

**LOCAL GOVERNMENT PECUNIARY  
INTEREST TRIBUNAL**

PIT NO 4/1995

DIRECTOR GENERAL, DEPARTMENT OF LOCAL  
GOVERNMENT

RE: COUNCILLOR DIANE VIRGINIA JUDGE,  
STRATHFIELD MUNICIPAL COUNCIL

***STATEMENT OF DECISION***

Dated: 9 January 1997

# LIST OF CONTENTS

|   |    |
|---|----|
| THE COMPLAINT.....  | 1  |
| HEARINGS.....   | 5  |
| PRELIMINARY HEARING.....                                    | 5  |
| FURTHER HEARINGS.....                                       | 6  |
| BACKGROUND TO THE COMPLAINT.....                            | 8  |
| ORIGIN OF THE COMPLAINT.....                                | 10 |
| COURSE OF THE COMPLAINT.....                                | 10 |
| PRELIMINARY INQUIRY BY DIRECTOR-GENERAL.....                | 20 |
| INTERVIEW WITH BUSCHMAN AND WALSH.....                      | 21 |
| INTERVIEW WITH MR MCKEITH, PRINCIPAL PLC.....               | 23 |
| INVESTIGATION BY DIRECTOR-GENERAL UNDER SECTION 462(1)..... | 24 |
| ISSUES FOR DETERMINATION.....                               | 31 |
| THE PARTS PLAYED BY BUSCHMAN AND WALSH.....                 | 33 |
| MR BUSCHMAN'S TESTIMONY.....                                | 35 |
| MR WALSH'S TESTIMONY.....                                   | 50 |
| JAMES MARKHAM INTERPOSED.....                               | 59 |
| MR WALSH CHANGES HIS EVIDENCE.....                          | 61 |
| VIRGINIA JUDGE'S TESTIMONY.....                             | 64 |
| MR KIERAN MULCAHY'S EVIDENCE.....                           | 67 |

|   |            |
|---|------------|
| <b>FINDINGS ON DEFENCE UNDER SECTION 457 AND REASONS.....</b>   | <b>69</b>  |
| <b>FINDING.....</b>   | <b>75</b>  |
| <b>SECTION 443(3)(A).....</b>   | <b>75</b>  |
| <b>WAS THERE A PECUNIARY INTEREST?.....</b>   | <b>76</b>  |
| <b>INTERVIEW “OFF THE RECORD”.....</b>  | <b>80</b>  |
| <b>COUNCILLOR JUDGE’S CLAIM FOR AN ORDER FOR COSTS UNDER<br/>SECTION 481 OF THE ACT.....</b>  | <b>87</b>  |
| <b>CRITICISM OF CONDUCT OF INVESTIGATION AND PRESENTATION OF<br/>EVIDENCE TO THE TRIBUNAL.....</b>                                      | <b>90</b>  |
| <b>DRAFT WITNESS STATEMENTS AND THE QUESTION OF PRIVILEGE<br/>FROM PRODUCTION AND INSPECTION.....</b>                                   | <b>93</b>  |
| <b>MR BUSCHMAN, EXHIBITS P1, P2.....</b>  | <b>93</b>  |
| <b>MR GRAY’S SUBMISSIONS ON THE EVIDENCE OF MRS WALLACE AND<br/>MR BUSCHMAN REGARDING MR BUSCHMAN'S STATEMENT (EXHIBIT<br/>P2).....</b> | <b>97</b>  |
| <b>MR WALSH (EXHIBIT N).....</b>  | <b>101</b> |

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## ***STATEMENT OF DECISION***

### **THE COMPLAINT**

On 12 December 1995 the Tribunal received from the Director-General, Department of Local Government, notice pursuant to section 465 of the Local Government Act, 1993 that he had approved an investigation under section 462 of the Act into a complaint that Councillor Virginia Judge of Strathfield Municipal Council may have committed a breach of section 451 of the Act with respect to the consideration by the Council's Planning and Building Committee Meeting on 26 September 1995 of an application to the Council for approval of the development of land at 16 Margaret Street, Strathfield owned by the Presbyterian Ladies' College, Croydon (PLC).

Section 451 of the Act provides as follows:

**451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.**

**(2) The councillor or member must not take part in the consideration or discussion of the matter.**

**(3) The councillor or member must not vote on any question relating to the matter.**

It was alleged that Councillor Judge had had a pecuniary interest in the outcome of the development application by virtue of her involvement with the firm of real estate agents Judge Buschman Walsh, trading as The Professionals, at Strathfield (JBW).

It was alleged that JBW had been seeking to come to an arrangement with PLC for the sale of the property (which was known as “the Branxton site”) to a client of the firm, the Markham Corporation Pty Limited (Markham), which was interested in building residential units on the site for sale through JBW on a commission basis.

Councillor Judge had not disclosed to the committee meeting any pecuniary interest in the matter and had participated in the debate and voted. It was alleged that this conduct contravened section 451.

On 2 August 1996 the Tribunal received from the Director-General a report dated 14 June 1996 of the investigation of the complaint. The Report was furnished pursuant to the requirements of section 468(1) of the Act. After considering the Report, the Tribunal, pursuant to section 469 of the Act, decided to conduct a hearing into the complaint.

Notice of the Tribunal's decision was given to the parties on 15 August 1996 (Exhibit B). This Notice contained particulars of the contravention alleged and set out the issues to be determined as derived by the Tribunal from the information contained in the Report. They were as follows:

**“PARTICULARS of the breach alleged are as follows:**

**Councillor Dianne Virginia Judge, being a councillor who had a pecuniary interest in a matter with which the Council was concerned and being present at a meeting of a council committee at which the matter was being considered:**

- **failed to disclose the interest to the meeting;**
- **took part in the consideration and discussion of the matter;**
- **voted on a question relating to the matter**

**contrary to the provisions of section 451 of the Act.**

The matter with which the Council was concerned and the meeting at which Councillor Judge was present and the matter was being considered was:

**26 September 1995 - Meeting of the Planning and Building Committee (Meeting as Committee of the Whole) of the Council of the Municipality of Strathfield.**

The matter being considered was whether development application DA95/23 for approval of the construction on the land at 16 Margaret Street, Strathfield of a residential flat development consisting of 3 separate unit buildings and the conversion and extension of an existing item of environmental heritage to provide for 13 x 3 bedroom and 10 x 2 bedroom apartments should be approved, deferred for further information or refused by the Council.

The Pecuniary Interest of Councillor Judge in the above matter is alleged to have been as follows:

1. At the relevant time, Councillor Judge was employed as a real estate salesperson in a real estate agency business then trading under the name "Judge Buschman Walsh" (JBW) at 22 The Boulevard, Strathfield, having formerly traded under the name "G H Buschman Real Estate" at the same address. George Henry Buschman, a licensed real estate agent, was the proprietor of the business and the employer of Councillor Judge. He also employed as a salesperson in the same business David Michael Walsh. The Development Application DA95/23 was being made for and on behalf of the Presbyterian Ladies College, Sydney (PLC), the owner of the subject land. Prior to and at the time of the Development Application coming before the Council for decision George Henry Buschman and David Michael Walsh on behalf of JBW had been and were in negotiation with PLC with a view to procuring a sale of the land, or the land with approval of the proposed development, from PLC to a developer-client of JBW named Markham Corporation Pty Limited. If the Development Application was approved there would have been a reasonable likelihood or expectation of appreciable financial gain to JBW consisting of (a) fees to be earned on the sale of the land by PLC to Markham Corporation Pty Limited and (b) commissions to be earned on sales of the units to be constructed pursuant to the Development Approval, JBW expecting to be appointed the exclusive agent for such sales by Markham Corporation Pty Limited.

It is alleged that Councillor Judge had a pecuniary interest in the matter within the meaning of section 442(1) of the Act by virtue of that section and section 443(1)(b) and 2(a) of the Act in that her employer had a pecuniary interest in the matter.

2. At the relevant time:
- (a) Councillor Judge held an option granted to her by George Henry Buschman to purchase a share of the business of JBW and consequently had a financial interest in the success of the business. Approval by the Council of the Development Application would have enhanced and promoted the prospects of the proposed sale of the land by PLC to Markham Corporation Pty Limited, the profit to the business expected to flow from that sale and sales of the units to be constructed.
  - (b) Councillor Judge had an arrangement or agreement with David Michael Walsh to split between them on a 50/50 basis all listing and selling commissions earned by either or both of them as salespersons employed in the business of JBW. David Michael Walsh was personally engaged on behalf of JBW in the negotiations seeking to procure a sale of the land from PLC to Markham Corporation Pty Limited and would also have been engaged in selling the units to be constructed if the Development Application was approved by the Council. Councillor Judge would have been entitled to 50% of the commissions earned by David Michael Walsh from these activities.

It is alleged that Councillor Judge had a pecuniary interest in the matter within the meaning of s.442(1) of the Act by virtue of the facts alleged in subparagraphs (a) and/or (b) above.

## **ISSUES**

Information contained in the Director-General's Report of the investigation of this complaint received by the Tribunal on 2 August 1996 indicates that it is not likely to be disputed that the meeting described above took place, that Councillor Judge was present, that she did not disclose to the meeting the alleged or any pecuniary interest in the matter in question, and that she took part in the consideration and discussion of and voted on the matter. On this basis, the issue for determination by the Tribunal would appear to be:

Whether, in relation to the matter dealt with at the meeting on 26 September 1995, Councillor Judge had at the time of the meeting a pecuniary interest within the meaning of the Act to which section 451 of the Act applied.

If the Tribunal were to find that any contravention of the Act by Councillor Judge has been proved, a consequential issue will be whether any, and, if so, what action should be taken by the Tribunal.

**NOTE: The parties are at liberty to submit to the Tribunal that the issues arising out of the complaint are different or that there are other relevant issues not stated above, in which case, they each should specify to the Tribunal what they contend to be the issues to be determined by the Tribunal.”**

## **HEARINGS**

### **Preliminary Hearing**

A Preliminary Hearing on procedural matters was conducted on 8 October 1996. Mrs Jean Wallace, Legal Officer of the Department of Local Government appeared for the Director-General on that occasion. Councillor Judge was represented by Mr Peter Gray of counsel instructed by Mr Damien Tudehope of O’Hara & Company, Solicitors of Strathfield.

The Director-General's Report to the Tribunal received on 2 August 1996 was admitted as evidence and information before the Tribunal and marked Exhibit A. The Tribunal’s Notice of its decision to conduct a hearing and certain preliminary correspondence between the Tribunal and Councillor Judge and her solicitors were also admitted (Exhibits B to G).

A discussion took place as to the issues for determination in the course of which Mr Gray indicated that Councillor Judge would make certain admissions and would rely, amongst other things, on a defence under section 457 of the Local Government Act, 1993 which provides:

**“457. A person does not breach section 451 ... if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest.”**

The Tribunal formally noted the admissions and issues and gave some procedural directions (Exhibit H). In part they were as follows:

**“NOTED:**

- 1. Councillor Judge admits for the purpose of these proceedings that:**

- (a) the meeting as listed and described in the Notice of Decision to Conduct a Hearing dated 15 August 1996 took place.
  - (b) she took part in the consideration and discussion of and voted on questions relating to the matters that were before the meeting.
  - (c) Councillor Judge denies having had at the time of such meeting any pecuniary interest within the meaning of the Local Government Act, 1993 that she was required by section 451 of that Act to disclose but, subject to that denial, she admits for the purposes of the hearing that she did not make any disclosures to the meeting of the alleged or any other pecuniary interest in the questions that were before the meeting.
2. That the issues set forth in the Notice of Decision to Conduct a Hearing dated 15 August 1996 will be issues for consideration and determination at the hearing.
3. That Councillor Judge intends to rely on a defence under s.457 of the Local Government Act 1993 and to contend that her state of knowledge of relevant facts was such that she did not breach s.451 of the Act by non-disclosure of a pecuniary interest or by her participation or voting on the matter before the meeting in question.

... ..

**Direct** that, subject to any further or other order or direction, the hearing proceed on the basis of:

- (a) The material contained in the Director-General's Report received by the Tribunal on 2 August 1996; Exhibit "A".
- (b) Exhibits "B" to "G" (inclusive) admitted today.
- (c) The admissions by Councillor Judge already noted above;
- (d) Any further statement of evidence or documents furnished by the parties;
- (e) Any further oral evidence and any cross-examination of witnesses at the final hearing."

## **Further Hearings**

Further hearings were conducted on 28 October and 13 and 14 November, 1996. At these hearings the Director-General was represented by Mrs Josephine Kelly of counsel instructed by Mrs Jean Wallace. Mr Peter Gray continued throughout to appear for Councillor Judge.

The following witnesses were called to give oral testimony:

**DIRECTOR-GENERAL:**

**Tony John Day**, Investigations Officer, Department of Local Government.

**Gregory Edward Cousley**, Investigations Officer, Department of Local Government.

**Margaret Eve Dutton**, Councillor on Strathfield Council since 1987 and Mayor in and since September 1995.

**David Michael Walsh**, Licensed Real Estate Agent employed as real estate salesperson by the firm known as Judge Buschman Walsh, The Professionals, prior to and during 1995 up to October 1995 when the firm name was changed to Buschman Walsh, The Professionals, Strathfield.

**James Neville Andrew Markham**, a representative of Markham Corporation Pty Limited, Property Developer.

**George Henry Buschman**, Licensed Real Estate Agent, Sole Proprietor of the firm Judge Buschman Walsh, later Buschman Walsh, The Professionals, Strathfield, mentioned above.

**Helen May Colbey**, presently Management Consultant, formerly (during 1995 into 1996) General Manager, Strathfield Municipal Council.

**Jean Wallace**, Legal Officer, Legal Services Branch, Department of Local Government.

**COUNCILLOR JUDGE:**

**Diane Virginia Judge**, Councillor Strathfield Municipal Council, first elected on 16 September 1995. She was employed as a real estate sales person by the abovementioned real estate agency when it was known as Judge Buschman Walsh until she resigned on 10 October 1995. (Councillor Judge calls herself and is known as "Virginia

Judge”, the name by which she is referred to by the witnesses and most of the documents in these proceedings).

**Damien Francis Tudehope**, Councillor Judge’s solicitor earlier mentioned.

**Kieran Mulcahy**, Property Consultant.

A number of documents additional to those already mentioned were tendered into evidence (Exhibits J - S). They need not be detailed here.

At the close of the evidence counsel for both sides made their submissions and the hearing concluded on 14 November 1996.

The proceedings were recorded in a written transcript, references to the page and line numbers of which will be prefixed by the letter “T”.

## **BACKGROUND TO THE COMPLAINT**

What follows is an outline of the background to the complaint on the basis of matters which are not in dispute.

In July 1994 Virginia Judge and David Walsh became employed as real estate salespersons by George Buschman, then trading as a real estate agent under the name Judge Buschman Walsh, The Professionals, Strathfield. Each of them was entitled to a share of the commissions earned by the firm. Additionally, George Buschman had granted each of them an option to purchase a one-third share of the business. The option was dated 8 July 1994 and could be exercised any time before 30 July 1996. A separate oral agreement was made between Virginia Judge and David Walsh to split listing and selling commissions between them on a 50/50 basis (Exhibit A, Annexures 24, 25).

The site known as “Branxton” is located at 16 Margaret Street, Strathfield. In 1995 it was being operated by PLC as a pre-school. PLC was proposing to close the school and sell the site. Kieran Mulcahy sent his children to the pre-school and became aware (in or about February 1995, he says) that it was to become available for sale. He mentioned it to Virginia Judge who is a friend of his and she passed the news on to David Walsh and George Buschman. On behalf of JBW, David Walsh sought to interest PLC

in being introduced to a prospective purchaser through JBW and also to interest James Markham, a developer client of his representing the Markham Corporation, in acquiring the site from PLC for development.

David Walsh communicated with officials of PLC and James Markham in the period May to July 1995 in an endeavour to negotiate an arrangement whereby PLC would agree to sell the site to Markham through the agency of JBW, with a commission to be received by JBW from PLC on the sale, and Markham would engage JBW as agents to sell on commission the residential units when the site was developed.

Meanwhile PLC, apparently in an endeavour to enhance the value of the site by having it available for sale as a development project with development approval already granted, proceeded to apply to the Council for approval of the development of the site by the erection of residential unit buildings in accordance with plans prepared on behalf of PLC by a firm of architects.

It appears from documents tendered to the Tribunal that the development application was lodged on 9 March 1995 for 27 home units and later amended in July 1995 to reduce the number to 23: Letter from Markham Corporation (for PLC via JBW) dated 3 July 1995, Part Exhibit R; Exhibit A, Annexure 1, page 14.203.

The amended application came before the Council's Planning and Building Committee on 26 September 1995 with a comprehensive report from the Council's Development Planner and Senior Development Officer recommending that the application be deferred until additional information and plans as detailed in the report were submitted prior to further consideration by the Council (Exhibit A, Annexure 1, Page 14.214).

Virginia Judge had just been appointed to the Council and this was her first meeting. She participated in the debate and spoke out strongly against the proposed development. The meeting, contrary to the staff

recommendation for deferral, resolved to refuse the application. The voting was eight out of nine Councillors for refusal with one abstaining. The abstainer was, in accordance with the practice of the Council, counted as a negative vote, so that, formally, the refusal was unanimous.

## **ORIGIN OF THE COMPLAINT**

PLC's architect had been permitted by the committee to address the meeting in favour of the development. Present in the public gallery was the Principal of PLC, Mr William T. McKeith. He had heard Councillor Judge speaking ("vehemently" he described it) against the development although he did not know who she was until it was pointed out to him after the meeting: Exhibit A, Annexure 11.

On October 1995 Mr McKeith wrote a letter to the Mayor of the Council, Eve Dutton, in the following terms:

**"Re: Council Meeting Tuesday September 26 1995: discussion and decision of proposed Development Application: 16 Margaret Street, Strathfield.**

**We are advised to inform you of a possible conflict of interest on the part of one of the Councillors, Virginia Judge, involved in the discussion and decision making at the meeting of the above date.**

**As you may be aware, Ms. Judge is a principal of Judge Buschman Walsh, 22 The Boulevard, Strathfield (The Professionals). Ms. Judge's firm had been in contact and in discussion with P.L.C. Sydney concerning the possible purchase of this property. From her firm we have documentation which includes at least three written forms of correspondence and notes from telephone discussions, and correspondence from a developer whose interest were represented by Ms. Judge's firm. Clearly, Ms. Judge's firm stood to financially benefit from the sale of "Branxton" (16 Margaret Street, Strathfield) through her firm to this developer.**

**We wish to advise you and the Council of this situation and we await your response.": Exhibit A, Annexure 3**

## **COURSE OF THE COMPLAINT**

This letter from PLC set off a train of events that led to the Director-General's investigation and ultimately to the proceedings before the Tribunal.

The relevant events will be summarised here; but, as counsel for Virginia Judge voiced in the course of the proceedings some trenchant criticisms of the manner in which the investigation and preparation for the hearing before the Tribunal were carried out by officers of the department, it will be necessary in due course to deal with some of these events in more detail.

1. On receipt of PLC's letter the Mayor, Councillor Dutton, approached the General Manager, Helen Colbey, and discussed what response should be made to PLC and how the matter might be handled. They agreed that, given Councillor Judge's employment in the real estate industry, conflict of interest was likely to be an ongoing issue for her and, therefore, a meeting should be arranged with the Council's solicitor, the Mayor, Councillor Judge and the General Manager to discuss the problem in general prior to responding to PLC. Arrangements were made for such a meeting to be held on 13 October 1995. (Exhibit A, Annexures 27, 28).
2. On 9 October 1995 Councillor Judge was informed of the proposed meeting. She called to see the General Manager for clarification of the purpose of the meeting. The General Manager outlined what was intended and provided Councillor Judge with a copy of PLC's letter. In her evidence to the Tribunal Mrs Colbey said that Councillor Judge, having seen the letter, said, "I had no knowledge that my colleagues had any involvement with the developers at Branxton. I am concerned that this will be an ongoing problem for me, that my colleagues could be doing work with developers that I have no knowledge of when I come to Council as a Councillor.": T226/32. She went on to say that Councillor Judge confided to her that she was standing for pre-selection for the Labor seat of Strathfield and thought that there could be "some political element associated with this whole issue." T226/38. Mrs Colbey told Councillor Judge that if what she had said as to her lack of knowledge was the case then she probably wouldn't be in any

difficulty: Exhibit A, Annexure 27, page 2/69 - page 3/86; Annexure 28, paragraph 3.

3. Councillor Judge gave evidence that when Mrs Colbey showed her the letter she was “really surprised, in fact shocked ... I was dumbfounded” and that she told Mrs Colbey that she didn’t know the facts alleged in the letter and that she didn’t have any conflict of interest in the matter: T277/42-47. Councillor Judge said that she went straight back to her office and showed the letter to Mr Walsh after which she left the office to show a client a property and later that day she showed it to Mr Buschman following which she went straight down to see her solicitor: T277/49-T278/16; T286/10. She said that her solicitor advised her that as she would never know what her colleagues were doing she ought to consider resigning. She gave evidence that she was feeling “very disappointed” and “disgusted” with her colleagues, Mr Buschman and Mr Walsh, because of what she thought they were trying to do to her: T278/44. She explained that the reason for her disappointment was their failure to say anything to her about their involvement with the developer of Branxton and she thought that they were “compromising my integrity.” She said she was disappointed that they hadn’t revealed to her the information that was in PLC’s letter: T286/25-36. She said that because of this disappointment with Mr Buschman and Mr Walsh she thought it would be a good idea to resign as suggested by her solicitor. She asked him to prepare a “proper letter”. He did so and she collected it on the following day, 10 October 1995, and took it to the office. As Mr Buschman was out she left it on his desk: T278/47-T279/30. The letter was addressed to Mr Buschman and signed by her. The text was as follows:

**“I refer to the Option Agreement between you, myself and David Michael Walsh dated 8 July 1994.**

**As a result of recent events and the role which I have recently taken in Local Government politics, it would appear that I am not in a position to be able to devote myself to the business in the**

**matter in which I was formerly able. Accordingly I feel obliged to notify you that I will not be exercising the Option which you granted to me pursuant to the Deed dated 8 July, 1994 and will be resigning from the business effective forthwith.**

**You will no doubt be aware that I am under some significant obligations in relation to my interest in any potential developments which may be or about to occur in Strathfield and accordingly I would be pleased if you would itemise for me those matters in respect of which I still retain some financial interest by way of entitlement to commission or otherwise. I need this should any matter arise before Strathfield Municipal Council in respect of which I am required to cast a vote I will cast that vote knowing that I have no interest in the particular development or proposal.**

**Additionally would you please provide confirmation that I have no further interest in the business, Judge Buschman Walsh, The Professionals.**

**I thank you for the opportunity of working with you and wish both you and David every success in the future.” Exhibit Q**

4. On 11 October 1995 the Mayor and Mrs Colbey were informed that Councillor Judge intended to attend the meeting to be held on 13 October accompanied by her solicitor and another Councillor as an observer. Mrs Colbey attempted to contact Councillor Judge at the office of JBW to clarify the purpose of the meeting and was advised that Councillor Judge no longer worked there. The Council's solicitor was then consulted after which it was decided that as the proposed meeting on 13 October was intended to be only a general discussion about conflict of interest there would seem to be no purpose in continuing with that meeting, that Councillor Judge should be so advised and requested to respond in writing to the allegations made by PLC to enable the Mayor to respond to PLC's letter. On 11 October 1995 the Mayor wrote to Councillor Judge accordingly, stating that she may wish to take her own legal advice in preparing her response. She was asked to respond within seven days: Exhibit A, Annexures 6, 27, 28.

