National Court of Papua New Guinea

State v Veraga [2005] PGNC 103; N2849 (2 June 2005)

N2849

PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

CR 389 of 2004

THE STATE

v

IORI VERAGA

WAIGANI : SAKORA J
2005 : 14, 15, 16, 17, 21, 22 & 24 March
1, 5, 6, 28 April & 2 June

CRIMINAL LAW – Conspiracy – Agreement to do an unlawful act – Conspiracy to defraud. Offence completed when agreement made – Proof of – Agreement expressed or implied – Community of purpose – Acts and omissions of parties – Engagement of valuer outside tendering procedures, without Board approval – Excessively and unreasonably high valuations – Exorbitant and excessive fees accepted before valuation reports – Fees accepted and paid without Board knowledge and approval – Sharing of these fees – Misappropriation.

TEXTS CITED:
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CASES CITED:
The State v Tanedo [1975] PNGLR 395.
The State v Sebulon Wat and Miskus Maraleu [1995] PNGLR 582.
Brian Kindi Lawi v The State [1987] PNGLR 183.
The State v Gabriel Ramoi [1993] PNGLR 390.
The State v James Makario (1990), unreported N862.
R v Jones [1832] EngR 870; (1832) 110 ER 485.
Aspinall (1876) 2QBD 48.
R v Meyrick and Ribuffi [1929] Cr App Rep 94.
R v Churchill (No 2) [1967] 1QB 190.
Churchill v Walton [1967] 2 AC 224.
Doot [1973] AC 807.
Scott v Metropolitan Police Commissioner [1975] AC 819.
Kalajzich and Orrock [1989] A Crim Rep 415
Siracusa [1990] 90 Cr App Rep 340.
R v Gudgeon [1995] QCA 506; (1995) 133 ALR 379.

Coounsel:
A. Kupmain for the State.
L. Henao for the Accused.

02 June 2005

Sakora J:

Introduction

The accused Iori Veraga is a married father of six children, and hails from Gomore village, Rigo in the Central Province. He is a valuer by profession, currently duly registered, having graduated from the University of Technology, Lae, in 1973 with a diploma in valuation. After four years in the public service with the Office of the Valuer-General, the accused entered private practice in the employ of several real estate agents in Port Moresby before setting up his own company, Veraga Valuation Centre Ltd (VVC) some 21 years ago.

Indictment

On 11 March 2005 the State presented an indictment charging the accused with two counts of conspiracy and four counts of misappropriation. Upon arraignment he pleaded "Not Guilty" to all counts. At the conclusion of State evidence I entertained a "No Case" submission which I ruled against, thereby ordering that he had a case to answer in respect of all six counts.

For a proper appreciation of the discussions on the evidence and the pertinent principles of law leading to the Court's verdict, it is convenient and instructive that the six counts of the indictment be reproduced in full, and I do so hereunder as follows:

Count 1: IORI VERAGA of Gomore Village, Rigo, Central Province stands charged that he between the 01st day of September 1998 and the 31st day of December 1998 at Port Moresby in Papua New Guinea, conspired with one JIMMY MALADINA, and one HENRY FABILA and one HERMAN JAMES LEAHY to defraud the National Provident Fund (NPF) of Papua New Guinea, by fraudulently charging a sum of Sixty-Thousand and Three Hundred Kina (K60,300.00) which was in excess of the normal appropriate valuation fee for that property described as Allotment 2, Section 429 (Hohola) Port Moresby, the Waigani Land.

Count 2: AND ALSO THAT the said IORI VERAGA**,** stands charged that he between the 01st day of September 1998 and the 28th day of February 1999, at Port Moresby in Papua New Guinea, conspired with one JIMMY MALADINA, and one HENRY FABILA and one HERMAN JAMES LEAHY to defraud the said National Provident Fund (NPF) of Papua New Guinea, by fraudulently charging a sum of One Hundred and Seventy-Five Thousand Kina (K175,000.00) which was in excess of the normal appropriate valuation fee for that property described at Allotment 16, Section 5 (Granville), the National Provident Fund (NPF) Tower.

Count 3: AND ALSO THAT the said IORI VERAGA, stands charged that he between the 01st day of September 1998 and the 31st day of December 1998 at Port Moresby in Papua New Guinea, dishonestly applied to his own use the sum of Twenty-Thousand, Three Hundred Kina (K20,300.00) the property of the National Provident Fund (NPF) of Papua New Guinea.

Count 4: AND ALSO THAT the said IORI VERAGA, stands charged that he between the 01st day of September 1998 and the 31st day of December 1998 at Port Moresby in Papua New Guinea, dishonestly applied to the use of one JIMMY MALADINA, monies in the sum of Thirty-Thousand Kina (K30,000.00) the property of the National Provident Fund (NPF) of Papua New Guinea.

Count 5: AND ALSO THAT the said IORI VERAGA**,** stands charged that he between the 01st day of September 1998 and the 28th day of February 1999 at Port Moresby in Papua New Guinea, dishonestly applied to his own use monies in the sum of Seven Thousand One Hundred and Fifty-Five Kina (K7,155.00) the property of the National Provident Fund (NPF) of Papua New Guinea.

Count 6: AND ALSO THAT the said IORI VERAGA, stands charged that he between the 01st day of September 1998 and the 28th day of February 1999 at Port Moresby in Papua New Guinea, dishonestly applied to the use of one JIMMY MALADINA monies in the sum of Eighty-Seven Thousand Five Hundred Kina (K87,500.00) the property of the National Provident Fund (NPF) of Papua New Guinea.

Facts relied on by the State

The basic facts the State relied on to bring these charges against the accused can be stated briefly as follows. Between 1st September 1998 and 31 December 1998, the accused had contacts with Jimmy Maladina, Henry Fabila and Herman Leahy, as a result of which the accused and his company (VVC) were engaged by Messrs Fabila and Leahy to undertake valuation of the "Waigani Land", property described as Allotment 2 Section 492, Hohola, Port Moresby.

At the time Mr Jimmy Maladina was the managing partner of the law firm of Carter Newell Lawyers, and Messrs Fabila (now deceased) and Leahy were the managing director and corporate secretary respectively of the National Provident Fund (NPF, though the successor entity is now NASFUND, the acronym for National Superannuation Fund). And the accused, of course, the principal of his company (supra).

The accused then purportedly conducted valuation of the subject property and charged the NPF his professional fees of K60,300.00 which were paid. It is the State's case that the fees of K60,300.00 to value the property was quite excessive, and that, in any case, the engagement of the accused and his company to undertake the valuation did not comply with the necessary tender procedures.

It is the State's case also that upon receipt of payment of his professional fees rendered to the NPF, the accused caused his company's cheque to be drawn in the sum of K30,000.00 made payable "Cash", which cheque was then handed to Mr Jimmy Maladina as his 50% share of the professional fees charged as agreed between the two of them.

The State further alleged that between 1st September 1998 and 28 February 1999, the accused was once again engaged by Messrs Jimmy Maladina, Henry Fabila and Herman Leahy to undertake another valuation job in respect of the property then known as the "NPF Tower", described as Allotment 16 Section 5 Granville. Once again it is the State's case that the engagement of the accused and his company for such valuation job did not comply with the normal standard tender procedures.

After valuation of this second property the accused submitted his professional fees to the NPF totalling K250,000.00. Mr Henry Fabila disputed this amount, offering to pay only K175,000.00, which offer was readily accepted by the accused. A cheque for this amount drawn on the NPF account made payable in the company's name was then paid to the accused.

The accused then, once again, had a cheque drawn on his company's account for the sum of K87,500.00 which is half of the total professional fees paid by NPF for the "NPF Tower" evaluation. The company's cheque was made payable to Carter Newell Lawyers. It is the State's case that this K87,500.00 went to Mr Jimmy Maladina as his half share of the professional fees charged to and paid by the NPF as agreed to between them.

Thus, the State's case alleges that the accused and Messrs Jimmy Maladina, the late Henry Fabila and Herman Leahy had conspired to conduct business in a dishonest manner from which the accused obtained monies from the NPF that he used for himself and for the use of Jimmy Maladina.

The Properties in Question

"The Waigani Land" is described in State Lease Volume 10 Folio 234 as Allotment 2 Section 429 (Waigani) Hohola, National Capital District.

At the relevant time it was a 9.8 hectares piece of prime undeveloped land located at the northern corner of the main Waigani and Sir John Guise Drives. On 9 April 1998 the land was advertised in the National Gazette (Tender No. 12/98) as being available for tender for grant of Urban Development (Mixed Hotel and Commercial) Lease.

