REPORT ON ENQUIRY INTO DEALINGS IN THE VOTING SECURITIES OF GULF RESOURCES PACIFIC LIMITED (FORMERLY CITY REALTIES LIMITED) DURING THE PERIOD NOVEMBER 1989 TO JANUARY 1990

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1.0 Introduction

1.1 On 19 March 1990 the Commission announced that it would undertake an enquiry into the trading in the listed securities of City Realties Limited ("CRL") on the New Zealand Stock Exchange in the period November 1989 to January 1990 inclusive for the purpose of ascertaining whether any insider of that company has traded in the securities during that period. In particular the Commission proposed to enquire whether:

(a) a breach of Part I of the Securities Amendment Act 1988 occurred in the trading of CRL shares during the period under enquiry;

(b) Mr David John Rowland ("Rowland") and Garofil Business S.A. ("Garofil"), a company incorporated under the laws of Panama, were insiders in terms of the Act who had inside information and who bought securities as those terms are defined in the Act.

2.0 Background

2.1 During the period October 1989 to March 1990 the Commission conducted an enquiry in relation to the voting securities of CRL, a public company whose shares were listed on the New Zealand Stock Exchange. CRL was principally involved in the holding and development of commercial properties in the main centres in New Zealand. In particular the Commission enquired whether any person other than Zelas Enterprises Limited ("Zelas"), a shelf company with

an unpaid capital of $100, had acquired a relevant interest in 70.42% of the voting securities of CRL during the period October and November 1989. Zelas had given a substantial security holder notice on 16 October 1989, notifying that it had acquired beneficial ownership in these voting securities.

2.2 In the course of its enquiry the Commission determined that an approach was made to certain shareholders of CRL on 9 August 1989 on behalf of Gulf Resources and Chemical Corporation ("Gulf"), a Delaware corporation whose shares were listed on the New York Stock Exchange. The Commission ascertained that an "indicative offer" dated 20 September 1989 was made to Tower Corporation Limited to acquire its controlling parcel of shares in CRL which Tower believed had come from a subsidiary of Gulf.

2.3 The chief executive of Gulf at that time was a Mr David John Rowland. Rowland is a United Kingdom citizen domiciled in Monaco. At the relevant time through a private firm, Monaco Group Fund S.A., Mr Rowland held a substantial interest in a United Kingdom company called Inoco plc, which in turn owned 37% of Gulf.

2.4 During a visit to New Zealand in May 1989 and again from 30 September to 6 October 1989 Mr Rowland inspected a number of commercial properties in various centres. During his visit to New Zealand in May 1989 he had negotiated for the purchase of the Triangle complex in Christchurch. It is not clear which company Mr Rowland was then acting for but the property was later moved to Gulf. Further properties were acquired on behalf of Gulf during his second visit in September-October 1989. During the course of that visit discussions also took place with Tower regarding the purchase by Gulf of Tower's controlling shareholding in CRL. It appears,

however, that before leaving New Zealand Mr Rowland had further thoughts about the acquisition by Gulf of an interest in CRL, and before his departure on 6 October 1989 Mr Rowland informed a New Zealand chartered accountant, Mr McKenzie, who had been acting as his agent in New Zealand, that Gulf would not proceed with the purchase of CRL's shares, and this was later confirmed in instructions received after Mr Rowland left New Zealand.

2.5 Mr McKenzie, with others, proceeded to incorporate Zelas on 13 October 1989 and Zelas took over the negotiations for the acquisition of the Tower shares. On 16 October 1989 an agreement was entered into between Tower and Zelas. Funding was arranged through a Mr McGoldrick, who arranged a deposit of $2 million from monies which he had on deposit with Mr Rowland, with whom he had a close business relationship. The monies were lent on a non-recourse basis. There was no documentation. The intention was that Mr McGoldrick would proceed to place Zelas' CRL shares with institutions abroad.

2.6 On 16 October 1989 Zelas gave a substantial security holder notice under the Securities Amendment Act 1988, notifying that it had acquired a beneficial ownership in 70.42% of the voting securities of CRL. On 6 December 1989 Mr C.W. McKenzie, a director of Zelas, was appointed to the Board of CRL.

2.7 Mr McGoldrick's efforts to place the Zelas shares with institutions abroad were not successful, and in order to provide more time for that placement Gulf agreed to advance $16.7 million to Zelas to enable payment to be made of a further sum which was due under Zelas' agreement to purchase the shares from Tower and loan documentation was entered into between Zelas and Gulf. The advance was made on or about 11 December 1989 and on 15

December Mr Rowland was appointed to the board of CRL by Zelas to protect the interests of Gulf.

2.8 On 15 December 1989 Gulf gave a substantial security holder notice under s.5(1)(f) of the Securities Amendment Act 1988 notifying a relevant interest in the voting shares of CRL as a lender under the loan agreement.

2.9 In the meantime, in late November or early December Gulf took renewed interest in using CRL as a vehicle for the acquisition of the commercial properties which Gulf had purchased in New Zealand, with Gulf taking a controlling equity position in the company. We quote from the findings made by McGechan J. in the High Court in the case referred to later in para. 2.12 of this Report:

> "Mr McKenzie and Mr Whittaker were active in following up intended property acquisitions on behalf of Gulf over the intervening period and by the end of November some 25 properties to a value in excess of $250 million were under purchase. It is perhaps hardly surprising that somewhere around the end of November or more probably early in December, Mr McGoldrick broached the possibility of Gulf re-interesting itself in CRL as a property vehicle. It was Mr McGoldrick who raised the possibility. It was that Gulf would insert its properties into CRL and CRL would issue shares and cash and take over indebtedness in exchange. Zelas would place its 70% holding with international institutions through Mr McGoldrick as intended and there would be benefits all round. There would be a vehicle; there would be a stock market investment; there would be an institutional backing amongst minority shareholders. Mr McGoldrick and Mr Rowland with whom he spoke agreed in principle. It is perhaps interesting that around this point in time there was some major purchasing on the stock exchange involving CRL shares in the name of a company Garofil Business SA said to be Monaco based. On the state of the evidence before me there is reason to believe that at least under that name such a company may not exist in Monaco. I deliberately will say no more." Securities Commission v. Gulf Resources and Chemical Corporation (1990) 5 NZCLC 66324, 66333.]

2.10 Between December 1989 and mid January 1990 CRL and Gulf negotiated the Gulf entry and share issue. Agreement was reached under which CRL purchased Gulf's commercial properties in New Zealand in return for the issue to Gulf of ordinary shares in CRL. Public notice of this agreement was given on 16 January 1990 when CRL advised the Stock Exchange and gave details of the transaction under which Gulf would acquire a 62.2% shareholding in CRL. The transaction was approved at an extraordinary general meeting of shareholders on 30 March 1990.

2.11 In mid-February 1990 the Commission made application to the High Court under s.30 of the Securities Amendment Act 1988 seeking orders under s.32 of that Act in respect of the voting securities of CRL. The Commission claimed that Gulf had acquired a relevant interest in the voting securities of CRL other than as is recorded in Gulf's substantial security holder notice dated 15 December 1989. The Commission claimed that Zelas, when it acquired 70.42% of the voting securities of CRL, acquired those shares on behalf of Gulf, or that Gulf had a power to control the acquisition or disposition of those shares.

2.12 Mr Justice McGechan in an oral judgment in the High Court dated 19 March 1990 dismissed the Commission's application and held that Gulf did not acquire a beneficial interest (whether in a trustee/beneficiary sense or in a wider benefit sense) in the CRL shares purchased by Zelas on 16 October 1989, and that Gulf did not acquire a power to control the exercise of any right to vote attached to the CRL shares purchased by Zelas on that date, or acquire any other "relevant interest" in the shares. This judgment is reported as Securities Commission v. Gulf Resources and Chemical Corporation (1990) 5 NZCLC 66324.

2.13 During the course of the Commission's enquiry into this matter the Commission reviewed the trading in the shares of CRL in the period 1 November 1989 to 31 January 1990 and received certain reports on trading in CRL's shares at its request from the New Zealand Stock Exchange, from sharebrokers in New Zealand, Jordan Sandman Were Ltd, and from Paul E. Schweder, Miller & Co., an English brokerage firm. The facts revealed as a result of these reports led to the Commission's press release of 19 March 1990 announcing the holding of an enquiry in relation to the trading in listed securities of CRL during this period.

3.0 Summary of Facts Relating to the Present Enquiry

3.1 The facts of the present enquiry are instructive and illustrate the complexity which can be associated with international dealings in the shares of a publicly listed company. The facts ascertained by the Commission indicate that instructions were given to a Swiss law firm based in Geneva to direct a London firm of sharebrokers to purchase a parcel of shares in a New Zealand listed company. The shares were purchased through a New Zealand firm of sharebrokers, on the New Zealand Stock Exchange, the purchase to be funded through and purchased for a company incorporated in Panama and administered initially by an agent in Geneva and subsequently by an agent based in Monaco. The Panama company was first introduced to the London sharebrokers by a United Kingdom citizen, ordinarily resident in Monaco, and the sharebrokers were instructed to consult with that person as to how the purchase order should be handled and that person was updated with the prices.

3.2 On 28 November 1989 Paul E. Schweder, Miller & Co, ("Schweder"), an English brokerage firm with offices in London,

received a facsimile from Mayor & Balser, a Swiss law firm based in Geneva, with instructions to buy up to one million shares in City Realties Limited at prices up to 50 New Zealand cents. It further stated that the account of Garofil (a company registered in Panama) had been credited with the funds necessary to carry out the transaction.

3.3 Acting on these instructions, Mr Gerald Needleman ("Needleman"), a partner of Schweder, ordered the New Zealand firm of Jordan Sandman Were Limited ("Jordan") to purchase CRL shares. The shares were registered under PAS Nominees Limited, Jordan's nominee company.

3.4 Needleman was told to consult with Rowland as to the details of how the order should be handled. Mr Needleman states that he updated Rowland with the prices being paid for CRL shares.

3.5 A total of 1,009,900 shares were purchased at prices within a range of 43c to 45c between 28 November 1989 and 10 January 1990.

3.6 Rowland is a United Kingdom citizen resident in Monaco. He was, at the time the shares in CRL were purchased, Chief Executive of Gulf, a company incorporated under the laws of Delaware and listed on the New York Stock Exchange.

3.7 Gulf had, prior to the date of purchase, acquired a number of commercial properties in New Zealand and had at an earlier stage been negotiating for the acquisition of a controlling interest in CRL which was a public company carrying on the business in New Zealand of holding and developing commercial properties. It has been held, however, by the High Court in New Zealand that at the time of the purchase Gulf was not a substantial security holder in

CRL. The Court also held that in early December 1989 or possibly late November 1989 it was suggested to Gulf that it re-interest itself in CRL and use it as a property owning vehicle by inserting its New Zealand commercial properties in the company and taking up a controlling shareholding.

3.8 On 15 December 1989 Gulf acquired a relevant interest in CRL as lender holding security over a controlling parcel of shares and Rowland was appointed a director of CRL.

3.9 Rowland at all relevant times through a private firm, Monaco Group Fund S.A., held a substantial interest in a company called Inoco plc, which in turn owned 37% of Gulf.

4. Collection of Evidence

4.1 The Commission requested information on this matter from The Securities Association Limited ("TSA") in London. On 19 March 1990 the Commission received a facsimile informing the Commission that on 16 March 1990 certain officers of the TSA had met with Needleman at Schweder's offices and that at the meeting Needleman stated that a company called Garofil Business S.A. had been introduced to his firm by Rowland in 1987, (Appendix A).

4.2 TSA included in its transmission a copy of a facsimile dated 28 November 1989 sent by the Swiss law firm of Mayor & Balser of Geneva on behalf of Garofil to Needleman instructing him to buy up to one million shares in CRL at prices up to 50 New Zealand cents per share, (Appendix B). Needleman further informed him that the orders were fulfilled through Jordan Sandman Were Ltd ("Jordan") in New Zealand.

4.3 Subsequently, on 22 March 1990 the Commission issued a summons to Jordan. It sought all documents in Jordan's possession or control relative to trading in CRL securities for the period of November 1989 to January 1990.

4.4 On the same date the Commission asked Gulf's local counsel to request information from Rowland as to his relationship with Garofil in particular who Garofil was, its directors, shareholders, registered office, what it does, who manages it, its history of trading in listed securities and the nature of Mr Rowland's association with it, (Appendix C). On 23 March Rowland's solicitors, Russell McVeagh McKenzie Bartleet & Co., responded that:

> "Mr Rowland is confident that there is no substance to the Commission's expressed insider trading concerns in relation to Mr Rowland and he is proceeding to assemble information and documentation to assist the Commission in coming to the same view." (Appendix D)

4.5 On 27 March 1990 Jordan responded to the Commission's summons. The information provided showed that 1,009,900 CRL shares had been purchased in the name of PAS Nominees Limited for Schweder in the period November 1989 and 31 January 1990. The chronology of the purchase was:

Date	Volume	Price
28.11.89	14,500	.4345
29.11.89	156,900	.4744
30.11.89	500,000	.45
13.12.89	50,000	.45
14.12.89	44,000	.45
15.12.89	50,000	.45
18.12.89	40,500	.45
8. 1.90	4,000	.45
9. 1.90	100,000	.45
10.1.90	50,000	.45
Total	**1,009,900**	

4.6 On 30 March 1990 the Commission received another facsimile from TSA with a copy of a telex sent to Needleman by Rowland dated 4 September 1987 concerning Garofil, instructing Needleman to receive one million Inoco plc ("Inoco") shares from Barclays Bank.

