
SECRET COMMISSIONS

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There is an engaging simplicity in the title "Secret Commissions". Perhaps, at long last, a legal topic has been discovered which is relatively discrete and narrow; a suitable subject for a short paper late on a Friday afternoon at the conclusion of a testing conference.

CIVIL LIABILITY

General

The detailed rules which have been and continue to be developed concerning civil liability for the payment and receipt of secret commissions are substantially derived from general principles which, for present purposes, may be summarised in the following broad and considerably oversimplified manner:¹

- (i) a fiduciary who takes or uses trust property without authorisation is liable for the property and any other property acquired with it and any resultant profits;
- (ii) a fiduciary is liable for any unauthorised benefit obtained in circumstances of possible conflict between his duty and personal interest; and
- (iii) a fiduciary is liable for any unauthorised benefit obtained from his position.

A similarly broad description of a secret commission is an undisclosed benefit received from another by a person in public office or in a fiduciary relationship in circumstances in which the benefit could influence the recipient to favour or assist the donor in the course of the recipient's performance of the office or relationship. For this purpose, "fiduciary" is used "in a very loose, or at all events, a very comprehensive sense ...",² and generally includes any person who has undertaken to act for another either in some general capacity or for a specific purpose.

Obviously, considerably more detail emerges from the cases. For example:

- . Evidence as to motive is inadmissible, and there is an irrefutable presumption that the recipient was influenced by the benefit.³
- . It is immaterial that the transaction caused no loss, or that the benefit could not have been obtained by the recipient's principal.
- . The benefit must accrue to the recipient in the course of or by reason of his office his relationship with his principal.

A benefit given to a former fiduciary or public official for assistance previously rendered to the donor is not a secret commission unless it was arranged during the former period.⁴

On the other hand, a recent decision of Brownie J in the Supreme Court of NSW in the dispute between Harry M. Miller and Graham Kennedy⁵ demonstrates a practical approach to such temporal distinctions.

The judge found that Miller told Kennedy that he would donate his company's agency fee to charity in order to induce Kennedy to contract his services to TCN Channel 9 Pty Ltd, but did not disclose his justified expectation (without prior arrangements) that the channel would reimburse the lost fees to his company, as was subsequently arranged while its agency with Kennedy continued. It was held that Kennedy was entitled to terminate his agency agreement with Miller's company and recover the amounts which it had received.

The classic instance of a secret commission is a commission on a transaction between the donor and the recipient's principal as illustrated by the much-debated case of *Lister v Stubbs*,⁶ but various benefits other than a payment of money have been held to be secret commissions; for example, a release from liability,⁷ a gift of property,⁸ and a disposal of property at an undervalue.⁹ Further, secret commissions have been held to have been given in various transactions and circumstances; for example, a payment of a bet,¹⁰ a fee paid to an agent for an introduction,¹¹ and a payment for services rendered to the donor by the recipient in a transaction in the course of the recipient's fiduciary relationship.¹²

As the description suggests, secret commissions are concerned with undisclosed payments, and a number of propositions emerge from the cases, including the following:

- . It is not enough for a recipient to show that his principal had an opportunity to find out that the recipient was to receive the benefit.¹³
- . It is of no avail for the recipient or donor to say that he had been assured by the other that adequate disclosure of the benefit had been made to the principal, if in fact no proper disclosure had been made.¹⁴

- . The disclosure must be such as to fairly bring home to the principal a proper appreciation of the facts surrounding the benefit so as to provide an effective opportunity for election.¹⁵
- . The principal must agree, expressly or impliedly, to the benefit.¹⁶

The recipient of a secret commission is not entitled to be rewarded by his principal in relation to the subject transaction,¹⁷ but remains entitled to remuneration for other, untainted transactions.¹⁸

The principal, or in the case of a secret commission paid to a public official the Crown¹⁹ or appropriate public authority, is entitled to recover the secret commission from the recipient, irrespective of whether the transaction in relation to which the commission was paid is terminated or affirmed, and recovery of the secret commission does not evince an election to affirm the transaction.²⁰

Personal of Proprietary Remedies

According to *Lister v Stubbs*, generally speaking the recipient does not hold a secret commission paid in money as a trustee for his principal who cannot claim the specific money paid or any property purchased with it or resultant profit, but can only sue for the amount of the secret commission as money had and received,²¹ subject to the ordinary time limit imposed by the statute of limitations²² or for an equitable debt where there is a true (equitable) fiduciary relationship between the principal and the recipient of the secret commission. Even a trustee who receives a secret commission in money is not obliged to disgorge any resultant profit, and the beneficiary has only personal, not proprietary, remedies.²³ According to Lindley LJ in *Lister v Stubbs* (p 15), to hold otherwise would be to confound ownership with obligations.