A total of eight formal applications were received for consideration by the Papua New Guinea Land Board (Land Board). At its meeting No. 2000 the Land Board approved *Waim No. 92 Pty Ltd* as the successful applicant, and the decision was duly notified in the National Gazette No. G105 of 14 September 1998 under the hand of the Secretary of Lands (Exhibit "E4"). Before the gazettal notice, a formal advice of the Land Board's decision was conveyed to the successful company by letter dated 10 August 1998 under the hand of the Chairman of the Land Board (Exhibit "E6").

The proprietary company *Waim No. 92 Pty Limited* was incorporated under the *Companies Act* on 26 September 1997 (Exhibit "E5").

The lease was for a period of five years commencing 14 September 1998, containing the usual and specific covenants, conditions and reservations as to improvements/developments on the subject land. The State Lease was issued under the hand of the responsible Minister under s 106 of the *Land Act* 1996 on 9 October 1998 (Exhibit "E7").

"The NPF Tower": Two Business Leases described as Allotments 9 and 10 Section 5 Granville, City of Port Moresby (Volume 1 Folio 161), and Allotment 11 Section 5 Granville, City of Port Moresby (Volume 27 Folio 6717) were consolidated or merged to become Allotment 16 Section 5 Granville, on which land the NPF Tower (now the "Deloittes Tower") stands. The combined land area of the property is 0.3035 hectares, and situated on Douglas Street, Port Moresby, adjacent to the PNGBC (now BSP) building (Exhibits "D1" and "D2").

The property is an 18 storey office/retail complex in the commercial heart of the Central Business District (CBD) (Exhibits "D1" and "D2"). The property was then owned by the National Provident Fund (NPF) Board, now the Board of its successor, the National Superannuation Fund (NASFUND).

Facts not in dispute

Before 19 October 1998 the accused received a telephone call from Mr Jimmy Maladina, a lawyer and managing partner in the law firm of Carter Newell Lawyers, as a result of which he attended at Mr Maladina's office the same day. There he was asked to do valuations on two properties: the Waigani land and the NPF Tower.

The accused agreed to conduct the valuations, upon which Mr Maladina requested him to share his professional fees for the two jobs with him on a 50-50 basis. And the accused agreed to the sharing of the fees.

As at that meeting Mr Maladina had no official position within the NPF administration or management, nor with the NPF Board of Trustees.

On 19 October 1998 Mr Herman Leahy, the corporate secretary for NPF, wrote to Iori Veraga (transmitted by facsimile) requesting him to "provide us with a quotation of your fees in providing us with a full valuation. . ." The accused responded the very same day (by facsimile transmission) with his quotation: "We are please (sic) to undertake the full valuation report for a fee of K60,300.00 (Sixty Thousand and Three Hundred Kina)."

On 21st October 1988 the NPF, under the hand of the managing director the late Mr Henry Fabila, wrote to the accused (transmitted by facsimile) providing formal instructions in respect of the "Waigani land" in the following terms:

Further to your letter of 19 October 1998, please proceed to undertake a full valuation report of the abovementioned property. We accept your fee of K60,300.00.

On 29 October 1998 the accused furnished the managing director his company's Valuation Report (compiled and dated 20 October 1998) on the "Waigani land" (Exhibits "E10" & "E11"). The land was valued at K14,700,000.00 (Open Market Value). NPF was invoiced the same date for the sum of K60,300.00 as professional fees. The accused quoted his professional fees before receiving formal instructions from NPF to conduct the valuation, and before the valuation was actually conducted. The accused conducted the valuation of the property before he received formal instructions to value the land.

The NPF, through its then managing director, accepted the accused's professional fees of K60,300.00 before actual valuation of the subject property had been conducted and before the Valuation Report had been compiled and submitted to it, together with the invoice for fees.

The accused subsequently received payment of his fees for the Waigani land by NPF cheque drawn on its Papua New Guinea Banking Corporation (PNGBC) account, Port Moresby branch (for K60,300.00 in favour of Veraga Valuation Centre Pty Ltd, dated 8/12/98) (Exhibit "E18"). This payment cheque was not received direct from NPF but rather through (and from) Mr Jimmy Maladina who had telephoned the accused to go to his office and pick it up. The accused went to the office taking with him his company's

cheque for a sum of K30,000.00 payable "Cash" drawn on its Westpac Bank account with the Port Moresby branch (dated 11/12/98) (Exhibit "J2").

The K30,000.00 cheque was handed over to Mr Jimmy Maladina upon receipt of the NPF cheque for K60,300.00. The K30,000.00 was Mr Maladina's 50% share of the accused's professional fees as agreed.

At the same date as the request to the accused for the quotation of his professional fees for the valuation of the "Waigani land" (19 October 1998), the NPF corporate secretary caused a similar letter of request in respect of the "NPF Tower" to go to the accused by facsimile transmission (Exhibit "E22"). The accused responded the very same day by facsimile transmission quoting the sum of K250,000.00 as his fees for the job (Exhibit "E23"). This quotation was, once again, submitted before a formal instruction for valuation had been given; similarly before actual valuation had been conducted on the subject property.

By letter dated 21 October 1998 (Exhibit "E24") the managing director of NPF rejected the accused's quoted fees and offered K175,000.00 instead, with the instruction to proceed to value the property if he accepted the lesser fee. The accused did not dispute or challenge the rejection of his quoted fees but readily accepted the K175,000.00 offered by Mr Fabila. Valuation of the "NPF Tower" was conducted on 20 January 1999. The property was valued at K87,854.500.00 (Open Market Value), i.e; Land K4,560,000.00 and Improvements K83,294,500.00 (Exhibit "E27").

The K175,000.00 professional fees for the "NPF Tower" valuation was received once again through Mr Maladina by NPF cheque for the amount drawn on its PNGBC account (Port Moresby branch) in favour of the company. It was dated 28/01/99 (Exhibit "E31"). As in the case of the earlier fees cheque, Mr Maladina telephoned the accused to go to his office and pick up the cheque. The accused went there armed with a cheque of his own drawn on his company's Westpac Bank account in the sum of K87,500.00, originally payable "cash" but altered to "Carter Newell", and dated 29/01/99 (Exhibit "J4(a)"). He handed this cheque over to Mr Maladina as the 50% share of the accused's fees as agreed.

The "Waigani land" was a large unimproved tract of land that had, a month before Mr Maladina's approach to the accused, had an "Urban Development (Mixed Hotel and Commercial) Lease" granted to *Waim No. 92 Pty Ltd*. The purpose of the valuation was for "proposed purchase" by NPF.

The "NPF Tower", at the time of the accused's valuation was still under construction. It was expected to be completed by April 1999. Except for a few indications of intention to lease certain floors/levels of the tower block, no tenancy agreements had been signed, and certainly no tenants were in occupation. The purpose of the accused's valuation was "to assess the market value for sale of equity".

No tenders were called for applicants to bid for the valuation of the two properties. The engagement of the accused and his company to undertake the two valuations was, at the outset, by word of mouth in a meeting between the accused and Mr Maladina. It was after this that written communications took place between the corporate secretary and the managing director with the accused respectively.

Evidence: The State Case

The State called eight witnesses to give sworn oral evidence. Through these witnesses, and by consent, a total of 104 documents were tendered and admitted into evidence on behalf and in support of the State case. Most of these documents can be described as either business documents/records (cheques and various banking transactions forms) or specific correspondence between the various parties featuring in the State case, and also official documents.

Four of the eight witnesses were duly qualified and registered valuers, two of whom practised privately and the other two attached to the Office of the Valuer-General. Their evidence were in respect of their own and the accused's valuation of the two properties in question, and the professional fees he charged the NPF for these. In the process each described the various and common methodologies employed by professional valuers to assess and value certain types of properties. In the end each of these witnesses offered his professional opinion as to the reasonableness or otherwise of the accused's valuations and his professional fees in respect of these.

One of the other four witnesses was the present managing director of NASFUND. The other was the former Chairman of the then NPF Board of Trustees. The remaining two witnesses were the former accounts clerk and the then and current finance manager of the law firm of Carter Newell Lawyers. The evidence of the two latter witnesses were in respect, firstly, of the various bank accounts operated by the law firm, and, secondly, certain transactions conducted upon receipts of the cheques for K30,000.00 and K87,500.00 respectively.