5. In the evening of 12 October 1995 the Mayor received at her home a telephone call from David Walsh. He told her that the purpose of the call was to inform her that Councillor Judge had been dismissed from the business of Judge Buschman Walsh, the reason being that they had been shown the contents of the letter from PLC to the Mayor claiming that Councillor Judge should have declared a “conflict of interest” at the Planning Committee Meeting at which the Branxton development had been debated. The Mayor informed David Walsh that the General Manager of the Council had told her that Councillor Judge, on being informed of the allegations in the PLC’s letter, responded by denying that she had any pecuniary interest in the matter and that, although she was employed by the firm, she was not party to the discussions that had gone on between the firm and PLC because it was not handled by her but by others. The Mayor’s evidence was that, at that point of the conversation, David Walsh asked her to repeat what she had said to George Buschman and said that he would put him on the phone. Mr Buschman then came on the phone and she repeated to him what she had said to David Walsh. According to her evidence, Mr Buschman said to her, “I am furious with Virginia Judge because she knew very well about the discussions that had been going on with the Branxton matter and the developer.” He said - he actually said, “She is telling lies because we meet” - that is, those of the estate agency” meet regularly and she was party to them and she knew what each other was doing.”: T24/17-24. Her evidence went on to say that Mr Buschman said to her, “I have worked very very hard to bring this matter to a successful conclusion. If it falls through we stand to lose thousands of dollars and I am so furious with Virginia Judge that I have sacked her in front of my solicitor.” He told her that he had done this on the day following his receipt of the information in PLC’s letter to the mayor: T24/25; Exhibit A, Annexure 4. Further

conversation took place between the Mayor and Mr Buschman concerning Councillor Judge's position with his firm and it concluded, according to her evidence, with Mr Buschman saying, "I will be very happy to put all this in writing and let the General Manager have it." T24-25.

After concluding the conversation, the Mayor, on the same evening, telephoned the General Manager at her home and reported the conversation to her including the fact that the persons concerned indicated that they would be prepared to provide a written statement to support their comments. The General Manager advised the Mayor to immediately write down the substance of the telephone conversation and said that she would raise the matter with the Council's solicitors the following morning: Exhibit A, Annexure 28, paragraph 8. The Mayor said in her evidence that she had made handwritten notes of the conversation that same night which she had since read and that the notes were an accurate record of her recollection of the event: T26/4-17. Those notes are Annexure 4 to the Director-General's Report, Exhibit A. They corroborate the evidence given by the Mayor to the Tribunal which, she said, was her then present recollection of the event: T22/45-T23-20. In addition to what she said in evidence, her handwritten note contained the following:

**"Mr B said he was terribly upset and embarrassed that VJ had participated in the debate on Branxton, especially as the Principal of PLC was present in the gallery."**

**"Mr B also said he was willing to repeat all he had said to me to the GM, Helen Colbey, at any time, as he was anxious to explain the whole situation re VJ properly, and that he was furious with her for what she had done, and for telling lies."**

Mrs Colbey's evidence to the Tribunal corroborated the Mayor's evidence as to this telephone conversation: T227/55.

6. In the period 13 to 17 October 1995 the Council's solicitor advised the General Manager that as third party information (i.e. from Walsh and

Buschman) was now to be obtained authority should be sought by the General Manager from the Council before proceeding to investigate the matter further. Mrs Colbey prepared a report for the Council's forthcoming meeting on 17 October 1995 with a view to obtaining the Council's authority to proceed with interviews as necessary to investigate the allegations and report further to the Council. Having drafted her report she telephoned Councillor Judge to inform her of its contents prior to its circulation to Councillors. Councillor Judge asked to be told who the third party was but Mrs Colbey told her that she could not inform her at that stage but that when the allegations were received in writing she would be given the opportunity to respond to them. Councillor Judge also asked her to wait until she had received Councillor Judge's response to the allegations before raising the matter with the Council, to which Mrs Colbey indicated that the legal advice she had received was that the matter should be raised with the Council immediately. On 16 October 1995 Councillor Judge's solicitor, Mr Damien Tudehope, telephoned Mrs Colbey objecting to the proposal to put the matter before the Council and advising her that he would be requesting her to withdraw her report by 4 p.m. on that day otherwise he would arrange to get an injunction to prevent the matter from being discussed by the Council. Mrs Colbey informed the Council's solicitor. Later that day she received a letter by facsimile from Mr Tudehope stating that he had given Councillor Judge certain advice in relation to the letter from PLC and that he had drafted a response to that letter and to the allegations contained therein. He expressed the view that prior to Councillor Judge providing a detailed response to the PLC allegations she be made aware of the additional material which was proposed to be investigated including the identity of the person making the allegations in the telephone conversation to the Mayor. His letter claimed that the powers which the General

Manager was seeking from the Council were premature and involved Council in a “witch-hunt” in circumstances where Councillor Judge was being denied “all her entitlements in terms of natural justice and procedural fairness.” He sought confirmation by 4 p.m. that the motion before Council had been withdrawn. On 17 October 1995 the Council's solicitors wrote to Mr Tudehope taking exception to the nature of Mr Tudehope's assertions to the General Manager and stating that the matter was being addressed properly and in accordance with the provisions of the Act and the Council's Code of Conduct. The allegation of a “witch-hunt” was described as “grossly distasteful” and was rejected by the Council. The letter stated:

**“Our client is well aware of its obligations as to natural justice and the requirements of procedural fairness. We can assure your client that Council proposes to invite your client to participate in the process once the General Manager is in a position to clarify the facts surrounding this issue. You should appreciate that no determinative or judgmental step has been taken nor any conclusion reached at this stage. Accordingly our client will not be providing the confirmation sought in your facsimile. To this end, we are instructed to accept any initiating process on behalf of the Council.” Exhibit A, Annexure 7**

On the same date Mr Tudehope wrote again to Mrs Colbey referring to the complaint by the Principal of PLC and stating:

**“On the basis of the material contained in the correspondence from the Principal of PLC we can see no evidence contained in that letter which would give rise to any suggestion that our client has been involved in a conflict of interest. The mere fact that the firm for which she previously worked for in the past had put an offer to PLC on behalf of a client of theirs to purchase the site, in our view, does not constitute sufficient material to draw the inference that there was a conflict of interest. Our client denies that she has any conflict of interest ...”: Exhibit A, Annexure 8**

7. On 16 October 1995 Mrs Colbey, in anticipation of being authorised to proceed with interviews, telephoned David Walsh indicating what action was being taken in raising the matter with the Council and

seeking to arrange for him to attend to be interviewed. In her evidence to the Tribunal she said:

**“In the context of arranging the interview, I said to him, “I will be discussing with you the matters that you have raised with the Mayor on the telephone in the telephone call to her about the question of whether or not Councillor Judge was aware of the involvement of Judge Buschman and Walsh in the matter of Branxton.” David Walsh said in response, “There is no doubt in my mind that Virginia Judge did know that Judge Buschman and Walsh were involved in discussions with developers about Branxton. We are a small real estate agency. We meet on a regular basis both formally and informally and discuss what each of the parties are doing. And I cannot see how she could claim that she doesn’t know.”: T230/1-16.**

Mrs Colbey recorded that on that occasion Mr Walsh and Mr Buschman agreed to attend an interview with her and provide a statement regarding the matters that they had conveyed to the Mayor. She asked them “to be discreet and confidential” about what they had told the Mayor: Exhibit A, Annexure 28, paragraph 12; Annexure 27, page 5/183-6/195.

8. In the conversation with Mr Walsh quoted above, he told Mrs Colbey that he would be prepared to give a statutory declaration if required. Consequently Mrs Colbey telephoned Mr Buschman and Mr Walsh several times seeking to have them make good their promise to furnish statutory declarations. Eventually on 26 October 1995 Mr Buschman provided a statutory declaration to which reference will be made shortly. However Mr Walsh never provided anything in writing to the Council. Mrs Colbey gave the following evidence to the Tribunal about her attempts to follow up their promise:

**I requested that the statutory declaration be provided by both parties, Mr Buschman and Mr Walsh. When I followed it up, I received a statutory declaration from Mr Buschman and not Mr Walsh. I phoned Mr Walsh and asked him was he intending to still provide the statutory declaration. He indicated that he and Mr Buschman had had legal advice, and that based on that advice it was considered that only one statutory declaration was required. And that, in any event, he would be saying exactly the**

same thing as Mr Buschman.”: T230/32-43; Exhibit A, Annexure 27, page 5/185-6/195.

9. Mr Buschman eventually furnished a statutory declaration dated 26 October 1995 (Exhibit A, Annexure 5). It read as follows:

**“1. Judge Buschman Walsh, The Professionals, initially became involved in the site at 16 Margaret Street, Strathfield to advise on appraisals and had not at any time been formally appointed to act as agent by any party. As a result of consultations and discussions we indicated and were anticipating that we would be able to introduce a prospective purchaser upon development approval by Council. To date, the business has not been appointed to act as agents on the abovementioned property.**

**2. Virginia Judge had an option to purchase one third share in the business, Judge Buschman Walsh, The Professionals, up until 30.07.1996.**

**3. She was an employee in the capacity of a salesperson, holding a salesperson’s certificate.**

**4. Virginia Judge did not hold a Real Estate Agent’s Licence. As such she was not a real estate agent or auctioneer.**

**5. The firm and trading name ‘Judge Buschman Walsh’ has always been owned and operated by G. H. Buschman as sole trader.**

**6. To the best of my knowledge I believe Virginia Judge was aware of discussions with the Developer and the Owner of the site at 16 Margaret, Strathfield.**

**7. Virginia Judge would have been entitled to a proportion of fees, if any, earned by the business on completion of the sale and/or any prospective proportion of commission, if any, if the office were to be retained at some future date, to market the end development.**

**8. The Developer was only interested in purchasing a development site with or subject to development approval. In the event that a D. A. was not approved by Council and the Developer withdrew, there would be no financial benefit to neither George Buschman, David Walsh or Virginia Judge.”: Exhibit A, Annexure 5**

10. According to the Director-General's Report (Exhibit A, Section B, page 4), the General Manager did not consider that Councillor Judge's response through her solicitor adequately dealt with the PLC allegations and, after approaching the Department for advice, she referred the complaint to the Director-General on 30 October 1995 enclosing a number of documents, including Mr Buschman's statutory declaration which, she wrote, "raises the possibility of a pecuniary interest by Councillor Judge in this matter": Exhibit A, Annexure 9.
11. The Mayor on 6 and 19 October had written to Mr McKeith acknowledging PLC's complaint and advising him that it was viewed seriously by the Council and was being investigated in accordance with the appropriate legal procedures. On 30 October 1995 the Mayor wrote again to Mr McKeith advising that the Council had considered it appropriate to refer the matter to the Director-General for consideration.

### **PRELIMINARY INQUIRY BY DIRECTOR-GENERAL**

Under section 463(1) of the Act the Director-General may decide to take no action on a complaint if he considers that it falls into any of certain categories specified in the section. One of those categories (paragraph (b)) is that the subject matter of the complaint does not warrant investigation. In the present case, as indicated in the Director-General's report to the Tribunal (Exhibit A, Section B, page 4, paragraph 1.2), it was decided to conduct preliminary inquiries to determine whether the matter warranted investigation.

On 3 November 1995 the Director-General wrote to Councillor Judge outlining the complaint and the procedure laid down by the Act for dealing with it. The letter said, "In order for me to determine whether this matter should be the subject of complaint and investigation, I would be pleased to receive your comments on the matter." The letter acknowledged that she may wish to obtain legal advice: Exhibit A, Annexure 14. Mr Tudehope replied by letter dated 13 November 1995 stating that any further

correspondence should be addressed to his firm, that his client “denies any pecuniary interest in relation to the property at 16 Margaret Street, Strathfield” and that, “She is aware of no agreement or arrangement between the firm she previously worked for and any proposed purchaser.” A copy of Mr Tudehope’s letter to the General Manager of 17 October 1995, quoted above, was enclosed: Exhibit A, Annexure 15. Neither of these letters from Mr Tudehope expressly denied that Councillor Judge was aware of negotiations by her firm with PLC on behalf of a client of the firm for the acquisition of the Branxton site, as had been alleged in PLC’s letter of complaint.

### **Interview with Buschman and Walsh**

On 24 November 1995 Investigations Officer, Mr Tony Day, interviewed George Buschman and David Walsh at their office at Strathfield. After the interview and before he returned to his own office he made handwritten notes of the interview which he personally typed up into a file note on his return to his office. A copy of that file note is Annexure 10 to Exhibit A. In his evidence to the Tribunal Mr Day swore that this file note was an accurate reflection of what Mr Buschman and Mr Walsh had said to him in the interview: T9/24-T10/1. According to the file note, reference was made by Mr Buschman to his statutory declaration of 26 October 1995 and Mr Day asked Mr Buschman to state the basis of his statement in the statutory declaration that Councillor Judge knew of the matter (that is, “discussions with the developer and the owner of the site”: paragraph 6 of the statutory declaration) at the time of the Council meeting. Answers to this question were provided by both Mr Buschman and Mr Walsh. As recorded in the file note they were as follows:

- **“Both Judge and Walsh had an option to purchase into partnership of the business trading as Judge Buschman Walsh until 8 July 1996. Mr Buschman remained as sole owner in the interim.**

- **Buschman, Walsh and Judge operated as a close team because of the size of the office and the vested interest both Walsh and Judge had in the business.**
- **Walsh and Judge had an agreement to share the commissions each generated 50/50, so each had a keen interest in the other's work.**

**Both Buschman and Walsh were "150%" sure that Judge knew of the negotiations between the developer, James Markham, and the firm, and between Markham and the PLC. They indicated that Judge had been present at a meeting between the three and the developer on a specific date which was to be advised after checking diaries, and that she participated in the discussions about the property at that meeting.**

- **Buschman discussed Judge's vote on the DA with her on the morning after the Council meeting and asked her why she had so voted after all the work that had been put in to the negotiations. Judge apologised to him at least 3 times and to Walsh at least twice and said "I'll make it up to you." Buschman asked for her resignation and she provided it within 24 hours, and explained her conduct as voting according to her conscience and the interests of her constituents.**
- **Walsh indicated that further evidence of her knowledge of the negotiations was a question she put to him a couple of weeks before the Council to the effect of "how is the school matter going with James?" Walsh advised her at that time that the matter was pending the DA going before the Council.**
- **Judge had expressed an interest in introducing a Keiran Mulcahy into the negotiations prior to the Council meeting, who was described as a valuer and a project manager. It is understood that Mulcahy ran for Council on Judge's ticket.**
- **It was understood by all parties that when negotiations reached contract stage, that Judge Buschman Walsh would be given the agency agreement for the sale of the property. The estimated commission on the sale of the land alone was 450,000. Buschman indicated that he was at the time leading up to the Council meeting in question, he was, conservatively, 70 to 80% sure that the firm would be the agents for the sale of the land. It was "well on the way." At the time of the meeting, only that firm was involved in negotiations with the PLC regarding sale. If the DA had been approved by the Council, "we would have had them."**
- **Mr Buschman and Mr Walsh indicated that they were 99% assured of getting the agency for the units if the sale went through, and this**

would have equated to a commission of approximately \$190,000 for the firm.

- **It was understood by Buschman and Walsh that after the Council Meeting, McKeith lost faith in the firm and started talking with other agents in the area about selling the property. Buschman indicated that he has put in a lot of work to repair relations which appears to have been successful.”**

There are two passages in the file note recording the conclusion of this interview which are significant in the light of subsequent events. The first relates to concerns expressed at this time by Mr Buschman and Mr Walsh about the consequences of the action they had taken in relation to PLC’s complaint. It reads:

**“Both Buschman and Walsh expressed the view that it would be unfortunate and sad if anything were to happen over the matter, and Buschman said that he would like to see the matter dropped. I explained the process of the Department in coming to a decision on whether to investigate the matter and the role of the Tribunal in determining the matter.”**

The second passage records that they were put on notice of the possibility of a formal taped interview to come and a hearing in which they would be called as witnesses. It reads:

**“I concluded the interview by indicating that I would advise them if the matter proceeded to investigation and that I would need to conduct formal taped interviews with them on the ground covered here, and neither indicated a problem with this. I further advised them that if the Tribunal decided to conduct a hearing into the matter, it was likely that they would be called to give evidence before the Tribunal.”**

### **Interview with Mr McKeith, Principal PLC**

On 27 November 1995 Mr Day interviewed Mr McKeith at PLC Croydon. He made notes of what was said during the interview and on returning to his office he typed them up into a file note which is Annexure 11 to Exhibit A: T13. The file note records that Mr McKeith told Mr Day that he did not have personal knowledge of Councillor Judge’s involvement in the

negotiations concerning Branxton and that prior to the Council meeting of 26 September 1995 he had not met her. However, he told Mr Day that George Buschman and David Walsh had subsequently to the meeting confirmed to him that Councillor Judge was aware of the negotiations because of "internal arrangements etc." On the question of negotiations Mr McKeith indicated that Judge Buschman Walsh had approached the school after the school had lodged its development application and advised that they had a genuine purchaser for the property and negotiations commenced. Mr McKeith informed Mr Day that it was not automatic that JBW would acquire the property if the development application had gone through the Council because it was still subject to them making an offer which the school found acceptable. The file note records, "He indicated, however, that the school was genuinely looking to sell and that Markham appeared to be a genuine purchaser and on that basis they were in a good position.": Exhibit A, Annexure 11.

By letter dated 7 December 1995 the Director-General notified Councillor Judge that on the basis of the information now held by his Department he had decided that the matter should be adopted by him as a complaint which required investigation under section 462(1) of the Local Government Act. The letter informed her that the investigation would be conducted by Mr Tony Day and Mr Greg Cousley, Officers of the Investigations and Review Branch of the Department and that an officer would be in contact with her to arrange a time to interview her during the investigation.

### **INVESTIGATION BY DIRECTOR-GENERAL UNDER SECTION 462(1)**

Some of the events that occurred during the Director-General's formal investigation should be noted here.

On 12 December 1995 Mr Day and Mr Cousley had a discussion with the Mayor of Strathfield Municipal Council and the then Acting Manager

during the course of which the Mayor appears to have confirmed to them that she had been told by George Buschman that he had “sacked” Virginia Judge. Mr Cousley made a file note of the points discussed in which Mr Day concurred: Exhibit A, Annexure 18. Point numbered 7 in the file note states:

**“VJ was sacked by GB - given the option of resigning.”**

In his evidence to the Tribunal Mr Cousley verified the accuracy of his file note: T19/5.

Arrangements were made by the investigation officers to further interview Mr Buschman and Mr Walsh. Mr Buschman had agreed to be interviewed on 13 December 1995. On that date Mr Buschman rang Mr Day and told him that his solicitor had advised him not to attend the interview. Mr Buschman said that the statutory declaration which he had provided and the preliminary interview which had taken place “should be sufficient.” He further indicated to Mr Day that he would not provide documentation relating to the commission sharing arrangements Councillor Judge had with the firm.

Immediately after speaking with Mr Buschman Mr Day spoke to David Walsh who indicated to Mr Day that his views were in concert with Mr Buschman’s. Mr Day asked Mr Walsh about the diary entry which Mr Walsh had mentioned to Mr Day at the earlier interview and which Mr Walsh was to furnish in order to establish the date of the meeting with James Markham which Councillor Judge was alleged to have attended. Mr Walsh indicated that his diary did not record the details of the meeting, saying that Mr Markham was often in Strathfield and that he may well have just dropped in.

Mr Day informed both Mr Buschman and Mr Walsh that the Tribunal was empowered to require them to appear before it and to subpoena documents and that it was likely by refusing to be interviewed that they would be called as witnesses to any hearing which may eventuate (Exhibit A, Annexure 19; T13/43-T14/6).

Mr Day made arrangements with Councillor Judge to be interviewed on 19 December 1995 at the Department of Local Government. In arranging the

interview he explained to her that the interview would be taped and that she would be under no obligation to answer any of the questions put to her. Mr Day also advised her that her solicitor would be at liberty to attend if he wished but that his role would be limited to advising her. Mr Day, in his evidence to the Tribunal, said that Councillor Judge had agreed to undergo the proposed taped interview: T295/39-T296/15; Exhibit A, Annexure 22. Councillor Judge, in her evidence, said that she did not recall having agreed but she did not deny it: T297/23-26.

On 19 December 1995 Councillor Judge attended the Department of Local Government with her solicitor, Mr Damien Tudehope. Mr Day and Mr Cousley were both present to conduct the proposed interview. Before commencing the formal interview, Mr Day explained that they were conducting an investigation as set out in the terms of reference communicated to Councillor Judge in the Director-General's letter of 7 December 1995 and that as part of the investigation they were conducting a series of interviews to assist in compiling a report to the Pecuniary Interest Tribunal. He further explained that their role was to collect information and that they had no determinative or judgmental role as the matter fell to the Tribunal to determine. Conversations then occurred between those present at the end of which the interview that had been proposed did not take place. The substance of these conversations became the subject of file notes made by Mr Day and Mr Cousley separately. These file notes were included in the Director-General's Report as Annexure 22 to Exhibit A. In their evidence to the Tribunal, Mr Day and Mr Cousley each testified to the accuracy of their file notes: T14/55; T19/52.

Counsel for Virginia Judge had forecast at the preliminary hearing before the Tribunal on 8 October 1996 that it would be contended at the hearing that these conversations should not be admitted as evidence before the Tribunal and that the Tribunal should disregard the record of the conversations contained in the file notes on the ground that Mr Tudehope

had stipulated at the time that the conversations were to be “off the record” and that Mr Day and Mr Cousley had agreed to that stipulation. At the hearing Mr Gray put forward his contention as forecast. There was an issue as to whether the stipulation had been made by Mr Tudehope. He, Councillor Judge and Mr Day gave evidence on the matter. The Tribunal overruled the contention for reasons to be mentioned later. For present purposes it is sufficient to say that in the course of the conversations that took place on this occasion Mr Tudehope demanded that Councillor Judge be provided with all information and documentation held by the Department concerning the alleged pecuniary interest and breach of the legislation before Councillor Judge was interviewed so that she would be in a position to fully respond to the allegations. The investigating officers declined to provide the material demanded by Mr Tudehope in consequence of which Mr Tudehope announced that Councillor Judge was not prepared to be interviewed but would be happy to respond in writing to the questions which they had proposed to ask. Mr Day informed Mr Tudehope that he would fax a copy of the questions that were going to be asked to Mr Tudehope as soon as possible and repeated that Councillor Judge was under no obligation to respond to those questions if she chose not to do so. Reference will be made later to other statements attributed to Mr Tudehope and Councillor Judge in the file notes.

