Theft (Amendment) Bill
Proposed offence of 'Fraud'

Response to queries from the Bills Committee

Background - the Law Reform Commission Report, the current law and the previous Bill

Several years ago the Attorney-General requested the Law Reform Commission to consider and report on the creation of a substantive offence of fr*aud,*' and in July 1996, the Commission published a report detailing its considerations and making certain recommendations. It was proposed by the Commission *inter alia*, that the common law offence of conspiracy to defraud should be abolished, and that the offence of fraud should be confined to fraud which occasioned economic loss to the victim.

2. At common law the term '*defraud*' or to act *fraudulently*' means *dishonestly to prejudice or to take the risk of prejudicing another's rights, knowing that you have no right to do so."*

This definition is taken from *Archbold*[1], and is derived from the decisions of various courts in a number of cases including the Hong Kong case of *R. v. Wai Yu-tsang*[2]. It is also apparent from the leading cases on this topic, as the learned authors of *Archbold*[3] comment, that

'... [the term fraud] ... is not confined to a risk of possible injury resulting in economic loss, though most cases do involve this..'

3. Although a representative of the Commercial Crime Unit of the Prosecutions Division (the unit within the division which prosecutes fraud cases) and although counsel from the Commercial Crime Unit did make representations expressing concern in regard to the recommendations that conspiracy to defraud be abolished and that the statutory offence of *fraud*

[1] Criminal Pleading Evidence and Practice 1999 edn. Para. 17-62
[2] [1992] 1 AC 269 - Privy Council.
[3] Supra. Para. 17-63

should be confined to fraud occasioning economic loss, the fraud bill which went to the legislature prior to the handover reflected the recommendations of the Law Reform Commission sub-committee. That bill lapsed on 30 June 1997.

The present Bill

4. The views of prosecutors from the Commercial Crime Unit and Law Enforcement Officers, were sought and were taken account of, prior to the present bill being presented to the legislature. This bill is regarded by those who prosecute fraud cases, as a compromise bill. The ideal from the prosecutor's perspective, is a bill which enables cases that can **currently** be prosecuted as conspiracies to defraud, because they involve an agreement between two or more persons to commit fraud (as defined above), to be brought against individuals who act alone. Although this bill is perceived as an improvement on the bill which lapsed in June 1997, it still falls short of this ideal standard.

5. The only advantage a prosecutor will derive, if the present bill goes forward, is that fraud cases which involve the element of *deceit,*' committed by a person acting alone, could be prosecuted. The number of cases falling into this category would be minimal. Cases not involving *deceit*, and which could not be prosecuted as a conspiracy, are not covered by the bill.

The Bill's Committee queries

(a) The definitions.

6. Some members at the last meeting, expressed concern about the nature of cases that could be prosecuted, in view of the wide definitions of the terms 'benefit,' 'loss' and 'deceit.' We endeavoured to make the point at that time, that so far as conduct involving two or more persons (as opposed to a person acting alone) is concerned, if that conduct came within the common law definition of to *defraud*,' it could be prosecuted under the law as it presently stands. The definitions endeavour to reflect what is derived from the common law definition of '*to defraud*,' and these definitions, including the definition of '*deceit*,' in fact, add nothing to the common law.

7. The draft definition of '*to deceit*,' as was indicated at the last meeting, is similar to the definition of the term '*deception*' in section 17(4) of

the Theft Ordinance, Cap. 210, for the series of offences in that ordinance, such as obtaining property by deception, involving the element of deception.

8. Honourable members would be familiar with the Prosecution Policy Handbook, which sets out the factors that are considered when determining whether or not to prosecute. We are not concerned with prosecuting trivial matters as in most instances it would not be in the public interest to do so, and certainly so far as the Commercial Crime Unit is concerned, we have enough work to do prosecuting serious fraud, to become involved in minor matters that may or may not contain the elements of the crime of fraud. So far as the Honourable Margaret NG's example involving the amorous Mr. A and the attractive Miss B. is concerned, it does not appear that the facts as stated would amount to fraud under the bill, but in any event the conduct is of such a trivial nature, that it would certainly not be within the public interest to initiate a criminal prosecution.

9. So far as the example that the Honourable James To put forward is concerned, regarding real estate agents who act for both parties in a landlord/tenant situation, and make false representations to one of the parties, the agent may well have committed fraud, and again if the fraud is serious enough and involves conduct which is becoming common place justifying action to curb such conduct, assuming sufficient evidence is available, such conduct should be prosecuted.

10. It is difficult to put forward hard and fast rules, as to when fraudulent conduct will and will not result in prosecution, other than to refer back to the Prosecution Policy in this regard, for each case must be considered on its merits.

(b) The need to retain fraud not involving economic or proprietary loss/gain

11. On the last occasion we referred to a case involving a fraud by medical practitioners on the School Medical Service Board,[4] the facts were somewhat complicated and for the information of members a copy of the

[4] R. v. King HO You-sang and Others

judgment of the Court of Appeal in respect of the case is annexed to this note. But the reason for retaining non-economic fraud, is not confined to the facts of that case, for fraud cases which do not involve financial loss to the victim or gain to the perpetrators, are charged regularly.

12. The indictments in the ***Chim Pui-chung*** and ***World Trade*** cases both contained charges alleging frauds on the Securities and Futures Commission, and although the defendants were ultimately acquitted of those particular charges, there was a proper legal basis for preferring those charges in both instances. As indicated on the last occasion, the ***Allied*** case, a case currently under preparation for trial, includes three counts of conspiracy to defraud the Stock Exchange as well as the Securities and Futures Commission, in there respective public duties.