However, there have been dicta which may be difficult to reconcile with *Lister v Stubbs*, for example, in *Grant v Gold Exploration and Development Systems Ltd*²⁴ per Collins LJ at p 251 and more recently in 1988 in *Logiscrose Ltd v Southwell United Football Club Ltd*²⁵ in 1900 per Millet J at p 1261.

The essential focus of the debate is extremely narrow. The supporters of the decision in *Lister v Stubbs*, such as Hanbury and Maudsley "Modern Equity" (12th ed) p 334, and Professor P. Birks "An Introduction to the Law of Restitution", contend that a principal ordinarily has no proprietary interest in money paid in the circumstances of a secret commission, and that, without such an interest, there is no entitlement to resultant profits and that only personal, not proprietary, remedies are available. Critics of this view include Goff and Jones "The Law of Restitution" (13th ed) p 78, Shepherd "The Law of Fiduciaries" (1981) p 268, and Finn "Fiduciary Obligations" (1987) p 214. In

essence, it is asserted against *Lister v Stubbs* by Goff and Jones that an equitable interest in money paid to a recipient as a secret commission should be conceded to his principal whenever that is required by the justice of the case. Some commentators (eg. Meagher, Gummow and Lehane - "Equity - Doctrines and Remedies" (2nd ed) para 545), seem to seek an intermediate position, and emphasise that *Lister v Stubbs* concerned an application for interlocutory relief and, in the judgment of Cotton LJ at p 12, reference was made to the circumstances that no judgment had been given in the action in connection with the conclusion that the money held by the recipient of the secret commission was not the property of his principal.

The Australian law is not fully settled. In *Consul Development Pty Ltd v DPC Estates Pty Ltd*²⁶ two members of the New South Wales Court of Appeal expressed the view that *Lister v Stubbs* is anomalous and not to be extended beyond its own facts.

The correctness of *Lister v Stubbs* did not fall for discussion by the High Court in the further appeal to the High Court,²⁷ but in *Daly v The Sydney Stock Exchange*²⁸ three members of the High Court expressly endorsed the application of *Lister v Stubbs* to the particular factual situation which then fell for consideration. However, in the intervening period, in *Chan v Zacharia*²⁹ at p 199, Deane J in his leading judgment stated unequivocally that a fiduciary who obtains a benefit in circumstances of possible conflict of duty and interest or from his fiduciary position holds that benefit as a constructive trustee. *Lister v Stubbs* was not referred to.

More generally, Deane J, with the support of Mason CJ, has been at the forefront of the High Court's development of a more flexible doctrine with respect to the imposition of constructive trusts. The current view is that the constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention "to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle". While the notion that a constructive trust will be imposed in accordance with idiosyncratic views of what is just and fair is rejected, it is acknowledged that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, which underlies fundamental equitable doctrines, including the constructive trust.³⁰

Given the subtlety and almost paradoxical sophistication of that approach, it would be rash for a humble commentator to suggest more than that the full rigour of *Lister v Stubbs* seems unlikely to continue unabated, and that the future is likely to see principals increasingly permitted to pursue proprietary remedies and resultant profits against the recipients of secret commissions.

Such an approach is consistent with the view that where a secret commission is not money but other property, the principal "...

has the option of claiming what is given, or its value, ie., the highest value while held by the [recipient] ...".³¹

Further, even where the secret commission takes the form of money, if it is obtained by the recipient out of his principal's funds, for example if it is deducted with the assent of the donor from monies otherwise payable by the recipient's principal to the donor, *Lister v Stubbs* (Cotton LJ at p 13) accepts that, in equity, the money is regarded as still belonging to the principal so that it and any property purchased with it or resultant profit can be claimed by the principal.

Damages

The principal of the recipient of a secret commission may also recover as damages any loss which the principal has sustained by entering into the transaction with the donor.

Although the principal must prove any additional loss claimed, there is a presumption that any price paid by a principal in such circumstances incorporates a premium of at least the amount of the secret commission, and that amount is recoverable without any proof of damage.³² Logically perhaps, a similar presumption should be made that any price paid to a principal has been reduced by at least the amount of the secret commission.