4.7 On 9 April 1990 the Commission received affidavits from two of TSA's enforcement officers and also from two partners of Schweder, including Needleman. The affidavits stated that on 16 March 1990 a meeting took place at Schweder's offices in London. At the meeting, attended by Mr Hudson, Mr Kenmin of TSA and Mr D.T. Davis and Needleman, partners of Schweder, Needleman informed the other participants:

(1) that Garofil was introduced to him as a client by Rowland in 1987;

(2) that Rowland instructed him to sell a number of shares in Inoco for the account of Garofil shortly after the said introduction;

(3) that between 29 July and 1 September 1987 he sold a total of one million Inoco shares for the account of Garofil;

(4) that no other bargains were transacted for Garofil until 28 November 1989;

(5) that he had received a letter from Mr Balser of Mayor & Balser of Geneva instructing him to buy up to 1 million shares in CRL at prices up to NZ50 cents;

(6) that between 28 November 1989 and 10 January 1990 1,009,900 shares were purchased via Jordan of New Zealand;

(7) that contract notes were despatched to Mr Simon Crispin Groom of Monaco and Mr E. Balser of Geneva.

This information was ratified by Needleman in a sworn affidavit dated 29 March 1990, (see Appendix E).

4.8 On or about 16 March 1990 at the High Court of New Zealand during the hearing of the Commission's action against Gulf for alleged violations of Part II of the Securities Amendment Act 1988, Rowland was cross-examined by Mr J.R. Wild (counsel for the Commission). The following exchange occurred (reproduced from the Court's transcript records):

Q. (Mr Wild) Have you or any entity that you control bought shares in CRL?

A. (Mr Rowland) No.

Q. Do any entities that you control use the London brokerage firm of Miller & Co?

A. No.

Q. Do you have any connections with Garofil Business SA, a company registered in Monaco?

A. What's the name of the company?

Q. Garofil Business SA.

A. Where is it registered?

Q. In Monaco.

A. No, I have never heard of it before.

4.9 Having heard Mr Rowland's testimony, the Commission made further enquiries as to the existence and status of Garofil. French authorities advised that, at least under the name of Garofil Business S.A. with registered address at Leroqueville, 20 Boulevard Princess Grace, Montecarlo, Monaco, that company did not exist. The Commission sought application for leave to call further evidence in relation to Garofil. The High Court declined the application because it would not "serve the best interest of justice" at that stage of the proceedings given that the evidence did not go directly to the issues in this case, (Appendix F).

4.10 On 8 May 1990 the Commission received an affidavit from Rowland dated 4 May 1990 in London (Appendix G). The declarant made the following statements:-

(1) that he is neither a shareholder nor a director of Garofil.

(2) that as far as he is aware Garofil is controlled by Mr Alan Burnside. He added:

> "Mr Burnside is a close friend and business colleague of mine and is an active investor in the major international markets. I have known him for many years and he also lives in Monaco."

(3) That Mr Burnside advised him that the manager of Garofil is Mr Simon Groom. That he does not know who the directors of the company are.

(4) That he understands that Garofil is incorporated in Panama but that he does not know the address of its registered office.

(5) That he is aware of the following share dealings by Garofil:

(i) In 1987 by arrangement with Mr Burnside the declarant instructed Schweder to sell a number of shares in Inoco for the account of Garofil;

(ii) That the declarant had seen a copy of the affidavit of Gerald Needleman of Schweder dated 29 March 1990 which states that Schweder received instructions from Garofil on 28 November 1989 to purchase up to 1 million shares in CRL.

(6) That prior to 28 November 1989, the declarant had "discussed the New Zealand property scene with Mr Burnside on a number of occasions and that no doubt they discussed CRL in general terms." That he is a director of Gulf and Mr Burnside was aware that Gulf had bought property in New Zealand and that the declarant considered that the New Zealand property market presented "interesting opportunities for capital appreciation".

(7) That he did not advise or encourage Mr Burnside to buy shares in CRL and did not provide him with any unpublished price sensitive information about CRL.

(8) That on 15 December 1989 Gulf made a proposal to CRL for the sale of its New Zealand property portfolio to CRL in exchange for a controlling interest in CRL. The Board of Directors of CRL first considered the proposal on 18 December 1989. Gulf subsequently revised its proposal and CRL's acceptance of the revised proposal was publicly announced on 16 January 1990.

(9) That he understood that he was a director of CRL from 15 December 1989 to 29 December 1989 and for a very short period in January 1990.

(10) That he has never visited CRL's offices or attended a meeting of the Board of Directors.

(11) That on 11 December 1989 Gulf made a loan to Zelas Enterprises Limited ("Zelas").

(12) That at that time Zelas had a substantial shareholding in CRL, which it had recently acquired from Tower Corporation.

(13) That the acquisition was public knowledge at the time, that prior to the making of the loan, Gulf had had no involvement with Zelas, and that Gulf had not received any information in CRL from Zelas.

(14) That he first knew of Gulf interest in CRL as a result of his interest in Gulf.

(15) That he did not obtain this knowledge through Zelas or CRL.

(16) That he did not discuss Gulf's interest in CRL nor, after 15 December 1989 did the declarant discuss CRL with Mr Burnside or with any other officer of Garofil.

(17) That other than the sale of shares of Inoco plc and the purchase of shares in CRL referred to above the declarant had no knowledge of the business of Garofil or of any dealings by that company in listed securities.

4.11 Upon receipt of Rowland's affidavit the Commission contacted the authorities of the Republic of Panama and on 17 October 1990 Panamanian authorities advised by facsimile (Appendix H) that:

(a) Garofil Business S.A. was a company incorporated under the laws of Panama;

(b) Garofil was registered under the following number "FICHA 125239; ROLLO 11641, IMAGEN 150" at the Microfilm Section of the Registrar. Its date of incorporation was 10 February 1984;

(c) The Board of the Directors is formed of Mr Rodrigo Vives (Director/President), Victor Alvarado (Director/Vice President); and Zoila de las Casas (Director/Treasurer). Victor Alvarado is also Company Secretary. The "Resident Agent" appointed is Vives y Asociados. The registered address of the above mentioned persons is Avenida Balboa y Calle 39, Edificio Torre IBM, Piso PB, Panama, Republica de Panama;

(e) Its registered capital is US$10,000. The Registrar further stated that Garofil's shareholders are not registered.

It is our understanding that Panamanian law does not require registration of the name of a company's shareholders if that company does not propose to carry on business in Panama. It has been confirmed by the Ministry of Commerce and Industry of Panama that Garofil does not have a licence (either commercial or industrial) to do business in Panama (Appendix I) and therefore, the

Company's directors and legal representative are under no obligation to disclose the names of its shareholders.

4.12 On 30 January 1991 following request made by the Commission, Mr Needleman and Mr Hudson swore affidavits which are annexed at Appendix J. Mr Needleman declared:

(a) That Garofil was introduced to him as a client by Mr Rowland on behalf of Edouard Balser of Mayor & Balser, a Geneva law firm domiciled at 25 Boulevard Helvetique;

(b) That Garofil was not known to Schweder independently of Rowland;

(c) That he had never heard of a Mr Burnside, and that he is not known to Schweder;

(d) That he received a telephone call from Mr Balser indicating that Garofil was interested in purchasing City Realties shares;

(e) That the telephone call he received from Balser was to confirm funds totalling 150,000 pounds had been credited to Garofil's account at Schweder, and that instructions were being placed to purchase 1 million City Realties shares;

(f) That he was told to consult with Rowland as to the details of how the order should be handled;

(g) That he updated Rowland with the prices;

(h) That contract notes were initially sent to Balser in Geneva;

(i) That he received a telephone call from Mr Balser advising him that Balser would no longer be administering the business of Garofil;

(j) That he received another telephone call from Simon Crispin Groom of Monaco stating that he was now duly authorised attorney of the Board of Directors of Garofil;

(k) That subsequent purchases were executed in City Realties and contracts sent to Mr Groom that further funds totalling 30,000 pounds were put in place for Mr Groom for the account of Garofil at Schweder;

(l) That the only correspondence from Groom held by Schweder is a copy of two declarations on non-residence dated 6 December 1989.

Mr Hudson's affidavit reproduced the same information contained in Needleman's.

4.13 The Commission's investigations indicate that there was little, if any, impact on the market price of CRL's shares consequent on the substantial security holder notice given by Gulf on 15 December 1989. The share price remained within a range of 40c to 45c apart from a few sales on 28, 29 and 30 November at 48c. It appears that the size of the buying order pushed the price briefly to that level, but it then fell back to the 40c to 45c range. There was, however, some impact on the market following the announcement on 16 January 1990 of the agreement between CRL and Gulf. The share price moved up briefly to a range of 48c to 50c, but slipped back again to a range of 43c to 48c by 19 January. Appendix K sets out a list of trades reported at the relevant times.

4.14 The share price has since declined and the shares of CRL were on 16 December 1991 quoted at 26c buy and 29c sell. Inquiries made by the Commission indicate that no transfer of the relevant shares has been registered and they continue to be registered in the name of PAS Nominees Limited.

4.15 The Commission's investigations show that Rowland was a director of CRL from 15 December 1989 until his retirement at the AGM on 29 December. He was reappointed on 19 January 1990. It was the board's intention expressed at the board meeting on 18 December 1989 that Rowland be reappointed following the AGM. It is clear, therefore, that he was at all relevant times following 15 December 1989 a "director" of CRL within the meaning of the definition of "Director" in s.2 of the Securities Amendment Act 1988 as "a person occupying the position of a director by whatever name called".

4.16 On 20 December 1991 a draft report was sent to Mr Rowland's New Zealand solicitors and the solicitors to Zelas Enterprises Limited, and an opportunity was provided for comment to be made to the Commission on the matters set out in the draft. Mr Rowland, by letter dated 17 February 1992, commented on a number of matters in the draft report and the Commission has had regard to those comments when presenting this report.

5.0 Subsequent Developments in relation to Gulf's Shareholding in CRL

5.1 On 29 May 1991 CRL announced that it had been notified by Gulf that Inoco plc had entered into a conditional agreement for the sale of its 35% shareholding in Gulf with Nycal Corporation ("Nycal"), a company incorporated in the United States with shares listed on

Nasdaq (over the counter traded shares). The sale was conditional upon clearance under U.S. antitrust legislation. On 19 July 1991 CRL made an announcement to the New Zealand Stock Exchange to the effect that the sale had become unconditional and advising that, as a result of the change of control in Gulf, the Board of the company had suffered significant changes. Five directors were appointed including a new Chairman, Mr Graham Ferguson Lacey, while four out of five directors resigned. A further director was appointed increasing the number of the members of the Board to six. One former director remained on the Board after the sale was confirmed.

5.2 In summary, CRL is presently controlled by Gulf, which, in turn, is no longer controlled by Inoco but by Nycal. Rowlands' involvement in CRL appears to have ended with Inoco's disposition of its interest in Gulf.

5.3 Enquiries made by the Commission do not indicate any previous relationship between Nycal or Lacey and Rowland.

5.4 In March 1992 CRL changed its name to Gulf Resources Pacific Limited, and on 14 April 1992 the New Zealand Stock Exchange announced that the company was listed under that name.

6.0 Issues

The issues raised by the facts ascertained during the course of the enquiry may be summarised as follows:

(a) Did Rowland, at the time shares in CRL were purchased by Garofil have "inside information" about CRL within the meaning of s.2 of the Securities Amendment Act 1988?

(b) Was either Rowland or Garofil an "insider of a public issuer" for the purposes of the Securities Amendment Act 1988?

(c) Did Rowland as an insider tip Garofil about the securities of CRL?

(d) Whether any liability under the Act would have arisen notwithstanding that the insider may have gained no advantage from its dealings on the basis of "inside information".

(e) Does the Securities Amendment Act 1988 affect the purchase of shares in a public issuer whose shares are listed on the New Zealand Stock Exchange, when the purchase order was made outside New Zealand by a person who was not a New Zealand resident or otherwise connected with New Zealand, provided the person is an insider of the public issuer?

(f) If the answer to the preceding question is in the negative, will the New Zealand Courts nonetheless be prepared to exercise jurisdiction under the principles of private international law (conflict of laws), treating New Zealand law as being the appropriate law for determination of the relevant issues and the New Zealand Courts as being the appropriate forum?

(g) Whether any aspects of the law require amendment in order to deal adequately with the particular circumstances of the nature disclosed by this enquiry?

7.0 Inside Information

7.1 The question which arises from the facts ascertained in the course of this enquiry is, did Rowland, at the time shares in CRL were purchased by Garofil, or did any other person, have "inside information" about CRL within the meaning of s.3 of the Securities Amendment Act 1988.

7.2 "Inside information" is defined in s.2 of the Securities Act as follows -

> "'Inside information' in relation to a public issuer, means information which -
>
> (a) is not publicly available; and
>
> (b) would, or would be likely to, affect materially the price of the securities of the public issuer if it was publicly available."

7.3 The relevant information in the present case is the information relating to a proposal discussed between representatives of Zelas and Rowland to use CRL as a vehicle for the acquisition of the commercial properties which Gulf had purchased in New Zealand and that Gulf should take a controlling equity position in CRL, and in addition the knowledge that persons who were in a position to influence CRL's acceptance of that proposal were receptive to it. It was not until 16 January 1990 that notice was given by CRL to the Stock Exchange of an intended agreement with Gulf on these matters, and until that date this information was not publicly available.

7.4 It should be observed at this stage that McGechan J. in his oral Judgment in the High Court dated 19 March 1990, in a passage quoted at para. 2.9 above, stated that -

"somewhere around the end of November, or more probably early in December, Mr McGoldrick broached the possibility of Gulf re-interesting itself in CRL as a property vehicle."

