立法會保安事務委員會
獲取及執行涉及新聞材料的搜查令

目的

本文旨在應委員要求，提供有關廉政公署（廉署）獲取及執行涉及新聞材料的搜查令的資料。

權限

2. 法院爲配合刑事調查行動而授權執法部門搜查新聞材料的權限，受香港法例第 1 章《釋義及通則條例》第 XII 部，尤其是該條例第 84 及第 85 條所規管。依據該條例，執法部門在行使權力進入任何處所，搜查及檢取新聞材料時，須要受到特別規管。其用意是給予新聞自由較大的保障。有關的執法權力並非「廉署權力」。其他執法部門若能提供充份理據，會獲法庭授予同等的權力。

3. 惟有區域法院法官或原訟法庭法官可以發出涉及新聞材料的搜查令。法例規定，向法官申請有關搜查令前，必須先取得「紀律部隊首長級人員」（就廉署而言，即職級不低於廉署執行處助理處長）的批准。實際上，廉署在提出任何申請之前，都必須先得到執行處首長兼副廉政專員的批准。這是確保作出決定的是高層人員，以及有關行動是經過深思熟慮和具備充分理據支持。

4. 在法官簽發涉及新聞材料的搜查令前，他必須信納

有關申請已符合多項嚴格的規定（見第 5 段）。爲進一步保障新聞自由，該條例亦訂明，除非法官信納如不准許申請人立即取用所檢取的材料可能會嚴重損害有關調查，否則，他會在簽發的搜查令中加入一項規定，將所檢取的材料即時封存。根據有關搜查令所檢取的材料須封存 3 天，期間有關材料的擁有人可向法院申請發還材料（正如廉署有關個案的情況）。除非法官信納讓有關當局使用材料是符合公眾利益的，否則他須命令有關方面立即把材料交還遭檢取材料的人。

一般性原則

5. 引用《釋義及通則條例》第 85 條向法庭申請手令搜查新聞材料的指導性原則，已詳列於有關條例之中。正如上文所述，法官必須確定案情符合條例所訂的既嚴格又詳盡的先決條件，才會考慮簽發搜查令。而他在考慮向提出申請的執法部門簽發手令時，必須信納以下各點：

（甲） 有合理理由相信有人已觸犯可逮捕的罪行；申請書所指明有關處所內有，或懷疑有是新聞材料的材料；而這些材料相當可能對就某可逮捕的罪行而進行的調查有重大價值或是與就有關該罪行而進行的法律程序的相關證據；

（乙） 已嘗試用其他方法獲取該材料但失敗；或因相當可能會失敗或嚴重損害調查而並未嘗試用其他方法獲取該材料；

（丙） 在考慮到搜查令相當可能會爲調查帶來的利益後，有合理理由相信作出該命令是符合公眾利益

的；以及

（丁） 與任何有權批准進入有關處所或取用申請所涉材料的人溝通，並不切實可行；或送達依據第 84(2)條發出的交出令的通知，可能會嚴重損害有關調查。

另一辦法是，申請人須令法官信納依據第 84 條發出與該材料有關的交出令並沒有獲得遵從。

6. 上述法律條文規定，只有在具備非常充分理據下才可引用《釋義及通則條例》第 85 條申請搜查令。再者，廉署亦只會在高層管理人員審慎考慮各項因素並向律政司尋求法律意見後，才會作出向法庭申請搜查令的決定。這些因素包括調查所涉罪行或多項罪行的嚴重性，新聞記者本身是否調查對象，以及有關行動對新聞自由有何影響並如何在新聞自由與整體公眾利益兩者之間取得適當平衡。

背景

7. 有關個案涉及廉署執行搜查令，搜查多家報館及個別新聞記者的寓所。在未向法庭申請搜查令前，廉署已向律政司尋求法律意見，亦曾就如何在維護司法公正和保障新聞自由兩方面取得平衡這個問題進行甚爲詳細的討論。在達致有關決定後及獲得執行處首長批准後，廉署一名總調查主任連同律政司一名高級助理刑事檢控專員，經過漫長和謹慎的申請程序，才獲原訟法庭法官信納有必要發出該等搜查令。

8. 廉署是項調查的情況相當特殊，主要涉及多名人士

涉嫌干犯非常嚴重的罪行，該等人士（當中包括一些法律界人士及較早時因貪污罪行被拘捕的人士）涉嫌串謀妨礙司法公正及違反《證人保護條例》的規定。他們向新聞界披露「廉署證人保護計劃」下受保護證人的身份，不但危害證人的安全，亦可能有損本港司法公正及整體的證人保護制度。新聞界將有關資訊印行，亦涉嫌違法。因此，爲了找出及取得對調查極重要的證據，廉署顯然須要申請搜查令。

9. **附錄甲**及**乙**分別載有原訟法庭就星島日報及一名記者申請撤銷廉署搜查令的判詞和上訴法院就廉署對上述判詞所提出的上訴的裁決。

10. 上訴法庭的裁決，對搜查和檢取新聞材料的工作提供了清晰指引。就本案而言，廉署在考慮搜查和檢取新聞材料的時候，已完全遵照有關法例規定，並確保符合條例的精神。

廉政公署
二零零四年十月

由此

附錄甲
Annex A

HCMP 1833/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO.1833 OF 2004

BETWEEN

SO WING KEUNG	Applicant
and	
SING TAO LIMITED	1st Respondent
HUS HIU YEE	2nd Respondent

Before : Hon Hartmann J in Court
Dates of Hearing : 2 and 4 August 2004
Date of Handing Down Judgment : 10 August 2004

J U D G M E N T

Introduction

1. On 23 July 2004, in furtherance of wide-ranging criminal investigations, an *ex parte* application was made to this court by counsel for the Independent Commission Against Corruption ('the ICAC') seeking

the issue of 14 search warrants pursuant to s.85 of the Interpretation and General Clauses Ordinance, Cap.1 ('the Ordinance'). S.85 is contained within Part XII of the Ordinance, that part bearing the heading : 'Search and Seizure of Journalistic Material'.

2. The ICAC sought the issue of the search warrants to enable their officers to enter the premises of seven newspapers and the offices or homes of a number of journalists in order to search for and seize 'journalistic material'. 'Journalistic material' is defined in s.82(1) of the Ordinance as 'any material acquired or created for the purposes of journalism'. It was hoped that the material obtained would include evidence of who had supplied certain information to the newspapers to enable them to publish news stories which the ICAC suspected may have constituted and/or been related to criminal offences.

3. The application for the issue of the 14 search warrants came before Stone J. Well aware of the importance of interposing himself between the legitimate desires of the ICAC to pursue its investigation and society's equally legitimate requirement to ensure the freedom of the press, Stone J conducted a robust and lengthy hearing. At the conclusion of that hearing, he determined that the requirements of s.85 of the Ordinance had been met, obliging him to issue the warrants.

4. Stone J, however, was not satisfied that, unless the ICAC was given immediate access to any material seized, its investigations would be at risk of being seriously prejudiced. He therefore ordered that all material seized under the warrants be sealed, allowing the owners of the

material a period of three days within which to apply under s.87 of the Ordinance for its return.

5. The first respondent in this matter is one of the seven newspapers whose premises were searched. The second respondent is a journalist employed by that newspaper whose home was searched. During the course of these searches material was seized and sealed. It is accepted that the material is journalistic material. I shall refer to the respondents jointly by the name of the newspaper : Sing Tao.

6. Two remedies are sought by Sing Tao. The primary remedy sought is that, in terms of O.32, r.6 of the Rules of the High Court, the two search warrants, being *ex parte* orders, should be set aside on the basis that in law they should never have been issued. The secondary remedy sought, should the principal remedy not be available, is that, pursuant to s.87(2) of the Ordinance, the material seized, not being required in the public interest for the ICAC's investigations, should immediately be returned.

7. It is said that in law context is everything. Certainly, in my view, this applies in the present case. A brief history is therefore required.

Background

8. On 9 July 2004, a number of persons were arrested by the ICAC for alleged offences of corruption. One of the arrested persons — I shall call her 'the participant' — agreed to assist the ICAC in their investigations. Perceiving a risk to her safety, the ICAC took steps to place her in a witness protection programme.

9. Witness protection programmes are established by statute; namely, the Witness Protection Ordinance, Cap.564. S.3 of that Ordinance defines the purpose of the programmes, saying that they are intended to provide 'protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses'.

10. The Ordinance encompasses the possibility that a witness in a witness protection programme may have to be given a new home, a new occupation, even a new identity. It is paramount therefore that the identity of a person in such a programme is not allowed to pass into the public domain. S.17 of the Ordinance provides penalties for those who bring this about. Of relevance to the present case, s.17(1) reads :

> " A person shall not, without lawful authority or reasonable excuse, disclose information—
>
> (*a*) about the identity or location of a person who is or has been a participant or who has been considered for inclusion in the witness protection programme; or
>
> (*b*) that compromises the security of such a person."

A person who contravenes s.17(1) is liable on conviction on indictment to imprisonment for ten years. Clearly, the legislature viewed the offence as one of gravity.

11. I understand that the participant was placed into a witness protection programme on 13 July 2004. On the evening of that same day, acting on the instructions of persons who said they had spoken to the participant and believed her to be held against her will, lawyers sought access to the participant. The ICAC did not grant that access. This

resulted in a complaint being lodged with the police concerning the conduct of the ICAC.

12. Late the following day; that is, on 14 July 2004, an application for a writ of *habeas corpus* was filed with this court seeking the release of the participant from what was alleged to be her unlawful detention by the ICAC. Those proceedings were heard on 15 and 16 July 2004. Virtually all of the proceedings were held either in chambers or in court but *in camera*. Late on the afternoon of the second day, after the matter had come before me, I dismissed the application, being satisfied that the participant was not in any form of custody nor was she being in any way held against her will.

13. The events spanning the evening of 13 July 2004 through to the dismissal of the *habeas corpus* application were reported by those newspapers that were made subject to the search warrants issued by Stone J. I understand, however, that the reports did not deal only in general terms with the events but condescended to details including details of the participant's identity. I understand also that a number of the reports contained details of documents used and words spoken in the *habeas corpus* proceedings during the time they had been conducted either in chambers or *in camera*.

14. The Court of Appeal, to which recourse had been made during the course of the *habeas corpus* proceedings, was sufficiently disturbed by the public dissemination of these matters to request the Secretary for Justice to consider what, if any, action should be taken.

15. The ICAC investigations which arose out of this history were focused on the possible commission of two arrestable offences.

16. First, the ICAC was concerned that certain persons may have contravened s.17(1) of the Witness Protection Ordinance by revealing the identity of the participant. The clearest evidence of this lay in the published stories themselves. But the ICAC considered it necessary to ascertain not only which journalists had played a role in the publication of the news stories and their degree of involvement but who had disclosed forbidden information to those journalists.

17. Second, the ICAC was concerned that certain persons may have pursued the *habeas corpus* application not for the *bona fide* purpose of seeking the release of the participant from what they believed to be her unlawful detention but instead for the sinister purpose of intimidating the participant and thereby dissuading her from acting as a prosecution witness. If that was shown to have happened, it would constitute a conspiracy to pervert the course of public justice, one aspect of that conspiracy being the leaking of information concerning the identity of the participant to the press.

18. I pause at this juncture to record that the writ of *habeas corpus* was described more than two centuries ago as ‘that noble badge of liberty which every subject … wears’. Many say that it is one of the greatest creations of the common law, a shield from unlawful executive detention that is strapped to the arm of every subject from the most humble to the most grand. In my judgment, it cannot be disputed that it must overwhelmingly be in the public interest to prevent its perversion for

criminal ends. Certainly, it was an issue which caused Stone J the deepest concern.

19. Having said that, it is to be emphasised that, when the application for the issue of the search warrants was made, counsel for the ICAC assured Stone J that no suggestion was being made that the newspapers themselves had in any way knowingly been complicit in a conspiracy to pervert the course of justice of the kind I have described. The verbatim transcript of the hearing makes that plain. It was conceded by counsel that, if there had been such a conspiracy, the press itself had been unwittingly used.

20. As for the hearing before Stone J, O.118 of the Rules of the High Court, which governs the manner of proceedings concerning the search and seizure of journalistic material, directs that all applications under s.85 of the Ordinance shall be made *ex parte* by originating summons and shall be heard in chambers not open court. The hearing was held in compliance with those directions.

21. All applications for the issue of search warrants under s.85 must be supported by affidavit or affirmation setting out all of the grounds required by Part XII of the Ordinance to be demonstrated including the evidence relied on in support of those grounds. I am able to say that the supporting affirmation of Mr So, the applicant in these proceedings, ran to 13 pages. It was certainly no standard format document with appropriate boxes ticked. It was painstaking in its detail.

22. Mr So's affirmation was at all times, and remains, protected by public interest immunity, being protected not by reason of its particular

contents in the present case but rather as a class of document. In this regard, I refer to the dictum of Keith JA in *Apple Daily Ltd v. Commissioner of the Independent Commission Against Corruption (No.2)* [2001] 1 HKLRD 647, at 663B :

> " I appreciate that there is a difference between a claim to public interest immunity in respect of documents falling within a particular class, i.e. the affidavits or affirmations used to support applications for search warrants, and a claim to public interest immunity in respect of information of a sensitive nature which might be included in such documents. *But in my opinion affidavits or affirmations used to support applications for search warrants constitute one of the classes of documents to which public interest immunity attaches, so long as the investigation in aid of which the warrants were sought continues*. It may be that once that investigation has come to an end, public interest immunity no longer attaches to the documents as a class, and public interest immunity only attaches to such parts of the document as identifies informants, but that is not something which I need to address. For the time being, while the investigation continues, the affirmation of Ricky Yu falls within one of the classes of documents to which public interest immunity attaches and cannot be inspected by Apple Daily or its advisers." [my emphasis]

23. Although in the hearing before myself Mr Dykes SC, leading counsel for Sing Tao, argued that, in light of more recent common law authorities, Keith JA's dictum must be held to be wrong in law, he effectively conceded that I am bound by it and that accordingly no part of Mr So's affirmation could be revealed, no matter how unrelated to the need for public interest immunity that particular part may be. I am satisfied that I am bound by Keith JA's dictum and that I am therefore bound to hold that the affirmation, as a class of document, is protected by public interest immunity.

24. It would, of course, defeat the purpose of clothing Mr So's affirmation with public interest immunity if the transcript of the

proceedings before Stone J, during which the affirmation was considered in detail, was to be revealed. That hearing was in any event in chambers. I am satisfied, however, that, when the interests of justice demand, I am permitted to reveal limited portions of what was said during the hearing provided such references do not in any way undermine the essential confidentiality of the chambers hearing or undermine the public interest immunity vested in Mr So's affirmation and provided, of course, that they go directly to the issues in contention before me.

25. With this *caveat* in mind, I observe that, on my reading of the transcript, it is apparent that, over a long and arduous hearing, Stone J had to be drawn reluctantly to his final determination that the search warrants should be issued. Early in the hearing he is recorded as saying by way of comment on the application : 'Don't like it, don't like it'. He then enquiries whether there may not be some way of hearing from the newspapers before a decision is made whether to issue the warrants.

26. There is, of course, a procedure laid down in the Ordinance which permits a newspaper or a journalist to be heard before any decision is made as to the delivery up of journalistic material. That procedure is laid down in s.84 of the Ordinance. I shall refer to it in greater detail when I look to the overall statutory scheme contained in Part XII of the Ordinance governing the seizure of journalistic material. During the course of the hearing, Stone J quite properly had his attention drawn to the procedure laid down under s.84, a procedure for seeking by way of an *inter partes* hearing what is called a production order, requiring the delivery up of journalistic material.

27. The ICAC, however, took the view that, with the newspapers and the journalists themselves being suspected of the commission of serious criminal offences, it was not prudent to give notice that journalistic material was being sought from them. Accordingly, circumstances dictated that, rather than giving notice under s.84 of the Ordinance of an intention to seek production of material, it was necessary to proceed directly to the issue warrants under s.85. This was because the ICAC perceived a risk that, if notice was given, relevant material may be hidden or destroyed by the newspapers or by the individual journalists. In this regard, Stone J enquired of counsel how it was to be concluded that all the newspapers and the journalists would do away with the material. In reply, counsel said : "It's not a question of knowing that they will, it's a question of not being able to take the risk that they won't … that's the same in any search warrant situation." Counsel went on to emphasise : "We're talking about a very serious criminal investigation …"

28. As I have said earlier, Stone J determined at the end of the *ex parte* hearing that all the warrants should be issued. He was not prepared, however, to give the ICAC immediate access to any material seized pursuant to s.85(7) of the Ordinance and required instead that the material be sealed in terms of s.85(6) which reads :

> " Subject to subsection (7), it shall be a term of any warrant issued under this section that a person who seizes journalistic material pursuant to the warrant shall seal the material upon seizure and shall hold the sealed material *until otherwise authorized or required under section 87*." [my emphasis]

The relevant portions of s.87 are to the following effect :

> " (1) A person from whom journalistic material has been seized pursuant to a warrant issued under section 85, other than a warrant to which subsection (7) of that section applies, or

> a person claiming to be the owner of such material, may within 3 days of such seizure apply to the court from which the warrant was issued for an order under subsection (2).
>
> (2) On an application under subsection (1), unless the judge is satisfied that it would be in the public interest that the material be made use of for the purposes of the investigation, he shall order that the material be immediately returned to the person from whom it was seized; and in making a determination under this subsection the judge shall have regard to, among other things, the circumstances under which the material was being held at the time of its seizure."