The four valuers have practised for a combined period of about 123 years, three of them over 30 years and the other over 20 years. Three of them would have been in the first group of pioneering students at the Rabaul School of Valuation run by the then Department of Lands, Surveys and Mines, later incorporated into the Surveying Department of the University of Technology, Lae. One of them, Mr Mark Kelep whose practice experience spans 35 years, was the Valuer-General of PNG from 1978 to 1983 before going into private practice. Another, Mr Paul Ikupu (33 years practice), held the position of President of the PNG Institute of Valuers and Land Administrators in the 1980s for four terms. All four possess post-graduate qualifications in valuation and related professions, internally and overseas, and enjoy membership of their professional bodies, also here and overseas.

Of the four valuers, Mr Mero Voro was the only one who conducted the actual valuation of the "Waigani land". He has been employed in the Office of the Valuer-General for some 32 years, and he valued the land at the request of the "NPF Commission of Inquiry" for the purpose of determining "the fair market value of the subject property for record purposes", and value as at 20 October 1998. Inspection (physical) of the property was conducted on 1st June 2000, and a Valuation Report (Exhibits "A1" & "A2") compiled and certified on 4 July 2000. At the date of inspection official Lands Department records confirmed the owner of the leasehold interest as: *Waim No. 92 Ltd*. The land was still vacant and undeveloped with no improvements on it (in the two years of a 5 year lease).

The Office of the Valuer-General's valuation of this land (supra) was described as follows:

The fair market value of the leasehold interest is assessed at Eight Million Kina (8,000,000.00) (sic) as at 20th October 1998.

Mr Voro acknowledged in his evidence that whilst valuation was not an exact science, certain factors and information were always present to assist. These he itemized as: information on property transactions, development or improvement costs, current state of the real estate market, and the interpretation of data in respect of these. Upon suggestion by accused's counsel in cross-examination that valuing this type of property was a "rare thing" for a valuer in this country, the witness responded that it was not. All it would require, the witness offered, would be to collect more information on comparable property sales around the time or date of the valuation, analyse these and employ the rate per square metre that had been determined.

Mr Voro said that, as there had not been any improvements on the land, only the vacant land had to be valued. And he used the rate of K81.63 per square metre (of 9.8 ha) to arrive at K8,000,000.00. The accused had employed the rate of K150.00 per square metre and arrived at the value of K14,700,000.00. It was the evidence of this witness that the rate used by the accused of K150 per square metre was: "may be a little bit too high". And the difference between the two rates being about K60 was "quite a difference" in the opinion of this witness also.

In relation to the professional fees of K60,300.00 charged by the accused, Mr Voro stated that if the Valuer-General were to charge fees (which it did not here), a reasonable fee would have been between K10,000.00 and K15,000.00, based on the value of the property using certain mathematical calculations on the scale of fees stipulated by the Valuer-General in 1982.

Mr Ikupu's evidence was that, following the Commission of Inquiry he had been engaged mid June 1999 by the new chief executive officer of NPF, Mr Rod Mitchell, to carry out valuation on the renamed "Deloittes Tower". Instructions were to assess the value of the property as at January 1999. Employing the Capitalisation method of assessing the value, he arrived at the sum of K37,000.000.00 as the value of the property. This particular method of valuation was said to entail determining, firstly, the market rental of the property less outgoings and capitalizing it at an appropriate rate. The result was described as "capitalizing returns on investment".

The fees charged was K8,320.00, based on the hourly rate of K500.00 for two valuers at a total of K15 hours, plus disbursements. A fee of K15,000.00 had been agreed prior to valuation, but only K8,320.00 was invoiced for work done up to the time of withdrawal of instructions.

It was Mr Ikupu's opinion that the amount of K87.8 million arrived at by the accused as the capital value of the property was "grossly excessive". In relation to the accused's quoted fee of K250,000.00, this witness described it as "ridiculous and unrealistically high" (Exhibit "B"). The readily accepted (by the accused) offer of a reduced fees of K175,000.00 was further characterized as "vastly excessive" (*ibid*).

Whilst he did not conduct valuation of the "Waigani land", Mr Ikupu expressed the opinion, from his previous experience of valuing two properties in the Waigani area and considering the accused's valuation in this case, that the use of square metre rate of K150.00 was "in correct" (sic), and that, therefore, the accused's valuation was "excessive", bearing in mind the unimproved state of the property being valued.

Finally, on the 50-50 sharing of the accused's fees with Mr Maladina, Mr Ikupu believed that the "payment of commission is improper" (*ibid*).

Mr Mark Kelep was involved in the valuation of the renamed Deloittes Tower with an Australian colleague Mr John Purcell, upon instructions from the NPF on 2 June 1999. At the time of inspection and valuation (23 and 24 June 1999) only a few of the floors of the tower block were tenanted, together with the car parking areas. The value of the renamed Deloittes Tower was assessed at K53 million, and, allowing for loss on rentals, this figure was reduced to K35 million (also Exhibit "C" – affidavit).

If fully tenanted, and taking into account naming rights and parking and storage areas, gross annual rental income was assessed at K8 million. The professional fees for this valuation was K18,500.00. It was the professional opinion of this witness that the accused's valuation "appears to be excessive . . .". Similarly the K175,000.00 fees and, indeed, the original K250,000.00 fees. In cross-examination he was asked if his valuation and fees were influenced by the media attention over the matter, and he responded that he was not.

The final "valuation" witness was Mr Kaira Dobi the chief valuer with the Office of the Valuer-General, a 23 year veteran. He was instructed by the acting Valuer-General to conduct a valuation of the NPF Tower upon request by the Commission of Inquiry dated 26 May 2000 (Exhibit "D2"). The request was for valuation of the property as at January 1999.

Following physical inspection the market value of the property was assessed at K40 million as at 31 January1999, employing what he called the Comparative and Capitalisation methods. This amount was made up of: K2.3 million and K37 million for land and improvements respectively (Exhibits "D1" and "D2").

It was Mr Dobi's professional opinion, from "experience and knowledge of the Port Moresby real estate market, in particular the sale and lease of high rise office/shop properties" that the accused's valuation was "high and excessive" (para. 15, Exhibit "D2"). In relation to the fees charged the witness deposed: "This in my view is excessive and unrealistic for a single job and I do not think a professional valuer or the Valuer-General would be successful under normal bidding process quoting this amount" (para. 16, Exhibit "D2").

Opinions about the professional fees came from three other sources also: Salome Dopeke the then Chief Accountant of NPF (affidavit, Exhibit "G"); Noel Wright the then deputy managing director of NPF responsible for finance and investments (letter, Exhibit "E16"); and Rod Mitchell the current chief executive officer of NASFUND (the successor to NPF) (his sworn oral evidence and affidavit, Exhibit "E1").

It was the evidence of Salome Dopeke that upon receipt of the K60,300.00 fees invoice from the accused, payment of the invoice was raised with Mr Wright who expressed concerns saying that the fees were "too excessive". Upon follow up on the fees in November 1998 by both the accused and Mr Herman Leahy, Mr Wright advised the chief accountant that Board approval was required prior to payment. This advice was relayed to Mr Leahy together with the suggestion that the accused should be referred to the Institute of Valuers. Mr Wright wrote to the accused asking him to justify his fees (Exhibit "E16").

The chief accountant was later called into Mr Henry Fabila's office and instructed in the presence of Mr Leahy "to pay the two invoices and Herman will prepare a board (sic) paper to have the board (sic) ratification later" (para. 6, Exhibit "G"). This happened soon after Mr Noel Wright's letter to the accused (supra).

The cheques were raised and signed the same day, and delivered to Mr Leahy. Similar concerns were raised in respect of the K175,000.00 fees for the NPF Tower valuation. It was considered by Salome Dopeke and Noel Wright that for the valuation "on an incomplete Tower. . . the fees were also excessive" (Exhibit "G"). In January 1999, Mr Wright was asked to resign, one month after his 9 December 1998 letter (Exhibit "E16") and raising those concerns about the fees. The chief accountant left the employ of NPF in February 2000.

Salome Dopeke further deposes that the financial delegation limits of the corporate secretary and the managing director were increased to K50,000.00 and K250,000.00 respectively. And that the delegation limits of other managers were removed.

Mr Leahy had recommended to Mr Fabila that "NPF was in no position to resist the payment legally and therefore should approve payments of the K175,000.00 . . ." Mr Fabila approved payments end of January 1999, and the cheques were raised and delivered to Mr Leahy.

Mr Rod Mitchell joined NPF on 5 May 1999 as the chief executive officer following 20 years in the investment fund industry in Australia. He gave sworn oral evidence confirming his depositions in his 18 March 2003 affidavit (Exhibit "E1"). Through him also, a host of documents were tendered without objection, some of which have already been referred to. His evidence touched on the "Tender procedures", stating that any decision on sale or purchase of property has to go through an Investment Committee to the Board (of Trustees) for final decision. And these decisions have to fit in with "Investment Guidelines" which stipulate minimum and maximum funds in any particular transaction. The NPF can only have, it was stated, 20% investment in property; cannot have more.