13. Although the case of ***Scott and the Metropolitan Police Commissioner***[5] is put forward as authority for the proposition that a fraud which prejudices the rights of a private individual, as opposed to an individual or organisation which owes a duty to the public or a section of the public, should involve risk of economic loss, the learned Authors of ***Archbold***[6] suggest that it should not be so confined. Prosecution experience however, suggests that fraud cases of this type usually involve persons or organisations who/which do owe a duty to the public such as the Stock Exchange, the Securities and Futures Commission, and the School Medical Board.

14. Some other examples that come to mind include a person who makes false representations when applying to the Bar Association or the Law Society for a practising certificate, or when applying to the Transport Department for a drivers licence, or when applying for an import/export licence, or for export quotas, or when applying for a hawker's licence. If documents are used in support of the representations, it may be possible to prosecute such individuals for using a false instrument, but if the representations are made orally there may be no other offence available, and it is envisaged that fraud would be an appropriate charge in these circumstances.

[5] [1975] A.C. 819
[6] Supra. Para. 17-63

(c) A reconsideration of the comments of the Bar Assocation and the Law Society.

15. The views of both professional bodies were fully considered by the Administration prior to the last meeting.

16. The Bar Association's main concern was the absence of the element of dishonesty from the definition of 'fraud.' The proposed definition requires the presence of an 'intent to defraud,' and precedent cases including *Wai Yu-tsang*[7] make it quite clear that offences requiring proof of '*intent to defraud*' necessarily involve dishonesty. Accordingly, it is not necessary to include *dishonesty* in the definition.

17. Whilst the Law Society was concerned about the 'wide definitions' used in the bill, it was also concerned about the offence trespassing into the arena of the civil law. However, any conduct that involves representations which are made with intent to defraud, is criminal in nature and should be dealt with by the criminal courts.

Points requiring clarification and/or information

18. The Clerk's letter of 6 January detailed 6 points with which the Committee required assistance.

(a) List of Extradition Countries which include 'conspiracy to defraud' as an extraditable offence.

The following table details the countries which have entered into fugitive offender agreements with Hong Kong and whether or not conspiracy to defraud is an extraditable offence.

[7] Supra.

Surrender of Fugitive Offenders Agreements

Country	**Signed on**	**Conspiracy to defraud included under**
Australia	15.11.1993	Article 2(1)(xiv)
Canada	7.9.1993	Article 2(1)(ix)
India	28.6.1997	Article 2(1)(xv)
Indonesia*	5.5.1997	Article 2(1)(41)
Malaysia*	11.1.1995	Article 2(1)(xx)
Netherlands	2.11.1992	/
New Zealand	3.4.1998	Article 2(1)(h)
Philippines	30.1.1995	Article 2(1)(xiii)
Singapore	11.11.1997	/
UK	5.11.1997	Article 2(1)(xxv)
USA	20.12.1996	/

* Agreement not yet in force.

(b) Cases which could be prosecuted under the common law but not under the proposals in the bill.

The offence of fraud under the bill includes the element of *deceit*. In cases of bank and company fraud, where the manager of the bank or the manager of the company is a party to the fraud, it cannot be said that the bank or company has been deceived. Accordingly prosecutions in such cases as the *Ka Wah Bank* case and the *BMFL* case, in which the the Low Brothers in the former, and Lorrain Osman, Rais Saniman and Mohammed Shamsudin in the latter were all involved in the management of the banks

concerned, would not have been possible under the provisions of the bill.

19. Points (c) and (d) have been dealt with in paras. 6 to 14 above.

20. As for (e), as indicated, a copy of the School Medical Scheme Fraud appeal case is attached to this note, and we will endeavour to further explain the case at the meeting, although we would like to re-iterate that this case is just one example of a 'breach of public duty' situation, and is not the only case of its type, as has been illustrated in paras. 12 to 14 above.

21. Point (f) has already been discussed at paras. 15 to 17 above.

Conclusion

22. There is concern among those who investigate fraud and those who prosecute it, that if the Law Reform Commission's recommendations regarding the abolition of the common law offence of conspiracy to defraud, and restricting the prosecution of fraud to those cases involving economic or proprietary loss or gain, are implemented that it will be 'open season for the fraudsters,' particularly in the current climate, when it is becoming more and more difficult for those involved in the commercial and financial sectors, to make a reasonable profit. The present law has worked quite effectively in dealing with incidents of fraud and fraudsters, both domestically and where there is an international element (and most major frauds usually involve an international element, for fraud knows no boundaries) save and except for those infrequent cases when the fraudster is acting alone, and is not caught by any of the offence provisions of the Theft Ordinance, or the forgery offence provisions of the Crimes Ordinance.

23. If the Law Reform Commission proposals were adopted, the law as it presently operates, would be far less effective. The Bill is not ideal; it is a compromise, a compromise which at the same time adopts some of the proposals of the Law Reform Commission, and retains the important features of the present law.

Department of Justice
February 1999

IN THE COURT OF APPEAL 1990 No. 573 (Criminal)

BETWEEN

THE QUEEN

and

(D1) KING HO YOU-SANG (1st Applicant)
(D2) IRENE HO CHUN-YUEN (2nd Applicant)
(D3) DAVID CHOW SIU-SHEK (3rd Applicant)

Coram: Hon. Silke, V.-P., Power & Macdougall, JJ.A.
Date of Hearing: 10th-13th, 17th-20th November 1992 & 11th February 1993.
Date of Judgment: 11th February 1993

JUDGMENT

Power, J.A.:

This is the judgment of the Court.