29. Sing Tao's 'secondary remedy', as I have described it, is for an order under s.87(2) for the immediate return of the seized material.

The issue of jurisdiction

30. As I have indicated earlier, the primary remedy sought by Sing Tao is one which Mr Dykes submitted accrues to it pursuant to O.32, r.6 of the Rules of the High Court. That order reads :

> "The court may set aside an order made *ex parte*."

31. Where an order is made by a judge *ex parte*, the same judge or another judge of concurrent jurisdiction has the power to set aside the order after an *inter partes* hearing. That is an established principle of jurisdiction. It arises, I believe, out of the nature of *ex parte* orders which are made by a judge on the basis of evidence and submissions made by one side only and are therefore no basis for making a definitive order.

32. Mr Zervos SC, leading counsel for the ICAC, questioned whether the issue of search warrants by a judge pursuant to s.85(2) of the Ordinance, even though manifestly done *ex parte*, could constitute an 'order'. I am satisfied, however, that the issue of each warrant by the

judge constituted an 'order' in terms of the Rules in that in each case it constituted a direction given by the court. The issue of each warrant was an 'order' in the sense that it was made with authority to command and did command the carrying out of specific acts; namely, search and seizure. The word 'order' in terms of the Rules is used in a broad range of senses and, in my view, must encompass almost all decisions which are not properly to be categorised as judgments.

33. It was contended by Mr Zervos that the issuing of the search warrants was a criminal procedure, inherent to the criminal investigative process. As such, the issue of the search warrants did not create a dispute between opposing parties, a *lis inter partes*, as is the case in civil proceedings. Once the search warrants were issued and executed the process was complete. In light of this, an application under O.32, r.6 to set aside the already 'expended' warrants was therefore inappropriate.

34. Mr Zervos complemented or underscored this submission by saying that the Rules of the High Court, concern practice and procedure only and cannot expand the jurisdiction of the High Court nor confer on parties rights that they do not have under common law or a relevant statutory provision.

35. Going first to that latter point, I reject the submission that the relevant rules, to which I shall come in a moment, are *ultra vires*. The power to issue search warrants to seize journalistic material is given to the High Court by s.85(1) of the Ordinance which reads :

> " A person on whom there is or may be conferred under a provision in any Ordinance, being a provision to which section 83 applies, the power to enter any premises and to search

> the premises or any person found on the premises or to seize any material, may apply to a judge of the Court of First Instance or District Court for the issue of a warrant under subsection (3) authorizing him to enter those premises for the purpose of searching for or seizing material which is known or suspected to be journalistic material."

36. The High Court, in the exercise of this statutory power, has the jurisdiction to direct the manner in which proceedings which take place before it concerning the exercise of the power are to be conducted. The High Court is master of its own process and the relevant Rules are no more than examples of the High Court setting its own process.

37. The Rules of the High Court relate in greatest part to civil proceedings but not exclusively so. In this regard, O.1, r.3 reads :

> " These rules shall not have effect in relation to any criminal proceedings other than any criminal proceedings to which Order 53, Order 59, Order 62, Order 70, Order 115, Order 116, Order 117, *Order 118* or Order 119 applies." [my emphasis]

38. O.118 governs the criminal proceedings brought under Part XII of the Ordinance, specifically proceedings brought either under s.84 for the issue of a production order or under s.85 for the issue of a search warrant. Just as the High Court may direct the manner in which civil proceedings before it are conducted so it may direct, as it has done in terms of O.118, the conduct of criminal proceedings before it.

39. It seems to me that the more fundamental issue going, to jurisdiction is Mr Zervos' contention that the issue of a search warrant under s.85 is not a *lis inter partes* and that accordingly proceedings under O.32, r.6 cannot apply to it. This contention has previously been

ventilated by Mr Zervos before the courts. In its judgment in *Apple Daily Ltd v. Commissioner of the Independent Commission Against Corruption*, cited in para.22 *supra*, Keith JA, at 657G, made the following observations in respect of his submissions :

> " Mr Kevin Zervos, for the Commissioner, contended that O.32 r.6 did not give the court power to set aside the warrants. Accordingly, the appeal had to be dismissed without a consideration of the merits …
>
> When properly analysed, Mr Zervos' argument has, I think, two limbs. First, it is said that an application for a search warrant is not a *lis inter partes*. It is a unique procedure in which there is only one party, namely the party applying for the warrant. Thus, the proceedings in which the application is made are such that they come to an end when the *ex parte* application for the warrant is granted. Mr Zervos argued that O.32 r.6 does not apply to such an order because : (a) O.32 r.6 contemplates another party to the proceedings (and in something other than a *lis inter partes* by definition no other party exists); and (b) the proceedings are over by the time when O.32 r.6 can be invoked. Secondly, it is said that O.32 r.6 only applies to orders made in civil proceedings. Mr Zervos argued that orders for the issue of search warrants in connection with the investigation of criminal offences are not civil proceedings.
>
> I am skeptical about the correctness of these arguments. As for the first argument, I agree with the premise on which the argument is based, namely that an application for a search warrant is not a *lis inter partes*. An application for letters of request, which was held by Godfrey J (as he then was) in *A-G v. 'L'* [1990] 1 HKLR 195 not to be a *lis inter partes*, in an analogous example. But it does not necessarily follow from that that O.32 r.6 cannot be relied upon to found an application to set the warrant aside."

40. In the result, as the appeal by Apple Daily was decided on its merits, Keith JA was not required to determine the issue. However, in passing, he said that he would be very reluctant to accede to Mr Zervos' submissions if their effect was—

> " … to deny the occupier of premises to which the search warrants related an opportunity to apply to the court for their revocation or variation. It would be very surprising if the court

> could not revoke or vary search warrants when it could be shown, for example, that they had been obtained on obviously inaccurate facts or on facts which were seriously incomplete because of a lack of candour at the time when the applications for them were made."

41. In a more recent Court of First Instance judgment given in October 2003, that of *X v. The Commissioner of the Independent Commission Against Corruption* (unreported) HCCM 49 of 2003, Lugar-Mawson J came to the conclusion that O.32, r.6 *did* give him jurisdiction to set aside orders related to the ICAC's powers of investigation under the Prevention of Bribery Ordinance, Cap.201, all proceedings concerning the making of such orders being governed by O.119 of the Rules of the High Court. In reaching his determination, the judge said :

> " Regardless of whether or not the application under s.14(1A) leading to the Order was in respect of civil or criminal proceedings the clear words of O.1 r.2(3) referring to O.119, make it clear that O.32 r.6 applies to it and unless jurisdiction can be denied under any other rule of law, this Court can set the Order aside. It is unnecessary for me to determine the nature of the proceedings."

He continued by making reference to Keith JA's observations in *Apple Daily Ltd* (to which have referred) and said :

> " … O.32 r.6 is in clear term. It provides that an order made *ex parte* can be set aside, but it says nothing about who may, or may not, bring the application to set it aside. Obviously the applicant for the order has the right to ask the Court to set it aside, but what of the subject of the order? As it was made *ex parte* it must necessarily follow that its subject was unaware both of the bringing of the application for the order and of its making. However, once the order is made and served on its subject, the position changes, the subject is aware of the order and has an interest in it and, as I see it, O.32, r.6 gives him an avenue under which he can ask the Court to reconsider the making of the order."

42. In my view, Lugar-Mawson J, in the second passage to which I have referred, succinctly laid to rest the *lis inter partes* issue. While I am not bound by his judgment, I am satisfied that it is a correct pronouncement of the law.

43. Finally, I come to the submission made by Mr Zervos that, in terms of s.85 of the Ordinance, while the issue of a search warrant by a District Judge may be open to review by this Court, the issue of the same warrant by a judge of this Court is final and is not open to challenge. Mr Zervos founded this submission on the provision contained within s.85(1) that an application for the issue of a warrant may be made to a District Court judge or to a judge of the Court of First Instance. As I understood Mr Zervos, it was his contention that, if the decision is made to bring an application to the higher court, a more rigorous, more deeply informed scrutiny will take place; that itself, in so far as s.85 reveals legislative intent, being considered by our law makers to be sufficient and requiring no form of appeal or review. I do not agree. I have no doubt that the legislature, in making the law, looked to the *same* level of rigorous and informed scrutiny from the judges of both the District Court and the Court of First Instance. In my view, the clear purpose of providing for the two courts is simply because both exercise criminal jurisdiction and it may in any given case be more appropriate to apply to one court rather than the other.

44. For the reasons given, I am satisfied therefore that I do possess jurisdiction to determine an application made under O.32, r.6 to set aside the search warrants.

The principles underlying Part XII

45. Critical to Sing Tao's case in respect of its primary remedy is a consideration of the structure of the scheme contained within Part XII of the Ordinance. It was Mr Dykes' submission that a consideration of that structure reveals the legislative intent behind the scheme and thereby dictates the principles to be adhered to by the courts in discharging their judicial responsibilities under it.

46. In my judgment, the scheme contained in Part XII of the Ordinance must be viewed through the prism of art.27 of the Basic Law. That article commences : "Hong Kong residents shall have freedom of speech, of the press and of publication …".

47. In short, in Hong Kong a free press is a constitutional guarantee. It is a guarantee of the greatest importance for it is the function of the press to act as the eyes and ears of all concerned citizens. It was Thomas Jefferson, the third president of the United States of America, who said : "No government ought to be without censors, and where the press is free none ever will".

48. It follows that a free press must be an effective press, not moribund or compliant. If it is to act as the eyes and ears of all concerned citizens it must be able, when necessary, to obtain information which would otherwise not be revealed to the light of day and to protect the identity of those willing to pass on such information. In an often cited passage, the European Court of Human Rights, in its judgment in *Goodwin v. United Kingdom* [1996] 22 E.H.R.R.123, para.39, affirmed that—

> " … freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as it reflected in the laws and the professional codes or conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

49. This passage was approved by Lord Phillips in *Ashworth Hospital Authority v. MGN Ltd* [2001] 1 WLR 515, at 534. In the same judgment, at 537, Laws LJ, in referring to the same passage, expanded upon it to the following effect :

> " It is in my judgment of the first importance to recognise that the potential vice—the 'chilling effect'— of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a 'chilling effect' in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always *prima facie* (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to

> a pressing social need, to which the need to keep press sources confidential should give way."

50. These statements of judicial principle by the European Court of Human Rights and the English Court of Appeal quite clearly, in my view, apply to the statutory scheme for the search and seizure of journalistic material contained within Part XII of our Ordinance, demanding that Part XII be interpreted consistently with these principles. Art.27 of the Basic Law (referred to in para.46 *supra*) and art.9 of the International Covenant on Economic, Social and Cultural Rights, incorporated into our law in terms of art.39 of the Basic Law, contain similar provisions as art.10 of the European Convention, affirming in substance the same constitutional protections of freedom of expression, orally or in writing or through the media.

51. In so far as it is necessary to look further to the intent of our law makers, in moving the second reading of the bill which was to be passed into law as Part XII, the Secretary for Security said the following when addressing the Legislative Council on 28 June 1995 :

> " We are aware of the community concerns, particularly those expressed by Members of this Council and members of the media, that the powers of search and seizure of the police are too wide, and that such powers, if abused in relation to journalistic material, may threaten press freedom. Although we were asked only to amend the Police Force Ordinance, we discovered that similar provisions are contained in a number of other Ordinances. Therefore, we propose to deal with them all, by amending the Interpretation and General Clauses Ordinance."

The provenance of Part XII

52. In respect of the search and seizure of journalistic material, the English Police and Criminal Evidence Act 1984 ('PACE') has given legislative recognition to the fundamental requirement to ensure the freedom of the press. PACE creates a statutory scheme which — in respect of a range of confidential material (described in the statute as 'excluded' or 'special procedure' material; journalistic material falling into the first category) — seeks to balance two conflicting public interests; namely, the public interest in the investigation of crime and the public interest in maintaining the confidentiality of material such as journalistic material or, for example, papers held by a solicitor that are not subject to legal privilege.

53. In respect only of journalistic material, Part XII of the Hong Kong Ordinance is modelled on, indeed, in its essentials, is a mirror of the procedures and protections contained in PACE.

54. In the course of his submissions, Mr Zervos contended that the statutory scheme contained in Part XII of our Ordinance constitutes a markedly different regime from the one contained in PACE. I must reject that contention. Yes, the statutory scheme in PACE is broader, encompassing a range of confidential material, not only journalistic material. But in so far as journalistic material is concerned, Part XII of the Hong Kong Ordinance has adopted the same system of procedures as those laid down in PACE and, in respect of those procedures, has qualified them in the same manner. In my judgment, it is manifest that the Hong Kong legislature, looking to the same conflicting issues of public

interest as the English Parliament; namely, the need for the efficient investigation of crime and the need to protect the freedom of press, has chosen to adopt the same legislative scheme as the English Parliament.

55. That being the case, I am satisfied that English jurisprudence concerning the principles to be adhered to by the courts in determining applications for search and seizure of 'excluded' or 'special procedure' material in terms of PACE constitute authorities of direct relevance to applications made under s.85 of Part XII of the Ordinance.

56. During the course of hearing before me, Mr Dykes, for Sing Tao, placed a body of English cases before me which go directly to the manner in which the English courts must determine applications made in terms of PACE for the search and seizure of journalistic material or confidential material held by solicitors. I shall refer to a number of these cases shortly. Having read these cases, I am satisfied that the principles set down in them not only provide valuable guidance in respect of applications made under Part XII of the Ordinance but go further, defining the principles that must be applied by our courts in determining applications made pursuant to s.85 of Part XII.

57. Regrettably, none of these authorities were placed before Stone J. If those authorities had been known to him, on a reading of the transcript of the proceedings, I am of the belief that, guided by the principles contained in them, Stone J would have been less likely to have made the orders he did. Indeed, I go so far as to say that, on my reading of the transcript, I think it highly unlikely that the orders would have been made.

An overview of Part XII

58. In order of gravity, the two coercive measures contained in the statutory scheme under Part XII may be summarised as follows :

(i) The least 'intrusive' application is one made on notice for an order to produce journalistic material pursuant to s.84(2), either so that access only may be given to it or so that it may be taken away. This procedure does not involve any 'without notice' entry and seizure. Instead, the parties are able to make representations to a judge at an *inter partes* hearing as to whether the journalistic material should be delivered up or the application refused. It is to be emphasised that service of a notice under s.84 places an obligation on the recipient of the notice to preserve the journalistic material which is now the subject of the production procedure. Service of a notice in terms of s.84 does not therefore give to the recipient liberty to destroy confidential material. If that is done, it is subject to sanguine punishment. In this regard, s.88(5) and (6) read :

> (5) Where notice of an application for an order under section 84 has been served on a person, he shall not conceal, destroy, alter or dispose of the material to which the application relates except—
>
> (*a*) with the leave of a judge; or
>
> (*b*) with the written permission of the applicant,
>
> until —
>
> (i) the application is dismissed or abandoned; or
>
> (ii) he has complied with an order under section 84 made on the application.
>
> (6) Any person who knowingly contravenes subsection (5) commits an offence and is liable to a fine at level 6 and to imprisonment for 1 years."

(ii) The second procedure — in my judgment, the statutory scheme contained within Part XII makes it a procedure of last resort — is an *ex parte* application made under s.85 for the issue of a search warrant so that journalistic material may be searched for and seized without notice being given to the newspaper or journalist involved. This procedure may be subject to the condition that any material seized will be sealed pending a possible application for its return or may allow the investigating agency to have immediate access to it.

59. Both of these procedures, impinging on the freedom of the press, are subject to stringent consideration. The legislation states in unambiguous terms that applications under s.85 to search for and seize journalistic material are to be the subject of separate proceedings. This is underscored by s.83 which reads :

> " A provision in any Ordinance which confers on, or authorizes the issue of a warrant conferring on, any person the power to enter any premises and to search the premises or any person found on the premises or to seize any material (whether of a general or particular kind and whether or not the word 'material' is used in that provision) shall not, in the absence of an express provision to the contrary, be construed as conferring, or authorizing the issue of a warrant conferring, a power to enter premises where such entry is for the purpose of searching for or seizing material which is known or suspected to be journalistic material."

60. Of central importance, is that the legislature, in conferring the discretion to issue production orders under s.84 or search warrants under s.85, requires judges to look not only to the imperatives of a criminal investigation but in each case to consider applications within the broader context of 'the public interest'; that being the public interest to protect the freedom of the press.