In relation to valuations, it was Mr Mitchell's evidence that major transactions require the calling of tenders, for instance of valuations over K30,000.00. And for a decision to engage a valuer who quoted his professional fees at over K30,000.00, the matter definitely has to go to the NPF Board of Trustees via a body known as the Audit and Remuneration Committee. It is a committee of the Board.

For best result in tendering within a transparent framework, three to four quotations or bids were said to be necessary. It was the opinion of this witness that a reasonable fee for the valuation of the Deloittes Tower would be no more than K20,000.00. He stated that in a recent valuation of that property (November 2004), fees of K18,500.00 had been paid. Valuation now would be far more complex, he said, because it would involve upwards of 20 to 30 tenants, all on different lease arrangements that had "roll overs" and price adjustments to rent. Therefore, a lot more work would be required in analysis and assessment of a building that was fully occupied. The witness, therefore, found it hard to understand fees in 1998 of K175,000.00 (from the original K250,000.00) when today with 90% occupancy, fees had been considerably less.

It was Mr Mitchell's conclusion that the fees were "excessive". Similarly, fees for the Waigani land valuation. He stated that "No one pays fees that unrealistically high".

In relation to the value placed on the NPF Tower by the accused of about K68 million, the witness said that that was almost double the amounts given by other valuers, that always came to between K35 and K38 million. When the NPF had paid fees of around K18,000.00 for consistent valuations, the K175,000.00 fees was described as "totally unrealistic". It was suggested that today the property would not be valued over K40 million.

Finally Mr Mitchell stated that same pattern of valuation and fees emerged in both the Waigani land and NPF Tower valuations. They were excessive in terms of the market value of the land.

The next witness for the prosecution who had some connection with the NPF, though at the policy decision-making level, was Mr Brown Bai. By virtue of his appointment as Secretary to the Department of Treasury and Finance during the relevant period, he was a member and chairman of the NPF Board of Trustees (established under s 5 of the *National Provident Fund* Act 1980) pursuant to s 6 (1) (a) and (b) of the Act from August 1998 to January 1999.

It was his evidence that all statutory institutions are bound by the *Public Finances (Management) Act* 1995. These institutions are, therefore, required to follow tender procedures and processes for expenditure on capital purchases, and for disposal of their assets. He explained that tenders require public notices inviting interested parties to apply with their bids for the advertised items or services. Likewise where the assets of the institutions are to be sold. There has to be public tender in both instances. Decisions by these statutory institutions in respect of services or assets are made on the basis of these bids, and these have to be formal and in writing.

Summarising the decision-making process in respect of tendering bids, Mr Bai stated that the bids are forwarded (tendered) to the organization or institution concerned, and these are then assessed by the management relative to the objects of the bids; and based on these, and depending on the size of the project or subject matter, the bids go to Supply and Tenders Board, or, in some instances, to the Boards of these institutions.

In respect of the "Waigani land", Mr Bai was referred to his affidavit (sworn 7 July 2003, Exhibit "N") where he had deposed that a proposal for purchase of that land had been put before the Board of Trustees for the first time at its 115th meeting on 6 November 1998.

That was the first time he said he became aware of what came to be popularly known as the "Waigani land deal", and deposed that: "most if not all those Trustees present expressed reservations and strong dissent against the proposal. As presiding chairman I recalled (sic) speaking against the Fund's involvement in land deals like that being proposed unless there is viable and productive use for such investment. My concern was that the Board must avoid tying up funds that cannot generate income for the Fund and the contributors" (para. 6, Exhibit "N"). It was deposed further that, to the best of his recollection, the Board then resolved that a further valuation should be obtained, upon receipt of which it should be circulated to all the Trustees for their decision as to whether to proceed with the purchase or not (para. 9, *ibid*).

At the next Board meeting, the 116th on 22 December 1998, which Mr Bai also chaired, proposal for purchase of the subject land was on the agenda, and the then managing director, Mr Fabila, referred to that proposal received from the leaseholder, *Waim No. 92 Ltd,* to sell to the NPF. Mr Leahy who was present also, presented a report informing the Board members of the advantages of the land under proposal, adverting to such factors as: the prime location, potential development into office and shopping centre. If the proposal were successful Mr Leahy advised that the NPF would "sell down its equity" after purchase to other financial institutions and statutory bodies, thereby increasing the value of the land. It was suggested that an injection of some K3 million would be required for infrastructure development on the land.

The management then recommended to the Board that NPF negotiate a price of around K10 million to purchase the land (para. 12, *ibid*). Paragraph 13 of his affidavit contains the following deposition:

I also recalled (sic) commenting at the meeting that, if the Fund considers it absolutely necessary to acquire the land, then the option is, first to confirm from the Lands Department the current status of the land, particularly whether the Titleholder had complied with the terms and conditions of the lease; and second, in the event that the leaseholder had defaulted, the Board would bid for the land when the Ministry of Lands forfeits the title and calls for open bid through the normal land tender process.

It was Mr Bai's further evidence that following that meeting he had met with several members of the Board when they resolved to oppose the proposed purchase of the Waigani land. He, however, could not recall if that had been a formal Board meeting or an informal gathering of those members who opposed it.

Finally, Mr Bai recalled that the Board resolved that the management investigate the possibility of acquiring the land through the Department of Lands, and that in the event the investigations concluded that the land could not be purchased, that the proposed purchase from *Waim No. 92 Ltd* be rejected outright (para. 15, *ibid*).

In the second week of January 1999, Mr Bai was replaced as Chairman of the Board by the then Prime Minister, Mr Bill Skate, in his capacity as acting Treasurer at the time. Mr Jimmy Maladina was then appointed as Chairman.

The oral evidence of the final two State witnesses deal with, firstly, the accounts the law firm of Carter Newell Lawyers operated, and, secondly, laying down what can be described as the "money trail" in respect of the cheques for K30,000.00 and K87,500.00 that Iori Veraga gave to Jimmy Maladina as his shares of the fees for the two valuations as agreed between them.

Dorothy Misitom (formerly known as Dorothy Sahoto) had been employed by Carter Newell Lawyers between 1991 and early 2003, as an accounts clerk responsible, *inter alia,* for processing of cheque receipts and banking for the firm and partners upon requests. She now works for Blake Dawson Waldron Lawyers. She confirmed her depositions in her affidavit of 3 June 2003 that was tendered without objection (Exhibit "M"), and much of the evidence of Barbara Jean Perks on the number of accounts and

their operations. The firm operates three bank accounts with Australia and New Zealand Banking Group (PNG) Limited (ANZ bank) at its Port Moresby branch: Service company; General; and Trust Account.

Her immediate boss was Barbara Perks. To assist her in banking she had Mr Sinari Kou Karu, a banking clerk. His duties involved the following: doing banking for the firm; delivery of mail; driving company lawyers to and from courts; and general office duties (Exhibit "I").

The service company account pays administrative staff and other administrative costs. The general office account is for the lawyers, the partners, managers and clients. They are paid from funds out of this account. And the trust account is operated solely for the benefit of clients; funds come into and out of it at their requests. Certain banking documents were shown to Ms Misitom (para. 4, Exhibit "M"), and, though she recognized them as passing through her office from the signatories to the firm's cheques, she could not recall (because she deals with numerous cheques in her work) what happened to the individual cheques eventually.

Some of these documents relate to the two cheques Mr Maladina received from the accused: the Westpac Bank (PNG) Limited (Westpac) Port Moresby branch cheque no. 780288 dated 11/12/98, made payable to Cash for K30,000.00 from Veraga Valuation Centre Limited (Exhibit "J2"); and the Westpac cheque no. 780364 dated 29/1/99, firstly written "Cash", then crossed out and in its stead "Carter Newell" written, for the sum of K87,500.00, from Veraga Valuation Centre Limited (Exhibit "J4").

The "Cash" cheque for K30,000.00 was cashed by the banking clerk Sinari Karu at the bank's Gold Card section (Exhibit "J2(a)"). The K87,500.00 cheque (supra) was deposited into Carter Newell Trust account on 29/1/99 with the instruction to 'DO A SPECIAL CLEARANCE TODAY" (Exhibit "K1"). On 4/2/99 a Carter Newell Lawyers Trust account number 1065784 cheque with ANZ bank (Port Moresby branch) for the sum of K87,500.00 (Exhibit "M3(a)") was deposited with other cheques (K127,254.04 deposit slip dated 5/2/99) into Carter Newell (2) General Account Number 1082007 (Exhibit "M3(b)").