On 21 December 1995 James Markham sent to Mr Day written answers to a series of questions which had been sent to him on 18 December 1995: Exhibit A, Annexures 20, 21. The substance of Mr Markham’s answers were: In the period leading up to 26 September 1995 Markham negotiated with JBW as a potential purchaser of the Branxton property but had no direct negotiations with PLC up to that date. In that period the prospects of Markham securing the Branxton property “seemed possible but were uncertain” as there was no indication from PLC of a selling price or the relevant timing of any sale. If JBW assisted Markham in securing the

Branxton property and Markham developed the site for units then JBW would have been appointed as exclusive selling agents and JBW was always aware of that. "As far as I am aware, Councillor Judge was not involved with any of the negotiations with myself or Markham and/or PLC up to 26 September 1995." He said that he recalled one conversation with Councillor Judge before 26 September 1995 which he described as follows:

**"Mr David Walsh informed me of a property MC (Markham Corporation) may be interested in buying. We arranged to meet at the office of JBW at Strathfield on 12 May 1995 at 11.30 a.m. As I entered the office, Mr Walsh greeted me and reintroduced me to Mrs Judge. Mrs Judge said in passing that the Branxton site was a very good site. ... I have had no communication with Mrs Judge since 12 May 1995."**

On 20 December 1995 Mr Day sent to Mr Tudehope by facsimile a list of the questions that he and Mr Cousley had been proposing to ask Councillor Judge at their meeting on the previous day. The response came by way of a letter from Mr Tudehope dated 3 January 1996 received by the Department of Local Government on 29 January 1996: Exhibit A, Annexure 24. An identical letter dated 5 February 1996 together with enclosures omitted from the earlier letter was received by the Department on 7 February 1996: Exhibit A, Annexure 25. Question 6 asked Councillor Judge to detail her knowledge and awareness of any discussions or negotiations involving JBW in relation to the Branxton site. Mr Tudehope furnished the following answer:

- "6. (i) Ms Judge have (sic) been advised by a friend that the site was available for sale in about February, 1995.**
- (ii) Ms Judge spoke to David Walsh and George Buschman and advised them of the "lead". They decided to try and find purchasers for the site.**
- (iii) In or about March, 1995 Ms Judge was advised by David Walsh, another employee of Judge Buschman Walsh, that a client of his namely, James Markham, may be interested in the site.**

- (iv) Ms Judge can recall attending a social meeting with Markham and Walsh where the site was discussed and Markham expressed some interest in the site.**
- (v) Ms Judge was aware that Walsh and Buschman had approached PLC School with a view to seeking to negotiate a purchase of the site on behalf of Markham and had had some correspondence with the Principal.**

**In or about May of 1995 Ms Judge had a conversation with David Walsh to the following effect;**

**Judge: "What has happened with that Branxton site?"**

**Walsh: "It has all come to nothing, the School has decided to develop the site themselves."**

**Thereafter Ms Judge had no dealings in relation to the site and no discussions with any person relating to its development other than representations which were made to me (sic) in my capacity as a potential Councillor relating to the development and objections to it."**

In answer to a question as to her knowledge of and any meetings with Mr James Markham, Mr Tudehope responded:

**"Yes, Ms Judge knows James Markham. She had no discussions with him in relation to the 16 Margaret Street, Strathfield Development Application other than a social meeting referred to in Paragraph 6 above. Other than that meeting there were no discussions held with Mr Markham and no contact with him or discussions in relation to the site."**

In answer to a question asking her to detail any conversations she may have had with George Buschman and/or David Walsh on 27 September 1995 relating to her participation as a Councillor in considering the development application, Mr Tudehope answered that Ms Judge had no conversation with either of those individuals on 27 September 1995 relating to that application.

With regard to a question as to the circumstances under which she ceased to be employed by JBW, Mr Tudehope replied that it had been asserted against her that she had voted on the development application and had failed to disclose an interest which she had in that application. The

answer stated that Ms Judge denied that she had any knowledge of any interest in the subject matter in respect of which she voted and took the view that for the preservation of her integrity it would be best to resign from the firm so that no suggestion could ever be raised in the future that she had acted otherwise than with the utmost propriety.

At the meeting on 19 December 1995 with Mr Day and Mr Cousley, one of the statements recorded in the file notes of that meeting and attributed to Councillor Judge was that she had said words to the effect that the whole thing was politically based and that she was innocent of any wrongdoing. She also said that it was a set-up and that “one person was badgered into making a statement, and that she would bet we couldn’t get him in here to be interviewed.”: Exhibit A, Annexure 22. In relation to the suggestion of a “set-up” she was asked to detail what she meant and her reasons for holding that view. In his response to the questionnaire, Mr Tudehope said that it was not an appropriate question for the purposes of the inquiry but nevertheless went on to state as follows:

**“Ms Judge has her views as to the motivation for the assertions which are made against her. She is of the view that there is absolutely nothing which she has done wrong which gives rise to a breach of any obligation which she has under the Act and to that end believes that any fairminded person viewing the material would form the same view and that consequently to pursue her is motivated by other reasons including the fact that at the time the allegation was made against her she was running for pre-selection for the Labor Party in respect of the State seat of Strathfield.”**

Another question asked whether she had turned her mind to the question of pecuniary interest in relation to the development application for the Branxton site. Mr Tudehope answered that on every issue before the Council she formed a view as to whether she had a pecuniary interest and had formed the view that she had no pecuniary interest in or conflict of interest in relation to that application.

As mentioned earlier, the Director-General’s Report of the investigation was received by the Tribunal on 2 August 1996 and on 15

August 1996 the Tribunal gave notice of its decision to conduct a hearing into the complaint.

## **ISSUES FOR DETERMINATION**

Numerous issues between the parties arose in the course of the hearing. The principal ones should be mentioned before turning to the oral evidence and other material which was tendered.

The provisions of section 451 of the Act have already been set out. It uses the expression “pecuniary interest”. Section 442 describes what is a pecuniary interest in terms which, so far as material, are as follows:

**“442. (1) For the purposes of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated as provided in section 443.**

**(2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter ...”**

The relevant parts of section 443 provide:

**“443. (1) For the purposes of this Chapter, a person has a pecuniary interest in a matter if the pecuniary interest is the interest of:**

- (a) the person; or**
- (b) another person with whom the person is associated as provided in this section.**

**(2) A person is taken to have a pecuniary interest in a matter if:**

**(a) the ... employer of the person has a pecuniary interest in the matter ...”**

The nature of the pecuniary interest alleged against Councillor Judge has been earlier particularised. There are two parts to it. The first alleges that she had a pecuniary interest because her employer JBW had a pecuniary interest. The pecuniary interest of JBW is alleged to have consisted in a reasonable likelihood or expectation of financial gain to JBW if the development application had been approved by the Council, the gain in question being made by JBW by either commissions to be earned on a sale

from PLC to Markham or on sales of residential units after development by Markham. Both cases depended upon Markham becoming the purchaser from PLC and JBW becoming appointed agent, in the first case by PLC and in the second by Markham. The considerations just mentioned would apply also to the second part of the allegation which is that she had a direct personal pecuniary interest by reason of her option to purchase a share in the business and/or her personal entitlement to share in commissions earned in the business.

The Tribunal has to decide whether on the evidence the complaint has been proved, it's findings to be made on the balance of probabilities: section 483.

Part of the case put by Mr Gray at the close of the evidence was that the contingencies standing between the Council's decision and any prospects of JBW's gaining any financial benefit were such that the Tribunal should find that the evidence failed to establish the requisite reasonable likelihood or expectation of financial gain that would constitute a pecuniary interest for the purposes of the Act.

However, Mr Gray's primary contention for Councillor Judge was based on the provisions of section 457, which states that a person does not commit a breach of section 451 if the person did not know and could not reasonably be expected to have known that the matter under consideration at the Council meeting was one in which he or she had a pecuniary interest. This section presupposes that a pecuniary interest in the matter before the Council did exist and that, because of its existence, its non-disclosure and the participation of the person concerned would have been a breach of section 451 but for the fact that the person was ignorant of and could not reasonably have been expected to know the facts which constituted that pecuniary interest. Mr Gray submitted that on the evidence and the probabilities the Tribunal should find that this defence has been established in the present case.

The Tribunal proposes in the first instance to deal with this issue, that is to say, the question whether, assuming that the facts gave rise to a pecuniary interest, Councillor Judge did not know and could not reasonably be expected to have known those facts. The Tribunal will return later to the questions raised by Mr Gray as to whether a pecuniary interest existed at all.

## **THE PARTS PLAYED BY BUSCHMAN AND WALSH**

Mr Buschman had a profound influence on the course of events. Though Mr McKeith had been the one to initiate the complaint to the Council, it was Mr Buschman who drove it forward with what he told the Mayor in their telephone conversation on 12 October 1995. He was aided and abetted by Mr Walsh. When confronted by the General Manager with PLC's letter three days before, Councillor Judge had denied knowledge of the negotiations which were described in the letter as the basis of PLC's complaint. The General Manager had accepted and expressed the view that, if what Councillor Judge said was true, the complaint would be no problem for her. Only a general discussion of pecuniary interest hazards for a real estate agent/councillor with a view to avoiding future problems was then contemplated, with PLC to be informed in due course. Mr Buschman, however, brutally rejected Councillor Judge's explanation, branding her a liar and backing it up with positive assertions of Councillor Judge's knowledge and means of knowledge of the firm's dealings with PLC and Markham. To add to the denigration he claimed to have sacked her from the firm. To reinforce his credibility he volunteered to put it all in writing. However, as can be seen from the recital of events so far, he began gradually to recede from the front he had presented to the mayor. It will be seen that in his evidence to the Tribunal he finally executed a total retreat.

The telephone conversation with the Mayor came to be focussed on Councillor Judge's knowledge at the time of the Council meeting because when the profession of ignorance which she had made to the General Manager was relayed to Mr Walsh by the Mayor and, at Mr Walsh's request, repeated to Mr Buschman, Mr Buschman's furious rejection of it made

Councillor Judge's state of knowledge the principal issue in the matter. His assertion that she knew was unequivocal. He sought to reinforce it by his claim that they had had regular meetings at JBW and were kept informed of each other's dealings. The righteous indignation with which he expressed himself to the Mayor was made the more convincing by Mr Buschman's claim that he had promptly dismissed Councillor Judge from his employ and by his expression of willingness to put it all in writing for the Council.

The writing was slow in coming. The General Manager had to chase it up. When it did come two weeks later in the form of his statutory declaration it was, as to the question of her knowledge, a pale shadow of the assertions Mr Buschman had made to the Mayor. He stated, "To the best of my knowledge I believe Virginia Judge was aware of the discussions ...". In retrospect this can be judged as the first sign of a retreat from the position Mr Buschman had put forward in relation to the complaint by PLC. In his evidence to the Tribunal Mr Buschman stated that his statutory declaration had been prepared by him at the office of his solicitors and that the contents were true: Exhibit K, paragraph 12.

In the meantime Mr Walsh had lent support to Mr Buschman's assertions to the Mayor by telling the General Manager, when she telephoned him to arrange the interview with her that never took place, that he "had no doubt" that Councillor Judge knew of the discussions. He repeated Mr Buschman's representations to the Mayor that at JBW they met on a regular basis and exchanged information as to each other's activities. However, the promise he made on this occasion to provide a statutory declaration was never kept. He excused himself on the ground that, on legal advice, Mr Buschman's was enough. Again, in retrospect, a first sign of retreat on Mr Walsh's part.

Both Buschman and Walsh had been bold enough to repeat to Mr Day in his preliminary inquiry on 24 November 1995 their assertions that

Councillor Judge knew of the negotiations, instancing what they called “a meeting” between the three of them and the developer on a specific date on which she was said to have participated in the discussions about the property; but signs of their having had second thoughts about the position they had put themselves in on the matter emerged once again when Mr Buschman said that he would like to see the matter “dropped” and both said that it would be “unfortunate and sad” if anything were to happen over it. Then, when it came to the question of a formal taped interview they both declined to be interviewed. Moreover Mr Buschman declined to furnish copies of documents and Mr Walsh said that he had no diary entry of the alleged “meeting” with the developer attended by Councillor Judge.

As well as telling the Mayor and the General Manager of the Council that Councillor Judge knew of the negotiations, Mr Buschman and Mr Walsh had also told the person who had made the complaint, Mr McKeith, that she knew. JBW’s “internal office arrangements” were mentioned again.

Prior to their giving evidence, unsuccessful attempts had been made by the legal branch of the Department of Local Government to obtain the evidence of Mr Buschman and Mr Walsh in the form of signed written statements. There is an issue to be dealt with later arising out of these attempts. For now it is sufficient to record that both of them ended up being summonsed by the Tribunal to give oral testimony, the possibility of which had been forewarned to them by Mr Day many months before it happened.

## **MR BUSCHMAN’S TESTIMONY**

Very shortly before the hearing before the Tribunal was due to commence, Mr Buschman furnished to the Department of Local Government a signed written statement dated 23 October 1996 which he had prepared with his solicitor. It became Exhibit K in the proceedings.

On the question of Councillor Judge’s knowledge of the negotiations with PLC and Markham, Mr Buschman said in his statement:

**“The first meeting that I recall attending relating to this site was a meeting at my office sometime early in May of 1995. At that meeting,**

**David Walsh, myself and James Markham were present. I recall Markham arriving at the office. At that time Virginia Judge was also present in the office but was not present at the meeting which we had with Mr Markham. I recall that either prior to the meeting or after the meeting Virginia Judge saying to Markham words to the effect “The Branxton is a good site James. You ought to get it.””: Exhibit K, paragraph 6.**

The statement goes on to say that there were a number of meetings thereafter involving David Walsh, himself, James Markham and Bill McKeith but to the best of his knowledge Virginia Judge did not attend on any meetings involving PLC or James Markham relating to the site.

In relation to what he had said to the Mayor concerning Councillor Judge's knowledge, he said in his statement that he recalled the Mayor asking him whether she knew about Markham's interest in the site and the firm's involvement with Markham. According to the statement, “I said yes. If she's telling you any different she's telling lies. The reality was that my recollection was that Virginia was certainly aware in May of 1995 that Markham Corporation were interested in the site and I had assumed at the time that I spoke to the Mayor that she knew about it at the time that she voted.”

In relation to paragraph 6 of his statutory declaration in which he had said that he believed that Virginia Judge was aware of the discussions, his statement says, “When I made that statement my clear recollection was that Virginia was present in the office certainly at the very first meeting when James Markham, David Walsh and I discussed the proposal. It was my recollection of that meeting that led me to say that I believe that she knew of the discussions with the developer.” The statement proceeded later to say, “I am aware of no discussions which took place between David Walsh, myself and Virginia Judge involving this site. I say that this is particularly the fact because I recall a meeting at which I attended with James Markham, Bill McKeith, David Walsh, Geoff Markham and myself at which Bill McKeith impressed upon me that “I want to keep this confidential as I don't want it get

around the town that Branxton is closing down.” I was therefore particularly concerned to ensure that as few people as possible were aware of the development.”

There are other matters in this statement that need to be dealt with but in the present context the concluding paragraph of the statement ought to be quoted:

**“In making this statement I do so with a better perspective of the events than I did at the time that I made the telephone call on 10 October 1995 and the statutory declaration on 26 October 1995. It is my belief that Virginia Judge quite possibly and probably did not know of the continuing negotiations relating to this site with Markham Corporation. I accept that it is quite probable that she believed that the PLC school was going to develop the site themselves. To the best of my knowledge I believe she had no involvement in any of the meetings, discussions, negotiations or correspondence relating to the development of this site by Markham Corporation. To the best of my knowledge and belief her only knowledge of the interest in the site would have been her presence in the office in early May of 1995 when the matter was first discussed with James Markham.”**

In paragraph 18 of Mr Buschman’s statement he purports to refute a number of matters recorded by Mr Day of the preliminary interview Mr Day had with Mr Buschman and Mr Walsh on 24 November 1995. In every case the “refutation” failed to deny that the file note accurately recorded what was said to Mr Day by Mr Buschman and Mr Walsh at that time. The denials or qualifications contained in Mr Buschman’s statement are denials of the facts but not of what had been said at the interview. They purport to be corrections of the underlying facts but are consistent with Mr Buschman and Mr Walsh having made incorrect statements to Mr Day which he has faithfully recorded. For example: “Mr Day records “Buschman discussed Judge’s vote on the DA with her on the morning after the Council meeting and asked her why she had so voted after all the work that had been put into the negotiations.” I deny that I had any discussion with Virginia on the day after the Council meeting.” Another example, “It is recorded that “I asked her for her resignation and she provided it within 24 hours.” “I deny that I demanded her resignation. We

had a discussion about whether she could continue to work for the firm in view of the clear conflict of interest which she was going to have in relation to matters where the firm was involved.” Two other matters dealt with in the same fashion were the statements recorded in the file note that Virginia Judge had expressed an interest in introducing Kieran Mulcahy into the negotiations prior to the Council meetings and that Buschman and Walsh had indicated that they were 99 per cent assured of getting the agency for the units if the sale went through. Mr Buschman used the same technique in an attempt to evade the question of what he had told the Mayor and the investigating officers on other matters when they were put to him.

On two of the strongest and most significant assertions that Mr Buschman had made to the Mayor in their telephone conversation Mr Buschman backed down completely. They were the manner of the termination of Councillor Judge's employment and the question whether she was telling lies about her knowledge of the negotiations.

As mentioned earlier, the Mayor's recollection backed by her handwritten note of the conversation was that Mr Buschman told her that he was so furious with Virginia Judge that he had “sacked” her. In his statement of evidence (Exhibit K, paragraph 9), he gives a different version: “I was so angry I said to her words to the effect “Virginia this can't go on. You can't continue to work us (sic) and to have these sort of matters arise. There is only one clear way out of this and that's for you to resign.” In the same statement (paragraph 9) he says, “I deny that I said to the Mayor that I had dismissed Virginia Judge. I may have said words to the effect “She's gone now you know” or words like that.” When the question whether he had told the Mayor that he had dismissed Virginia Judge was raised with him in the witness box he was evasive and gave a further version. He said, “I wouldn't necessarily have said that. I can't recall that, but all I know is that I was angry at the time and - well, too - I can't exactly remember what I said, but words to the effect that, “She's no longer with the firm” because I thought that

- at the time - that Ms Judge had besmirched a good name that's been there for 28 years.”: T183/33-51. He further vacillated between demanding, requesting, or suggesting that she resign or just having a discussion of the subject: T186/24; T187/10-17, 19; T189/21-29, 41. Mr Buschman’s final position was that her resignation was by mutual agreement. He said, “ ... so to say that I said, look, you go, or else,” I was angry. Okay, I might have said things to that effect,. but the truth of the matter is that we discussed it, and we both agreed that that was the best course of action.”: T189/56-T190/2. Of course, this conflicts with the evidence of Councillor Judge referred to earlier that it was her own decision to resign because of her disappointment with her colleagues and her desire to eliminate the risk of future conflict of interest problems in the performance of her duties as a Councillor. However, the question which remained was, regardless of what in fact occurred with respect to her resignation, what did Mr Buschman tell the Mayor? When he was finally brought back to that question and was asked whether he had used the word “sacked” he at first sought to evade the question by saying, “I would dispute that, because I didn’t sack her.”: T189/11-14. But finally he gave this evidence:

**“Q. You wanted to convey to the Mayor that you were taking an initiative to distance yourself from what she had done; is that correct?”**

**A. That's probably better put, yes, sir.**

**Q. One way of doing that would be to say, “Look, I’ve sacked her.”?**

**A. Possibly, yes, yes.**

**Q. So, you may have said it?**

**A. I may have, but I can’t - I really can’t recall. I really can’t recall.”: T190/4-15.**

The Tribunal has no hesitation in preferring the evidence of the Mayor on the question of what he said to her on this topic, and the evidence of

Councillor Judge on the question of how her resignation came about, to the evidence given by Mr Buschman on those subjects.

On the question of what Mr Buschman had told the Mayor on the subject of Councillor Judge's knowledge of the negotiations in relation to Branxton at the time of the Council meeting on 26 September 1995, Mr Buschman admitted in his evidence to the Tribunal that he had told the Mayor that if Councillor Judge had denied knowledge of the negotiations she was telling lies: T194/1-26. He was then asked whether he had also told the Mayor that all of them at JBW were kept informed of each other's dealings with clients at regular meetings. Once again Mr Buschman attempted to evade that question by stating what the facts were instead of dealing with the issue as to what he had said the facts were. Eventually, whilst avoiding an outright admission, he said that he could have told the Mayor that, in effect, Councillor Judge must have known what was happening in relation to the Branxton site because all at JBW were kept informed of each other's dealings with clients at regular meetings: T194/28-38; T194/55-T195/1. He was then asked whether, if he had said it, it would have been true, and he answered "Oh, we have regular meetings, yes.": T195/5.

Further questioning elicited that, by this answer, Mr Buschman was referring to regular weekly meetings on Mondays or Tuesdays with the entire staff of JBW, including Virginia Judge and David Walsh, that had taken place over the entire period up to the date of the Council meeting here in question: T195/7-33; but he then went on to say that the Branxton had never been discussed at any of those meetings. He said that the reason was that he and Mr Walsh had been told by Mr McKeith of PLC to keep that matter extremely confidential, "Because Branxton was still operating and they didn't want ... word around town that ... the site, it was for sale, because it was still operating and parents would get upset. So, the Branxton site was left out of the discussions. None of the salesmen knew anything about the Branxton site other than what I thought was David Walsh and, at the time, Virginia

Judge and myself.”: T195/35-52. He went on to say that the Branxton site was not discussed at these staff meetings so that it wouldn't go beyond the three of them: T196/5-10. Mr Buschman then gave the following evidence:

**“Q. Since Virginia Judge was not excluded from the confidentiality as regards the Branxton site proposal, do I take it that she was included in discussions in the office about what was happening with regard to the Branxton site?**

**A. Not by myself. It could have been between - because keep in mind that David was the lister, as it were, and the potential salesman of the site. I was there as a - as a back up for him, for want of a better word, but I did not have any discussions with Ms Judge about the site, not personally, but David and Ms Judge did, because they had a close liaison at the time, and, in fact, they even split their commissions in two ways. So, there was a close liaison there, so I left that to them, but I personally can say that I've had no discussions with Ms Judge about the site, and also I was not aware of exactly what Ms Judge knew at any given time.**

**Yes, in May of 1995, she was aware of it, because of her statement to Mr Markham, but since then, she's not attended any of meetings that David Walsh had, either with myself and James Markham or with Geoff Markham, his father, and Bill McKeith, et cetera, et cetera. She was kept right out of it. That's my recollection of it.**

**Q. Are you saying that she wasn't even informed what was going on?**

**A. Not from my side, no.**

**Q. Or by Mr Walsh when the three of you were together?**

**A. We never discussed it with the three of us. It was always David Walsh and myself who discussed this.”: T196/12-48**

In the light of this evidence, Mr Buschman was asked to explain, “What would be the point of telling the Mayor, in the context of your accusing Virginia Judge of telling lies about her knowledge, that all of you were kept informed of each other's dealings with clients at regular meetings?” He replied, “I can only say that, possibly, that was done in anger.”: T196/50-T197/2.