61. In this regard, a judge may only issue a production order in terms of s.84 if, in addition to a list of other stringent considerations, he is satisfied in terms of s.84(3) that—

> "(*c*) other methods of obtaining the material—
>
> (i) have been tried and failed; or
>
> (ii) have not been tried because they were unlikely to succeed or would be likely to seriously prejudice the investigation; and
>
> (*d*) there are reasonable grounds for believing that it is in *the public interest* that an order should be granted, having regard to—
>
> (i) the benefit likely to accrue to the investigation; and
>
> (ii) the circumstances under which a person in possession of the material holds it."
>
> [my emphasis]

A judge to whom an application has been made to issue a search warrant in terms of s.85 (when there has been no production order made in respect of which there has been non-compliance) may only do so when he too, in addition to a list of other stringent considerations, is satisfied of the same requirements. In this regard, s.85(3) reads :

> "(3) If on an application under subsection (1) a judge—
>
> (*a*) is satisfied—
>
> (i) *that the conditions specified in section 84(3)(a), (c) and (d)(i) are fulfilled*; and
>
> (ii) that one of the further conditions set out in subsection (5) is also fulfilled; or
>
> (*b*) is satisfied that an order under section 84 relating to the material has not been complied with,
>
> he may, subject to subsection (4), issue a warrant authorizing the applicant to enter onto the premises and to search the premises and any person found on the premises and to seize any material."
>
> [my emphasis]

62. The legislation contained in Part XII further makes it plain that the issue of a search warrant should be what I will call an investigative tool of last resort. In terms of s.84(3)(c)(i), a judge may only make a production order if he is satisfied that 'other methods of obtaining the material (i.e. seeking its voluntary disclosure) have been tried and failed' or that such methods have not been tried because they were unlikely to succeed or would be likely to 'seriously prejudice' the investigation. The likelihood of prejudice is not enough, it must be serious prejudice. In terms of s.85(5), a judge may only issue a search warrant if he is satisfied that it is not practicable for the investigating agency to communicate with anybody entitled to grant entry to the premises where the material is believed to be held or access to the material itself or that service of a notice under s.84(2) seeking a production order 'may seriously prejudice the investigation'. In respect of this last option, again prejudice is not enough, the judge must be satisfied that a failure to follow the 'production order route' may result in serious prejudice to the investigation

63. In the present case, based on the seriousness of the criminal offences being investigated and the fact that the newspapers and journalists were themselves the subject of investigation, the ICAC did not seek voluntary disclosure nor did it seek delivery up of the material by following what I have called the 'production order route'. It went directly to the measure of last resort; namely, an *ex parte* application for the issue of search warrants.

64. In my judgment, no material was placed before Stone J nor has any material been placed before me to justify the ICAC determining that it should proceed directly to seek the issue of search warrants. I have

reached this determination after taking into account the authorities placed before me by Mr Dykes. That being the case, before stating my reasons for my determination, something must be said of those authorities.

A consideration of the English authorities

65. In so far as they apply to *ex parte* applications for the issue of warrants to search for and seize 'excluded' or 'special procedure' material, the English authorities establish the principles which I set out below. As I have indicated earlier in this judgment, I am of the view that these principles apply equally to applications made to our courts for the issue of search warrants pursuant to s.85 of Part XII of the Ordinance. The principles may be summarised as follows :

(i) An application for a search warrant constitutes a serious intrusion upon the freedom of the press. The responsibility for ensuring that the procedure is not abused lies with the courts and it is of cardinal importance that judges should be scrupulous in discharging that responsibility. See *R v. Maidstone Crown Court, ex parte Waitt* [1988] Crim LR 384.

(ii) The issue of a search warrant constitutes the exercise of a draconian power and it is therefore for the judge to satisfy himself that there are reasonable grounds for believing the various matters set out in the supporting affidavit. The fact that an investigating officer, who has been investigating the matter, states in the affidavit that he considers that there are reasonable grounds is not enough. The judge must himself be satisfied. See *R v. Southampton Crown Court, ex parte J and P* (unreported) CO/1421/1992-Lexis Transcript, page 17, citing with approval the observations of Parker LJ in *R v.*

Guildhall Magistrates Court, ex parte Primlaks Holding Co. (Panama) Inc. [1990] 1 QB 261.

(iii) An application for a search warrant should not be a matter of common form; the preferred method should be by way of giving notice to seek a production order. See *R v. Lewes Crown Court, ex parte Nigel Weller & Co.* (unreported) CO/2890/1998-Lexis Transcript.

(iv) The fact that the staff of a newspaper or journalists believed to be in possession of journalistic material may themselves be under investigation for the commission of criminal offences is not of itself necessarily a sufficient reason for a judge issuing a warrant. See *R v. Southampton Crown Court, ex parte J and P* (*supra*), per Auld J :

> "the fact that a solicitor is himself under investigation is not of itself necessarily a sufficient reason for ordering such an intrusion into his affairs and those of his clients. All the circumstances of the individual application must be taken into account, including, for example, the seriousness of the matter being investigated, the evidence already available to the police to found a prosecution based on it, and the extent to which the solicitor has already been put on notice of interest on his affairs such as might have caused him to hide or destroy or otherwise interfere with incriminating documents."

(v) The risk that journalistic material may be hidden or destroyed must be a 'real risk', which is the phrase I prefer, or, as the court accepted in *R v. Leeds Crown Court, ex parte Switlaski* (unreported) CO/1322/89-Lexis Transcript, should amount to a 'substantial probability'. A judge should not issue a warrant unless material is placed before him demonstrating that in the particular case, if notice is given, there is a real risk, as opposed to a mere possibility, that the journalistic material will be hidden or destroyed. See, for example, *R v. Central*

Criminal Court, ex parte Propend Finance Property Ltd & Another [1996] 2 Cr.App.R.26 at 30 :

> "… the Commonwealth of Australia is prepared to consent to an order of *certiorari* quashing the issue of the warrants, and no party now before the court contends that they were rightly issued. The principal reason why this is accepted, and the only aspect of the grounds into which we need travel at all, is that this was not a proper case for an order to be made *ex parte*. That is because, in essence, there was no material placed before the learned judge which was capable of demonstrating that there was any risk that, if served with an *inter partes* notice, either the solicitors or the accountants would have so misbehaved as to destroy all the documents … In effect, Judge Goddard Q.C. had nothing but the assertion of a long-standing association between the clients and the firms as a basis upon which to issue an *ex parte* order. That was manifestly not enough."

(vi) In determining an application made under s.85, a judge should give reasons for his decision even though they need not be elaborate. See, for example; *R v. Central Criminal Court, ex parte Propend Finance Property Ltd* (*supra*) :

> " The learned judge then proceeded to order the warrants. She gave no reasons for her decision. With respect to her, she should have done so. That is not only because generally judges should always give reasons for what they do, but in particular because she was here exercising a draconian jurisdiction."

(vii) An applicant who seeks the issue of a warrant under s.85 of Part XII must act in the utmost good faith and disclose to the court all matters which need to be taken into account by the court in deciding whether or not to grant relief *ex parte*, and if so, on what terms. In this respect, an applicant is in the same position as an applicant seeking an *Anton Piller* order. See *Gross and Others v. Southwark Crown Court and Others* (unreported) CO/1759/98-Lexis Transcript :

> "The remaining criticisms of the application concern the lack of full and frank disclosure. The procedure … has been correctly likened to the *Anton Piller* orders in the civil jurisdiction, and there is abundant authority that it is the duty of the applying party to make the fullest disclosure of all facts which may be relevant, whether those facts are favourable to him or adverse."

My determination of the O.32, r.6 application

66. As I have earlier observed, the decision by the ICAC to by-pass less intrusive proceedings and to go directly to the measure of last resort by making an *ex parte* application for search warrants was based on two considerations. First, the seriousness of the criminal offences being investigated and, second, the risk of the journalistic material to which access was sought being destroyed.

67. To make good its application, that is, to convince Stone J to exercise the draconian power of issuing search warrants, the ICAC had to demonstrate that, if it attempted to obtain the journalistic material by pursuing the 'production order route' and serving notice of its intention on Sing Tao in terms of s.84(2), that may 'seriously prejudice' its investigation. Put shortly, in the circumstances of this case, it had to demonstrate that there was a real risk that the staff of Sing Tao and the journalist involved in writing the news story would destroy the material being sought. Indeed, it had to demonstrate this real risk in respect of all seven newspapers and each and every journalist made the subject of search warrants. On my reading of the transcript of the proceedings before Stone J, I fail utterly to see how that was demonstrated or could have been demonstrated.

68. As Auld J said in *R v. Southampton Crown Court, ex parte J and P (supra)* all the circumstances of the *individual* application must be taken into account. In my view, this would include not only the seriousness of the matter being investigated and the fact that the newspapers and journalists were themselves under investigation but also the evidence already available and all other circumstances which would give rise to a reasonable finding that there was — or was not — a real risk that the journalistic material being sought would be destroyed. Could it really be said that, if a notice was served pursuant to s.84(2) there was a real risk that all seven newspapers and each and every journalist would destroy the material in issue despite the fact that to do so would constitute a grave criminal offence and may well visit those persons with a sentence of incarceration? While there are renegades in every profession, the profession of journalism is one of an integrity, one that, if it is to maintain the trust of the public, must always adhere to that integrity.

69. During the course of hearing before Stone J, he asked how it could be concluded that all the newspapers and all the journalists would do away with the material. As I have said earlier (para.27) counsel for the ICAC was only able to answer : "It's not a question of knowing that they will, it's a question of not being able to take the risk that they won't … that's the same in any search warrant situation. We're talking about a very serious criminal investigation …" But that of itself is not sufficient. The statutory regime created under Part XII of the Ordinance is not to be equated with the everyday issue of search warrants in respect of criminal offences. To avoid the criticism that I have taken counsel's words out of context, I should state that, on my reading of the affidavit by Mr So in support of the s.85 application, in substance, it said no more.

70. In making the *ex parte* application, counsel for the ICAC was obliged to make full and frank disclosure of all relevant matters to assist Stone J in coming to a most difficult decision. There can be no suggestion that counsel, a barrister of the highest professionalism and repute, deliberately failed to acquaint Stone J with the fairly substantial body of English jurisprudence to which I have referred. But the fact remains that Stone J had to reach his determination without the benefit of that jurisprudence and the guidance it would have given him. As I have said earlier, I am satisfied that Stone J, who was drawn reluctantly to his final decision, if he had been made aware of the authorities, would have been most unlikely to have made the orders he did.

71. In all the circumstances, I have no doubt in my mind that on this occasion the ICAC was wrong in fact and in law in seeking the issue of search warrants when, in terms of the statutory scheme contained within Part XII of the Ordinance, it could equally have achieved it legitimate aim by less intrusive measures. The search warrants must therefore be set aside in terms of O.32, r.6.

The application made in terms of s.87(2) of the Ordinance

72. As I have come to the determination that the search warrants issued by Stone J must be set aside in terms of O.32, r.6 of the Rules of the High Court, there is no need for me to move on to consider the return of the materials to Sing Tao pursuant to s.87(2) of the Ordinance.

Conclusion

73. For the reasons given in the body of this judgment, I am satisfied that the search warrants issued by Stone J, which are the subject of these proceedings, must be set aside. I make that order. As to costs, I see no reason why costs should not follow the event. I will make an order *nisi* to that effect, the order to be made final in 21 days from the date of this judgment unless an application is filed earlier seeking a different order.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Mr Kevin Zervos, SC, SADPP leading Mr Alex Lee, SGC of Department of Justice, for the Applicant

Mr Philip Dykes, SC leading Mr Victor Dawes, instructed by Messrs Wilkinson & Grist, for the 1st and 2nd Respondents

HCMP 1833/2004

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO.1833 OF 2004

BETWEEN

SO WING KEUNG	Applicant
and	
SING TAO LIMITED	1st Respondent
HSU HIU YEE	2nd Respondent

Before : Hon Hartmann J in Court

Dates of Hearing : 2 and 4 August 2004

Date of Handing Down Judgment : 10 August 2004

C O R R I G E N D U M

On page 1, the name of the 2nd Respondent be amended as "**HSU** HIU YEE".

Dated 10 August 2004

(Yiu-sun CHUNG)
Clerk to Hon Hartmann J

HCMP 1833/2004

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO.1833 OF 2004

BETWEEN

SO WING KEUNG	Applicant
and	
SING TAO LIMITED	1st Respondent
HSU HIU YEE	2nd Respondent

Before : Hon Hartmann J in Court

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Date of Handing Down Judgment : 10 August 2004

2nd C O R R I G E N D U M

On page 19, paragraph 50, the "art.9 of the International Covenant on Economic, Social and Cultural Rights" be amended as "**art.19 of the International Covenant on Civil and Political Rights".**

Dated 11 August 2004

(Yiu-sun CHUNG)
Clerk to Hon Hartmann J

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Annex B

CACV245/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 245 OF 2004

(ON APPEAL FROM HCMP NO. 1833 OF 2004)

BETWEEN

SO WING KEUNG	Applicant
and	
SING TAO LIMITED	1st Respondent
HSU HIU YEE	2nd Respondent

Before : Hon Ma CJHC, Stuart-Moore V-P & Stock JA in Court

Dates of Hearing : 8, 9 and 13 September 2004

Date of Handing Down Judgment : 11 October 2004

J U D G M E N T

Hon Ma CJHC :

Introduction

1. The present appeal, listed and for the most part treated by the parties as a civil appeal, is from the decision of Hartmann J handed down on 10 August 2004 in which he set aside the ex parte decision of Stone J made on 23 July 2004 issuing search warrants to the Applicant allowing the Independent Commission Against Corruption ("the ICAC") to search the business premises of the 1st Respondent (Sing Tao Limited) and the home of the 2nd Respondent, a news editor of Sing Tao Daily. Costs were awarded to the Respondents. The application to Stone J was made under section 85 in Part XII of the Interpretation and General Clauses Ordinance, Cap.1 ("IGCO"). It was only the third time that such an application has been made in Hong Kong. The Applicant, So Wing Keung, is an investigator with the ICAC. In this judgment, I shall simply refer to the Applicant as the ICAC.

2. In order to understand the issues arising in this appeal, it is desirable first to set out the factual background. I take this largely from the judgment of Hartmann J, but would add some observations of my own.

3. The story begins on 9 July 2004 when a number of persons were arrested by the ICAC for suspected corruption offences under the Prevention of Bribery Ordinance, Cap.201 ("POBO"). One of the arrested persons agreed to assist the ICAC. This person was then put into a witness protection programme. Like the Judge, I shall hereinafter refer to this person simply as the Participant.

4. The reason for a person like the Participant to be put into a programme is obvious : - he is in the most vulnerable and dangerous of positions. It is not an exaggeration to say that persons protected under the witness protection programme face not just the possibility (and often the

probability) of imminent danger to their well-being and life, but this may continue perhaps for the rest of their life. This should not be lost sight of. The witness protection programme is governed by statute, namely the Witness Protection Ordinance, Cap.564 ("WPO"). The following provisions of this Ordinance are of note : -

(1) Section 3 establishes the witness protection programme under which the approving authority "arranges for or provides protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses." (emphasis added).

(2) In deciding whether or not a person (referred to in the Ordinance as a participant) is to be included in the witness protection programme, the approving authority must take into account the perceived danger to the witness : - see section 4(3). In other words, all participants in the witness protection programme share at least one characteristic : a perceived danger to their well-being.

(3) As part of the programme, the participant may have to assume a new identity : - see section 8(2). Specific provisions exist as to how the legal rights and obligations of a participant who has assumed a new identity are to be dealt with : - see section 9.

(4) Heavy penalties (understandably and necessarily) exist against any person who, without lawful authority or

> reasonable excuse, discloses information (a) about the identity or location of a person who is or has been a participant or who has been considered for inclusion in the witness protection programme or (b) that compromises the security of such a person : - see section 17(1). A contravention of this section attracts a maximum imprisonment of 10 years. Conviction can only be on indictment.

5. As can be seen from the provisions of WPO set out above and as the Judge said, it "is paramount therefore that the identity of a person in [the witness protection programme] is not allowed to pass into the public domain". Sadly, this is precisely what has happened in the present case and the instruments by which this was achieved were several newspapers, among them the 1st Respondent. By their actions (on which I shall presently elaborate), the Participant's name was disclosed to the world at large and thus this person's well-being could thereby well have been put in jeopardy. This apart, and speaking generally, the publication of the name of a participant causes the risk of undermining proceedings in train, as well as a danger of debilitating the future efficacy of witness protection schemes. As Mr Gerard McCoy, SC (for the Applicant) asked rhetorically : how could such a thing have happened?

6. The Participant was placed in a witness protection programme on 13 July 2004. That evening, lawyers acting on the instructions of people purporting to have spoken to the Participant, sought access to the Participant. When this was denied, on the following day, an application for a writ of habeas corpus was made to the Court of First Instance seeking the

Participant's release from ICAC custody. This application was heard by Hartmann J on 16 July 2004. He dismissed the application "being satisfied that the Participant was not in any form of custody nor was [the Participant] being in any way held against [the Participant's] will". A question mark thus arose in relation to the motives of those persons who had purportedly instigated the habeas corpus proceedings.

7. Details of the habeas corpus proceedings (which at one stage involved the Court of Appeal) were reported in the press, this notwithstanding that many of the relevant hearings were either in Chambers or in camera. As far as the 1st Respondent was concerned, newspaper reports surfaced on each of 14, 15 and 16 July 2004. We have had the relevant reports in the Sing Tao Daily included in the appeal bundle before us. Apart from identifying the relevant company which was at the centre of the investigation by the ICAC, the Participant was specifically named. Her full name was given. Not only that, the Participant's age, position within the company, area of residence and even the name of her friend were disclosed, as was the fact that the Participant was in a witness protection programme. The irony of these disclosures is that the article in the 16 July 2004 edition actually referred to the bar against disclosure of the name of a person in the witness protection programme.