On 4/2/99 a Carter Newell (2) General Account No. 1082007 cheque was drawn on the ANZ bank (supra) for the sum of K87,500.00 made payable "cash" (Exhibit "O5"). This cheque was cashed seven days later (11/2/99) at the ANZ bank and "was signed for and collected by Angeline Sariman all in K50 denomination" (para. 3.16, affidavit of Karl Tuwai, tendered by consent, Exhibit "K"). Angeline Sariman was an employed lawyer with Carter Newell Lawyers and is married to Herman Leahy.

Barbara Perks joined Carter Newell Lawyers in September 1995 to set up a new computerized accounting package for the firm and later assumed the duties and responsibilities of Office and Financial Manager. This entailed the daily responsibilities of supervision over the accounts department as well as the hands-on tasks of insurance, taxation and staff training. In relation to accounts, Ms Perks had to do daily checks on bank reconciliation to see if the books balanced and on the transactions if any queries came from somebody or some office to see where errors might have occurred. She was the immediate superior of Ms Misitom (supra).

This witness confirmed the existence and purposes of the three bank accounts the firm operated. She added that the General account is also referred to as "Carter Newell Lawyers (2)" to distinguish it from the accounts of the original Brisbane firm. It is also known as the "Partnership Account", and pays out

disbursements on behalf of clients, renders invoices and receives payments. Moreover, the account pays equity shares to equity partners.

Ms Perks confirmed that neither Iori Veraga nor his company VVC Ltd was a professional client of the law firm. It was her evidence also that for funds, cheques to be paid into accounts, especially the Trust account, clients had to be registered, adding that you "can't just bank monies with no file". Finally, she confirmed that the K87,500.00 cheque received from Iori Veraga was paid into the firm's Trust account initially. Then the firm's cheque for this amount drawn on its General account and made payable "cash" was cashed on 11 February 1999 by Angeline Sariman (her signature and other notations on the back of the cheque) after the bank had called Jimmy Maladina to confirm that the cheque could be cashed (see Exhibit "O", police statement of the witness dated 30 June 2003, tendered without objection).

In relation to the processing of cheques and cashing of cheques, Ms Perks stated as follows (Exhibit "O"):

After signing cheques these are returned to the accounts department where they are processed in accordance with instructions from the work author/lawyer/partner. If cash cheques are actioned by our staff all cash monies are firstly checked by two accounts staff and then given to the Partner/Lawyer as per this (sic) request. . .

The "money trail" demonstrated by the foregoing bank documents are confirmed by the affidavits of two bank officers that were tendered on behalf of the State case without objection: firstly, the affidavit of Edward Tau sworn 26 March 2003 (Exhibit "J") and, secondly, the affidavit of Karl Tuwai (supra). Mr Tau is the Investigations Officer with Westpac bank (Port Moresby branch), the bank and branch of the accused's company VVC Ltd. Mr Tuwai is the manager of Banking Services with ANZ bank.

Pursuant to the service on their respective banks of Search Warrants by the Police in 2002 and 2003 both officers conducted investigations into the accounts of VVC Ltd and Carter Newell Lawyers and the operations of and transactions in these accounts during the relevant period.

The record of interview conducted by the police with the accused on 31 July 2003 was tendered without objection on behalf of the State case and became Exhibit "F".

Evidence: Defence Case

The principal and crucial dates and events relied upon by the State and the documentary evidence that accompany some of these are facts that are not in dispute (supra). The only points of contention in respect of these are as to what should be made of these, what implications, if any, these have in relation to the charges of conspiracy and misappropriation; what inferences, if any, should be drawn, if at all, from these.

Thus, the sworn oral evidence of the accused mainly confirmed those undisputed facts, and, in the process, attempting to deflect any adverse inferences to be drawn from these. The entire case for the

Defence is that the prosecution case put forward through the sworn oral evidence of its eight witnesses and the 104 documents that had been tendered by consent do not prove, firstly, a conspiracy to defraud, and, secondly, misappropriation of funds, as alleged.

Briefly put, it was the evidence of the accused that in early October 1998 Jimmy Maladina telephoned him and asked him to go to his office. The subject-matter of the summons was not discussed over the telephone. The two had never met before this telephone summons, nor had there been any previous or current business dealings or connections between them.

When the accused got to the offices of Carter Newell Lawyers and saw Maladina, he was told to do valuations on two properties, the "Waigani land" and the "NPF Tower" (supra). When he enquired as to "where the instruction was coming from", Maladina said that it was coming from the NPF. After which Maladina then told him that he required 50% of the fees. Whilst the accused said he was reluctant to share his fees with Maladina, he agreed because, otherwise, he "might not get those two projects".

The meeting was said to last some 15 minutes, and there were no other matters discussed then, not even about the fees, as to who would be paying those. The accused characterized Maladina's 50% share of the fees, not as "commission" for engaging him, but "work referrals" which he described as where "other real estate companies when valuations go through them, they ring me to do the valuation and after the valuation is completed I give them fee out of my fees". He said that this was a normal practice. But he admitted later that he had never received any work referrals from lawyers or law firms such as the one with real estate agents before.

It was the further evidence of the accused that valuation work for or on such prestigious properties as the ones given to him by Maladina did not come often to valuers in this country and that, therefore, this was "a very rare opportunity". That is why he had been concerned that he might not get the jobs if he did not agree to share his fees with Maladina. As at this meeting he knew that Maladina was not the chairman of NPF. At that time also, he did not know that Herman Leahy was the corporate secretary of NPF, nor that Henry Fabila was the then managing director. At his meeting with Maladina the names of these two officers were not mentioned, the accused maintained.

Two weeks after the meeting with Maladina, the accused received from Herman Leahy facsimile letter dated 19 October 1998 requesting quotation on his fees for full valuation of the "Waigani land" (supra). This elicited same day facsimile response from the accused, quoting the sum of K60,300.00. This quoted fee was formally accepted by Henry Fabila in his 21 October 1998 letter (faxed) instructing the accused to proceed to undertake full valuation. His valuation report (Exhibit "E11") containing the assessed value of K14.7 million was dated 20 October 1998, after having done a physical inspection of the property and compiling the report.

Similar letter of request for quotation of fees dated also 19 October 1998 from the corporate secretary was received by the accused (by facsimile transmission) in respect of the "NPF Tower". The accused responded the same day quoting his fees at K250,000.00. In his letter of 21 October 1998, the managing director advised the accused that the quoted fee of K250,000.00 was "too high" and that he could proceed with valuation of the property if he accepted lesser fee of K175,000.00. The accused responded, accepting the fee of K175,000.00 and proceeded to value the property, completing it on 20 January 1999. The value of the property was assessed at K87,854,500.00.

He was then paid his fees for the two valuations, by NPF cheques received from Jimmy Maladina as described above (see "Facts not in dispute"). The accused maintained that apart from the written correspondence between the two NPF officers and him, no verbal communications between them ever took place.

In relation to the valuations and the fees for these, the accused maintained these were not too high or excessive. The valuations were properly conducted and assessed, taking into account proper factors. And the fees were based on the values assessed of the respective properties. He insisted that, firstly, there had been no discussion with Maladina about assessing high valuations from which the fees charged would be based for them to share on a 50 – 50 basis, and, secondly, that, in relation to the rejection of the K250,000.00 and the offer of the lesser fee of K175,000.00, he did not dispute it and readily accepted because: "That was the counter-offer and I accepted. That's their reply".

The Defence case, therefore, is that, firstly, there is no evidence of conspiracy between the accused and the alleged co-conspirators, and, secondly and similarly, State has not produced any evidence of dishonesty in relation to the two valuations and the two fees, and, therefore, no evidence of misappropriation. What happened here, the accused says, was a normal business undertaking, an agreement, to provide the services of valuation for reward. And just as there is no evidence that the accused met with Henry Fabila and Herman Leahy and/or discussed with them his fees, communication being by correspondence only, there is no evidence of Jimmy Maladina communicating with Henry Fabila and Herman Leahy in respect of getting the accused to provide quotes on fees and the amounts of these.

The Law: Conspiracy

Section 407 of the *Criminal Code Act* (CCA) makes provision in respect of *conspiracy to defraud* in the following terms:

> (1) A person who conspires with another person –
>
> > (a) by deceit or by fraudulent means to affect the market price of any thing publicly sold; or
> > (b) to defraud the public, or any person (whether or not a particular person); or
> > (c) to extort property from any person,
>
> is guilty of a crime.
>
> Penalty: Imprisonment for a term not exceeding seven years.
>
> (2) A person shall not be arrested without a warrant.