Subsequently Mr Buschman's evidence agreed that at the time of the telephone conversation he was concerned to convince the Mayor that what

Virginia Judge had done was wrong and that he didn't want to have anything to do with it and that, in order to convince the Mayor, he told the Mayor that if Virginia Judge said that she didn't know about the firm's involvement with Markham Corporation over the Branxton site she was telling lies, and, to reinforce that, he had said to the Mayor, in effect, "She should have known, because we had regular meetings in which we discussed each other's dealings with clients." It was then put to him, "So you said it to reinforce your accusation that she was telling lies, didn't you?" To which he answered, "I would say yes to that, yes.": T197/31-53.

Finally, Mr Buschman was asked whether he was adhering to his accusation made to the Mayor that Virginia Judge had been telling lies and he answered "Not now." He was asked "So, you are now withdrawing that accusation?" He answered, "Yes.": T198/22-33. The question of how it came about that Mr Buschman decided to withdraw his accusation has yet to be dealt with.

When counsel for Virginia Judge came to cross-examine him, Mr Buschman readily agreed that he had never been present when the Branxton site was discussed "if it ever was" between Virginia Judge and David Walsh and that he himself had never discussed it with Virginia Judge nor had it ever been discussed at the weekly meetings to which Mr Buschman had referred: T200/10-27. Mr Gray then turned his attention to two documents that had come into existence during the course of an attempt by the Legal Branch of the Department of Local Government to obtain from Mr Buschman the signed statement of his evidence for the purpose of the hearing before the Tribunal. One of the documents was a four paragraph draft statement which had been sent to Mr Buschman for his consideration. The other was a three paragraph unsigned statement which Mr Buschman had faxed back to the Department. They featured in his later submissions on behalf of Councillor Judge criticising the conduct of officers of the Department in the preparation of the matter for hearing by the Tribunal. That matter will be dealt with in due

course but, as part of Mr Gray's cross-examination of Mr Buschman related to the two documents in question, it is necessary to set them out here. They together became Exhibit P. For ease of reference I have marked the four paragraph document Exhibit P1 and the three paragraph document Exhibit P2.

**Exhibit P1**

- "1. On or about [redacted] a meeting was conducted in the offices of Judge Buschman Walsh, The Professionals, Strathfield regarding the sale of 16 Margaret Street, Strathfield and I, Ms Dianne Virginia Judge, a PLC representative, David Walsh and Mr James Markham were present. I recall Ms Judge participating in the discussions about the property at that meeting.**
- 2. To the best of my knowledge at the time of the meeting only our firm was involved in negotiations with PLC regarding the sale of the land with approval of the proposed development to a developer Mr Markham.**
- 3. An understanding between Mr Markham and me was that the firm of Judge Buschman Walsh, The Professionals would be given the agency agreement for sale of the property. The estimated commission on the sale of the land alone was about \$50,000. I am certain that Mr Walsh and Ms Judge knew of the understanding.**
- 4. Mr Markham assured me that the firm of Judge Buschman Walsh, The Professionals would get the agency for sale of the proposed units and this would bring a commission of approximately \$190,000 for the firm."**

**Exhibit P2**

- "On or about May 1995 a meeting was conducted in the offices of Judge Buschman Walsh, The Professionals, Strathfield regarding the sale of 16 Margaret Street, Strathfield and I, David Walsh and Mr James Markham were present.**
- 2. To the best of my knowledge at the time of the meeting only our firm was involved in negotiations with PLC regarding the sale of the land with approval of the proposed development to a developer Mr Markham.**
  - 3. It was my belief that Mr Markham would give the firm of Judge Buschman Walsh, The Professionals the agency agreement for sale of the units to be built on this property. The estimated commission on the**

**sale of the land alone was about \$50,000. I am certain that Mr Walsh knew of the understanding, but I am not sure that Ms Judge knew of the understanding as she had no direct involvement in any of the negotiations.”**

Mr Buschman said in his evidence to the Tribunal that Exhibit P1 had been faxed to him by the Department of Local Government and “I thought that various parts in this particular statement were erroneous, and I spoke to someone and he said, “Well, give me your interpretation of the events,” and that's why I prepared the other document” (Exhibit P2): T204/14-20.

In the course of his cross-examination Mr Gray proceeded to lead Mr Buschman through Exhibit P1. On the question of Mr Buschman's credit as a witness, what is illuminating is not so much the substance of his answers but their form and the manner in which he gave them.

It is apparent that paragraph 1 of Exhibit P1 relates to the reference to “a meeting between the three and the developer on a specific date which was to be advised after checking diaries” contained in Mr Day's file note of his interview with George Buschman and David Walsh on 24 November 1995 (Exhibit A, Annexure 10). It is also obvious that, as a reproduction of the substance of what was contained in the file note, paragraph 1 is inaccurate when it includes amongst those present at the meeting “a PLC representative.” However, Mr Buschman cooperated with Mr Gray in seeking to make a great deal of this. When Mr Gray asked, “May we take it you say no such meeting occurred?”, Mr Buschman replied, “Totally and utterly incorrect. A PLC representative has never put one foot over my threshold, and Mr Day should know that because he was there. He was there when he, David Walsh and I sat together in the office. That is a totally incorrect statement.” Mr Gray then put it to him “And you had not told Mr Day or Mr Cousley that any such meetings had occurred, had you?” To which he answered, “I couldn't have, because the meeting didn't occur. The PLC wouldn't know where my firm was, for that matter - or is.” Mr Gray went on to put it to Mr Buschman that even leaving PLC out of the statement, “You say

now, don't you, that there was no meeting at which you, Virginia Judge, David Walsh and James Markham were present?" He answered "Definitely and utterly not." And it went on:

**“Q. You never told Mr Day that there was?**

**A. No.**

**Q. Or Mr Cousley?**

**A. No.”**

And:

**“Q. Is it your evidence Ms Judge did not participate in any such way at all?**

**A. That is exactly what I am saying, yes.**

**Q. And you never told Mr Day or Mr Cousley that she did?**

**A. No, sir.” T207/2-44.**

Mr Buschman delivered these answers in the witness box with what appeared to the Tribunal to be a histrionic display of outrage which, having regard to his own performance in his conversation with the Mayor, was hypocritical and, having regard to what he and David Walsh had told Mr Day on 24 November 1995 and what Mr Buschman had stated in paragraph 6 of his prepared statement of 23 October 1996 (Exhibit K), was a gross exaggeration. But it didn't stop there.

Mr Day had recorded in his file note (Exhibit A, Annexure 10) that Buschman and Walsh had told him on 24 November 1995 that "It was understood by all parties that when negotiations reached contract stage, that Judge Buschman Walsh would be given the agency agreement for the sale of the property" and that the estimated commission on the sale of the land alone was \$50,000. Paragraph 3 of Exhibit P1 obviously refers to that statement in the file note and reproduces the substance of the expression "It was understood by all parties," in the form, "I am certain that Mr Walsh and Ms

Judge knew of the understanding.” When Mr Gray put that statement to Mr Buschman he said, “Again, that is erroneous. That's why I didn't want to send that back signed.”: T208/4-9. And it went on:

**“Q. That's why, is it, that your three paragraph statement which you prepared - you told the Department: “I am certain that Mr Walsh knew of that understanding but I am not sure that Ms Judge knew of the understanding as she had no direct involvement in any of the negotiations.”?”**

**A. That is exactly right, yes.**

**Q. Is that what you have told Mr Day and or Mr Cousley previously?**

**A. I must have. How they came to these conclusions is a mystery to me.”: T208/15-28**

The reference to the “three paragraph statement” in Mr Gray’s question is a reference to paragraph 3 of Exhibit P2. Comparing it to what Mr Buschman had told the Mayor and Mr Day about Ms Judge’s knowledge, the words “I am not sure that Ms Judge knew,” is to be regarded as one of the numerous steps backward taken by Mr Buschman in recanting from his previous allegations. It does nothing to aid Mr Buschman's credibility as a witness.

Relevant to an issue to be dealt with later is the fact that the cross-examination of Mr Buschman in relation to the documents contained in Exhibit P plainly was directed to raising questions or casting doubt upon the competence, credibility or integrity of the person or persons who prepared the draft statement of Mr Buschman which is Exhibit P1, the finger of suspicion being pointed by both Mr Gray and Mr Buschman at Mr Day and Mr Cousley.

The extent of Mr Buschman's cooperation with counsel for Virginia Judge in the witness box was even greater on another topic. Councillor Judge was later to give evidence of a visit to JBW’s offices in December 1995 when she went there to collect a camera that she had left behind and had had a conversation with Mr Buschman. In his prepared statement of evidence of 23 October 1996 (Exhibit K, paragraph 15), Mr Buschman stated that on or about 15 December 1995 Virginia Judge came to his office to collect her

camera, initially coming to the front door but he invited her in to have a discussion. His statement proceeds:

**“We discussed this matter and she said to me “George you know I didn’t know.” I said “Virginia, surely you knew.” She said “George, I had asked David whether Markham still had an interest in this site and he said to me “PLC are going to do it themselves.””**

The statement goes on in the succeeding paragraph to say, “I believe that what Virginia told me was the truth and it may have been the case that she did not know that Markham Corporation had a continuing interest in the site.”

This account of what Councillor Judge said does not attribute to her any statement as to the date at which the conversation with David Walsh had taken place. Counsel for the Director-General directed Mr Buschman's attention to this paragraph of his statement, asking him what were the topics of the conversation, and he replied, “Some mundane topics, and then it swung over to this particular matter, and either she or I was concerned - I’m not all that sure - but she made a very profound statement that - that just prior to attending the Council meeting, that she had had a conversation with Mr Walsh and, at that conversation Mr Walsh had said words to the effect, “Don’t worry about it. The school is going to do it themselves - develop it themselves.” (Emphasis added) It went on:

**“Q. So, she said to you, mid-December, that she had had a conversation with Mr Walsh just before the Council meeting?”**

**A. That's correct, ma’am, yes.**

**Q. And Mr Walsh had said --**

**A. Words to the effect, don’t worry about it. The school is going to do the project themselves.”**

Mr Buschman added that that was one of the options for the school that the Principal of PLC, Mr McKeith, had mentioned to him: T185/4-34.

Later on Mr Buschman, in seeking to explain how he had come to withdraw his allegation to the Mayor that Councillor Judge knew about the

negotiations, he said that he had rethought the matter in view of what Virginia Judge said to him in December when she assured him that she had not known what was going on. He was asked whether anybody else had discussed with him that he should withdraw his accusation that she had been telling lies. Mr Buschman replied, "Definitely not. It was my own decision, and I always found Virginia Judge, when she was working with me, to be forthright and honest with me and I was with her, and we appreciated that in each other, so if she told me that, in December, I can't sit here and say that she knew definitely at the meeting ... that we still had had negotiations with Branxton or with PLC." He was asked:

**“Q. Virtually the only basis on which you have withdrawn this accusation is because she told you in December that she did not, in fact, know what was going on?”**

**A. That's correct, and I had no reason to disbelieve her.”: T198/4-T199/14**

Councillor Judge's statement of evidence dated 25 October 1996 (Exhibit Q), paragraph 11 states:

**“In or about late May, 1995 I had a conversation with David Walsh to the following effect:**

**I said: “What’s happening with the Branxton site?”**

**He said: “It’s all come to nothing, the school has decided to do it themselves.”**

The statement goes on in the next paragraph to say that from that time onward, her understanding was that neither Mr Markham nor her firm had any interest, either actual or potential in the Branxton site.

When Councillor Judge came to give evidence she said that Mr Buschman was not correct in stating that she had told him that her conversation with Mr Walsh had occurred only shortly before the Council meeting: T259/31; T259/41. She was later asked, “Did you tell him that, at some time, Walsh had told you that it had all come to nothing?” In the course

of her answer, she said, “I’d said to him that when I’d asked David, which was way back earlier in the year, David had said to me that there was no potential with that site, or that, as in my statement, that, you know, they were going to do it themselves.”: T260/26-41

It is not clear from her answer whether she is saying that she told Mr Buschman the conversation with David Walsh was way back earlier in the year or that this is what she is telling the Tribunal. When cross-examined about the date of the conversation with Mr Walsh, Councillor Judge, whilst expressing some uncertainty, eventually adhered to May or the early part of June 1995: T274/25-T275/39.

Councillor Judge's alleged conversation with Mr Walsh was clearly of great importance as to the state of her knowledge as at the time of the Council meeting. Mr Buschman's corroborating statement in Exhibit K was a valuable ally; but his sworn evidence had attributed to Councillor Judge the timing of the conversation to “just prior to attending the Council meeting”. It may be taken that Mr Gray was well aware when cross-examining Mr Buschman that in Councillor Judge's statement she had put the conversation as having occurred “in or about late May.” In this situation of conflict between Mr Buschman's evidence and Councillor Judge, Mr Gray was able to obtain what seemed to the Tribunal an extraordinary degree of cooperation in procuring from Mr Buschman a departure from his evidence as to the date of the conversation with Mr Walsh as given to him by Councillor Judge. The cross-examination of Mr Buschman proceeded as follows:

**“Q. I would like you to consider whether she may have told you that that conversation with Mr Walsh took place not shortly before the Council meeting, but some time earlier still?”**

**A. No.**

**Q. Do you agree that that's possible?”**

**A. That would be possible. I mean, there was some time before the meeting where she said - where she would have asked David Walsh for his opinion, and that he has said that to her. That's possible. Look, you**

run a busy office - I didn't know it would come to all this. I don't recall all these dates and, you know --

**Q.** What you were particularly focusing on - is that right --

**A.** Yes.

**Q.** -- was the central point of what she said, namely, that, at some time or other Walsh had told her the school is going to do it themselves?

**A.** Yes.

**Q.** And whenever that had been said, if Ms Judge was telling you that that's what she had been told then, as far as you were concerned, you believed her?

**A.** Yes, because I - as I said, I found her - the time that she worked with me and it was that we had a few conversations about that - where I pride myself on being straight with people and she was the same with me, and we appreciated that in each other. So, I have no reason to disbelieve her.

**Q.** And you are quite prepared to agree with me, I think - is that right - that she may have told you that that conversation she had with Mr Walsh had happened not simply a few days before the Council meeting but actually some months previously?

**A.** That could have been the case.”: T210/14-56

Before dealing further with the testimony of Mr Buschman it is necessary to refer to that of Mr Walsh.

## **MR WALSH'S TESTIMONY**

Mr Walsh was called to give evidence before Mr Buschman. Much of his evidence was given in a vague and rambling fashion. He often diverged away from the subject and appeared to be confabulating. It was difficult to obtain from him direct answers to questions, particularly when seeking to have him attribute conversational content to a particular speaker, especially so with regard to the alleged meeting on the subject of the Branxton site at which Mr Markham and Virginia Judge were alleged to have been present.

After a considerable amount of probing, Mr Walsh gave quite a detailed account of such a meeting.

He said that it occurred in May or June 1995: T39/17. He said that the meeting commenced in JBW's office between himself, Mr Markham and Virginia Judge, was continued at a coffee shop across the road from the office and then returned to be further continued at the office with Mr Buschman participating at that stage. He said that Virginia Judge was present and participated in the meeting at all three places: T38/39, T40/17, 21. He said that before Mr Markham arrived at the office for the meeting, he had had a strategy discussion with Virginia Judge as to how they should deal with Mr Markham. Of this he was definite: T40/49. He said that he and Virginia Judge were "in total harmony" on the subject of endeavouring to get James Markham "sufficiently enthused over the property" that he should buy it because it was the best site in Strathfield and there would be a very good profit margin at the end of the day: T41/13, 30-39. Mr Walsh said, "We had to ensure that James Markham was enthusiastic and confident enough to propose making an offer for the site. That was the essence of the conversation and the purpose of the meeting. We knew he had the ability to buy the site. He had the experience to develop the site, and we had to ensure that he responded to our enthusiasm for it.": T42/17-24. When pressed to be explicit about his conversation with Virginia Judge prior to Mr Markham's arrival, he said, "As far as I can recall I said words to the effect that, James is coming to the office. We will get together and have a coffee with him. We want to make sure that he puts forward an offer, that he moves on the site." When asked how she replied, he said, "We were in harmony. There was no disagreement. "Let's do it." We were all excited about the prospect.": T43/8-20.

Mr Walsh claimed that in his talks with Virginia Judge whether on this occasion or subsequently he worked out "what was in it for us at the end of the day", pointing out that whilst the initial commission for selling the site

would be worthwhile, the big commission would come from selling units at the end." And in that regard James Markham had assured me that we would get the resale of the units.": T42/26-42

In describing the meetings with Mr Markham, Mr Walsh insisted that she was involved in the discussions with him. He was asked specifically whether she had contributed anything on the subject of the desirability of the Branxton site and he replied, "I did most of the talking, although Virginia was making contributions, because it is not like Virginia to keep - to say nothing. She is quite a vocal person, and she usually gets involved in any discussions." T45/27, T46/2-10. He further claimed that Virginia Judge participated in the meeting that continued in Mr Buschman's office on their return from the coffee shop. He said that she was there for at least part of the discussion: T47/36-T48/28. Having failed so far to get Mr Walsh to attribute any direct speech to Virginia Judge, he was asked, "Do you recall anything at all that she said in the course of her making her contribution to the discussion?" And he answered, "I believe it was at this meeting that she said - it was a comment when James was leaving: "It's a top site" or "It's a good site" or "You should go for it. Make sure you get it." Words to that effect." He added, "Yes, as he was walking out. I remember it. It was a passing comment as he was going.": T48/33-46. In giving this evidence, Mr Walsh went on to declare that this was the only comment that he could recall Virginia Judge making on that day at any of the meetings that took place: T48/53-T49/2

In the period 16 May 1995 to 19 July 1995 correspondence passed between David Walsh on behalf of JBW and different officials of PLC.: (Exhibit A, Annexure 26; Exhibit R). Mr Walsh had called on the bursar in the week preceding the letter dated 16 May 1995 in which he had written to the school mentioning "confidential discussions" with a highly reputable developer who was a qualified structural and civil engineer known to JBW for a number of years. The letter requested a meeting between the school and

the developer. It transpired that the Principal of the school Mr McKeith, was away on leave and on 30 May 1995 the Acting Principal wrote to Mr Walsh advising that there could be no meeting until after 29 June 1995 when Mr McKeith would have returned. It appears from the correspondence that Mr Walsh's first direct communication with Mr McKeith was by letter dated 17 July 1995 with which Mr Walsh enclosed an official letter dated 3 July 1995 from Markham Corporation Pty Limited expressing "A serious interest in buying the land or participating with the school in the development of the project" and seeking a meeting with the Principal and members of the school board. Mr McKeith replied to Mr Walsh by letter dated 19 July 1995 thanking him for his interest in the project and advising him that, "A Development Application is currently before Strathfield Council and discussions are well advanced." The letter said that the school would keep Mr Walsh informed of progress and "When the time is right, pursue your offer of a meeting." As mentioned earlier PLC's original development application was lodged on 9 March 1995, which predates Mr Walsh's first approach to the school, and was amended on 19 July 1995, the same date as Mr McKeith's letter.

Mr Walsh was asked whether he had informed Virginia Judge at any time of his having had a preliminary meeting at PLC. He commenced to answer, "Ms Judge knew that we were --", when Mr Gray interposed an objection which was quickly followed by Mr Walsh saying before the objection could be ruled upon, "I told Virginia Judge everything that I was involved in regarding the school.": T51/47-55. When pressed to deal with the question whether he had mentioned the school at all to Virginia Judge on the occasion of Mr Markham's visit to the office, Mr Walsh said that he could not recall the exact wording of the conversation, "But I kept Virginia Judge fully informed of what I was discussing with the school, yes, because we were working together on the whole thing. It wasn't as though I was excluding her for any ulterior motive.": T52/8. Mr Walsh persisted in his claim that he kept Virginia Judge fully informed, repeating it on several occasions: T58/14-27, 42;

T58/54-T59/6. He claimed that he and Mr Buschman had attended a meeting at the school with Mr McKeith in August 1995: T56/55-T57/2; T58/3; T57/4. Mr Walsh swore that Virginia Judge was aware that they were attending that meeting because he told her that they were going to a meeting at the school: T57/8-15; T58/5-27. Notwithstanding these protestations of keeping her informed, when asked about his correspondence with PLC, Mr Walsh said that he could not recall showing Virginia Judge any of the letters that had passed between him and the school except the last one from Mr McKeith dated 19 July 1995 as to which, he said, "It is a positive letter I may have shown it to Virginia Judge, but I can't be certain.": T59/13-T60/10. He later adhered to this evidence: T149/41-T150/56; but at the same time conceded, as to the letter of 19 July 1992, that he had no actual recollection of showing it to her could not be certain about it because he believed that that is what he would have done although he did not recall having done so: T151/6-10; T153/24-30.

In contrast to the impression conveyed by Mr Walsh's evidence to the Tribunal to the effect that Virginia Judge was an active participant in the dealings of JBW with Mr Markham and was kept fully informed of the dealings with PLC, was evidence given by Mr Walsh of a deliberate plan by him and Mr Buschman, but, he claimed, in agreement with Virginia Judge, to exclude Virginia Judge from any meetings or negotiations with PLC, and also evidence by him that he had been enjoined by PLC to keep their negotiations and anything to do with the proposed development of the Branxton site completely confidential.

Mr Walsh said in his evidence that the exclusion of Virginia Judge arose because she wanted to get involved in the negotiations with the school and had expressed a wish to come to a meeting: T53/20-40. Mr Walsh said that he and Mr Buschman had organised a meeting with Mr McKeith after he had returned from leave. Before the meeting he and Mr Buschman had a discussion which he described as follows: "George and I agreed - and,

because I was leading the negotiations, I was enforcing my contribution here, that it would not be in our best interests to let Virginia come to the meeting, being a male headmaster, head of the school, we thought - we believed that George and I, being men, of course, would probably develop a better rapport with him. So we decided it would be better if Virginia Judge was excluded from the meeting.”: T53/43-T54/25. He claimed that they had told Virginia Judge of their decision: T54/27. Mr Walsh later corrected the timing of this decision to some time prior to Mr Walsh’s first meeting with the bursar, that is to say, sometime before 16 May 1955: T55/11-27. Mr Walsh said, “Definitely before the meeting with the bursar, because it was a similar situation that, well, I didn’t believe that Virginia Judge should be involved in discussions with a male bursar and a male headmaster. I didn’t believe it was in our best interests to have a lady negotiating.”: T55/39-54.

Under cross-examination by Mr Gray, Mr Walsh volunteered further reasons for the exclusion of Virginia Judge from the negotiations, reasons that would extend to negotiations with the prospective developer, Markham, as well as negotiations with PLC. The additional reasons he gave were that he and George Buschman had had over 20 years of expertise in the development field whereas Virginia Judge had had no experience in that field and no experience of projects of anything like the Branxton site’s potential magnitude and not much experience in the real estate field generally. T140/39-T141/57.