The Charges

The first two applicants, King Ho You-sang and his wife Irene Ho Chun-yuen, were tried before Barnes J. and a jury on an indictment which contained 19 counts. The first count was one of conspiracy to defraud contrary to Common Law.

The particulars of the count were that the two applicants on divers dates between 1st January 1984 and 31st October 1988, in Hong Kong, conspired with Francis Roynon Latimer, Carey ("Carey") and Ing Chi-kin ("Ing") to defraud the Hong Kong Government, the School Medical Service Board ("the Board") and other participating medical practitioners in the School Medical Service Scheme ("the Scheme") by dishonestly:-

(i) causing and permitting pupils in excess of the maximum number prescribed for any one medical practitioner under the Rules of the Board made under the Scheme to be assigned to King Ho You-sang for medical treatment;

(ii) failing to personally treat pupils assigned to King Ho You-sang under the Scheme;

(iii) causing and permitting medical practitioners to be nominated and registered as participating medical practitioners under the scheme ("the nominated medical practitioners"), without their knowledge;

(iv) causing and permitting the nominated medical practitioners to treat pupils assigned to King Ho You-sang under the Scheme;

(v) causing and permitting medical practitioners other than King Ho You-sang or the nominated medical practitioners to treat pupils assigned under the Scheme to King Ho You-sang or the nominated medical practitioners;

(vi) falsely representing to the Board that clinic addresses for the nominated medical practitioners provided to the Board, were the true and genuine clinic addresses of the nominated medical practitioners;

(vii) falsely representing to the Board that the bank account details of the nominated medical practitioners provided to the Board were the details of bank accounts belonging to the nominated medical practitioners;

(viii) Concealing from the Board that the said bank accounts were controlled by King Ho You-sang, Irene Ho Chun-yuen or both of them;

(ix) causing and permitting medical practitioners fees payable under the Scheme to the nominated medical practitioners to be credited to bank accounts under the control of King Ho You-sang and Irene Ho Chun-yuen or both of them;

(x) withdrawing from the said bank accounts sums credited thereto as aforesaid to which King Ho You-sang and Irene Ho Chun-yuen were not entitled.

The 2nd applicant was further charged in the alternative with ten counts of false accounting. These were counts 2 to 11 in the indictment.

The 3rd applicant faced a count of conspiracy to defraud, contrary to Common Law, count 12 in the indictment. The particulars of that offence were that he, on divers dates between 1st January 1984 and 31st October 1988, conspired with Carey and Kwok Chun-kwai ("Kwok") to defraud the Hong Kong government, the Board and other participating medical practitioners in the Scheme by dishonestly:

(i) causing and permitting pupils in excess of the maximum number prescribed for any one medical practitioner under the Rules of the Board made under the Scheme to be assigned to David Chow Siu-shek for medical treatment;

(ii) failing to personally treat pupils assigned to David Chow Siu-shek under the Scheme;

(iii) causing and permitting medical practitioners to be nominated and registered as participating medical practitioners under the Scheme ("the nominated medical practitioners"), without their knowledge;

(iv) causing and permitting the nominated medical practitioners to treat pupils assigned to David Chow Siu-shek under the Scheme.

(v) Causing and permitting medical practitioners others than David Chow Siu-shek or the nominated medical practitioners to treat pupils assigned under the Scheme to David Chow Siu Shek or the nominated medical practitioners;

(vi) falsely representing to the Board that clinic addresses for the nominated medical practitioners provided to the Board were the true and genuine clinic addresses of the nominated medical practitioners.

(vii) falsely representing to the Board that the bank account details of the nominated medical practitioners provided to the Board were the details of bank accounts belonging to the nominated medical practitioners;

(viii) Concealing from the Board that the said bank accounts were controlled by David Chow Siu-shek;

(ix) causing and permitting medical practitioners fees payable under the Scheme to the nominated medical practitioners to be credited to the bank accounts under the control of David Chow Siu-shek;

(x) withdrawing from the said bank accounts sums credited thereto as aforesaid to which David Chow Siu-shek was not entitled.

The 3rd applicant also faced four alternative counts of false accounting. These were counts 13 to 16 in the indictment.

The 17th count was conspiracy to defraud, contrary to Common Law, against all applicants alleging a conspiracy with Carey between 1st January 1986 to 31st October 1988 to defraud the same parties as were named in the previous counts. The particulars of this count were almost identical with those in the previous conspiracy counts except that they alleged participation by all three applicants. There were two further alternative counts of false accounting, one against the 2nd applicant and the other against the 3rd applicant which were counts 18 and 19 in the indictment.

After trial before Barnes J. and a jury, the 1st applicant, King Ho Yu Sang, was convicted on count 1 as was the 2nd applicant, Irene Ho Ching Yuen - conspiracy to defraud. Also on the 17th count, similarly a conspiracy to defraud. The 3rd applicant David Chow Siu Shek was convicted on count 12 and count 17 - both alleging conspiracy to defraud. Those were the only counts on which the jury was required to render a verdict.

The 1st and 2nd applicants were sentenced on count 1, each to two years' imprisonment, and each was fined $3 million dollars to be paid within 12 months from 22nd November 1990 or to serve a further nine months' imprisonment in default. On count 17 there was imposed a further sentence of two years' imprisonment but this was ordered to be served concurrently with the sentence on count 1 - they were each ordered to pay one third of the taxed costs of the prosecution.

The 3rd applicant was, on count 12, sentenced to imprisonment for two years and was also fined $3 million dollars with the same terms attached. On count 17 the judge made the same sentencing order as he did in the case of the 1st and 2nd applicants.