As to conspiracies generally, the CCA makes provisions for these in ss 515 – 517: s 515 Conspiracy to commit crimes; s 516 Conspiracy to commit other offences; and s 517 other conspiracies.

It is surprising that there appears to be a dearth of authority in this jurisdiction, and the law is as briefly stated in the cases of: *The State v. Tanedo* [1975] PNGLR 395 and *The State v. Sebulon Wat and Miskus Maraleu* [1994] PNGLR 582, both National Court decisions. In view of this, I wish to take the liberty to and avail of the opportunity to restate the law fuller with assistance from a discussion of the pertinent case law from both England and Australia.

Osborn's Concise Law Dictionary (6th ed) defines "conspiracy" as:

The agreement of two or more to do an unlawful act, whether criminal or tortious in its nature, or to do a lawful act by unlawful means, whether the act is committed or not.

The new edition (1977) of the *Oxford Dictionary of Law* defines the term in the following manner:

An agreement between two or more people in a manner that will automatically constitute an offence by any one of them (for example, two people agree that one of them shall steal while the other waits in a getaway car). The agreement is itself a statutory offence, usually punishable in the same way as the offence agreed on, even if it is not carried out.

Halsbury's Laws of England (4th ed) Vol 11 (1) 1990, provides the common law definition in the following terms:

A person who agrees with one or more other persons by dishonesty:

> (1) to deprive a person of something which is his or to which he would or might be entitled; or
>
> (2) to injure some propriety right of a person

is guilty of conspiracy to defraud at common law.

Thus, the offence of conspiracy consists of an agreement between at least two persons to do an unlawful act or a lawful act by unlawful means. This is the classic definition that owes its origin to Lord Denman CJ in *R v Jones* [1832] EngR 870; (1832) 110 ER 485.

The guilty act, the *actus reus*, of the offence of conspiracy is the agreement to do an unlawful act, or a lawful act by unlawful means. The prosecution must prove the existence of an agreement. The physical acts by which the conspirators formed the agreement are the relevant facts. Once the agreement is formed, the crime is committed. It is to be noted that the prosecution need not prove that there was an

agreement regarding the way in which the unlawful act was to be performed, only that there was agreement to perform the unlawful act.

The *mens rea* for 'conspiracy' is similar to 'attempt', in that anything less than the intent to perform an unlawful act will be insufficient. Thus, 'recklessness' will not ground liability: *Siracusa* (1990) 90 Cr App R 340. The prosecution must prove what is termed 'a community of purpose', that is to say:

(a) the intent to perform an unlawful act;

(b) the intent to agree with one or more members of the group.

The learned author of *Carter's Criminal Law of Queensland* (10th ed. by Jerrad, Butler & Shanahan, Butterworths, 1997), from which much of our criminal law is borrowed, provides a statement of this offence thus: The essence of the offence of conspiracy lies in the "agreement of minds" and performance of the agreement is not a requisite of the offence. Evidence of acts following the agreement may be the only available proof that the agreement was made, but it is the agreement and not the evidence that constitutes the offence: *R v Gudgeon* [1995] QCA 506; (1995) 133 ALR 379 (CA). It was held in the English case of *Scott v. Metropolitan Police Commissioner* [1975] AC 819, that the object of a conspiracy must not be confused with the means by which it is intended to be carried out.

As these and many other cases going back, at least, as far as the 1832 case of *R v Jones* (supra) have repeatedly emphasized, conspiracy is an offence based wholly on agreement. The agreement may be a simple case of a meeting of minds, around a table to more complex 'chain' and 'wheel' conspiracies: *Australian Criminal Justice*, by Findlay, Odgers and Yeo (OUP, Melbourne, 1994, p. 35).

To prove the existence of a conspiracy it must be shown that the alleged conspirators were acting in pursuance of a criminal purpose held in common with them: *Carter RF, Criminal Law of Queensland, 3rd ed;* (1969), Butterworths, p. 473. The learned author added further:

The conspirators may join in the conspiracy at various times; any one of them may not know all the other parties, but only that there are other parties; and any one may not know the full extent of the scheme to which he attaches himself; but each alleged conspirator must know that there is in existence a scheme which goes beyond the illegal acts which he agrees to do and must attach himself to that scheme. The kind of conspiracy known as a 'wheel conspiracy', where each conspirator is said to conspire with a central villain but not with the other named conspirators, is not known to the criminal law: *R v Griffiths* [1967] 2 All ER 448; [1966] 1 QB 598.

The important case of *Doot* [1973] AC 807 (HL) involved five Americans convicted of charges including conspiracy to import cannabis resin into England. Pursuant to a plan made either in Belgium or Morocco they had bought the cannabis in Morocco and concealed it in two vans which were brought to England to be shipped to the US. The cannabis were found by customs officers who searched the vans in England. The Court of Appeal quashed the convictions, holding that conspiracy was completed when the agreement was made and as the agreement was made abroad there was no jurisdiction to try them in England. But the Court of Appeal granted the Director of Public Prosecutions (DPP) special leave to appeal to the House of Lords.

Viscount Dilhorne referred to the earlier case of *Aspinall* (1876) 2 QBD 48 where Brett J A had said (at 58):

In order to apply these rules to the present case it is necessary to determine what are the essential facts to be alleged in order to support a charge of conspiracy. Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed.

In considering and determining whether or not, as the Court of Appeal had concluded, the conspiracy (to import cannabis resin into England) was completed when the agreement was made, and as the agreement was made abroad there was no jurisdiction to try and convict the five Americans in England, Viscount Dilhorne stated (at 822):

I see no reason to criticize this passage unless it be interpreted to mean that the crime, though completed by the agreement, ends when agreement is made. When there is agreement between two or more to commit an [823] unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of an agreement. It will continue so long as there are two or more parties to it intending to carry out the design . . .

If it is, as in my opinion, it is a continuing offence then the courts in England, in my view, have jurisdiction to try the offence if, and only if, the evidence suffices to show that the conspiracy whenever or wherever it was formed was in existence when the accused were in England. Here the acts of the respondents in England, to which I have referred, suffice to show that they were acting in concert in pursuance of an existing agreement to import cannabis, to show that there was then within the jurisdiction a conspiracy to import cannabis resin to which they were parties.

All five Law Lords agreed that the DPP's appeal should be allowed. As their Lordships' judgments enunciate so clearly the law on the subject, I take further liberty to respectfully reproduced hereunder two more extracts from that decision. Lord Pearson stated (at 827):

A conspiracy involves an agreement expressed or implied. A conspiratorial agreement is not a contract, not legally binding, because it is unlawful. But as an agreement it has three stages, namely (1) making or formation (2) performance or implementation (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place: *Aspinall*, *2 QBD*, 48 per Brett JA; at 58 – 59. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be. (underlining mine).

Lord Salmon's judgment expressed similar sentiments on the continuing effect and influence of conspiratorial agreements. His Lordship (at 835) said:

My Lords, even if I am wrong in thinking that a conspiracy hatched abroad to commit a crime in this country may be a common law offence because it endangers the Queen's peace, I agree that the convictions for conspiracy against these respondents be supported on another ground, namely, that they conspired together in this country notwithstanding the fact that they were abroad when they entered into the agreement which was the essence of conspiracy. That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed.

The 'chain' and 'wheel' conspiracies adverted to already (Findlay et al, supra) are the two more complex ways of forming conspiratorial agreements, highlighting the principle that each party need not speak to all the other parties. Thus, as was explained in the English case of *R v Meyrick and Ribuffi* [1929] Cr. App. Rep. 94 (CCA), in a 'wheel' conspiracy, there is: 'one person . . . round whom the rest revolve', and in a 'chain' conspiracy: 'A communicates with B, B with C, C with D, and so on to the end of the list of conspirators'.

It is not necessary, therefore, in order to prove conspiracy, that there should be shown to have been direct communication between each conspirator and every other, provided that there is a design which is common to all of them. The overall intention of the conspirators is, thus, relevant, rather than the conspirators' relationship to each individual overt act relied upon: *Kalajzich and Orrock* (1989) 39 A Crim R 415.

