>
> *(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

9. The above dictum has been followed in numerous cases in both South Africa and Lesotho, and the test still applies to this day.[15] The *"two cardinal rules of logic"* were recently again approved by the Supreme Court of Appeal in South Africa.[16]

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[14] LAWSA: JOUBERT, et al, vol.9, 1st re-issue, para 643, p.449
[15] The Law of South Africa (LAWSA), vol.9, 1st re-issue, para 643 (p.449) (supra) and the authorities there mentioned).
[16] Cooper and Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009

10. For the sake of completion it is mentioned that the second rule in the **Blom** case has no application in civil cases, but only in criminal cases.[17] This is the result of a less stringent onus in civil cases.

11. A distinction should be made between inferences validly drawn on the one hand; and on the other hand, conjecture, speculation and making assumptions, which would not allow permissible legal inference.[18]

12. The *"inferences"* to be drawn and referred to in the **Blom** case must therefore be based on the proven facts before this Court and not on guesswork or speculation.[19]

13. Having regard to the first rule in the **Blom** case, it follows that an inference of an intention to bribe (on the facts of this case) is inconsistent in the face of a legitimate representative agreement. For the CROWN to succeed, the legitimacy of the representative agreement must therefor be destroyed. All three

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(SCA) at 1027F-G

[17] Cooper and Another NNO (supra) at 1027; LAWSA (supra) at 643

[18] S v Cooper and Others 1976 (2) SA p.875 at 888H-889C
S v Naik 1969 (2) 231 at 234D-E, with reference to
Caswell v Powell Duffryn Associated Collieries Ltd (1939) 3 All ER 722 at 733
S v Essack and Another (AD) 1974 (1) p.1 at 16D, approving the dictum in the Caswell case.

[19] S v Cooper and Others 1976 (2) (supra), at 889A-C

attacks on this agreement are based on circumstantial evidence, and the question is therefore whether on the evidence before this court, the CROWN has satisfied both rules in the **Blom** case with reference, also, to the legitimacy of the representative agreement. With these evidential rules in mind, the evidence relied upon by the Crown must be examined.

14. The second principle which must be borne in mind, is that the evidential rules in the **Blom** case can never be applied in favour of the CROWN in this case, unless the evidence of the defence witnesses are rejected as false. The inferences sought to be drawn by the prosecution are inconsistent with the evidence of Messrs HARE, BROWN, GORDEAUX BURNETT and GIBBS and for this court to reject their evidence as false, their evidence must be tested against other credible evidence, and not against speculation, conjecture or theory. It must be tested against facts found to be proved, on the one hand, if corroboration for their evidence is found, when tested, it may not be rejected. Again, no direct evidence to contradict the evidence of Messrs HARE, BROWN, GORDEAUX and GIBBS were placed before this court by the prosecution. It relied purely on circumstantial evidence.

THE FIRST ATTACK:

15. **The facts and circumstances surrounding the conclusion of the representative agreement, and the evidence relating to the implementation thereof**

There are a number of issues and arguments raised by the Crown in this regard, and these will be dealt with below.

16. However, before doing so, it is necessary to have regard to the evidence tendered by ACRES on this issue. The witness who testified on this issue was Mr DENNIS HARE, who was at the time a Vice-President of ACRES and who negotiated the representative agreement with BAM on behalf of ACRES. He was, as already indicated, also a signatory to the representative agreement.

17. On this particular issue, the evidence of HARE can be summarised as follows:

17.1 The use of agents is internationally recognised not only by consultants and contractors and the professional body of engineers, but also by government agencies and international funding agencies such as the European Union and the World Bank;[20] This evidence is corroborated by

[20] Record: vol. 12 p1281 line 25, p1277 lines 15 –26, p1278 lines 1 –5, p1317 lines 17 -25 *

the independent expert witness, MR J.P. GOURDEAU[21]

17.2 Following international custom and usage, ACRES as a matter of course and as part of it's business plan has historically over 50 years made use of agents when operating on foreign soil.[22]

17.3 HARE produced NINE (9) examples of representative agreements relating to agents employed by ACRES throughout the world;[23]

17.4 He testified as to the high standard of business conduct and ethics expected from ACRES' personnel (supported by documentary evidence[24]), and the need to undertake a due diligence before a representative is appointed to ensure that such representative is honest and will comply with the high standards of business conduct expected by ACRES from its representatives and employees.[25]

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[21] vol 21 p2065 lines 6 -22
[22] Record: vol.12 p1268 lines 5 -23
[23] Record: vol. 12 p1286 lines 9 –17, Exh. C vol 15 section 3.
[24] Exh. C. vol 15 p6 -7

17.5 He referred, as an example, to enquiries made from the Canadian Embassy before the Zambian representative of ACRES was appointed[26], and also referred to a report tabled before the Board of Directors of ACRES evidencing the status and reputation of each of ACRES' agents employed throughout the world.[27]

17.6 In regard to the appointment of ACPM as its representative under C65, HARE testified that TONY RUSSELL of ACRES got to know BAM well when ACRES and LESCON worked side by side as sub-consultant to DELCANDA on the Maseru Airport Project.[28]

17.7 Based on his intimate knowledge of BAM over a period of five years, RUSSELL recommended BAM as ACRES' agent in Lesotho and repeatedly stressed that there can be no better due diligence than personal experience.[29]

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[25] Record: vol. 12 p1284 lines 25 –26, p1285 lines 1 –13, p1282 lines 12 –16, p1283 lines 1 –9, Exh. C. vol 15 section 1 p 6 -7
[26] Record: vol. 12 p 1291 lines 7 –26, p1292, p1293 lines 1 -4
[27] Record: vol. 12 p1293 lines 9 26, p1294 lines 1 -26
[28] Record: vol. 12 p1295 lines 10 –25, p1296 lines 3 –11, p1296 lines 20 -23
[29] Record: vol. 17 p. 1698 lines 7 -15

17.8 When ACRES, to its surprise, was short-listed to submit proposals in respect of C19, HARE held discussions with BAM with a view of appointing him as ACRES' representative in Lesotho for purposes of the entire project.[30]

17.9 In the course of the aforesaid discussions a verbal agreement or understanding was reached between HARE, on behalf of ACRES, and BAM on behalf of LESCON in terms of which BAM undertook to act as ACRES' representative in Lesotho in respect of all or any contracts which may be awarded to ACRES under the project, and to assist ACRES in obtaining contracts and in the execution thereof.[31]

17.10 Pursuant to the aforesaid agreement with BAM, the first written representative agreement was concluded with LESCON in respect of the services rendered by ACRES under Contract 19.[32]

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[30] Record: vol. 12 p1318 lines 17 -25
[31] Record: vol. 12 p1319 lines 21 –26, p1320 lines 1 -5
[32] Record: vol. 12 p1320 lines 2 -10

17.11 Pursuant to the same initial verbal agreement, a second (verbal) representative agreement was reached with ACPM/BAM during 1989 when ACRES was advised of the intention of the LHDA to sole-source ACRES in respect of C65[33], such agreement having only been finalised and signed on 23 November 1993.

17 bis. The attack against the circumstances surrounding the conclusion of the representative agreement must also be seen against the background of the evidence of HARE who explained why the agreement was only signed on 23 November 1990 in circumstances where the first written draft had been prepared as early as 13 November 1989.[34] It must be remembered that ACRES was advised on 28 April 1989 of the intention of the LHDA to sole-source ACRES.[35] It was shortly after 28 April 1986 that, in consultation with JIM GRIFFITHS, HARE decided to appoint ACPM/BAM as ACRES' representative, and on 10 November 1986 the first meeting between HARE and BAM took place at the Lesotho Sun Hotel which resulted in the first draft of the representative agreement which had already been signed by HARE by 13 November

[33] Record: vol. 12 p1335 lines 12 –26, p1336 lines I –26, p1337 lines 1 -20
[34] Record: Exh. C. vol. 16, section 6, p.7; Record: vol. 12 p1337 lines 14 -26
[35] Record: Exh.C.vol. 15, section 5, p.1; Record: vol. 12 p1333 lines 1 -3

1989.[36] (It seems that the first written representative agreement had seen the light of day before 8 November 1989).[37]

18. The evidence of HARE in regard to the delay in the final signature of the representative agreement is to some extent corroborated by the prosecution's own witnesses. It appears to be common cause that the RSA delegation to the JPTC (to which reference will be made later in this argument) had a problem with the payment of taxes as formulated in the Memorandum of Understanding between ACRES and the LHDA under C65. Initially, and as envisaged by the MOU, ACRES was liable to pay all taxes and the fees payable to ACRES expressed as a percentage (namely 20%)[38], as negotiated, reflect such liability. However, when the contract was eventually prepared and signed in final form, the LHDA and the RSA delegation of the JPTC had agreed that ACRES will not be liable for the payment of the taxes, but that such taxes would be reimbursable to ACRES after having paid the Receiver of Revenue. This arrangement impacted on the fees which were ultimately reduced to 14.7%.[39]

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[36] Record: Exh. C.vol. 15, section 4, p.6 and p.9; Record: vol.12 p1339 lines 19 – 26, p1340 lines 1 14
[37] Record: Exh.C.vol. 15, section 6, p.1
[38] Exh. C. vol 15 section5 p15 para 3.10
[39] vol 17 p1854 lines 10 –25.p1855 lines 2 –6, p1855 lines 16 –17.vol 13 p1412 lines 14 -19*
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19. The evidence of HARE was that the commission of 3.6% payable to ACPM was not in respect of the contract price, but only in respect of the value of the services rendered by ACRES, which excluded taxes and disbursements.[40] The debate relating to the taxes was only resolved towards the end of 1990, and this, according to HARE, necessitated an amendment to the representative agreement.[41]

20. Further, after the first draft of the representative agreement was presented to BAM, he (BAM) requested that in the light of the advance payment to be made by the LHDA to ACRES, that ACRES likewise make an advance payment to ACPM/BAM.[42] ACRES agreed to this proposal, subject to the advance being paid by instalments and ACPM issuing a bank guarantee in respect of such advance.[43] These discussions between BAM and HARE took place during June 1990.[44]

21. The negotiation of the written representative agreement and the various amendments made thereto over a period of approximately 18 months is destructive of the concept of a

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[40] Exh. C vol 15 section 7 page 8, vol 12 p1368 lines 18 -19
[41] vol 12 p1346 lines 20 –26, p1347 lines 1 -19
[42] Record: Exh. C. vol. 15 section 7 p.5, Record: vol. 13, p1365 lines 6 16
[43] Record: Exh. C.vol. 15, section 6, p.22; Record: vol. 13, p1364 lines 4 -8
[44] Record: Exh. C. vol. 15, section 6, p.22

simulated agreement in respect of which neither party had any intention to give effect to. It is inconsistent with the demand that ACPM must furnish a bank guarantee for the return of the advance payment in the event of it repudiating its obligations to render services under the representative agreement, and the amendments support the prosecution's own evidence in relation to the change in the tax structure. It is highly unlikely, and therefore improbable, that these elaborate changes to the representative agreement would have been made over an extended period of 18 months if the parties had no serious intent to be bound thereby. The insistence in particular on a bank guarantee by ACRES from ACPM in respect of the advance payment is inconsistent with the theory of a simulated contract. The aforesaid amendments (5 revisions) and insistence on a bank guarantee are supported by documentary evidence. The provision of the advance payment under the representative agreement supports the evidence of HARE that such payment was in recognition for the services which ACMP/BAM had rendered to Acres in respect of C65 from as far back as 1989.It should not be forgotten that ACPM/BAM had rendered services to Acres in respect of C65 from April 1989 without any compensation. The payment to A.C.P.M. / BAM was coupled to the payments which Acres was to receive from

the L.H.D.A, and was not dependent on the signature, or the date of signature of the representative agreement.[45]

22. The Crown, either in its heads of argument or under cross-examination of ACRES' witnesses, referred to the following issues in support of the inference that the representative agreement is false or simulated:

22.1 <u>ACRES was sole-sourced in respect of C65 and there was therefore no need for the services of a representative to assist in obtaining contracts.</u>

HARE repeatedly testified that the need for a representative is not only to assist in obtaining contracts,[46] but that the services of a representative are also required in the execution and implementation of the contract.[47] This evidence was supported by an independent international expert and a former vice-president of FIDIC, Mr JEAN PAUL GOURDEAU.[48] In any event, both the correspondence and documents

[45] vol 13 p1367 lines 16 -23*
[46] vol 12 p1335 lines 20 –26, p1336 lines 1 -21
[47] ibid
[48] *vol 21 p2067 lines 15 –26, p2068 lines 1 –2, p2068 lines 21 –26, p2069 lines 1 –6, p2079 lines 25 –26, p2080 lines 10 13, p2083 lines 4 -9

before this Court,[49] and the evidence,[50] show that the award of the contract to ACRES under C65 was not a foregone conclusion and LAHMEYER placed pressure on the World Bank to change the procedure to an open bidding system and opposed the sole-sourcing of ACRES.[51] HARE explained that the duty of ACPM/BAM was to keep ACRES informed of the developments and the requirements of the LHDA and to provide all relevant intelligence in this regard[52]. There is nothing improbable in this evidence and such evidence certainly do not permit an inference that the agreement was simulated.

22.2 The representative agreement was only signed on 23 November 1990 in circumstances where the award of Contract 65 to ACRES was imminent and unavoidable, and there was thus no further need for the services of a representative.

The same remarks mentioned above apply equally to this proposition. For the reasons

[49] Exh. E p36 -52
[50] Exh. E. pp 36 –52, , vol 4 p328 lines 8 -26, p329 lines 1 –3, p313 lines 19 –25, p330 lines 4 -17
[51] Exh. E page 42, vol 15 p1583 lines 20 -24
[52] vol 15 p1583 lines 20 to p1584 line 1, vol12 p1350 lines 1 -11

mentioned, the delay in the signing of the agreement on 23 November 1990 was adequately explained by HARE[53] and such explanation fits in with the other evidence, including documentary evidence and the evidence from the prosecution's own witnesses. This argument furthermore ignores the evidence that BAM had commenced the rendering of services in respect of Contract 65 notionally as early as 1986, but in any event continuously from April 1989 in respect of which services he was not paid at all. This argument is based on the erroneous assumption that the representative agreement only became effective on date of signature thereof, namely on 23 November 1990, and it ignores the terms of the first verbal agreement during 1986 between HARE and BAM, in terms of which Bam undertook to act as Acres' representative in all contracts which may be awarded to Acres under the project. The signing of the representative agreements in respect of C19 and C65 respectively was simply giving effect to the existing oral agreement of 1986.

[53] vol 12 p1337 lines 4 -26

22.3 <u>There is no evidence of any services rendered by BAM in respect of C65</u>

This contention completely ignores the evidence of HARE and of BROWN. HARE testified in regard to the continuous reports he received from BAM.[54] He also testified that WITHERELL acted as ACRES' corporate contact with BAM in Lesotho,[55] and he confirmed the correctness of the contents of the affidavit of WITHERELL in this regard.[56] (See also the affidavit of WITHERELL in this regard).[57] Finally, he testified that after WITHERELL left, BROWN was ACRES' corporate liaison officer with BAM in Lesotho.[58] This evidence was not challenged under cross-examination of BROWN.

HARE also testified that a representative agreement is, to some extent, analogous to an insurance contract[59]. Depending on the prevailing circumstances there may be no need at all for the

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*** See paras. 18 –21 above**
[54] vol 12 p1338 lines 4 –9, p1348 lines 24 –26, p1350 lines 1 –11, p1384 lines 24 –26 , p1385 lines 1 -2
[55] *vol 13 p1385 lines 3 -12
[56] *vol 14 p1444 lines 10 –26, p1445 lines 1 -11
[57] *Exh. C. vol 4 p442
[58] *vol 12 p1385 lines 9 -12

services of a representative; whereas his services become indispensable in situations of crises, such as political turmoil and civil unrest necessitating for instance the evacuation of personnel from a country.[60] This evidence was corroborated by GORDEAU, and not challenged under cross examination. HARE gave historical examples of similar situations,[61] and testified that ACRES' personnel were forced to evacuate Lesotho during the uprisings in Maseru during 1994 (Reference will again be made later to the political developments in Lesotho which warranted the appointment of a representative) .[62] He also testified that by the very nature of the services rendered by a representative, a high degree of discretion is maintained and neither party will openly advertise the contractual relationship between them.[63] This evidence was not attacked under cross-examination. Even if A.C.P.M. / BAM rendered no services at all to Acres it does not follow that there was no need for the

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[59] vol 12 p1270 lines 2 –26, vol 21 p2082 lines 3 -6
[60] vol 12 p1313 lines 11 –20, p1314 lines 9 –22, p1315 lines 4 -18
[61] *vol 12 p1270 lines 4 -26
[62] *vol 16 p1662 lines 4 -9
[63] vol 15 p1527 lines 18 -25

appointment of a representative or that a representative agreement was not required.

Again, the suggestion that there is no evidence of any services rendered by BAM totally ignores the evidence of HARE. No evidence was placed before this Court on behalf of the prosecution to contradict the evidence of HARE, and in the absence of any evidence to the contrary the evidence of HARE must stand. Again, his evidence is corroborated by an independent expert witness, Mr JEAN PAUL GOURDEAU.

22.4 <u>There is no documentary evidence of any services rendered by BAM and nor are there any invoices issued by ACPM in support for the payment of its services</u>

The remarks mentioned above apply equally to this argument. Further, it again ignores the evidence of HARE to the effect that discussions between him and Bam were oral or telephonically, and that there was no practical or any other need for the exchange of correspondence or the writing

of memoranda.[64] Further, by virtue of the fact that the remuneration under the representative agreement is by its very terms commission driven expressed as a percentage of monthly payments received by ACRES from the LHDA, ACPM would be unaware of the amount received by ACRES in any particular month and it would therefore be unable to generate and issue an invoice.[65] The very nature of the representative agreement, including the nature of the services rendered and rate of remuneration, called for payments to ACPM to be calculated by ACRES, and it would indeed be unusual to find invoices issued by ACPM to ACRES. The absence of invoices support the terms of the representative agreement and no adverse inferences of any kind can be drawn therefrom.

22.5 <u>The requirement that payments to ACPM should be made in a Swiss banking account should have alerted ACRES to unlawfulness.</u>

The payments of funds into Swiss banking accounts, ***per se***, are not unlawful and the

[64] vol 14 p1451 lines 18 –20,p1454 lines 15 -21

keeping of Swiss banking accounts are generally regarded as prudent. In the absence of any other contributing factor, an inference of unlawfulness form the payment of funds into a Swiss banking account is not only impermissible, but also paranoiac. The evidence of both HARE and GOURDEAU to the effect that the payment of fees to representatives in Swiss banking accounts are not unusual, cannot be ignored.[66] Indeed, the evidence of HARE and supported by GOURDEAU was to the effect that this is an internationally accepted and usual practice by representatives, particularly where they operate in countries with a weak currency and an unstable political environment. ACRES own experiences in Lesotho from 1981 did not contribute to a belief in the political stability of the South African Region generally and that of Lesotho in particular:

- During 1983 the South African Defence Force invades Maseru searching for ANC leaders;

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[65] vol 14 p1471 lines 8 –26, p1472 lines 1 –6, p1472 lines 21 -25
[66] vol 13 p 1517 lines 1 -7

- On 20 January 1986 Prince Minister Leabua Jonathan is overthrown in a coup d' etat by Major General Lekhanya and Lesotho is governed by a military council of 5 generals;

- During 1990/91 Major General Lekhanya is overthrown in a coup d' etat by a group of army officers and General Elias Ramaema becomes chairman of the military council, and King Moshoeshoe II is deposed and enters into exile in the UK;

- During January 1994 fighting breaks out between factions in the Lesotho Army forces and ACRES is forced to evacuate staff to R.S.A.;

- During August 1994 further military unrest results in King Letsie to dissolve parliament and appoint his own government;
- During September 1994 the Mokhehle Government is restored and King Moshoeshoe II is restored as King;

- During August 1998 civil unrest breaks out and R.S.A. and Botswana troops invade the country resulting in heavy fighting with the Lesotho Army, killing, widespread looting, destruction of property and ACRES staff are again forced to evacuate to R.S.A. (These are also partly contributing factors for HARE'S initial decision during 1986 to appoint a representative in Lesotho and such decision is vindicated by subsequent events).