The date at which Mr Rowland contemplated a renewed interest on the part of Gulf in CRL did not have the same significance for McGechan J. as it has for the Commission's present enquiry. In examining the evidence which was put before the Court the Commission is satisfied that it was more probable than not that the discussions between Mr McGoldrick and Mr Rowland took place in November rather than early December, and preceded the instruction given to Schweder to purchase shares in CRL. The Commission refers in particular to the following matters of evidence which were put before the High Court -

- Mr Rowland himself testifies in his affidavit dated 8 March 1990, para 12 -

> "In November 1989 Mr McGoldrick also discussed with me the possibility of Gulf acquiring a separate interest in City Realties in exchange for Gulf's New Zealand property portfolio. At that time both the New Zealand property market and the New Zealand stock market had improved somewhat. The idea of an involvement with City Realties became more attractive because at that stage Gulf had agreed to acquire a substantial property portfolio in New Zealand. ... We had general discussions about the possibility of gradually turning City Realties into a substantial public company in New Zealand, possibly by a large share placement internationally in approximately mid-1990. The possibility of listing the company in the United States was discussed. This general concept was that we could end up with a very substantial, lowly-geared, revenue-producing company in New Zealand as an attractive vehicle for overseas investors."
> **(emphasis added)**

- At page 23 of the Notes of Evidence Mr Rowland was cross-examined on that paragraph in his affidavit. The cross-examination took the following form:

> Q. (Mr Wild) In paragraph 12 just in the last four lines (of your affidavit) you say this, you start at paragraph 12 by saying in November 1989 the idea of an involvement with City Realties became more attractive because at that stage Gulf had agreed to acquire a property portfolio using that to acquire an interest in a substantial public company in the stock market.
>
> A. (Mr Rowland) Yes.
>
> Q Are you conveying through to the Court that idea of backdropping a portfolio of properties into a listed company only developed in or about November last year (1989)?
>
> A No, the concept that had been discussed earlier, I discussed the concept earlier with Mr McGoldrick in the summer of 89. It was a very fluid subject, no it hadn't been discussed in general terms prior to that. I mean the northern summer June/July.
>
> Q Are you saying that your interests in City Realties only developed in November last year?
>
> A No, I had an interest in it all the time. I had an interest in what McGoldrick was doing, I had not firmly locked it out of my mind, I wasn't ready to do it at that particular time I left New Zealand. We used to speak nearly every day."

- Later in his evidence, at page 35, Mr Rowland stated:

> "There was talk that they would have a management company, it was a continuing changing thing, by late November/early December we were on the transactions that we are now talking about, we then got overtaken by events, the document went out, nothing was formalised."

It is apparent from this evidence given by Mr Rowland that the proposal for Gulf in discussions between Rowland and McGoldrick to use CRL as a vehicle for holding Gulf's New Zealand properties and for attracting equity investment had been formed before the end of November, and was in prospect at the time the instruction was given to Schweder to purchase shares in CRL.

7.5 These matters were also in the minds of the Zelas directors (McKenzie and Whitaker) at the time board information of CRL was available to them, and at a time when they would have expected that in their position as controlling shareholder of CRL they could influence the decisions of the board of CRL. The Zelas directors worked closely with McGoldrick, who was in very regular contact throughout the October-November period with Rowland. It was clear that at this time the Zelas directors and McGoldrick hoped to interest Rowland in using CRL as Gulf's property owning vehicle in New Zealand, and knew that if Rowland did agree, they were in a position to secure CRL's agreement. At page 16 of the notes of evidence in the proceedings before McGechan J. it is stated:

> Q. (Mr Wild) What about the idea of Gulf booking its properties into CR? What about that. Did that aspect seem to you to be a novel idea?
>
> A. (Mr McGoldrick) It wasn't a novel idea, it seemed a good idea.
>
> Q. Did you get the impression Mr Rowland had not considered that before?
>
> A. I don't ever recall being surprised at anything he said. Right from the word go, I hoped in some way, shape or form Mr Rowland would come back into the picture, I had a good feeling he would come in, he liked the New Zealand property market. I believe we had a good story, in my view I thought it would be good for the company, and I worked very hard for it."

7.6 The Commission considers, moreover, that these proposals, if implemented, could be perceived by the market to have an important effect on the administration of the company, on the quality of its assets and on its net worth to shareholders. Information, if released at that time, could reasonably have been expected to affect materially the price of the securities on the New Zealand Stock Exchange. Section 2 defines "inside information" in terms of information which is not publicly available and would or "would be likely to affect materially the price of the securities" if it was publicly available. It has recently been held in the United States that the fluctuation in a company's stock price following a public announcement is a relevant factor but does not in itself determine the materiality of information. That required in that case delicate assessments of the inferences a reasonable shareholder would draw from the facts: U.S. v. Bilzerian (1991) Fed. Sec. L.R. 98283, 98290-98291. The use of the words "likely to affect materially the price" indicates that a similar approach would be taken in relation to the definition of "inside information" in our Act.

7.7 The Commission considers that there are reasonable grounds for coming to the view that Rowland, and Zelas, through its representatives McGoldrick and McKenzie, had inside information in relation to CRL.

8.0 Was either Rowland or Garofil an "insider of a public issuer"?

8.1 The persons who come within the description of an "insider" in relation to a public issuer are defined in s.3 of the Securities Amendment Act. Section 3(1) provides:

> "For the purposes of Part I of this Act, 'insider' in relation to a public issuer, means -

(a) The public issuer:

(b) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in the public issuer, has inside information about the public issuer or another public issuer:

(c) A person who receives inside information in confidence from a person described in paragraph (a) or paragraph (b) of this subsection about the public issuer or another public issuer:

(d) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, a person described in paragraph (c) of this subsection, has that inside information:

(e) A person who receives inside information in confidence from a person described in paragraph (c) or paragraph (d) of this subsection about the public issuer or another public issuer:

(f) A person who, by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, a person described in paragraph (e) of this subsection, has that inside information."

8.2 **"Public Issuer"** is defined by the Act as a -

> "Company or person that is, or that was at any time, a party to a listing agreement with the Stock Exchange."

"Stock Exchange" is defined in s.2 as meaning the New Zealand Stock Exchange, and includes the stock exchange registered under the Sharebrokers Act 1908.

8.3 To satisfy the definition of an "insider" section 3 requires a connection to be established between the insider and the public issuer or betwen the insider and any other person who is a principal

officer, or employee, or company secretary of, or a substantial security holder, in a public issuer. There will not be a breach of Part I of the Act if the information does not emanate from a person connected with the public issuer in the manner prescribed by the Act.

8.4 An insider who deals in the securities of a public issuer is liable under s.7 to the public issuer itself or to the persons with whom he deals for the amount of any gain made or loss avoided by the insider in buying or selling the securities. That liability is extended under s.9 to the case where the insider advises or encourages another person to buy or sell securities, or advises or encourages that person to advise or encourage some third person to buy or sell the securities. Similarly, the insider will be liable if the insider communicates the information or causes the information to be disclosed to a person knowing or believing that person or another person will, or is likely to deal in the securities or advise or encourage some third person to deal in the securities (the "tipping" provision).

8.5 A parallel set of provisions applies under sections 11 and 13 to the case of the insider who deals in the securities of another public issuer. An insider of public issuer A who has inside information about another public issuer B and who deals in the securities of public issuer B or tips in relation to those securities is liable to the persons with whom he deals or to public issuer A for the amount of any gain made or loss avoided by the insider in buying or selling the securities.

8.6 It is important to observe, however, that in order for there to be liability in either case, the person concerned must first be an insider in relation to public issuer A within the meaning of s.3, i.e. liability

will arise only where the insider is either public issuer A itself or the information must emanate from a person connected with a public issuer in the manner prescribed by s.3, namely by reason of being a principal officer, or an employee, or company secretary of, or a substantial security holder in, the public issuer, who has inside information about the public issuer or another public issuer.

8.7 In the present case the following considerations arise:

Rowland an "insider" as director of CRL from 15 December 1989

Rowland was appointed a director of CRL on 15 December 1989 and from that date was an insider by virtue of s.3(1)(b). The purchase of the shares commenced on 28 November in accordance with an instruction given that day by Mayor & Balser to Mr Needleman (Appendix B) to purchase up to one million shares in CRL at prices up to 50 New Zealand cents. Purchases of shares continued until 10 January 1990. During the period 15 December to 10 January, 254,000 shares were purchased at 45c each. Mr Rowland was up-dated with prices during this period.

Rowland not an insider by virtue of being a director of Gulf

Rowland was not an insider for the purposes of sections 11 and 13 (liability of an insider who deals or tips in the securities of another public issuer) by virtue of his position as a director of Gulf. That company was not a "public issuer", its shares not being listed on the New Zealand Stock Exchange. It is not sufficient for the purposes of the Act that Gulf was at the relevant time a company the shares of which were quoted on the New York Stock Exchange.

Rowland an insider as a tippee of Zelas

On the other hand, Rowland conferred extensively with the representatives of Zelas throughout the period of its ownership of

the CRL shares, including both McKenzie and McGoldrick. He was fully informed and well aware of their plans and aspirations for CRL and the part they expected to play in the realisation of any aspirations of Gulf Resources. Zelas was a substantial security holder. Zelas had inside information in relation to CRL (see para. 7.7 above). Rowland received information in confidence in relation to these matters. Rowland was therefore an insider in terms of s.3(1)(c) as a person who received inside information in confidence from a substantial security holder of CRL.

Garofil an insider as a tippee of Rowland

Garofil, for the reasons given in paragraphs 9.3 and 9.4 below, very probably received inside information in confidence from Rowland, and was then itself an insider under s.3(1)(e). Rowland and Garofil were, therefore, on this basis in the view of the Commission, likely to have been insiders in relation to CRL at the time Garofil acquired CRL shares in November/December 1989. Again most probably Garofil was also from 15 December an insider under s.3(1)(c) by reason of being a tippee of a director of CRL, once Rowland was appointed a director on that date.

8.8 We note in this respect that the definition of "insider" in the New Zealand Act is framed in more restrictive terms than the definition in the Australian, Canadian, United Kingdom or United States legislation. The policy of the New Zealand Act, as earlier articulated in the Securities Commission's Report on Insider Trading, is to limit liability for insider trading to persons who are insiders of public issuers, namely, companies whose shares are publicly traded on the New Zealand Stock Exchange. A person must either have information by reason of being connected with such a public issuer (as a principal officer, employee, secretary or substantial security holder) or have received information in confidence from a person so

connected. The question arises whether, having regard to the facts raised in the present enquiry, this policy should be reconsidered. This question is considered at para 12.3 below.

9.0 Was Garofil tipped by an insider about the shares in CRL?

9.1 The relevant section dealing with liability in relation to tipping in relation to the securities of a public issuer is s.9(1) of the Securities Amendment Act 1988 which provides as follows:

> "9(1) [When insider is liable] An insider of a public issuer who has inside information about the public issuer and who -
>
> (a) Advises or encourages any person to -
>
> (i) Buy or sell securities of the public issuer; or
>
> (ii) Advise or encourage any other person to buy or sell securities of the public issuer; or
>
> (b) Communicates the information, or causes the information to be disclosed, to a person knowing or believing that person or another person will, or is likely to, -
>
> (i) Buy or sell securities of the public issuer; or
>
> (ii) Advise or encourage another person to buy or sell securities of the public issuer -
>
> is liable to the persons referred to in subsection (2) of this section."

9.2 The question which arises on the present facts is whether Rowland as an insider of CRL either

(a) advised or encouraged Garofil to buy securities of CRL, or

(b) advised or encouraged any person to advise or encourage Garofil to buy securities of CRL, or

(c) communicated information or caused information to be disclosed to a person knowing or believing that person or another person is likely to buy securities in CRL or advise or encourage another person to buy securities in CRL.

9.3 The Commission considers, on the basis of the evidence which it has received and which is summarised in paragraphs 3 and 4 above, that Rowland on or shortly before 28 November 1989 knew of Garofil's intention to purchase shares in CRL and to instruct brokers for that purpose. It is clear from evidence provided by Mr Needleman and from Mr Rowland's own statement on affidavit to the Commission (Appendix G) that Mr Rowland at the relevant time was aware of and had at least a close business association with Garofil and had on one previous occasion given instructions to Schweder for the sale of shares on behalf of Garofil. Mr Needleman further says that he was told to consult with Rowland as to the details of how the order to purchase shares in CRL should be handled. Mr Rowland admits having had a discussion with Mr Burnside (a close business associate whom he says controls Garofil) prior to 28 November 1989 at which the New Zealand property scene was discussed and "that no doubt they discussed CRL in general terms". Mr Rowland says that Mr Burnside was aware that Gulf had bought property in New Zealand and that Rowland considered that the New Zealand property market presented interesting opportunities for capital appreciation. Mr Rowland in his affidavit says that he did not advise or encourage Mr Burnside to buy shares in CRL and did not provide him with any price sensitive information about CRL. Mr Needleman, for his part, says that he had never heard of Mr Burnside and that Burnside is not known to

Schweder. Mr Needleman further says that he updated Mr Rowland with the prices of CRL shares and was told to do so in his initial instructions from Mayor & Balser.

9.4 If, therefore, Rowland on or before 28 November knew of the proposal in relation to CRL's properties and Gulf a communication of that kind which linked the names of the two companies was probably made with the intention that the recipient of that information should draw the obvious connection and link Gulf with an intended investment opportunity in CRL. If Rowland at the relevant time knew of the proposal, the linking of the two companies in this way is unlikely to have been fortuitous.

9.5 It is also apparent that Rowland was privy to the instruction which was given to purchase shares in CRL on behalf of Garofil. He was to be consulted on the details of how the order to purchase the shares should be handled and he was updated with the prices of the shares. With that degree of involvement in the transaction the Commission considers that there are reasonable grounds for regarding him as a person who "advised" or "encouraged" Garofil to purchase the securities in CRL, and therefore the requirements of s.9(1) are satisfied.

10.0 **<u>Is there any liability under the Act where the price movement of the shares in question does not indicate that the insider obtained an advantage from the insider's dealing in the shares</u>?**

10.1 As stated at para. 4.13 above, an analysis of the price movement in CRL shares during the period 28 November 1989 to 31 January 1990 indicates that Garofil may have gained some small advantage as at 16 January 1990 from its dealing in CRL shares. Although the

giving of the substantial security holder notice on 15 December 1989 does not appear to have had any significant impact on the share price, a small gain was made briefly in the share price following the announcement on 16 January 1990. It could, however, be suggested that overall, any use which may have been made of inside knowledge has not advantaged the purchaser in this case. It appears that the shares have been retained by Garofil, and on the basis of the present share price Garofil has made a loss on its investment.