On the question of confidentiality, Mr Walsh told the Tribunal that PLC wanted everything connected with their possible interest in selling the Branxton site kept confidential: T140/30. He learned this when he was making contact with the school in May 1995. He said, “They wanted to keep everything hush hush, because the school was still active as a pre-school, ... they wanted to keep control, keep things tight.”: T56/49-32. In the records of PLC produced to the Tribunal there is a file note dated 2 June 1995 referring to a request from Mr Walsh for a copy of PLC’s development plans. The file

note states, "They would be prepared to give a signed undertaking of confidentiality, that the plans would not be disclosed to anyone else, and that anything discussed would remain confidential.": Part Exhibit R. Reference has already been made to the fact that in his statement of evidence Exhibit K, Mr Buschman advanced the confidentiality required by PLC as a particular reason for his being able to make the statement, "I am aware of no discussions which took place between David Walsh, myself and Virginia Judge involving this site.": Exhibit K, paragraph 13.

Counsel for the Director-General put to Mr Walsh the conversation that Councillor Judge in her statement of evidence of 25 October 1996 (Exhibit Q, paragraph 11) said she had had with Mr Walsh in about late May 1995 in which he had told her that the matter had all come to nothing because the school had decided to do it themselves. Mr Walsh said that he could not recall that conversation "As you have just said it, no.": T49/4. However, later he said that he could recall Councillor Judge asking him a question such as, "What is happening with the Branxton site?" His evidence varied as to when that happened. He said it would have been, "About ... August", "Within weeks of the September Council meeting", "Within two to three weeks", "Days, possibly a week or so - within a week or so prior to the Council meeting.": T60/29, 47; T73/25. He said that in answer to her question he had told her on that occasion that "Nothing was going to happen with the site until plans had gone before Council and the school had their approval. The school was not even considering doing anything or discussing any negotiations at that stage until they had their DA, because they had nothing to sell they didn't want to be locked into and subject to a planning development application which would have meant that the developer would have had to put - James Markham wanted to put his own plans into Council, but they didn't want to lose control on that development application process.": T60/41-T61/9.

On the subject of the conversation on the telephone with the Mayor on 12 October 1995, Mr Walsh confirmed that it was he who made the call. He said he rang her from Mr Buschman's office and Mr Buschman was sitting at the desk. He described the purpose of the call. He said, "It was really damage control, and we were speaking to Council and to the Mayor, to the General Manager of the Council, due to a response to a letter that was written by PLC complaining that Virginia Judge had voted on the issue.": T64/17. He said that they wanted to convey "our total surprise that Virginia Judge had voted on the issue." And that they had had no knowledge or involvement in how she voted: T64/14-17. Later he disclosed that they had also spoken to Mr McKeith at the school at about the same time as they spoke to the Mayor and the General Manager of the Council. He said they informed Mr McKeith that they had had no knowledge of Virginia Judge voting on the issue. Mr Walsh added, "Again, damage control, we were trying to rescue the situation.": T74/54.

Mr Walsh was asked if anything was said to the Mayor about Ms Judge's employment with the firm. Mr Walsh then proceeded to attribute to Mr Buschman a variety of words as used by Mr Buschman to describe the termination of Councillor Judge's employment. Mr Walsh and Mr Buschman both knew Councillor Judge had resigned by a formal letter of resignation dated 10 October, two days before the telephone conversation. Mr Walsh was visibly uncomfortable in the witness box attempting euphemisms for what Mr Buschman had told the Mayor on the subject. He said that Mr Buschman used words to the effect that she "Was no longer in the employ of the office", "No longer part of our firm", "No longer part of the office", "No longer involved in this firm", "She is finished with the firm", "No longer has any involvement with this firm,": T65/21, 43; T66/7-14; T71/11. However, when it was put to him, Mr Walsh would not deny hearing Mr Buschman say that she had been "dismissed" from the firm: T65/45. He finally said that he believed that Mr Buschman may have used the word "dismissed" when talking to the Mayor.

He said, "As far as I can recall, he may have used that term.", but he said he could not remember Mr Buschman saying that he had "sacked" Virginia Judge in the presence of his solicitor because there was no solicitor in the office: T68/5-16.

Although Mr Walsh had expressed some doubt about the terms used by Mr Buschman to convey that Virginia Judge had ceased to be employed by him, he showed no uncertainty at all about the reasons for the conversation with the Mayor. Mr Walsh told the Tribunal that, immediately they found out that she had voted on the DA at the meeting, they discussed it and said, "We have to do something about this to prevent damage to the firm." Then, he said, that what Mr Buschman told the Mayor about her being no longer with the firm, "was a comment to distance us from the whole situation, to distance the office.": T67/36; T66/25.

Mr Walsh was asked to describe Mr Buschman's demeanour while he was speaking to the Mayor. Mr Walsh replied, "He was livid. He was red in the face. He was, you know, he was very upset over the matter.": T70/6. He was also asked whether Mr Buschman indicated to the Mayor why he was so angry. Mr Walsh replied, "As I recall he told her that he was angry because the reputation of the business, which he still held 100 per cent ownership, was being tarnished. He wanted to put it on record that this was - it was not something that had been done with the approval of the rest of the firm.": T71/3.

As indicated earlier, on the question of Councillor Judge's resignation, Mr Buschman's evidence varied between a discussion, a request by him and mutual agreement on the subject. Councillor Judge gave evidence that it was her own decision following a discussion with Mr Buschman and a consultation with her solicitor. Mr Walsh however, gave a more dramatic version. Mr Walsh said he believed he walked into the office while Mr Buschman was talking with Virginia Judge in his office. He said that he overheard part of the conversation, "I can't remember if it was the full conversation, but he

demanded her resignation. I did hear that.” And he said that, “Following that, she left the office “Decisively” - “Yes, she marched out of the office, and I later heard she had gone down to her solicitor to prepare a letter of resignation”: T66/47-T67/23.

On the question whether there were regular staff meetings consisting of himself, Mr Buschman and Virginia Judge, Mr Walsh’s evidence was:

**“We tried - Virginia Judge tried to organise staff meetings, and there were a few staff meetings organised. George Buschman didn’t like them and never turned up for them and, because there was not all round active participation in these meetings, they didn’t last very long. Also because I have to drive 20 kilometres to work each day I didn’t like turning up earlier in the office. So we would have informal meetings in the office around the desk but no formal meetings.” T63/27**

When asked about the interview with Mr Tony Day on 24 November 1995, Mr Walsh said that he remembered using words to the effect that Virginia Judge was “fully aware of ... the negotiations between our office and James Markham and the school.”: T72/21. He also said that he could recall commenting to Mr Day that Virginia Judge had mentioned to James Markham in passing while he was in the office, “It’s a good site. You should go for it.”: T72/32-40. On the subject of JBW’s prospects of being appointed agents to sell the units, Mr Walsh said that he could not recall having expressed to Mr Day their prospects in terms of a percentage. He said, however, they were the only developer that was working closely with the school at that stage and, if the DA was to be approved by the Council, “I would have said to Mr Day they were very good prospects because we would have had the school wanting to sell with the DA and we had a purchaser set up ready to buy.”: T74/6-42.

### **James Markham Interposed**

Mr Gray’s cross-examination of Mr Walsh had barely commenced when Mr James Markham was interposed to give his evidence. He had furnished a written statement of his evidence to the Director-General which was tendered and became Exhibit M. It confirmed the answers which Mr

Markham had furnished on 21 December 1995 in response to Mr Day's questionnaire to which reference has already been made. (Exhibit A, Annexures 20, 21) In his evidence to the Tribunal, Mr Markham said that he had been able to verify from his diary as 12 May 1995 the date of the meeting at JBW when Councillor Judge had made a passing remark to him that the Branxton site was a good site: T84/48. He affirmed that this meeting was with Mr Buschman and Mr Walsh and that Virginia Judge had not participated in the meeting which he said took place in Mr Buschman's office: T85/9. He was quite positive that the meeting had never transferred to the coffee shop across the road as claimed by Mr Walsh: T85/49; T91/41. He said that he had had no conversation with Virginia Judge after this meeting with Mr Buschman and Mr Walsh: T86/31; T93/19-28.

Mr Markham said that in the course of their meeting, Mr Buschman and Mr Walsh told him that the school wanted to keep any negotiations, "Very confidential." He said that they told him what the school intended to do, there being various options, "We could look at buying the land outright, we could look at developing it in cooperation with the school. From there we just decided that the best thing to do was for them to make contact with the school, which I believe they did, to express our interest.": T86/48. They discussed the range of possible prices for the sale of units after the property was developed, there being 27 units contemplated at that time: T87/3-10. On the question of commission for JBW, Mr Markham said, "I only emphasise that if we were successful in purchasing the property and we actually developed it for units, then it was very likely that they would receive exclusive selling rights of the project, working on an arrangement which we work on with many other agents whereby if they introduce a property we usually hand it back for them to sell.": T87/19.

Mr Markham said that subsequent to the meeting on 12 May 1995 when Virginia Judge had made her passing remark about the Branxton site, he did not have any other meetings or discussions with her in relation to the

Branxton proposal nor did he ever see her at any meetings he had with Mr Walsh: T88/43-49. He said that he had had a number of subsequent meetings with Mr Walsh of which there had been probably six meetings at the offices of JBW but Virginia Judge had not been present at any of them: T90/34-45; T93/19-28.

## **MR WALSH CHANGES HIS EVIDENCE**

Mr Markham had completed his evidence at the conclusion of the first day of hearing. When the hearing resumed some two weeks later Mr Walsh returned to the witness box to continue his evidence. He said that he wished to change his evidence about the conversation at the coffee shop. He said that he had had a conversation with Mr Markham at the court on the last occasion and Mr Markham “was emphatic that we had never had any coffee with anybody, with Virginia over in that shop.” He said that he wished to correct his evidence by withdrawing the evidence he had given of a meeting with Mr Markham in the coffee shop and of Virginia Judge being present in the coffee shop with him and Mr Markham.

He sought to explain that he had confused that meeting with another meeting that had occurred about the same time, namely, a meeting with Virginia Judge and Kieran Mulcahy. He said, “I feel that, at that time, we were trying to organise - Virginia was wanting to organise a meeting with Kieran Mulcahy and James Markham, and it was on or about the same day that Kieran - and I think it was Kieran we had the coffee with in the coffee shop.”: T127/7-40.

He adhered to his evidence of the passing remark made by Virginia Judge to James Markham about the Branxton site in JBW’s office but ultimately he withdrew virtually all of his evidence of Virginia Judge’s participation in the meeting with James Markham and George Buschman that occurred on that occasion. He admitted that not only was it wrong to say that they went to the coffee shop together but it was also wrong to say that Virginia Judge had been present at a meeting with Mr Markham before and

after going to the coffee shop: T132/48, 57. He said that he did not suggest that there had been any other meeting between Mr Markham and Virginia Judge: T134/11; T139/38-44; and admitted that his evidence now was that there never was a meeting at all at which he, Mr Markham and Virginia Judge were present other than the occasion of her passing remark, which Mr Walsh agreed was not a meeting: T134/11, 21-27; T137/24; T138/48-T139/26

Mr Walsh also altered his evidence with regard to the conversation with Virginia Judge in which she asked him what was happening with the Branxton site. As mentioned above, in his various descriptions of the time at which the conversation occurred, he had placed it close to the date of the Council meeting on 26 September 1995. In cross-examination he admitted that he could not say accurately when the conversation took place and it may have been in May or June. He then, for the first time, suggested that there may have been more than one such conversation, but when pressed he could only remember one occasion and, whenever it was, he could not remember having had any such conversation between 16 September 1995, the date of Councillor Judge's election to the Council, and 26 September, the date of the meeting: T142/13-T143/2; T143/17-T144/22; T145/3-8. As to the contents of that conversation, Mr Walsh's cross-examination proceeded as follows:

**Q. At some time between May and September, Mrs Judge asked you, "What's happening with the Branxton site?" Is that correct?**

**A. Yes, that's right.**

**Q. And you agreed earlier today that that may have been as early as May/June?**

**A. It could have been, yes.**

**Q. Did you say to her in response to that question something like, "It's all come to nothing. The school has decided to do it themselves?"**

**A. No, no, I never made that statement.**

**Q. Did you say, the matter is pending the development application going before the Council?**

**A. Words to that effect: nothing is happening with it until it is dealt with by the Council.” T160/43-T161/3**

With respect to Mr Walsh’s earlier evidence that he kept Virginia Judge fully informed and told her everything that was happening, he admitted that between July and the Council meeting in September he had not told her anything because there was nothing to tell as they were waiting to see what happened with the development application: T161/16-50

There is one other matter that should be mentioned at this stage because it bears on the reliability of Mr Walsh’s recollection. Mr Walsh had been asked who on behalf of JBW had undertaken the conduct of negotiations with PLC and Mr Markham. His reply was as follows:

**“I was working with Virginia Judge. I was, because of my contact and my association with James Markham, I was in a sense leading the push to try and pull something together from this. One of the letters I wrote to the school was along the lines that if we were successful in bringing the purchaser together with the school that we would be looking to the school to pay us our commission, because in a circumstance like this it is never guaranteed. The school may say, “Well go to your developer and get the commission from him.” So we had to establish - one of my letters to the school was along the lines that if we are successful in bringing together negotiations that result in a sale we would like to look to the school for a fee for that service.” T37/35**

In the course of his cross-examination, Mr Walsh said that he remembered seeing a letter from PLC in response to his request for confirmation that they would retain JBW in the event that JBW put together a successful sale, a letter that confirmed that they would pay JBW’s commission: T78/22. PLC had been given notice by the Tribunal to produce, amongst other things, all correspondence passing between PLC and JBW. All of the documents produced by PLC are contained in Exhibit R. They contain neither a letter from Mr Walsh nor a response from PLC on the subject of commission. Mr Buschman had also been given a notice to produce all documents relating to the matter and had not produced any such letters. Mr Walsh persisted in saying that the two letters had existed: T78/56-T79/3; but he said that he did

not know where they were and had no idea whether they could be produced: T78/56-T79/12. When Mr Walsh resumed his evidence on the second day of the hearing it was put to him that there was no such letter as he had claimed he had written to PLC. He said that he thought that JBW had sent such a letter and received a response but he went through the file after the previous day's hearing to look for the letters but they weren't there. He was reminded of the evidence he had previously given about writing to the school on the subject of commission and he said that he adhered to that evidence: T154/10-58. He even said that he thought he could remember in the reply they got from the school a figure of 2 per cent commission in the event that they were successful: T155/6-14. He said that it was a mystery to him why no such letters could be found by him or Mr Buschman or in the correspondence produced by PLC. He was asked, "Does that help you to recall that perhaps you hadn't written such a letter after all?" And he replied, "It would - it would lead me to - it would suggest that, yes.": T156/1.

## **VIRGINIA JUDGE'S TESTIMONY**

At the conclusion of the evidence presented to the Tribunal by the Director-General, Councillor Judge went into the witness box to give oral evidence. She swore that the contents of her statement of evidence dated 25 October 1996 were true. That became Exhibit Q.

She said that she attended a meeting with Mr Kieran Mulcahy, Mr Walsh and Mr Buschman shortly after Mr Mulcahy had told her about the Branxton site. She said that the meeting did not take place in the office of JBW but across the road at a coffee shop called Mary's Cafe. She said that the meeting was not for the purpose of getting Mr Mulcahy involved in the matter but for the purpose of discussing finding a buyer for the site: T269/31-T270/6. It was suggested to her that the meeting she had with Mr Mulcahy and the others at Mary's Cafe was on the same day as Mr Markham had come to their office, that is, on 12 May 1995, when she had passed a remark to him about the site. She denied that it was the same day because it had

happened not long after Mr Mulcahy had told her about the site which she thought was around February or March: T271/22-T272/3.

The General Manager of the Council, Mrs Colbey, gave evidence of carrying out an induction procedure with Councillor Judge and other new Councillors prior to their first meeting of the Council which was due on 26 September 1995. She met with Councillor Judge for this purpose on 14 September 1995. She provided her with an induction kit she had prepared and went through it with her. The topics covered by the kit included Council procedures, conflict of interests and pecuniary interests. Mrs Colbey alerted Councillor Judge to her particular vulnerability to pecuniary interest obligations because of her occupation as a real estate salesperson: T215-T221. A bus trip was organised for the new Councillors to point out to them development sites and other sites with which the Council was currently dealing. One such site was 228 Beresford Road. Councillor Judge drew Mrs Colbey's attention to the fact that she might need to disclose a pecuniary interest with respect to that site and Mrs Colbey invited her to contact Mrs Colbey to discuss it. The Branxton site was also visited on this bus trip but Councillor Judge made no comment about that site.

The business agenda for the Council meeting included both of the above sites. When Councillor Judge read it she contact Mrs Colbey about the Beresford Road site, saying that she thought it was a matter in which she would have a conflict of interest or pecuniary interest and asking Mrs Colbey to confirm the procedure she had to follow at the meeting: T223/29; T287/54. Mrs Colbey advised her what to do: T223/42. Councillor Judge did not mention the Branxton site in this conversation. Mrs Colbey said that when the Beresford Road matter came up at the meeting, Councillor Judge declared a pecuniary interest and left the chamber until after it was dealt with but did not declare an interest in the Branxton site on which she spoke at length: T224/1-T225/6.

Councillor Judge was cross-examined by counsel for the Director-General on her understanding of her obligations in relation to pecuniary interest or conflict of interest. Councillor Judge said that she had not known that there was a difference between a conflict of interest and a pecuniary interest or that “a pecuniary interest can be a negative as well as being a positive, and that there’s such a thing as imputed pecuniary interest.”: T281/33. She said that she had a “fairly simplistic view”. The reason she abstained from voting and “declared a conflict” in regard to the Beresford Road application before the Council was that she stood to benefit financially in the future from commissions earned on the sale of that site: Exhibit Q, paragraph 17; T281/54-T282/3; T287/54. She said that she did not have time to study the material contained in the induction kit given to her by Mrs Colbey before the Council meeting took place: T282/22; Exhibit A, Annexures 24, 25, paragraph 10; but she afterwards said, “I would never vote or do anything to cause me to get a benefit from it. I’m there to be looking after my residents and that’s the role I undertake as Councillor.”: T284/36.

It was later put to her that the reason she had failed to declare a pecuniary interest in relation to the Branxton site development application was not that she did not know of the negotiations being conducted by JBW but that, in her state of knowledge as to what constituted a pecuniary interest, she did not consider that the negotiations gave rise to “a conflict of interest.” Her response was, “Oh, I’m sorry, I don’t want to be impolite, but that’s totally incorrect, and that’s a lie, because I knew about the site initially. I thought it was finished. It’s not true.” T288/27.

Councillor Judge specifically denied that at some time prior to the Council meeting on 26 September Mr Walsh, in reply to a question by her as to what was happening with the Branxton site, told her that it was waiting for the development application to be dealt with by the Council. She said that Mr Walsh’s evidence was not true: T308/42-58.

As to Mr Buschman's claim that Virginia Judge would have been fully aware of the negotiations on Branxton because of regular meetings in the office, Councillor Judge said that when she joined the office in August 1994 she had endeavoured to set up regular meetings so that they could all work together to improve the functioning of the office and initially they used to have meetings on Monday or Tuesday morning but the others didn't like getting in early for the meetings and the idea only lasted a few months and then stopped. The meetings ceased by Christmas and rarely were there any meetings in 1995: T311/13-57.

In regard to Mr Walsh's evidence that he had kept Virginia Judge fully informed of everything that was happening with respect to Branxton she denied that any of the discussions that Mr Walsh swore had taken place with her had ever occurred: T312/10. She also denied that Mr Walsh had shown her any of the letters that had passed between JBW and PLC: T306/32.

### **MR KIERAN MULCAHY'S EVIDENCE**

Mr Kieran Mulcahy was called to give evidence in support of Councillor Judge. He had provided a statement of evidence dated 24 October 1996 to Councillor Judge's solicitors, the contents of which he verified in the witness box. It was admitted as Exhibit S. The statement affirmed that he had become aware in or about February 1995 that the pre-school known as Branxton where he sent his children was to become available for sale and that shortly thereafter he had a discussion with Virginia Judge, David Walsh and George Buschman and told them of the potential for sale and development of the site. He also said in his statement that in or about late May or early June 1995 he had had a discussion with Virginia Judge in which he asked what had happened to the site and she told him that PLC had decided to do it themselves. He said that shortly thereafter he recalled a conversation with David Walsh in which he said that it was bad luck about Branxton and Mr Walsh replied, "Yes the school has decided they will develop the property themselves." He said that before giving this statement

(Exhibit S) he had had a discussion with Mr Tudehope and told him the detail of “what he believed was the case” after which the document was sent over to him as a confirmation of what he had said to Mr Tudehope, and as he believed that it was correct, he signed it: T314/31-51.

Mr Mulcahy said that he had a very clear recollection of the discussion about the potential of the site referred to in his statement. He recalled that it was a weekday and that they had sat on the footpath at the coffee shop across the road from JBW’s offices and discussed the matter: T316/11-29. He said that their discussion was along the lines of giving general advice as to how they might handle an approach to the school and consider the development of the site. He said, “So, I guess I was, effectively, giving free consultancy advice on the basis that I knew Virginia and I was trying to give Virginia a bit of a helping hand in that arrangement.”: T316/48.

Mr Mulcahy said that subsequently he made a couple of phone calls to the office and spoke to Mr Walsh and it was in one such phone call that Mr Walsh had made the statement that the school had decided to develop the property themselves: T317/51-T318/15. In his statement Mr Mulcahy had said his conversation with David Walsh had occurred shortly after the time when Virginia Judge had told him that PLC had decided to do it themselves. When asked to put a date on the conversation with David Walsh he said that it would have been in June or July: T321/8-15; T322/30-36. When it was put to him that it was possible that what Mr Walsh had said to him was that nothing was going to happen until they got development consent from the Council, Mr Mulcahy swore that that was not correct. He said that Mr Walsh may have said that in previous conversations but in this particular conversation that was not what Mr Walsh said, “Because I’m quite clear that I heard the words from that office that they were doing it themselves which I thought was most unusual.”: T322/46.

## **FINDINGS ON DEFENCE UNDER SECTION 457 AND REASONS**

On the evidence the Tribunal finds that Councillor Judge's defence under section 457 has been established. The reasons for coming to this conclusion follow.

Apart from Councillor Judge herself, the only persons in a position to give direct evidence of her state of knowledge of any negotiations with PLC and Markham were Mr Buschman, Mr Walsh, Mr McKeith and Mr Markham.

Mr McKeith is eliminated by the fact that he told the investigators that she was not involved in the negotiations and that he did not even know her until after the Council meeting. Although it was his complaint that set the matter off, the only information Mr McKeith had that she knew of the negotiations was what he was told by Mr Buschman and Mr Walsh after the Council meeting of 26 September 1995. At that time they were exercising what Mr Walsh called "damage control" which will be mentioned again later.

Mr Markham, a patently honest and competent witness, was in no doubt about his encounter with Virginia Judge at JBW's office on 12 May 1995. Her brief passing comment about the merits of the site on that occasion was the only communication of any sort regarding the Branxton site that ever passed between them. His evidence establishes positively that she did not take part in and was not present at any of the meetings or discussions that took place between Mr Markham and Mr Walsh or Mr Buschman concerning Branxton.