- No adverse inferences can therefore be drawn from the requirement of ACPM that its fees must be paid into a Swiss banking account. Notwithstanding vague references to possible contraventions of the Lesotho Exchange Control Regulations, no evidence was placed before this Court to even faintly suggest that the payments of the funds into Swiss banking accounts were unlawful or in contravention of any Exchange Control Regulations.

22.6 The address nominated by ACPM under the representative agreement was that of a bank and not its physical address in Maseru.

Again, no inference of any kind may be drawn from this fact. It is common cause that BAM is deceased and only he can explain why he nominated his bank as his ***domicilium*** address. One possible explanation is that he operated in various countries such as Lesotho, Botswana, and perhaps even South Africa, and that he had an arrangement with his bank to forward to him all or any correspondence if and when so required. The evidence of HARE (supported by GORDEAU) was to the effect that this practice was not unusual and that Swiss banks undertake such duties.[67]

22.7 During the relevant time, BAM was employed in Botswana and could not and did not render services to ACRES under the representative agreement.

The evidence of HARE and the other witnesses who testified on behalf of ACRES was to the

effect that as far as ACRES was concerned, BAM fulfilled his obligations under the representative agreement and continued to render services, notwithstanding his absence from Maseru. Although ACRES knew that BAM was engaged in business activities in Botswana (the representative agreement was sent to him in Botswana for his signature),[68] ACRES did not know that BAM was employed in Botswana.[69] Furthermore, BAM was not employed by ACRES and there was no contractual or other obligation on him to remain on a full-time basis in Maseru; he was an independent contractor and his duties as such were described in the representative agreement. As far as ACRES was concerned, he performed those duties,[70] and regular contact was made with him in person in Maseru[71] and also telephonically in Canada from either Maseru or Botswana.[72] As long as ACRES was satisfied that BAM performed his duties and rendered the services under the representative agreement,

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[67] vol 14 p1515 lines 9 –14, p1516 lines 3 –6, vol 12 p1343 lines 1 –26, p1344 lines 1 -5
[68] vol 12 p1348 lines 3 -11
[69] vol 12 p1351 lines 12 –18, p1352 lines 2 -11
[70] vol 12 p1348 lines 10 –26,p1349 lines 1 -23
[71] vol 12 p1348 lines 22 –26
[72] vol 12 p1348 lines 22 –26, p1350 lines 20 –26, p1351 lines 1 -11

there was no cause for it to be alarmed.[73] BAM's employment record in Botswana produced by the prosecution shows conclusively that he visited Maseru at least once every month, and during August 1990 he visited ACRES in Canada.[74] The mere fact that BAM was also employed in Botswana during the relevant time does not permit an inference that the representative agreement was simulated.

22.8 ACPM was paid a huge amount of money in return for very little service.

Firstly, BAM was not paid a *"huge amount"* of money. On the evidence of HARE, BAM was employed as ACRES' representative during 1986 in respect of all contracts which may be awarded to ACRES under the project. BAM continually rendered services from 1987 and performed his duties to, inter alia: *"… make ACRES known to and assist if necessary in registering ACRES with appropriate agencies and staff."*[75] ; *"… promote ACRES' interests in Lesotho by presenting*

[73] see 72 supra, vol 15 p1573 lines 24 –26, p1574 lines 1 -26
[74] vol 15 p1572 lines 1 –2p1573 lines 1 –9, vol 16 p16 9 lines 14 -20

brochures and other publicity material to appropriate officials …"[76] "……*assist ACRES in seeking, negotiating and securing a contract or contracts in Lesotho for the performance of the services…."*[77] ; "…. *assist ACRES in maintaining good relationships with the LHDA…."*[78] It is conceivable that partly due to the rendering of the aforementioned services, the decision was made by the LHDA to sole-source ACRES under C65. Further, BAM continued to render services to ACRES in respect of C65 from the time ACRES was advised that it was sole-sourced during April 1989.[79] This means that ACPM/BAM rendered services to ACRES over a period of 12 years from 1987 until his demise during March 1999. During this period he received a total sum of CAD723 000.00 from ACRES in respect of C65; and CAD 132,000 in respect of C19. Making provision for his disbursements, salaries, travelling expenses and rentals, he received a net amount of approximately CAD 5500 (Maluti

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[75] Schedule 1, paragraph 3 of the representative agreement in Exh. C. vol.15, section 7, p.3
[76] Exh. C. Schedule 1, paragraph 7;
[77] Exh. C. Schedule 1, paragraph 7;
[78] Exh. C.Schedule 1, paragraph 9.
[79] vol 12 p1348 lines 12 –26, p1349 lines 1 -9

11000) per month in respect of his services.[80] These payments are certainly not *"huge"* by any standard.

Secondly, the analogy with a contract of insurance remains appropriate.[81] Consultants and contractors recognise that agents often render services and incur disbursements in respect of which they never get paid (the representative agreements being success-driven), and they accept that a premium must be paid in respect of these losses once a contract is awarded. In this regard HARE referred aptly to the example of an estate agent who only receives payment of the commission when the property is sold.[82] Finally, the evidence of Mr JEAN PAUL GOURDEAU was to the effect that a commission of between 2% and 5% of the contract price constitutes the international norm.[83] In the present case ACPM was paid 3.6% of the value of services, which translates to 2.2% of the contract price,[84] and which remuneration is at the bottom

[80] vol 12 1360 lines 1 –26, p1361 lines 1 –26, p1362 lines 1 -15
[81] vol 21 p2068 lines 21 –26, p2069 lines 20 –26, p2082 lines 1 -13
[82] vol 13 p1376 lines 22 –24, p1377 lines 2 -23
[83] vol 21 p2066 lines 18 –21
[84] vol 12 p1362 lines 2 -6

end of the scale. No inference whatsoever can be drawn from these facts.

22.9 The representative agreement was concluded with ACPM and not with BAM

The prosecution contends that the reason why the contracting party was ACPM and not Z M BAM in his personal capacity, was to cloud the relationship in secrecy and to hide the identity of BAM. This suggestion is nonsensical. If taken seriously, the long-standing practice throughout the world in commerce and business to use partnerships, firms, companies, corporations, and the like as vehicles to conduct business, will immediately become suspect. There are very good commercial reasons why corporate entities are used. In this particular case, HARE testified as to the reasons why BAM decided to use ACPM as the contracting party in the place of LESCON (PTY) LIMITED who was the contracting party as the representative under C19.[85] BAM also conducted other businesses (including that of a consultant on the project), and the decision to

conduct business as a Project Manager in relation to his agency under the name of ACPM, was reasonable. No inference of whatsoever nature can be drawn from the fact that ACPM, and not BAM, is the contracting party to the representative agreement. HARE testified that it was clearly understood between ACRES and BAM that he, BAM, would perform the services under the representative agreement. It was at the same time acknowledged by ACRES that BAM also employed others in the execution of his duties as agent.[86]

22.10 <u>The payments under the representative agreement were made into the accounts of M M BAM and Z M BAM and not into the name of ACPM</u>

This argument is factually incorrect. All banking records and deposit slips scrutinised by the prosecution's own expert witness, ROUX, indicate that all deposits by ACRES under the representative agreement were made in the name

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[85] vol 12 p1340 lines 12 -21
[86] vol 12 p1341 lines 5 –7, p1341 lines 17 -19

of ACPM.[87] The only exception was the payment of CAD7358,70 on 2 October 1990 paid into the NEDCOR South African (Johannesburg) account of Z M BAM. The evidence clearly established that this was not a payment under the representative agreement, but was an advance made by ACRES to BAM to cover his travelling expenses to Canada and which advance was deducted from the February and March 1991 payments to ACPM under the representative agreement.[88] This evidence was never challenged. All other payments were made into the account of ACPM. Further, all payments were made into the account designated by the representative agreement and the unchallenged evidence was that for banking purposes the banking account number was sufficient and ACRES did not know, and could not have known, that these accounts were not in the name of ACPM, but were operated by BAM in the names of M M ZAM and Z M BAM, respectively.[89]

[87] vol 7 p747 lines 3 –10, p749 lines 24 –26, p750 lines 1 -5
[88] vol 22 p2249 lines 9 –25,
[89] Exh. C. vol 15 section 7 p9, vol 13 p1372 lines 24 –26, p1373 lines 12 -20

23. The attack against the circumstances surrounding the representative agreement is based solely on the evidence presented by ACRES. No evidence whatsoever was presented by the Crown to substantiate or support the inference sought to be drawn from those facts by the Crown. The evidence of ACRES in this regard stand uncontested and is supported by documentation and by the prosecution's own witnesses as indicated above. For the above reasons it is respectfully submitted that no inference of impropriety, unlawfulness, illegality or unenforceability of the representative agreement can be drawn from the above evidence: the inference of a simulated contract is not supported by the facts and totally inconsistent and destructive of the evidence. The first rule in the **Blom** case is not satisfied; and in regard to the second rule the more plausible, reasonable, and probable inference is that both parties to the representative agreement intended to contract with one another in good faith on the terms and conditions set out in the representative agreement.

24. **THE SECOND ATTACK**:

The alleged non-compliance with the Treaty requirements

The second ground of attack against the legitimacy of the representative agreement is based on the alleged non-compliance with the Treaty requirements. Before dealing with

the specific allegations, it is necessary to analyse the evidence against which the allegations must be tested, and we do so hereunder.

25. In terms of Article 6(6) of the Treaty,[90] the RSA and GOL established the Joint Permanent Technical Commission (JPTC) in accordance with the provisions of the Treaty. In terms of Article 7(15),[91] the LHDA

> *"… shall provide the JPTC with all information, as and when required by such Commission, regarding all operational aspects of any phase of the project implemented at that stage."*

26. In terms of clause 7(16),[92] the LHDA

> *"…. shall give its full co-operation to the JPTC and shall give full effect to the applicable provisions of Article 9."*

27. In terms of Article 9(1), the JPTC is composed of two delegations, one from the RSA and from the GOL.[93] All decisions of the JPTC shall require the agreement of both delegations.[94] The JPTC shall have monitoring and advisory powers relating to the activities of the LHDA insofar as such activities may have an effect on the delivery of water to South

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[90] Exh C. Vol.16, section 14, p.81
[91] ibid p.84
[92] ibid, p.84
[93] ibid, p.91

Africa.[95] It is important to note that the activities of the LHDA are not restricted only to water delivery, but also to the provision of hydro-electrical power. The monitoring and advisory powers of the JPTC are therefore restricted to only those activities of the LHDA relating to water delivery to South Africa.

28. The members of the JPTC have the right to attend management meetings and technical working meetings of the LHDA.[96] The object and purpose of this right is to ensure that the JPTC is kept fully informed of the activities of the LHDA.

29. Article 9(11) of the Treaty obliges the LHDA and the JPTC to consult each other on a continuous basis, and this Article makes provision for a number of matters which require the approval of the JPTC in order to take effect.[97] There has been much debate and evidence before the Court in regard to the approval requirements of the Treaty, and it is prudent to quote hereunder the relevant sections of the Treaty:

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[94] Article 9(3), p.91
[95] Article 9(8), p.91
[96] Article 9(21), p.93
[97] Article 9(11), ibid, p.92

"9(11) The LHDA and the TCTA[98] shall each consult with the JPTC on a continuous basis with regard to all aspects of the matters listed below and any decision of the LHDA or the TCTA and any organ of such authorities with regard to all aspects of such matters, shall require the approval of the JPTC in order to take effect:

(a) ….

(b) …

(c) …

(d) …

(e) …

(f) the design of project works, tender procedures and tender documents relating to the implementation, operation and maintenance of the project;

(g) the appointment of consultants and contractors for the implementation, operation and maintenance of the project, as well as the issuing of variation orders and the settlement of all claims;

(h) ….

(i) financing arrangements and loan agreements as well as all

[98] Trans-Caledon Tunnel Authority, being the authority responsible for the implementation, operation and maintenance of that part of the project in the

borrowings from whatsoever source, for the purpose of the implementation of the project;

(j) the appointment of professional and managerial staff of the LHDA and the TCTA, other than the chief executive of such authorities;

(k) …

(l) …

(m) …

(n) …

(o) …"

30. It is an established principle of the interpretation of statutes and of contracts that if there is evidence that words or phrases are used in a sense peculiar to a specific trade or business or profession, the words and phrases must be construed in that sense. Technical terms or expressions in mercantile usage must be construed according to their technical meaning and in accordance with the mercantile usage.[99]

Republic of South Africa relevant for present purposes.
[99] E A Kellaway, Principles of Legal Interpretation, p.436, p.563 and p.75, and the authorities referred to therein.

31. There was evidence from both Messrs HARE[100] and BROWN,[101] supported by the independent evidence of MEYER,[102] that in the engineering industry throughout the world a clear distinction is drawn between consultancy contracts on the one hand; and construction contracts on the other hand. According to the aforesaid evidence, consultancy contracts (sometimes referred to as engineering contracts) are concerned with the planning and design of particular works; whereas construction contracts are concerned with the actual construction of such works in accordance with the design prepared by the consultants and in accordance with the plans and specifications.

32. The aforesaid evidence was to the effect that there is a recognised difference in terminology used when speaking about consultancy contracts on the one hand; and construction contracts on the other hand. In consultancy contracts, for instance, reference is made to a *"Request For Proposals*" *(*RFP) and *"Proposals";* and under construction contracts reference is made to *"Tenders",* and *"Tender Documents."*[103]

33. The aforesaid distinction between consultancy contracts and RFP's on the one hand; and construction contracts and

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[101] **vol 17 p1766 lines 1 –26, p1767, lines I –26, p1768 lines 1 -4**

[102] **vol 21 p2116 lines 16 –26, p2117 lines 1-6**

tenders and tender documents on the other hand, are recognised in the Treaty.[104] Such distinction was also recognised by the JPTC when it issued different procedures in respect of the establishments of consultancy contracts and construction contracts, including other types of different contracts.[105] The distinction and use of different terminology was also recognised by the LHDA in correspondence,[106] and the difference in terminology is also evident from the minutes of the JPTC.[107]

34. It is therefore quite clear that on a proper interpretation of the Treaty, consultancy contracts are treated differently to construction contracts and the reason for such distinction was explained in evidence by MEYER.[108] The costs of the consultancy contracts were a fraction (10%) of the costs of the construction contracts which were considered to be the "major contracts" such as C123, C124, C125 and C126. None of the evidence referred to hereinbefore was challenged by the prosecution and it seems common cause that consultancy and construction contracts are treated differently in terms of the Treaty. For the reasons more fully discussed later, a strong case can be made out for the argument that the Treaty, on a

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[103] ibid
[104] See, particularly, Article 9(11)(f) and 9(11)(g) of the Treaty referred to above.
[105] Exh C. Vol.16, section 14, pp.143 to 149
[106] *Exh. C. vol 8 p233; vol 18 p1841 lines 3 -21
[107] Exh. Z. @ p4 para 5.6(a), p6 para 5.13, p9 para 5.24, p40 para 5.22

proper interpretation thereof did not require the approval of the J.P.T.C. for the establishment of the ACRES contract C65.

35. Bearing the aforesaid in mind, there was ample evidence before this Court from witnesses called both on behalf of the prosecution[109] and on behalf of ACRES[110], that there was a growing tension between the LHDA and the JPTC in regard to the matters in respect of which the LHDA required the approval from the JPTC under the Treaty.[111] All the various witnesses, from both sides, agreed that such tension resulted in the amendment of the Treaty in terms of Protocol 4,[112] during 1992. In terms of one such amendment the JPTC was empowered to issue procedures which had to be followed by the LHDA when

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[108] vol 21 p2115 lines 10 –26, p2116 lines 1 -9
[109] Messrs Putsuane, Hiddema and Molapo
[110] Messrs Brown and Meyer
[111] vol 21 p2119 lines 22 –26 p2120 lines 1 -17
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[112] vol 21 p2119 lines 10 –20, vol 8 p843 lines 16 –21.p851 lines 4 –26, p852 lines 1 –9,EXH C. vol 8 p411

requesting and obtaining the approval of the JPTC in respect of those matters referred to in Article 9 of the Treaty.[113]

36. The evidence show that the procedures in respect of civil construction contracts [114] were issued during January 1992;[115] in respect of the appointment and termination of staff during February 1993;[116] in respect of civil construction contracts 123, 124, 125 and 126 during June 1993;[117] in respect of the appointment of consultants during February 1994;[118] and in respect of the appointment of contractors during March 1995.[119] Although the procedures were issued during the aforesaid dates, it seems that effect was only given to Protocol 4 by the JPTC on 23 August 1995.[120] The significance, for present purposes, is that the procedures relating to the approval requirements of the JPTC in respect of consultancy contracts (such as C65) were only issued during February 1994. Effectively, no procedures were in place in regard to the appointment of engineering consultants (such as ACRES) from

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[113] Protocol 4 authorises the JPTC to oblige the LHDA to obtain "prior" approval,(Article 7 thereof-Exh.C. vol 8 p404) but it is to be noted that in terms of the procedures issued subsequently there is no requirement for "prior" approval and neither does the Treaty require "prior" approval. The minutes of the JPTC clearly indicate that approval may be obtained ex post facto. –Exh. Z p46 para 6 .14(i)

[114] Vol 21 p2113 lines 5 -10

[115] ibid

[116] vol 21 p2114 lines 8 -14

[117] vol 21 p2114 lines 15 -26

[118] vol 21 p2115 lines 7 -8

[119] vol 21 p2113 lines 16 -19

[120] Record: Exh. C. vol.16, section 14, p.143

the date of the establishment of the LHDA and the JPTC until February 1994. C65 (the contract establishing ACRES' personnel on the technical division of the LHDA) was established between 1989 and February 1991.

37. It has already been noted that in terms of Article 9(3) of the Treaty, the approval of the JPTC is only required in respect of water delivery contracts. The reason for this is that the JPTC (more particularly the R.S.A. delegation) controlled the funding of contracts in respect of water delivery to South Africa.[121] C65 related to the appointment of ACRES staff to the LHDA, and their functions on the Technical Division of the LHDA related to both hydro-electrical power contracts, and also to water delivery contracts. It is surely a matter of impossibility to determine whether C65 relate essentially to water delivery; or to hydro-electrical power. The facts of the matter are that C65 related to neither; C65 related to the establishment of a consultancy contract the functions of which related to both water delivery and hydro-electrical power contracts. HIDDEMA[122] was unable to explain these anomalies. This was a further factor in the uncertainty which existed in regard to the approval requirements under the Treaty, and the LHDA's reluctance to obtain the JPTC's approval (prior to the issue of the approval procedures in respect of consultancy contracts in February

1994) in respect of C65 during the period 1989 to 1991. Indeed, for the reasons which will be advanced later it may be said that, as a matter of law, the approval of the JPTC was never required in respect of C65, and the JPTC's insistence in this regard, as articulated by HIDDEMA, is misplaced.

38. The evidence show that notwithstanding the issue of the aforesaid approval procedures, the tension between the JPTC and the LHDA continued to grow which eventually resulted in the ERNST & YOUNG audit report, and which in turn gave rise to the disciplinary hearing of SOLE as chief executive of the LHDA and his eventual dismissal and conviction on criminal charges of corruption.[123] For present purposes it is to be noted that no reference whatsoever is made in the report of ERNST & YOUNG to C65 or to ACRES; and neither did the charges under the disciplinary inquiry against SOLE relate to ACRES or C65.[124] The reference to ACRES in the criminal proceedings against SOLE will be dealt with later. The evidence referred to hereinbefore was not challenged by either party and is common cause.