10.2 The Securities Amendment Act creates only a form of civil liability in relation to insider trading. No criminal penalties or sanctions are provided in the legislation. The extent of the insider's liability to any person from whom the insider or tippee bought the securities or to whom the securities were sold is the amount of the loss incurred in the transaction. If no loss was incurred by the person who dealt with the insider or tippee there will be no liability to compensate the persons. The extent of the liability to the public issuer, that is, the listed company, is rather different. It is the amount of any gain made or loss avoided by the insider. Again, if there were no gain made or loss avoided there would be no liability.

10.3 The Act in ss.7(2), 9(2), 11(2) and 13(2) refers to "any gains made or losses avoided". The Act does not refer to a realised gain, and a gain made but unrealised would be covered. Section 15 expressly covers this situation. Section 15(1)(c) provides that a person who buys a security for less than its value makes a gain equal to the difference between the value of the security and the consideration payable. "Value" is defined in s.15(2) as meaning the value the security would have had <u>at the time of the sale or purchase</u> if the inside information known to the insider about the public issuer was publicly available. In the present case any gain which could have

been made by Garofil is the difference between the purchase price paid on the respective purchases between 28 November 1989 and 10 January 1990 and the value the shares would have had, namely their value once the information was released to the market on 16 January 1990.

10.4 The Act also provides that the insider is liable to the public issuer not only for the amount of any gain made or loss avoided by the insider in buying or selling the securities, but also for any amount which the Court considers to be an appropriate pecuniary penalty. This penalty is, in the view of the Commission, in addition to and does not rest on there being any gain made or loss avoided by the insider. In this respect we draw attention to the word "and" at the end of ss.7(2)(c)(i), 9(2)(g)(ii), 11(2)(c)(i) and s.13(2)(g)(ii). The maximum pecuniary penalty which the Court may order the insider to pay is set out in s.7(4) and in the equivalent provisions of s.9(4), 11(4) and 13(4), namely -

> "The amount of any pecuniary penalty shall not exceed -
>
> (a) the consideration for the securities; or
>
> (b) three times the amount of the gain made or the loss avoided by the insider in buying or selling securities -
>
> whichever is the greater."

Where, therefore, no gain has been made or loss avoided by the insider or tippee the Court may nonetheless order the insider to make payment to the public issuer of a pecuniary penalty, the maximum amount of which may be the total consideration paid for the securities.

11.0 **Does s.11 of the Securities Amendment Act 1988 apply to the purchase of shares in a New Zealand listed company when the purchase order was made outside New Zealand by a person who was not a New Zealand resident or otherwise connected with New Zealand?**

11.1 The Securities Amendment Act 1988 is silent as to its extraterritorial effect. Unlike s.4 of the Commerce Act 1986 it does not contain provisions that make any reference to extraterritoriality.

11.2 We set out our analysis of the relevant issues and our conclusions as to the effect of the New Zealand legislation in Appendix L. The Commission has come to the view that the Securities Amendment Act 1988 does have extraterritorial effect insofar as it is directed at trading in the shares of a company listed on the New Zealand Stock Exchange whether the trading in shares is initiated within or outside New Zealand. In addition, the New Zealand Courts are likely to be prepared to exercise jurisdiction under the principles of private international law (conflict of laws) treating New Zealand law, and in particular the provisions of the Securities Amendment Act 1988, as being the appropriate law for determination of the relevant issues, and the New Zealand Courts as being the appropriate forum, at least insofar as an insider is liable under the Act for the amount of any gain made or loss avoided by reason of the trading in the shares.

11.3 In the present case there is a very clear and close connection with New Zealand, such as to lead to the application of these principles. The shares in question were shares of a New Zealand public issuer listed on the New Zealand Stock Exchange. The transaction was effected through a New Zealand broker on the Exchange in New Zealand, and the shares which were purchased are held by a New Zealand nominee, and are registered on a share register in New Zealand.

11.4 We consider that it would be desirable when the Securities Act is next amended to consider including a provision which expressly gives extraterritorial effect to the Securities Act and Amendments in this respect. We consider that the remedies provided in the Act should be more clearly available when investors are affected here by activity which is initiated from another jurisdiction.

12.0 Conclusions and Recommendations

12.1 The enquiries conducted by the Commission illustrate the difficulties which arise in identifying whether or not there has been trading with inside information where the information originated in New Zealand and is about a New Zealand company but the transaction is initiated outside New Zealand. The Commission, on the evidence available to it, considers that there are reasonable grounds for considering that a cause of action against an insider may be available under Part I of the Securities Amendment Act 1988. However, it is open to doubt whether the litigation would be cost-effective, as the prospective defendants are likely to be outside New Zealand.

12.2 The Commission observes that it does not have any enforcement role under the Act. The remedies under the Act may be invoked in accordance with ss.17(2) and 18(1), only by a shareholder of the public issuer or the public issuer itself.

12.3 The Commission does have power under s.10 (c) of the Securities Act 1978 to keep under review practices relating to securities, and to comment thereon to any appropriate body, and under s.10(d) to promote public understanding of the law and practice relating to securities. The Commission comments particularly on the following matters which have arisen in the course of this enquiry, and intends

to make this report publicly available and to send copies to the New Zealand Stock Exchange, Listed Companies Association Inc, and the Commercial Affairs Division of the Department of Justice.

12.3.1 We have noted in paragraph 8.8 that the definition of "insider" in the New Zealand Act is framed in more restrictive terms than the definition in the Australian, Canadian, United Kingdom or United States legislation. The policy of the New Zealand Act, as earlier articulated in the Securities Commission's Report on Insider Trading, in para. 5, limited liability for insider trading to persons who are insiders of public issuers, namely, companies whose shares are publicly traded on the New Zealand Stock Exchange. The person must either have information by reason of holding some named office or association in such a public issuer (i.e. as principal officer, employee, secretary or substantial security holder), or have received information in confidence from such a person. However, a person who is connected in that way with one company and in that capacity is in possession of material information, which is not publicly available, which relates to an actual or expected transaction between the company with which he or she has a connection and some other company is not, under the New Zealand Act, precluded from trading in the shares of that other company. This is because he or she has the inside information otherwise than as an insider of the other company. For example, a director of A, which at the relevant time was in the course of price-sensitive negotiations with B, is not precluded by the New Zealand Act from trading in the shares of B, if the

information available to the director had come only through his connection with A. In the absence of a tip from persons who were insiders of B, a person in that position could not be held liable.

12.3.2 In this respect, the New Zealand Act has a narrower application than s.1(2) of the Companies Securities (Insider Dealing) Act 1985 of the United Kingdom which expressly covers an individual who being knowingly connected with a company A, deals on a recognised stock exchange in securities of any other listed company B if he has price-sensitive information in relation to the securities of that other listed company B. The U.K. section provides as follows:

> "(2) Subject to section 3, an individual who is, or at any time in the preceding 6 months has been, knowingly connected with a company shall not deal on a recognised stock exchange in securities of any other company if he has information which -
>
> (a) he holds by virtue of being connected with the first company,
>
> (b) it would be reasonable to expect a person so connected, and in the position by virtue of which he is so connected, not to disclose except for the proper performance of the functions attaching to that position,
>
> (c) he knows is unpublished price sensitive information in relation to those securities of that other company, and
>
> (d) relates to any transaction (actual or contemplated) involving both the first company and that other company, or involving one of them and securities of the other, or to the fact that any such transaction is no longer contemplated."

12.3.3 In the same way the (now replaced) s.1002(2) of the Australian Corporations Law 1991 expressly covered a person who by reason of being connected with body corporate A receives price-sensitive information affecting the shares of body corporate B, and deals in the shares of body corporate B. The former section 1002(2) provided:

> **"1002(2) [A person connected with a body corporate]** A person who is, or at any time in the preceding 6 months has been, connected with a body corporate shall not deal in any securities of any body corporate if, because of the person so being, or having been, connected with the first-mentioned body corporate, the person is in possession of information that:
>
> (a) is not generally available but, if it were, would be likely materially to affect the price of those securities; and
>
> (b) relates to any transaction (actual or expected) involving both those bodies corporate or involving one of them and securities of the other."

12.3.4 In many cases, as the facts under enquiry indicate, liability will still arise under the New Zealand legislation because the information received by the director or connected person of company A will have been provided in circumstances which amount to tipping by way of advice or encouragement under ss.9 or 13. There may, however, be exceptional cases where the price-sensitive information affecting the shares of company B is derived not from any advice or encouragement but only through the person's connection with company A, e.g. where the

commercial activity which generates the inside information is undertaken wholly by a subsidiary company and a director of the subsidiary trades in shares of the parent company, which is the publicly listed body but does not, itself, carry on any commercial activity.

12.3.5 A different and broader approach is taken in the United States. Insider trading in the United States is regulated by Rule 10b-5 of the Securities and Exchange Act of 1934. The term "insider" is not defined under the Act. Rule 10b-5 simply provides that:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of mails, or of any facility of any national securities exchange:
>
> (a) to employ any devise, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make these statements, in light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." (Emphasis added).

The question of who is subject to the trading constraints of Rule 10b-5 has concerned the U.S. Courts. The matter was addressed in the leading case

of SEC v. Texas Gulf Sulphur Co. 401 F.2d 833 (2nd Cir 1968), where the Second Circuit held that:-

> "anyone in possession of material inside information must either disclose it to the investing public, or refrain from trading."

12.3.6 The American definition of "insider" differs from the definition adopted by New Zealand and the UK and, until recently, the Australian legislatures. The US Congress appears to have rejected the "connection" principle as a basis for establishing who is an insider. Persons do not need to be connected with or be in a special relationship with an issuer to be "insiders". Under US law any person who is in possession of material information may be an "insider" regardless of whether he or she is in any way "connected" with an issuer.

12.3.7 It is interesting to note that one of the Canadian provinces, Quebec, has adopted a definition of insider which refers to "anyone who so trades" if he or she is in possession of inside information that he or she knows to be privileged concerning an issuer. Unlike the Ontario definition (which follows a "connection" rule approach), Quebec has followed the American model.

12.3.8 Australia has now also moved in this direction. The Australian Corporations Law has been amended in order to adopt the Griffith's Committee's recommendation that the "connection" rule be

abandoned. In paragraph 28(b) of the Schedule of Recommendations and Responses, the Committee recommended:

> "(b) That the requirement that a person be connected with a Corporation which is the subject of the information (in the case of insider trading) or that an association or arrangement be proved (as in the current requirement for tipping) should be deleted."
>
> "(c) The prohibition should focus on the use (to trade in or subscribe for the securities of the company or an associate company) of inside information by a person who is in possession of it and who knows or ought reasonably to know that it is inside information ...".

These recommendations were accepted by the Government on the condition that:

> "the amendments will need to be carefully drafted to avoid imposing an unreasonable burden on the prosecution to prove that the person in possession of the inside information used it to trade in or subscribe for particular securities. The Government considers that, once the prosecution has proved that the person was in possession of information and that the person traded in the relevant securities, it is reasonable to assume that the person was motivated to trade by possession of the information."

12.3.9 The new provisions of the Corporations Law 1991 include the following sections:

> "**1002G(1) [Application of section]** Subject to this Division, where:

(a) a person (in this section called the 'insider') possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and

(b) the person knows, or ought reasonably to know, that:

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities;

the following subsections apply.

1002G(2) [No purchase or sale etc of securities] The insider must not (whether as principal or agent):

(a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

(b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

1002G(3) [No communication of information] Where trading in the securities referred to in subsection (1) is permitted on the stock market of a securities exchange, the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

(a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

(b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities."

12.3.10 The approach taken in the New Zealand Act when defining an insider and in particular the absence of any provision, in the New Zealand Act, corresponding to s.1(2) of the U.K. legislation is a matter which should be addressed when the Securities Amendment Act 1988 is next reviewed. Subject to this, the Commission makes no recommendation in respect of the matters raised in this para 12.3 but proposes to keep the matters under review.

12.4 Liability in the absence of any personal advantage

The facts of the present case indicate that there are circumstances in which an insider makes use of inside information in order to deal in the shares of the public issuer, but the dealing does not in fact result in any significant profit being obtained by the insider out of his use of the inside information (or alternatively, no loss is avoided). In the Commission's view, however, as indicated in paras 10.3 and 10.4 above, the absence of any gain or avoidance of any loss does not mean that the insider is free from liability under the Act. The public issuer, in those circumstances, may itself seek a pecuniary penalty from the insider. In this way the Act provides an important sanction against the misuse of inside information, even when the insider does not profit from the activity.

12.5 Extra-territorial application of the Act

The Commission, after its examination of the facts of the present case, has concluded that the Act does cover alleged insider trading in the shares of a company whose shares are listed on the New Zealand Stock Exchange, notwithstanding that the order for the purchase or sale of the shares was made outside New Zealand by a person not ordinarily resident in New Zealand. The Commission proposes that consideration be given to making express provision in the Act itself for the extra-territorial application of the Act along the lines of s.4 of the Commerce Act 1986 and s.3 of the Fair Trading Act 1986. The inclusion of a choice of law provision in the Act itself will serve to make it clear that transactions entered into outside New Zealand in breach of the provisions of the New Zealand securities legislation and having an effect on the market for securities in New Zealand are subject to the provisions of the Securities Amendment Act. As Mr Richard Breeden, Chairman of the SEC, recently stated:

> "We can't allow a situation in which the market became internationalised, but law enforcement remained restricted by national borders." (CCH, #1715, October 3, 1990)

The Commission considers that this recommendation should be addressed when the New Zealand securities legislation is next reviewed.

Peter McKenzie
Chairman
Securities Commission

12 June, 1992

APPENDICES

GAROFIL BUSINESS S.A./ DAVID ROWLAND

During a meeting at the London offices of Paul E. Schweder Miller & Co on the afternoon of 16th March 1990 , Mr G.G. Needleman, a dealing partner with responsibility for Garofil , stated that the company was introduced by Mr David Rowland. This introduction took place in 1987 and Mr Rowland actually instructed Mr Needleman to sell a number of shares for the account of the above company at that time.