As can be seen from the foregoing account of his actions and evidence, Mr Buschman, on the subject of Virginia Judge's knowledge at the time of the Council meeting, not only executed a complete backdown from his original allegations against her but then did his best to assist her case in the hearing before the Tribunal. Mrs Kelly, seeking in her submissions to assist the Tribunal, observed that it was very difficult to explain why Mr Buschman had recanted and changed his evidence so radically from what he had said to the Mayor on 12 October 1995; also, it should be added, from what he and Mr

Walsh had told Mr Day on 24 November 1995. In his evidence to the Tribunal Mr Buschman attempted to resile from some of the matters attributed to him by Mr Day's record of the interview but the Tribunal prefers Mr Day's record and recollection of that interview to Mr Buschman's evidence.

The reasons for Mr Buschman's remarkable turn about are a matter for concern by the Tribunal. While the evidence and the surrounding circumstances postulate various possible explanations, some more probable than others, they leave the Tribunal uneasy about expressing a final conclusion.

It is apparent that Mr Buschman early on became wary about the position that he had created for himself, seeking legal advice about his statutory declaration, giving a watered down version in that document of his claim as to Virginia Judge's state of knowledge, expressing a wish that the matter be dropped when interviewed by Mr Day on 24 November 1995 and avoiding a formal taped interview with the investigating officers. Before producing at the last minute his statement of evidence dated 23 October 1996 Mr Buschman had twice sought advice from the Department of Local Government officers, Mr Cousley and Mrs Wallace, as to whether his evidence to the Tribunal could be used in any other Tribunal: T248/32; T253/46. He also said that over the last two months before he gave his evidence he had had two or three telephone conversations with Mr Tudehope whom he had known a long time. He said that he could not recall at all the contents of these conversations except that they related partly to affairs of clients and, secondly, to asking about this Tribunal's proceedings. He said they were just "mundane" not "in depth" things they spoke about. He specifically denied discussing with Mr Tudehope what his evidence would be in these proceedings. He finally went to his own solicitor for advice with respect to the preparation of his statement of evidence for the Tribunal.

As related earlier, Mr Buschman's own explanation for changing his evidence was that he had rethought the matter in view of what Virginia Judge

had said to him when she came to his office in December 1995 to collect her camera. On that occasion she had denied to him that she had known what was going on with respect to the Branxton development and he said that he believed her. He also said that nobody else had suggested to him that he should withdraw his allegations against her.

Apart from the possibility of some outside influence having been brought to bear on Mr Buschman, there is another scenario that would provide an explanation. To adopt Mr Walsh's account, when he and Mr Buschman became aware of PLC's complaint, they embarked upon a deliberate plan of "damage control" directed to recovering credibility and maintaining goodwill with PLC and seeking to repair the firm's supposedly tarnished reputation. They embarked upon this plan while acutely aware of and deploring the possible loss of the lucrative potential for the firm which development of the Branxton site promised. Their plan was executed by seeking with Mr McKeith and the Mayor to distance themselves from Virginia Judge's action in having voted against PLC's development application and to ensure that, to the exoneration of themselves, the entire blame was placed upon Virginia Judge, thereby avoiding their firm from being held in any way responsible for the failure of the development application to pass through the Council. The execution of the plan was accompanied by misrepresentations to Mr McKeith and the Mayor as to both Virginia Judge's state of knowledge and her means of knowledge as well as righteous protestations of their own innocence and insincere promises to back their allegations with writing.

However, the plan backfired when the complaint became official with the Director-General, followed by the prospects of a formal departmental investigation and a hearing before this Tribunal. In those circumstances, if, in fact, the allegations made by them had been misleading, exaggerated, mistaken, unjustified, or, simply, untrue, a radical change of course to withdraw the allegations or assist the victim can be explained on the basis of guilty conscience or feelings of remorse or a desire to redress a wrong or an

endeavour to avoid the repercussions of persisting in the allegations by giving false evidence to the Tribunal or a belated desire to tell the truth. On the evidence relating to Mr Buschman's conduct and on the basis of his own testimony all of these explanations are possibilities as well as the possible exercise of external influence. All or any of them could have played a part. However, the Tribunal need not reach a conclusion as to specifically why Mr Buschman altered his position. The fact that he has comprehensively withdrawn or reversed his allegations that she knew all about the negotiations at the time of the Council meeting deprives those allegations of any credibility and provides a strong basis for an inference that they were untrue.

This leaves only the evidence of Mr Walsh on which to base a finding that Councillor Judge was aware of the negotiations at the relevant time. On the account of Mr Walsh's evidence and the manner in which he gave it which has already been described, the Tribunal is driven to regard him as a most unreliable witness. His detailed but wholly fanciful account of the alleged meetings with Mr Markham on 12 May 1995 in which she was alleged by him to have participated and which he afterwards completely retracted is enough to destroy his credibility.

The Tribunal rejects Mr Walsh's evidence that he kept Virginia Judge fully informed of all of his dealings with respect to Branxton. The only allegation of any communication to her about Branxton after 12 May 1995 to which some credence is due is his claim, with which Councillor Judge agrees, that after that date there was an occasion when she asked him what was happening.

As to the conflict in the evidence between his and her respective versions of what he said on that occasion and when he said it, the fact is that in the period 19 July to 26 September 1995 nothing was happening with respect to the negotiations because in that period PLC's amended development application, which PLC was doing entirely on its own behalf, was going through the Council's procedures and awaiting the Council's

decision. Moreover Mr Walsh had been enjoined by PLC before July to keep PLC's plans and activities with regard to Branxton completely confidential and he and Mr Buschman had decided to exclude Virginia Judge from the negotiations. In those circumstances it is not unlikely that he would have put off her inquiry by telling her that it had come to nothing because PLC had decided to do it themselves or that he would put off, in the same way, any inquiry made to him by Mr Mulcahy. Nor, in the light of the lack of any action known to her and the lapse of time since 12 May 1995, is it unlikely that Virginia Judge might have concluded by the time of the Council meeting that negotiations had been terminated.

Mr Buschman's evidence as to the content of the conversation as told to him by Virginia Judge in December 1995 accords with her own evidence of what Mr Walsh had said to her but Mr Buschman so lacks credibility that the Tribunal can place no reliance upon what Mr Buschman told the Tribunal that Councillor Judge said to him either in relation to the content, or the time, of her conversation with Mr Walsh.

In her evidence to the Tribunal, Councillor Judge strongly denied Mr Walsh's version and adhered to her own. She was corroborated by the evidence of Mr Mulcahy both as to what she said she told Mr Mulcahy in May or June and what Mr Walsh told Mr Mulcahy no later than July. Whatever was said by Mr Walsh to Councillor Judge on the matter, his suggestion at one stage that the conversation took place close to the time of the Council meeting must be rejected. Mr Walsh himself withdrew the suggestion when he said there had been only the one conversation and it may have been as early as May or June. This would place it at about the time that PLC was insisting on confidentiality and Mr Walsh and Mr Buschman had agreed to exclude Virginia Judge from participation in the negotiations, which on the probabilities tends to favour her timing of the conversation.

The Tribunal accepts Councillor Judge's evidence that between about June and 26 September 1995 she was not told anything by either Mr Walsh

or Mr Buschman about PLC or Mr Markham and the Branxton site or about any negotiations by Mr Walsh or Mr Buschman with respect to it. In her evidence Councillor Judge not only denied such knowledge but asserted that at the time of the Council meeting she had a positive belief that there were no negotiations on foot or pending, the original proposal having come to nothing.

In the light of her position as an employee of JBW, one of the three senior operatives in the firm and having a potential right to a one-third share in the business, her denial warranted careful scrutiny.

Though she exhibited anger and resentment at the plight she had been put in by the accusations made against her, her demeanour in the witness box was that of a truthful witness. Her claim of ignorance at the time of the Council meeting was supported by other circumstances that had emerged in the evidence. Her immediate reaction to the revelation by the General Manager of the complaint from PLC was to proclaim her ignorance of the negotiations referred to in the letter. She claimed she was innocent of any wrongdoing. Following that she returned at once to her office to convey the news of the complaint to her colleagues, expressed concern as to the implications of this incident on the problems of future conflict between her employment and her duties as a Councillor, resigned from her employment and requested a list of matters in the office in which she might have some future conflicting interest as a Councillor.

In the opinion of the Tribunal, her conduct in relation to the Beresford Road application which was on the same agenda as the Branxton development application at the Council meeting affords strong support for her claim that she was unaware that JBW was still involved in the Branxton site. When she became alerted to the Beresford Road application being on the agenda she recognised her potential pecuniary interest, verified it with the General Manager, sought the General Manager's advice as to the procedure she should follow to declare her interest and abstain from participation and acted accordingly. It is highly unlikely that a person who acted as

conscientiously as she did with respect to that application would disregard a similar potential interest in the Branxton site of which she was aware or ignore even a suspicion that she might have had such an interest without consulting the General Manager for advice. As mentioned above, Councillor Judge rejected a suggestion by counsel for the Director-General that she was aware at the relevant time of JBW's involvement with the Branxton site, but in her ignorance of the pecuniary interest requirements of the law, she misinterpreted her obligations. The Tribunal accepts her denial of this suggestion.

### **Finding**

On all of the evidence and information before the Tribunal, the Tribunal finds on the balance of probabilities that Councillor Judge did not know that the development application in relation to the Branxton site under consideration at the meeting of the Council's Planning and Building Committee on 26 September 1995 was a matter in which she had a pecuniary interest. The Tribunal further finds that, in all the circumstances, she could not reasonably be expected to have known at that time that that matter was one in which she had a pecuniary interest. Under the provisions of section 457 of the Act, and these findings, she did not commit a breach of section 451 of the Act in relation to that matter at that meeting by participating in the debate and casting her vote even if she had a pecuniary interest by virtue of the activities of other members of the firm of which she was unaware. The result is that the complaint must be dismissed.

### **SECTION 443(3)(A)**

The foregoing finding makes it unnecessary to decide a further argument by counsel for Virginia Judge that, under the provisions of section 443(3)(a), she could not be taken to have a pecuniary interest in the matter even if her employer JBW had such an interest because she was unaware of JBW's interest. This argument arises because section 443(2)(a) read with

section 443(1)(b) provides that a person has a pecuniary interest in a matter if the pecuniary interest is the interest of “the person’s spouse or de facto partner or a relative of the person, or a partner or employer of the person.” In the present case it is the word “employer” that applies to Councillor Judge because of her employment by JBW. Subsection (3)(a) of the same section provides, however, that a person is not taken to have a pecuniary interest in a matter as referred to in subsection (2) “if the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative or company or other body.” For no apparent reason the word “employer” has been omitted from subsection (3)(a). The question whether subsection (3)(a) can or should be interpreted to cover also the case of the employer/employee situation need not be decided in the present case and will be left for another day. On the Tribunal's findings section 457 of the Act is sufficient to exonerate Councillor Judge from the commission of any breach of section 451 in this matter.

### **WAS THERE A PECUNIARY INTEREST?**

The terms of section 442 of the Act have already been quoted. They describe a pecuniary interest as an interest that a person has in the matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person.

Mr Gray submitted that on the evidence it should be found that there was no reasonable likelihood or expectation of JBW, and, therefore, Councillor Judge, benefiting financially from the Council's decision on the PLC development application and, for that reason, there was no pecuniary interest to attract the operation of section 451 of the Act at the time of the Council meeting in any event. There were two limbs to his argument:

1. As to the prospects of JBW being able to earn a commission on the sale of the land by PLC, no negotiations between PLC and JBW continued after 19 July 1995 while the development application was pending. PLC was proceeding alone and unattached with that

application and had declined Mr Walsh's request for a meeting with JBW and the developer until the Council had given its decision. Mr Gray described the prospects of any deal between PLC and JBW as "dead in the water" at the time of the Council meeting. It was submitted, therefore, that if the development application had been approved it was no more likely that JBW would be PLC's agent or that Markham would have been the purchaser than would anyone else. There was evidence that there were other prospective buyers around and other agents in the field.

2. As to JBW's prospects of being able to earn commission on the end sales of units if the property was developed, the evidence did not show that approval of the development application would affect JBW's chances of being the selling agent because:
  - (a) PLC was intent on selling the site with or without development approval;
  - (b) JBW's chances depended on Markham being the purchaser and there is no evidence that the purchaser was more or less likely to be Markham;
  - (c) There was evidence that Markham did not favour buying the land alone but preferred a development joint venture with the school; and
  - (d) Because of JBW's lack of progress with PLC there was at the relevant time no reasonable likelihood or expectation of benefit to JBW.

In view of the defence that has been established under section 457, these contentions may be dealt with briefly. Without repeating the reasons considered at length by the Tribunal in other cases, it has to be accepted that a pecuniary interest in a matter may exist when the outcome of the issue before the Council may advance or retard the prospects of financial gain or loss to the person or body concerned not only as a matter of probability but

also as a matter of possibility. The legislation is concerned to prevent local government decision making being affected in any way by a conflict between private interest and public duty where the private interest in question is of a financial character. If a pecuniary interest exists, a Councillor is not exonerated by voting against that interest.

The potential effects of the outcome of the matter upon the prospects of financial gain or loss have to be considered because they have the capacity to influence decisions. If the potentials are so remote or insignificant that they could not reasonably be regarded as likely to influence the person's decision on the matter the person will not have a pecuniary interest for the purposes of the Act: section 442(2).

In the opinion of the Tribunal, the evidence in the present case shows that JBW had prospects of financial gain if PLC's development application was approved by Council. PLC was a willing seller seeking to enhance the value of the site by obtaining, and so being able to sell the site with, development approval. Markham was a potential buyer with the financial capacity and expertise to buy and develop the site and had a serious interest in acquiring it from the PLC or participating with the school in its development. Markham's letter dated 3 July 1995 which was provided to JBW for presentation by JBW to Mr McKeith testifies to this: Exhibit R; and is backed by James Markham's evidence to the Tribunal.

However, Markham was not interested if the development application was not approved: T94/46. Whilst price would be the final arbiter of whether Markham would be the purchaser, Mr McKeith regarded Markham as "a genuine purchaser" who was "in a good position" and PLC would have been "responsive to good offers": (Interview with Mr Day on 27 November 1995, Exhibit A, Annexure 11). JBW had been assured by Markham of being appointed exclusive agents to sell the units if the development was carried out by Markham. Mr McKeith had a sufficiently high opinion of JBW's prospects of financial gain if the Council had approved the development

application to be moved to write his letter of complaint to the mayor and to state in it, "Clearly, Ms Judge's firm stood to financially benefit from the sale of Branxton ... through her firm to the developer.": Exhibit A, Annexure 3. The reaction of Mr Buschman and Mr Walsh when they learned of PLC's complaint was based at least as much on dismay and disappointment at the loss of their prospects of gain as it was on concern for their reputation and this indicates that they considered those prospects to have been substantial. It is to be remembered that Mr Buschman afterwards said to Mr Day, if the DA had been approved, "We would have had them.": Exhibit A, Annexure 10.

One potential outcome of the matter before the Council was a refusal of the application and that could be seen not only to retard but most likely to destroy JBW's prospects because it was probable that Markham would then cease to be interested.

Another potential outcome was approval of the development or, as recommended by Council staff, a deferral for further information and further consideration by Council. These outcomes would not guarantee JBW's prospects but the first would enhance them and the second keep them alive. In either case JBW, and, therefore, Virginia Judge had an interest of a financial character in the outcome which was not insignificant and not so remote as to be regarded as unlikely to influence a decision as to how to vote on the matter.

In the Tribunal's opinion, if Councillor Judge had known that JBW's prospects were still on foot at the date of the meeting she would have been bound to declare her interest and otherwise comply with section 451.

Mr Gray's arguments point to the uncertainties and contingencies that stood between the outcome of the matter before the Council and the realisation of JBW's prospects of gain; but the fact that that realisation might have been less than a probability and only an expectation contingent on the happening of other events does not prevent them from being a pecuniary interest, especially when, as here, one possible outcome, namely refusal of

the application, could kill off JBW's prospects altogether. Mr Gray's submission that the chances of a deal between JBW and PLC were dead in the water after July is not consistent with Mr McKeith's letter of 19 July 1995, his letter of 3 October 1995 and what he later said to Mr Day about Markham being a genuine prospective purchaser.

### **INTERVIEW "OFF THE RECORD"**

Mr Day gave evidence that he had arranged the proposed interview of Councillor Judge on 19 December 1995 to which reference has already been made. He also said that he had advised Councillor Judge that the interview would be taped and that she had agreed.

Mr Tudehope gave evidence that he wasn't aware until he arrived that it was to be a taped interview. He said that he was uncomfortable with that situation and said, "Before we get to that, can we have an off the record discussion?" and a discussion ensued with the tape machine turned off: T292-T293. Mr Tudehope explained that his primary purpose in attending the interview was first of all to find out what was being principally alleged against Councillor Judge and when he said he wanted to have a discussion of the record it was principally to elicit that material which was to be relied upon by the investigators in making the allegations against Councillor Judge: T294/4-19.

When Councillor Judge gave evidence she said that she had a clear recollection of Mr Tudehope saying that he wanted the discussion off the record and of Mr Day saying that he agreed to take that course: T297/28, T298/43.

Mr Day's evidence was that he could not recall Mr Tudehope proposing that there be a discussion off the record but he did recall an agreement that it not be taped. He said that, having earlier indicated to Councillor Judge that her solicitor could attend but only in the role of her adviser, "It threw me off a bit when Mr Tudehope started demanding documents from me, but it was towards the end of the discussions that they

decided that they wouldn't undergo a taped interview." Mr Day says that he did not think that he would have forgotten Mr Tudehope requesting a discussion of off the record because he would not have agreed to that: T295/21-50; T296/35. The file notes made by Mr Day and Mr Cousley do not record any "off the record" request by Mr Tudehope: Exhibit A, Annexure 22. Mr Day's file note indicates that Mr Tudehope became somewhat aggressive while demanding to be told what information the Department had relating to the matter. Mr Day said in evidence that he had never given any thought to the suggestion that Mr Tudehope had asked for an off the record discussion until he heard it at the preliminary hearing before the Tribunal and that although he had cast his mind back since then he could recall no discussion to that effect: T296/24.

The Tribunal is prepared to accept that Mr Tudehope requested an off the record discussion to try and find out what information was in the Department's possession before deciding whether to allow his client to be interviewed: but it is apparent from the file notes made by Mr Day and Mr Cousley and from Mr Day's evidence that at the time Mr Day did not take whatever Mr Tudehope said as proposing that the discussion be and remain confidential because, as Mr Day said, he would never have agreed to that and their file notes contain no record of it. However, Mr Day admits to having been somewhat thrown off by Mr Tudehope's demands for disclosure of the Department's information before allowing the interview to proceed and there was room for Mr Day to have misunderstood the nature of the request, believing it to be for the preliminary discussion not to be taped rather than to be kept confidential.

In the course of the hearing objection was taken by Mr Gray to Councillor Judge being cross-examined on certain statements attributed to her by the file notes on the ground that they were made in pursuance of a representation that, in effect, they would not be disclosed. The Tribunal dealt with the objection on the footing that statements had been made on the basis

that they would be “off the record” and will deal with it now on the same footing.

As pointed out in the course of the hearing the legislation has invested the Tribunal with comprehensive investigative powers for dealing with a complaint of a breach of the pecuniary interest provisions of the Act. By section 471 the Tribunal may determine its own procedure and in the conduct of any proceedings the Tribunal may inform itself on any matter in any way it thinks fit, is not bound by the rules of evidence, may receive information or submissions in the form of oral or written statements and may consult with such persons as it thinks fit.

By section 472 hearings are to be held in public but the Tribunal is given power to conduct private hearings subject to its giving due regard to the public interest. The Tribunal has power to summon persons to appear to give evidence and produce documents and to require a person appearing in the proceedings to produce any document. It has power to take evidence on oath and may require a person appearing in the proceedings to take an oath or make an affirmation before giving evidence: section 475. The Tribunal may require any person to attend before the Tribunal to produce documents: section 476. Disobedience to the requirements of sections 475 and 476 will incur a penalty.

Of particular relevance to the present issue is section 477 which provides that a witness summoned to attend or appearing before the Tribunal is not excused from answering questions or producing documents on the ground of self incrimination, any other ground of privilege, duty of secrecy or other restriction on disclosure or on any other ground. However, if a witness objects to giving an answer or producing a document, whilst the witness must nevertheless provide the answer or produce the documents, they are then not admissible in evidence against the witness in any civil, criminal or disciplinary proceedings: section 477(2), (3). The only recognition of legal professional privilege required of the Tribunal is in relation to a privileged communication

passing between a legal practitioner in his or her capacity as such and a person for the purpose of providing or receiving legal professional services in relation to the appearance or reasonably anticipated appearance of a person at a hearing before the Tribunal unless the privilege is waived by a person having authority to waive it: section 477(4). No other form of legal professional privilege or any ground of secrecy or confidentiality will excuse the witness from answering questions or producing documents or any other thing.

As a further aid to investigation the Tribunal is given power to make suppression orders directing that the name of any witness be not disclosed in the proceedings or that the name and address of any witness, complainant, or person against whom a complaint has been made, or any specified evidence or the subject matter of a complaint be not published. The person who contravenes such a direction is guilty of an offence: section 480.

The purpose of providing a Tribunal with such powers is obviously to enable it so far as possible to discover the truth when conducting a hearing into a complaint. Implied by the nature and extent of the powers is an obligation on the Tribunal to use its powers to establish, if it can, the true facts in respect of any complaint as to which the Tribunal has decided to conduct a hearing. The provisions in question reflect an underlying policy that the public interest in having the pecuniary interest provisions of the Act enforced demands no less.

The investigation of a complaint by the Director-General for the purpose of presenting a report to the Tribunal is an aid to the performance of the Tribunal's functions under the Act and is to be regarded as no less dedicated to the ascertainment of the truth of the complaint. In the Tribunal's opinion, it is not consistent with the duties of investigating officers carrying out a formal investigation under section 462 of the Act to receive evidence or information under a pledge of secrecy or confidentiality because that would be incompatible with section 477 and could result in making those officers

parties to an attempt to suppress the truth from the Tribunal. If there is a case for confidentiality in the public interest it is the Tribunal in which the power of suppression is entrusted by the Act, not the investigators, and, if investigators purported to give such a pledge by representation or agreement or otherwise, the Tribunal would certainly not be bound by it nor could the Tribunal be expected to honour it if it appeared likely to be any obstacle to ascertaining the true facts. To hold otherwise would, in the view of the Tribunal, be inconsistent with the powers of the Tribunal earlier described and the duty of the Tribunal implied by the existence of those powers.

Mr Gray sought to base his objection on what he described as the broad principle of “fairness” for which he cited no authority but which he said was part of the rules of natural justice. Notwithstanding the width of its powers, the Tribunal in all its proceedings seeks to confirm to all the rules of natural justice. They are designed to ensure procedural fairness, not avoidance of the truth and, if Mr Tudehope believed, as no doubt he may well have done, that he would be gaining secrecy on the matters he and Councillor Judge wished to pursue with the investigators before agreeing to an interview, he was simply mistaken and if, contrary to Mr Day’s recollection, Mr Day did agree or appear to agree to that course, that could not inhibit the Tribunal in the performance of its own duties in the investigation of the complaint.