39. In regard to the complaint by the JPTC that the LHDA did not request or obtain the prior approval of the JPTC in regard to

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[121] vol 8 p851 line 24, p852 line 3
[122] vol 9 p1001 lines 10 -26
[123] vol 8 p850 lines 1 –8, vol 21 p2170 lines 4 -20

various matters, both Messrs HIDDEMA,[125] who testified on behalf of the prosecution, and MEYER,[126] who testified on behalf of ACRES, indicated quite clearly and unequivocally that the complaint was not directed against the event having taken place; but rather against the failure to obtain formal approval from the JPTC for such event. Notwithstanding the protestations of HIDDEMA[127] an examination of the nature of the complaints reveal that they are of form by nature and not of substance. HIDDEMA was not, at the time, a member of the JPTC and he confirmed that he had no personal knowledge of the events during the time C65 was implemented.[128] However, he subsequently became a member of the JPTC as part of the RSA delegation.[129] MEYER, called on behalf of ACRES, was part of the GOL delegation.[130] If, for no other reason, his evidence of these issues must therefore be preferred against that of HIDDEMA.

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[124]vol 9 p1040 lines 12 –24,*
[125] vol 9 p1041 lines 1 –14, p1049 lines 3 –14, p1050 lines 1 -2
[126] vol 21 from p2146 lines2 to p2160 line 21 to p2161 line 15, p2162 lines 10 -19
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[127] see footnote 125
[128] vol 9 p904 lines 1 –13, p905 lines 9 –26, p906 lines 1.-9; also see vol 21 p2168 line 21 -26

40. It is quite clear from the evidence of MEYER that, in addition to the tension and uncertainty which prevailed prior to 1992 in regard to the procedures for approval requirements, there was also some tension in the JPTC between the RSA delegation on the one hand; and the GOL delegation, on the other hand. This tension originated from the fact that the RSA delegation held the *"purse strings"* and was extremely concerned about expenditures;[131] whereas the GOL delegation was more concerned with the proper and timeous implementation of the project.[132] This tension between the two delegations is also evident from the minutes of the JPTC.[133] According to MEYER, this further resulted in the RSA delegation addressing their concerns directly to the LHDA and funding organisations such as the World Bank, in circumstances where the GOL delegation took the attitude that any representations by the RSA delegation to the LHDA or to the World Bank did not necessarily represent the official attitude of the JPTC.[134]

41. For the reasons which follow, and on a proper and legal interpretation of Article 9 of the Treaty, the LHDA did not require the approval of the JPTC for the various progress stages in the implementation and establishment of consultancy

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[129] vol 8 p812 lines 13
[130] vol 21 p2106 lines 1 –20, p2107 lines 11 –14,
[131] *vol 8 p851 lines 24 to p852 lines 11 -14
[132] vol 21 p2148 lines 18 –26, p2149 lines 1 –6, p2127 lines 19 -23
[133] Exh. Z. p 233 para 8.6

contracts (as opposed to construction contracts); although it certainly required consultation with the JPTC *"… on a continuous basis …."*[135] Article 9(11)(g) of the Treaty, referred to above, clearly distinguishes between the appointment of *"consultants"*[136] and *"contractors"*[137], and this distinction was recognised by the JPTC when different procedures were issued in respect of the appointment of consultants and contractors respectively. The wording of Article 9(11)(f) of the Treaty quoted above clearly requires the approval of the JPTC in relation to tender procedures and tender documents, but it is silent in regard to requests for proposals and proposals. No mention whatsoever is made in Article 9 to RFP's, the composition of evaluation committees, the negotiation process, the issue of a letter of intent, the mobilization of consultants or advance payments to either contractors or consultants. Clearly, the specific reference to *"tender procedures"* in respect of construction contracts is indicative of an intention that the entire establishment procedure in respect of construction contracts will require the approval of the JPTC. However, the absence of any reference to "… Request for Proposals…" or to "Proposals" is equally indicative of an intention that the establishment of consultancy consultants will not require the

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[134] vol 21 p2130 line 14 –26, p2132 lines 1 18
[135] Article 9(11) of the Treaty; vol 5 p532 lines 6 -24
[136] Article 9(11)(g)
[137] Article 9 (11)(f)

approval of the JPTC. If that was the intention the Treaty would have made specific reference thereto.

42. It is a trite principle of interpretation of statutes of enactment that where a provision in an enactment makes express mention of one thing (or particular class of things; or genus) there is an intention to exclude the other class, or genus, of things.[138] (*expressio unius est exclusio alterius)* Clearly, the specific reference to construction contracts and tender procedures in Article 9(11)(g) read with (f) of the Treaty, excludes any reference to consultancy contracts and proposals. The reason for this distinction has already been alluded to.[139]On a proper reading of the treaty it can therefore not be said that it required the approval of the J.P.T.C. for the establishment of C65, it being a consultancy contract.

43. Article 9(11)(i) requires the approval of the JPTC for financing arrangements and *"… loan agreements as well as all borrowings from whatsoever source…."* Clearly, this Article relates to the powers of the LHDA to obtain financing from the World Bank, the European Union and other financial institutions for purposes of the project, and in respect of which the approval of the JPTC is required. Once a consultancy or construction

[138] See, generally, Kellaway (supra) from 153 to 157; Du Plessis <u>The Interpretation of Statutes</u>, p. 156, and the authorities discussed by the authors.

contract is established and the appointment of such consultant or contractor is approved by the JPTC, no further approval is required from the JPTC to make payment under the contract and this duty is the sole function of the LHDA. This was recognised by both witnesses from the prosecution (CLAASSENS)[140] and from ACRES (MEYER)[141].Reliance on this Article in the Treaty for the proposition that the L.H.D.A. required the approval of the J.P.T.C. is accordingly without merit.

44. Before the procedures in respect of the approval requirements were issued by the JPTC the attitude of the LHDA under the direction of its chief executive, SOLE, was, in relation to consultancy contracts, to obtain the *"concurrence"* from the JPTC. As explained by BROWN,[142] the reason for this direction was that the ultimate appointment of a consultant required the approval of the JPTC under Article 9 (11) (g) of the Treaty, and it would serve no purpose to undergo a lengthy procedure starting from the Request for Proposals and culminating in the contract, unless it is known that the JPTC will eventually approve the appointment of the particular consultant. On a proper interpretation of the Treaty in regard to the approval requirements of the JPTC, this attitude was justified

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[139] Para 34 (supra)
[140] vol 5 p530 lines 3 -10
[141] vol 21 p2160 lines 4 -14

for the reasons mentioned. It is for this very reason that consultation *"on a continuous basis"* is required by the Treaty and why members of the JPTC have the right to attend management meetings and technical working meetings of the LHDA under Article 9(21) of the Treaty. It is significant that when the first approval procedures were issued by the JPTC during 1992, the requirement from *"concurrence"* changed to obtaining the *"approval"* by the LHDA from the JPTC, and the evidence of BROWN on this aspect was not disputed.[143] The CROWN's proposition that the only reasonable inference from the purported non-compliance with the Treaty requirements is the intentional disregard of those requirements due to the payment of bribe monies, is therefor untenable.

45. Finally, regard must also be had not only to the identity of the person or persons who implemented C65, but also to the manner and the circumstances under which it was established. As indicated, C65 called for the provision of professional staff from ACRES to fill certain posts in the technical division of the LHDA. A part of their duties would be to *"establish"* contracts between the LHDA and various other consultants and contractors by preparing the scope of work or tender documents; the calling for RFP's or tenders; the evaluations of proposals and tenders; the negotiation process; the

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[142] ***vol 17 p1789 lines 6 –15 , vol 17 p1779 lines 2 -25**

preparation of contract documents or MOU's; the issue of letters of intent, and so forth. A small number of ACRES' personnel (between 9 and 12) were still on the LHDA when the time came for C65 to be established and when ACRES was sole-sourced. For obvious reasons, and to avoid a conflict of interests, ACRES' personnel on the LHDA could not be entrusted with the establishment of their own contract. The duty to do so was therefor assigned to the Capital Finance Division of which one PAUL BERMINGHAM was the manager. The documents and correspondence relating to the establishment of C65 originated primarily in the office of BERMINGHAM as the references on the documents and correspondence show. Although the correspondence were in most cases signed by or on behalf of the Chief Executive, the correspondence invariably bear the reference of Mr PAUL BERMINGHAM (pb) and the signature of the correspondence does not detract from the fact that such correspondence was generated by BERMINGHAM. This much was evident from witnesses who testified on behalf of both the Crown and ACRES, and was not disputed and must therefore be accepted.[144]

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[143] *vol 17 p1775 lines 2 -8
[144] *vol 17 p1792 lines 5 –7
vol 11 p1205 lines 10 –11
vol 11 p1216 lines 4 –20
vol 11 p1217 lines 12 –20
vol 11 p1219 lines 19 –22

46. The evidence showed that, for instance, the technical division on the LHDA was responsible for, ***inter alia***, the establishment of technical contracts such as consultancy and construction contracts; the environment division for contracts concerning environmental impact studies; and, for instance, the capital finance division for financial contracts and loan agreements relating to the procurement of finance. The evidence was that Mr PAUL BERMINGHAM was a chartered accountant[145] and for purposes of establishing C65 he was assisted by Messrs ERIC COLE and RAYMOND formerly employed by the World Bank..[146]

47. The uncontradicted evidence was further that Mr ERIC COLE was a senior official in the employ of TAMS, the unsuccessful bidder under C19 who was sole-sourced by the LHDA but whose proposals were found to be unacceptable. It will be

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vol 11 p1220 lines 1 -20
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[145] *vol 17 p1776 lines 17 –22.

remembered that ACRES was short-listed with three other firms under C19, and the documentation show that ERIC COLE was the chairman of the evaluation committee who evaluated the proposals under C19.[147] The evidence further show[148] that ERIC COLE was again appointed as the chairman of the evaluation committee under C65 and the evaluation report bears his signature.[149]

48. The evidence showed that Mr PAUL BERMINGHAM was a senior and well experienced and respected official of the LHDA whose reputation was never in doubt.[150] Similarly, Mr ERIC COLE was independently contracted through TAMS to head the evaluation committees under C19 and C65, and his integrity and that of Mr RAYMOND were beyond repute.[151] Notwithstanding, BROWN indicated that although BERMINGHAM had the necessary expertise and experience to establish loan agreements and financial contracts, he may not have been sufficiently versed in the establishment of technical contracts such as C65.[152]

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[146] *vol 5 p488 lines 5 –8; vol 11 p1205 lines 2 –11; p1216 lines 14 –26; p1217 lines 1 –20; 1220 lines 2 –20; vol 21 2118 lines 8 -13
[147] *vol 21 p1804 lines 10 –16, p1799 lines 19 –26, p1797 lines 19 –23; Exh. C. pp34 -36
[148] *vol 13 p1307 lines 6 –26, p1308 lines 1 -6
[149] *vol 13 p1412 lines 20 –23; Exh.C. vol 15 sec. 5 p8
[150] *ibid
[151] *vol 8 p872 lines 5 -13
[152] *vol 17 p1798 lines 6 -17

49. It is against the aforegoing background and evidence that the attack of the Crown against the legitimacy of the representative agreement must be evaluated. The reasoning by the Crown is that the alleged non-observance of the Treaty requirements in respect of the establishment of C65 is indicative of favouritism shown by SOLE as chief executive to ACRES, and from which the inference should be drawn that ACRES paid bribe moneys to SOLE and, for that reason, the representative agreement is simulated and, to use the words of the prosecutor, a *"sham"*. This reasoning is inherently flawed and untenable for the reasons more fully described and discussed below.

50. Firstly, it remains a question of law whether or not the JPTC's approval was required throughout all procedural steps in the establishment of C65. The evidence of HIDDEMA[153] and MEYER[154] was that it was the perception and *"belief"* of the JPTC that its approval had to be obtained, but it remains for this Court to find whether, on a proper interpretation of the Treaty, its approval was as a matter of law required by the Treaty. The LHDA believed that it did not require the approval of the JPTC for these purposes, and for the reasons mentioned it is respectfully submitted that BERMINGHAM through the LHDA was indeed correct in his belief that the LHDA did not require

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[153] ***vol 9 p1041 lines 5 –7; p1060 lines 2 -26**

[154] ***vol 21 p2152 lines 11 -14**

the approval of the JPTC for those purposes. The LHDA was obviously obliged to consult with the JPTC on a continuous basis in regard to those matters, but the evidence clearly show that such consultation took place and there is no suggestion that there was no consultation by the LHDA with the JPTC on those issues.[155] If this submission is accepted, then the entire attack on the perceived non-compliance with the approval requirements fail, and nothing further need be said on this issue.

51. Secondly, and even if it can be said that there was an obligation on the LHDA to obtain the approval of the JPTC in respect of these matters, then on the evidence of both the prosecution and the defence witnesses, the LHDA (BERMINGHAM) believed that it did not require the approval of the JPTC, and such belief was certainly reasonable having regard to the wording of Article 9 of the Treaty. Such belief. Was re enforced by the limitation of the approval functions of the J.P.T.C. to water delivery contracts, and C65 not being a water delivery contract On the evidence of both HIDDEMA[156]

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[155] ***vol 21 p2120 lines 3 -17**

[156] ***vol 8 p840 lines 17 –18**
p851 lines 24 –26
p852 lines 1 –3
p843 lines 25 –26
p844 lines 19 –20
vol 9 p962 lines 23 –26
p963 lines 1 –26
p1009 lines 2 -15

and BROWN[157] the tension between the LHDA and the JPTC was created by the uncertainty in regard to the approval procedures and the non-observance of the requirements (such as there may be) is more likely to be attributable to such uncertainty and to the opposing beliefs held by the two parties, than to any other sinister cause. The tension and uncertainty was further exacerbated by differences of opinion between the RSA and GOL delegations on the JPTC, and it is common cause that these uncertainties resulted in Protocol 4 which empowered the JPTC to issue procedures whereby its approval had to be obtained.

52. In the above circumstances any suggestion of an inference that the non-observance of the Treaty requirements was attributable to favouritism exhibited towards ACRES, is untenable. There are numerous and more plausible and reasonable inferences which can and should be drawn, such as: the LHDA and BERMINGHAM either correctly believed the LHDA did not require the approval of the JPTC, or acting in the ***bona fide*** but erroneous belief that it did not require the approval, did not ask for or obtain such approval; the uncertainty in regard to the approval procedures common to both the JPTC and the LHDA resulted in approvals being neither sought nor obtained (although the JPTC was kept informed through negotiations

[157] *vol 17 p1795 lines 9 –21; see also vol 21 p2120 lines 3 -17

and its attendance of management and technical meetings); the complaint, on the direct evidence of HIDDEMA[158] and MEYER[159] was not of substance but of form in that the complaint related to the absence of formal approval by the JPTC, but not to the fact that the event had taken place.

53. Finally, the suggestion that SOLE was responsible for the alleged non-observance of the Treaty requirements, cannot be supported by the evidence before this Court. In order to draw the inference, which the Crown seeks to draw, it must follow by necessary implication that Messrs BERMINGHAM, COLE and RAYMOND were party to the corrupt process. There is no evidence whatsoever to support such an inference and the evidence point to the contrary.[160] Against the aforegoing background, the specific complaints concerning the specific stages of the establishment process of C65 must be viewed:

54. <u>The JPTC did not approve the request for proposals</u>

It is common cause that the JPTC never formally approved the issue of the RPF's to ACRES. However, there is ample evidence that the LHDA consulted extensively with the JPTC in

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[158] *vol 9 p1009 lines 2 –15, p1041 lines 1 -20
[159] *vol 9 p1041 lines 8 -20
[160] *vol 21 p2152 lines 18 –26

regard to the content of the RFP's.[161] The JPTC, and more particularly the RSA delegation of the JPTC, commented fully on the request for proposals. The evidence show conclusively that all concerns raised by the RSA delegation of the JPTC (more particularly the tax issue, the fees, and the optimisation phase 1B study) were addressed and satisfactorily resolved in accordance with the demands of the JPTC.[162]

According to MEYER, there was not even certainty as to whether the JPTC required approval for the issue of the RFP's during January or February 1990.[163] There is certainly no such requirement in the Treaty.[164] Further, on the evidence of HIDDEMA, supported by the minutes of the JPTC, any RFP could have been amplified by addenda.[165] It is evident from

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[161] *vol 9 p1041 lines 11 –13, vol 21 p2139 lines 8 -10
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[162] *vol 9 p932 lines 13 to p938 line 9, p945 from line18 to p954 line26; vol 9 p1049 lines 8 -24
[163] *vol 21 p2134 lines 9 -17
[164] See Article 9
[165] *vol 10 p1148 lines 11 –13, p1149 lines 7 –14, 2 –23, p1150 lines 4 -6
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the minutes of the JPTC that RFP's in respect of other contracts were also the subject of addenda.[166] On the evidence of HIDDEMA,[167] MOLAPO,[168] and MEYER,[169] the JPTC attended management and technical meetings of the LHDA[170] and the JPTC must therefore have been fully aware of the RFP's, its content, and the stage of implementation of C65. In this regard the evidence of HIDDEMA was shown to be contradictory where he initially testified that the JPTC had no knowledge of the RFP's having been issued, which evidence he was forced to retract under cross-examination.[171] This shows his bias. Clearly, the evidence on this issue again demonstrates that HIDDEMA was concerned with form rather than with substance.[172]

53. The composition of the evaluation committee and evaluation procedure.

The Treaty is silent in regard to the composition of the evaluation committee, and no reference thereto is made in the

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[166] *vol 10 p1140 lines 15 –23, Exh. Z p6 para 12.6© ;p20 para5 .12 (a)
[167] *vol 9 p964 lines 1 11
[168] *Exh. AA, vol 11 p1198 lines 11 -25
[169] *vol 21 p2138 lines 22 –26, p2139 lines 1 -6
[170] *footnotes 148 &149 supra
[171] *vol 9 p936 lines 21 –26, p937 lines 1 -3
[172] *vol 10 p1041 lines 11 -13

Treaty. The evaluation committee was chaired by Mr E COLE of TAMS, and there is no evidence before this Court which suggests any impropriety or unlawfulness in this process. There is no evidence that the JPTC was not aware of the evaluation process, that it was dissatisfied with its result or that it questioned the results in any way.

54. Negotiation process

Again, the Treaty does not require the approval of the JPTC to invite a successful proposer to negotiations. On the other hand, the JPTC was fully apprised of the negotiation process and the evidence indicated conclusively, both from the prosecution's witnesses and from ACRES' witnesses, that the JPTC attended the negotiations[173] and the documents before the Court include hand-written notes by the RSA delegate to the JPTC of negotiations attended by him.[174] It is significant to note that those hand-written notes refer to the composition of the fee structure which include an overhead component.[175] The overheads include, as part thereof, agent's fees and it was conceded by CLAASSEN, (a witness called by the prosecution who attended the negotiations on behalf of the JPTC) that the agent's fees were on the table for discussions. This shows

[173] *vol 5 p487 lines 17 –25, vol 21 p2140 lines 3 -18
[174] *vo 5 p500 lines 9 –17, Exh C.vol 8 p107 –116
[175] *vol 5 p508 lines 1 –25, p510 lines 1 -5

conclusively that not only were the JPTC kept fully informed of the negotiation process and the matters discussed, but knew full well of ACRES' intention to use a representative and in fact approved the fees payable to the agent as part of the overhead component.