The applicants now seek leave to appeal against their convictions and, if necessary, their sentences.

The Crown Case

It was the Crown case that the Board, appointed under the School Medical Services Board Incorporation Ordinance ("the Ordinance"), had set up a scheme, in accordance with the object of the Ordinance, to provide economical medical treatment to school students. The Annual Report of the Board ending year 31st March 1985, which was exhibited at the trial, indicated that consequential to the report of a Working Party which had been set up in 1962, the government in 1964 constituted the Board as a statutory body under the Ordinance. Following the recommendation of the Working Party Report, the scheme set up was one which would "organizationally and administratively ..... be a 'school to doctor' scheme". A doctor was required to apply to and be approved by the Board which would then circulate a

list of approved doctors to the schools from which each school would choose a doctor or doctors. Each school would then refer pupils who had registered with it under the scheme to the chosen doctor. The Report went on to state :

> "Participating doctors
>
> 5. A registered doctor may, on application and agreement with a simple set of conditions, participate in the scheme.
>
> Briefly he is required, at his office during his normal consultation hours, to provide treatment and medication without charge to pupils from one or more schools in his area. However, at his discretion the doctor may issue prescriptions which should be filled at a pharmacy, cost borne by the patient.
>
> 6. The pupil's medical history and progress records are confidential and retained by the doctor, details of which are useful in following the child's development. Thus the doctor treats the pupil no differently from his private patient."

Pupils who wished to participate in the scheme enrolled through their school paying a contribution which was initially $5, later raised to $10. The school transmitted this fee to the Board which, in due course, added its contribution of $50, later raised to $65, and paid the participating doctor the sum of $55, later raised to $75, for each pupil.

We cannot help but here remark, and more will be said in this regard later, that a fundamental weakness of the Scheme from the outset was the failure of the Board to lay down specific rules ensuring that parents of children were fully informed as to the nature of the Scheme and requiring them to give an indication in writing that they

wished to participate in and intended to make use of the Scheme. If a pupil was enrolled without there being any intention to make use of the Scheme, the government's contribution would be paid for nothing. Such a situation was, of course, more likely to occur if someone other than the pupil's parent paid the pupil's contribution. In the course of time, this did occur and was referred to when the payment was made by a participating doctor, as "rebating".

The 1st and 3rd applicants were active participants in the Scheme, being doctors nominated by various schools. The 2nd applicant, who is the wife of the 1st applicant, appears to have been the administrator of his medical practice. The evidence was clear that both applicants entered into arrangements with other doctors whereby they agreed, under the direction of the applicants, to treat pupils under the scheme. However, in a number of cases, the applicants did not make it known to the doctors that they had registered them under the Scheme, that schools had selected and allocated pupils to them and that they were, after 1st October 1985, entitled to receive directly from the Board the payments made in relation to those pupils.

The thinking behind the Scheme appears to have been that applications to participate would come from individual doctors. This approach, implicit in the paragraph headed "Participating Doctors" set out above, was never, it must be said, specifically spelt out. An inherent weakness there was that it made no provision for partnerships and charitable institutions employing large numbers of doctors.

The Board met infrequently and appears not to have exercised any real supervision over the day to day running of the Scheme. This was left to the Secretary Carey, officially entitled Secretary to the Board. While Carey was also charged with offences which were related to the counts

before the jury his trial, because of his ill health, was not proceeded with. He gave evidence in the course of this trial and died sometime after its conclusion.

In 1984/85 three resolutions, which are set out in full hereunder, were passed by the Board. The first, which was promulgated on 22nd June 1984, dealt with the practice of rebating. The other two, which were promulgated on 25th July 1985, dealt with the upper limit of pupils which a doctor could treat under the Scheme and the requirement that payments by the Board be made to individual doctors. The impact of the two latter resolutions was a financial one as, after they came into operation on 1st October 1985, payments could not properly be made by the Board other than to a doctor personally and in relation to not more than 3,500 pupils, the specified upper limit. It was the Crown case that, despite the resolution dealing with rebating, both the 1st and 3rd applicants continued to rebate. The allegation was that the 2nd applicant did so on behalf of the 1st applicant using her mother as a nominal benefactor, when in fact the money was coming from accounts which she and the 1st applicant controlled, and that the 3rd applicant continued quite openly so to do.

It was the Crown case that both the 1st and 3rd applicants used "nominal" doctors to make it appear that they were not treating and were not being paid for more than the allowed maximum of 3,500 pupils. In some cases, they continued to use the names of these doctors long after any association with them had ceased, and caused money to be paid into bank accounts opened in their names but which were, in fact, controlled by the applicants.

It must be said that the thrust of the arguments both of Mr. Sedgwick, who appeared for the 1st and 2nd applicants, and of Mr. Macrae, who appeared for the 3rd

applicant, was not that the Crown had failed to prove the above matters but that (i) the regulations of the Board were invalid; (ii) that it was never proved that the applicants acted dishonestly individually, or in association with each other or in association with Carey; and (iii) the trial judge had, on a number of matters, misdirected the jury, particularly as to the alleged dishonesty of Carey.

We set out, for ease of reference, the sections and regulations which were canvassed at length in the course of the appeal.

The Ordinance

School Medical Services Board Incorporation Ordinance (Preamble) :

"To make provision for the establishment and incorporation of a Board to operate a scheme to provide economical medical treatment for the pupils of schools participating therein and for matters ancillary thereto."