In *Bell v Lever Brothers*³³ the view was expressed that "double recovery" is permissible; that is to say, that a principal can recover the amount of the secret commission additionally to the full loss sustained.

However, in *Mahesian v Malaysian Government Officers Co-operative Housing Society Ltd*³⁴ the Privy Council held that the principal's remedies for recovery and damages are alternative, not cumulative, and that the principal must elect, at the time of judgment, to take either the amount of the secret commission or damages for loss suffered. Obviously, damages would ordinarily be chosen if the amount recoverable as damages exceeded the secret commission, but if the proven loss was less than the secret commission that amount would normally be accepted. Whether or not there is a windfall to the recipient's principal in such circumstances (albeit in a lesser sum than would have flowed from double recovery) depends upon what attitude is adopted to the effect (if any) of the payment of the secret commission upon the price paid by or to the principal in the transaction.

In *Logiscrose v Southend United*,³⁵ an issue arose as to whether, incidentally to rescission of the transaction in relation to which a secret commission was paid and the restoration of the parties to their original positions, a principal was obliged to repay to the donor the amount of a secret commission which it had already recovered from the recipient. The donor contended that the principal was obliged to treat the secret commission as a part of the purchase price which had initially been diverted to

the recipient but subsequently received by the principal and which was repayable on rescission.

However, it was held that the principal was entitled, but not obliged, to treat the secret commission as part of the purchase price and rescission was ordered without repayment of that amount to the donor. No attempt was made to relate the amount retained to any loss sustained by the principal, which plainly enough was held entitled in the circumstances to a windfall.

Remedies against Donor

It is apparent from what has been said that a principal is entitled to rescind a transaction in relation to which a secret commission has been paid, and, according to *Logiscrose*, is entitled to avoid a transaction *in futuro* if rescission is impossible.

A principal also has other remedies against the donor of a secret commission on the usual principles applicable to third party involvement in breaches by fiduciaries, including a right to damages for loss sustained by the principal, for which the donor and the recipient of the secret commission are jointly and severally liable.

Broadly stated, the general principle is that a third party is liable for knowingly participating in a breach by a fiduciary. It is sufficient that the donor becomes aware of the fiduciary relationship between the recipient of a secret commission and his principal in the course of the subject dealings.³⁶

The nature and extent of the knowledge required may vary according to whether or not there is a true (equitable) fiduciary relationship between the principal and the fiduciary; if there is, constructive notice may be sufficient.³⁷

Judicial intellects continue to be titillated by constructive notice, which has not been substantively considered by the High Court in the fifteen years since *DPC Estates*,³⁸ although many other courts have had their say. Broadly, wilfully ignoring the obvious or knowing circumstances which would indicate the facts to an honest and reasonable person (or put him/her on inquiry) is sufficient, although there are further questions such as whether knowledge of the impropriety as well as the facts is needed and whether there are different tests in different circumstances, eg. depending on whether or not the third party actually had the trust property.³⁹

Common practice notwithstanding, it is plain enough that there are many pitfalls in this branch of the law.

Those traps can be increased and expanded by steps taken for other purposes, for example, the establishment of separate business entities to carry on particular functions, and are probably often inadequately countered by standard disclosure

claims such as those used by some investment advisers and insurance agents and others who desire remuneration from those to whom they refer their principal's business.

Professional groups and financial institutions are amongst those who are vulnerable. For example, banks simply cannot provide personal benefits such as reduced interest rates to public officials or to fiduciaries such as solicitors, real estate agents, liquidators, etc., to encourage them to use the institution's services and facilities in the course of their duties on behalf of their principal.

Particular significance is accorded to these matters by the consideration that civil liability is not all that is at stake.

CRIMINAL LIABILITY

Common Law

At common law, secret commissions have long involved criminal offences by both donor and recipient,⁴⁰ but only where the recipient is acting in an official capacity or the benefit is given in anticipation of an appointment to an official position.⁴¹

Apart from the monarch, and perhaps a representative such as the Governor-General or a Governor,⁴² there is no official so high that a bribe does not involve criminal liability, and proceedings have been brought against a Lord Chancellor, A Chief Justice and a First Lord of the Treasury.

For this purpose, a public official is anyone who performs any duty in the discharge of which the public is interested,⁴³ whether or not the official is entitled to be remunerated for his work.⁴⁴

It is of no consequence that the recipient does not hold the official position claimed,⁴⁵ or presumably that an appointment was invalidly made.

It is not necessary that the official position is full-time or permanent and it is an offence to bribe electors or jurors (the offence of embracery).⁴⁶

As usual, superficially simple notions contain difficulties under the surface.