D.F. Kenmir
Enforcement Officer TSA

D.J. Hudson
Enforcement Officer TSA

APPENDIX B

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BY FAX

PAUL E.SCHWEDER, MILLER & CO
46-50 Tabernacle Street
GB- LONDON EC2A 4BJ

Attn: Mr. G.G. NEEDLEMAN

Genève, 28th November, 1989

Dear Mr. Needleman,

Re : Gerofil Business SA

I refer to our phone conversation of today.

On behalf of the above mentioned Company, I instruct you to buy up to one million shares in City Realties Limited of New Zealand, at prices up to 50 New Zealand cents. I have duly noted that the account of the Company has now been credited with the funds necessary to carry out the above mentioned instruction.

Yours sincerely,

Edouard Balser

APPENDIX C

FILE COPY

Securities Commission

LEVEL 6,
GREENOCK HOUSE
39 THE TERRACE, WELLINGTON
NEW ZEALAND
TELEPHONE (04) 729 830
FACSIMILE (04) 728 076
P.O. BOX 1179

Our ref: 376-2

22 March 1990

Russell McVeagh McKenzie Bartleet & Co.,
Barristers & Solicitors,
Facsimile: 771-849,
AUCKLAND.

Attention: Mr Harmos

Dear Sirs,

GULF RESOURCES & CHEMICAL CORPORATION - MR D.J. ROWLAND

I refer to your letter of 19 March 1990.

I suggest you ask Mr Rowland to inform us who Garofil Business S.A. is, its directors, shareholders, registered office, what it does, who manages it, its history of trading in listed securities, and the nature of Mr Rowland's association with it.

For this purpose I attach a copy of a press release issued by the Commission on 19 March 1990. A copy of this release has been sent to Gulf Resources & Chemical Corporation.

Yours faithfully,

J. Farrell
Executive Director

Enc.

(D/c/F13:42)

Securities Commission

LEVEL 6,
GREENOCK HOUSE
39 THE TERRACE, WELLINGTON
NEW ZEALAND
TELEPHONE (04) 729 830
FACSIMILE (04) 728 076
P.O. BOX 1179

Our ref: .....

19 March, 1990

MEDIA RELEASE

The Commission will undertake a review of trading in the listed securities of City Realties Limited on the New Zealand Stock Exchange in the period November 1989 to January 1990 inclusive, for the purpose of ascertaining whether any insider of that company or of any substantial security holder in that company has traded in the securities in that period.

John Farrell
Executive Director

[S121]

RUSSELL McVEAGH McKENZIE BARTLEET & CO

BARRISTERS, SOLICITORS & NOTARIES PUBLIC

THE SHORTLAND CENTRE, 51-53 SHORTLAND STREET, AUCKLAND
PO BOX 8, AUCKLAND 1, NEW ZEALAND. TELEPHONE (09) 309-[illegible] (09) 771-420
TELEX NZ 21[illegible] RMCVKB. FAX (09) 771-[illegible], DX 85

Name A W Harmos

Partner

23 March 1990

Mr J Farrell
Securities Commission
Fax No: (04) 728 076
WELLINGTON

Dear Mr Farrell

MR D J ROWLAND

Thank you for your letter dated 22 March. If the Commission has any suspicion or concern not clearly dealt with in your letter, please advise us urgently with particulars.

Mr Rowland returned to the United Kingdom last week. We have however forwarded a copy of your letter to him, and we understand that he is taking legal advice in the United Kingdom.

Mr Rowland is confident that there is no substance to the Commission's expressed insider trading concerns in relation to Mr Rowland and he is proceeding to assemble information and documentation to assist the Commission in coming to the same view. It may take a little time for the necessary information to be located and made available to the Commission.

Some concerns have been raised in the United Kingdom as to the procedures adopted by the Commission, and its associates, in the enquiries that have been conducted by the Commission in the UK to date. We record that Mr Rowland reserves his rights, and his position, in relation to any illegality or action taken in excess of authority.

Yours faithfully
RUSSELL McVEAGH McKENZIE BARTLEET & CO

A W Harmos

AFFIDAVIT

I, Mr. Gerald Godfrey Needleman of Paul E. Schweder Miller & Co. ("Schweder"), 46-50 Tabernacle Street, London, England MAKE OATH AND SAY,

A I am a Partner with Schweder and make this Affidavit from my own knowledge and belief.

1. That on Friday, 16th March 1990 at 15.30 hrs I, accompanied by a colleague Mr. David T. Davis ("Davis) attended a meeting, ("the meeting") at the office of Schweder for the purpose of a discussion with Mr. David F. Kenmir ("Kenmir") and Mr. David J. Hudson ("Hudson") both Enforcement Officers within the Enforcement Division of The Securities Association, London, England.

2. That at the meeting a person identified himself as Kenmir and a person identified himself as Hudson.

3. That at the meeting I told the Enforcement Officers the following information:

   * That Garofil Business S.A. ("Garofil") was introduced to me as a client by Mr. David Rowland ("Rowland") in 1987.

   * That Rowland instructed me to sell a number of shares in Inoco PLC for the account of Garofil shortly after the introduction.

   * That between 29th July 1987 and 1st September 1987 I sold a total of 1,000,000 Inoco PLC for the account of Garofil.

   * That no other bargains were transacted for Garofil until 28th November 1989.

   * That I received a letter dated 28th November 1989 from Mr. Edouard Balser of Mayer & Balser Avocats au Barreau de Geneve, 25 Boulevard Helvetique, 1207 Geneve, who acting on behalf of Garofil, requested me to purchase up to 1,000,000 shares in City Realties Limited of New Zealand, at prices up to 50 New Zealand Cents.

   * That between 28th November 1989 and 10th January 1990, 1,009,900 shares in City Realties Limited were purchased via the New Zealand firm Jordan Sandman Were Limited.

* That contract notes were dispatched to Mr. Simon Crispin Groom of 20 Boulevard Princesse Charlotte, Monte Carlo, Monaco or to Mr. Edouard Balser in Geneve.

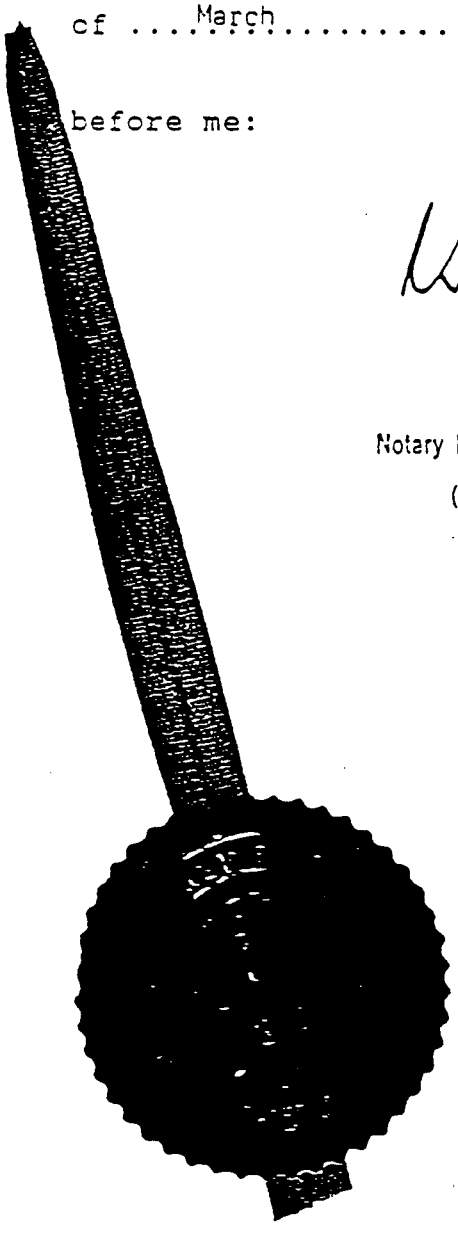
Sworn at 24 St. Mary Axe

in City of London, England

this twenty-ninth day

of March 1990

before me:



Notary Public London, England

(Richard J. Saville)

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M No. 64/90

UNDER	the Securities Act 1978
IN THE MATTER	of an originating application under Section 30 of the Securities Amendment Act 1988
BETWEEN	THE SECURITIES COMMISSION Plaintiff
AND	GULF RESOURCES AND CHEMICAL CORPORATION First Defendant
AND	ZELAS ENTERPRISES LIMITED Second Defendant
AND	CITY REALTIES LIMITED Third Defendant

Dates of Hearing: 15-17 March 1990
Date of Ruling: 19 March 1990

Counsel:

J R Wild & Carmel Peters for Plaintiff
G P Curry & K J Catrin for First Defendant
T C Weston & S A Barker for Second Defendant
K I Murray for Third Defendant
C M Stevens for Tower Corporation (Body served)

RULING (4) OF McGECHAN J

At the point of delivery of oral judgment in this matter counsel for the plaintiff, Securities Commission, made

application for leave on whatever basis may be available to call further evidence. It is due to counsel to record that the courtesy of a message through the Registrar of an intention so to apply was given some 15 minutes before but, in the circumstances, there had not been time to notify or review the matter with counsel for other parties. It appears the evidence had become available to the Commission around 8.30 am this is morning, with judgment scheduled to be given at 9.00 am.

I have not been told, and have not sought, the exact nature of the evidence concened in open Court, but from information given clearly it would cast doubt upon an answer given by Mr Rowland, a primary witness for the first defendant Gulf as to his knowledge or otherwise of a company known as Garofil Business SA. Mr Rowland was asked in cross-examination "do you have any connection with Garofil Business SA, a company registered in Monaco?" He responded, "what is the name of the company?" He was told, "Garofil Business SA". He asked "where is it registered?" He was told "in Monaco" and he responded "no I have never heard of it before". There was subsequent evidence from Mr Farrell of the Commission as to making inquiries as to this company of French authorities and being told that at least under the name and address of Garofil Business SA, Leroqueville, 20 Boulevard Princess Grace, Monte Carlo, Monaco 9800, it did not exist.

There was evidence of heavy purchasing of City Realties shares in late November, early December, by that body or as the case may be, in that name. The evidence, I assume, would cast doubt upon Mr Rowland's denial in those terms and as such would be intended to go to his credibility, or perhaps it would affect his credibility in some other way.

It is not evidence which goes directly to the issues in this case, namely the events which happened in relation to City Realties, Zelas and Gulf as at the 16 October date in 1989. It goes, as I have said, not to the issue but to

credibility. That is not to say it is unimportant as Mr Rowland's credibility is involved. However, given that and given associated extreme time pressures of a commercial nature, the very late notification, and the absence of any opportunity by Mr Rowland to respond within any acceptable timeframe, he having gone abroad, after being excused following cross-examination, I do not see this as a case where such powers as the Court may have at this late stage in the interests of justice should be exercised so as to allow in the evidence. If there were more time then if only to clear the shadow of doubt created, it might be proper to do so but in the circumstances I am not prepared so to act over opposition of all defendants apart from Tower (which takes no position either way).

The application is declined.

.....

R A McGechan J

Solicitors:

Chief Solicitor, Securities Commission for Plaintiff
Russell McVeagh McKenzie Bartleet & Co, Auckland for First Defendant
Buddle Findlay, Wellington for Second Defendant
Chapman Tripp Sheffield Young for Third Defendant
Phillips Nicholson, Wellington for Tower Corporation (Body served)

COPY

I, DAVID JOHN ROWLAND, of 7 Avenue Princesse-Grace, Monte-Carlo, 98000 Monaco, Company Director, MAKE OATH AND SAY as follows:-

1. I am informed that the Securities Commission of New Zealand is undertaking a review of trading in the listed securities of City Realties Limited on the New Zealand Stock Exchange in the period November 1989 to January 1990 inclusive, for the purpose of ascertaining whether any insider of that company or of any substantial security holder in that company has traded in the securities in that period. In connection with such review, the Securities Commission has requested that I inform it who Garofil Business SA is, its directors, shareholders, registered office, what it does, who manages it, its history of trading in listed securities and the nature of my association with it.

2. I am neither a shareholder nor a director of Garofil Business SA and so far as I am aware it is controlled by Mr Allan Burnside. Mr Burnside is a close friend and business colleague of mine and is an active investor in the major international markets. I have known him for many years and he also lives in Monaco.

3. Mr Burnside has told me that the manager of Garofil Business SA is a Mr Simon Groom. I do not know who the directors of the company are.

4. I understand that Garofil Business SA is incorporated in Panama but I do not know the address of its registered office.

5. I am aware of the following share dealings by Garofil Business SA:

   (i) In 1987 by arrangement with Mr Burnside I instructed Paul E. Schweder Miller & Co. ("Schweder") to sell a number of shares in Inoco plc for the account of Garofil Business SA;

(ii) I have seen a copy of the affidavit of Gerald Godfrey Needleman of Schweder dated 29th March 1990 which states that Schweder received instructions from Garofil Business SA on 28th November 1989 to purchase up to 1,000,000 shares in City Realties Limited ("CRL").

6. Prior to 28th November 1989, I had discussed the New Zealand property scene with Mr Burnside on a number of occasions and no doubt talked about CRL in general terms. I am a director of Gulf Resources and Chemical Corporation ("Gulf") and Mr Burnside was aware that Gulf had bought property in New Zealand and that I considered that the New Zealand property market presented interesting opportunities for capital appreciation. I did not advise or encourage Mr Burnside to buy shares in CRL and did not provide him with any unpublished price sensitive information about CRL.

7. On 15th December 1989 Gulf made a proposal to CRL for the sale of its New Zealand property portfolio to CRL in exchange for a controlling interest in CRL. The Board of Directors of CRL first considered that proposal on 18th December 1989. Gulf subsequently revised its proposal and CRL's acceptance of the revised proposal was publicly announced on 16th January 1990.

8. It is my recollection that I was a director of CRL from 15th December 1989 to 29th December 1989 and for a very short period in January 1990 but I have never visited CRL's offices or attended a meeting of the Board of Directors of CRL.