Powers

"7. (1) For the purposes of providing of Board economical medical treatment for pupils in all or any schools of the Colony, the Board shall have full powers:

(a) to manage, administer and operate any scheme for the furtherance of the said purpose;

(b) to contract upon such terms and conditions as it may consider expedient with any person or body of persons, whether corporate or unincorporate:" (Emphasis supplied)

The Rebating Resolution

"SCHOOL MEDICAL SERVICE BOARD

Rebate of Pupil's Contribution $5
Circulars 19th February & 23rd March 1984

Reference is made to these circulars, sent to all doctors with panels, on the subject loosely-termed "Rebate". Doctors will wish to know what action the Board has taken.

2. At its meeting on 3rd May 1984 the Board unanimously adopted the following resolution and that doctors and schools be so advised:

> 'Should it be proved to the satisfaction of the School Medical Service Board that an arrangement has been made between school and doctor whereby the doctor pays the pupil's contribution, the Board will demand the doctor's resignation from the Service.'

3. It was also agreed that prior to issuing the warning the Secretary should try to discover whether (as had been suggested) any school would withhold enrolling pupils if the chosen doctor were not prepared to pay the pupil's contribution.

The Secretary has been unable to discover the future intentions (whether to enrol or not) of the few schools asked. Definite answers can only be known when the next academic year opens in September 1984.

4. Doctors have treated this subject as an internal matter and the Board appreciates the understanding of its confidential nature.

To: Doctors with panels
22nd June 1984

Sd. F.R.L. Carey
Secretary to the School
Medical Service Board"

The Pupil Limitation and Individual Payment Resolutions

"SCHOOL MEDICAL SERVICE BOARD

NOTES TO DOCTORS

The following rules, laid down by the Board in May 1985, will govern the distribution of pupils and payment to doctors with effect from 1st October 1985 (date of change from the current 'V' P/Cards to 'W' P/Cards) :

a. The upper limit of pupils per doctor shall be 3,500, but doctors with over 3,500 will be permitted to retain their present numbers while those pupils phase out of Form III;

b. Doctors will be remunerated personally, not the organisation to which they are attached, be it partnership or any other form of corporate entity;

c. The long-standing system 'continuous enrolment' (instituted in 1966 for the benefit of schools enrolling their pupils) shall if possible remain.

2. On present figures 24 doctors will be particularly affected by Rule a.; and although we shall try as far as possible to keep to the long-established policy 'school chooses doctor' we will have to exercise stricter control over the issue of P/Cards to schools. As enrolment's focal point is the school care will be taken to accommodate the school principal as much as possible within the effort to even distribution of pupils among doctors.

It should be remembered that the exact number of pupils enrolling is not known until the school sends pupil-fees and counterfoils to the administration's office. Very often many months elapse before this takes place, but the accounting system is such that the doctor eventually receives his due in full.

3. Many doctors are still under the impression that we allot pupils to doctors. The Board has not allotted pupils since 1966, but allowed the school to choose its doctor(s). This is the natural corollary to the 'school to doctor' scheme initiated by the

Government which, acting as agent, the Board merely follows. However, in limiting the size of panel there is no contravention of fundamentals. Limitation should lead to a fairer deal for doctors and a lessening of criticism (even uninformed) from any quarter.

4. Understandably some doctors, now with less than 3,500 pupils, will wish to increase their numbers. However, we shall try to prevent a switch, by school, from one doctor to another. This is a sensitive matter and bears on the school's choice; but doctors will appreciate that the criterion for choice of doctor should be location and consultation hours, not, as is often suggested, that a doctor can offer "a better service" than a colleague in the same profession. Switching can lead to friction between doctors, in which we find ourselves in the middle: we shall do our best to find the right answer in such cases.

5. I have been instructed to keep to the rules (in particular a. and b. above) even if it means a drop in enrolment. I shall need your full support.

6. The enrolment at over 300,000 pupils is, in my view, mainly due to the undoubted service rendered by all doctors. Fifteen years ago enrolment was no more than one-tenth of its present figure. The scheme is basically unassailable, no matter what the critics say. So let us all pull together and continue to make it the success it most certainly is.

Sd. F.R.L. Carey
Secretary to the School
Medical Service Board"

To: Members in the Service."

The Summing-up

We turn now to the summing up which has been subjected to vigorous criticism by counsel for the applicants.

The first material direction which the judge gave on the law was as to conspiracy. He said:

> "For the purposes of this case, it can be said that a conspiracy to defraud means an agreement between two or more to use dishonest means to cause the School Medical Service Board to act contrary to its public duty."

He went on to say:

> "The prosecution case essentially is that the plan was to cause the Board to act contrary to its public duty by authorising the payment of government money to people to whom it would not have been paid had the Board not been dishonestly deceived."

He said later:

> "As a matter of practicalities, it can be said that if the evidence does not convince you that there was an agreement to use dishonest means to cause the Board to act contrary to its public duty, then it could not convince you that there was an agreement to use dishonest means to cause economic loss to other participating doctors. I want to avoid discussing technical issues with you wherever possible, and I think we can avoid a technical issue here by concentrating on the practical. That practical issue is whether it has been proved that there was an agreement to use dishonest means to cause the Board to act contrary to its public duty."

He then said that this "practical issue" involved the answers to the following four questions:

> "Firstly, what was the Board's public duty ? Secondly, how did the Board endeavour to perform that duty? Thirdly, did any defendant plan with another or others to cause the Board to act contrary to its public duty? And if the answer to that question is

> yes, the fourth question is : were dishonest means to be used to achieve that purpose?"