For example, at what point does a benefit given to a public official cease to be a social courtesy or lawful favour and become a bribe?

In days gone by, "meat or drink" of small value seems to have been considered acceptable.⁴⁷ More recently, gifts of boxes of matches carrying an exhortation to vote for a candidate in an election were held not to be an offence because the value was too

small to influence the recipient.⁴⁸ On the other hand, sexual favours are realistically considered valuable enough to be a fitting subject for a bribe,⁴⁹ and an attempt to justify gifts of substantial sums of money as Christmas presents has been rejected with the judicial comment that it "would be unfortunate if seasonal goodwill were to be regarded as a legitimate cloak for the giving of bribes".⁵⁰

The conceptual problem is obvious, since once the criminal law admits to blurred distinctions it becomes potentially oppressive as well as vulnerable to exploitation. Queensland courts are currently observing a somewhat analogous debate in the course of charges concerning alleged misuse of public funds which relate in some instances to occasions involving hospitality, entertainment, travel, etc., and revolve around disputed boundaries between public and private activities.

The nature and value of a benefit alleged to constitute a bribe is plainly enough associated with the requirement that there be a criminal intent or, as it is often described, a corrupt purpose.

Essentially, this appears to involve an intention that the recipient of the benefit be influenced in the performance of his duty, irrespective of whether or not the underlying motive is selfish or for the public good.⁵¹

Not surprisingly, protestations by the recipient of a bribe that he proposed to ignore the donor's wishes attract little sympathy.⁵²

However, there is scope for complication in the possibility that donor and recipient may have different intentions.

Basically, the donor or the recipient is guilty if his purpose is corrupt without proof of the other's intention. That seems obvious enough with respect to the guilt of would-be donors involved in unsuccessful attempts at bribery, and has also been held in relation to persons who have sought bribes unsuccessfully or who have been paid as part of an entrapment process.⁵³

Some circumstances may involve other common law offences rather than bribery: for example, it may not be bribery but fraud to accept money for a licence if the donor believes that the payment is a fee which must be paid to public funds,⁵⁴ and there is also a quite wide common law offence, "misconduct in a public office", which occurs where there is a breach of trust, fraud or imposition by an official in a matter concerning the public.⁵⁵

Statute

The common law has been replaced by legislative codes in Queensland, Western Australia, Tasmania and the Northern Territory, and it has been modified and supplemented by statutory provisions in New South Wales, Victoria and South Australia. For example, New South Wales passed amendments to its *Crimes Act* in

1987 and the *Independent Commission Against Corruption Act* in 1988. The Commonwealth has also legislated quite extensively. For example ss 73 and 73A of the Commonwealth *Crimes Act* make it an offence for a benefit of any kind to be given to or sought by a Commonwealth officer or a member of the Federal Parliament to influence or affect the performance of his duty or authority.

All who are still awake will be pleased to hear that it is quite impractical to try to analyse, summarise and explain the various statutes on this occasion. A few random comments will have to suffice.

Generally, the legislation is expansively cast, and involves wide concepts of who is a public official, what is a benefit etc.

One general matter of considerable significance is that the common law has been extended by statute to provide criminal sanctions for the bribery of fiduciaries as well as public officials.

Financial institutions which provide benefits to public officials or fiduciaries to encourage them to use the institutions' services and facilities in the course of their duties face considerable risks, and so do the officers and employees who authorise or participate in such activities.

However unreasonable it may seem to some whose competitive and acquisitive instincts are impeded, an increasingly open and egalitarian society is demanding more public and corporate morality and accountability, and the criminal law is likely to be used more extensively to impose the required standards.

The Commonwealth legislation is the *Secret Commissions Act* 1905, which by s 2, applies to transactions with the Commonwealth or any Commonwealth department, agency or officer, and in relation to trade and commerce with other countries and among the States, and, by s 7 of the *Seat of Government (Administration) Act* 1910, also applies to trade and commerce in and with the Australian Capital Territory.

Queensland (*Criminal Code*, s 442B), New South Wales (*Secret Commission Prohibition Act*, 1919), Victoria (*Crimes Act*, 1978, s 176), South Australia (*Secret Commissions Prohibition Act*, 1919), and Western Australia (*Criminal Code*, s 530) all have provisions derived from the English *Corrupt Practices Prevention Act*, 1854 (which was replaced by the *Prevention of Corruption Act*, 1906), and which are, for present purposes, materially identical.