55. The Memorandum of Understanding

Under cover of a letter dated 19 May 1990 signed by E COLE, in his capacity as chairman, evaluation committee,[176] the said evaluation committee forwarded the MOU to SOLE who, in turn, forwarded the MOU to the JPTC on 19 May 1990[177]

The penultimate and last sentence on the first page of the MOU reads as follows:

> *"It is anticipated that once LHDA and AIL have reached agreement in principle, a letter of intent will be issued to AIL on the basis of which AIL will be in a position to mobilise for the services. AIL indicates that the letter of intent should be received by 15 June 1990 if the mobilization of Mr CLARKE and Mr MARKOWSKY is to be achieved by the projected dates."*

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[176] Exh. C.vol.15, section 5, pp.7, 8 and 9
[177] vol 9 p974 lines 6 -7

Not only did members of the JPTC attend the negotiations, but a copy of the MOU prepared by COLE was furnished to the JPTC on 19 May 1990. It follows as a matter of necessary implication that the JPTC knew of the anticipated letter of intent (LOI) to be issued to ACRES *"… on the basis of which AIL will be in a position to mobilise for the services."* The MOU clearly indicates that the LOI should be received by ACRES by 15 June 1990 *"… if the mobilization of Mr CLARKE and Mr MARKOWSKY is to be achieved by the projected dates."* This much was conceded by Mr MEYER who was a member of the JPTC at the time. The evidence is therefor overwhelming that the JPTC not only was a party to the wording of the MOU but was fully kept fully informed of every step in the establishment of C65.

56. The uncontradicted evidence of MEYER in this regard was to the effect that the mobilization of Messrs CLARKE and MARKOWSKY was urgent, imminent and unavoidable because they were the designated personnel to negotiate the main contract works on behalf of the LHDA.[178] It is common cause that the main contract relate to contracts 123, 124, 125 and 126 concerning the construction of the Mohale Dam and delivery tunnels.[179] The negotiations in respect of the aforesaid main

[178] *vol 21 p2142 lines 18 –24, vol 11 p1250 lines 19 –23, 1228 lines 8 –15, 1226 lines 2 -6
[179] *common cause

construction contracts were scheduled for September 1990 and were subsequently postponed to October 1990.[180] These negotiations could not take place before C65 was established and Messrs CLARKE and MARKOWSKY were mobilised in terms thereof.[181] Unless C65 was established and CLARKE and MARKOWSKY mobilised, the entire project would have been delayed and this was recognised by both the prosecution witnesses and ACRES' witnesses.[182]

57. The undisputed facts are therefore that the JPTC knew and approved of the issue of the letter of intent with the subsequent mobilization of the ACRES personnel thereunder.[183] As it happened, the letter of intent was not issued by the date anticipated by the MOU on 15 June 1990, but was only issued late on 28 July 1990.[184]

58. It is common cause that HIDDEMA was not a member of the JPTC at the relevant time and has no personal knowledge of the events which took place at the time. He simply placed the minutes of the meetings of the JPTC before this Honourable Court, the content of which is self-explanatory. His attempt to interpret those minutes and to describe the motives and

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[180] *vol 10 p1145 line 1 to p1147 line 20
[181] *see (MOU) Exh C. vol 15 sec 5 p9 -17, vol 9 p921 lines 10 –13; p923 lines 22 -26
[182] *vol 9 p921 lines 10 –14, p923 lines 22 -26
[183] Exh. C. vol 8 p159

surrounding circumstances of the resolutions reflected therein, are singularly unhelpful. By virtue of his lack of personal knowledge, such evidence is rendered totally irrelevant and useless, particularly in regard to the evidence of MEYER who was a member of the JPTC at the time and who was a party to those resolutions and matters reflected in the minutes. Therefore, and to the extent that there may be any conflict between HIDDEMA and MEYER, the evidence of MEYER should prevail.

59. The evidence of MEYER clearly shows that the JTPC not only knew of the letter of intent and pending mobilization thereunder, but that it also carried the approval of the JPTC. He testified that everyone knew what was happening and that the expeditious implementation of C65 and the mobilization of the ACRES' personnel thereunder was a known fact and not an issue. Again, his complaint, supported by HIDDEMA[185] and MOLAPO,[186] was that the LHDA did not obtain *"formal"* approval from the JPTC to issue the letter of intent and to instruct ACRES to mobilise thereunder; the objection was not aimed at the actual event of the letter of intent or the mobilisation, but aimed at the lack of formal approval.

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[184] Exh. C.vol.15, section 5, p.18
[185] *vol 9 p942 lines 11 –22, p946 lines 23 –24, p1008 lines 21 -26
[186] *vol 11 p1231 lines 1 –25, p1229 lines 24 to p1230 lines 1 -5

60. Authorisation of the advance payment under C65 to ACRES without JPTC approval

The evidence before this Court was that the provision of an advance payment in either a consultancy or construction contract is not unusual; rather, it is the norm in circumstances where the consultants or contractor incurs substantial expenditures in mobilising.[187] The JPTC minutes reflect advance payments also to other contractors or consultants, even in circumstances where the contract has not yet been signed (as was the case in C45 and C46).[188] In the present case, the MOU, similarly, makes provision for an advance payment,[189] and this would have been reflected in the first draft of C65.

61. In view of the anticipated letter of intent by 15 June 1990 and it's mobilisation thereunder,[190] it may be assumed that ACRES was not unduly concerned during May 1990 about incurring costs of mobilisation. It was obviously anticipated that the signing of C65 and the mobilisation of ACRES personnel thereunder would occur either simultaneously or within a short period of time from one another. The draft contract made provision for payment of the advance on signature thereof, and

[187] *vol 21 p2159 lines 22 –26, p2160 lines 1 -3
[188] *Exh Z p215 para 6 .5; p250 para 8 .11 and 8 .12
[189] *vol 21 p2158 lines 3 –21, Exh C. vol 15 sec 5 p14 para 3 .7

not being involved in the establishment of C65, ACRES would not have been aware of all the various issues such as tax, fees and optimisation study still being outstanding between the LHDA and the JPTC. When it became clear that due to the outstanding issues the contract could not be signed on mobilisation, a mechanism had to be found to reimburse ACRES for the costs of mobilisation until such time the contract is signed. In its comments on the draft contract Mr RYNHARD, the chairman of the board of directors of ACRES, indicated a need for a mechanism whereby the advance payments will be paid pending signature of the contract to cover the costs of mobilisation.[191] Such sequence of events was narrated in evidence by HARE and remains unchallenged.[192] The mechanism devised in consultation with the LHDA was to provide for the retrospective operation of the contract to 1 August 1990, being the month during which ACRES mobilised in accordance with its instructions[193], coupled with an undertaking that ACRES will be paid for its services pending final conclusion and signature of the contract, and this is exactly what happened. This sequence of events accords with normal business practice and was not peculiar to C65,for instance the

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[190] Exh.C. record: vol.15, section 5, p.9
[191] vol 13 p1427 lines 1 –21, p1428 lines 12 -13*
[192] *
[193] Paragraph 2.3 of the General Conditions of C65, Exh. C.vol.16, section 11, p.10, read with p.31, clause 2.3.

advance payment was also paid before signature of the contracts.

62. In the instructions from the LHDA to ACRES to mobilise on 14 August 1990,[194] ACRES is advised that the costs of mobilisation will be covered by an advance payment *"in terms of the contract"*. Further "…the terms of the contract …" clearly provide for the retrospective operation of the contract to 1 August 1990 (when ACRES mobilised and incurred costs of mobilisation) notwithstanding signature of the contract on 21 February 1991. Again, on 4 February 1991 the LHDA advises ACRES that

> *"… LHDA will pay your firm for services rendered and expenses incurred from 1 August 1990 to 28 February 1991, before which time we expect the contract to be finalised. These payments will be made in accordance with the provisions of the draft contract dated 24 October 1990."*[195]

63. The *"provisions of the draft contract"* referred to in both communications mentioned in the preceding paragraph clearly entitles ACRES to an advance payment *"… on signature of the agreement and on submission of bank guarantees acceptable*

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[194] **Record: Exh.C.vol.9, pp.139 and 140**
[195] **Record: Exh.C.vol.15, section 5, p.22**

to the employer."[196] It is respectfully submitted that the instructions to mobilise on 14 August 1990[197] as confirmed in the communication of 4 February 1991,[198] created legal rights and obligations between the parties in terms of which ACRES was obliged to mobilise against the payment of the advance as envisaged in the contract, the operation of which took effect from 1 August 1990. The fact that the contract was signed on 21 February 1991 does not detract from the legal rights and obligations which existed ***inter partes*** from August 1990, and to hold otherwise will, with respect, be a misdirection in law.

64. The advance payments made during November 1990 and January 1991 by the LHDA to ACRES were accordingly made in accordance with contractual rights and obligations under C65, and are therefore in all respects regular and lawful. It has already been indicated, supported by the Crown's own evidence in this regard,[199] that once a contract is approved by the JPTC and in place, no approval is required from the JPTC to make payments thereunder and it is the sole duty and prerogative of the LHDA to implement such contract.[200]

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[196] Exh.C. Clause C6, Appendix C to Contract 65, vol.16, section 11, p.78
[197] Record: Exh C.vol.9, pp.139 to 140
[198] Record: Exh. C.vol.15, section 5, p.22
[199] *vol 5 lines 530 lines 3 -10
[200] *vol 21 p2160 lines 4 -14

65. The suggestion that C65 was never approved by the JPTC is based on a false premise and ignores the realities of the case and the evidence presented to the Court. On the evidence of HIDDEMA, MOLAPO and particularly MEYER,[201] and having regard to the JPTC's presence during the negotiations and its knowledge of the anticipated mobilisation of ACRES during June 1990 as envisaged by the MOU, there can be no doubt whatsoever that the JPTC knew and consented to the mobilisation of ACRES' personnel under C65 to conduct the imminent negotiations on behalf of the LHDA in respect of the main contracts during September or October 1990. The JPTC minutes unequivocally show that the draft C65 contract was forwarded to it for consideration, comment or approval,[202] and on 19 November 1990 the LHDA furnished the JPTC with a draft of C65 dated 24 October 1990 prepared by E COLE of TAMS.[203] On 5 February 1991 the LHDA again transmitted the final draft of C65 dated 31 January 1991 to the JPTC from which it is clear that all issues had by then been addressed and resolved. This document was distributed within the JPTC on 12 February 1991.[204] In the minutes of 5 March 1991 of the JPTC it is noted that C65 *"has already been signed"*[205] and it is

[201] *vol 21 p2147 lines 4 –6, vol 9 p975 lines 20 24
[202] *Exh. Z.p251 para 8 .7. p280 para 9 .7. p308 para 8.17. p328 para 8.17
[203] Record: Exh. C.vol.8, pp.165 to 166
[204] Record: Exh.C. vol.9, pp.256 and 257; vol 5 p523 lines 2-25
[205] *vol 5 p524 lines 3 –25, p525 lines 19 –26, p526 lines 1 -6

resolved that C65 *"is approved"*[206] On 13 March 1991 the JPTC formally approved C65.[207]

66. The evidence of MEYER was that if the JPTC had disapproved of C65, or of the mobilisation of the ACRES' personnel thereunder, or of the award of C65 to ACRES, it would certainly have recorded such objection in no uncertain terms and would have advised the LHDA accordingly.[208] This is only logical and realistic. There is no documentary evidence on record to indicate that the JPTC expressed its disapproval to the LHDA in this regard. Again, the complaints, as noted in the JPTC minutes[209] (not communicated to the LHDA or to ACRES), are directed against form rather than substance, in that it relates to the absence of formal approval and not to the event of the award and signature of C65. The evidence of BROWN, supported by MEYER, indicate as a matter of overwhelming probability that the delegates of the JPTC knew well before 21 February 1991 that the signing ceremony in respect of C65 was scheduled to take place on that date. The chairman of the board of directors of ACRES, Mr RYNHARD, travelled to Maseru with the specific object and purpose to sign the contract, and he visited both delegations of the JPTC during the

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[206] vol 5 p527 lines 5 -10
[207] Record:Exh C. vol.2, p.524
[208] *vol 21 p2155 lines 4 –16, p2161 lines 15 -25
[209] *Exh. Z.p266 para8 .17, vol 8 p348 , vol 21 p2152 lines 1 -6

course of his visit and before signature of the contract.[210] The signature of the contract was accompanied by a small ceremony and it is inconceivable and highly improbable that the JPTC was not aware of that event.

67. In the above circumstances an inference of impropriety or unlawfulness in relation to the establishment of C65 is not permitted by the evidence and inconsistent therewith. Indeed, on the evidence of the Crown's own witnesses, namely, Messrs PUTSOANE,[211] HIDDEMA,[212] MOLAPO[213] and CLAASSEN,[214] the establishment and implementation of C65 was in all respects proper, lawful and devoid of any suggestion of fraud or unlawfulness. The objections, at the risk of repetition, related to form rather than to substance, to the lack of written (formal) approval in respect of an event rather than to the event having occurred.

68. In the above circumstances it is respectfully submitted that an inference of corruption from the perceived or alleged non-compliance with approval requirements is not only logically impermissible, but it is inconsistent with the evidence before the Court and offends the first rule in the **Blom** case. As submitted

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[210] *vol 17 p1858 lines 14 -19
[211] *vol 2 vol 2 p343 lines 2 -9
[212] *vol 9 p1041 lines 5 -14
[213] *vol 11 p1229 line 24 to p1230 lines 1 –3; p1251 lines 19 -24
[214] *vol 5 p528 lines 1 -4

earlier, and in any event, an even if it is held that the Capital Finance Division of the L.H.D.A.did not properly observe the approval requirements of the JPTC under the Treaty, there are other plausible and more reasonable inferences which may be drawn as regards the cause or causes thereof, and to which reference has already been made earlier.

THE THIRD ATTACK:-

The so-called "linking" of payments

69. The third attack on the legality of the representative agreement is based on the "linking" of the payments which, on the one hand, ACRES made to ACPM/BAM and; on the other hand, to the payments which BAM made to SOLE. This argument is based on the theories of ROUX.

70. It is respectively submitted that this argument is based on inverted logic. It assumes as its point of departure the non-existence, or rather the illegality, of the representative agreement. Therefore, according to this argument, in the absence of any reasonable explanation as to why ACRES made payments to ACPM/BAM, it follows that ACPM/BAM was used merely as a conduit for the payments to SOLE and therefore ACRES paid bribe monies to SOLE. This inference, so the argument goes, is strengthened by the "pattern" of the

payments from BAM to SOLE which were made in close proximity of time to the payments from ACRES to BAM, and in most instances at the rate of exactly 60% of the payments received from ACRES.

71. THE CROWN therefore contends, on the above argument, that the representative agreement is a “sham” and constitutes nothing more than a simulated contract behind which ACRES hides for its illegal payments to SOLE. The fallacy of this argument is, of course, that by assuming the illegality of the representative agreement in order to arrive at the conclusion that the payments are “linked”, it concludes that the “linking” of the payments show the illegitimacy of the representative agreement. As the report of Roux (Exhibit K 1) and also his evidence show this argument totally ignores the question of the legality or illegality or the agreement. This argument begs the very question of the legality or otherwise of the representative agreement, and the agreement goes round in circles without beginning or end. It starts with an assumption that the agreement is illegal, and ends with the conclusion that the agreement must therefor be illegal.

72. It is submitted that the logical reasoning should be the following:

Before the question arises whether or not the payments can be "linked", the explanation for the payments from ACRES to ACPM/BAM must be tested. If that explanation is reasonably true, or more correctly put, if THE CROWN fails to prove that such explanation is not reasonably true, then that is the end of the matter and it can never be said, on the evidence, that the payments are "linked".

73. The situation would have been different if there was any evidence of direct payments from ACRES to SOLE, or any evidence of instructions from ACRES to BAM to make payment to SOLE, or any other independent or documentary evidence showing that the payments from ACRES to BAM were as a matter of fact intended for onward transmission to SOLE. Such evidence may conclusively show that the representative agreement was simulated and was therefore used as a shield for unlawful payments. However, there is not a shred of evidence before this court to show direct payments from ACRES to SOLE and the legitimacy or otherwise of the representative agreement must be evaluated independently from any payments made by ACPM/BAM to SOLE. For the reasons which will appear later, the payments from BAM to SOLE are quite irrelevant for purposes of determining whether the payments from ACRES to BAM were lawfully made under a lawful representative agreement.

74. The parties are *ad idem* in regard to the payments made by ACRES to ACPM/BAM and both experts, MESSRS ROUX AND BURNETT, agree that the payments from ACRES to BAM reflected on Exhibit L [215] are correct. The first question is whether those payments accord with the terms of the representative agreement. ROUX was not asked to express an opinion in this regard and this did not form part of his mandate. The evidence of GIBBS and BURNETT stand uncontradicted and their evidence was to the following effect:

a) the first payment of CAD 7358,70 was a loan to Z M BAM paid into the Johannesburg Nedbank account to defray travelling expenses and the documentary evidence supports the evidence of GIBBS in this regard[216];

b) the payment of CAD 180 000.00 on 28 January 1991 constitutes the advance payment envisaged by the representative agreement and was paid into account A which was the designated account under the representative agreement at the time.[217]

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[215] vol 21 p2374 lines 10 –17, vol 7 p704 lines 11 –14, p770 lines 11 –14, p783 lines 2 -24
[216] vol 23 p2294 lines 9 -21
[217] vol 23 p2295 lines 5 -15

Reference will again be made later to this payment;

c) in terms of the representative agreement, ACRES was obliged to pay 3.6% of the value of the services to ACPM/BAM[218]. The value of the services was "assumed" in the representative agreements to be CAD 20 million. 3.6% of 20 million equals CAD 720 000. In terms of the agreement, the balance of CAD 540 000.00 (CAD 720 000.00 less the deposit of CAD 180 000.00) were initially payable in monthly instalments[219] of CAD 7826.09 each. The February and March instalments therefore equalled CAD 15652.18. Deducting the advance of CAD 7358,70 paid in October from CAD 15652,18, the March instalment was CAD 8293,48. The evidence supported by CROWN's own documentation, show that this instalment was paid on 27 March 1991 into the account then designated by the representative agreement[220]. The evidence of

[218] Exh C. vol 15 section 7 p8
[219] See revision 4 of the agreement vol 15, section 7, p.6
[220]EXH. C Volume 15, section 7, p.9

GIBBS supports the documentation and entries on Exhibit L[221];

d) the payment on 30 May 1991 of CAD 31,304. 36 represents 4 monthly instalments of CAD 7826.09 each, and was paid into the B account designated by the representative agreement as amended[222]. The evidence of HARE and GIBBS are supported by documentary evidence and by the entries in the banking accounts.[223] BAM thereafter requested that payments be made on a three monthly basis[224] and the agreement was amended accordingly[225]. The evidence of HARE is supported by the actual payments and entries in the banking statements testified to by GIBBS[226] and accepted by ROUX.

75. The three monthly instalments (CAD 7826.09 x 3) amounted to CAD 23478,27 and Exhibit L show that the instalments of CAD 23478.07 were paid at three monthly intervals into the B

[221] vol 23 p2271 lines 12 -14
[222] Exh C.Volume 15, p.29 and 30
[223] vol 7 p704 lines 11 –14, p710 lines 10 -20
[224] Exh. C.Volume 15, section 6, p.31
[225] Exh C.Volume 15, section 7, p.8 (revision 5)
[226] see footnote 223 supra

account as designated by the representative agreement and as testified to by MESSRS HARE[227] and GIBBS[228].