He referred to the Ordinance stating:

> "That Ordinance says that its purpose is to make provision for the establishment and incorporation of a board to operate a scheme to provide economical medical treatment for the pupils of schools participating in the scheme."

Having set out the power given to the Board "to manage, administer, and operate a scheme for the purpose of providing economical medical treatment for pupils attending any school", he directed the jury that if the answer to the first question was that it "was the duty of the Board to manage, administer and operate not just any scheme at all for the provision of medical treatment for school pupils, but a scheme providing economical medical treatment", then it was "the public duty" of the Board to operate the scheme.

The judge then turned to the second question, telling the jury that the Board endeavoured to perform that duty by providing a form of medical insurance that linked schools which wanted to participate with medical practitioners who volunteered to provide treatment. He went on to say that the Board "formulated the policies and the rules by which the Board's public duty was to be performed, and they appointed a manager with subordinate staff to implement that policy in accordance with the rules."

We pause here to note that s.7(1) did not indicate the nature of the scheme to be administered but simply said that the Board was to "manage, administer and operate any scheme for the furtherance of the said purposes". There can be no argument that the Ordinance clearly contemplated that the Board would set up and operate such scheme as it considered appropriate.

Regarding the second question, the judge went on to say:

"The Board, being a corporation set up by the Ordinance, performs its public duty using the same kind of organizational set-up as a private business corporation uses to pursue the objects for which it is incorporated. It had a board of directors who formulated policy and an administration team to carry out that policy."

The judge then described the scheme which the Board had adopted:

"Participating doctors would receive $75 for each participating pupil attending a participating school which had nominated him. If, for example, a participating school in Kwun Tong had 1,000 participating pupils at the commencement of a school year and it nominated Dr. Wong, the Board would pay Dr. Wong $75,000 for that year. He would receive for 11 monthly instalments of $6,000 and a final payment of $9,000 and Dr. Wong would be entitled to receive that $75,000 irrespective of whether all, some, or none of the participating students at the school which nominated him ever attended his clinic for treatment.

The source of the Board's funds for this purpose was a contribution fee of $10 paid by the participating pupil on enrolment in the scheme and $65 contributed by the Government in respect of each enrolled pupil. The procedure adopted by the Secretariat for implementing the scheme began with the registering of doctors who volunteered to join by completing a form devised by the Secretariat. That form required the doctor who submitted it to supply his or her name, the address of his/her clinic, his/her hours of consultations, and details of the bank account into which he/she desired the Board to make payments. As no doctor, even though registered with the Board, could become eligible to receive any payment under the

scheme until he/she was nominated by a participating school, the Secretariat did not even open a file for a doctor who submitted such a form at that stage.

But the particulars of the clinic and consultation hours were important when the Secretariat sent circulars to the schools at the beginning of each school year. Those circulars advertised the scheme and gave the heads of schools details of the names, addresses, and consultation hours of participating doctors in their area. Accompanying each circular was an application form for the head to complete and return if he wished his school to be registered with the Board as a participating school. The practice, according to the evidence, what then happened was that the school head sent a notice to parents asking them to indicate whether they wished their children to participate in the scheme. If they did, they were required to indicate their willingness to participate by signing a form to that effect and paying to the school a $10 contribution fee for each student. If any parents did indicate their willingness, then the head completed the application for the school to be registered as a participating school. That particular form required the head to nominate a registered participating doctor. On completion, the form was sent to the Secretariat together with $10 for each participating pupil. The Secretariat registered the school as a participating school for that year on receipt of the duly completed and signed application form and payment of $10 for each participating student.

The next step in the routine procedure was that the Secretariat then sent to the school a card for each participating pupil. The cards were printed in books of 50. Participating schools with 400 participating students would receive 8 books of cards by the Secretariat, all stamped by the Secretariat with a chop showing the name and 'clinic address of the doctor nominated by the school. The cards were then distributed to participating pupils. Presentation of the card by a pupil to the doctor named on the card entitled the student to receive certain medical service without further payment

throughout that school year. Once a doctor was nominated by a school the Secretariat opened a file in his name and informed him that he had been selected.

More importantly, perhaps, from the doctor's point of view was that the Secretariat also passed to the Board's accountants the doctor's name, the number of pupils on his panel, and the details of the bank account which the doctor supplied on the form. The Board's accountants would then pay from the Board's account to the credit of the doctor's account the monthly instalments earlier mentioned so that by the end of the school year the nominated doctor received $75 for each student on his panel. The Board's fund from which payment of $75 for each participating student was made to a participating doctor was made up by the $10 paid through the school for each participating pupil matched by a $65 grant made by the Government.

The form of insurance Scheme adopted by the Board had benefits for both pupils and doctors. The benefit for a participating student was the entitlement to make an unrestricted number of visits to the nominated doctor throughout that school year for a single payment of $10. The benefit for the doctor was $75 for each participating student at any school which nominated him, whether all, some, or none ever called upon him for consultation during the course of that year. The minutes of the Board as recorded in Exh.P1 - and your own copy of it will be found on pages 1 and 2 of Vol. 1 - show that on 3rd May 1984 the Board unanimously adopted a resolution reading as follows:

> 'Should it be proved to the satisfaction of the School Medical Service Board that an arrangement has been made between a school and doctor whereby the doctor pays the pupils' contribution, the Board will demand the doctor's resignation from the Service.'"