8. The Court of Appeal, to which one aspect in the habeas corpus proceedings was referred, was so concerned about the press coverage to which I have referred that it convened a hearing to convey its concern and to hear counsel. Having heard counsel, the Court requested the Secretary for Justice to look into the matter and consider what appropriate action was

merited. The next day, further reports appeared in the press which repeated the fact that the Participant was in the witness protection programme.

9. The result of this were the investigations of the ICAC that form the immediate background to the search warrants issued by Stone J. Two suggested arrestable offences were involved. Hartmann J identified the offences and also said as follows : -

> "16. First, the ICAC was concerned that certain persons may have contravened s.17(1) of the Witness Protection Ordinance by revealing the identity of the participant. The clearest evidence of this lay in the published stories themselves. But the ICAC considered it necessary to ascertain not only which journalists had played a role in the publication of the news stories and their degree of involvement but who had disclosed forbidden information to those journalists.
>
> 17. Second, the ICAC was concerned that certain persons may have pursued the *habeas corpus* application not for the *bona fide* purpose of seeking the release of the participant from what they believed to be her unlawful detention but instead for the sinister purpose of intimidating the participant and thereby dissuading her from acting as a prosecution witness. If that was shown to have happened, it would constitute a conspiracy to pervert the course of public justice, one aspect of that conspiracy being the leaking of information concerning the identity of the participant to the press.
>
> 18. I pause at this juncture to record that the writ of *habeas corpus* was described more than two centuries ago as 'that noble badge of liberty which every subject ... wears'. Many say that it is one of the greatest creations of the common law, a shield from unlawful executive detention that is strapped to the arm of every subject from the most humble to the most grand. In my judgment, it cannot be disputed that it must overwhelmingly be in the public interest to prevent its perversion for criminal ends. Certainly, it was an issue which caused Stone J the deepest concern.
>
> 19. Having said that, it is to be emphasised that, when the application for the issue of the search warrants was made, counsel for the ICAC assured Stone J that no suggestion was being made that the newspapers themselves had in any way knowingly been complicit in a conspiracy to pervert the course of justice of the kind I have described. The verbatim transcript of the hearing makes that plain. It was conceded by counsel that, if there had been such a conspiracy, the press itself had been unwittingly used."

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10. The following points arising from these passages are of note : -

(1) The two suggested offences identified by the Judge - which I shall call the section 17 offence and the conspiracy to pervert the course of justice – are connected to one another. Aspects of the conspiracy to pervert the course of justice offence included the leaking of information concerning the Participant to the press, the motives for this and the persons responsible for it. These were precisely those aspects which the Judge regarded as being what the ICAC considered necessary to ascertain in relation to the section 17 offence.

(2) Both the Judge and Stone J regarded as extremely serious the possible use of habeas corpus proceedings (and, I might add, of the press) for criminal ends.

(3) The concession by counsel for the ICAC at the hearing before Stone J that the newspapers were not complicit in the conspiracy to pervert the course of justice offence, meant only that they were not suspected of "knowingly" being complicit. In other words, they had been "unwittingly [to the newspapers, that is] used".

11. With the above background, I now turn to the obtaining of the search warrants by the ICAC from Stone J and the subsequent hearing before Hartmann J.

The relevant statutory provisions

12. For the sake of convenience, I now set out some statutory provisions and Rules of the High Court that will have to be considered in this appeal.

13. Interpretation and General Clauses Ordinance, Cap.1 ("IGCO")

"**82. Meaning of 'journalistic material'**

(1) Subject to subsection (2), in this Part 'journalistic material' (新聞材料) means any material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Part if it is in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.

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84. Application for production order in respect of journalistic material

(1) A person on whom there is or may be conferred under a provision in any Ordinance, being a provision to which section 83 applies, the power to enter any premises and to search the premises or any person found on the premises or to seize any material, may apply to a judge of the Court of First Instance or District Court for an order under subsection (2) in relation to material which is known or suspected to be journalistic material.

(2) If on an application under subsection (1) a judge is satisfied that the conditions in subsection (3) are fulfilled he may make an order that the person who appears to be in possession of journalistic material specified in the application shall –

(a) produce it to the applicant to take away; or

(b) give the applicant access to it,

not later than the end of the period of 7 days from the date of the order or the end of such longer period as the order may specify.

(3) The conditions to be fulfilled for the purposes of subsection (2) are that –

(a) there are reasonable grounds for believing –

(i) that an arrestable offence has been committed;

(ii) that there is material which consists of or includes material known or suspected to be journalistic material on premises specified in the application;

(iii) that the material is likely to be –

(A) of substantial value to the investigation of the arrestable offence; or

(B) relevant evidence in proceedings for the arrestable offence;

(b) but for section 83 the applicant would be or could have been authorized under the provision mentioned in subsection (1) to enter onto the premises specified in the application and to search the premises or a person found on the premises or to seize the material specified in the application;

(c) other methods of obtaining the material –

(i) have been tried and failed; or

(ii) have not been tried because they were unlikely to succeed or would be likely to seriously prejudice the investigation; and

(d) There are reasonable grounds for believing that it is in the public interest that an order should be granted, having regard to –

(i) the benefit likely to accrue to the investigation; and

(ii) the circumstances under which a person in possession of the material holds it.

(4) An application for an order under subsection (2) shall be made inter partes.

(5) Any person who without reasonable cause fails to comply with an order made under subsection (2) commits an offence and is liable to a fine at level 6 and to imprisonment for 1 year.

85. Application for warrant to seize journalistic material

(1) A person on whom there is or may be conferred under a provision in any Ordinance, being a provision to which section 83 applies, the power to enter any premises and to search the premises or any person found on the premises or to seize any material, may apply to a judge of the Court of First Instance or District Court for the issue of a warrant under subsection (3) authorizing him to enter those premises for the purpose of searching for or seizing material which is known or suspected to be journalistic material.

(2) An application for a warrant under this section shall not be made unless it has been approved by a person specified in Schedule 7 to be a directorate disciplined officer.

(3) If on an application under subsection (1) a judge –

(a) is satisfied –

(i) that the conditions specified in section 84(3)(a), (c) and (d)(i) are fulfilled; and

(ii) that one of the further conditions set out in subsection (5) is also fulfilled; or

(b) is satisfied that an order under section 84 relating to the material has not been complied with,

he may, subject to subsection (4), issue a warrant authorizing the applicant to enter onto the premises and to search the premises and any person found on the premises and to seize any material.

(4) A warrant issued under subsection (3) shall not authorize any entry, search or seizure other than such entry, search or seizure as, but for section 83, would be or could have been authorized under the provision mentioned in subsection (1).

(5) The further conditions mentioned in subsection (3)(a)(ii) are –

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises to which the application relates;

(b) that while it might be practicable to communicate with a person entitled to grant entry to the premises, it is not practicable to communicate with any person entitled to grant access to the material;

(c) that service of notice of an application for an order under section 84(2) may seriously prejudice the investigation.

(6) Subject to subsection (7), it shall be a term of any warrant issued under this section that a person who seizes journalistic material pursuant to the warrant shall seal the material upon seizure and shall hold the sealed material until otherwise authorized or required under section 87.

(7) Subsection (6) shall not apply where the judge is satisfied that there may be serious prejudice to the investigation if the applicant is not permitted to have immediate access to the material.

(8) Any person empowered by a warrant issued under this section may –

(a) use such force as may be necessary to enter the premises specified in the warrant;

(b) on the premises, seize such material, including journalistic material, as may be found and as but for section 83 he would be or could have been authorized under the provision mentioned in subsection (1) to take possession of;

(c) detain for a reasonable period any person found on the premises who may have such material in his possession or under his control and who if not so detained may prejudice the purpose of the search.

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87. Procedure in relation to sealed material

(1) A person from whom journalistic material has been seized pursuant to a warrant issued under section 85, other than a warrant to which subsection (7) of that section applies, or a person claiming to be

the owner of such material, may within 3 days of such seizure apply to the court from which the warrant was issued for an order under subsection (2).

(2) On an application under subsection (1), unless the judge is satisfied that it would be in the public interest that the material be made use of for the purposes of the investigation, he shall order that the material be immediately returned to the person from whom it was seized; and in making a determination under this subsection the judge shall have regard to, among other things, the circumstances under which the material was being held at the time of its seizure.

(3) If on an application under subsection (1) the judge determines not to grant an order under subsection (2), or where no application has been made under subsection (1) within the period specified in that subsection, the material may be unsealed.

(4) For the purpose of determining an application under subsection (1) a judge may require the person who seized the material to produce it to the judge for examination by him.

(5) An application for an order under subsection (1) shall be made inter partes.

…..

89. Miscellaneous

(1) The costs of any application under this Part and of anything done or to be done in pursuance of an order made under it shall be at the discretion of the judge.

(2) For the avoidance of doubt, it is declared that nothing in this Part shall be construed as requiring a judge to make an order under this Part where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order.

(3) Unless a judge otherwise directs, proceedings inter partes under this Part shall be held in open court.

(4) Rules of court may provide for the practice and procedure applying to proceedings under this Part."

14. <u>High Court Ordinance, Cap.4 ("HCO")</u>

"**13. Jurisdiction of Court of Appeal**

(1) The Court of Appeal shall be a superior court of record.

(2) The civil jurisdiction of the Court of Appeal shall consist of –

(a) appeals from any judgment or order of the Court of First Instance in any civil cause or matter;

(b) appeals under section 63 of the District Court Ordinance (Cap.336); and

(c) any other jurisdiction conferred on it by any law.

(3) The criminal jurisdiction of the Court of Appeal shall consist of –

(a) appeals from the Court of First Instance or District Court under Part IV of the Criminal Procedure Ordinance (Cap.221);

(aa) appeals from a judgment or order of the Court of First Instance given or made in the exercise of the powers conferred on it under section 21I(1) and relating to a criminal cause or matter;

(b) the consideration of questions of law reserved under section 81(1) of the Criminal Procedure Ordinance (Cap.221);

(c) the consideration of –

(i) applications by the Secretary for Justice for the review of any sentence under section 81A(1) of the Criminal Procedure Ordinance (Cap.221);

(ii) references by the Secretary for Justice of questions of law under section 81D of the Criminal Procedure Ordinance (Cap.221);

(d) appeals by way of case stated from the District Court under section 84 of the District Court Ordinance (Cap.336); and

(e) any other jurisdiction conferred on it by any law.

(4) For the purposes of and incidental to –

(a) the hearing and determination of any appeal to the Court of Appeal; and

(b) the amendment, execution and enforcement of any judgment or order made on such an appeal,

the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought.

(5) Any provision in this or any other Ordinance which authorizes or requires the taking of any steps for the execution or enforcement of a judgment or order of the Court of First Instance applies in relation to a judgment or order of the Court of Appeal as it applies in relation to a judgment or order of the Court of First Instance."

15. Independent Commission Against Corruption Ordinance, Cap.204 ("ICACO")

"**10. Power of arrest**

(2) Where, during an investigation by the Commission of a suspected offence under the Prevention of Bribery Ordinance (Cap.201) or of a suspected offence under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554), another offence is disclosed, any such officer may without warrant arrest a person if he reasonably suspects that such person is guilty of that other offence and –

(a) he reasonably suspects that such other offence was connected with, or that either directly or indirectly its commission was facilitated by, the suspected offence under the Prevention of Bribery Ordinance (Cap.201) or the suspected offence under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554) as the case may be; or

(b) the other offence is one which is specified for the purposes of this subsection in subsection (5).

…..

(3) Any such officer –

(a) may use such force as is reasonable in the circumstances in effecting an arrest under subsection (1) or (2); and

(b) may, for the purpose of effecting such an arrest, enter and search any premises or place if he has reason to believe that there is in the premises or place a person who is to be so arrested.

(4) No premises or place shall be entered under subsection (3) unless the officer has first stated that he is an officer and the purpose for which he seeks entry and produced his warrant card to any person

requesting its production, but subject as aforesaid any such officer may enter any such premises or place by force, if necessary.

(5) The following offences are specified for the purposes of subsection (2) –

(a) the offence of perverting or obstructing the course of justice;

(aa) ……"

16. Witness Protection Ordinance, Cap.564 ("WPO")

"**17. Offences**

(1) A person shall not, without lawful authority or reasonable excuse, disclose information –

(a) about the identity or location of a person who is or has been a participant or who has been considered for inclusion in the witness protection programme; or

(b) that compromises the security of such a person.

(2) …

(3) …

(4) A person who contravenes –

(a) subsection (1) commits an offence and is liable on conviction on indictment to imprisonment for 10 years;

(b) …"

17. Rules of the High Court, Cap.4

O.1, r.2(3)

"(3) These rules shall not have effect in relation to any criminal proceedings other than any criminal proceedings to which Order 53, Order 59, Order 62, Order 70, Order 115, Order 116, Order 117, Order 118 or Order 119 applies."

O.32, r.6

"6. The Court may set aside an order made ex parte."

O.118, r.1

"**Interpretation (O.118, r.1)**

1. In this Order 'the Ordinance' (條例) means the Interpretation and General Clauses Ordinance (Cap.1), and a section referred to by number means the section so numbered in the Ordinance,"

O.118, r.2

"**Application (O.118, r.2)**

2. This Order applies to proceedings under sections 84, 85 and 87."

O.118, r.3

"**Proceedings under section 84 (O.118, r.3)**

3.(1) An application for an order under section 84 shall be made by originating summons in the expedited form supported by affidavit.

(2) The affidavit shall contain the evidence relied on to show that the conditions set out in section 84(3) have been fulfilled.

(3) Unless the court otherwise directs, the affidavit may contain statements of information or belief with the sources and grounds of such information or belief.

(4) Notwithstanding Order 28, rule 1A, a copy of the originating summons and affidavit shall be served on the respondent not less than 3 clear days before the date fixed for the hearing of the application."

O.118, r.4

"**Proceedings under section 85 (O.118, r.4)**

4.(1) An application for a warrant under section 85 shall be made ex parte by originating summons supported by affidavit.

(2) The affidavit shall –

(a) state which of the grounds set out in section 85 is relied on;

(b) contain the evidence relied on in support of those grounds; and

(c) specify the name, rank, title and address of the officer who has approved the making of the application.

(3) Unless the court otherwise directs, the affidavit may contain statements of information or belief with the sources and grounds of such information or belief.

(4) All applications under section 85 shall be heard in chambers."

O.118, r.5

"**Proceedings under section 87 (O.118, r.5)**

5.(1) An application for an order under section 87 shall be made by summons which may be supported by affidavit.

(2) The summons shall set out the grounds on which the applicant relies.

(3) A copy of the summons and affidavit (if any) shall be served on the person named in the warrant pursuant to section 86(1)(a) by delivering it to him not less than 3 clear days before the date fixed for the hearing of the summons.

(4) Unless the court otherwise directs, a party wishing to adduce evidence shall do so by affidavit, and such affidavit may contain statements of information or belief with the sources and grounds of such information or belief."

The obtaining of the search warrants and the hearing before Stone J

18. On 23 July 2004, two search warrants in the following terms were issued by Stone J relating to both Respondents : -

"**IT IS ORDERED THAT :**

(1) You and any other investigating officer of the Independent Commission Against Corruption are authorized to enter, by force if necessary, the specified premises or place namely :

offices of …..

And to search for and seize any photographs, negatives, documents, articles or objects, or any records of data processed or stored in a computer or other electronic devices in relation to the articles published in 'Sing Tao Daily' dated 14.7.2004, 15.7.2004 and 16.7.2004, which is material that consists of or includes journalistic material which is likely to be of substantial value to the investigation of arrestable offences, namely conspiracy to pervert the course of public justice contrary to common law and unlawful disclosure of information about the identity of a person who is a participant in the witness protection programme contrary to section 17(1) of the Witness Protection Ordinance, Cap.564, and which you have reason to believe to be or to contain evidence of those offences.

(2) It is a condition of this search warrant that any journalistic material seized shall be sealed upon seizure and the sealed material be held until otherwise authorized or required under section 87 of the Ordinance.

(3) Any person from whom journalistic material is seized under this warrant or a person who is an owner of such material may apply within 3 days of its seizure under section 87 for the immediate return of such material. Failure to so apply will result in the material being unsealed."

19. The search warrants were issued following a hearing before Stone J that stretched from 12:11 pm to 4:11 pm, with a lunch break which he used to study the legislation and the papers. We have read the transcript of the proceedings (although this has not been made available to the parties). With respect to Stone J, he conducted an extremely thorough examination of the ICAC's application, frequently asking very searching questions and demonstrating the need to tread very carefully given the nature of the application before him (search warrants to search journalists' premises and seize journalistic material). Hartmann J described the hearing before Stone J as being "robust and lengthy", "long and arduous". In the end, he issued the search warrants despite being "drawn reluctantly" to this determination, but would not allow the ICAC immediate access to any materials that might be

seized thereunder. He ordered that any seized materials be sealed in compliance with section 85(6) IGCO.

20. I should mention that the basis for the ICAC's application for the search warrants was contained in an affirmation of the Applicant, who, as identified above, was an investigator with the ICAC. This affirmation, running to some 13 pages and 36 paragraphs, was described by Hartmann J as "certainly no standard format document" and "painstaking in its detail". It was not in the agreed bundle used in the present appeal since, according to the Applicant, public interest immunity attached to it. For reasons that I will elaborate on below, this Court has read the affirmation for itself even though the parties could not refer to it (and in the Respondents' case, they had not even seen it).