Australian case law on the subject has of course relied on the authoritative decisions of the earlier English courts, some of which I have canvassed here. There is, finally, one other case that I wish to refer to as being pertinent to the discussion here in relation to the case before me. And that is the case of *R v Churchill* (No. 2) [1967] 1 QB 190 which went to the House of Lords from the Court of Criminal Appeal as *Churchill v Walton* [1967] 2 AC 224, where their Lordships in reversing the decision of the Court of Criminal Appeal, held that:

. . . on a charge of conspiracy to commit a statutory offence that is an absolute offence, the question essential to the determination of the issue whether there was agreement to do an unlawful act is still "what did the parties agree to do?", if what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realize that such an act was a crime; but if on the facts known to them what they agreed to do was lawful, they are not rendered artificially guilty of agreeing to do an unlawful act by the existence of other facts, not known to them, giving a different and criminal quality to the act agreed on.

The Law: Misappropriation

Section 383A (1) of the CCA defines the offence of *misappropriation* as follows:

(1) A person who dishonestly applies to his own use or to the use of another person –

(a) property belonging to another; or
(b) property belonging to him, which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or on account of any other person,

is guilty of the crime of misappropriation or property.

The law is well settled in this jurisdiction as to what the constituent elements of this offence are from a line of decided cases over the years. These are restated hereunder as follows:

(a) dishonesty;
(b) application to own use or use of another; and
(c) property must belong to another.

The prosecution must prove these elements beyond reasonable doubt in order to find the accused guilty. The cases of *Brian Tindi Lawi v The State* [1987] PNGLR 582, *The State v Gabriel Ramoi* [1993] PNGLR 390, and *The State v James Makario* (1990) Unreported N862, amongst many others, emphasise these principles.

Conclusion

The conduct of the two valuations by the accused were flawed from the outset. Correct or proper procedures or methodologies for assessing the market value of the particular description, nature and status of each of these two properties were not undertaken. The pertinent factors or considerations applicable to each property do not seem to have been heeded or taken due account of.

In the case of the "Waigani land", it was a large tract of unimproved, undeveloped land over which an Urban Development (mixed hotel and commercial) Lease had been granted by the Land Board only the month before to a recently incorporated (26 September 1997) company. Thus, the value of the unimproved leasehold interest rather than the market value would have had to be assessed. Even the preparatory improvement covenants such as the obtaining of the necessary planning permission for subdividing and zoning the land had not taken place. And of course the other covenants and conditions for substantive and substantial infrastructural improvements had yet to be undertaken.

Under these circumstances, the valuation of this property would appear to have been over-exaggerated, so much so that the physical inspection of the land was supposed to have been done on the very day that the valuation report was compiled and submitted, but one day after receiving and responding to a written request from Herman Leahy to quote his fees for both properties, and one day before receiving the formal written instructions from Henry Fabila to proceed to full valuation of both the land and the high-rise building.

The "NPF Tower" was incomplete, still under construction when valued by the accused. It was not expected to be completed before April 1999. Thus, the tower building was not fully tenanted and

occupied when valued, such that the task would have been far more complex because it would have involved, in the evidence of State witness Rod Mitchell, "upwards of 20 to 30 tenants, all on different lease arrangements that had roll-overs and price adjustments to rent". Consequently, a lot more work would have been required than that confronting the accused.

I find that the values assessed of the two properties were over-exaggerated by the accused, and were thus excessive and unreasonably high. Similarly the fees that were quoted and paid for these valuations.

I accept the evidence of the four qualified, experienced and still-practising valuers who gave evidence for the State. They, as earlier noted, came with a combined accumulated practical experience of some 123 years. They had no reason to not give their proper and considered professional opinions. And I reject the suggestion put to them by the learned counsel for the accused that their own valuations and opinions on these and fees charged by the accused were heavily influenced by the media attention on and coverage of the matters that went before a Commission of Inquiry.

One of the valuers conducted an actual valuation of the "Waigani land"; the other three undertook actual valuation of the "NPF Tower", all at the behest of either the Commission of Inquiry or the new chief executive officer. Thus, in all instances it is not as if they were just expressing their respective professional opinions only on the accused's valuation reports without having physically inspected the subject properties themselves and applied the methodologies and pertinent factors acceptable in the profession.

I accept the State evidence that, firstly, the rate per square metre of both the unimproved land and untenanted and unoccupied floor spaces on the incomplete tower block were too high and exaggerated, and, secondly, thereby leading to the quotation (and payment) of such exorbitant professional fees. In this respect I discount the accused's attempt at explanation as not constituting any justification at all. The accused had a real reason to be less than frank in his evidence. I repeat, his two valuations were seriously flawed, and his professional fees had no logical practical connection with reality.

In support of my findings on these, I rely also on and accept the evidence of Rod Mitchell, the present managing director of the renamed Nasfund. Though not a valuer by profession, he came to the Fund in May 1999 with 20 years experience in investment fund industry in Australia which involved constant association and dealings with people in the real estate industry. He was, therefore, conversant with the property market and familiar with the practices and culture of the industry. His overall opinion that the fees were excessive confirms and gives credence to the consistent opinions of the four valuers. To use his phrase, "No one pays fees that unrealistically high" for the valuation of the two properties back in 1998 in the state they were as described (supra). Support for this conclusion also comes from the concerns raised about those fees by Noel Wright in his letter to the accused on 9 December 1998 (Exhibit "E16"). Mr Wright was the then deputy managing director, who was asked to resign soon after these concerns were raised. Then there is also the concerns raised by Mr John Jeffrey in his Statutory Declaration of 15 September 2003 (Exhibit "R"). He had been appointed a Trustee on 20 April 1999, and raised his concerns about this and other associated matters at the Board's meeting on 29 July 1999 under the new chairmanship of Jimmy Maladina. Following this meeting John Jeffrey co-authored a *Special Report* with the new managing director, Rod Mitchell, which went before the 8 October 1999 Board meeting.

In relation to the engagement of the accused to undertake the two valuation jobs, firstly, Jimmy Maladina had no authority to procure the services of the accused. He was neither officially associated with the NPF

management or its Board of Trustees, nor was he a legal adviser or representative of the Fund or its Board. He had no authority, therefore, to engage in any discussions or negotiations with anybody, the consequence of which would be to bind the Fund or its Board of Trustees to future legal liabilities and obligations. He was, however, "the beneficial owner of Waigani land" (Exhibit "R", supra).

The fact that some two weeks later formal instructions came from the Fund via its managing director (after the request for quotation of fees from the corporate secretary) is not of moment as far as the initial contact by Maladina is concerned. As will be discussed in due course here, the "dye was cast", as it were, and Messrs Leahy and Fabila merely went through the motions of purported regularity, in pursuance of the interests of what the learned counsel for the State characterized as "a little network" in operation.

Secondly, the type of professional services the accused was engaged to provide, and extent of the reward that he sought (by his quotations) required the attention and approval of the Board of Trustees. I accept the evidence of both Mr Bai and Mr Mitchell that tenders ought to have been called on the two valuations. As it was, the procedures and processes in place had not been undertaken or complied with so that the Board's attention, information, consideration and final determination on the expenditure of such large sums of money were avoided or evaded. I find that this was no mere inadvertence on the part of the Fund management, more particularly the corporate secretary and the managing director. This was deliberate.

The evidence on this demonstrates a pattern of eagerness to "cut corners", keep matters away from the formal official attention and deliberations of the Board, the legitimate legal authority on such matters. So much so that, firstly, the excessively high fees that had been quoted before the actual valuations ever took place, let alone submitting the reports on these, were readily accepted by Messrs Leahy and Fabila. And, secondly, to continue to deliberately keep matters away from the Board, the fees had to be approved for payment by these two officers. Thus, as the evidence of Salome Dopeke demonstrates, and which I have no reason to discount or disbelieve, the financial delegation limits of the corporate secretary and the managing director were increased to K50,000.00 and K250,000.00 respectively in order for them, more especially the latter, to sanction the payment of the excessive fees.

In the absence of any evidence to the contrary, I am satisfied that increased limits of the financial delegation were instituted once again without the Board's notice and approval, and in order to accommodate the easy payment of the exorbitant fees. No wonder then that the managing director declined to accept the initial K250,000.00 quotation of fees, and in its stead suggesting that the accused accept the reduced fee of K175,000.00 (letter Exhibit "E24" dated 21 October 1998). Put simply, the quoted fee for the "NPF Tower" job is, in excess of the managing director's financial authority so a lesser figure is suggested, after which the financial limit is increased to accommodate.

In respect also of the demonstrated secrecy in relation to the accused's valuations amounts and fees, as far as the Board of Trustees is concerned, there was the added element, I would suggest, of the correspondence by the corporate secretary and the managing director with the accused that, though on the Fund's letterhead, bore no file reference(s). So it would appear that the entire business relationship with the accused was conducted without an official file having been opened on it, in the usual way for record purposes in any self-respecting well-run organisation.