9. On 11th December 1989 Gulf made a loan to Zelas Limited ("Zelas"). At that time Zelas had a substantial shareholding in CRL, which it had recently acquired from Tower Corporation. The acquisition was public knowledge at the time. Prior to the making of the loan, Gulf had had no involvement with Zelas. Gulf did not receive any information on CRL from Zelas. I first knew of Gulf's interest in CRL as a result of my interest in Gulf; my knowledge was not obtained through Zelas or CRL.

10. I did not discuss Gulf's interest in CRL nor, after 15th December 1989, did I discuss CRL with Mr Burnside or with any officer of Garofil Business SA.

11. Other than the sale of shares in Inoco plc and the purchase of shares in CRL referred to above, I have no knowledge of the business of Garofil Business SA or of any dealings by that company in listed securities.

SWORN AT

OWEN THOMAS
SOLICITORS
1 GREEN STREET, MAYFAIR
LONDON W1Y 3RG

this 4th day of

MAY 1990

before me

A Solicitor empowered to
administer oaths.

(AUDLEY RICHARD OWEN-THOMAS).

fjd/RB36-004/1-affidavit

'90 10 24 15:58 2 649746 Fee Publi

DIRECCION GENERAL DEL REGISTRO PUBLICO

TRANSMISION POR FAX

FECHA: PANAMA, 17 DE OCTUBRE DE 1990

PARA: SECURITIES COMMISSION

[redacted]: E.E. TRUMPER

FAX No. 64-4-728 070 PAIS:

DE: REGISTRO PUBLICO: DR. CARLOS MANUEL ARCE M.

RE: INFORMACION SOLICITADA

NUMERO DE PAGINAS (incluye esta hoja): UNA (1)

MENSAJE/ INSTRUCCIONES:

QUE LA SOCIEDAD " GAROFIL BUSINESS, S.A" SE ENCUENTRA INSCRITA Y VIGENTE A LA FICHA 125239, ROLLO 12641, IMAGEN 150, DE LA SECCION DE MICROPELICULAS (MERCANTIL) DESDE EL 10 DE FEBRERO DE 1984.----AGENTE RESIDENTE: VIVES Y ASOCIADOS. DIRECTORES Y DIGNATARIOS: RODRIGO VIVES: Director/Presidente; VICTOR ALVARADO: Director/Vice-Presidente; ZOILA DE DE LAS CASAS: Director/Tesorero; VICTOR ALVARADO: Secretario.----TODOS CON DIRECCION EN AVE. BALBOA Y CALLE 39 , EDIFICIO TORRE IBM PISO 8U, PANAMA, REPUBLICA DE PANAMA.--Que su Capital es de 10,000.00 Dólares Americanos. No constan accionistas.

NOTA: EN EL MINISTERIO DE COMERCIO E INDUSTRIA LE PUEDEN DAR LA INFORMACION DE LOS ACCIONISTAS DE DICHA SOCIEDAD, YA QUE EN EL REGISTRO PUBLICO NO CONSTAN.

República de Panamá

Ministerio de Comercio e Industrias
DIRECCION GENERAL DE COMERCIO INTERIOR

Panamá, 21 de septiembre de 1990
Referencia: SDGCI-297-90

Señor
E.E. TRUMPER
COUNSEL
SECURITIES COMMISSION
E. S. D.

Señor Trumper:

Hemos recibido su nota Nº 232-8 del 24 de Agosto del año en curso, donde nos solicita información acerca de la empresa GAROFIL BUSINESS, S.A. , al respecto tengo a bien informarle que de acuerdo a los archivos del Departamento de Licencia, de la Dirección General de Comercio Interior, dicha empresa no posee licencia comercial ni industrial.

Para ampliar su información le sugiero remitirse al Registro Público, institución gubernamental, donde se registran legalmente todas las sociedades mercantiles en este país a la siguiente dirección:

REGISTRO PUBLICO
ENTREGA GENERAL
ZONA # 7

Es necesario señalarle, que nuestras licencias, es un documento legal, que solo se exige para realizar transacciones comerciales e industriales dentro de la República de Panamá.

Sin otro particular, me suscribo de usted,

Muy Atentamente,

LICDA. PRISCILLA VASQUEZ U.
SUB-DIRECTORA GENERAL DE COMERCIO INTERIOR

REPUBLICA DE PANAMA
DIRECCION GENERAL DE COMERCIO E INDUSTRIAS

RECEIVED
15 OCT 1990

AFFIDAVIT

I, Gerald Needleman of Paul E. Schweder Miller & Co. ("Schweder"), 46-50 Tabernacle Street, London, England MAKE OATH AND SAY,

A. I am a Partner with Schweder and make this Affidavit from my own knowledge and belief.

1. That on Thursday, 3rd January 1991 at 11:00 hours I attended a meeting ("the meeting") at the office of Schweder for the purpose of a discussion with Mr. David J. Hudson ("Hudson"), an Enforcement Inspector with the Enforcement Division of The Securities Association, London, England.

2. That at the meeting a person identified himself as Hudson.

3. That at the meeting I told the Enforcement Inspector the following information:-

   * That Garofil Business S.A. ("Garofil") was introduced to me as a client by Mr. David Rowland ("Rowland") on behalf of Edouard Balser ("Balser") of Mayor and Balser, Avocats au Barreau de Geneve, 25 Boulevard Helvetique 1207 Geneve.

   * That Garofil was not known to Schweder independently of Rowland.

   * That I have never heard of a Mr. Burnside, and that he is not known to Schweder.

   * That I received a telephone call from Balser indicating that Garofil was interested in purchasing City Realties' shares.

   * That a telephone call I received from Balser was to confirm funds totalling £150,000 had been credited to Garofil's account at Schweder, and that instructions were being placed to purchase one million City Realties.

   * That I was told to consult with Rowland as to the details of how the order should be handled.

   * That I updated Rowland with the prices.

   * That contract notes were intitially sent to Balser in Geneva.

   * That at some point I received a telephone call from Balser informing that me that he would no longer be administering the business of Garofil.

* That I received a telephone call from Simon Crispin Groom ("Groom") of 20 Boulevard Princess Charlotte, Monte Carlo 98000, Monaco, stating that he (Groom) was the duly authorised attorney of the board of directors of Garofil Business S.A.

* That subsequent purchases were executed in City Realties and contracts sent to Groom. Further funds totalling £30,000 were put in place by Groom for the account of Garofil at Schweder.

* That the only correspondence from Groom held by Schweder is a copy of two Declarations of Non-Residence dated 6th December 1989, one sent to Midland Bank Plc., the other to Coutts & Co. and subsidiary companies.

Sworn at 24 St. Mary Axe.....

in the City of London, England.....

this .....30th..... day

of .....January..... 1991

Before me:

Notary Public London, Engl...
(J. B. BURGESS)

AFFIDAVIT

I, David James Hudson of The Securities Association, London, England MAKE OATH AND SAY,

A. I am an Enforcement Inspector with the Enforcement Division of The Securities Association, London, and make this Affidavit from my own knowledge and belief.

1. That on Thursday, 3rd January 1991 at 11:00 hours I attended a meeting ("the meeting") at the office of Paul E. Schweder Miller & Co. ("Schweder"), 46-50 Tabernacle Street, London, England for the purpose of a discussion with Mr. Gerald Needleman ("Needleman"), Partner of Schweder.

2. That at the meeting a person identified himself as Needleman.

3. That at the meeting Needleman told me the following information:-

   * That Garofil Business S.A. ("Garofil") was introduced to him as a client by Mr. David Rowland ("Rowland") on behalf of Edouard Balser ("Balser") of Mayor and Balser, Avocats au Barreau de Geneve, 25 Boulevard Helvetique 1207 Geneve.

   * That Garofil was not known to Schweder independently of Rowland.

   * That he had never heard of a Mr. Burnside, and was not known to Schweder.

   * That he had received a telephone call from Balser who indicated that Garofil was interested in buying shares in City Realties.

   * That a telephone call he had received from Balser was to confirm that funds totalling £150,000 had been credited to Garofil's account at Schweder, and that instructions were being placed to purchase one million City Realties.

   * That he was told to consult with Rowland as to the details of how the order should be handled.

   * That he updated Rowland with the prices.

   * That contract notes were intitially sent to Balser in Geneva.

   * That he had at some point received a telephone call from Balser informing him that he (Balser) would no longer be administering the business of Garofil.

* That he had received a telephone call from Simon Crispin Groom ("Groom") of 20 Boulevard Princess Charlotte, Monte Carlo 98000, Monaco, stating that he (Groom) was the duly authorised attorney of the board of directors of Garofil Business S.A.

* That subsequent purchases were executed in City Realties and contracts sent to Groom. Further funds totalling £30,000 were put in place by Groom for the account of Garofil at Schweder.

* That the only correspondence from Groom held by Schweder is a copy of two Declarations of Non-Residence dated 6th December 1989, one sent to Midland Bank Plc., the other to Coutts Co. and subsidiary companies.

Sworn at ...24. St. Mary Axe.....

in .the .City.of London,. England.....

this .....30th..... day

of .... January..... 1991

fore me:

Notary Public London, England
(J. B. BURGESS)

891101	CYR	.3600	2000	USLW	ACBW	093306	LM	1567.3800
		.3800	2000	USLW	FORD	100845		
		.3400	257	FASW	USLW	144007	OL	
891102	CYR	.3700	4500	USLW	JARW	095345		2101.0000
		.3700	1000	USLW	JARW	095347		
		.3300	200	FASW	FORD	134916	OL	
891103	CYR	.3600	2000	USLW	JSWA	145403		919.2000
		.3600	500	USLW	JSWA	145404		
		.3200	60	FASW	JSWA	150323	OL	
891106	CYR	.3200	227	FASW	JSWA	094548	OL	577.6400
		.3500	1000	USLW	JSWA	095004		
		.3100	500	FASW	ACBW	101036	OL	
891107	CYR	.3100	92	FASW	JSWA	093531	OL	1281.2600
		.3100	200	FASW	ACBW	094639	OL	
		.3500	3000	BPLA	ACBW	094755		
		.3100	382	FASW	OCOW	101103	OL	
		.3100	72	FASW	OCOW	101103	OL	
891108	CYR	.3100	215	FASW	GLEW	093304	OL	2050.6500
		.3700	2000	USLW	USLW	101506	MR	
		.3700	2100	USLW	EWCC	101528		
		.3300	500	FASW	CRAA	101628	OL	
		.3700	3000	USLW	FORD	141407		
891109	CYR	.3300	500	FASW	ACBW	150617	OL	905.0000
		.3700	2000	JARW	ACBW	151108		
891110	CYR	.3700	3000	USLW	YOUW	100446		1850.0000
		.3700	2000	USLW	USLW	143304	MR	
891113	CYR	.3300	691	JSWA	HHGC	143955	OL	228.0300
89 14	CYR	.3800	2000	WEGD	BPLA	144903		760.0000
891115	CYR	.3400	1179	JSWA	FORD	095956	OL	1363.9100
		.3900	2000	JARW	USLW	100823		
		.3500	523	JSWA	HHGC	143232	OL	
891116	CYR	.3900	5000	JARW	WEGD	101351		4138.3000
		.3500	538	JSWA	WEGD	142729	OL	
		.4000	3000	BWCA	USLW	144457		
		.4000	2000	BWCA	USLW	144457		
891117	CYR	.3600	272	JSWA	CRAA	093633	OL	151.5600
		.3600	149	JSWA	BWCA	142821	OL	
891120	CYR	.3900	11000	JARW	BWCA	100309		9970.8500
		.3500	416	JSWA	BWCA	141344	OL	
		.3500	215	JSWA	ACBW	143649	OL	
		.3900	10200	JARW	USLW	144608		
		.3900	1800	JARW	USLW	144609		
		.3900	2000	JARW	USLW	144609		
891121	CYR	.3500	71	JSWA	USLW	143120	OL	24.8500
891122	CYR	.3900	4000	JARW	USLW	150636		1560.0000
891124	CYR	.3500	600	JSWA	WMDA	141533	OL	285.2500
		.3500	215	JSWA	CRAA	150940	OL	