21. On 24 July 2004, the two search warrants were executed by the ICAC on the relevant premises and various materials were seized and, following Stone J's direction to this effect, sealed. We have been told that execution followed a refusal voluntarily to hand over the material. It was subsequent to this search and seizure that the Respondents moved to set aside the search warrants.

The hearing before Hartmann J and the judgment below

22. By a summons dated 27 July 2004, within three days of the seizure, the Respondents applied under RHC O.32 r.6, O.118 r.5 and the Court's inherent jurisdiction to set aside the search warrants and for the return of the journalistic materials seized by the ICAC. The grounds for setting aside were that the requirements under section 85(3) and/or (5) had

not been met. The grounds in support of the application for the return of the seized materials (under section 87 IGCO) were that (a) it was unnecessary for the ICAC to have proceeded under section 85 IGCO (when a less intrusive way was open to them, namely an application under section 84); and (b) the seized materials were neither valuable nor relevant to the investigation of arrestable offences and in the circumstances, it was not in the public interest that they should be permitted to be used by the ICAC.

23. The hearing of the application took place before Hartmann J on 2 and 4 August 2004. In his judgment handed down on 10 August 2004, he set aside the search warrants under O.32 r.6. In the light of this, he considered it unnecessary to make a decision in relation to the application for the return of the materials under section 87 IGCO.

24. The Judge arrived at this decision essentially for the following reasons : -

(1) He held that he had the necessary jurisdiction under O.32 r.6 to hear and determine the summons to set aside Stone J's issue of the search warrants. The Judge was of the view that the decision of Stone J to issue the warrants was an "order" in civil proceedings to which O.32 r.6 applied. In adopting this reasoning, Hartmann J rejected the ICAC's contention that as the issue of search warrants was a "criminal proceeding inherent to the criminal investigative process", that order had no application. The Judge was of the view that notwithstanding the fact that proceedings governed by O.118 were criminal

proceedings, the Rules of the High Court (including therefore O.1 r.6) applied to such proceedings by reason of O.1 r.2(3). He derived support in his view from the obiter remarks of Keith JA in *Apple Daily Ltd. v Commissioner of the Independent Commission Against Corruption (No.2)* [2000] 1 HKLRD 647, at 657A-658H. Neither of the other members of the court (Chan CJHC and Nazareth VP) dealt with this point.

(2) Having assumed jurisdiction, the Judge then examined the material before him to determine whether the requirements of section 85 IGCO had been met. He had before him the affirmation that had been used by the ICAC before Stone J even though, by reason of public interest immunity, it could not be revealed to the Respondents. He also looked at the transcript of the hearing before Stone J although the parties before him did not. The Judge reached the conclusion that on the materials before him, the ICAC had not made out a sufficient case for search warrants to be issued under section 85 IGCO.

(3) In arriving at the conclusion that the ICAC had not made out a case under section 85, the Judge referred to the requirements of that provision and also to various legal principles. He suggested 7 legal principles governing section 85 applications : -

"65. In so far as they apply to *ex parte* applications for the issue of warrants to search for and seize 'excluded' or 'special procedure' material, the English authorities establish the principles which I set out below. As I have indicated earlier in this judgment, I am of the view that these principles apply equally to applications made to our courts for the issue of search warrants pursuant to s.85 of Part XII of the Ordinance. The principles may be summarised as follows :

(i) An application for a search warrant constitutes a serious intrusion upon the freedom of the press. The responsibility for ensuring that the procedure is not abused lies with the courts and it is of cardinal importance that judges should be scrupulous in discharging that responsibility. See *R v. Maidstone Crown Court, ex parte Waitt* [1988] Crim LR 384.

(ii) The issue of a search warrant constitutes the exercise of a draconian power and it is therefore for the judge to satisfy himself that there are reasonable grounds for believing the various matters set out in the supporting affidavit. The fact that an investigating officer, who has been investigating the matter, states in the affidavit that he considers that there are reasonable grounds is not enough. The judge must himself be satisfied. See *R v. Southampton Crown Court, ex parte J and P* (unreported) CO/1421/1992-Lexis Transcript, page 17, citing with approval the observations of Parker LJ in *R v. Guildhall Magistrates Court, ex parte Primlaks Holding Co. (Panama) Inc.* [1990] 1 QB 261.

(iii) An application for a search warrant should not be a matter of common form; the preferred method should be by way of giving notice to seek a production order. See *R v. Lewes Crown Court, ex parte Nigel Weller & Co.* (unreported) CO/2890/1998-Lexis Transcript.

(iv) The fact that the staff of a newspaper or journalists believed to be in possession of journalistic material may themselves be under investigation for the commission of criminal offences is not of itself necessarily a sufficient reason for a judge issuing a warrant. See *R v. Southampton Crown Court, ex parte J and P* (*supra*), per Auld J :

> 'the fact that a solicitor is himself under investigation is not of itself necessarily a sufficient reason for ordering such an

> intrusion into his affairs and those of his clients. All the circumstances of the individual application must be taken into account, including, for example, the seriousness of the matter being investigated, the evidence already available to the police to found a prosecution based on it, and the extent to which the solicitor has already been put on notice of interest on his affairs such as might have caused him to hide or destroy or otherwise interfere with incriminating documents.'

(v) The risk that journalistic material may be hidden or destroyed must be a 'real risk', which is the phrase I prefer, or, as the court accepted in *R v. Leeds Crown Court, ex parte Switlaski* (unreported) CO/1322/89-Lexis Transcript, should amount to a 'substantial probability'. A judge should not issue a warrant unless material is placed before him demonstrating that in the particular case, if notice is given, there is a real risk, as opposed to a mere possibility, that the journalistic material will be hidden or destroyed. See, for example, *R v. Central Criminal Court, ex parte Propend Finance Property Ltd & Another* [1996] 2 Cr.App.R.26 at 30 :

> '... the Commonwealth of Australia is prepared to consent to an order of *certiorari* quashing the issue of the warrants, and no party now before the court contends that they were rightly issued. The principal reason why this is accepted, and the only aspect of the grounds into which we need travel at all, is that this was not a proper case for an order to be made *ex parte*. That is because, in essence, there was no material placed before the learned judge which was capable of demonstrating that there was any risk that, if served with an *inter partes* notice, either the solicitors or the accountants would have so misbehaved as to destroy all the documents ... In effect, Judge Goddard Q.C. had nothing but the assertion of a long-standing association between the clients and the firms as a basis

upon which to issue an *ex parte* order. That was manifestly not enough.'

(vi) In determining an application made under s.85, a judge should give reasons for his decision even though they need not be elaborate. See, for example; *R v. Central Criminal Court, ex parte Propend Finance Property Ltd* (supra) :

> ' The learned judge then proceeded to order the warrants. She gave no reasons for her decision. With respect to her, she should have done so. That is not only because generally judges should always give reasons for what they do, but in particular because she was here exercising a draconian jurisdiction.'

(vii) An applicant who seeks the issue of a warrant under s.85 of Part XII must act in the utmost good faith and disclose to the court all matters which need to be taken into account by the court in deciding whether or not to grant relief *ex parte*, and if so, on what terms. In this respect, an applicant is in the same position as an applicant seeking an *Anton Piller* order. See *Gross and Others v. Southwark Crown Court and Others* (unreported) CO/1759/98-Lexis Transcript :

> 'The remaining criticisms of the application concern the lack of full and frank disclosure. The procedure ... has been correctly likened to the *Anton Piller* orders in the civil jurisdiction, and there is abundant authority that it is the duty of the applying party to make the fullest disclosure of all facts which may be relevant, whether those facts are favourable to him or adverse.'"

(4) The Judge took the view that had Stone J's attention been drawn to the legal authorities that contained these 7 suggested principles, it was highly unlikely that he (Stone J) would have issued the search warrants. The failure to draw Stone J's attention to relevant authorities

was ascribed by the Judge to counsel for the ICAC. This was held by Hartmann J to be a failure to make full and frank disclosure, although not a deliberate one.

(5) On the facts, the Judge took the view that it had simply not been demonstrated by the ICAC that there was a real risk of the Respondents destroying the journalistic materials sought in the investigation. This being the burden on the ICAC, the Judge said, "I fail utterly to see how that was demonstrated or could have been demonstrated".

(6) In summary, the Judge said this : -

> "71. In all the circumstances, I have no doubt in my mind that on this occasion the ICAC was wrong in fact and in law in seeking the issue of search warrants when, in terms of the statutory scheme contained within Part XII of the Ordinance, it could equally have achieved it legitimate aim by less intrusive measures. The search warrants must therefore be set aside in terms of O.32, r.6."

25. It is from this decision that the ICAC has appealed in the present case. The appeal was, as I have already stated, marked as a civil appeal.

The issues in the appeal

26. The issues for this Court's determination arising from the Notice of Appeal, Respondents' Notice and counsel's submissions, can be identified as follows : -

(1) It was submitted by the Respondents that this Court had no jurisdiction to entertain the present appeal because this was not an appeal, it is said, from a judgment or order in a civil cause or matter and because none of the situations specified under section 13(3) of the HCO which delineate the criminal jurisdiction of this Court, applies. In order to resolve this question, it is necessary to determine whether the proceedings before Hartmann J were civil, failing which whether section 13(3) of the HCO can confer jurisdiction. (**Issue 1 : The jurisdiction of this Court to hear the appeal**).

(2) Mr Philip Dykes, SC (for the Respondents) also submitted that the present appeal was in any event academic and therefore should not be entertained for that reason as well. The basis for this submission was that all the materials that were seized during the searches made by the ICAC under the search warrants have now been made available to them. Accordingly, Mr Dykes submitted, there is nothing to be gained whichever way the present appeal was decided. (**Issue 2 : Is the appeal academic?**)

(3) On the assumption that the Court of Appeal had jurisdiction to hear the present appeal and that it was not academic to do so, Mr McCoy argued that Hartmann J was wrong, both in law and fact, to decide the matter as he did. In brief, the Judge had erred :-

(a) By assuming jurisdiction to set aside Stone J's order of 23 July 2004 under O.32 r.6 when no such jurisdiction existed. (**Issue 3 : Jurisdiction to set aside under O.32 r.6 or the Court's inherent jurisdiction**).

(b) In any event on the facts by holding that there was no justification for search warrants to be issued under section 85 IGCO. (**Issue 4 : Was there justification to issue the search warrants in the present case?**)

27. Although a number of sub-issues arose within these issues, they are the main ones. I will now deal with them in turn.

Issue 1 : The jurisdiction of this Court to hear the appeal

28. I have already mentioned the fact that the present appeal was listed as a civil appeal. This was also how both parties treated it when the Notice of Appeal and Respondents' Notice was served. However, the day before the hearing began on 8 September 2004, Mr Dykes served a skeleton submission in which the jurisdiction of this Court to hear the present appeal was questioned.

29. Mr Dykes' arguments were basically as follows : -

(1) Section 13(2) HCO sets out the jurisdiction of the Court of Appeal to hear appeals in civil matters. As section 13(2)(a) states, the civil jurisdiction of the Court of Appeal is to hear appeals from any judgment or order of the Court of First Instance in any "civil cause or matter". In order to determine whether or not a judgment or order of the Court of First Instance was made in a civil cause or matter, one had to look at the nature and substance of the matter underlying the particular judgment or order under appeal. Reliance was here placed on the decision of the Court of Appeal in *Attorney General v Alick Au Shui-yuen* [1992] 1 HKLR 88 and that of the English Court of Appeal in *Bonalumi v Secretary of State for the Home Department and another* [1985] 1 All ER 797. Accordingly, if the nature and substance of the matter underlying the decision sought to be appealed from, was criminal rather than civil, then it was to the criminal jurisdiction of the Court of Appeal that one had to look in order to found jurisdiction. The criminal jurisdiction of the Court of Appeal is of course set out in section 13(3) of the HCO.

(2) The application made by the ICAC for search warrants under section 85 of the IGCO were essentially criminal proceedings. So were the proceedings before Hartmann J in which the Respondents sought to set aside the issue of

the search warrants. Both proceedings concerned the investigation into alleged crimes and were therefore quite clearly criminal in nature. Mr Dykes referred to *George Tan Soon-gin v His Honour Judge Cameron and Another* [1992] 1 HKLR 149 (Court of Appeal) and [1992] 2 AC 205 (Judicial Committee of the Privy Council), where it was held that an application for judicial review made in the context of underlying criminal proceedings could not give rise to any appeal to the Court of Appeal since it was not a civil cause or matter. He also referred to the decision of the Canadian Supreme Court in *Knox Contracting Ltd v The Queen* (1990) 58 CCC 65, in which it was held that proceedings for the issue of a search warrant were criminal in nature.

(3) If he were correct in this analysis so far, Mr Dykes submitted that the Court of Appeal simply had no jurisdiction in the present case to entertain the appeal, and that remained the case even if the Judge below himself assumed a jurisdiction which he did not possess. Nothing in section 13(3) gave the Court the necessary jurisdiction and, as the Court of Appeal was a creature of statute whose jurisdiction was clearly set out in the HCO, the absence of an express jurisdiction was fatal.

30. Mr McCoy countered these arguments in the following way : -

(1) Generally, where the Court of First Instance has acted without jurisdiction, the Court of Appeal had an inherent jurisdiction to set aside the judgment or decision below. This inherent jurisdiction existed by reason of the Court of Appeal being a superior court of record (section 13(1) HCO). It had jurisdiction by reason also of section 13(3)(e) HCO. Mr McCoy relied on *R v Stuchiner* [1997] 2 HKC 271 as an example where this inherent jurisdiction was utilized by the Court of Appeal. There, Litton VP referred to this court as being "a superior court of unlimited jurisdiction" : - see 274F. *Killenny Ltd & Ors v Attorney General* [1996] 1 HKC 30 was also cited to us as an example where the Court of Appeal set aside the order of the court below by reason of an absence of jurisdiction.

(2) Next, in order to support his contention that the present appeal arose from a decision of the Court of First Instance in a civil cause or matter, Mr McCoy approached the matter from the opposite end. He tried to persuade us that as the present proceedings were <u>not</u> criminal proceedings, they must therefore have involved a civil cause or matter. Here he relied on various speeches in the decision of the House of Lords in *R (McCann and others) v Crown Court at Manchester and another* [2003] 1 AC 787. It was argued that in order for criminal proceedings to exist,

there had first to be a formal accusation of a breach of criminal law (in other words, an information laid or a charge preferred) with the consequence that, if the breach was proved and the proceedings prosecuted to their conclusion, penal consequences would result : - see the speeches of Lord Steyn at 808 (paragraph 22), Lord Hope of Craighead at 816-7 (paragraph 54), Lord Hutton at 828-830 (paragraph 93-95).

(3) Applying this test, Mr McCoy accordingly submitted that the section 85 application for a search warrant involved civil, not criminal, proceedings. There was at that stage no formal accusation of a breach of the criminal law (in other words, no charges were laid) and the conclusion of the section 85 proceedings did not (and could not) result in the conviction of anyone or the imposition of penal consequences.

(4) Reference was also made to the obiter observations of Keith JA in *Apple Daily Ltd* at 658C where he said : -

> "But as a matter of principle, I would be surprised if an application for a warrant, whose purpose was to render lawful acts which would otherwise amount to *civil* wrongs, i.e. trespass to land and detinue, would be regarded as an application made in *criminal* proceedings, simply because the execution of the warrant might result in the discovery of materials which might be used in a criminal prosecution."

These observations were made to reinforce the view that O.32 r.6 was an available procedure to set aside the search

warrant. This aspect will of course be dealt with under Issue 3.

31. In my view, this Court does not have the jurisdiction to hear the present appeal : -

(1) The jurisdiction of the Court of Appeal to hear both civil and criminal appeals is circumscribed by the provisions of section 13 HCO. There is no inherent jurisdiction to hear appeals outside of what is prescribed by statute. This is by no means a startling proposition. In *George Tan Soon-gin,* Silke VP said at 177, "We are a creature of Statute and we are bound within the confines of the appropriate legislation". In the same case in the Judicial Committee of the Privy Council, Lord Mustill, delivering the opinion of the Board, said at 217A-B, "The Court of Appeal in Hong Kong has both a civil and a criminal jurisdiction, each defined and limited by section 3 of the Supreme Court Ordinance [now the HCO]". This reflects the position in England as well. We were referred by Mr Dykes to the decision of the House of Lords in *In re Racal Communications Ltd* [1981] AC 374. Further, in one of the authorities provided to us by Mr McCoy, *Taylor and another v Lawrence and another* [2003] QB 528, it was said by Lord Woolf (presiding in that case in a Court of Appeal comprising five judges including the Master of the Rolls) at 538 (paragraph 16) :

> "Accordingly, it is accepted that the Court of Appeal does not have any inherent jurisdiction in respect of appeals from the county court but only that which is given by statute. However, the use of the word 'inherent' in this context means no more than that the Court of Appeal's jurisdiction depends on statute and it has no originating jurisdiction. The position is very much the same in relation to other appeals to the Court of Appeal. Its jurisdiction is to be determined solely by reference to the relevant statutory provisions."