For these reasons the Tribunal overruled Mr Gray’s objection and permitted the cross-examination to proceed as well as itself taking note of the statements by Councillor Judge which were recorded in the file notes and to which reference will now be made.

It is recorded that Mr Tudehope told the investigators that Councillor Judge’s position would be to deny any knowledge of any profit sharing arrangements between her firm and other parties in relation to the property or any commission sharing arrangements between herself and her firm in regard to the transaction. Councillor Judge is recorded as having spoken out in

confirmation of what Mr Tudehope had said as to her state of knowledge. In the light of what the investigators later were told by Mr Tudehope's answers to Mr Day's questionnaire about Councillor Judge's potential interest in a share of the JBW business and her commission sharing arrangements with Mr Walsh, the above statements made by Mr Tudehope and Councillor Judge on the occasion of their attendance for the interview could be regarded as less than frank. When cross-examined, Councillor Judge said that the remarks made on that occasion focused upon and were intended to relate only to arrangements between JBW and PLC or Markham specifically in relation to the Branxton property.

There was some ambiguity in the statements attributed to Mr Tudehope and Councillor Judge and at the time their attention was most likely directed to the complaint in respect of which the proposed interview was to take place. The complaint was based on Mr McKeith's letter of 3 October 1995 which concentrates on the possible sale and purchase of the Branxton site and the prospects of financial benefit to "Ms Judge's firm" from the sale through her firm to the developer. Councillor Judge swore that her remarks were addressed to that transaction not to her general commission arrangements with the firm and Mr Walsh. The Tribunal accepts her explanation of the apparent discrepancy.

Another remark attributed to her in the file notes is that "She didn't even know the difference between a conflict of interest and a pecuniary interest and was never informed on the matter." Mr Day's note records that she said that those concepts had not been explained to her at any time. Councillor Judge, in cross-examination, did not deny having made such statements but said that at the time in question she was not in fact aware that there was a distinction: T304/2-33. It was suggested that her profession of ignorance at the time of the proposed interview was inconsistent with the evidence of the General Manager, Mrs Colbey, as to the induction process that she had carried out with Councillor Judge. Councillor Judge did not

deny that Mrs Colbey had endeavoured to explain the concepts but she claimed that it had not resulted in her becoming aware of the difference or of “imputed” pecuniary interests or that a pecuniary interest could include a loss as well as a gain.

Councillor Judge’s ignorance of the law with regard to pecuniary interest was not put forward as part of her defence under section 457 of the Act. Her assertions of ignorance were challenged in cross-examination by counsel for the Director-General as a matter going to Councillor Judge's credit as a witness. The Tribunal accepts her evidence as to her limited awareness of the concepts of conflict of interest and pecuniary interest but does not infer from it that Mrs Colbey did not take proper steps in an endeavour to explain them to her. It may be accepted that there was a very great deal to be absorbed between the dates of the induction and first meeting of Council by a new Councillor unversed and inexperienced in the law and practice of Council proceedings but, nevertheless, Councillor Judge had been well enough instructed by Mrs Colbey to recognise that she had a pecuniary interest in the Beresford Road matter. Therefore, her remark to the investigators that the concepts of conflict of interest and pecuniary interest had never been explained to her at any time was inaccurate and misleading. Allowance has to be made for the stress of the occasion and the fact that Councillor Judge gave a full account of the induction process and her inability to absorb all of the material prior to the Council meeting (which, she said, accounted for her limited understanding) when Mr Tudehope furnished answers to Mr Day’s questionnaire: Exhibit A, Annexures 24 and 25, paragraph 10. In all the circumstances, the Tribunal does not consider that the statements Councillor Judge made at the interview should detract from the impression she gave of being a truthful witness when she was giving her evidence on oath in the witness box.

## **COUNCILLOR JUDGE’S CLAIM FOR AN ORDER FOR COSTS UNDER SECTION 481 OF THE ACT**

Section 481 of the Act provides, “A person who is required to appear or to give evidence before the Pecuniary Interest Tribunal is entitled to be paid such allowances and expenses as the Pecuniary Interest Tribunal may determine in respect of the person.”

Mr Gray submitted that on its terms this section should not be regarded as limited to a witness called by a party to give evidence and that Councillor Judge was a person answering the description in the section. He also submitted that the expression “allowances and expenses” was wide enough to include legal costs incurred by the person.

In the Tribunal's opinion, there is no substance in this submission. While section 481 refers neutrally to “a person”, it appears in the Act under the heading “Witnesses’ Expenses”. The section refers to persons who are “required to appear or to give evidence” which is apt language to describe a person summoned before the Tribunal by compulsory process whether issued by the Tribunal of its own motion or at the request of a party, although, perhaps, it would not exclude voluntary witnesses whose evidence was available to a party without the need for compulsion.

The expression “allowances and expenses” is apt to cover out of pocket expenses and loss of remuneration incurred by a person other than a party who is called by a party to give evidence to assist a court or a tribunal in resolving issues between parties in the investigative or judicial processes in our legal system. It is certainly not the kind of language used in legislation, regulations or rules of court to refer to legal costs incurred by a party. Moreover, the Act itself draws a distinction between a person who is a party and a person who is a witness called by a party. While section 481 refers to a person required to appear or to give evidence, section 474 states: “A party to proceedings before the Pecuniary Interest Tribunal may: (a) call and examine any witness; and (b) cross-examine any witness called by another party ... “

The absence from the legislation of any reference to “legal expenses” or “costs” is of itself a telling argument against Mr Gray’s submission. A power in the Tribunal to award legal costs is not a matter likely to have been left by the legislature to rest on implication or doubtful language. It is a highly important subject calling for clear and express language if the Tribunal was intended to have such power. Also, it should be pointed out, that while it suits Councillor Judge's interests to argue for a power in the Tribunal to award costs if she succeeds, it could be confidently predicted that the argument would have gone in the opposite direction if she failed. The point of this observation is that a power in the Tribunal to award legal costs against a Councillor who is found by the Tribunal to have contravened the Act could result in imposing on a Councillor who failed the penalty of a huge financial burden by reason of their having to pay the Director-General's costs as well as their own. If that was what the legislature intended, it would have been expressed in the Act in unmistakable terms.

Thus, in the Tribunal's view, Mr Gray’s contention must be rejected as a matter of interpretation of the words of section 481 read in their context. However, if there had been any room for doubt as to the meaning of the section, section 34 of the **Interpretation Act, 1987** would need to be applied.

Under that section consideration may be given to extrinsic material capable of assisting in the ascertainment of the meaning of a legislative provision either to confirm the ordinary meaning conveyed by the text or to determine the meaning of the provision if it is ambiguous or obscure or would lead to a result that was manifestly absurd or unreasonable. The extrinsic material that may be considered includes any relevant report of a royal commission, law reform commission, committee of inquiry or other similar body that was laid before either house of Parliament before the provision was enacted or made.

The history of the present legislation was examined by the Tribunal in some detail in its decision concerning Councillor Roberts of Hastings Council

dated 3 August 1995 (PIT No.1/1995). It was noted there that in March 1992 the Independent Commission Against Corruption presented to both houses of Parliament its report of an investigation into local government, public duties and conflicting interests. That report was later referred to in the second reading speech by the then Minister for Local Government in the Legislative Assembly on 27 November 1992 in introducing the Local Government Amendment Bill by which the present Act came into existence. In relation to the subject of honesty and disclosure of interests, the Minister said, "The essence of the ICAC's recommendations are now incorporated in the new chapter of the bill dealing with honesty and disclosure of interests." The ICAC's report had found the then existing system of criminal prosecutions for breaches of the former Act to be not only a failure but also one liable to impose a heavy burden of costs upon Councils and Councillors. The report stated (at page 41):

**"Because cases are meant to be brought in the public interest, there seems to me to be no good reason why the authority which takes that step should be required to pay costs even if the charge fails. On that basis there should be no right of recovery against the convicted person if the charge succeeds."**

Later, in recommending the establishment of this present Tribunal, the report recommended: "There should be no cost orders, but witness expenses should be paid." It is apparent from the provisions of the present Act that those recommendations were followed and, accordingly, the ICAC's observations and recommendations on the matter of power of the Tribunal to award costs may be considered in the interpretation of the provisions now in question. They serve to confirm the meaning of the provision as determined by the Tribunal on its interpretation of the language used in the section.

The foregoing would be enough to dispose of both Mr Gray's submission and the case he subsequently sought to make out for an order for costs to be made in exercise of the supposed power. However, his submissions on the facts and the findings he asked the Tribunal to make in

support of an order for costs were of such importance to those affected by them that it would be unjust to let them pass without comment by the Tribunal.

## **CRITICISM OF CONDUCT OF INVESTIGATION AND PRESENTATION OF EVIDENCE TO THE TRIBUNAL**

Mr Gray criticised aspects of both the conduct of the investigation and the presentation of evidence to the Tribunal in an endeavour to establish that if they had been carried out in a different way material would have become available to the Tribunal before the hearing began which would have led the Tribunal to reconsider whether there should be a hearing at all and, presumably, if the criticism was to have any point, to cancel or curtail the hearing, thereby avoiding costs of legal representation which were incurred by Councillor Judge.

It is relevant to recall certain dates: the Director-General's decision to conduct an investigation was notified on 7 December 1995. The Tribunal received his report on 2 August 1996 and notified its decision to conduct a hearing on 15 August 1996. The preliminary hearing was held on 8 October 1996 and the hearing proceeded thereafter on 28 October, 13 and 14 November 1996.

The points of criticism made by Mr Gray were as follows:

1. Mr Day had recorded that Mr Buschman had told him that he had discussed Councillor Judge's vote with her on the morning after the Council meeting and asked for her resignation which she provided within 24 hours. Mr Gray's complaint was that no attempt had been made to check the date of Councillor Judge's resignation which would have proved that this did not happen the day after 26 September 1995.

This complaint has neither substance nor relevance. Mr Day in his questionnaire of 20 December 1995 asked for details of any conversation with George Buschman on 27 September 1995 and Mr Tudehope had replied that there was no such conversation on that

date. This meant that there was a conflict and Mr Buschman could be mistaken as to the date. Discovering that the resignation was not given until 10 October 1995 would not have shown that Mr Buschman had never had a conversation such as he alleged and, in any event, would not have provided a reason for not proceeding with a hearing.

2. The notice to PLC to produce all correspondence and records of any meetings and a further notice to Mr Walsh to produce correspondence had been issued by the Tribunal on 1 November 1996 at the request of the solicitors for Councillor Judge. The responses made to these notices showed that no correspondence had passed between 19 July and 26 September 1995. The Director-General was criticised for having failed himself to cause such notices to be given and thereby not bringing this fact to light earlier.

This failure could have made no difference to the course of events before the Tribunal. The Tribunal has already pointed out that the tone of the correspondence was not that negotiations were terminated or not further to be contemplated by PLC but only that they be in abeyance from 19 July 1995 pending the outcome of PLC's development application, this intent being, in effect, affirmed by PLC's letter of complaint of 3 October 1995 and the interview with Mr McKeith on 27 November 1995. The investigators had already obtained copies of the correspondence from Mr Markham (Exhibit A, Report, Section B, page 11, Annexures 21 (paragraph 10) and 26), and, as it was known that the Council did not deal with PLC's application until 26 September, it would have been reasonable to suppose that there had not been further correspondence before that date. It may be said that it would have been a more prudent course to summons the PLC for its

records but, as the documents produced by PLC show, they would have provided no reason for not proceeding to a hearing.

3. Mr Mulcahy's evidence favoured Councillor Judge on the question of her state of knowledge. Mr Gray contended that Mr Mulcahy should have been interviewed by the investigators but no attempt was made to interview him, thereby depriving the Tribunal of information that could have led to a reconsideration of its decision to conduct a hearing.

As Mrs Kelly pointed out for the Director-General, the Department had nothing to indicate that Mr Mulcahy could give relevant evidence until his statement dated 24 October 1996 was produced to the Department on Friday 25 October 1996 with the hearing due to commence the following Monday 28 October 1996. Councillor Judge's statement of evidence referred to Mr Mulcahy but was dated 25 October 1996 and produced to the Department on that day. Mr Tudehope's reply to Mr Day's questionnaire of 20 December 1995 failed to identify Mr Mulcahy when, in responding to a request for details of her knowledge about the Branxton site, he wrote that she had been advised of its availability for sale "by a friend". Neither Mr Tudehope nor Councillor Judge saw fit to disclose until the last that the "friend" was Mr Mulcahy or that Mr Mulcahy could give the evidence that turned up in his and Councillor Judge's statements of evidence.

4. A further point of criticism was made in the form of an allegation that the Director-General had actively sought to withhold relevant evidence from the Tribunal. As this allegation needs to be dealt with in some detail, it will be dealt with separately under the next heading.

## **DRAFT WITNESS STATEMENTS AND THE QUESTION OF PRIVILEGE FROM PRODUCTION AND INSPECTION**

Reference has earlier been made to a four-paragraph draft statement of evidence prepared for Mr Buschman (Exhibit P1) and a three-paragraph statement prepared by Mr Buschman (Exhibit P2). A draft statement of evidence had also been prepared for Mr Walsh who made some amendments to it and had a fresh statement prepared incorporating his amendments but he did not sign it or send it to the Department (Exhibit N). These documents are the subject of Mr Gray's complaint that the Director-General actively attempted to withhold evidence from the Tribunal. He contended that if the documents had been provided the Tribunal may have decided not to proceed with a hearing. Questions of fact arose and questions of law were argued in relation to the documents. It is proposed to deal firstly with the facts.

### **Mr Buschman - Exhibit P1, P2**

The text of the two documents relating to Mr Buschman and part of Mr Gray's cross-examination with respect to the documents has already been dealt with. It is clear that this cross-examination and Mr Buschman's answers were calculated to suggest that Mr Day and/or Mr Cousley had or may have presented to Mr Buschman and attempted to obtain from him a signed statement of evidence (Exhibit P1) which contained matters that were false to their knowledge and that Mr Buschman had righteously rejected this attempt by preparing his own correct statement of the facts (Exhibit P2).

On further cross-examination by Mr Gray, not previously mentioned, he elicited evidence from Mr Buschman that Mr Buschman had faxed his corrected version, unsigned, to Mr Day: T201/14, after which he was told by Mr Day or Mr Cousley (later he added, "Or another lady who was there whose name escapes me - a solicitor") not to bother signing it or faxing a signed copy to the Department because "It's irrelevant, or words to that effect." Mr Buschman gave this as the reason why he had not signed the original or faxed it to the Department: T201/15, 36; T203/30.

When questioned by Mrs Kelly for the Director-General, Mr Buschman said that he was not sure to whom he had spoken or to whom he had faxed his three-paragraph document, Exhibit P2: T203/39; but he gave a different version of the response he had received. He said that he was told, "by someone there not to bother signing it, because it was not what they wanted. This (he was referring to the Department's four-paragraph draft, Exhibit P1) is what they wanted, and it's erroneous - various points in here are erroneous and when I gave my interpretation of it, they didn't want it signed, sir.": T204/14. Mr Buschman went on to repeat the story again but this time he reverted to his original claim that what he was told was not to sign the document because it was "irrelevant, or words to that effect.": T204/47-T205/1, 51. Mr Buschman denied, when it was put to him, that what really happened after he had faxed back his three-paragraph unsigned statement was that he told whoever he spoke to that he did not intend to sign the document because he was going to see his own solicitor to prepare a statement: T205/26-33.

Mr Gray cross-examined Mr Day and Mr Cousley and the Director-General called Mrs Wallace to give evidence in relation to Mr Buschman's allegations. On the question of who prepared Exhibit P1 the evidence established that it, together with a draft statement of evidence for Mr Walsh (part Exhibit N), was prepared by Mrs Wallace in the Department's legal branch. Mrs Wallace requested Mr Cousley to fax the documents to Mr Buschman and Mr Walsh for them to consider, make any corrections, sign and return. Mrs Wallace explained that although it was the Legal Branch's responsibility to prepare the matter for hearing once the Tribunal had notified its decision to conduct a hearing, she had asked Mr Cousley, who was from the Investigations Branch, to make the contact because he had already had dealings with Mr Buschman and Mr Walsh: T235; T240/11; T244/58; T251/35-43.

Mr Cousley's evidence was that in late September 1996 he called Mr Buschman on the telephone to arrange to fax to him the draft witness statements that had been prepared for him and for Mr Walsh: T245/48. He said that he had a conversation with Mr Buschman to the effect that he was going to fax the document to him, he would have the opportunity to read through it and if he didn't think it was quite right he could make changes and then fax the document back to the Department signed. He told Mr Buschman that the same could be done for the draft statement that was prepared for Mr Walsh. Mr Cousley said that he had also had a conversation to the same effect with Mr Walsh: T246/23, 32, 40-58. Mr Cousley said that a week or so later Mr Walsh rang him back to say that he had lost his draft statement and requested Mr Cousley to fax it again, which he did. Mr Cousley said that he had no other conversations with Mr Buschman or Mr Walsh in relation to these documents: T247/18, 25, 28.

Mrs Wallace gave evidence that she had prepared the draft statements for Mr Buschman and Mr Walsh based upon what was in the Director-General's Report to the Tribunal, which she had in front of her, on the basis that Mr Buschman and Mr Walsh would check their diaries and look at their documents and make any necessary changes as the drafts were only an indication of their evidence according to what she had on her file: T251/10-35. She said that just before the preliminary hearing on 8 October 1996 Mr Buschman had sent back the three-paragraph statement, Exhibit P2, but refused to sign it: T251/48. She had looked at it and recognised that it was different from the draft but that didn't concern her as long as Mr Buschman was happy with it and was prepared to sign it: T252/13. She had then telephoned Mr Buschman and asked him whether he was prepared to sign the document and also whether he had any more documents or information relating to what was in the statement. She said that Mr Buschman then said that he wasn't prepared to sign the document and that he was going to see his own solicitor about it: T252/24-33.

Mr Gray cross-examined Mr Wallace in an attempt to suggest that her version of this conversation was wrong and that what Mr Buschman had told her was that he was not prepared to sign the document that she had sent him but that he was prepared to sign the one that he had gone to the trouble of preparing himself. Mrs Wallace replied, “No, absolutely not, because whenever I prepare statements, they go back and forth until the facts are right and the witnesses are prepared to sign. So, if he wasn’t prepared to sign the statement that I prepared, I didn’t even expect him to do so, because they were drafts to be worked on.”: T254/46-56. The cross-examination then proceeded to suggest to Mrs Wallace that, if her version of the conversation was true, she would have found Mr Buschman's refusal to sign surprising and would have questioned him as to why he had prepared the document, whether it was true, and requested him to sign it. Mrs Wallace said that she had not done any of those things because Mr Buschman had told her that he was not going to sign it but was going to see his own solicitor: T255/5-T256/29. She said, “Actually, he said to me that he’s going to seek his own legal advice, and suddenly on the day, even without anything indicating that he was going to have a statement prepared by the solicitor, he sent us a copy of his statement prepared by the solicitor on the day.”: T255/9. (Mr Buschman’s prepared statement, Exhibit K, dated 23 October 1996 was received by the Director-General on that date and faxed to the Tribunal on 24 October 1996). Mrs Wallace denied Mr Buschman's allegations that she had told him that the three-paragraph statement Mr Buschman sent was irrelevant or not what they wanted: T257/47-52.

At the preliminary hearing on 8 October 1996 Mr Gray informed the Tribunal that he understood a statement had been prepared for Mr Buschman by the Department and they would like to receive it. Mrs Wallace explained to the Tribunal that the Department had been trying to take a statement from Mr Buschman and Mr Walsh but they had been very reluctant to put anything in writing and the Department had decided to call them to the hearing to give

oral evidence. The Tribunal then stated that the possibility had to be faced that statements from Mr Buschman and Mr Walsh would not be provided which meant that the hearing might turn out to be longer than expected although there was material in the Director-General's Report indicating what evidence they might be expected to give. Mr Gray then said, "As to Mr Buschman, it is understood by those instructing me that a statement by him has been provided to the Department. If that is so and I appreciate that my friend has told the Tribunal that it is not so, but perhaps that could be checked. If that is so then we would like to be provided with it." Mrs Wallace responded by stating to the Tribunal that Mr Buschman had not provided a signed statement to the Department. She said, "The Department was trying to get the evidence in the form of a statement by Mr Buschman. However, Mr Buschman reduced the statement to three paragraphs and I do not think we could proceed on the basis of the statement that he was willing to provide us with. There was insufficient evidence in it to be presented to the Tribunal.": T217/38.

### **Mr Gray's Submissions on the Evidence of Mrs Wallace and Mr Buschman Regarding Mr Buschman's Statement (Exhibit P2)**

One of the submissions made by Mr Gray related to the conflicting evidence of Mr Buschman and Mrs Wallace as to what was said in their telephone conversation about the unsigned statement provided by Mr Buschman. Mr Gray submitted that Mrs Wallace's evidence that Mr Buschman told her he was unwilling to sign the statement that he himself had provided was "Literally incredible." He submitted that Mr Buschman's claim that he was willing to sign but was told not to bother because it was irrelevant and not what was wanted was more probable and should be accepted. He further submitted that Mrs Wallace's evidence that she did not question Mr Buschman as to whether the contents of his statement were true and why he would not sign it "beggars belief" and was "literally unbelievable."

The Tribunal rejects these submissions. As Mr Buschman demonstrated in the witness box he is not a credible witness and at the time of giving his evidence he appeared bent upon assisting Councillor Judge's case in any way he could. The suggestions made in the cross-examination of Mr Buschman that Mr Day or Mr Cousley had attempted to procure false statements of evidence from him had to be abandoned when it was found that they had not prepared the draft statements. Having regard to the reluctance by Mr Buschman to make statements or be interviewed after having given his solicitor-vetted statutory declaration there is nothing improbable in his declining to sign the statement he had prepared and his declaring an intention to seek his solicitor's advice once it appeared certain that he was going to be called upon to provide evidence to a hearing before the Tribunal. He was vague and inconsistent in his evidence about whom he dealt with at the Department in regard to the statement and what was said about the signing of it, seeking, by mentioning different names and using the phrase "or words to that effect", to protect himself from being pinned down. By contrast, Mrs Wallace gave every indication of being an honest witness and on a question of credibility her testimony is clearly to be preferred to that of Mr Buschman where they are in conflict.

Mrs Wallace's account of what happened is entirely consistent with the duties she was performing. She had no investigative or adversarial role to perform in preparing the matter for presentation to the Tribunal. The investigation was complete and the information obtained by the investigating officers was before her in the form of the Director-General's Report. The Tribunal had already made the decision to conduct a hearing. In seeking to obtain signed statements of evidence for presentation to the Tribunal, especially in the case of witnesses who have not given a taped interview, she was following a practice adopted in previous cases. The Tribunal accepts her evidence that in drafting Mr Buschman's and Mr Walsh's statements she was seeking to reflect the information in the Report as to the evidence they

might be able to give, that the drafts were presented to them for consideration and such correction as the witnesses saw fit to make and that she was not concerned to procure them to make or sign any statement if they did not wish to do so. The Tribunal also accepts the evidence of Mr Cousley as to the explanation he gave to Mr Buschman and Mr Walsh in telephoning them to advise that he was faxing draft statements for their consideration.