CODE	MATCH DATE	CONTRACT	SELLER	BUYER	PRICE	QUANTITY	CAPTURE DATE	CAPTURE TIME	MATCH TIME
P	891128	9333867330	WEGD	JSWA	.3500	95	891128	142642	142642
		9333867351	WEGD	JSWA	.3500	595	891128	142643	142643
		9333867375	FRAA	JSWA	.4000	10000	891128	142726	142022
		9333867376	USLW	JSWA	.4000	1000	891128	142749	142023
		9333867377	USLW	JSWA	.4000	1500	891128	142749	142023
		9333867482	FORD	JSWA	.4000	1000	891128	144649	144907
		9333867501	WEGD	JSWA	.4000	1000	891128	145024	145444
		9333867561	FORD	JSWA	.4800	4000	891128	150349	150403
		9333867629	FRAA	JSWA	.4500	10000	891128	150643	150948
	891129	9333867730	FORD	JSWA	.4000	92	891129	093427	093427
		9333867771	USLW	JSWA	.4000	76	891129	094414	094414
		9333867772	USLW	JSWA	.4000	52	891129	094414	094414
		9333867773	USLW	JSWA	.4000	50	891129	094414	094414
		9333867774	USLW	JSWA	.4000	11	891129	094414	094414
		9333867825	HHGC	JSWA	.4500	5000	891129	095113	095151
		9333867827	HHGC	JSWA	.4000	73	891129	095152	095152
		9333867842	USLW	JSWA	.4000	200	891129	095656	095656
		9333867843	USLW	JSWA	.4000	536	891129	095656	095656
		9333867903	USLW	JSWA	.4900	100000	891129	095658	100611
		9333867920	LAWC	JSWA	.4500	2000	891129	100310	100829
		9333868044	JSWA	JSWA	.4600	30000	891129	141337	141337
		9333868070	FORD	JSWA	.4000	215	891129	142254	142254
	891130	9334868619	EWCC	JSWA	.4500	4300	891130	100739	100940
		9334868634	DPBW	JSWA	.4300	47000	891130	101102	101126
		9334868635	ACBW	JSWA	.4500	8000	891130	100640	101127
		9334868636	USLW	JSWA	.4600	10400	891130	100050	101128
		9334868637	USLW	JSWA	.4800	62400	891130	100049	101129
		9334868638	USLW	JSWA	.4800	128700	891130	100050	101129
		9334868639	USLW	JSWA	.4800	20000	891130	100050	101130
		9334868640	USLW	JSWA	.4800	20000	891130	100049	101130
		9334868641	USLW	JSWA	.4800	25000	891130	100051	101131
		9334868666	FORD	JSWA	.4500	6000	891130	101126	101309
		9334868667	FORD	JSWA	.4500	8500	891130	101128	101310
		9334868734	USLW	JSWA	.4000	50	891130	141756	141756
		9334868842	FRAA	JSWA	.4500	1000	891130	143829	143850
		9334868882	LAWC	JSWA	.4700	28000	891130	144627	144814
		9334868911	FORD	JSWA	.4700	2000	891130	145810	145859
		9334868977	WEGD	JSWA	.4300	3000	891130	145729	150413
		9334868978	JARW	JSWA	.4800	80000	891130	150141	150414
		9334868979	JARW	JSWA	.4800	800	891130	150141	150414
		9334868987	JSWA	JSWA	.4800	51500	891130	150451	150451
		9334868988	JSWA	JSWA	.4800	7700	891130	150452	150452
		9334868996	HHGC	JSWA	.4300	381	891130	150651	150651
	891201	9335869142	USLW	JSWA	.4700	794	891201	095854	095854
		9335869159	ACBW	JSWA	.4300	215	891201	100020	100020
		9335869218	DPBW	JSWA	.4700	724	891201	100627	100627
	891204	9338869649	CVLA	JSWA	.4300	1722	891204	095552	095552
		9338869964	LAWC	JSWA	.4700	1000	891204	144441	144441
		9338870141	CPAA	JSWA	.4700	1937	891204	150629	150629
		9338870142	CPAA	JSWA	.4300	270	891204	150630	150630
	891205	9339870349	OCOW	USLW	.3800	5700	891205	100739	101037
		9339870350	OCOW	USLW	.3800	1700	891205	100739	101038
		9339870351	USLW	USLW	.3800	1800	891205	101038	101038
		9339870352	USLW	USLW	.3800	800	891205	101038	101038
		9339870510	USLW	JSWA	.3400	30	891205	141945	141945
		9339870523	USLW	JSWA	.3400	29	891205	142514	142514

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		9339870563	OCOW	JSWA	.3400	95	891205	143933	143933
	891206	9340870876	WMDA	JSWA	.3400	1498	891206	094304	094304
		9340870966	WEGD	JSWA	.3400	918	891206	095223	095223
		9340871230	WEGD	JSWA	.3400	918	891206	144828	144828
		9340871232	WEGD	JSWA	.3400	933	891206	144929	144929
	891207	9341871437	USLW	USLW	.4000	5000	891207	093910	093910
		9341871447	JARW	USLW	.4000	2000	891207	093910	094037
		9341871487	HAYA	USLW	.4000	1000	891207	093909	095139
		9341871654	JSWA	USLW	.4000	5000	891207	095759	101001
		9341871721	HAYA	JSWA	.3600	76	891207	141221	141221
	891208	9342872125	JSWA	JARW	.4000	2000	891208	093731	094735
		9342872179	ACBW	JSWA	.3600	53	891208	100207	100207
		9342872295	JSWA	USLW	.4000	10000	891208	100956	101009
		9342872338	ACBW	USLW	.4000	2100	891208	100531	140956
	891211	9345872822	CRAA	JSWA	.3600	549	891211	100434	100434
		9345872940	ACBW	JSWA	.3600	215	891211	143129	143129
		9345872955	ACBW	JARW	.4000	3000	891211	143129	143341
		9345872969	OCOW	JARW	.4000	10000	891211	143341	143438
		9345872970	OCOW	JSWA	.3600	619	891211	143439	143439
		9345877008	FORD	JSWA	.3600	215	891211	145645	145645
	891212	9346872514	JARW	JARW	.4000	10000	891212	142533	142533
	891213	9347873844	WEGD	JSWA	.3600	76	891213	094943	094943
		9347873857	CRAA	JSWA	.3600	39	891213	095219	095219
		9347873929	WEGD	USLW	.4000	1000	891213	100427	100433
		9347873961	JSWA	JSWA	.4500	10000	891213	101002	101002
		9347874054	OCOW	JSWA	.4500	20000	891213	101002	101621
		9347874213	FORD	JSWA	.4500	10000	891213	143945	144710
		9347874232	OCOW	JSWA	.4000	892	891213	144943	144943
		9347874255	OCOW	JSWA	.4500	20000	891213	143945	145001
	891214	9348874464	JSWA	JSWA	.4500	20000	891214	095039	095039
		9348874564	OCOW	JSWA	.4500	11000	891214	095039	101012
		9348874656	JARW	JSWA	.4500	10000	891214	095039	141050
		9348874790	FORD	JSWA	.4500	3000	891214	143120	144652
		9348874791	FORD	JSWA	.4000	364	891214	144653	144653
	891215	9349875209	USLW	JSWA	.4500	2000	891215	101048	101227
		9349875281	WEGD	JSWA	.4500	5000	891215	100615	101704
		9349875299	CRAA	JSWA	.4000	700	891215	102100	102100
		9349875369	WEGD	JSWA	.4000	59	891215	142332	142332
		9349875505	ACBW	JSWA	.4500	3000	891215	145123	145149
		9349875506	ACBW	JSWA	.4000	153	891215	145449	145449
		9349875534	LAWC	JSWA	.4500	10000	891215	145124	150040
		9349875544	WEGD	JSWA	.4500	2000	891215	142152	150215
		9349875669	DPBW	JSWA	.4500	29000	891215	150500	151726
	891218	9352875716	OCOW	JSWA	.4000	30	891218	093626	093626
		9352875780	DPBW	JSWA	.4500	23000	891218	094753	095937
		9352875781	DPBW	JSWA	.4000	16	891218	095937	095937
		9352875954	USLW	JSWA	.4500	10500	891218	141743	142055
		9352875955	USLW	JSWA	.4500	1000	891218	141743	142056
		9352876091	BPLA	JSWA	.4500	5000	891218	144617	144620
		9352876188	LAWC	JSWA	.4500	1000	891218	141743	150100
		9352876190	LAWC	JSWA	.4000	133	891218	150101	150101
	891219	9353876298	ACBW	JSWA	.4000	1076	891219	094249	094249
	891220	9354876873	JARW	BPLA	.4500	2000	891220	100700	100747
	891221	9355877347	USLW	JSWA	.4000	970	891221	095352	095352
		9355877348	USLW	JSWA	.4000	15	891221	095352	095352

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1	891221	9355877349	USLW	JSWA	.4000	42	891221	095353	095353
		9355877501	BWCA	BFLA	.4500	13000	891221	101401	101551
		9355877557	USLW	JSWA	.4000	753	891221	143737	143737
	891222	9356877851	CRAA	JSWA	.4000	400	891222	095700	095700
	900103	0003878663	JARW	USLW	.4000	6000	900103	094355	095015
		0003878708	ACBW	JSWA	.3600	1076	900103	095520	095520
	900104	0004879043	JSWA	AMSA	.4400	4	900104	093921	093921
		0004879079	WEGD	JSWA	.3600	93	900104	094746	094746
		0004879113	FORD	USLW	.4000	4500	900104	094225	095423
		0004879269	FORD	JSWA	.3600	19	900104	141557	141557
		0004879290	FORD	JSWA	.3600	57	900104	141558	141558
		0004879327	WEGD	JSWA	.3600	200	900104	143037	143037
		0004879491	ACBW	USLW	.4000	6300	900104	144902	145235
		0004879492	ACBW	JSWA	.3600	19	900104	145235	145235
	900105	0005879551	JARW	USLW	.4000	7000	900105	093826	095105
	900108	0008880018	JSWA	JSWA	.4300	2000	900108	142749	142749
		0008880052	ACBW	JSWA	.4300	2000	900108	142749	143047
		0008880083	ACBW	JSWA	.3600	153	900108	143048	143048
	900109	0009880219	HHGC	JSWA	.3800	200	900109	094458	094458
		0009880219	JARW	JSWA	.4500	20000	900109	093337	094526
		0009880225	OCOW	JSWA	.4500	20000	900109	093337	094538
		0009880248	USLW	JSWA	.4500	10000	900109	093337	094953
		0009880263	OCOW	HHGC	.4500	2000	900109	094541	095403
		0009880265	BWCA	JSWA	.4500	27000	900109	093337	095237
		0009880399	JARW	JSWA	.4000	179	900109	142409	142409
		0009880554	OCOW	JSWA	.4500	18000	900109	144132	145252
		0009880565	USLW	JSWA	.4500	7000	900109	144132	145413
	900110	0010880611	USLW	JSWA	.4500	20000	900110	093805	093925
		0010880687	USLW	JSWA	.4500	18000	900110	095944	100219
		0010880713	USLW	JSWA	.4500	5000	900110	095944	100655
		0010880798	USLW	JSWA	.4000	23	900110	141638	141638
		0010880837	AMSA	JSWA	.4000	213	900110	144055	144055
		0010880851	ACBW	JSWA	.4000	1076	900110	144224	144224
		0010880852	BFLA	JSWA	.4500	5000	900110	143729	144224
		0010880893	FRAA	JSWA	.4000	438	900110	144605	144605
	900112	0012881669	CRAA	USLW	.4000	1000	900112	143104	143753
	900116	0016882487	WEGD	JSWA	.3600	69	900116	142739	142739
		0016882545	JSWA	JSWA	.4000	4000	900116	143739	143739
		0016882676	WEGD	USLW	.4000	4500	900116	142747	145933
	900117	0017882751	OCOW	USLW	.4500	1000	900117	094138	094236
		0017882768	JARW	USLW	.4200	2000	900117	094137	095636
		0017882804	USLW	FORD	.5000	4000	900117	095533	095950
		0017882942	USLW	USLW	.5000	9000	900117	142343	142343
		0017882945	USLW	HHGC	.5000	25100	900117	142342	142600
		0017882946	USLW	HHGC	.5000	500	900117	142342	142601
		0017882949	JARW	HHGC	.5000	22000	900117	142602	142725
		0017882950	JARW	HHGC	.5000	2000	900117	142601	142727
		0017882981	JARW	BFLA	.5000	5000	900117	142727	144126
		0017883009	USLW	JSWA	.5000	16000	900117	144316	144632
		0017883129	USLW	BFLA	.5000	2000	900117	145819	145942
	900118	0018883218	OCOW	JSWA	.4500	76	900118	095532	095532
		0018883251	JARW	ACBW	.5000	2000	900118	094248	100143
		0018883282	JSWA	JSWA	.5000	5000	900118	100545	100545
		0018883450	WEGD	JSWA	.4500	76	900118	143704	143704
		0018883523	JARW	BRFC	.4800	24000	900118	143852	144803
		0018883623	WEGD	BRFC	.4800	1000	900118	143852	150340

CLOSE CODE	MATCH DATE	CONTRACT	SELLER	BUYER	PRICE	QUANTITY	CAPTURE DATE	CAPTURE TIME	MATCH TIME
CYR	90.119	0019883705	USLW	JSWA	.4300	69	900119	095157	095157
		0019883706	USLW	JSWA	.4300	22	900119	095157	095157
		0019883748	BFLA	BFLA	.4700	2000	900119	095736	095736
		0019883986	JARW	JSWA	.4300	200	900119	144439	144439
		0019883993	FRAA	JSWA	.4300	1000	900119	144622	144622
		0019883994	FRAA	JSWA	.4300	200	900119	144623	144623
	90.123	0023884471	USLW	JSWA	.4300	351	900123	093906	093906
		0023884477	USLW	OCOW	.4700	7000	900123	093906	094325
		0023884616	LAWC	OCOW	.4800	10000	900123	100426	100943
		0023884737	JARW	JSWA	.4300	220	900123	143056	143056
		0023884899	LAWC	LAWC	.4700	6000	900123	145717	145717
		0023884920	BFLA	LAWC	.4800	2000	900123	145718	145930
	90.124	0024885125	BFLA	FORD	.4800	1000	900124	093457	095621
		0024885269	WEGD	BRFC	.4800	1000	900124	100255	101253
		0024885270	JSWA	BRFC	.4800	1000	900124	100045	101254
		0024885303	BFLA	OCOW	.4800	16400	900124	142559	142716
		0024885304	BFLA	OCOW	.4800	10400	900124	142559	142717
		0024885305	BFLA	OCOW	.4800	10000	900124	142558	142717
		0024885306	BFLA	OCOW	.4800	1500	900124	142559	142717
		0024885352	WEGD	JSWA	.4300	905	900124	143751	143751
	90.125	0025885623	JARW	OCOW	.4800	8000	900125	093851	094832
		0025885626	JARW	OCOW	.4800	8300	900125	093851	094833
		0025885627	JARW	OCOW	.4800	24700	900125	093852	094833
		0025885628	JARW	OCOW	.4800	300	900125	093852	094834
		0025885792	JARW	OCOW	.4800	52000	900125	101108	101541
		0025885918	BRFC	OCOW	.4800	5000	900125	142159	144534
		0025885980	LAWC	OCOW	.4800	10000	900125	143332	145442
	90.126	0026886066	BRFC	JSWA	.4300	150	900126	092745	092745
		0026886135	JSWA	OCOW	.4700	7000	900126	094840	095615
	90.129	0029886640	LAWC	JSWA	.4200	133	900129	144211	144211
		0029886659	LAWC	OCOW	.4700	1000	900129	144211	144909
	90.130	0030886905	GRKW	JARW	.4800	3000	900130	100755	101017
		0030887002	BFLA	OCOW	.4700	5200	900130	142406	143004

APPENDIX L

THE EXTRA-TERRITORIALITY QUESTION

1. Introduction

1.1 The Securities Amendment Act 1988 is silent as to its extra-territorial effect. Unlike s.4 of the Commerce Act 1986 and s.3 of the Fair Trading Act 1986, the Securities Amendment Act does not contain provisions that make any reference to the extra-territorial application of the Act.