(2) Notwithstanding the above, does an inherent jurisdiction exist nevertheless giving the Court of Appeal jurisdiction to hear appeals in situations not referred to in section 13? It is not necessary to enter into a discussion of what is meant generally by the term 'inherent jurisdiction'. For an erudite discussion of this concept, see the well known article "The Inherent Jurisdiction of the Court" by I H Jacob (1970) Current Legal Problems 23. It is necessary, however, to recognize the limits of the inherent jurisdiction when the jurisdiction of the court is defined by statute. Here, there is no room for a court to exercise any jurisdiction to hear a case when its jurisdiction has already been defined by statute. In other words, where a statutory provision delineates the jurisdiction of a court, that court cannot assume a jurisdiction that is outside the statutory scheme. The cases referred to in the previous paragraph (and we are bound by some of them) seem exactly to confirm this point. Obviously, the Court will have the full armoury of powers <u>within</u> that jurisdiction to do what is necessary, whether such powers derive from statute or its inherent

jurisdiction, but it cannot exercise a jurisdiction it does not have.

(3) As to Mr McCoy's point that the Court of Appeal, as a superior court of record, must have an inherent jurisdiction to overturn a lower court's order or decision if that has been reached without jurisdiction, I do not see any distinction between such a situation and that where it is said that the court below has erred, whether on fact or law. Quite simply, whether or not the Court of Appeal can hear an appeal from a lower court depends on the wording of the statute that defines its jurisdiction. As will presently be seen, it has unfortunate consequences in the present case where the Judge has, in my view, himself acted in excess of jurisdiction.

(4) Although in *Stuchiner*, Litton VP referred to this Court as a "superior court of unlimited jurisdiction", it is clear, when that statement is read in context, that all the Vice-President was saying was that the Court of Appeal had an inherent jurisdiction to do everything necessary within the jurisdiction it already had, even though the statutory rules were silent on the court's powers. As for *Killenny*, that case is upon analysis no more than an example where the Court of Appeal set aside the decision below which was reached without jurisdiction. There was never any question that the Court of Appeal itself did not

possess the requisite jurisdiction to hear the appeal. It obviously did, since it arose in a civil cause or matter.

(5) The value of *Killenny*, rather, is more for the trite proposition that where a court or tribunal does not have the necessary jurisdiction, the parties cannot consent to jurisdiction being granted. Nor can it be conferred either by the operation of doctrines such as estoppel or waiver which might otherwise prevent a party from asserting his legal rights. In the present case, it is notable that both sides were content to treat the present appeal as a civil one and the jurisdiction point was one that was raised late in the day. I mention this not as a criticism of the Respondents (quite the contrary, as this point is an important one that had to be resolved) but merely to emphasize the point on jurisdiction discussed so far.

(6) The critical question is whether the present appeal is from a judgment or order of the Court of First Instance in a civil cause or matter : - cf section 13(2)(a). The criminal jurisdiction of the Court of Appeal is not engaged, for the subject matter of the present appeal does not fall within any of the provisions of section 13(3)(a) to (d). Mr McCoy argued that the appeal could come within section 13(3)(e) (“any other jurisdiction conferred on it by law”) but I think Mr Dykes is correct when he says that this relates only to appeals where an express provision to this effect exists in a statute.

(7) The question whether or not an appeal arises from a judgment or order in a civil cause or matter, was expressly dealt with in *George Tan Soon-gin* by both the Court of Appeal and the Judicial Committee of the Privy Council. The applicable principles from that case can be stated as follows : -

(a) In order to see whether an appeal comes from a judgment or order in a civil cause or matter, one must have regard to the nature of the cause or matter in which the appeal is brought : - see the opinion of Lord Mustill at 221B.

(b) The term "cause or matter" is a reference to the proceedings underlying the particular judgment or order sought to be appealed : - see here *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 at 159-60 per Lord Wright. Silke VP in the Court of Appeal in *George Tan Soon-gin* (in a passage cited with approval by the Privy Council) used the term "root" in posing the question whether or not proceedings were criminal or civil : - see 177. Thus, in *George Tan Soon-gin*, where the matter sought to be appealed was a decision of the District Court on an application to stay the prosecution of criminal charges, it was held that the relevant cause or

matter were the underlying criminal proceedings (being the trial of the accused in that case on various charges).

(c) Where the nature of a cause or matter is criminal rather than civil, it does not lose this characteristic merely because at one stage or another, techniques are employed which closely resemble those used in civil matters : - see *George Tan Soon-gin* at 221B-C. For example, in *Alick Au Shui-yuen*, the immediate judgment or order sought to be appealed was a decision in judicial review proceedings, although the underlying cause or matter were criminal proceedings.

(8) The above statement of the principles arising from *George Tan Soon-gin* do not, however, answer the fundamental question, crucial in the present case, as to how one is to determine whether the "nature" of a cause or matter is civil or criminal. On one view, the nature of a cause or matter (the underlying proceedings) can only be criminal where (borrowing the words of Lord Wright in *Amand* at 162) it is one "which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment".

(9) This view is said to find support from the case of *McCann* which was heavily relied on by Mr McCoy. In that case,

the House of Lords had to determine whether the making of what were commonly known as anti-social behaviour orders under the Crime and Disorder Act 1998 were civil or criminal proceedings. Such orders, made by magistrates, prohibited persons who have acted in an anti-social way from doing certain things (for example, from entering certain areas of a city). Anti-social behaviour could include criminal activities but, importantly, not necessarily so. In addition, the making of such an order did not involve any criminal sanctions, although the breach of such an order, could. Instead, what was involved in the making of such orders was essentially the granting of the civil remedy of an injunction against the anti-social person : - see 806 at paragraph 18. The House of Lords accordingly held that the making of anti-social orders involved civil, not criminal, proceedings. It is pertinent to note that the House of Lords had to consider this question in the context of the following provisions : -

(a) First, Article 6 of the European Convention which stipulated a number of requirements for persons charged with criminal offences (such as the presumption of innocence and the right to a public hearing within a reasonable time).

(b) Secondly, the Civil Evidence Act 1995 and the Magistrates Courts (Hearsay Evidence in Civil

Proceedings) Rules 1999 concerning the use of hearsay evidence.

(c) Thirdly, section 1(1) of the Administration of Justice Act 1960 providing for appeals from the High Court to the House of Lords "in any criminal cause or matter". In arriving at its conclusions, the House of Lords made statements as to what would constitute criminal proceedings or a "criminal cause or matter". I have already referred to the relevant passages in paragraph 30(2) above.

(10) Attractive though this view (expressed in paragraph (8) above) is, I regret I do not agree with it. Nor do I think that it was the intention of the Judicial Committee of the Privy Council in *George Tan Soon-gin* to restrict the inquiry as to the nature of the relevant cause or matter in this narrow way. While no doubt the presence of underlying criminal proceedings where the relevant accused faces the possibility of a conviction on a criminal charge and of being punished for it, will certainly mean that the "cause or matter" is criminal and not civil, this I believe merely to be an example (albeit a classic one) and not exhaustive. Further, in my view, the House of Lords in *McCann*, in those passages already referred to, was not seeking to lay down an exhaustive definition of criminal proceedings or a criminal cause or matter. These statements were made in the particular context before the

House of Lords. It was expressly recognized that the term "criminal cause or matter " may bear a different meaning when interpreted in the context of the existence of appellate jurisdiction : see the speech of Lord Steyn at 807 (paragraph 21).

(11) In ascertaining the nature of the underlying cause or matter in which the judgment or order under appeal is brought, one must, I believe, adopt a flexible approach with some degree of commonsense. The analysis should involve looking at the object and purpose of the relevant cause or matter. A cause or matter that has as its object or purpose the possible conviction of a person on a criminal charge is an *a fortiori* situation where the nature is without doubt criminal, but this is not the only situation. Where, for example, an order was sought for the production of various documents which constituted "special procedure material" under the terms of the Police and Criminal Evidence Act 1984 ("PACE") in order to assist a criminal investigation (these being proceedings similar to those under section 84 IGCO), it was held by the English Court of Appeal that these proceedings were a criminal cause or matter for the purpose of section 18(1)(a) of the Supreme Court Act 1981 (which barred appeals to the Court of Appeal in relation to any judgment of the High Court in a "criminal cause or matter") : - see *Carr and Others v Atkins* [1987] 1 QB 963. This was so even where criminal proceedings had not yet

begun : - see 968C-E per Lord Donaldson of Lymington. In the same case, Stephen Brown LJ agreed with the judgment of the Master of the Rolls and added at 971C :

> "The criminal investigation is, in my judgment, the basis of the application in the instant case. This is undoubtedly, in my view, a criminal cause or matter, and to hold otherwise would render the administration of this Act [PACE] well nigh impracticable".

I pause here to note that *Carr and Others v Atkins* was one of the authorities referred to by Lord Mustill (without any disapproval) in *George Tan Soon-gin* : - see 218H-219A. This lends support to the proposition that the analysis of the nature of a cause or matter was not intended by the House of Lords to be too narrow in scope.

(12) In the present case, the judgment or order on appeal before us is that of Hartmann J where he set aside the search warrants that had been issued by Stone J under section 85 of IGCO. The relevant cause or matter here were therefore the underlying section 85 proceedings. Admittedly, there has been no formal accusation of any breach of criminal law and the consequences for the Respondents of the section 85 application, when carried out to its conclusion, was not their (or indeed, anyone else's) conviction. The only consequence of that application as far as the Respondents are concerned was that search warrants were issued allowing the ICAC to search their premises. No criminal charge may ever be

brought. Yet, as a matter of reality and commonsense, the whole point of a section 85 application is to further investigations into criminal offences. There is no other purpose. Here, it is to be noted that a section 85 (or for that matter a section 84) application can only be made where there are reasonable grounds for believing that an arrestable offence has been committed : - see sections 84(3)(a)(i) and 85(3)(a)(i) IGCO. This is a requisite condition to be fulfilled. In *Apple Daily Ltd* when the matter was before the Appeal Committee of the Court of Final Appeal (where the application for leave was eventually refused), it was stressed in the judgment of Litton NPJ that the search and seizure powers of section 85 had to be seen against section 10C(1)(c) of ICACO which empowered the ICAC to seize and detain material only if there was reason to believe that such material was itself or contained evidence of an offence under section 10 of that Ordinance. Moreover, search warrants in general are only issued in furtherance of a criminal investigation. This has to be contrasted with the position in *McCann* where the relevant underlying proceedings were the making of anti-social orders which did not <u>necessarily</u> (although it could) involve the investigation of criminal offences or the making of any finding that such offences had been committed. This was evidently an important factor which enabled the House of Lords to reach the view that such orders were civil orders (and constitutes, in my view, the main distinguishing

feature of that case from the present) : - see 808-9 (paragraphs 22-27), 817 (paragraph 54), 822-3 (paragraphs 71-72), 829 (paragraph 94). Accordingly, for these reasons, I am of the view that section 85 proceedings are criminal in nature and do not constitute a civil cause or matter.

(13) Statute also strongly supports this conclusion. During the course of argument, Stock JA referred to the provisions of RHC O.1 r.2(3) which expressly refers to O.118 as applying to criminal proceedings. Given that O.118 deals solely with applications under Part XII of IGCO for the search and seizure of journalistic material, it follows that applications made under sections 84 and 85 IGCO are necessarily criminal proceedings. In my view, there is no answer to this argument. Mr McCoy tried to draw a distinction between applications made under section 85 before charges have been laid and such applications being made after charges have been made (and therefore criminal proceedings commenced). However, Part XII of IGCO does not make this distinction. Further, even if it were possible for a section 85 application to be made once charges have been laid, an absurdity arises on the ICAC's arguments here : - it would logically follow that while applications under section 85 made prior to charges being laid would be regarded as civil proceedings and therefore any decision can be appealed to the Court of Appeal, this radically changes once charges have been laid, when such

applications under section 85 would presumably be transformed into criminal proceedings with the result that no appeal would be available to the Court of Appeal.

(14) I accept in the conclusion reached above as to the nature of a section 85 application that this is directly contrary to the obiter views of Keith JA in *Apple Daily Ltd* at 658 that a section 85 application could not be regarded as having been made in criminal proceedings. However, we have had the benefit of extensive argument on this point, unlike in *Apple Daily Ltd* where no one seems to have raised any question of the Court of Appeal's jurisdiction to hear the appeal. If the same question had been raised and the Court there provided with the assistance that we have, it is doubtful whether the appeal would have been entertained in that case either.

(15) Lastly in this context, I would just deal with one minor point that was raised by me during argument, namely, the possibility whether jurisdiction could be conferred on this Court by reason of RHC O.1 r.2(3) making the RHC (and therefore O.59) applicable to proceedings under O.118. On closer analysis, this point is untenable. O.59 is applicable only where there is jurisdiction to lodge an appeal in the first place (see O.59 r.1). It does not itself provide any basis for founding jurisdiction.

32. Accordingly, since the proceedings underlying Hartmann J's decision were not a civil cause or matter, this Court has no jurisdiction to hear the present appeal. The only means of appeal would be an appeal to the Court of Final Appeal : - see section 31(b) of the Hong Kong Court of Final Appeal Ordinance, Cap.484.

33. This point of jurisdiction having been resolved against the ICAC, the appeal must inevitably be dismissed. In *George Tan Soon-gin*, the Court of Appeal, after having decided that it had no jurisdiction nevertheless continued to state its views on the subject matter of the appeal before it. This caused the Judicial Committee of the Privy Council to remark that "any observations concerning the merits of an appeal which should not be before the court must necessarily be extra-judicial" : - see 221E-F. Though mindful of this, I think it must be accepted that my conclusions on jurisdiction could be wrong. Therefore, out of completeness and as the other issues I have identified above have been fully argued, I think it worthwhile to state my views on them.

Issue 2 : Is the appeal academic?

34. It is true that the ICAC have now been given access to the seized materials. However, the present appeal is far from academic, even as between the parties. An order for costs in the court below was made against the ICAC and the reversal of this forms a part of the Notice of Appeal. No concession having been made by the Respondents as to costs, it seems to me that, on the assumption the Court has jurisdiction, this question can only be resolved in the present case by determining the merits of the appeal.

35. More important, considering that the outcome and determination of the present appeal involves the examination of provisions that singularly affect one of the basic freedoms enshrined in the Basic Law (Article 27 : the freedom of the press), the case is of considerable public importance and interest. Moreover, a number of other newspapers in respect of whom search warrants were also issued, find themselves in a similar position as the Respondents in the present case and are awaiting the outcome of the present appeal. In these circumstances, there is a very strong case that is made out in the public interest to hear the present appeal : - see here *Chit Fai Motors Co Ltd v Commission for Transport* [2004] 1 HKC 465, at 472-3 (paragraph 20(3)) referring to *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, at 457.

Issue 3 : Jurisdiction to set aside under O.32 r.6 or the inherent jurisdiction

36. It is first necessary to outline the statutory scheme under Part XII of IGCO. The relevant provisions here have already been set out in paragraph 13 above. Essentially the scheme is as follows : -

(1) As the title to that Part suggests, the subject matter is the search and seizure of what is termed “journalistic material”, a term which is defined in section 82. The provisions contained in Part XII are unique in the sense that while production orders and search warrants are frequently made or issued by the courts in many varied situations, the search and seizure of journalistic material has been singled out for special consideration. The reason is perhaps not difficult to discern : when a

fundamental freedom such as the freedom of the press is involved, it was obviously felt necessary and desirable to set out clearly any qualification or derogation of that freedom. Journalistic material forms the backbone of the freedom of the press. As a general rule, such material must be given the greatest possible protection from seizure or public exposure; otherwise the press may become inhibited in informing the public of matters it is entitled to know.

(2) However, the protection of journalistic material is of course not absolute either, for sometimes it may be in the public interest that journalistic material should be seized or exposed. Part XII aims to set out the requisite criteria to govern the search and seizure of journalistic material. There has been no suggestion in the present appeal that the provisions of Part XII are in any way unconstitutional. It must therefore be assumed in these circumstances that, for present purposes at least and as far as these Respondents are concerned, they are within acceptable bounds.

(3) The first requirement that has to be fulfilled before any search or seizure can take place is that access to journalistic material under Part XII is restricted only to those persons who are authorized by statute to carry out searches in the first place. Thus, the police or the ICAC

are able to make the necessary application to court for access to journalistic material.

(4) Only two means to search and seize journalistic material are provided for under Part XII : an application under section 84 or one under section 85. Both can only be made in the context of arrestable (and therefore serious) offences.

(5) In the case of an application under section 84, the following features are present : -

(a) The application is made either to a judge of the District Court or of the Court of First Instance.

(b) The Applicant must demonstrate those requirements stipulated in section 84(3). Of particular note here is the requirement in section 84(3)(c) that other methods of obtaining the material have been tried and failed or that such methods have not been tried because they were unlikely to succeed or would be likely seriously to prejudice the investigation.

(c) Of note also is the public interest the Court must take into account not only under section 84(3)(d) (which is somewhat limited) but also under section 89(2). These provisions require a court to

have a broad view of the public interest in considering whether such orders should be made.

(d) The application is to be made inter partes. O.118 r.3 states that such applications must be made by way of originating summons and that there must be a supporting affidavit. This exemplifies one of the singular features of an application made under this section, namely, that the Respondent has full notice well in advance of just what is sought.

(e) An order under section 84, once made, requires the journalist or newspaper respondent to produce the journalistic material sought or to allow the applicant to take it away not later than 7 days from the date of the order or such longer period as may be permitted by the Court. In other words, access is not immediate.