76. The payments continued until the demise of BAM during March 1999.

77. The payments made by ACRES to ACPM/BAM support the probabilities that they were made under a legal and lawful representative agreement, and are destructive of any unlawful intent or purpose for the following reasons:-

77.1 Much is made by the prosecution of the timing of the advance payment from the LHDA to ACRES and from ACRES to BAM during January 1991. However:-

77.1.1 both advances (from the LHDA to ACRES and from ACRES to ACPM/BAM) correspond with the terms of C65 and with the representative agreement respectively;

77.1.2 on the CROWN's own evidence,

[227] **vol 13 p1373 lines 12 -20**
[228] **vol 23 p2298 lines 2 -8**

SOLE received nothing from BAM under the advance payment;

77.1.3 until 28 May 1991, BAM received a total sum of CAD 226 956.54 (Exhibit “L”) from ACRES, of which nothing was paid or transferred to SOLE;

77.1.4 until 28 May 1991, ACRES received a total sum of CAD 2 312 811,87 from the LHDA, of which nothing was paid or transferred to SOLE;

77.1.5 if the advances referred to in sub 1.1. above were unlawfully made or irregular or with the intention to pay SOLE as suggested by the prosecution, then it must follow as a matter of overwhelming probability that BAM would have made concomitant payments to SOLE. Failure to do so is not only destructive of the intent to pay SOLE, but also of ROUX’s “pattern”

of payments and of the inference that the payment of the advance was manipulated to benefit SOLE;

77.1.6 the indictment alleges that the payments to SOLE were intended to induce him to “action” or “inaction” for the benefit of ACRES. For the reasons explained in evidence and mentioned again later, no payments were made by ACRES to BAM for over one year (October 92 – January 94), during which period SOLE also received no payments from BAM. Yet, during this period, both Variation Orders 1 and 2 were approved in respect of C65 by the LHDA, to which reference is made in the indictment. It is improbable that these Variation Orders would have been approved if such approval was dependant upon the payment of bribe monies to SOLE, and is inconsistent with an inference of bribery;

77.1.7 SOLE was suspended as Chief Executive of the LHDA during November 1996 on the basis of his irregular and dishonest conduct. If ACRES was paying him bribe monies through BAM, it is inconceivable and improbable that ACRES would have continued doing so at the risk of being exposed during the investigations into SOLE's affairs. Yet it continued to make payments to BAM, which supports the inference that the payments were lawfully made under a lawful representative agreement;

77.1.8 SOLE's services as Chief Executive of the LHDA were terminated during October 1995 as a result of findings of, essentially, dishonesty and misappropriation of funds. Civil proceedings were instituted against him and the laying of criminal charges were imminent and unavoidable. Yet, ACRES

continued uninterruptedly until the demise of BAM during March 1999 to make payments to ACPM/BAM. Such continued payments are destructive of an inference that the payments to BAM were intended as the payment of bribe monies to SOLE. This course would have been self-destructive and incriminating for ACRES if it intended the monies for onward transmission to SOLE and is so improbable that the entire notion of bribery becomes nonsensical. On the other hand, the continued payment to ACPM is in harmony with an innocent intention to make payments under a legitimate representative agreement, and accords with the probability of payments made under such representative agreement;

77.1.9 for the reasons to be more fully discussed later, the cessation of

payments to ACPM during March 1999 upon the demise of BAM, accords with the terms of the representative agreement.

78. During the course of cross examination of GIBBS, some criticism was expressed in regard to the structure and reduction of the payments to ACPM/BAM, and this is dealt with below. It was suggested to GIBBS under cross examination that the amounts and dates of the instalments changed, which constituted an "amendment" of the representative agreement to which ACPM/BAM had not consented[229]. The thrust of the cross examination was intended to show that the payments were not paid in accordance with the provisions of the representative agreement, but rather pursuant to an agreement of bribery.

79. The proposition put to GIBBS that the change in the amounts and dates of payments constitute "amendments" of the representative agreement[230], is factually incorrect and legally untenable. The representative agreement clearly and unequivocally show that ACRES was obliged to remunerate ACPM/BAM at the rate of 3.6% of the value of the services, and

this term was never amended. The payment method or structure under the representative agreement was based on two assumptions. Firstly, in terms of the agreement ".. it is assumed that the total fees for services to be received by ACRES will be CAD 20 million based on the anticipated scope of services …"[231]. Secondly, in terms of Clause 4 on page 2 of the agreement[232], the estimated duration of the agreement was six years , subject to renewal or early determination. In the third paragraph in schedule 2 (remuneration and reimbursement) of the representative agreement it is acknowledged that "… the total sum payable to ACPM and the corresponding payments may be adjusted proportionately should the anticipated scope of services and the corresponding fees change significantly either in the signed contract or subsequently …". In the last paragraph of the same schedule ".. the total estimated amounts " less the advance, is payable over 69 months being 72 months (anticipated period of 6 years) less the first three monthly progress payments.[233]

80. The representative agreement, and the payments thereunder, quite clearly follows the payments from the LHDA to ACRES under contract 65, and are inherently linked to those payments.

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[229] vol 23 p2329 lines 2 -18
[230]vol 23 p2332 lines 11 -23
[231] Exh C. vol 15 section 7 p8
[232] Exh. C. vol 15 section 7 p2
[233] See the penultimate para (revision 5) of schedule 2, remuneration and the

In terms of the representative agreement, the liability to make payment to ACPM only arises when and if ACRES receives payment from the LHDA, and the total amount (not the monthly instalments) payable by ACRES to LHDA equals 3.6% of the value of services rendered by it under contract 65. The representative agreement does not state that the monthly payments are to be calculated at the rate of 3.6% of the value of services rendered every month; it explicitly assumes a total sum payable ".. based on the anticipated scope of services .." payable by equal instalments (less the advance) over an expected duration of 6 years or 72 months. Legally, and applying the rules of interpretation, the payment obligations under the representative agreement must be construed with reference to the terms of Contract 65, the payments made by the LHDA to ACRES thereunder, the value of services thereunder, and the duration of Contract 65. The representative agreement clearly states that the payments "… may be adjusted …" in relation to the fees receivable from the LHDA.

81. Accordingly, there was no "amendment" of the representative agreement but merely a change in the payment structure in order to comply with the terms thereof. In this regard:

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imbursement

a) both HARE[234] and GIBBS[235] testified that ACRES did not immediately make payment of the first advance to ACPM because it wanted to ensure the LHDA would continue to make payment to ACRES and that the payments to ACPM are in fact linked to the payments from the LHDA. When ACRES became satisfied that the payment structure from the LHDA was in place and that it will continue to receive payments, the first two advance payments to ACPM had already fallen due and it was accordingly decided, in favour of ACPM, to make a lump sum payment of the entire advance. (It was in arrears with the first two payments and paid the last two payments in advance). This payment certainly did not require the approval of ACPM and can never be regarded as an amendment or deviation from the terms of the representative agreement. The advance (in CAD) remained CAD 180 000,00 under the agreement and this sum was in fact paid.

b) On any calculation, the payments from ACRES to ACPM during October 1992 by far exceeded the amounts owing by it to ACPM at that stage

[234] vol 13 p1367 line 16 to p1368 lines 1 -2

(6.14%). This was caused by the payment of the advance to ACPM. In order to bring the payments back within the terms of the agreement (3.6% of the value of the services) it was agreed between BAM and ACRES that payments will be suspended until the payments expressed in a percentage of the cumulative payments are closer to the agreed percentage of 3.6%[236]. The payment structure was therefore changed in order to comply with the terms of the agreement, and cannot be viewed as an amendment thereof. If anything the payments were changed in terms thereof and to comply therewith. In any event BAM agreed to this arrangement. [237]

c) On any calculation, if the payments continued after May 1997 in the agreed sum of CAD 23 478,27, the agreed percentage of 3.6% would have again been exceeded by far. It was therefore agreed between the parties[238] that in order to comply with the terms of the agreement the instalments would be reduced to CAD 10 500.00 in order to again reach the target of

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[235] vol 23 p2296 lines 4 -14
[236] vol 23 p2300 lines 8 -19
[237] vol 23 p2303 line 22 to p2304 line 2

3.6%. The evidence of GIBBS in this regard[239] is supported by a contemporaneous note made by him on 3 July 1997[240]. The dates upon which the changes were made are irrelevant. If made earlier, the instalments would have been bigger, if later the instalments would have been smaller. The object of the payments were to remain as close as possible to the agreed 3.6% as provided for by the agreement.

d) GIBBS testified that towards the end of 1998 the payments expressed in a percentage of the cumulative payments for services showed that the payments to ACPM was falling below the contractual rate of 3.6%, and the expense controller at the time decided to increase the payments to CAD 13 500.00 with effect from March 1999 in order to again achieve and maintain the target of 3.6%. This evidence stands uncontradicted and undisputed.

82. GIBBS testified that the payments to BAM ceased during March 1999 when ACRES was advised of the demise of BAM. BAM

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[238] **ibid**
[239] **vol 23 p2302 line 17 to p2303 line23**
[240] **Exh C. Volume 15, section 6, p.37**

died on 20 March 1999 and the last payment made to him by ACRES was on 24 March 1999 in respect of services rendered by him (BAM) till date of his death.

83. A note on a payment schedule[241] indicate that further payments ceased *"as instructed by ACRES' legal counsel"* and this was confirmed by GIBBS in evidence.[242] It is respectfully submitted that such legal advice was sound for two reasons:

(a) the representative agreement is in the nature of personal services and it creates personal rights and obligations. When the party who is obliged to render personal services becomes deceased, the reciprocal obligation, in law, to pay for the services, cease. It is submitted that the death of a contracting party in these circumstances will, in law, put an end to the contractual relationship.

(b) At the time of BAM's demise, the payments from ACRES to ACPM was approximately CAD30.000 short of the contractual 3.6% of the value of the services rendered until such date.[243] Theoretically, BAM's deceased estate may have a

[241]Exh C. Record: vol.15, section 7, p.8

[242] see footnote 198 supra

claim against ACRES for this amount. However, if BAM made unlawful payments to SOLE, (as is suggested by the CROWN), he is in breach of his agreement with ACRES,[244] and ACRES may be excused in law from making any further payments to ACPM/BAM.

84. It is to be noted that there is a difference between the contract price and the services' amount. The evidence of GIBBS showing how the services amounts are calculated or arrived at from the amounts reflected on the payment certificates, is undisputed and confirmed as correct by BURNETT, an independent chartered accountant in the employ of KPMG. BURNETT also testified that the entries and transactions reflected on Exhibit "L" are correct and supported by source documents.[245] He also testified that, in his view, the payments correspond with the terms of the representative agreement.[246] There is no evidence to the contrary. In these circumstances the inference is unavoidable that the payments made by ACRES to ACM/BAM were made under and in terms of the representative agreement. The conclusion of the representative agreement between ACRES and ACPM is not disputed, and the payments thereunder constitute extremely strong

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[243] Exh. C.Record: vol.15; section 7, p.16
[244] Clauses 2(vii) and paragraph 7 of Schedule 1 (The Services)
[245] *see footnote 201 supra

corroboration and support for the legitimacy of the representative agreement.

85. The evidence of HARE, GIBBS and BURNETT clearly and unequivocally indicate that all payments made by ACRES to ACPM/BAM, were made in accordance with the terms of the representative agreement and the mathematical calculations correspond. The payments are all supported by entries in the banking statements of both ACRES and BAM, and both experts (ROUX and BURNETT) agree on the correctness on such entries. The payments, and changes thereto, correspond with the terms of the representative agreement and, as indicated, the reasons for the changes in the payment structure are supported by documentary evidence. The payments made by ACRES to ACPM therefor support not only the terms of the representative agreement, but also the implementation thereof. It is respectfully submitted that the payments from ACRES to BAM is much more supportive of an inference of a legitimate representative agreement; than of an inference of the payment of monies under a contract of bribery. At best for the CROWN, an inference of bribery is not the only reasonable inference which can be drawn from the payments. An inference of bribery falls far short of the test in the Blom case(supra).

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[246] ***see footnote 202 supra**

86. For the reasons mentioned, it is respectfully submitted that there is no evidence whatsoever before this Court to hold that the representative agreement is illegitimate or that it is simulated. Once the legitimacy of the representative agreement stands, an inference of the payment of bribe moneys from ACRES to SOLE can not be drawn. Such an inference is inconsistent with the existence of a legitimate representative agreement and offends the first rule in the **Blom** case.

87. Once it is accepted that the representative agreement is legitimate, or that there is no evidence to prove otherwise, then the theories of ROUX become irrelevant. Whether BAM paid exactly 60%, or 44%, or any other percentage, of some or even all of the payments received by him from ACRES to SOLE, is irrelevant. If an employer over a period of 20 years pays exactly 60% of his monthly salary to the mortgagor of his house on exactly the first day of the month following the month he receives his salary, and a firm pattern of payment is thereby established, it cannot be said that the employer paid the mortgagor. At best, it can be said that the employee used the funds which he received from his employer to pay the mortgagor. It is precisely what happened in this case. On

ROUX's own evidence[247] and on the unshaken evidence of BURNETT, BAM simply used the moneys he received from ACRES to make payment to SOLE. It can never be said, on the evidence, that ACRES paid SOLE.

88. Once payment is made into a banking account, the depositor loses his ownership to the moneys and retains only a personal right against the bank.[248] It can never be said that ACPM used ACRES' moneys to pay SOLE. This is the fundamental flaw in the reasoning process of the Prosecution as articulated in paragraph 7 of its written argument to which reference will again be made later.

89. There may be a number of reasons why BAM made payment to SOLE. For purposes of this case it is accepted that the payments from BAM to SOLE were made unlawfully, and this has already been found by another Court of this Division in the case R. v SOLE. However, on the facts placed before this Court it can not be said that ACRES knew of the transactions between BAM and SOLE, or that it was a party thereto. Asked by the prosecution to speculate, the witnesses, BURNETT suggested that BAM may have paid SOLE to ensure that

[247] *vol 7 p667 lines 10 -25
[248] Dantex Investment Holdings v National Explosives (Pty) Ltd (in liquidation) 1990(1) SA 736 (A) at 748F.

ACRES and all other consultants or contractors which he represented, remained on the project. The longer these consultants/contractors remained on the project, the more they would earn and the more BAM would receive as remuneration. Another theory is that Sole may have committed the crime of extortion by demanding payments from Bam against a threat of terminating the services of Acres, which he was entitled to do in terms of C65. Another, and perhaps even more plausible, explanation is that a much wider network existed among local engineers, contractors and even other state officials. The evidence before this Court showed the existence of a voluntary organisation of local engineers and contractors (ABC)[249]. There may very well have been in existence a scheme whereby it was agreed that a number of persons and firms (including SOLE and ACPM) would club together and pull all resources together for the mutual financial benefit of all members. On such basis SOLE would ensure that all contractors/consultants who employ ACPM / BAM remain on the Project and that all sub-consultancy or construction works are awarded to the members of the consortium, against payment of a percentage to be shared by everyone. It does not follow that the major consultants who employed BAM as their agent, including ACRES, was aware of this scheme or was a party thereto. The inference that ACRES was a party to corrupt dealings between

[249] vol 2 p165 line 22 to p166 line 15

ACPM/BAM and SOLE, can not be drawn in the absence of any evidence linking ACRES to those dealings, and for the reasons advanced the inference of corruption is not the only reasonable inference which can be drawn from the payments from ACRES to ACPM/BAM. Put differently : the only evidence linking ACRES to the BAM/SOLE payments, are the payments from ACRES to ACPM/BAM. If it can not be excluded as a reasonable possibility that ACRES made the payments to ACPM/BAM in terms of a legitimate representative agreement, then ACRES can not be linked to the unlawful transactions and payments between BAM and SOLE, and the rules in the BLOM case are not satisfied and ACRES is entitled to an acquittal.

90. The submission that this Court is not bound by the factual findings of the Court in the criminal proceedings against Sole in R v SOLE and should not be influenced thereby, is so trite that its warrants no further justification. Suffice to say that no evidence whatsoever was placed before that Court (in the Sole trial) to show the relationship between BAM and ACRES, and in the absence of any evidence or explanation supported by evidence in regard to the payments from ACRES to BAM, that Court (in the Sole trial) was fully justified and entitled to draw the inference that such payments were unlawfully made. ACRES was not a party to those proceedings and was not in a position to defend it against the allegations made against it by

the CROWN, and the findings of that Court in relation to the payments from ACRES to BAM, should be totally ignored. This case can only be decided on the evidence before this Court.

91. In any event, ACRES can never be convicted on count 2. The second count relates to the alleged payment of the advance of CAD 180 000.00 which ACRES made to ACPM/BAM during January 1991. It is common cause between the parties, and indeed the evidence of the prosecution's own expert witness, ROUX, that the sum of CAD 180 000,00 (or any part thereof) was never paid by BAM to SOLE. He. was therefore unable to "link" this payment, or any percentage thereof, to any payment to SOLE. The allegation in the charge sheet is that BAM, upon receipt of the funds "… paid/transferred or was supposed to pay/transfer the said sum, or part thereof, to SOLE …Even if an intent to bribe is established, no crime is proved because mens rea alone is not punishable. An attempt to commit a crime requires an actus reus, or at least an act commencing an act to commit the crime.[250] There is no evidence whatsoever, even on ROUX's own theories, and evidence that this amount, or part thereof, was ever intended for SOLE and mens rea is not even proved in respect of count 2. There is also no evidence of actus reus, or even an attempt to make payment in

[250] Burchell and Hunt, S.A. Criminal Law and Procedure (Vol 1) (2nd Edition) P. 453 – 460 and all the authorities there cited

respect of count 2. ACRES should, with respect, at least have been acquitted on this charge at the close of the CROWN's case.

92. In all the above circumstances it is respectfully submitted that the CROWN has failed to prove the allegations set out in the indictment against ACRES, more particularly in that:

a) having regard to the "rules of logic" in the BLOM case, the evidence is not supportive of the only reasonable possible inference from the facts that the representative agreement is a simulated contract and therefore void;

b) the inference of the payment of bribe monies to SOLE is inconsistent with the existence of a representative agreement; and

c) an inference of mens rea to commit the crime of bribery as the only reasonable inference from the facts is not consistent with the proven facts before this Court.

93. The accused ACRES, should therefore be discharged on both counts.

THE CROWN'S HEADS OF ARGUMENT

To the extent that the defence has not dealt with the CROWN's argument in the aforegoing paragraphs, it does so hereinafter.

Ad Paras 1 – 4 (Introduction)

1. Whilst the CROWN agrees that "conclusions" (in legal terms more correctly described as "inferences") must be drawn from the evidence, it refers selectively to only that evidence which ostensibly support the inferences it asks this court to draw, and it completely ignores the evidence which support other, more reasonable, inferences and, in addition, which is destructive of the inferences which the CROWN wishes to draw. Where the guilt of an accused is dependant on circumstantial evidence, the inferences which establish the guilt or innocence must be drawn from the totality of all the evidence. It is not permitted to simply rely on some evidence which support one conclusion; and ignore other evidence which support another conclusion. The court is obliged to have regard to the whole of the evidence, including exculpatory statements, evidence under cross examination, and documentary evidence.[251]

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[251] S v Ostilly & Others SA 1977(2) Pg 104 at 106H – 107A and the authorities mentioned therein, especially Narotam v Madhav & Another 1965(4) SA 85 at 88B

2. Further, some of the "essential facts" upon which the CROWN relies are misleading if taken out of context. It is trite that evidence must be evaluated in its context. Examples are the following:-

2.1 In paragraph 1.4 it is suggested, by implication, that there is something sinister in the trip to Canada by SOLE during March 1989 in circumstances were ACRES was advised in April 1989 that it will be sole-sourced. The evidence show, to which reference has already been made, that the issue of sole-sourcing was heavily debated by the World Bank and its documents[252] support this evidence. Further, SOLE was told by the World Bank to make an urgent decision in regard to a number of contracts, including C65[253]. The evidence further shows that SOLE visited Washington, USA, during March 1989 where the World Bank is situated for the ostensible purpose of discussing the contract, including C65 with the World Bank who was funding most of the contracts, including C65. SOLE's trip to Washington is supported by the CROWN's own evidence.[254] It is not unreasonable, and indeed highly probable, that the sole-

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– **89A ; See also : S v Cooper & Other 1976(2) SA Pg 875 at 889A – C; S v Makgatla 1977 (9) BSC 79 at 85D - E**

[252] Exh. E. p40 -52

[253] Exh. C. vol 1 p113 –114, p114 para 111; vol 2 p308 line 2 to p310 line 25

sourcing of ACRES in respect of C65 was discussed between SOLE and officials of the World Bank during his visit to them in March 1989, and that the decision was then made, in principle, to sole-source ACRES. It must be remembered that ACRES could not be sole-sourced without the consent of the World Bank (otherwise it would not have financed the contract) and it is common cause that the World Bank consented to the sole-sourcing of ACRES[255]. The evidence of HARE was further that a flight from Washington to Toronto is just over 1 hour and SOLE visited ACRES during March 1989 to verbally convey the decision to sole-source ACRES and to meet its senior and executive corporate officials[256]. The visit to Canada accords with good corporate and business conduct and practice[257] and there is no evidence to indicate the contrary. Indeed, in the written notification of 28 April 1989 from the LHDA to ACRES advising it of the decision, SOLE states "…I write to confirm that …". This was simply a confirmation of a previously verbal notification which obviously took place during March 1989 at the time of his visit to Canada.