We pause here to observe that this resolution made no mention of pupil's contributions which were being paid by charitable organizations or other benefactors. Its purpose seems to us to be unarguably clear i.e. to prevent pupils who had no intention of using the scheme being enrolled in it by virtue of the payment of their contribution by a doctor. As we have already indicated, the possibility of such enrolment was a real one if there was no signification from parents that they intended to use the Scheme. Indeed, common sense suggests that if pupils' contributions were paid en bloc by anyone, be it doctor, charitable organization or benefactor, the payment would inevitably include some whose parents were not interested in using the Scheme.

We return to the summing-up. The trial judge next referred to the minutes of a Board meeting held on 17th January 1985 at which the Board unanimously agreed "on two firm principles as a matter of policy to come into force from 1st October 1985". Those firm principles were expressed by the Board in the following way:

> " (i) The Board would not limit a doctor's panel but would remunerate the doctor full remuneration $75 for no more than 2,000;
>
> (ii) The Board would remunerate the doctor personally and not the organization to which he was attached, be it partnership or any other form of corporate entity."

The trial judge went on to say:

> "By the time the principles came into force the first was modified by increasing the number of pupils to 3,500 and making an exception in honour of those who already had more than 3,500, it being expected that with the effluxion of time any with more than

> 3,500 would be reduced to the limit as students ceased to be eligible, either because they were no longer students or because they passed beyond Form III, the upper level of student eligibility. The effect of the adoption of the first of those two principles was that from October 1985 no doctor was entitled to receive more than $262,500 per year (i.e. $75 × 3,500) unless he had built up a panel exceeding 3,500 before that year, but even he would receive less and less from the Board as the years went by."

The judge told the jury:

> "The Board adopted those resolutions in the course of performing its public duty."

He went on to say:

> "All I want to say about the matter at this stage is that it is not for us to say whether the reasons which led the Board to formulate those rules are sound or not. Our only concern is the fact that the Board did decide, as the law fully empowered the Board to decide, how it should perform its public duty. Whether Carey or any of the defendants agreed with that policy is only of importance when considering whether or not they had in mind acting dishonestly, a question I will come to later. But, as far as these resolutions are concerned, I simply remind you that you are concerned with matters of evidence and the evidence is that the Board decided to perform its public duty by adopting those rules. If you accept that evidence then I tell you, as a matter of law, that any person who combined or agreed with another to use dishonest means to cause the Board to remunerate a doctor in breach of any of those rules committed the offence of conspiracy to defraud. I tell you as a matter of law that any person who combined or agreed with another to use dishonest means to cause the Board to remunerate a doctor in breach of any of those rules committed the offence of conspiracy to defraud. Although the prosecution in the indictment lists 10

> particulars of acts by the defendants evidencing their conspiracy, the gist of the allegation is that they combined to use dishonest means to obtain payments in breach of one or more of those rules."

As can be seen, the judge firmly identified the conspiracy as one which used dishonest means to obtain remuneration in breach of the Board's rules.

The third question which the judge posed to the jury was whether it had been proved that any defendant planned with another or others to cause the Board to act contrary to its public duty. He pointed to what he described as:

> "The unchallenged and uncontradicted evidence of Miss Ivy Hui, an employee of the Board at the material time, is that the 1st defendant's personal panel jumped from 16,000 odd in 1985/86 to 21,000 odd in 1986/87 and the 3rd defendant's from 23,000 odd in 1985/86 to 31,000 odd in 1986/87; and those figures leave out of account the number of students allotted to doctors whose names they used to open bank accounts into which Board funds were paid in what the prosecution alleged was a breach of another Board rule".

The judge went on to say :

> "So, as I said, just speaking for themselves the figures say that each of the doctor defendants did cause the Board to make payments which benefited him contrary to the Board's rules.
>
> There is a considerable body of other unchallenged, uncontradicted evidence from heads of schools, led by the prosecution and confirmed by the 2nd defendant when she gave evidence, to the effect that she assisted her husband in maintaining a panel above the limit. There is evidence from doctors and banking records that she arranged for payments to be made in breach of the rule

> requiring payment to be made personally to the participating doctor. The authenticity of the Board and bank records is accepted and they are before you as exhibits. Those records show that payments were not made by the Board to many doctors personally but directly to the 1st and 2nd defendants in some cases, to the 3rd defendant in others. Mrs. Ho gave an explanation as to why payments were not made personally to the doctors to whom, according to the Board's rule, payment should have been made but she could not refute the obvious: payments had not in fact been made personally to the doctors concerned. Her explanation is relevant to the question as to whether the defendants were acting honestly but, as I say, that explanation cannot refute the obvious breach of the rule.
>
> For present purposes I can say that you should have no difficulty in deciding that each defendant did in fact plan to cause the Board to act contrary to its public policy. The evidence is overwhelming that the defendants did plan with Carey, and actually carried out their plan, to cause the Board to act contrary to its public duty. The only real issue in this case, as far as the conspiracy charges are concerned, is whether the plan involved the use of dishonest means."

The judge then turned to his fourth question which was whether dishonest means were used to cause the Board to act contrary to its public duty. He pointed out that, while there was no evidence that Carey had received any money for what he had done, Carey himself had made it quite plain that he had disobeyed the Board's rules "because he needed to protect his 'beloved enrolment'". Carey said that with a Medical Insurance Scheme, the greater the number of participating pupils, the more successful the Scheme and that he encouraged the 1st and 3rd applicants because they were his most "successful salesmen". At the very least, this evidence displayed an astonishing naivety. The number on paper of participants can give but the shallowest measure

of the success of such a Scheme. Its real success can only be gauged by the number of actual participants, that is to say those using the Scheme or intending to use it when necessary. If, for example, the Scheme had 30,000 pupils enrolled, 2,000 of whom never intended to use it, being routinely sent by their parents to their own private doctors, it would, other than on paper, be far from successful as it would involve the public purse in a wholly unnecessary expenditure of $130,000 per annum.