(6) By way of total contrast, a section 85 application has the following features : -

(a) The application is for a search warrant, not an order to produce as in section 84.

(b) It is made ex parte (see O.118 r.5) to a judge of the District Court or of the Court of First Instance.

(c) It is intended to be acted upon immediately (as indeed are all search warrants).

(d) Accordingly, given these characteristics just referred to, the conditions that have to be fulfilled in obtaining a search warrant are more stringent than in the case of a production order. Not only have the conditions set out in section 84(3)(a), (c) and (d)(i) to be fulfilled and also the requirement that before an application under this section is made, there must be approval from a superior officer, the Applicant must fulfil each of the further conditions stipulated in section 85(5). For present purposes, the important condition is that contained in section 85(5)(c), being that it must be shown that a section 84 application could not have been made by reason that such an application "may seriously prejudice the investigation". It should be observed that this provision, dealing specifically with the question whether a section 84 application could instead have been made, qualifies the requirement in section 84(3)(c). It is curious that the term in section 85(5)(c) is "may seriously prejudice the investigation" whereas in section 84(3)(c)(ii) the term used is "would be likely to seriously prejudice the investigation". There may be little difference in practice between the two terms (and certainly in the present case, it makes no difference - see Issue 4

below) but on a plain reading it does suggest that somehow the requirement in section 85(5)(c) is less stringent than that in section 84(3)(c)(ii).

(e) Once a search warrant is issued and a search and seizure take place, the Applicant is not entitled to immediate access to the journalistic material, such material having to be sealed for 3 days pending any application under section 87 of IGCO, unless the judge is satisfied that there may be serious prejudice to the investigation if immediate access is denied : - see sections 85(6) and (7).

(7) Applications under both section 84 and section 85 require the Court to consider the public interest : section 89(2). Even where the various stipulated requirements are satisfied, the Court retains a discretion whether or not to grant the application (note the word "may" in section 84(2) and section 85(3)). In exercising this discretion, the judge must bear in mind the public interest.

(8) In the context of section 85 applications, section 87 requires careful examination. It enables a person from whom journalistic material has been seized under a section 85 search warrant to apply to Court for the return for such material. Although the heading to this subsection refers to "Procedure in relation to sealed material", it applies to all seized journalistic material,

sealed or not. In my view, this provision assumes great importance in the present case in the following respects : -

(a) First, it emphasizes the fact that an application under section 85 is made ex parte.

(b) Secondly, while in the normal case, ex parte decisions of the Court are revisited either on the return day (for example, on a summons day) or when the person affected by it applies to set it aside or have it quashed, in the case of a search warrant issued under section 85, the procedure for an inter partes hearing is expressly provided for in section 87 itself. It is difficult to see why a specific procedure for an inter partes hearing following the grant of a search warrant under section 85 should be set out in primary legislation unless it was intended that this was to be the only means by which the ex parte decision could be revisited. While a section 85 search warrant allows search and seizure of journalistic material, a section 87 application is for the return of that material.

(9) At a section 87 hearing, the Court has to consider whether it would be in the public interest that the seized material should be made use of for the purpose of the relevant investigation. This, together with the obligation on the

Court to look at the public interest in a broad way under section 89(2), permits the Court to look at all the circumstances of the case.

37. Hartmann J assumed there existed jurisdiction to entertain the Respondents' application to set aside the search warrants. He did so under O.32 r.6. The Respondents also prayed in aid of the Court's inherent jurisdiction. With respect, I regret not being able to agree with these approaches : -

(1) It will be clear from the earlier analysis of the statutory scheme under Part XII of the IGCO that a complete, self contained code has been devised to deal with the search and seizure of journalistic material. Detailed provisions exist in IGCO and in O.118 as to the two types of applications which relate to this, covering not only the substantive requirements which have to be satisfied, but also the procedures governing such applications. Insofar as section 85 proceedings are concerned, there is, I believe, no room for the application of O.32 r.6 (or the Court's inherent jurisdiction) when there exist express provisions (contained in section 87) to allow the person affected by a section 85 search warrant to be heard. It must not be forgotten that the purpose of a section 85 search warrant is to search for and seize journalistic material. Section 87 allows the affected person effectively to set this aside by obtaining the return of the seized material.

(2) I of course readily accept that in normal ex parte situations in civil proceedings, the party affected should have a right to be heard if that party wishes, particularly as ex parte orders are essentially provisional in nature : - see *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721, at 727 D-E. O.32 r.6 is the statutory embodiment of this right. Equally, the fact that an ex parte order has been performed provides no reason to prevent the affected person from seeking to overturn its grant. For example Anton Piller orders may often already have been executed before a party seeks to set it aside. However, a search warrant is quite different in nature. It is not part of any ongoing process, or part of any lis between two or more parties. In procedures for the issue and execution of such warrants, occupiers have no right to be told at the stage of the application or before the warrant is executed of the grounds upon which the application has been made or the grounds upon which the warrant has been issued : - see *R v IRC ex parte Rossminster* [1980] AC 952, 999. Normally, once a judge has issued a warrant and it has been executed he is then *functus officio*. It follows that but for section 87, there would be no right to entertain any application whether it be by way of Order 32, r 6 or by any other mechanism, to review the order (if it be an order) by which the warrant had been issued. So much is clear, if authority be needed, from the decision in *R v Liverpool Crown Court and another ex*

parte Wimpey plc [1991] Crim LR 635, a case in which similar provisions under PACE were examined, and from the full judgment (unreported) of which I take the following passages :

> " Mr Leveson on behalf of the Crown submits that the procedure within Schedule 1 is a self-contained procedure which has a beginning, a middle and an end. The beginning is an application to the circuit judge; the middle is the hearing of that application, and the end is the order made by the circuit judge. Although therefore Mr Scrivener in a sense rightly refers to this proceeding as an interlocutory proceeding in the sense that it is a proceeding which is ancillary to a projected criminal trial and is not the outcome of that trial, Mr Leveson submits that it is, being a self-contained procedure, one which leads within itself to a final order, that is to say, the final order made by the judge for the warrant to issue. It is not open to the parties to come back to the judge, submits Mr Leveson, to re-open that final order in order to hear further evidence and consider what, if any, alteration he ought to make.
>
> There is a principle which it is important to bear in mind, that proceedings ought to have finality, and, if it were open to parties to challenge an order made by a circuit judge in these circumstances, challenges would almost certainly be made in nearly every case and the circuit judge would be faced with a review of his order, conflicting evidence, and having to decide on that evidence matters which might pre-empt the trial of the case in some respects. Mr Leveson submits that it is not appropriate that there should be a review of that kind. This does not leave an aggrieved party without a remedy. The party has the remedy of applying for judicial review. That, Mr Leveson submits, is the proper approach.
>
> …..
>
> Speaking for myself, I can see the anxiety that is reflected by the submissions made by Mr Scrivener as to what might happen if a judge was persuaded to make an order which was erroneous in some important respect. He gave, as an example, what would happen if the judge were persuaded in error to make an order in respect of premises which were not in fact the premises that the police really wanted to examine but they had got the

> address wrong. I would have thought that that was an unlikely situation but one that could be met on a pragmatic basis, and in any event it could be a matter to be brought before the Divisional Court as swiftly as it could before a circuit judge in most instances.
>
> As a matter of principle, it seems to me that this situation provided for in Schedule 1 of the 1984 Act is unlike that which is to be encountered generally in the jurisdiction of the Crown Court and certainly unlike that to be encountered in the jurisdiction of the High Court on its civil side. Looking at the scheme of Schedule 1 and the statutory purpose, I have reached the conclusion that it would not be right for the circuit judge nor would he have any power to entertain an application inter partes to review the order that he had made ex parte pursuant to paragraph 12 of Schedule 1."

I should add in relation to PACE that there is no equivalent provision to section 87.

(3) Of course, in a section 87 application, the Court does not just look at the question whether the issuing of the search warrants was justified in the first place because it has, as required by section 87(2), to consider whether it would be in the public interest that the seized material should be made use of for the purpose of a criminal investigation. This may at times involve a careful balancing exercise, with the public interest as the paramount consideration. For example, the public interest may demand that notwithstanding the fact that an ex parte order was improperly obtained, the Court may nonetheless consider it appropriate to allow the seized material to be used, particularly when it is, say, crucial for the detection or prevention of a crime. On other occasions, the balance may tilt the other way. Because of the approach that a

court is required to adopt under section 87(2), this provides yet another reason to support the proposition that section 87 provides the only means by which an affected person can challenge the section 85 decision. Otherwise, the Court may find itself in the near impossible situation of having to apply different principles in relation to what in essence is the same inter partes application. The present case provides a ready example. An application under section 87 must be made within three days of the seizure (unless extended by the Court). An application under O.32 r.6 on the other hand, is not so restricted in terms of time. The fact that in the present case the Respondents made both applications within the 3-day limit is beside the point.

(4) In *Apple Daily Ltd*, Keith JA was of the view that an application to set aside under O.32 r.6 was available to an affected person : - see 657-8. This view was necessarily obiter as the matter was eventually resolved by the Court of Appeal on the facts. The basis for it seems to have been two-fold : - first, that it was thought the obtaining of a search warrant under section 85 involved civil proceedings; secondly, Keith JA was particularly concerned that an affected person should have the right to set aside an ex parte order where there existed, for example, material non-disclosure or misrepresentation. As to the first basis, for the reasons set out above in relation to the question of the jurisdiction of this Court, I

am of the view that section 85 proceedings are criminal in nature. As for the second basis, while I instinctively share Keith JA's concern over any inability of an affected person to be heard in relation to an ex parte order that has been made against him, this is not a concern in the present case since, for the reasons earlier discussed, the remedy made available to a person affected by a section 85 search warrant is to be found in section 87. Curiously, but significantly, this provision was not referred to by Keith JA in *Apple Daily Ltd*. This is quite apart from the point made in paragraph (2) above that a search warrant differs in nature to an ex parte order made in court proceedings.

(5) In the present case, in holding that there was jurisdiction to hear the setting aside application under O.32 r.6, the Judge did not examine the importance of section 87 to see how it fitted into the statutory scheme. Reliance was instead placed on O.1 r.2(3), the dicta of Keith JA in *Apple Daily Ltd* and a decision of Lugar-Mawson J in *X v The Commissioner of the Independent Commission Against Corruption*, unreported, HCCM 49/2003, 20 October 2003, Court of First Instance. It is correct that O.1 r.2(3) makes applicable the Rules of the High Court to proceedings under Part XII of IGCO, but this must be with the obvious qualification that the Rules are applied only insofar as they are applicable. There are many Rules in the RHC that are simply inapplicable to Part XII

proceedings. For the reasons earlier given, O.32 r.6 is one of them. As for *X v Commissioner for the Independent Commission Against Corruption*, this case, apart from merely following the dicta of Keith JA in *Apple Daily Ltd*, concerned O.119 (which deals with applications made under Part III of the POBO).

(6) Finally, I ought to mention that none of the foregoing discussion affects the right of a person to claim damages for the tort of the malicious procurement of a search warrant:- see *Brian Gibbs v John Mitchell Rea* [1998] AC 786.

38. Before us, interesting arguments were raised by Mr McCoy as to whether a decision to issue a search warrant under section 85 could constitute an 'order' for the purpose of O.32 r.6, and whether it was a judicial act in the first place (in Australia there exists a line of cases suggesting that the issue of a search warrant by a court was merely an administrative act open to judicial review : - see *Love v Attorney General for the State of New South Wales* (1990) 169 CLR 307). I have some doubts as to the soundness of these points. As to the first, although admittedly the language of section 84 refers to orders of the Court being made and this is absent in section 85, yet section 89(2) uses the terms "order" when referring to Part XII proceedings. It is in any event difficult to see the real difference between a section 84 decision and one under section 85 as a matter of substance when both deal with the search and seizure of journalistic material. As for the second point, whatever the position in Australia, it is difficult to see how section 84 or section 85 applications can be seen to involve merely

administrative acts, especially given the judicial nature of the procedures involved. In any event, these points are perhaps peripheral to the main point which is the availability of section 87 as a real (indeed the only) means of setting aside the effects of a section 85 search warrant after it has been granted.

39. The Judge being wrong to have assumed jurisdiction under O.32 r.6, he ought therefore to have heard only the Respondents' application under section 87 of IGCO. However, as paragraph 72 of his judgment makes clear, he did not deal with this application.

40. I now proceed to consider the merits, this being on the assumption that the Judge was correct to assume jurisdiction as he did.

Issue 4 : Was there justification to issue the search warrant in the present case?

41. I have already in paragraph 36 above set out the relevant statutory scheme in relation to the issue of search warrants under section 85 IGCO. To this scheme, the Judge superimposed 7 principles which he said could be derived from the English cases. These principles have already been set out in paragraph 24(3) above. Counsel for the ICAC was criticized for not having drawn Stone J's attention to these cases. Hartmann J was of the view that had the judge's attention been drawn to these cases, the outcome would have been quite different.

42. I will presently be embarking on an analysis of these suggested principles and then deal with the question whether on the facts the search warrants ought to have been granted in the first place. In this latter exercise,

I do so on the basis that this Court is in at least as good a position as Hartmann J to look at the facts. There is, moreover, no question of having to disturb a judicial discretion here because Hartmann J treated the hearing as a setting aside application under O.32 r.6. Had he (as I have held he ought to have done) conducted a hearing based on section 87, the question of a judicial discretion might well have arisen on appeal.

43. Before going into the 7 suggested principles, I would like to make some general points : -

(1) First, the Judge said in paragraph 46 of his judgment that the scheme contained in Part XII of IGCO had to be viewed "through the prism" of Article 27 of the Basic Law guaranteeing the freedom of the press. This is apt to confuse. If all that was meant was that Part XII deals with the permissible limits to the freedom of the press, then I would have no quarrel with this as a proposition. If, however, what was meant was that in approaching Part XII applications, there should be a bias in favour of this basic freedom and to regard that as some sort of paramount consideration, I would disagree. As I have earlier said, Part XII at the same time emphasizes the freedom of the press as well as fixes the limits to it. Part XII itself contains important safeguards to protect the basic freedom, safeguards which journalists alone enjoy in Hong Kong. And, it should perhaps be noted, these safeguards (in the form of those stringent requirements referred to earlier) are more extensive in

Hong Kong than in legislation such as PACE. There are, however, limits to it. If there is any paramount consideration at all, it is the public interest which is mentioned in at least 3 provisions : - sections 84(3)(d), 87(2) and the catch-all section 89(2). As far as section 84(3)(d)(i), imported by section 85(3)(a)(i) is concerned, the public interest to which the Judge is at that stage to have regard is expressly limited to the matters there stipulated and is not an open ended public interest condition. See *R v Central Criminal Court ex parte Bright* [2001] 2 All ER 244; *R v Northampton Crown Court ex parte Director of Public Prosecutions* (1991) 93 Cr App R 376, 381. The public interest referred to in sections 87(2) and 89(2) are of course much wider. The public interest requires the Court to consider all aspects of any given case, with no bias or predisposition towards any particular factor. Often, a balancing exercise between competing interests is involved.

(2) The balancing exercise that Part XII focuses on is the freedom of the press seen against the need effectively to investigate and deal with crime. In *Apple Daily Ltd*, Chan CJHC said at 674D-E : -

> "The court in discharging this constitutional duty must balance two competing aspects of the public interest, namely, the interest in the detection of crimes and bringing criminals to justice on the one hand and the interest in the protection of the citizens' rights and privacy on the other. See *IRC v Rossminster Ltd & Another* [1980] AC 952, *per* Lord Diplock at p.1007G, Lord Salmon at p.1015B and

A-G of Jamaica v Williams [1998] AC 351, *per* Lord Hoffman at p.361A."

(3) In *R(Bright) v Central Criminal Court* [2001] 1 WLR 662, which concerned an application for an order under section 9 and Schedule 1 of PACE (akin to a section 84 application), Judge LJ said in relation to this at 681F-G :-

> "The judge, alert to the need to safeguard basic freedoms, must simultaneously acknowledge the public interest which underpins the relevant legislation, and section 9 and Schedule I in particular, that crime should be discouraged and those responsible for crime should be detected and brought to justice. Balancing these interests where they appear to be in conflict is a decision to be made in each individual case where apparent conflict arises."