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[254] Exh. CC; also vol 17 p1722 line 21 to p1726 line 19
[255] referred above
[256] see footnote 253 above

2.2 In paragraph 1.8 it is stated that ACRES mobilised during August 1990, and the undertaking to make payment of the mobilisation costs, took place without C65 having been signed and even before ACRES's fee had been agreed. The issue of mobilisation, payment of the advance, signature of the contract and legal effect of the retrospectivity of C65 had been dealt with fully above. The statement that "…ACRES's fee had not yet even been agreed …" is factually incorrect and unsupported by the evidence, and has also been dealt with above. The MOU was prepared by COLE on the basis of the agreements reached during the negotiation process, during which the contract price was discussed and negotiated. CLAASEN, on behalf of the prosecution, testified that he attended such negotiations on behalf of the JPTC which had a particular interest in the financial terms and conditions of the contract, including the fee to be charged by ACRES.[258] The MOU shows that the fee was agreed at 20%, which included taxes.[259] The evidence further show that at the insistence of the RSA delegation of the JPTC the tax structure was subsequently amended, resulting in ACRES no longer being liable for the payment of taxes,

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[257] see footnote 253 above
[258] vol 9 p487 lines 17 -25
[259] Exh .C. vol 15 sec. 5 p15 – para 3.10, see also vol 21 p2141 lines 2 -9

but that the taxes would become reimbursable.[260] The effect of this amendment to the contract was, indirectly, that ACRES' fee had to be reduced (the agreed fee of 20% included ACRES' liability to pay taxes), and its fee was eventually reduced to 14.7% (on the basis that the taxes payable by ACRES would be reimbursed to it). This amendment is reflected in the final draft of C65.[261] Finally, it must be remembered that the tax issue was an issue between the JPTC (particularly the RSA delegation thereof) and the LHDA, which did not involve ACRES. The issue had no real financial implications to ACRES in that the original 20% included a tax liability; whereas the final 14.7% excluded such liability. The submission that the advance was paid in circumstances where the fee has not yet even been agreed, is therefore misleading.

2.3 In paragraph 1.11 the statement is made that WITHERELL "an ACRES employee" authorised the advance payment to ACRES under the unsigned contract. This statement completely ignores the job description of WITHERELL as acting Assistant Chief Executive[262]; the entire procedure which was followed in both the Technical Division and in the Capital Finance

[260] Exh.C. vol 8 p 141 –143;p160 –161; vol 5 p527 lines 19 –26; p526 lines 23 to p527 line 8; p523 line 3 to p524 line 25
[261] Exh. C. vol 16 section 11 p78

Division in the signing and authorisation process of a payment certificate; the functions and duties of the signatories to the payment certificates before they could authorise payments by their signature on the payment certificate; and the duty of WITHERELL which was restricted to the duty to ensure that all other signatories to the payment certificates had appended their signatures to the certificate.[263] This evidence stands uncontradicted by any of the prosecutions witnesses. Indeed, Messrs Molapi a prosecutions witness and Deputy Chief Executive in the Department of Finance, testified that WITHERELL would never have signed the payment certificate if it was not in order, and that the payment of the advance was procedurally correct. The issue of the signature of C65 is dealt with above.

2.4 In paragraph 1.13 the statement is made that "on 28 January 1990 ACRES paid BAM (not ACBM) CAD 180 000.00". Again, this is an incorrect, or at least misleading, statement. As shown above, the cheque requisitions of ACRES and documentary evidence produced by the CROWN, show that ACRES's instruction to the bank was to pay CAD 180 000.00 to

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[262] **Exh C. vol 7 p2128**

ACPM[264] which accords with the terms of the representative agreement. The evidence of HARE to the effect that it was unknown to ACRES that this account was actually being operated in the name of MM BAM and not ACPM, and that the bank did not require the name (only number) of the account holder for purposes of making deposits, was never challenged and this evidence stands uncontradicted.

2.5 The statement is paragraph 1.15 is not only irrelevant for the reasons already mentioned, but also factually incorrect. ROUX's (Exhibit K1) report shows that on a mathematical calculation, 65.04% (and not 60%) of all monies paid by ACRES to ACPM/BAM were paid from BAM to SOLE; and 44.06% (not 40%) were retained by BAM. Again, the "pattern" of ROUX is based on selective figures and it ignores the total amount paid by ACRES to BAM. In any event, and even if there is a "pattern" in respect of some of the payments, it ignores, for the reasons already canvassed, the existence of an inference that the payments were made in accordance with the terms of a representative agreement.

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[263] vol 5 p481 lines 1 –26; vol 18 p1846 line 11 to p1848 line 13
[264] Exh. C. vol 6 p1468, p1469

2.6 The statements in paragraph 1.16 are incorrect, misleading and not based on the evidence. The implication in the statement is that "… ACRES reduced its payments to BAM to approximately 40% of what it had been paying …" until after SOLE lost his court challenge against his dismissal in January 1997, which payments BAM did not share with SOLE. The further implication is that the "40%" fits in with ROUX's "pattern" of 60/40. The facts are that the reduced amount paid by ACRES to ACPM represents 44% (and not 40%) "… of what is had been paying up to then". Further, it ignores the evidence, supported by the documents, and discussed fully above, that the reduction was occasioned by overpayments to ACPM under the representative agreement, and that such reduction was in line and accords with the terms of payment (3.6% of the value of the services) under the representative agreement.

2.7 In paragraph 1.18 the statement is made that BAM also received payments from other contractors/consultants in respect of which payments he shared with SOLE. To the extent that the findings in the case R v SOLE (Case No. CRI/T/02/02) indicate unlawfulness in the relationship between those contractors/consultants and BAM; or in the relationship between BAM and SOLE; or even in the

relationship between ACRES and BAM; such findings are totally irrelevant for present purposes and this issue is more fully dealt with above. The reference by the CROWN to these matters is a futile, and with respect irresponsible, attempt to establish guilt by association and it has no legal foundation in the reasoning process of this case. The facts placed before this court are totally different to the facts placed before the court in R v SOLE, and this court must determine the facts of this case on the facts before this court.

2.8 The issue referred to in paragraph 2; namely whether or not ACRES intended for BAM to share the monies with SOLE or whether it was reckless in this regard or not, is totally and exclusively dependant on the legitimacy or otherwise of the representative agreement referred to in paragraph 3. If the CROWN fails to discharge the onus that such representative agreement was simulated, then, on the strength of the principles in the **Blom** case (supra), there is no room for a finding that ACRES either paid SOLE or intended for BAM to share the monies with SOLE. For the reasons canvassed earlier, it is respectfully submitted that the point of departure is the determination of whether or not the CROWN had

discharged the onus of proving that the representative agreement is simulated.

2.9 The issue in paragraph 4 is merely a factor in the determination of whether or not the agreement was simulated. Obviously, if the agreement was simulated then the payments were made (and this is conceded) with the intention to bribe SOLE resulting in ACRES being favoured. The point of departure therefore remains the legitimacy or otherwise of the representative agreement.

Ad Paragraphs 5 – 8 (Corporate Liability)

1. With two provisos, if the intention is that the submissions in paragraphs 5 and 6 result in the submission made in paragraph 7, then the defence concedes that if the payments were made by ACRES to ACPM with the intention to pay SOLE, then ACRES is guilty.

2. The first proviso relates to the statement that ACRES' money was used to pay SOLE. Only for the benefit of this Honourable Court and to prevent a possible perpetuation of bad legal submissions in a judgment, it is respectively pointed out that it can never be said that

"ACRES money was used". If this is a correct legal submission then ACRES must be found not guilty without even analysing the evidence. The reason being that once payment is made into a banking account, the depositor loses his ownership to the monies and retains only a personal right against the bank (Dantex Investments Holdings v National Explosives (Pty) Ltd (in liquidation) 1990(1) SA 736(A) at 748F). When the monies were deposited into BAM's account ACRES lost all ownership thereto and it can never be said that "ACRES's money was used". The true position is that ACRES paid ACPM/BAM which enabled BAM financially to make payments to SOLE. Put differently, BAM used monies funded by ACRES to pay to SOLE. The relevance of this distinction also lies at the heart of ROUX's theory of the "linking" of payment to which reference has already been made. Notwithstanding, and if it is proved by the CROWN that the payments to BAM were intended for SOLE (and this it can only do by proving the illegitimacy of the representative agreement), then it follows in the absence of any other explanation that the payments were intended as payment of bribe monies, and ACRES is guilty.

3. The second proviso relates to the second error in law made in the second sentence of paragraph 7 where it is stated that if the employees who paid the monies into BAM's account "… intended the money or part of it to be paid to SOLE …ACRES would have so intended …". As a matter of overwhelming probability, administrative clerks in the employ of ACRES who had no knowledge of C65

requisitioned the payments and caused the deposits to be made into the account of ACPM/BAM. They could never have had an intention to pay SOLE. In any event, there was no evidence before this court of any intention which may have been held by an ACRES employee when making the deposits. If this submission is correct, then ACRES must be found not guilty without the necessity of analysing the evidence any further. The truth of the matter, however, is that if an intention to pay SOLE can be attributed to any Director or servant of ACRES who had knowledge of the payments from ACRES to ACPM/BAM, then such intention may be imputed to ACRES and ACRES will be guilty.

4. In amplification of sub paragraph 3 above the only ACRES employees who testified in regard to the payments and their knowledge thereof, were HARE and GIBBS. HARE testified that the payments to ACPM/BAM were made under and in terms of the representative agreement, and this evidence was corroborated by GIBBS and, as mentioned above, by documentary evidence. GIBBS testified in regard to the reduction of the payments and the reasons therefore. Unless their evidence is rejected as false, an inference of an intent to pay SOLE cannot be drawn. The aforesaid erroneous reason on the part of the CROWN again demonstrates is failure to accept, as a point of departure, the onus of proving the illegitimacy of the representative agreement.

Ad Paras 9 – 11.3 (The indictment)

The allegations in the indictment speak for themselves. It is conceded that the CROWN need not prove actual benefits.

Ad Paras 12 and 13 (Jurisdiction)

It is conceded that this court has jurisdiction.

Ad Paras 14 –26 (Circumstantial evidence and the approach thereto)

1. Ignoring the criticism expressed in the last two sentences in paragraph 18, the defence agrees with the approach set out in paragraphs 14 – 19. In regard to the aforesaid criticism, the prosecution obviously did not understand the argument.

2. The defence agrees that the inferences in paragraph 20 are those inferences which the CROWN asks the court to draw. For the reasons already referred to, those inferences may not be drawn.

3. The arguments in paragraph 21 are convoluted and unnecessary complicated. The simple explanation is that two of the five[265] essential elements of the crime of bribery are (1) the intentional (2) offer to give any consideration, such as money. The first element relates to mens

rea; and the second to the actus rea. In the crime of bribery, the element of offering to give a consideration (actus rea) overlaps to some extent with that of intention (mens rea)[266]. It is stated by Hunt[267]: "There cannot be the required offer or agreement by the briber (actus rea) unless he intends what he offers or agrees to pay in return for corrupt action by the official". On the facts of the present case, it is conceded that the elements of mens rea and actus rea are inseparable. In the absence of a legitimate representative agreement, the payments to BAM must by necessary implication have been intended for SOLE in the absence of a legitimate representative agreement. The evidence show, and this is not disputed, that ACRES funded the monies used by BAM to pay SOLE. Accordingly, both elements of (1) intentional (2) offer of payment to SOLE are dependant on the existence or otherwise of a legitimate representative agreement. If the payments were made in terms of a legitimate representative agreement, then neither intention nor an offer to pay SOLE have been proved. This, again, shows that the point of departure is the existence or otherwise of a legitimate representative agreement.

4. The CROWN accepts the onus and it appears from paragraph 22 that it is common cause that ACRES "bears no onus".

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[265] South African Criminal Law and Procedure (Vol 2) Hunt, (2nd Edition) Pg 220
[266] South African Criminal Law and Procedure (supra) Page 225
[267] See footnote 264 (supra)

5. The argument in paragraph 23 again shows the inverted logic in the approach of the CROWN to the case. Although it is accepted that Exhibit K1 does not stand on its own and must be viewed against the background of the totality of all the evidence, Exhibit K1 does not deal or address the issue of the legality or otherwise of the representative agreement, and nor was it the mandate of its author (ROUX) to address such issue. Neither the content of the report (Exhibit K1) nor the evidence in chief of ROUX address the question whether or not the agreed payments from ACRES to ACPM/BAM could, as a reasonable possibility, have been made in terms of the provisions of the representative agreement. Under cross examination ROUX was constrained to concede that the payments to ACPM/BAM fitted with the terms of the representative agreement. Further, the evidence of HARE and GIBBS on this issue, for the reasons already referred to, are supported by the payments to ACPM/BAM, and the reductions in the payments are supported by a contemporaneous note and by projected schedule of payments showing the need for the reduction. To suggest that this note and schedule of payments are false, or had been subsequently manufactured for purpose of this case, is with respect, ridiculous.

6. The approach in paragraphs 24, 25 and 26 is not correct. Firstly, in terms of the constitution of the Kingdom of Lesotho, an accused is innocent until proven guilty. Such constitutional enactment, as is the case in South Africa, rendered a number of statutory provisions which

shifted the onus to the accused, unconstitutional. For instance, a statutory provision invoking a presumption of dealing with certain prohibitive drugs when an accused is found in possession of such drugs in excess of a specified quantity, has been declared to be unconstitutional. The case referred to in paragraph 25 of the CROWN's argument (R v Jacobson) is another example. In the Jacobson case the accused was charged with a contravention under the Insolvency Act which at the time shifted the burden of proof to the accused in the circumstances described in that case. Since the introduction of the constitutional amendments referred to above, these provisions are no longer constitutional either in Lesotho or in South Africa, and a reference to these cases are singularly unhelpful, as was argued during the application for the discharge at the close of the CROWN's case.

7. It is conceded that in certain circumstances an accused may be required to give an explanation, in the absence of which an inference of guilt may be drawn. In the present case, when ACRES was confronted with its payments to ACPM/BAM which BAM used to pay SOLE, it was required to give an explanation to avoid an inference that the payments were made in terms of an offer to bribe. The explanation, from the outset, was that the payments were made in terms of a representative agreement with ACPM/BAM. The requirement to give an explanation has nothing whatsoever to do with the question of onus. At the risk of repetition, the absence of an

explanation in certain circumstances may assist the CROWN in discharging its onus. The onus, however, at all times remain on the CROWN, and it is not for ACRES to prove the justification for the payments, but for the CROWN to approve beyond all reasonable doubt that the explanation is false or untenable. To do this, on the facts of this case, the CROWN must prove beyond all reasonable doubt that the representative agreement is simulated and "was nothing more than a smoke screen" as alleged in paragraph 20 of the CROWN's argument. The case of Ntsele referred to in paragraph 26 of the CROWN's argument is in point.

8. To the extent that the CROWN accepts the onus to prove the illegitimacy of the representative agreement in paragraph 26 of its argument, the defence agrees therewith.

Ad Paragraph 27 – 33 (Admissions and matters not in issue)

1. Subject to the following sub-paragraph, the defence agrees with paragraphs 27 – 31.

2. Firstly, the payments from ACRES to ACPM were reduced from CAD 23 478,27 to CAD 10 500,00 with effect from October 1997 and not from January 1997 as alleged in paragraph 28. The date when the

payments were reduced, namely October 1997, is insignificant in relation to the events which surrounded SOLE at the time. What is significant, is the fact that if the payments were not reduced, ACPM would have been overpaid in terms of the representative agreement. Secondly, the payments were reduced to 44% of the previous payments and not to 40% as stated. For the reasons mentioned, the reductions are more consistent with the terms of the representative agreement, than with a "pattern" of 40/60.

3. The payments in Switzerland as opposed to payments in Lesotho have already been dealt with. Further, there is no evidence whatsoever before this court of any contravention of the exchange control regulations. ACRES is a Canadian company who was paid by the LHDA in Canada. BAM was a South African citizen with permanent residence in Lesotho who was paid, in terms of the agreement between ACPM and ACRES, in Switzerland. How it can be said that ACRES contravened any South African or Lesotho exchange control regulations, is not understood.

Ad Paras 34 – 44 (Matters in issue)

1. These paragraphs contain argument already dealt with, and convincingly demonstrate the prosecution's failure to grasp the crisp issue in dispute; namely the legitimacy or otherwise of the representative agreement.

2. Paragraph 36 is the only attempt at a definition of the issue in dispute, and it correctly states that "… what falls to be decided quite simply is whether at the time ACRES paid BAM it knew and intended that BAM was to share the money with SOLE or whether it foresaw this and was reckless as to this happening…". This question, in turn, is entirely dependant on whether the payments were made to ACPM/BAM in terms of a genuine representative agreement, or not. If so, neither the question of actus rea (an offer to bribe); nor of mens rea (intention) arise. The CROWN, in order to prove the falsity of the explanation for the payments, must prove that this agreement was simulated to be entitled to a conviction of ACRES.

3. Again, the reference to the use of "ACRES's money" in paragraphs 35 and 37 is legally and factually misplaced. At best, ACRES funded the monies from BAM paid SOLE. The failure to recognise and appreciate this distinction has resulted in the failure to recognise that the point of departure, in the reasoning process, is the legitimacy or otherwise of the representative agreement.

4. The statement that "… ACRES paid BAM some 25% of its mark-up…" in paragraph 40 is not only misleading, but also contrary to the prosecutions own evidence and of a proper understanding of the facts of this case. The contract price under C65 was negotiated during May 1990 which negotiations were attended by, *inter alia,* CLAASENS, on

behalf of the JPTC. The agreement reached during these negotiations formed the basis of the MOU and the subsequent final draft of C65. CLAASENS testified in regard to the computation of the contract price and it is quite clear from his evidence that the contract fee of 3.6% of the value of the services paid by ACRES to ACPM under the representative agreement was not calculated with reference to, and has nothing to do with, the calculation or computation of the fee of 14.7% payable by the LHDA to ACRES under C65[268]. The value of the services on which the 3.6% payable to ACPM was calculated, exclude disbursements and taxes. CLAASEN explained that the mark up calculation (as opposed to the fixed fee calculation) include base salaries, social charges, overhead costs, support services, and (at the time) taxes[269]. The overhead expenses, in turn, is broken up in various components as a percentage of project salaries including, *inter alia*, an item known as "non-billable project costs".[270] In turn, "non-billable project costs" are broken up in certain components not billable to the client such a payroll and other (secretarial) expenses, client entertainment, and **agents fees**[271]. Agents fees, in this case the fees paid by ACRES to ACPM/BAM, were on the table during the negotiations and CLAASEN concedes that it formed part of the discussions[272].