With one exception which is noted below, s 266 of the Tasmanian *Criminal Code* is similar.

The Commonwealth *Secret Commissions Act* was previously also applicable in the Northern Territory by s 8 of the *Northern Territory Administration Act*, 1910, but the relevant provision is now s 236 of the Territory's *Criminal Code Act*, 1983.

Throughout the legislation, most of the provisions are so widely expressed as to leave little room to manoeuvre, except perhaps in relation to the states of mind of those involved.

Under the Commonwealth Act, no offence is committed if the principal had full knowledge of all material facts and circumstances and consented, whereas elsewhere (eg. Victoria, sub-s 86(2)), there is no express requirement that the principal did not know of and consent to the benefit, although once that is established the burden shifts to the accused to prove that no offence was committed.

Presumably, although it is not clearly spelt out, there would ordinarily be no intention to influence a fiduciary inappropriately if the principal knew of and consented to the benefit, and such a view is generally supported by the purpose and history of the legislation.

So far as concerns the accused's state of mind, there is a presumption, which may be displaced by the words or the subject matter of a statute, that "mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence".⁵⁶

No express reference is made to the accused's state of mind in the Commonwealth legislation, but it is provided that it is not a defence that a benefit given conformed with the custom of any trade or calling and evidence is inadmissible of any such custom.

Apart from other provisions dealing generally with criminal responsibility, for example those in Chapter V of the Queensland *Criminal Code*, all the State and Territory legislation expressly requires that the bribe be sought, given or received "corruptly".

Except in the Tasmanian legislation, it is expressly provided that custom is not a defence, which plainly enough bears upon the meaning of "corruptly" in the legislation and renders it difficult to conclude that no offence is committed merely because the accused believes that the action taken is permissible.

Two modern Victorian decisions deal with the interpretation of "corruptly".⁵⁷ After considering earlier authorities and the history of the legislation as well as internal indicia, it has been concluded that the legislation's concern is not with the honesty of the underlying motive but with the intended result of the benefit, whatever the reason.

Every legal subject needs its anomalies to maintain the popular image of the law as an ass, and it is possible to find an example in this topic.

In *Attorney-General of Hong Kong v Ip Chiu*,⁵⁸ two policemen were charged under the Hong Kong Prevention of Bribery Ordinances with accepting an advantage on account of abstaining from performing in their capacity as public servants. Shortly stated, they had

accepted two thousand dollars from a suspect with a past history of drug offences in return for not beating him up or planting evidence on him. The Privy Council held that they were not guilty, on the basis that the test was whether they could just as effectively have obtained the bribe if they had not been police officers, and that beating or planting evidence on a suspect is a course available to a civilian as well as a member of the police force.

And that seems as good a point as any at which to bring this discussion to a close.

Footnotes

1. *Boardman v Phipps* [1967] 2 AC 46; *DPC Estates Pty Ltd v Grey and Consul Developments Pty Ltd* (1975) 132 CLR 373; *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
2. *Attorney-General v Reading* per Asquith LJ (1949) 2 KB 232, 236.
3. *Hovenden and Sons v Milhoff* (1900) 83 LT 41, 43 per Romer LJ.
4. *The Parkdale* (1897) P 53.
5. *Denstate Pty Ltd v Kennedy* (2 November, 1989, unreported).
6. *Lister v Stubbs* (1890) 45 Ch D 1.
7. *re Domestic Services Ltd* (1931) 31 SR (NSW) 8.
8. *re Caerphilly Colliery Co; Pearson's Case* (1877) 5 Ch D 336; *Eden v Risdale's Railway Lamp and Lighting Co* (1889) 23 QBD 368.
9. *re West Jewel Tin Mining Co; Weston Case* (1879) 10 Ch D 579; cf. *Baker v Palm Bay Island Resort (No. 2)* (1970) Qd R 210.
10. *Burrell v Mossop* (1888) 4 TLR 270.
11. *Powell and Thomas v Evans Jones and Co* (1905) 1 KB 11.
12. *Fouche v Superannuation Fund Board* (1952) 88 CLR 609, 630, 644.
13. *Temperley v Blackrod Manufacturing Co* (1907) 71 JP Jo 341, 342.
14. *Taylor v Walker* (1958) 1 Ll LR 490, 513.
15. *Bartram & Sons v Lloyd* (1904) 90 LT 357, per Romer LJ 359-360; cf. *Kregor v Hollins* (1913) 109 LT 225.