Another instance of secrecy associated with this whole affair I find is the almost indecent haste in accepting the fees (before work was done) and instructing the Fund's accounts branch, specifically the

then Chief Accountant Salome Dopeke, to process the payments. At the time the deputy managing director (Noel Wright) was raising concerns about the excessive fees, the Chief Accountant was called into Mr Fabila's office and instructed in the presence of Mr Leahy "to pay the two invoices and Herman will prepare a board (sic) paper to have the board (sic) ratification later" (supra). It will be noted that payments were made by cheques raised in favour of the accused's company and delivered to Herman Leahy.

I find from the State evidence, confirmed by the accused's own evidence, that these cheques, instead of being despatched to the accused pursuant to the usual internal accounts department procedures in such matters, ended up in Jimmy Maladina's possession. He then rang the accused to come to his office to pick up the cheques. And I accept the State evidence, once again confirmed by the accused's own evidence that 50% of the proceeds of each of these cheques went to Maladina as his share of the fees as agreed between them. An irresistible question here is, if everything was aboveboard, legitimate and regular, what business had, firstly, a highly-placed member of the Fund's management in taking possession of cheques intended for the Fund's purported outside service(s) provider, a customer, and, secondly and similarly, someone who at that time had no official, management or professional connection with the Fund? There was no other legitimate reason for the accused to hand these cheques over to Jimmy Maladina, either for Jimmy Maladina himself or Carter Newell Lawyers.

The "money trail", therefore, started with the corporate secretary, travelled to Jimmy Maladina onto the accused, with the half share of the proceeds of the two cheques returning to Mr Maladina via the accused's company cheques. On the two occasions the accused was summoned to Mr Maladina's office to pick up his fees cheques, the accused went armed with his company's cheques for Mr Maladina in the amounts that constituted 50% of the fees.

I am satisfied that the fees cheques went from Mr Leahy to Mr Maladina pursuant to a prior arrangement so that Mr Maladina could get his half share of the proceeds of those cheques. I would suggest that if the cheques went direct to the accused there might have arisen problems with Mr Maladina getting his 50% shares, and enforcing an agreement such as that between the two of them might have posed some legal problems.

I am satisfied that the engagement of the accused was not a "work referral" as suggested by the accused. In any case, if such were the case and was a legitimate part of the practice of valuation, its confirmation would have been put to State witnesses in cross-examination to accord them the opportunity to comment, to respond, in compliance with the rule in the oft-cited case of *Browne v Dunn*. As it was, the suggestion was a recent invention on the part of the accused to deflect the State contention that the fees sharing agreement was contrary to the Valuers' Code of Ethics and an illegal commission for Mr Maladina.

I am further satisfied from the State evidence that the "money trail" in respect of K87,500.00, initiated by Herman Leahy, proceeded through Jimmy Maladina to the Carter Newell Lawyers Trust Account, from which it found itself into the law firm's General account. As evidenced from the affidavits of bank officers Edward Tau (Westpac bank) and Karl Tuwai (ANZ bank), the transactions enabling the "money trail" resulted in a cheque for K87,500.00 (drawn on the firm's General account) being cashed by Angeline Sariman (supra). I am satisfied that this money went to Jimmy Maladina as originally intended.

This "money trail" led to, I would suggest, what is described as "money laundering" on the part of Carter Newell Lawyers. The *Oxford Dictionary of Law* defines this process as:

Legitimizing money from organized or other crime by paying it through normal business channels.

The *Oxford Dictionary of Economics* (John Black ed; 1997) defines it this way:

The use of often complex series of transactions to conceal the ultimate source of money holdings. It is widely used to camouflage receipts from illegal activities, including drug trafficking, corruption, fraud, and tax evasion.

So it involves processing money acquired illegally (as by theft, drug trafficking etc.) so that it appears to have come from a legitimate source.

The cheque for K87,500.00 that the accused gave to Jimmy Maladina upon receipt of the NPF cheque for K175,000.00, as his (Maladina's) 50% share as agreed, was deposited into the firm's Trust account. Neither the accused nor his company was a client of the law firm. The cheque was changed from "cash" to "Carter Newell Lawyers" on the instruction of Maladina. Thus, I am satisfied that what was done in relation to the K87,500.00 cheque by Carter Newell Lawyers was "money laundering" as defined, in an endeavour to continue the secrecy surrounding the valuations and the fees charged. Thus, the firm's cheque for K87,500.00 made payable "cash" drawn on its General account to appear as some legitimate entitlement of the managing partner.

Now, it only remains for the court to decide, on the facts as I have found, and on those not in dispute at the trial, whether or not these facts, and the circumstances they present, either directly or inferentially prove beyond reasonable doubt the charges against the accused.

The law on conspiracy has been, with respect, adequately canvassed with the assistance of the pertinent case law and academic treatment. Was there an agreement between the accused and the three alleged co-conspirators to defraud the NPF as charged in counts 1 and 2 of the indictment? By the very nature of an offence such as conspiracy rarely if ever are there any direct evidence of an agreement between persons to involve in criminal activities. The rare occasions when direct evidence may be available is when a co-conspirator admits the offence and turns State evidence. Direct evidence may also be available from electronic eavesdropping. But this source is often fraught with uncertainty as such evidence may be liable to successfully challenge on human rights arguments, on the issue of admissibility.

Thus, as the case law demonstrate the success of a State case may depend on circumstantial evidence, on reasonable inferences that are capable of being drawn from the facts as found by the court.

It is the respectful opinion of the court that the exhaustive canvassing of and discussion on the factual circumstances surrounding these charges have sufficiently laid the factual basis upon which reasonable inferences can be drawn. It is, therefore, the judgment of this court that there was an agreement to defraud the NPF of its funds. The engagement of the accused by Jimmy Maladina in the circumstances it happened, as repeatedly adverted to, bear support and credence to this conclusion. I am satisfied beyond

reasonable doubt that when the accused met Maladina he knew what it was all about and how he was to proceed. The assessment of the values of the two properties and the quotation of the excessively high fees was for the purpose of defrauding the NPF.

I am satisfied beyond reasonable doubt that before Maladina's meeting with the accused, there had been an agreement with both Herman Leahy and Henry Fabila about this criminal enterprise. These two officers were to be the conduits for the successful prosecution of the conspiratorial agreement. The events which took place throughout the entire affair did not, in my opinion, take place by accident. There was here the hallmark of *preconcert*. These events occurred pursuant to a pre-existing, antecedent, agreement.

The conspiracy also depended on the accused performing his part by over-pricing or exaggerating the values of the two properties and charging excessive fees to be shared with Jimmy Maladina. The fees had to be large enough to be worth sharing. Messrs Leahy and Fabila were important elements, conduits, in the conspiracy. They were in the position to ensure secrecy, non-compliance with tendering requirements, keep the Board in the dark, and ensure further that the fees quoted were accepted, thus committing the Fund to paying them, and paying them quickly.

I am satisfied that the facts here properly and reasonably lead to effectively discounting any suggestion that the accused was here "an innocent bystander" as his counsel describes, and that whatever may have been agreed between the other three had nothing to do with him. It is my respectful judgment that the evidence as repeatedly canvassed here lead to the inescapable conclusion that there was here a conspiracy to defraud.

In relation to the charges of misappropriation, the detailed facts once again satisfy me to the necessary degree that the State has discharged its onus, an onerous one at that, of making out the four counts. The funds of the NPF were obtained by fraud and illegally shared with someone who had no legitimate right to them. The accused did not earn the K60,300.00, nor did he earn the K175,000.00 fees. He obtained these funds by deceit as defined. The three constituent elements of the offence of misappropriation have been satisfied. The element of dishonesty is ably demonstrated by the facts surrounding the secrecy with which the two officers of the Fund performed their respective parts. It is sufficiently demonstrated by the assessing of exorbitantly high values on the two properties and charge excessive fees that had no justification. It is further demonstrated by what happened once the cheques were raised and signed, and handed over to the corporate secretary.

The funds were the funds of the NPF. They remained the property of the Fund because neither the accused nor Jimmy Maladina had any legitimate claim over them. Thus, the sharing of the fees between the accused and Jimmy Maladina constituted the dishonest application to his own use and to the use of another person, property belonging to another as defined.

It is the judgment of this court that the accused, Iori Veraga, is found guilty as charged, and I formally order his conviction on Counts 1, 2, 3, 4, 5 and 6 of the indictment.

Lawyer for the State : The Public Prosecutor
Lawyers for the Defence : Henaos Lawyers