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[268] vol 5 p494 line 25 up to 495 line 26; p508 line 6 –25; p503 lines 16 –26; vol 13 p1412 lines 2 -11
[269] See Exh. C. Volume 8 Pg 82
[270] Exh C. Volume 8 Pg 88
[271] Exh C .Volume 8 Pg 92

5. It is therefore clear that agents fees, namely the fees of 3.6% paid to ACPM/BAM, did not reduce or even affect the total fee of 14.7%. It appears that the net fee of 14.7% was calculated on the total services[273] Total services include overhead expenses, which in turn include non-billable project costs and agents fees. Accordingly, the suggestion that the fee of 14.7% charged by ACRES was reduced by 25% due to the payment to ACPM/BAM is not supported by any evidence and is misleading.

6. The concession by the Defence Counsel referred to in paragraph 43 is equally misleading. The evidence of HARE, supported by GOURDEAU already referred to, clearly show that the object and purpose of a representative is not only to assist in obtaining contracts, but also to assist in the execution and implementation thereof. These requirements are clearly governed by the terms of the representative agreement, including the representative agreement in casu. What was suggested under cross examination by Counsel was that the duties of BAM after the award of C65 shifted to the implementation and execution thereof which duties are also governed by the terms of the representative agreement. The record fails to indicate a concession "… that this document does not reflect the true agreement…" and this submission is, with respect, irresponsible.

7. All the other arguments have been adequately dealt with above.

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[272] vol 5 p510 lines 1 -5

Ad Paragraphs 45 – 51 (The actual payments)

1. The submissions made in these paragraphs again show conclusively that the prosecution has failed to grasp the real issue in this case; whether it had discharged the onus of proving the legitimacy of the representative agreement. Assuming, for one moment, the legitimacy of the representative agreement. On this assumption, the payments from ACRES to ACPM/BAM are explained and such payments accord with the terms of the representative agreement. On this assumption, it was none of the business of ACRES what BAM did with the monies he received from ACRES, and there is not a shred of evidence suggesting that ACRES knew, or should have known, that BAM was making payment to SOLE. On this assumption, the payments from BAM to SOLE are irrelevant and could have been made for a number of reasons unknown to ACRES or to this court. It is surely not suggested by the prosecution that there is any onus on ACRES to proof the reasons for the payments from ACRES to BAM.

2. On the assumption that the representation agreement is legitimate, it does not matter whether BAM paid 60%; or 40%; or 99%; or 1%; or 44%; or 100% of the monies he received from ACRES to SOLE. It is clear from the submissions made in these paragraphs that the CROWN has misconstrued its case against ACRES. It relies solely on

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[273] **Exh C. Volume 8 Pg 82**

ROUX, Exhibit K1 and on the payments from ACRES to ACPM/BAM; whilst at the same time completely ignoring the question whether or not the payments could have been made in terms of a legitimate representative agreement. If so, it matters not in what percentage, and when, and for what reason, BAM paid SOLE.

3. In any event, there could be a number of reasons why BAM paid SOLE, which are all matters for speculation, and which are dealt with more fully earlier in this argument. For present purposes it suffices to say that it does not follow from the facts that BAM used the monies funded by ACRES to pay SOLE; that ACRES paid SOLE. This argument has been repetitively advanced, and if not understood or accepted by the CROWN, nothing further can be said.

4. The issue is therefore, as submitted repeatedly previously, whether there is any aliunde evidence (save for the actual payments made which are not in dispute) that the representative agreement is illegitimate .

5. The defence counsel and attorney take offence at the submissions made in paragraph 47. It is true that the defence team in the presence of HARE and BROWN consulted with SOLE and that SOLE was in court, and these events were never hidden and were openly disclosed to the prosecution. The implication in this paragraph is that SOLE, in the course of these consultations, may have disclosed or admitted that

he received bribe monies from BAM which originated from contractors and consultants, including ACRES. If this in fact is so, senior counsel, junior counsel and the instructing attorney would be guilty of gross professional and ethical misconduct which may warrant an application to strike their names from the roll of advocates and attorneys respectively. The defence based on the legitimacy of a representative agreement was vigorously, and perhaps even aggressively, canvassed and it was put to various witnesses, particularly ROUX, that the payments from ACRES to BAM were made in terms of a lawful representative agreement. This conduct of the defence would have been highly unprofessional and unethical if SOLE indicated that the monies received by him from BAM were bribe monies pursuant to offers of bribery by, inter alia, ACRES.

6. Both HARE and BROWN told the court that SOLE never disclosed to them why BAM paid him. SOLE elected not to disclose this information to the court in the course of his criminal trial in R v SOLE, and on all information available he did even disclose this information to his own counsel in the criminal proceedings. The assumption is made in the said paragraph 47 that SOLE told HARE and BROWN what the reason or reasons for the payments are, and BROWN's evidence that this question was not broached as a result of SOLE's obvious and willingness or refusal to discuss the subject and would therefore have been indiscreet, is described as "approaches the comical". Far from being "comical", there is no evidence and nothing

to suggest that SOLE made such a disclosure, and a suggestion that he did so is irresponsible in relation to the conduct of the defence by legal counsel for ACRES.

7. In regard to the submissions in paragraph 51, it is suggested that the change in the payment pattern coincided with the judgments of the Chief Justice on 7 February 1997 "… which marked the end of the road for SOLE's court challenge to his dismissal …" This is an incorrect factual submission. The "payment pattern" was first broken in October 1992 when payments from ACRES to BAM seized for more than one year for the reasons already discussed and explained; it was again broken in May 1997 when the payments were reduced from CAD 23 478.27 to CAD 10 500.00; and it was again broken in September 1998 when there was a further delay in payments to bring the cumulative total down to below 3.6%; and again broken in March 1999 when the payments were further reduced and when the payments then seized due to the demise of BAM, for the reasons already explained. The relevance of the dates January or February 1997 in relation to the dates when the changes in the payment pattern were made, escape the defence.

Ad Paras 52 – 62 (Accused's silence and false testimony)

1. The relevance of the above paragraphs and the submissions escape the defence. It is conceded, and has been conceded from the outset,

that there the prosecution produces evidence of payments from ACRES to BAM, and from BAM to SOLE; then a failure on the part of ACRES to tender an explanation for the payments to BAM may result in an adverse inference to be drawn from such failure. The correctness of the authorities referred to in these paragraphs are not in dispute.

2. However, to the extent that it may be alleged, perhaps by implication, that ACRES did not tender an explanation, such allegation is false and misleading. The evidence before this court, supported by correspondence placed before the court by the prosecution, show that when the World Bank confronted ACRES with its payments to BAM, ACRES immediately responded with the explanation that the payments were made under and in terms of a representative agreement.[274] The record shows that the World Bank subsequently found the allegations of bribery on the part of ACRES to be unsubstantiated.[275]

3. In regard to the present criminal proceedings, the prosecution was favoured, from the very beginning of the investigations, with a full record of the proceedings before the World Bank, including lengthy and detailed affidavits and submissions placing reliance on the representative agreement between ACRES and ACPM/BAM, and the lawfulness of the payments made thereunder. These documents have

become known as the "World Bank documents" in the course of the trial before this court[276], and they refer extensively to the payments, the legitimacy of the representative agreement, the need to appoint an agent, the relationship between ACRES and BAM, and the knowledge, or lack thereof, on the part of ACRES of the payments by BAM to SOLE.

4. The prosecution was therefore aware, even before service of the indictment on ACRES of the nature of the defence. During the opening address of the prosecutor when the criminal proceedings commenced, the first document handed in as an exhibit by the prosecutor, was the document finished by the defence to the prosecution disclosing the nature of the defence based on the representative agreement (Exhibit A). Any suggestion that ACRES failed to disclose its defence, or that it refused or failed to explain the payments to ACPM/BAM, is factually incorrect and contradicted by the documentary evidence before this court to which reference has already been made, particularly the "World Bank proceedings".

5. Finally, and for reasons already canvassed, once the explanation was tendered, the need for an adverse inference resulting from a failure to give an explanation, disappeared. Thereafter, and for the reasons already mentioned, the onus remained squarely on the CROWN to

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[274] Exh. C. vol 2 pp771 -773
[275] vol 12 p1274 lines 12 -23
[276] Exh C. Vol's 3 –7; Exh. E

proof the falsity of the explanation; or in casu, the illegitimacy of the representative agreement.

Ad Paras 63 – 65 (The evidence)

The defence is in agreement with these submissions.

Ad Paras 66 – 86 (Background to the payments)

1. The statement in paragraphs 66 – 72 are essentially factually correct. However, the evidence clearly show that ACRES personal were neither involved in the establishment of C19; nor in the establishment of C65 as suggested in paragraphs 73 and 76. WITHERELLS involvement had nothing to do whatsoever with the establishment of C65 and his authorisation of payment certificates found within these terms of reference under C64 and job description discussed more fully early. Applications for approval for variation orders from the World Bank have nothing to do with the establishment of C19 as suggested in paragraph 73.

2. The issues of mobilisation under C65 and the JPTC and World Bank approvals are discussed fully above.

3. The statements in paragraph 86 are factually incorrect. The World Bank approval in respect of C65 was given on 16 August 1990, and

the JPTC formally approved on 13 March 1991. For the reasons already mentioned, both the JPTC and the World Bank were fully aware of the proposed letter of intent anticipated under the MOU to be issued on 15 June 1990 and the actual mobilisation which took place during August 1990. These issues have been dealt with above.

Ad Paras 87 – 99 (The Agreement of 23 November 1990)

1. This issue concerns the gravamen of the case and the question remains whether the CROWN has discharged the onus of showing the falsity of this agreement. Save to the extent referred to below, all the arguments in these paragraphs have been fully dealt with above. The following need, however, be said about the CROWN's arguments.

2. The arguments contained in these paragraphs relating to the validity of the representative agreement are again based on selective evidence which are taken completely out of context, and the arguments ignore other relevant facts. For instance, and as already indicated, the arguments totally ignore the proven facts that all payments made by ACRES to ACPM/BAM accord with the terms of the representative agreement as amended from time to time; the reductions in the payments are supported by documentary evidence and by projected payment schedules showing the need for the reductions; the reductions are supported by contemporaneous notes and the payments accord with the evidence of HARE and GIBBS. The

CROWN's arguments also ignore the evidence of HARE in relation to the communications between him and BAM; the reasons advanced as to why ACRES needed BAM to continue to render services as a representative under C65; the evidence that the nature of the specific services to be rendered was unforeseen at the time when BAM was engaged; the analogy between an insurance contract and a representative contract and the likelihood that an agent may not be required to render any services at all. The CROWN's arguments are further premised on the unsubstantiated premise that the evidence of HARE and GIBBS are false.

3. It is true that on the assumptions made by the CROWN in these paragraphs, and by ignoring the totality of all the evidence, an inference may be based on certain selective evidence which may show that the agreement was simulated and that the intention was to pay bribe monies to SOLE. However, this is not the correct approach. If regard is had to the totality of all the evidence, such inference is inconsistent with the fact that the payments were made in terms of the representative agreement, and is also inconsistent with the documentary evidence in support thereof and with the evidence of GOURDEAU. As such, the inference sought to be drawn by the CROWN offends the first rule in the **Blom** case. The totality of the evidence, as indicated earlier, warrant the more reasonable and forceful inference that the payments from ACRES to ACPM/BAM were made in terms of a representative agreement. If such an inference

can be drawn, then the inference sought to be drawn by the CROWN is not permissible, and this infringes the second rule in the **Blom** case.

4. It must be borne in mind that the onus on the CROWN to prove the illegitimacy of the representative agreement can only be discharged on circumstantial evidence and the evidential rules in relation to circumstantial evidence may not be ignored. The arguments advanced on behalf of the CROWN have no regard whatsoever to such evidential rules, more particularly to the rules in the **Blom** case (supra).

5. It must also be borne in mind that the evidence from which the inferences are sought to be drawn, were placed before this court by the defence. In order to reject, as false, such evidence, it must be tested against other credible evidence. The CROWN has not placed any evidence whatsoever before this court which contradicts the evidence of HARE, BROWN or GIBBS; and nor was the evidence of GOURDEAU challenged in regard to the need for an agent. Further, the evidence of the expert witness, BURNETT, that the payments to ACPM/BAM correspondent with the terms of both the representative agreement and with C65, and that the calculation of the payments are supported by documentary evidence, stand uncontradicted. The evidence of HARE and GIBBS, for the reasons mentioned, is supported by documentary evidence and no evidence was were placed before this court by the prosecution to contradict such

evidence. Accordingly, there is no basis whatsoever for rejecting this evidence.

6. It seems that the basis upon which the prosecution asks that the aforesaid evidence be rejected, is that such evidence is in conflict with the theory, or inference, that the payments made by ACRES to ACPM/BAM were intended for SOLE. For reasons mentioned, such reasoning is based on inverted logic and it fails to address the real issue.

7. The submission in paragraph 92, that ACRES had no recourse against BAM under the representative agreement because the contract was concluded with ACPM, is such nonsense that it hardly warrants a reply. It is common cause that ACPM is a firm of which BAM is the sole proprietor. In these circumstances ACPM (unlike a registered company or registered partnership) would have no legal standing and BAM could have been sued "trading as ACPM".

Ad Paras 100 – 103 (Timing of the agreement)

1. These arguments are based on incorrect facts and not on the evidence before this court. The principal representative agreement with BAM was concluded during 1986 when ACRES was short-listed under C19. In terms of this agreement, on the evidence of HARE, BAM would render services to ACRES in respect of all contracts which

may be awarded to ACRES under the project. The first such contract was C19. The second was C65 verbally concluded during April 1989 when ACRES was advised that it was sole-sourced in respected of C65. It is trite law that a contract does not necessarily commence when the terms are put in writing and signed by the parties thereto. The law recognises that parties to a contract may agree that the terms of their verbal contract may be reduced to writing and signed by them sometime in the future without preventing the coming into operation of their verbal contract on the day it is concluded. The evidence of HARE, to which reference is made extensively earlier in this argument, seems to be totally ignored by the prosecution on this issue. For the reasons mentioned, his evidence show that the representative agreement in respect of C65 came into force during April 1989 (and not 23 November 1990) pursuant to an earlier oral agreement during about 1986, and for the reasons already explained and referred to, the representative agreement concluded during March 1989 was amended from time to time and was only signed on 23 November 1990. The suggestion by the prosecution that the representative agreement only came into force on 23 November 1990 is simply not supported by the evidence.

2. Much is made in paragraph 101 by the prosecution of alleged attempts "… to expedite payment under C65 …" and that the advance payment coincide with the signature of the representative agreement. It is submitted by the prosecution that SOLE approved such expedited

payments and the implication is that he did so unlawfully in order to enrich himself. These issues have already been fully dealt with earlier in this argument, but it warrants repetition to state that these submissions of the prosecution are wholly inconsistent with the proven and agreed facts that SOLE received nothing from the advance of CAD 180 000,00; that SOLE received nothing from the total sum of CAD 2 312 811,87 received by ACRES from the LHDA up to May 1991; that SOLE received nothing from the sum of CAD 226 956,54 paid by ACRES to ACPM/BAM until May 1991; and on the evidence of ROUX, the prosecutions own expert witness, SOLE only started receiving an amount equal to 60% from what ACRES paid to ACPM/BAM with effect from 5 June 1991.[277] The amount of the monies paid by BAM to SOLE, and the dates of such payments, and the sources of such funds, as evidenced in the ROUX report (Exhibit K1) are inconsistent with the inferences which the CROWN draws in paragraph 101 of its argument and offends the first rule in the **Blom** case (supra). Further, the signature of the representative agreement on 23 November 1990 is consistent with the evidence showing the amendments over a period of nearly 18 months and the need for such amendments, it fits with the evidence of HARE and GIBBS, and the payments from ACRES to ACPM/BAM fit with the terms of the agreement. Therefore, the more likely and reasonable inference is that the representative agreement is legitimate, and such inference

[277] **Exhibit K1, Pg 22**

can simply not be ignored. By ignoring this inference, as the CROWN wishes this court to do, the second rule in the **Blom** case is offended.

3. The other arguments have been dealt with fully above.

Ad Paras 104 – 116 (Acres' need for a representative)

1. The arguments contained in these paragraphs have already been dealt with fully above and nothing further need be said. It suffices to say that, again, these arguments totally ignore the independent and expert evidence of GOURDEAU. It also ignores the evidence of HARE, and more importantly, it ignores the fact that the prosecution was unable to tender any evidence to contradict the evidence of Messrs GOURDEAU and HARE. Again, it seems that the argument is that such evidence should be rejected because it does not fit in with the inference of bribery which the CROWN seeks to draw. This is certainly not a basis, in law, for rejecting the evidence. For the evidence to be rejected, it must be tested against other proven facts and evidence.

Ad Paras 117 – 128 (What Bam actually did for Acres)

These arguments are repetitive and have already been dealt with fully.

Ad Paras 129 – 134 (Payment amounts)

1. Put in proper perspective, ACRES did not by any standards, pay ACPM a huge or “fantastic sum” as suggested. These arguments are dealt with fully above. However, the following needs repeating.

2. The uncontradicted evidence of GOURDEAU was that the international standard rate of remuneration for a representative varies between 2% and 5% of the contract sum. In casu, ACPM was paid 3.6% of the services amount, which on the evidence translates into approximately 2% of the contract sum. Such evidence, particularly that of the independent expert, MR GOURDEAU, stand uncontradicted and cannot simply be ignored.

3. BAM rendered services to ACRES as a representative from the commencement of C19 during 1986 until his death during March 1999, a period of 13 years. In respect of C65 only, he rendered services from April 1989 until March 1999, a period of 11 years. On the evidence already referred to and discussed in more detail earlier, BAM therefore earned, in respect of C65 only, approximately CAD 5 000.00 per month (less than M10 000.00 per month) gross. If provision is made for office and secretarial expenses and other disbursements such as travelling, his net income was closer to M7000.00 per month. Not a “fantastic” sum. The calculations of the prosecution are therefore incorrect and do not accord with the evidence.

4. For the reasons fully explained by HARE (and again ignored by the prosecution) the payment structure under a representative agreement cannot be compared with salaries paid to officials in the employ of the LHDA. Representative agreements, world wide, are commission driven and are dependant upon the award of a contract. A representative may incur expenses and render services for years without receiving any compensation. In casu, and on the evidence of HARE, BAM rendered services to ACRES in respect of C65 from April 1989, and the first payment he received from ACRES was only in January 1991 when ACRES received payment from LHDA. HARE's analogy with a contract with an estate agent and the payment of commission to estate agents is, with respect, sound and realistic. This evidence of HARE is completely ignored by the prosecution and the arguments are based on totally irrelevant comparisons.

5. The inferences which the CROWN therefore wish this court to draw, can therefore not be drawn because such inference is inconsistent with the other evidence (first rule in the **Blom** case). Further, and perhaps more importantly, the evidence permit the drawing of another reasonable inference that the payment to ACPM/BAM accord with international practice and standards, and that the payments were therefore made under a perfectly legitimate representative agreement. If such an inference can reasonably be drawn, the inference which the CROWN wishes to draw offends the second principle in the **Blom** case.

6. The other arguments in these paragraphs are dealt with more fully above.

Ad Paras 135 – 140 (Manner of payment)

The payments in the Swiss banking accounts are dealt with fully above. It is disputed, on the evidence, that any conflict of interest arose. In any event, it seems that BAM's involvement with LAHMEYER related to the appointment of Doctor Meyer as the GOL delegate to the JPTC (this being the LAHMEYER contract in respect of which BAM rendered services to LAHMEYER) and how this could have created a conflict in relation to the establishment of C65, or C19 for that matter, escapes logic.

Ad Para 141 – 145 (Payment after Sole left the LHDA)

1. The relevance of these arguments are unclear. If it is found that the representative agreement was simulated and that the payments were intended for SOLE, ACRES is guilty whether the payments continued or not after SOLE left the LHDA. The real relevance of the payments after SOLE left the LHDA is that such payments, for the reasons already referred to, are more compatible with a legitimate representative agreement, than with the payment of bribe monies to SOLE. This is one of many factors which conclusively show that, at

best for the CROWN, the only reasonable inference to be drawn from all the facts is not the inference which the CROWN seeks to draw. The facts support, to the contrary, the more reasonable inference that the payments were made under a legitimate representative agreement.