(4) In *Canadian Broadcasting Corporation v Attorney General for New Brunswick* (1991) 67 CCC (3rd edition) 544, at 556-7, Cory J in the Supreme Court of Canada had this to say : -

> " The constitutional protection of freedom of expression afforded by s.2(b) of the Charter does not, however, import any new or additional requirements for the issuance of search warrants. What it does is provide a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises.
>
> Whether the search of a media office can be considered reasonable will depend on a number of factors including the nature of the objects to be seized, the manner in which the search is to be conducted and the degree of urgency of the search. It is of particular importance that the justice of the peace consider the effects of the search and seizure on the ability of the particular media organization in question to fulfil its function as a news

> gatherer and news disseminator. If a search will impede the media from fulfilling these functions and the impediments cannot reasonably be controlled through the imposition of conditions on the execution of the search warrant, then a warrant should only be issued where a compelling state interest is demonstrated. This might be accomplished by satisfying the two factors set out by Nemetz, C.J.B.C. in *Pacific Press*: namely, that there is no alternative source of information available or, if there is, that reasonable steps have been taken to obtain the information from that source. Alternatively, the search might be justified on the grounds of the gravity of the offence under investigation and the urgent need to obtain the evidence expected to be revealed by the search.
>
> The balancing of interests is always a difficult and delicate task. In this case, for example, the throwing of Molotov cocktails at a building not only damaged the property but constituted a potential threat to the lives and safety of others. The investigation of a serious and violent crime was of importance to the state. Further, in light of the ongoing demonstrations, some urgency in conducting the search must be recognized. On the other hand, the objects sought to be seized were the product of the research and investigation of a media organization. It was important that the continuing work of the media should not be unduly impeded.
>
> The factors to be weighed with regard to issuing a warrant to search any premises will vary with the circumstances presented. This is as true of searches of media offices as of any other premises. It seems to me, however, that where the media have fulfilled their role by gathering the news and publishing it, there would seem to be less to be said for refusing to make that material available to the police. At that point, the media have given to the public, by way of picture or print, evidence of the commission of a crime. The media, like any good citizen, should not be unduly opposed to disclosing to the police the evidence they have gathered with regard to that crime."

(5) Secondly, it is important to emphasize that neither Part XII nor any other legislation enables the ICAC to exercise any sort of arbitrary power to effect search and seizure of journalistic material. A search warrant must

first be obtained from a judge, who may only grant it upon certain identified, stringent requirements being fulfilled as well as it being in the public interest to issue one.

(6) Thirdly, while there is normally no objection in setting out general principles the way the Judge has done in the present case, care must be taken not to detract or divert attention from what are the statutory requirements for a section 85 application. As Bingham LJ said in *R v Crown Court at Lewes, ex parte Hill* (1991) 93 Cr App R 60, at 65-66 (in a passage cited with approval by the House of Lords in *R v Southwark Crown Court ex parte Bowles* [1998] AC 641, at 648) : -

> " The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal and property rights of citizens against infringement and invasion. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so.
>
> The 1984 Act seeks to effect a carefully judged balance between these interests and that is why it is a detailed and complex Act. *If the scheme intended by Parliament is to be implemented, it is important that the provisions laid down in the Act should be fully and fairly enforced. It would be quite wrong to approach the Act with any preconception as to how these provisions should be operated save in so far as such preconception is derived from the legislation itself.*

> It is, in my judgment, clear that the courts must try to avoid any interpretation which would distort the parliamentary scheme and so upset the intended balance. In the present field, the primary duty to give effect to the parliamentary scheme rests on circuit judges. It seems plain that they are required to exercise those powers with great care and caution. I would prefer to the observation of Lloyd L.J. in *Maidstone Crown Court, ex p. Waitt* [1988] Crim.L.R. 384 where he said:
>
> > 'The special procedure under section 9 and Schedule 1 is a serious inroad upon the liberty of the subject. The responsibility for ensuring that the procedure is not abused lies with circuit judges. It is of cardinal importance that circuit judges should be scrupulous in discharging that responsibility.'" (emphasis added)

(7) Fourthly, the Judge obviously felt that the ICAC had failed in its duty to make full and frank disclosure by its failure to draw Stone J's attention to certain English authorities. It is not clear whether this was by itself enough to set aside the search warrants but it can, I think, fairly be assumed that it must have been a factor that influenced Hartmann J. I should perhaps make it clear that normally in ex parte applications the duty to make full and frank disclosure applies to facts rather than law. That said, the overall duty on the party applying for an ex parte order is to present the case fully and fairly to the judge hearing the matter, whether relating to fact or law. By "fully and fairly" I do not mean that an advocate is expected to deal with every little nuance in an application but he must highlight to the Judge the weaknesses in particular in his case, whether in fact or in law. I have found useful in this discussion the remarks of Robert Walker LJ in *Memory Corporation Plc and*

Another v Sidhu (No.2) [2000] 1 WLR 1443, at 1454C-1455G.

44. With these general remarks in mind, I now proceed to deal with the 7 principles that the Judge suggested and then applied to the facts of the case. As stated above, he was firmly of the view that had Stone J applied these principles, the search warrants applied for by the ICAC would not have been granted. I deal with each in turn : -

(1) Principle 1

As long as one bears in mind the statutory scheme, the individual requirements contained in Part XII and the consideration of the public interest discussed above, this principle, as a general statement of the obvious, is unobjectionable. I have no doubt that Stone J would have had it in mind and from the transcript of the proceedings before him, it is clear that he did. Stone J had also before him the case of *Apple Daily Ltd*, where at 673J-4, Chan CJHC makes precisely the same point.

(2) Principle 2

This is also a statement of the obvious and of what is required by section 85. Again, there can be little doubt that Stone J had this principle in mind.

(3) Principle 3

This principle as stated is liable to mislead. It seems to suggest that before a section 85 search warrant is sought,

a section 84 application ought first be made first or that in most cases, this is the preferred method. Yet, the legislation itself makes no such suggestion or assumption. Admittedly, it must be shown as a condition of obtaining section 85 relief that the making of an application under section 84 may seriously prejudice the investigation, but this is the only requirement. I might perhaps add here that a factor which may justify a search warrant being issued under section 85 is the fact that the newspaper or journalist is itself or himself the subject of a criminal investigation : - cf *R v Leeds Crown Court ex parte Switalski*, unreported, 21 December 1990, QBD.

(4) Principle 4

The principle here stated is, with respect, self-evident with emphasis to be placed on the word "necessarily". The fact that a journalist is himself or herself a suspect may well suggest that the appropriate route should be a warrant : - see sentiments to that effect in *R v Lewes Crown Court, ex parte Nigel Weller & Co,* 12 May 1999, unreported; *Attorney General of Quebec v Canadian Broadcasting Corporation* 67 ccc (3d) 517, 534. The important point to remember here however is that there must be flexibility in the way that the Court treats any particular factor. Sometimes, it may be a matter of little consequence that the newspaper or journalist is being investigated for a crime but on other occasions, it may be

decisive. It simply depends on the relevant circumstances.

(5) Principle 5

It is not helpful for phrases such as "real risk" or "substantial probability" to apply to what needs to be shown in an affidavit in relation to the destruction or concealment of the journalistic material sought. Section 85(5)(c) only requires that it be shown that a section 84 application "may seriously prejudice the investigation". In my view, a judge will be perfectly able to test the evidence before him against these words without the need for additional words which, if anything, may confuse. In any event *Switalski* cited by the Judge is not support for the proposition the Judge there advances. The phrase "substantial probability" was used by counsel as descriptive of the likelihood of loss or destruction of material, a suggestion of fact - not of a test in law – with which Neill LJ agreed.

(6) Principle 6

While this may reflect good practice, I have difficulties in seeing how in the present case this factor could have influenced Stone J one way or the other.

(7) Principle 7

This has already been discussed in paragraph (5) above. However, again I have difficulties in seeing how this

> factor could have influenced Stone J into making a different decision even if he was somehow unaware of it (which I cannot accept).

45. In my view therefore, either these principles were obvious ones having regard to the decision of this Court in *Apple Daily Ltd*, the express provisions of Part XII of IGCO and as a matter of judicial commonsense, or they require to be qualified. I should also make it clear that I am of the view that counsel before Stone J could not be said to have failed in his duties to the Court in any way and I take this opportunity to underline this fact.

46. Nowhere in the judgment does the Judge explain just how the application of these principles would have persuaded Stone J to refuse issuing the search warrants. Perhaps the Judge thought that by doing so, he might have had to reveal the contents of the affirmation that was used to support the section 85 application before Stone J. I know not the reason but would only wish to say that I would be surprised in the extreme if Stone J did not have the relevant principles in mind when approaching the application before him. The length and content of the hearing amply demonstrates this. The Judge acknowledged also that Stone J was "well aware of the importance of interposing himself between the legitimate desires of the ICAC to pursue its investigation and society's equally legitimate requirement to ensure the freedom of the press". That said, in any event, this Court will now have to look at the facts to see whether the search warrants were properly granted.

47. As indicated earlier, this Court has had sight of the affirmation used to support the ICAC's application for the search warrants under

section 85. So did Hartmann J. This affirmation was not made available to the Respondents in the court below by reason of public interest immunity. In *Apple Daily Ltd*, the Court of Appeal held that public interest immunity attached to the whole of the affidavit used to support an application for a search warrant under section 85 and they were therefore privileged from disclosure : - see 659E-664C. This Court is bound by that decision on this aspect, forming as it does part of the ratio decidendi of the case. Mr Dykes cited to us various authorities to suggest that if public interest immunity attached at all, this could not be automatically applied to the whole document. It was necessary, he contended, to go through each part of the supporting affidavit to see whether public interest immunity attached. These submissions, interesting and important though they are, will have to await the decision of the Court of Final Appeal. I might perhaps add that even if Mr Dykes were right in his submissions, having read the affirmation in support of the section 85 application, I think it is abundantly clear that public interest immunity should attach to the whole of it in the present case.

48. I have already in paragraphs 3 to 9 above set out the factual background to the application for the search warrants by the ICAC. They reveal, I emphasize, an extremely troubling scenario whereby the well-being or life of the Participant in a witness protection programme may have been put at risk and the integrity of the programme potentially undermined. At the very least, the Participant's further co-operation in the criminal investigation could have been compromised. I cannot imagine that any responsible person could regard this situation as anything other than a serious one.

49. The critical question on the facts is : was it justified for search warrants to have been issued? In my judgment, it clearly was : -

(1) Hartmann J was of the view that the only condition that merited consideration was the requirement in section 85(5)(c) that the making of a section 84 application "may seriously prejudice" the ICAC's investigation. He must therefore have accepted implicitly that the other conditions were satisfied. I agree with the Judge's analysis in this respect. Subject to one aspect to which I shall return, Mr Dykes appeared also to be content in this regard.

(2) Having read the affirmation in support of the ICAC's application, I find myself in no doubt whatsoever that had the ICAC made a section 84 application, this may have (if not would have) seriously prejudiced their investigations. Although it is not appropriate to reveal the contents of the affirmation, I can, however, highlight some of the factual aspects of the case already dealt with in paragraphs 3 to 9 above. One aspect of the suspected conspiracy to pervert the course of justice offence was the possibility that the leaking of information concerning the Participant to the press may have been for motives which may not be innocent or inadvertent. The leaking of information to the press had the effect, desired or not, of revealing the identity of the Participant, thus potentially putting the well-being of this person at risk and possibly – one knows not – of undermining her willingness to continue with such co-operation as she may wish to render. The

1st Respondent, like some other newspapers, published in great detail the identity of the Participant. If there has been a conspiracy, then it would follow that these newspapers were vehicles for it and became themselves the target of investigations in relation to section 17 of the WPO. I have earlier referred to the concession by counsel for the ICAC in the hearing before Stone J that the newspapers have not "knowingly" been complicit in the alleged conspiracy. At most they had been "unwittingly" used. There is no reason to think otherwise on the evidence before this Court but the fact remains that the press has been used in a potentially most damaging way to the Participant as part of a suspected conspiracy to pervert the course of justice.

(3) Hartmann J regarded it determinative of the application the fact that there was no evidence to suggest that there was a real risk of the Respondents destroying or concealing the journalistic material, if they had been pre-warned of the ICAC's wish to see that material. He failed "utterly" to see how this was or could be demonstrated on the facts.

(4) With respect to the Judge, I think he has taken too narrow a view of the matter. Those factual aspects I have just set out were before the Judge and they revealed as I have said a very disturbing state of affairs not to mention the possibility of very serious criminal offences having been

committed. Given the link between the newspaper (and their journalists) and those persons who supplied the information about the Participant to them, the Judge ought to have gone on to consider the very real possibility that had a section 84 application been made or the newspaper had otherwise been informed of the ICAC's wish to investigate the suspected perpetrators of the alleged conspiracy, those very people would or might well then have been alerted by the newspapers or journalists, perhaps quite innocently, to the fact that the authorities were onto them. It may here be observed that once a section 84 application is made, there is nothing in the relevant statutory provisions to prevent a journalist from revealing this fact or the information used to support it to colleagues, friends, his readers or to the sources themselves. Further, and importantly, by reason of the requirement to serve on the other party the supporting evidence when making a section 84 application (see O.118 r.3), the Respondents would also have been alerted to the state of the investigation with all its details, with the added risk that this information might find its way to the suspected perpetrators of the alleged conspiracy. This aspect is clear from the affirmation in support. It refers (as indeed counsel referred in the hearing before Hartmann J) to "the sensitivity of the matter" and the need to preserve "the confidentiality of the investigation". These were the aspects, I believe, that must have ultimately persuaded Stone J to have issued the search

warrants. Whilst I agree with the Judge that it is not to be assumed that a journalist will seek to thwart an investigation, it has to be recognized that an investigation may be thwarted even unintentionally and further that the legislature has itself assumed, by the very act of legislating as it has, that the efficacy of an investigation may be put at risk by service of papers on a journalist.

(5) Both Stone J and Hartmann J were sensitive to the aspect of the freedom of the press in this case and rightly so. Fundamental rights are to be broadly construed and respected. However, on occasion, the enjoyment of such rights must be balanced against the rights and interests of other persons or society as a whole. The present case involves just such a balancing exercise. The freedom of the press in the present case must be seen against the fact that serious crimes may well have been committed, one in which the Respondents (one of course has to assume innocently at this stage) have been caught up; the other in respect of which there is prima facie evidence against the Respondents themselves (the section 17 offence).

50. I mentioned in paragraph 49(1) above one reservation that the Respondents had in relation to the question whether the ICAC had fulfilled the necessary requirements to obtain a search warrant under section 85. It is this and it relates to locus standi. In order for a section 85 application to be mounted, the Applicant must have the necessary locus standi to do so, meaning that he must by virtue of some other enactment have the power to

search and seize anyway : - see sections 83, 85(1) and (4) of IGCO. The number of possible Applicants is therefore restricted. The ICAC and the police are covered, as are the Immigration Department and the Customs and Excise Department. In the present case, one must therefore look at the extent of the powers of search and seizure of the ICAC.

51. Here, Mr Dykes referred to the power of arrest contained in section 10 of ICACO and made the point that since that provision did not allow the ICAC to make an arrest in relation to offences under section 17 of the WPO, it had therefore to follow from this that there was no power to search and seize in relation to such an offence. Accordingly, the ICAC had no locus standi to apply for a search warrant under section 85 in relation to the section 17 offence. Reference was made to sections 10(1), (2), (5) of ICACO. While the offence of perverting the course of justice was expressly named in section 10(5) as an offence for which an arrest could be made by the ICAC if it arose in the course of an investigation into a suspected offence under the POBO, a section 17 offence was not.

52. In my view, the ICAC did have the necessary locus standi to apply for the search warrants in the present case : -

(1) It is clear from the affirmation made in support of the section 85 application that in the course of the ICAC's investigations into a suspected offence under POBO, other offences were disclosed (these being the conspiracy to pervert the course of justice and a section 17 offence) : - cf section 10(2) of ICACO.

(2) The Respondents were suspects in relation to the section 17 offence though not for the conspiracy offence. The section 17 offence, though not one that is named in section 10(5) of POBO, is however suspected to be connected to the offence under POBO under investigation : - cf section 10(2)(a).

(3) Accordingly, the section 17 offence was one which by reason by section 10(2)(a) (which is an alternative to what is set out in section 10(2)(b)), the ICAC could effect an arrest and therefore exercise powers of search and seizure.

Conclusion

53. By reason of the conclusion reached by me on Issue 1, this Court has no jurisdiction to hear the present appeal and this appeal must therefore be dismissed. However, it will be clear from my views on the other issues that had this Court possessed the necessary jurisdiction, the appeal would have been allowed with costs. This would have been on the basis that first, the Judge had no jurisdiction under O.32 r.6 to deal with a setting aside application and secondly, in any event, the issuing of the search warrants by Stone J was entirely justified (and nothing material emerged thereafter to dictate a different result). I wish further to state that I am satisfied that the ICAC acted entirely lawfully in seeking the search warrants in this case. They did no more and no less than they were entitled by law to do. Had we had jurisdiction, we would simply have set aside the Order of Hartmann J dated 10 August 2004. There would have been no point remitting the

section 87 application to be heard given the fact that the relevant journalistic material have now been made available to the ICAC.

54. The appeal is dismissed, but this is as a result of my conclusion on this Court's jurisdiction, not because of my views on the merits.

55. As for costs, while it is true that the appeal is dismissed, the point on jurisdiction was raised late in the day and, given my conclusion on the other issues in the appeal, I would for my part make an order nisi as to costs that each side is to bear its own costs.

56. Finally, I wish to express my gratitude to counsel on both sides for their valuable and helpful submissions.

Hon Stuart-Moore V-P :

57. I agree.

Hon Stock JA :

58. I agree with the judgment of the Chief Judge and there is nothing I wish to add.

(Geoffrey Ma)	(Michael Stuart-Moore)	(Frank Stock)
Chief Judge, High Court	Vice-President	Justice of Appeal

Mr Gerard McCoy, SC, Mr Kevin P Zervos, SC, DDPP(Ag) and Mr Ned Lai Ka Yee, instructed by the Department of Justice for the Applicant/Appellant

Mr Philip Dykes, SC and Mr Victor Dawes instructed by Messrs Wilkinson & Grist for the 1st and 2nd Respondents/Respondents