16. *Bulfield v Fournier* (1894) 11 TLR 62.
17. *Andrew v Ramsay and Co* (1903) 2 KB 635.
18. *P and O Steam Navigation Co v Johnson* (1938) 60 CLR 189, 216-217.
19. *AG v Goddard* (1929) LJK B 743.
20. *Logiscrose Ltd v Southend United Football Club Ltd* (1988) 1 WLR 1256.
21. *Iran Shipping Lines v Denby* (Queen's Bench 20/10/86, unreported).
22. *Clarkson v Davies* [1923] AC 100.
23. *Reading v Attorney-General* [1951] AC 507; *Industrial Development Ltd v Cooley* (1972) 1 WLR 443.
24. *Grant v Gold Exploration and Development Systems Ltd* (1900) 1 QB 233.
25. *Logiscrose Ltd v Southend United Football Club Ltd* (1988) 1 WLR 1256.
26. *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1974) 1 NSW LR 443.
27. *DPC Estates Pty Ltd v Grey and Consul Developments Pty Ltd* (1975) 132 CLR 373.
28. *Daly v The Sydney Stock Exchange* (1986) 160 CLR 371; *Muschinski v Dodds* (1985) 160 CLR 583, per Deane J 614, 616, 617.
29. *Chan v Zacharia* (1984) 154 CLR 178, 199.
30. *Baumgartner v Baumgartner* (1987) 164 CLR 137, per Mason, Wilson and Deane JJ, 148.
31. *Eden v Risdale's Railway Lamp and Lighting Co* (1889) 23 QBD 368, 372 per Lindley J.
32. *Industries and General Mortgage Co v Lewis* (1949) 2 All ER 573, 576-577.
33. *Bell v Lever Brothers* [1932] AC 161.
34. *Mahesian v Malaysian Government Offices Co-operative Housing Society Ltd* (1978) 2 WLR 444.
35. *Logiscrose Ltd v Southend United Football Club Ltd* (1988) 1 WLR 1256.
36. *re Haslam and Hier-Evans* (1902) 1 Ch 765.

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37. *DPC Estates Pty Ltd v Grey and Consul Developments Pty Ltd* (1975) 132 CLR 373.
 38. *DPC Estates Pty Ltd v Grey and Consul Developments Pty Ltd* (1975) 132 CLR 373.
 39. *United States Surgical Corporation v Hospital Products International Pty Ltd* (1983) 2 NZLR 157; *Westpac Banking Corporation v Savin* (1985) 2 NZLR 41; *Elders Trustee v Reeves* (1987) 78 ALR 193, 239; *Stevens Travel Services International Pty Ltd v Qantas Airways Limited* (1988) 13 NSWLR 331, 359-360; *Ninety Five Pty Ltd (in liquidation) v Banque Nationale de Paris* (1988) WAR 132; *Budget Nominees Pty Ltd v Registrar of Titles (Vic)* (Supreme Court of Victoria, 22 March, 1988 - unreported).
 40. *R v Vaughan* (1796) 4 Burr 2494.
 41. *HM Advocate v Dick* (1901) 3F (Ct of Sess) 59.
 42. *FAI Insurance v Winneke* (1982) 41 ALR 1, eg, at p 49.
 43. *R v Whittaker* (1914) 3 KB 1283.
 44. *Stewart v R* (1960) 2 WIR 450 - Jamaican Court of Appeal.
 45. *Ex parte Winters* 140 P 164 (1914) Criminal Court of Appeals of Oklahoma.
 46. *R v Pitt and Mead* (1762) 97 ER 861.
 47. *Bodmin Case* (1869) 1 O'M & H 124.
 48. *Woodward v Maltbee* [1959] VR 794.
 49. *Scott v State* 141 NE 19 (1923).
 50. *S v Deal Enterprises* 1978 (3) SA 302.
 51. *R v Boston* (1923) 33 CLR 386; cf. *R v Patel* (1944) AD 511.
 52. *S v Van der Westhuisen* 1974 (4) SA 61.
 53. *S v Kok* 1960 (4) SA 638; *Simms v State* (1917) 198 SW 883.
 54. *R v Geel* 1953 (2) SA 398.
 55. *R v Bembridge* (1783) 99 ER 679; *R v Jones* [1946] VLR 300; *R v Llewellyn Jones* (1968) 1 QB 429.
 56. *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528.
 57. *R v Gallagher* [1986] VR 219; *R v Jamieson* [1988] VR 879.
 58. *Attorney-General of Hong Kong v Ip Chiu* [1980] AC 663.