2. The basic fallacy in the reasoning process of the CROWN is again demonstrated in paragraph 145 where is it suggested that "… the one fact that ACRES cannot get away from is that BAM used its monies to pay SOLE…". At the risk of repetition, it is a misdirection of both fact and of law to state that BAM used ACRES' monies to pay SOLE. It is respectfully suggested that the erroneous belief by the prosecution that BAM used ACRES' monies to pay SOLE leads to the conclusion that ACRES paid SOLE and, therefore, the representative agreement must, as a matter of necessity, be illegitimate. This reasoning is, for the reasons mentioned, untenable and devoid of any logic.

Ad Paras 146 (The evidence of Putsoane)

1. It is respectfully submitted that the evidence of Putsoane is largely unhelpful. His evidence-in-chief to the effect that ACRES had no need for the services of a representative is negated by his admission under cross examination that he has no experience in, or knowledge of, the international practice of engineering firms and their use of

representatives. His evidence on this issue is also contradicted by an independent international expert, GOURDEAU.

2. It is not, and was never disputed, that ex officio SOLE was influential. His position as Chief Executive of the LHDA by necessary implication demanded a position of influence. The question is whether, on the evidence before this court, SOLE exercised his influence to the benefit of ACRES.

3. Putsoane's evidence that SOLE favoured ACRES is based, firstly, on the alleged promotion of LIGHTFOOT; and secondly, on ACRES' alleged failure to train local engineers which was condoned by SOLE. Both these issues have been fully addressed in the course of the arguments for the discharge of ACRES after the close of the prosecution's case, and nothing further need be said. This Honourable Court is respectfully referred to those arguments in the accused's Heads of Argument filed in that application.

4. Putsoane's evidence, in any event, was contradicted by GIBBS and HARE in relation to the promotion of LIGHTFOOT, and by GIBBS in relation to the lack of training. Neither HARE nor GIBBS were cross examined on this evidence and their evidence on these issues stand uncontradicted. It is respectfully submitted that no inference of any nature can be drawn from the evidence of Putsoane.

Ad Paras 147 and 148 (The evidence of ROUX)

1. The evidence of ROUX and his report, Exhibit K1, is dealt with more fully above. The significant aspect of these paragraphs is the statement in paragraph 147 that ROUX's evidence "…forms the crux of the CROWN's case…" This is indeed so, and it is for this very reason that the CROWN's case is fatally flawed.

2. The prosecution still seems to suffer from the misapprehension that the effect of ROUX's evidence, and his report, is that ACRES paid SOLE. If this is indeed so, then it is conceded that the representative agreement is simulated and that ACRES is guilty of the crime of bribery. The fact of the matter, however, is that this is not the evidence of ROUX, and nor can such an inference be drawn from his evidence. At best, it may only be said that, on his evidence, BAM used monies to pay SOLE which were funded by ACRES. This, in turn, begs the question as to why ACRES paid BAM. This question, in turn, relates to the explanation of ACRES for the payments. This, in turn, results in the onus on the CROWN to prove the illegitimacy of the representative agreement. The illegitimacy of the representative agreement cannot be proved by showing that ACRES paid SOLE (or that BAM used ACRES's monies to pay SOLE) for the simple reason that there is no evidence before the court to this effect. Neither ROUX nor BURNETT showed this to be the case; to the contrary, BURNETT

showed conclusively that on accounting principles and on the financial statements, ACRES did not pay SOLE and that the payments were made by ACRES to BAM in accordance with the terms of the representative agreement.

Ad Paras 149 – 157 (Other factors)

These arguments are simply repetitive and have already been dealt with extensively above.

Ad Paras 158 – 163 (Issues arising from Exhibit "L")

These issues and arguments have already been dealt with extensively above and nothing further need be added.

Ad Paras 164 – 171 (What Sole did for Acres)

1. The issues raised in these paragraphs have been dealt with fully above. To the extent that it is necessary to do so, this Honourable Court is respectfully referred to the accused's Heads of Argument filed in the application for the discharge of ACRES after the close of the prosecutions case.

2. It is suggested in paragraph 170 that the alleged non-compliance with the treaty requirement "… can primarily be ascribed to SOLE.." It has already been pointed out that a finding that the treaty requirements have not been complied with in respect of the establishment of C65, is unwarranted. In any event, there is not a shred of evidence before this court to show that SOLE engineered or manipulated such non-compliance, even if found to exist. It is common cause that C65 was established by the Capital Finance Division of the LHDA, of which PAUL BERMINGHAM was the Manager. He was assisted by Messrs COLE and RAYMOND. There is no evidence whatsoever to suggest that these persons were influenced by SOLE, and such an inference is unwarranted on the evidence. The mere fact that SOLE occupied and influential position as Chief Executive, does not mean that he, in the absence of any evidence to the contrary, used such influence unlawfully.

Ad Paras 172 – 172 (The defence evidence)

These arguments are repetitive and have already been dealt with. However, they again clearly show the CROWN's failure to appreciate the onus of proving the legitimacy of the representative agreement.

Ad Paras 175 – 216 (The witness Hare)

1. If the defence were to be called upon to deal with each of the criticisms expressed in these paragraphs against the evidence of HARE, the floodgates of a sea of trivialities will be opened. The criticisms are either not based on the evidence, or on a misunderstanding thereof, or on both. Some, if not all, of the criticisms are so trivial that they do not warrant serious consideration.

2. The problem faced by the prosecution is that it was unable to place any evidence before this Honourable Court to contradict the evidence of HARE. The evidence of HARE, and indeed that of BROWN, GIBBS and GOURDEAU, cannot be tested against any evidence tendered on behalf of the prosecution, and for the CROWN to succeed, the version of ACRES must be rejected on the evidence of its own witnesses. This, with respect, the court it is unable to do.

3. The criticisms do not take into account that HARE's evidence is supported by documentary evidence already referred to; that it is corroborated by the evidence of both BROWN and GIBBS; that the evidence of GIBBS is corroborated by contemporaneous notes; that the evidence of HARE is corroborated by an international independent expert witness, GOURDEAU; and that the payments by ACRES under the representative agreement are corroborated by source documents examined by an independent auditor of KPMG, MR BURNETT. The only test used by the prosecution to measure the credibility of the defence witnesses is the inference of bribery. The

defence evidence cannot be tested against any other evidence therefore; the criticisms expressed against the evidence of MR HARE are based on speculation and conjecture which is prohibited by the legal principles already referred to.

4. The defence will deal with only a few of the criticisms expressed in these paragraphs:-

4.1 Exhibit EE does not contain all the representative agreements used by ACRES throughout its history and there may be many more. Exhibit EE only contains 29 representative agreements used by ACRES during the period 1981 – 1999. At the time when this document was compiled (March 2000, 7 agreements were current concluded during the period 1984 – 1999; and 21 had expired during the period 1981 – 1991). This much is evident from the evidence of HARE;[278]

4.2 HARE's evidence was that a contractor or consultant operating on foreign soil does not necessarily need a representative for every contract. For instance, where it is a joint venture with a firm from the host country, the host partner will fulfil the functions of a representative. Also, when operating as a sub-contractor, (for instance

with Delcanda) the main contractor will engage the services of a representative. Also, when operating in Canada, the USA or many countries in Europe where the language, culture, custom and laws are not foreign, there will be no need for a representative. This evidence makes perfect sense. In these circumstances the criticism that only 7 representative agreements were operative during the period 1984 – 1999, and that on 21 representative agreements had expired during the period 1981 – 1991, is not understood. Against what yardstick are these figures measured? No evidence whatsoever was placed before this court to show that this evidence cannot be true or that it should be rejected. This holds true for all of the criticisms expressed in the above paragraphs.

5. The prosecution's personal experience of business ethics and conduct is wholly irrelevant, and, judging from its submissions, must surely be limited. The submission that HARE's evidence in regard to ACRE's high ethical business standards should be rejected because "there is no such company on earth" (with such high ethical business standards) (paragraph 187); and because "this is too good to be true" and "… it defies human experience…" (paragraph 188), is simply absurd. The effect of these submissions is that all companies on earth

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[278] **Record: Vol 14, Pg 1461 Line 2 - 11**

are crooked and all commit crimes. The opposite is true: most businesses conduct business in an honest and ethical manner.

6. The suggestion in paragraph 189 that the guarantees were obtained by misleading the bank, is irresponsible and unworthy of submissions made by legal counsel. Clause 7.1 of each guarantee provides expressly that the guarantee shall "… exist independently of the contract …" being C65, and is being capable of being called up immediately and at any time. The guarantees are therefore not dependant on the "award" of C65; they exist independently of the existence of C65. In any event, on the prosecutions own documents, MR PETTENBURGER, the RSA delegate on the JPTC, conceded that C65 was "…awarded by letter of intent, commencement date 1 August 1990…"[279]. The evidence that a contract is "awarded" by a letter of intent was confirmed by MEYER.[280]

7. The criticisms expressed in paragraphs 193, 194, 195 and 196 ignore the evidence of HARE that when he first met with BAM on 10 November 1986, ACRES had already been advised that it was short-listed in respect of C19. The need for BAM's services related to the process to be followed from that stage to the final conclusion of the contract. The documentary evidence show conclusively that BAM assisted ACRES throughout the process of establishing C19.[281]

[279] **Exhibit C, Vol 8, Pg 233**
[280] **Vol 21 Pg 2142 Lines 1 -26**
[281] **Exhibit C, Vol 15, Section 4, Pgs 8 –24**

HARE was at pains to explain that the need for services related not only to the establishment of the contract, but also to the execution thereof, and this is extensively dealt with above. He also repeatedly said that the specific duties to be performed by a representative cannot be foreseen at the time when his services are engaged, and it is conceivable, and indeed to the advantage of the consultant, that the representation services would never be required. His services are only required when there are problems. If there are no problems in the execution of a contract, there is no need for his services. The criticisms show a misunderstanding of the nature of a representative agreement.

8. The criticisms ignore the evidence that the representative agreement in relation to C65 was verbally concluded during April 1989 and, for the reasons already mentioned, was only signed during November 1990. It has already been pointed out that BAM only started paying SOLE from June 1991, and this evidence is in conflict with the submissions that the advance payments during November 1990 and January 1991 were expedited for the financial benefit of SOLE. It is common cause that SOLE received nothing from these payments, and this was the evidence of BROWN's own witness, ROUX.

9. The other issues are so trivial that they do not warrant a response, and others have already been dealt with adequately above.

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282 Exh C. vol 15 section 2. pp1 –130; Exh. BB

Ad Paragraphs 214 – 239 (The evidence of the witness Brown)

1. The same remarks in relation to the evidence of the witness HARE apply in regard to the criticisms expressed in relation to BROWN. Essentially, the evidence of BROWN, in material respects, agree with the evidence of CLAASEN, MOHAPI, MOLAPO and PUTSOANE. The evidence of BROWN was tendered to show the growing tension between the LHDA and the JPTC, and his evidence in this regard finds support in the evidence of HIDDEMA and MOLAPO. His evidence is also corroborated in material respects, by the evidence of MEYER.

2. Essentially, BROWN testified that there were no formal procedures in place at the relevant time in regard to the implementation of the approval requirements of the JPTC under the Treaty and this evidence is corroborated by the CROWN's witnesses. He testified that the consultation requirements with the JPTC were observed by the LHDA, but that there were no requirements under the Treaty to obtain JPTC approval in respect of the establishment of consultancy contracts. This evidence is supported by a proper legal interpretation of Article 9 of the Treaty for the reasons already advanced.

3. BROWN testified that C65 was implemented by the Capital Finance Division of the LHDA of which PAUL BIRMINGHAM was the Manager,

who had little or no experience of the implementation of consultancy contracts. He also testified that, for obvious reasons, ACRES was not involved in the implementation of C65, and there is no evidence to point to the contrary. The documents relied upon by the prosecution do not relate to the establishment of either C64, C65 or C19 but to extensions or variation orders thereunder.

4. It is respectfully submitted that there is no reason whatsoever to reject his evidence. It neither contradicts other evidence; and nor is his evidence inherently improbable or so obviously untruthful that it should be rejected. In fact, his evidence is corroborated by other evidence, including evidence of the CROWN.

5. BROWN testified that he was the Liaison Officer with BAM after WITHERELL's departure, but he was not cross-examined at all on this issue. His evidence related primarily to the approval requirements of the JPTC under the Treaty, and the knowledge of the JPTC in regard to the various stages of the implementation of C65. All the cross examination was directed towards these issues, and such cross-examination, notwithstanding the criticisms, reveal nothing to warrant the rejection of his evidence.

6. The defence was afforded only four working days (Monday to Thursday 17 – 20 June of which Monday 17 June was a public holiday) to reply the prosecutions argument, and time simply does not

permit to deal with each and every criticism expressed in the above paragraphs. If the need arises, these issues will be dealt with more fully during oral argument. However, and at the risk of repetition, the criticisms are so trivial that they do not warrant serious consideration.

Ad Paragraphs 240 – 254 (The evidence of GOURDEAU)

1. On the evidence, GOURDEAU has no relationship with ACRES and he gave evidence as an unbiased independent international expert on engineering contracts, with particular reference to representative agreements. The prosecutions' submission that GOURDEAU was biased in favour of ACRES and not truly independent is not supported by the evidence, but is clearly made because his evidence destroys the inferences which the CROWN wishes to draw.

2. The prosecution could very easily have called any other independent expert to contradict the evidence of GOURDEAU. The prosecution had full knowledge of the defence of ACRES based on the representative agreement with ACPM/BAM, and the documentation furnished by the defence to the prosecution long before the case started indicated the international recognition of representative agreements, including recognition by Government institutions and the World Bank.[282] No attempt was made by the prosecution to place any evidence before this court to gainsay the evidence of GOURDEAU

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283 **Vol 21 P2145 Line 20 to P2147 Lines 1 –20 & Vol 21 P2148 Line 18 to Pg 2149 Lines 1- 6**

and his evidence stand uncontradicted and he is supported by the other witnesses called on behalf of ACRES, and by documentation (see footnote 282).

Ad Paragraphs 254 – 266 (The evidence of GIBBS)

1. It is apparent from the submissions made in these paragraphs that the content of the evidence of GIBBS are incapable of attack. The arguments contained in these paragraphs are unsubstantiated by evidence or facts, and have been adequately dealt with above.

2. For the reasons already canvassed, and supported by the evidence of GIBBS and BURNETT, the payments to ACPM/BAM clearly fit with the terms of the representative agreement.

Ad Paragraphs 267 – 281 (The evidence of BURNETT)

1. The prosecution clearly did not understand the evidence of BURNETT, and judging from the criticism of his evidence, it still does not understand the effect of his evidence.

2. The entire criticism is based on the premise referred to in paragraph 269, namely the belief that his evidence is to the effect "…that the RA

(Representative Agreement) correctly reflects the relationship between ACRES and BAM …". BURNETT repeatedly said in evidence-in-chief and also under cross examination that he was not a lawyer; and that he was not qualified to express any view on the legality or otherwise of the representative agreement; that it was the function of this court to determine the legality of the representative agreement ; and that he therefore expresses no views in regard to the relationship between ACRES and BAM. BURNETT repeatedly said that his only mandate was to determine whether or not, from accounting records and entries in the bank statements, the payments made by ACRES to ACPM/BAM accord with the terms of such representative agreement. He testified that the payments, supported by source documents and entries in the banking records, accord with the written terms of the representative agreement. He also testified that, on accounting principles, there was nothing to show that ACRES paid SOLE. He said the entries showed that ACRES paid BAM; and that BAM paid SOLE.

3. The object and purpose of the evidence of BURNETT was this: If the payments made by ACRES to ACPM/BAM accord with the terms of the representative agreement, then it lends support and wait to the legitimacy thereof. ROUX was not asked to express any opinion in regard to the legitimacy or legal effect of the representative agreement. This distinction the CROWN failed to understand.

4. BURNETT testified that the payments from the LHDA to ACRES accord with the terms of C65, and are supported by source documents. He examined the invoices and payment certificates and confirmed the correctness of the figures and entries on Exhibit L. He also confirmed the correctness of the calculations of the services amounts reflected on Exhibit L with reference to the payment certificates and based the calculations of 3.6% on those figures. He testified that the payments of 3.6% of the services amount accord with the terms of the representative agreement, and these issues have been dealt with extensively above. There is nothing on record to gainsay this evidence.

Ad Paragraphs 282 – 294 (The evidence of Meyer)

1. The thrust of the evidence of MEYER was to the effect that the JPTC insisted on formal approval in respect of each separate stage of the establishment process of consultancy contracts. He testified that the position of the JPTC was that these formal approvals were required by the provisions of the Treaty. It has already been shown that this position held by the JPTC was legally untenable.

2. MEYER further testified that because the LHDA held a different view (namely that only “concurrence” was necessary and not “approval” by reason of the requirement to consult) tension developed between the

JPTC and the LHDA which eventually resulted in the issue of formal written procedures whereby the JPTC's formal approval was required. At the time when C65 was established, these procedures were not yet in place. This evidence was supported by the CROWN's own evidence; particularly that of HIDDEMA.

3. MEYER's evidence show conclusively that both the World Bank and the JPTC were kept fully informed of each stage of the establishment of C65, and there was never any objection thereto. The JPTC therefore, if not formally, at the very least by necessary implication, consented to each stage of the implementation of C65. MEYER was adamant that the JPTC would never have stopped the process of establishing C65 because it would have adversely affected the entire project, and more particularly the establishment of the main contracts 123, 124, 125 and 126.

4. MEYER testified that if the JPTC had any substantive objections to any implementation stage of C65, it had the power to withhold funding authority and it would have expressed its objections in no uncertain terms either in correspondence or by way of a resolution.

5. MEYER testified that the objections of the JPTC, as expressed in the minutes, related to the failure on the part of the LHDA to obtain its prior written formal approval for a particular event, and not to the occurrence of such event. Put differently, the objections were of form

rather than of substance. To this extent his evidence is corroborated by BROWN, and this is also quite clear from the evidence of HIDDEMA.

6. The statement in paragraph 290 that MEYER "… testified that mobilisation and the issue of the letter authorising mobilisation took place without JPTC knowledge…" is incorrect. In context, MEYER testified that the JPTC was fully aware of the mobilisation and letter of intent and had in fact, at least by implication, approved of it[283]. In any event, on the uncontradicted evidence the delegates of the JPTC who attended the negotiations were party to the drafting of the MOU. It has already been pointed out that the MOU anticipated the letter of intent and the mobilisation of ACRES's personnel thereunder by as early as June 1990. In the result, the letter of intent was issued on 28 July 1990 and mobilisation took place during August 1990. To suggest, in these circumstances, that the JPTC had no knowledge of the letter of intent or of the mobilisation, is to make nonsense of the evidence before this court. Those aspects are fully dealt with above.

7. The other issues, relating to the various stages of establishment of C65 (from the RFP to the actual signing of C65) have been dealt with more fully above.

Ad Paragraphs 295 – 299 (Concluding submission)

For the reasons canvassed earlier, the defence disagrees with the concluding submissions. The CROWN has failed to discharge the onus of proving the falsity of the representative agreement, and the inference which it asks this court to draw from the circumstantial evidence does not meet the requirements in the **Blom** case (supra). For these reasons ACRES should be acquitted on both counts. For the CROWN to succeed, this Honourable Court must hold :

1. That the inference that ACRES intended the payments to BAM to reach SOLE, is consistent with all the facts; and

2. No other reasonable inference can be drawn from the facts. For the reasons mentioned, these inferences cannot be drawn.

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Attorney for the Defence

TO : THE REGISTRAR
HIGH COURT OF LESOTHO
MASERU

AND TO : THE DIRECTOR OF PUBLIC PROSECUTIONS
OFFICE OF THE ATTORNEY-GENERAL
MASERU