1.2 In the one case, where the facts raised issues of extra-territoriality, the question of the extra-territorial application of the Act was not raised in argument or considered by the Court. In Brook Investments Ltd v. Paladin (Unreported), M1581/89 Auckland, 21 October 1989, Sinclair J, the Court exercised the power conferred on it by s.32(1)(l) of the Securities Amendment Act to make an order declaring that the exercise of voting rights was of no effect until further order of the Court. The voting rights related to shares in a company incorporated in Bermuda which were to be exercised at a meeting to be held in Hong Kong, and at least some part of the affected shares were not on the New Zealand register of the company.

1.3 It should be observed that s.7 of the Securities Act 1978 prescribes the scope of the Act in relation to securities offered outside New Zealand. The prospectus and related requirements of ss.33 to 54 of the Act do not apply in respect of securities offered for subscription only to persons outside New Zealand, or to persons outside New Zealand and in New Zealand where no offer is made to the public in New Zealand. Apart from that section there is no provision in the Securities Act which deals with any extra-territorial application of the Act.

2. Two approaches where a statute is silent on the question of extra-territoriality

2.1 Dicey & Morris, The Conflicts of Laws, 11th ed., 1987, pp.16-17, identified two possible approaches for determining whether such a statute applies to the case in question:

(a) The first is to interpret the statute in the light of its background and purpose so as to read into it the limitations which the legislature would have expressed if it had given thought to the matter.

(b) The second approach is to apply general principles derived from the conflict of laws, i.e. first characterize the question, and then apply the relevant choice of law rule to decide whether that question should be determined by the New Zealand statute, or by the law of some other jurisdiction.

In the Commission's view, the application of either of these approaches leads to the conclusion that the insider trading provisions of Part I of the Securities Amendment Act 1988 apply in the present case. Each of those approaches will be examined in turn.

3. The Interpretation Approach

3.1 The Courts in New Zealand have generally adopted the same approach as is taken in England and Australia when construing the language of a statute in order to determine whether or not it has extra-territorial effect. The Courts have applied the principle that there is a presumption against extra-territoriality, i.e. where a New Zealand statute has no choice of law clause which declares that the Act applies to overseas matters, there is a

presumption against the Act having any such application. As stated in The Amalia, (1863) 1 Moore P.C. (NS) 471, 474; 115 E.R. 778, 779:

> "... the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction ... no statute ought, therefore, to be held to apply to foreigners with respect to transactions out of British jurisdiction, unless the words of the statute are perfectly clear."

3.2 This principle has been applied in New Zealand in two Privy Council decisions, Boots the Chemists (N.Z.) Ltd v. Chemists' Service Guild of N.Z. (Inc.) [1969] N.Z.L.R. 78, 92 and CIR v. Associated Motorists Petrol Co. Ltd [1971] N.Z.L.R. 660, 665.

3.3 In determining whether the intention of the statute is sufficiently clear to rebut the presumption, the whole subject-matter, object and scheme of the Act must be examined. Courts in New Zealand have adopted what is called a "purpose of approach " to statutory interpretation directed to "making the statute work": Northland Milk Vendors Association Inc. v. Northern Milk Ltd [1988] 1 N.Z.L.R. 530, C.A. To the extent that the scheme and purpose of a statute requires its application to persons or activities outside New Zealand, the statute should be given that effect.

3.4 There are a number of indications in the Securities Amendment Act itself that it is intended to apply to dealings in the shares of companies which are listed on, and whose shares are traded on, the New Zealand Stock Exchange. The definition of "person" in s.2 includes a body corporate whether incorporated in New Zealand or elsewhere. A "public issuer" within the meaning of those words in s.2 of the Act includes a company incorporated outside New Zealand that is, or that was at any time, a party to a listing agreement with the New Zealand Stock Exchange. Sinclair J. in Brook Investments Ltd v. Paladin (supra) stated with respect to Part II of the Act that the Act was intended to deal with the unhealthy situation which had grown up "in relation to the trading of shares on the New Zealand

sharemarket" prior to 1988. In order to protect the New Zealand sharemarket the Act necessarily has application to acts which take place outside New Zealand's territorial boundaries, and it would seriously undermine the impact of this legislation if it were to be read so restrictively as to exclude the actions of persons outside New Zealand when those actions are directed to trading activity on the New Zealand market in shares of a company listed on the New Zealand Stock Exchange. An opinion provided on 31 March 1990 under s.17 of the Act by Mr S.L. Franks supports that view of the Act, even though Mr Franks expressed the opinion that the Act did not cover the facts of the particular case before him. In para 49 of that opinion Mr Franks expressed the view that:

> "When examining the background and purpose of Part I of the Act one must consider whose interests the provisions were designed to protect. It would appear that the provisions were designed to protect persons trading on the New Zealand market. The general purpose of the Act was expressed to be to regulate New Zealand's securities market and to bring the regulations applicable to that market into line with regulations provided in other such markets."

3.5 The present case concerns trading in the shares of a New Zealand incorporated company, the shares being listed on the New Zealand Stock Exchange and held on a New Zealand register. The provisions of Part I of the Act dealing with insider trading are directed at the buying or selling of securities in such a company, and the fact that the instruction to purchase the securities is given outside New Zealand by a person who is not a New Zealand resident does not detract from the scope of the Act in this respect. We consider that the Act was clearly intended to apply to just this kind of activity.

4. Conflict of Laws Approach

4.1 The conflict of laws approach to this problem provides the same answer, namely that the New Zealand Courts have jurisdiction, through a different analysis. The conflict of laws approach requires two steps to be taken, first, to characterize the question at issue between the parties, and then apply the relevant choice of law rule to decide whether that question should be determined by the New Zealand statute, or by the law of some other jurisdiction: Dicey & Morris (supra), p.17.

4.2 The particular liability which arises under Part I of the Securities Amendment Act would appear to come within two categories -

(a) Liability under s.7(3) and similarly under s.9(3), 11(3) and 13(3) is a liability for restitution of amounts which are unjustly received under a contract for sale or purchase of shares.

(b) The liability which arises under s.7(4) and similarly under s.9(4), 11(4) and 13(4) is not primarily restitutionary but is described as a "pecuniary penalty" which is intended to discourage trading activity in breach of this part of the Act.

4.3 Dicey & Morris set out a number of rules under which these authors have categorised claims for the purpose of the conflict of laws approach. The relevant rule dealing with restitutionary claims is Rule 203 at p.1350, which provides:

> "Rule 203 - (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is ... determined as follows:
>
> (a) If the obligation arises in connection with a contract, its proper law is the proper law of the contract; ... whether

(b) If it arises in any other circumstances, the proper law is the law of the country where the enrichment occurs."

4.4 In the present case, the obligation arises in connection with a contract for the purchase of shares, and it is therefore necessary to determine the "proper law of the contract" in this case. Dicey & Morris at p.1161 define the proper law of the contract in these terms:

> "Rule 180 - The term 'proper law of a contract' means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."

4.5 In the present case the facts indicate that the place with the closest and most real connection to the contract is New Zealand. The shares were purchased through a New Zealand broker on the New Zealand Stock Exchange and were shares in a New Zealand incorporated and listed company. The company's share register is in New Zealand. The only foreign elements appear to be that the order to buy the shares came from overseas and that the purchaser was an overseas company. Hence, the only foreign elements are that an overseas person chose to do business in New Zealand by engaging in securities transactions here. There are, accordingly, good grounds for treating New Zealand law as being the law which has the most real connection to the transaction and which is therefore the proper law of the contract. The relevant New Zealand law is Part I of the Securities Amendment Act 1988.

4.6 The character of the "pecuniary penalty" in s.7(2)(c)(ii) and the other corresponding provisions of Part I of the Securities Amendment Act gives rise to more difficulty. It is clear that a penalty which has a criminal character must be dealt with in accordance with the *lex loci delicti*

commissi, or place where the wrong is committed. Part I of the Securities Amendment Act 1988, however, provides for the recovery of the "pecuniary penalty" by way of civil proceedings brought by the public issuer, and the sum recovered may be retained by the public issuer or paid to other persons or to charity. In that respect, the pecuniary penalty does not have a criminal character and is akin rather to an award of exemplary damages in tort. Proceedings to recover damages of that kind do not come within the description of "penal action" as given in the leading case of Huntington v. Attril [1893] A.C. 150. If that approach were adopted and the pecuniary penalty is held to have primarily a restitutionary character, then the law governing the transaction will be determined in accordance with the rule discussed above relating to restitutionary claims. It is not clear on the present state of the authorities whether a statutory penalty which can be enforced only in the course of civil proceedings and is not enforced by action of the state can be brought within the description of a restitutionary claim. It is, however, not necessary to pursue that question further in the present case having regard to the application of the statutory interpretation approach.

5. United States approach

5.1 It is useful to refer to the approach taken in the United States, where it has been considered important to accord extra-territorial application to securities legislation. The jurisdictional provisions of the US Federal Securities Laws do not expressly indicate when American Courts are empowered to adjudicate securities law disputes arising from extra-territorial transactions. Section 30(b) of the Exchange Act of 1934 states that the Act:

> "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter."

5.2 Notwithstanding the wording of the Act, the Second Circuit in Schoenbaum v. Fitzbrook 405 F.2d 200 (2nd Cir. 1968) held:

> "We believe that Congress intended the Exchange Act to have extra-territorial application, in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. In our view, neither the usual presumptions against extra-territorial application of legislation, nor the specific language of Section 30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stock traded in the United States which are effected outside the US where extra-territorial application of the Act is necessary to protect American investors."

In general, US Courts extend their jurisdiction when they are of the view that there is a sufficiently significant effect on American interests to warrant such extension. This extension of jurisdiction to foreign security transactions normally takes place in two specific areas. First, in situations where the conduct occurring outside the US has an internal effect on American securities markets or American investors ("Effects test"). Secondly, in situations where conduct occurs within the United States which has an impact outside the United States ("Conduct Test"). A useful discussion of these tests is given in Tennekoon, Law and Regulation of International Finance, Butterworths London, 1991 in Chapter 20.

5.3 The reasons behind the extension of jurisdiction are well explained in Continental Grain (Australia) Pty Ltd v. Pacific Oilseeds Inc 592 F.2d (8 Cir. 1979). The Eighth Circuit summed up the reasons as follows:

> "(a) The avoidance of creating a haven within the US for those who defraud foreign investors.
>
> (b) The encouragement of international reciprocity by allowing foreign investors to invoke American Securities Laws to protect themselves against being defrauded by acts, occurring within the US in anticipation that foreign governments will similarly protect American investors; and

(c) The specific advancement of the Federal Congressional policy of the Securities Exchange Act's anti-fraud provisions, by progressively raising standards of conduct in securities transactions to higher levels of honesty and integrity."

5.4 The Securities and Exchange Commission's interpretation of the legislative intent and extra-territorial extent of the Act differs somewhat from the position adopted by US Courts, although the end result in most situations would be the same. In the Amicus Curiae filed by the SEC in the Schoenbaum case the Commission said:

> "The SEC maintains that the Act is generally applicable extra-territorially whenever such application is necessary and appropriate for the protection of American investors in the overseas market."

5.5 In summary, in determining the extra-territorial reach of those provisions of the Securities Exchange Act 1934 which are directed at market misconduct, the US Courts seem to have relied heavily upon tests of both "conduct" and "effect". The "conduct" test relies on the principle that jurisdiction may be asserted over conduct which occurs within the US, where the consequences of that conduct are found outside territorial boundaries. In the "effect" test US Courts appear to assert jurisdiction over conduct which has taken place outside of the US and has a substantial direct and foreseeable effect within the US market.

5.6 The Australian Corporations Law 1991 has recently adopted a form of "conduct" and "effect test" in extending the application of the insider trading provisions in the new Division 2A of Part 7.11 of the Corporations Law. The new section 1002 provides:

> **"1002** This Division applies to:
>
> (a) acts and omissions within this jurisdiction in relation to securities of any body corporate, whether formed or carrying

on business in this jurisdiction or in Australia or not; and

(b) acts and omissions outside this jurisdiction, whether in Australia or not, in relation to securities of a body corporate that is formed or carries on business in this jurisdiction."

6. Conclusions

6.1 In the absence of an express provision in the Securities Amendment Act 1988 dealing with the extra-territorial application of that Act, it is necessary to turn to general principles of law to determine whether or not New Zealand law applies to the facts in question. Under the general principles of law two approaches may be adopted -

- the statutory interpretation approach
- the conflict of laws approach

6.2 If the question is approached as one of statutory interpretation, the Commission considers that the scheme of the Act indicates clearly that it is intended to apply to a case which concerns trading in the shares of a company listed on the New Zealand Stock Exchange.

6.3 If the conflicts of laws approach is adopted, the Commission considers for the purposes of the compensatory liability under Part I of the Act, the proper law to apply having the closest connection with the contract for the purchase of the shares is the law of New Zealand, namely Part I of the Securities Amendment Act 1988. The law is less clear in relation to the pecuniary penalty provided for in Part I of the Act. If that penalty is considered to have a criminal character, then the *lex loci delicti commissi* will apply, namely, the place where the wrong was committed. On the present facts, any wrong which may have been committed was committed

in the place where the order to purchase the shares was made. Whether that order was made in New Zealand or overseas would depend on the nature of the relationships between the persons giving and executing that order. On the other hand, if the pecuniary penalty is considered to have primarily a restitutionary character, then the proper law of the contract in connection with which the restitutionary obligation arises, will apply which, on the approach put forward earlier, is New Zealand.

6.4 If the law to be applied is New Zealand law, then the close connection which the transaction has with New Zealand will mean that the forum conveniens for the trial of any proceedings will be New Zealand: Club Mediteranee NZ v. Wendell [1989] 1 NZLR 216, 218, CA applying Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 A.C. 460.

6.5 When the Act is next reviewed, consideration should be given to including in the Act a provision which expressly declares the extra-territorial effect of this legislation.