In relation to the statement made by Mrs Wallace at the preliminary hearing about Mr Buschman's signed three-paragraph statement, "I do not think we could proceed on the basis of the statement that he was willing to provide us with", Mr Gray contended that this should be construed as meaning that she did not think that the Department's case could succeed if Mr Buschman was going to say what was in that statement. He put this forward as the motivation behind what he claimed were attempts to avoid disclosing the statement to the Tribunal and to Councillor Judge's legal advisers. He sought to rely on the fact that although the document had been provided to Councillor Judge's solicitors after he had made his request for it at the preliminary hearing it was not tendered in evidence by counsel for the Director-General nor was anything about it led from Mr Buschman in chief. Mr Gray said, "It was left to counsel for Councillor Judge to deal with it in cross-examination. It was only during that cross-examination that the Director-General then belatedly produced the earlier draft four-paragraph statement, notwithstanding that my instructing solicitors had repeatedly requested that that draft statement be provided."

In giving her evidence Mrs Wallace rejected the construction that Mr Gray sought to place upon what she had told the Tribunal. She said that what she intended was to inform the Tribunal that they couldn't proceed on the basis of an unsigned statement by Mr Buschman presented to the Tribunal and that, at the time of the preliminary hearing, the Legal Branch of the Department had decided to call Mr Buschman and Mr Walsh to give oral evidence to the Tribunal because Mr Buschman had only provided an

unsigned statement and Mr Walsh had not provided any statement. The Tribunal considers that Mrs Wallace's explanation is perfectly acceptable. Whilst the Tribunal may receive information in the form of written statements, a purported statement of evidence which a witness (by refusing to sign it) declines to adopt is, as counsel for the Director-General submitted, of no evidentiary value, can lead to no conclusion of fact except the unwillingness to sign and is neutral as what a witness may say under oath. The failure of counsel for the Director-General to deal with the unsigned statement when Mr Buschman was in the witness box, on which Mr Gray relied, is of no significance when it was known that counsel for Virginia Judge was aware of the document and could be expected to cross-examine Mr Buschman about it if he thought it was in his client's interests to do so. The Tribunal does not accept the submission that the Director-General sought to withhold the documents in Exhibit P from the Tribunal in order to advance a case against Councillor Judge or for any improper purpose.

In the end the question Mr Gray's submissions sought to make relevant was whether, if, before the hearing began, the Tribunal had been provided with the draft statement sent to Mr Buschman and the unsigned statement he returned to the Department, the Tribunal might have changed its decision to conduct a hearing. The submission hardly deserves serious consideration. The watering down in the statutory declaration of Mr Buschman's allegations, his subsequent unwillingness to be formally interviewed, and his expression of hope that the matter be dropped were known to the Tribunal before it decided to conduct a hearing but it was also apparent that, in spite of this evidence of reluctance on his part to proceed with the matter neither Mr Buschman nor Mr Walsh had withdrawn their allegations against Councillor Judge at that time. Mr Buschman's subsequent unwillingness to provide a signed statement of evidence to the Department and last moment delivery of a solicitor-prepared statement of evidence were also known to the Tribunal before embarking upon the actual hearing.

However, the complaint by PLC still stood. There was ample material in the Director-General's report to suppose that the complaint could well be true notwithstanding Mr Buschman's apparent backing away from his allegations. A hearing where the facts could be sought by the examination of witnesses on their oaths in the witness box was not only called for but also the only practical means of laying the complaint to rest. It follows that production of the documents in question to the Tribunal prior to the commencement of the hearing would not have altered the Tribunal's course of action.

### **Mr Walsh (Exhibit N)**

The evidence established that on 26 September 1996 Mr Cousley despatched by fax to Mr Walsh the draft statement of evidence prepared by Mrs Wallace preceded by a telephone call advising Mr Walsh that the document was coming and asking him to have a look at it, make any amendments he saw fit, sign and return it: T172/44-55. It was also established that Mr Walsh made amendments in his handwriting and caused a fresh statement of evidence incorporating those amendments to be produced in his office but he did not sign the document or send it back. Mr Gray elicited from Mr Walsh in cross-examination that the document containing the corrections made by Mr Walsh was an accurate statement of the facts. He was asked why, if it was a true account, he had not signed it and returned it to the Department. He replied, "I'm not keen on signing any documents where I'm not forced to do so, and ... although I said I would co-operate, I wasn't looking forward to being called to this Tribunal. So, I had the option to sign it or not to sign it and I didn't sign it. I thought it was going to create more - you know, waste more time ...": T176/18-38.

Relevant amendments made to the draft by Mr Walsh were as follows: He inserted the date May 1995 as the date of the meeting at JBW's offices attended by Mr Markham in which he had told the investigators Councillor Judge had participated. He struck out the names of Virginia Judge and the reference to a PLC representative being present at the meeting and a statement that he recalled Councillor Judge participating in the discussions

about the property at that meeting. He corrected a statement that he was certain that Councillor Judge knew of an understanding with Mr Markham that JBW would be given agency for the sale of the property to read that he was not certain that she knew. He corrected a statement that he knew that Mr Markham intended JBW to get the agency for the sale of the proposed units to read that he “believed” although he was not “certain” of that fact. He corrected a statement that Councillor Judge had asked him how the matter was going sometime in September 1996 to read that it had happened at least once between May and September 1995.

As mentioned earlier, Councillor Judge's solicitors had procured a notice addressed by the Tribunal to Mr Walsh to attend and produce documents to the Tribunal. The documents described in the notice included the following: “All original and copy statements of evidence prepared by or for you in connection with the proceedings before the Pecuniary Interest Tribunal relating to Councillor Virginia Judge including all such documents bearing annotations and/or amendments made by you.” On 7 November 1996 the Director-General filed with the Tribunal and served on Councillor Judge's solicitors a Notice of Motion for an order that the Tribunal's notice of 1 November 1996 to Mr Walsh in relation to that description of documents be set aside. The notice was returnable before the Tribunal on 13 November 1996 which was the date to which the hearing had been adjourned from the first day of hearing. Mr Walsh, in response to the notice which had already been given to him had already produced to the Tribunal two documents described above. At the Tribunal's direction they had been placed in a sealed envelope and inspection had been withheld from Councillor Judge's solicitor pending the outcome of the motion. The Tribunal deferred any inspection of the documents until the submissions of counsel on the motion were completed. Counsel for the Director-General endeavoured to establish that, as a matter of law, the documents were privileged from production to the Tribunal and from inspection by Councillor Judge and that on the basis of such privilege the Notice to Produce, as to such documents, be set aside.

The form of privilege relied on was the privilege from production of a statement taken from a potential witness at a time when litigation was anticipated and the reason for procuring the statement was to use it in the litigation or for the purpose of obtaining legal advice: **Grant v Downs** (1976) 135 CLR 674 at pp682-683; **Attorney-General (NT) v Maurice** (1986) 161 CLR 475 per Deane J, p490. This form of privilege is an extension of common law doctrines establishing legal professional privilege for communications between client and legal adviser, the policy underlying it being to “enhance the administration of justice by encouraging freedom of communication and candour between client and solicitor.”: **O’Reilly v The Commissioners of the State Bank of Victoria** (1983) 153 CLR 1, per Mason J at pp25-26; and see **Maurice** per Gibbs CJ at page 480; Mason and Brennan JJ. at p489; Deane J at p490.

The origin, nature and development and the limitations upon the application of the privilege were comprehensively discussed by judges of the High Court in lengthy judgments in **O’Reilly** (supra) and **Baker v Campbell** (1983) 153 CLR 52 and this Tribunal need not attempt an elaboration of the principles or a summary of the debate that occurred between the judges constituting the court in those cases. For present purposes it is sufficient to say that a majority in **O’Reilly** decided that the doctrine of legal professional privilege was limited to judicial and quasi-judicial proceedings. There was some debate before this Tribunal as to whether its proceedings, not being judicial in the ordinary sense of the word, were quasi-judicial; but that question had been made irrelevant by the decision in **Baker** which, by majority, overruled **O’Reilly** and held that the doctrine was not confined to judicial and quasi-judicial proceedings but extended also to cases of statutory compulsion to produce documents where the statute did not evince an intention to oust the privilege. That decision has been followed in later cases and remains the law: eg. **Maurice** (supra) per Gibbs CJ, p480; Deane J p490-491; **Carbone v National Crime Authority** (1994) 52 FCR 516 at p529.

There are restrictions and exceptions in the application of the doctrine some of which would require consideration here but a more immediate question is whether the present legislation overrides the claim of privilege altogether.

The powers which the legislation vests in the Tribunal with respect to the performance of its functions and the conduct of hearings into complaints have already been detailed but in dealing with the question whether the intention of the legislation was to exclude the privilege the principles of construction to be applied should be mentioned. There is no question that the privilege may be excluded by statute: **O'Reilly** (supra) per Murphy J, p28; but the intention must be clear: **Maurice** (supra) per Deane J, p491; and a provision for the compulsory production of documents expressed in general terms, without more, will not be sufficient: **Baker** (supra), per Wilson J at pp96-97; Deane J at pp116-117. As expressed by Deane J, (at p116) the principle is:

**“It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intendment”**

As has already been pointed out, the legislature has armed the Tribunal with powers designed to enable it to seek out the truth in relation to a complaint. In **O'Reilly** Mason J (at pp25-26) observed that privilege was “an obstacle to the investigation of the truth” and that the public interests which legal professional privilege is meant to protect is in conflict with a competing public interest in having litigation decided in the light of the entirety of the relevant materials.

The legislature must be taken to have been aware of the state of the law in this matter when it enacted the provisions governing the conduct of proceedings by the Tribunal. Those provisions read together exhibit a

general intention to remove any obstacles to pursuit by the Tribunal of the truth of a complaint and, in section 477, a specific intention to exclude any claim of privilege, duty of secrecy or other restrictions on disclosure or, indeed, “any other ground” on which a witness might seek to be excused from answering questions or producing documents.

There can be no doubt that legal professional privilege was intended to be excluded by the legislation because subsection (4) of section 477 expressly refers to such privilege for the purpose of providing an exception. The exception protects from disclosure a privileged communication between a legal practitioner in his or her capacity as such and a person “for the purpose or providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing” before the Tribunal. In such case the legal practitioner and the other person is entitled to refuse to comply unless the privilege is waived by a person having authority to do so. The presence of this exception in section 477 is the clearest of indications that no other form of legal professional privilege was to prevail and reinforces the view that legal professional privilege was intended to be excluded by the general reference to privilege in section 477.

However, counsel for the Director-General attempted to argue that section 477 was directed to the answering of questions and production of documents by witnesses whereas here the claim of privilege was being made in the name of the Director-General as a party. It was submitted that the documents sought by the Tribunal's notice to Mr Walsh constituted communications between Mrs Wallace, or the Department's Legal Branch, in the role of legal adviser, and the Director-General, in the role of client, in anticipation of and for the purpose of using them in the present proceedings. It was submitted that the privilege attached to the documents and it was the Director-General's, not Mr Walsh's, privilege that was in question. It was suggested that preparation for proceedings would be “very difficult indeed” if

the element of confidentiality of communications with potential witnesses by or on behalf of parties was not respected. Mrs Kelly put the issue thus:

**The issue is this: it goes to the preparation of the matter for proceedings. Is it the case that once you have a solicitor preparing a case, if he talks to any potential witness, provides documents, for example, to that witness and has communications in respect of drafts of affidavits and the like all those documents, once they have been sent to that witness are then to be produced by summons or subpoena? (T119/49-58)**

There are a number of reasons why, in the Tribunal's opinion, Mrs Kelly's submissions are unsound. First, the privilege claimed is incompatible with the provisions of section 477 and the tenor of the other provisions governing proceedings before this Tribunal generally. Secondly, it would be futile to recognise privilege in the Director-General on the basis that the legislation had not excluded it whilst at the same time applying section 477 to Mr Walsh himself. It could not be asserted that Mr Walsh was not bound by section 477 to produce the documents in question and answer any questions about them. Thirdly, if section 477 applied only to witnesses before the Tribunal, the Tribunal has power to summons the Director-General and put him in the role of witness for the purpose of obtaining access to documents or information bearing on the truth of a complaint. Incidentally, this has occurred recently in another matter before the Tribunal where the person against whom the complaint had been made desired to elicit information from the Director-General in support of his defence. In such a case section 477(1) would expressly apply to abrogate any privilege from production that otherwise may vest in the Director-General. Fourthly, the roles of and the relationship between the Director-General on the one hand and Mrs Wallace, or the Legal Branch, on the other which the submission seeks to assign to them, that is, client and solicitor in impending litigation, is artificial and is not consistent with their respective duties or positions in relation to proceedings before this Tribunal. Once this Tribunal has made its decision to conduct a hearing, whilst the Director-General may be described as a "party", he is not

a party in the sense of a litigant seeking to establish legal rights or obtain some relief or remedy on the basis of legal rights. His role is that of performing a public duty, namely, to assist the Tribunal in its endeavour to determine the facts of a complaint. He is as much involved with the search for the truth as the Tribunal. The legal officers of his Department charged with the preparation of material for the hearing, including the obtaining of statements from potential witnesses, are cast in the same role as the Director-General vis-a-vis the proceedings, not the separate roles of client and legal adviser as in ordinary litigation. Fifthly, if the response of a relevant witness who has been requested to provide a statement of his evidence is a refusal, or a withdrawal or a significant departure from allegations or information previously given to the Department, or in some other way bears on the truth or validity of the complaint, it would be inconsistent with the role and duty of the Director-General for him not to disclose that fact or to seek to withhold it from the Tribunal or, if requested on proper ground, from the party against whom the complaint has been made. If a case for confidentiality in a person's or the public interest arises resort may be had to section 480 to seek an appropriate direction from the Tribunal to avoid disclosure or publication. Such a direction would not preclude the use of the material by the Tribunal or a party in the proceedings.

For the foregoing reasons the claim of privilege on which the Director-General's Notice of Motion was based failed. In the Tribunal's view, the ground of privilege put forward did not arise in the circumstances on which it was sought to be founded but, if it had arisen, it was clearly overridden by the provisions of the legislation.

It is unnecessary to reach a conclusion on other possible obstacles to upholding the claim of privilege in these proceedings but they should be briefly mentioned. The documents in question favoured Councillor Judge in that they showed departures from previous adverse statements made by Mr Walsh and, as it turned out, they differed in certain respects from adverse

evidence-in-chief that Mr Walsh gave in the witness box. He was the most crucial witness against Councillor Judge. There are cases where privilege is denied because to maintain it would operate to impede the administration of justice rather than to further it: **R v Bell; Ex Parte Lees** (1980) 146 CLR 141 per Stephen J at pp151-152; **Carbone** (supra) p528E-G. It has been held that if a privileged communication would tend to establish the innocence of a person charged with a crime natural justice overrides the privilege and the document must be produced: **R v Barton** (1973) 1 WLR 115; (1972) 2 All ER 1192; referred to by Gibbs CJ in **Baker** (supra) at p68. By analogy, that principle would have been relevant to consider here.

Some other exceptions to the privilege are grounded on the basis of fairness as between the parties: see **Maurice** per Gibbs CJ at pp481-483; Mason and Brennan JJ. at pp487-488. As counsel for Councillor Judge pointed out, Mr Walsh in his evidence-in-chief mentioned that before giving evidence he had refreshed his memory from the statement he had prepared but not signed or returned to the Department: T72/48-T73/9. If it had been upheld, the Director-General's claim of privilege would have prevented counsel for Councillor Judge from comparing Mr Walsh's evidence with the statement from which he said he had refreshed his memory. Moreover, if maintained, the privilege might deny access to a witness statement in the Director-General's possession that contradicted the evidence of the witness in the witness box, leaving the Tribunal to rely on that evidence without its being made aware of the contradiction and precluding the other party from cross-examining if the statement favoured that party or was more favourable than the evidence which the witness had given. Whatever may be said of adversary proceedings, this would appear to be neither fair as between the parties nor in the interests of justice in investigative proceedings. A case could have been made here for an exception to privilege on the foregoing grounds.

The point sought to be made by Mr Gray out of the Director-General's claim of privilege was that the Director-General's preparation of the case was deficient in that he had failed to seek to obtain the documents in question from Mr Walsh by notice to produce them and then, when they were produced to the Tribunal by Mr Walsh in response to Councillor Judge's notice, the Director-General sought to prevent their becoming available to the Tribunal and to conceal them from Councillor Judge by claiming privilege. Once again, it is not to be overlooked that the point would not have assisted Mr Gray's argument for an order for costs unless production of the documents to the Tribunal would or might have led to a cancellation or shortening of the hearing. As to the first point, Mrs Kelly rejected the charge of deficiency in the preparation for the hearing on the basis that since Mr Walsh had not adopted the Department's draft statement or signed his own version the Department had taken a proper course in issuing a summons for Mr Walsh to attend to give oral evidence and paying no further attention to the failed attempt to obtain a written statement of evidence. She also contended that any suggestion that there had been an attempt by the Director-General to conceal evidence was invalid because both of the documents in question were of neutral value. The Department's draft statement was not Mr Walsh's document so he could not have been cross-examined on it on any basis. The other document was brought into being by him but he had not adopted it until he did so in the witness box in the course of the hearing. It was submitted that the proper course for the Director-General was to have put Mr Walsh in the witness box as was done.

In the opinion of the Tribunal the course taken on behalf of the Director-General was unexceptional up to the point of asserting the claim of privilege. Whilst that claim was put forward as a matter of important principle in the practice of preparation for litigation generally, it was, for the reasons given by the Tribunal, misconceived and inappropriate in relation to proceedings before the Tribunal. However, Mr Gray's ultimate point failed for

reasons similar to those given in relation to Mr Buschman's statements. Disclosure to the Tribunal of Mr Walsh's draft and unsigned statements, though properly sought by Councillor Judge's solicitor, could have made no difference to the course of the proceedings before the Tribunal. It would not have resulted in a cessation or curtailment of the hearing. Accordingly, their non-disclosure would not have advanced Mr Gray's case for an order for costs if the Tribunal had had power to award costs.

Mr Gray sought to bolster the case for costs against the Director-General based on alleged deficiencies in the conduct of the officers of the Department by reference to the vulnerability of a Councillor to unfair advantage being taken by political opponents, in and out of Council, of the mere fact that a decision has been made by the Director-General to investigate a complaint or a decision to conduct a hearing has been made by the Tribunal. He referred to the tendency of political adversaries to seek to make capital of pending proceedings without concern for what the outcome might be, attempting to cause as much political damage as possible by casting doubt on opponents' reputations and exposing the opponents to the trouble and expense of having to defend themselves. Councillor Judge claimed that this is what had happened to her as a result of the PLC's complaint and the subsequent investigation. She also complained that pending the hearing she had been subject to personal harassment and adverse publicity impugning her integrity: T261-T262. Mr Gray submitted, in effect, that because the Director-General would be aware of the potential of pecuniary interest allegations to have these kinds of repercussions for Councillors and would also be aware of the possibility of false complaints and allegations being made for political purposes or open to political advantage being taken of them, he ought to be liable to an order for costs and expenses if the complaint was found to be not proved and he had failed to conduct the investigation and preparation for hearing in such a way as to avoid or diminish the damage that could be caused by it.

It should be pointed out that Mr Gray several times in the course of the hearing sought to assure the Tribunal that in his submissions for Councillor Judge he was not suggesting that there had been any complicity on the part of the Director-General or this Tribunal in any political aspects or motivations that may have been involved in the pursuit of the complaint and that he did not question the propriety of the Director-General's decision to conduct an investigation or the Tribunal's decision to conduct a hearing into the complaint on the basis of the Director-General's report. He was asked by the Tribunal to state in what way he suggested that it was open to the Tribunal to take account of any politically caused damage or distress complained of by Councillor Judge. He was asked, "Do you say because she suffered in this way I ought to make an order under section 481 as a kind of compensation for her suffering?", and he replied, "That is, if I may say so, exactly the question I will answer because that's the burden of my submission.":  
T357/36-43.

Making all due allowance for the fact that in conducting a case counsel is heavily dependent on the client's instructions it seems to the Tribunal that Mr Gray's earnest and persistent endeavours to find a way to seek for Councillor Judge some relief from her legal costs led him to espouse an untenable position on the power of the Tribunal to award costs and to attempt to support it by criticisms of the conduct of officers of the Department which were misplaced, unwarranted or unfair. Because of this the Tribunal has taken the time and trouble to give a full account of the course of the complaint, its investigation and the hearing before the Tribunal so that interested persons may see how the system for dealing with allegations of pecuniary interest breaches is conducted and make a judgment for themselves as to the validity of the criticisms that have been made on behalf of Councillor Judge in this matter. Deplorable though some political point-scoring based on untested allegations and unresolved proceedings may be, it has become part of the political culture at all levels and is a risk undertaken

by any person entering politics even at the level of local government. However, this is a completely independent Tribunal and there is no room for political considerations to play any part in the performance of its duties and functions.

Councillor Judge was distressed, that in order to vindicate her conduct as a Councillor in relation to the Branxton development application, she had to endure an investigation and a hearing as well as political attacks before she could be exonerated. On the facts found by the Tribunal, the blame for this must rest principally if not entirely on the shoulders of Mr Buschman and Mr Walsh. However, one factor contributing to the necessity for a hearing to determine the matter was Councillor Judge's own decision to decline a formal interview by the Department's investigators. Untested written answers to a questionnaire such as Mr Tudehope furnished on her behalf are not always a satisfactory or conclusive substitute. Her decision was made on the advice of Mr Tudehope who thereafter interposed himself between Councillor Judge and interrogation both at the Council and departmental levels. However, the Tribunal wishes to make it absolutely clear that it has no criticism of Councillor Judge for seeking legal advice or acting upon it. On the contrary, it is not only every citizen's right but in the present context it is to be greatly encouraged because pecuniary interest problems can be complex and involve legal difficulties. The point to be made here is that whilst a person against whom a complaint has been made is fully entitled to decline to be interviewed, if relevant conflicts and questions of fact remain unresolved by the investigations the absence of an interview may contribute to a decision by the Tribunal to conduct a hearing as being the only satisfactory way to resolve the issues.

Of course, the decision whether or not to be interviewed and the attendant possibility that a hearing may ensue if an interview is declined remains entirely a matter of judgment for the person concerned as to the person's best interests, aided, if desired by legal advice. In the present case

the hearing has resulted in Councillor Judge being exonerated from the breach alleged in the complaint made against her and the complaint has been dismissed.

Pursuant to section 484 of the Act a copy of this Statement of Decision will be furnished to Councillor Judge and the Director-General and, thereafter, to the Strathfield Municipal Council and such other persons as the Tribunal thinks fit.

DATED: 9 January, 1997



**K J HOLLAND Q.C.**  
**Pecuniary Interest Tribunal**