The judge then dealt with matters in evidence which he suggested the jury might wish to consider when determining whether Carey had been dishonest. We shall, at a later stage, consider these in detail when we come to consider Ground 5.

The trial judge finally said:

> "To summarize the position regarding Carey: if you cannot be sure that Carey did agree to the use of dishonest means to circumvent the Board's rules then you must find the 1st defendant and the 2nd defendant not guilty on the first count and the 3rd defendant not guilty on the 12th count. If you are sure that he did agree to use dishonest means to help the Hos break the rules, then you must go on to consider the case of each of them on the first count."

When dealing earlier with the question of dishonesty, the trial judge had said:

> "So, before discussing the charges individually, it is convenient to discuss the question of dishonesty, because it is relevant to the case of all defendants and to Carey's involvement.
>
> A person's intentions can only be known by inference from what he or she says and does. A person might say: 'I genuinely

> believed at the time that I was acting honestly' but evidence might show that at the time that person was acting in such a deliberately deceitful way that ordinary people would say: 'We regard that as dishonest conduct and it is so obviously dishonest that he or she must have known it to be dishonest at the time and so now we reject the assertion that he or she believed the conduct was honest'. A person's assertion that he or she was acting honestly is a factor to be considered but if analysis of other evidence shows that what the person did must have been known to him or her to be the sort of conduct which ordinary people would regard as dishonest, then the conduct is dishonest. It remains dishonest no matter how spiritedly the person may say that he or she genuinely believed that he or she was acting honestly. You may well think that it is a human tendency for a person proved to have acted dishonestly judged by ordinary standards to react by saying: 'I genuinely thought I was acting honestly'. You should therefore consider not only Mrs. Ho's own assertion to the fact that they all regarded their conduct as honest, you should also look at what they said and did at the time in considering the question of dishonesty."

The judge then turned to examine the evidence on the first count. He pointed out that, of the doctors who had worked in conjunction with the 1st applicant, some said that when they signed the form to join the Scheme it contained no particulars regarding the location of the clinic, all said that the bank account details were not supplied by them and most said that the bank account details were not on the form when it was signed.

He referred in particular to the evidence of Dr. Choy Seck-ling who worked part time for the 1st applicant from August 1985 to September 1986. This doctor said that in August 1985 the 2nd applicant had told him it was necessary for him to sign the Scheme form and that he did not have to bother about particulars. The judge

referred also to the evidence of Dr. Chang Han-chin, another doctor who had worked with the 1st applicant, and who testified that in August 1985 he had entered the particulars of his own bank account on a Scheme form but that the 2nd applicant told him that this was not correct and that other details were inserted. These details were on the form which was shown to him while he was giving evidence. This doctor, when referred to the Board's records showing that he was a doctor selected by a particular school, said that he had never heard of the school nor known that he had been selected until told so while in the witness box.

The judge referred also to the evidence of Dr. Wu Bun-fai who said that in August 1985, when he signed the Scheme form, most of the details were not there and that they were not added in his presence. This doctor said that he did not even know the address of the bank referred to and that the 2nd applicant had said that she would fill in the details later and pass the form on for him, but had never done so. He said that he had never been to the clinic at Tuen Mun stipulated on the form and that he was unaware that the Board's records showed that four schools with 3,000 participating students had selected him as their school doctor and that over $470,000 had been paid by the Board into a sole proprietorship bank account bearing his name.

It is important when examining this evidence to bear in mind that the limitation of pupil regulation and the personal payment to doctor regulation were promulgated on 25th July 1985.

The judge referred also to the evidence of Dr. Lee Pei-hwa who said that she worked at the 1st applicant's clinic in Nathan Road in 1985/86. Dr. Lee said that in December 1987 the 2nd applicant rang her saying she needed Dr. Lee's support in a campaign to gain an increase

in doctors fees. She said that she signed a document without reading it carefully. This document was dated 24th December 1987, and on it appeared the words "I am Dr. King Ho's associate". She said that at that time she was in the United States and that she had never joined the Scheme, although the Board's records showed that in 1985/86 five schools with 2,769 pupils had selected her as school doctor and in 1986/87 five schools with 5,659 pupils had selected her. The records also showed that $653,700 was paid into bank accounts in the name of the "Lee Pei-hwa Surgery" which had been opened by the 2nd applicant. Dr. Lee said that she had never received any of that money.

Reference was then made to the evidence of Miss Hung Sun-yee, an employee of the Chekiang First Bank at Tsimshatsui East Branch, as to the opening of bank accounts. She said that the 2nd applicant came to her branch on 6th August 1985. This would have been about 8 weeks before the Board's rule that it would remunerate doctors personally was to come into effect, but was only 10 days after the rule was promulgated. Miss Hung said that the 2nd applicant produced business registration certificates, which are necessary to open a sole proprietorship account, in each of which the name of a doctor was followed by the word "Surgery". Each showed the 2nd applicant to be the sole proprietor. Miss Hung said that she told the 2nd applicant to ask each of the doctors concerned to countersign the account opening form and that, when she later found that this had not been done, she reminded the 2nd applicant about it. In the outcome, although there were no signatures from the doctors, the bank opened the accounts and received autopay credits from the Board into those accounts. It was Miss Hung's evidence that difficulty arose in December 1985 because the autopay credits did not bear the word "Surgery" and that, after further communications, she told the 2nd applicant that the bank wanted all accounts closed, and that this was done.

The judge next made reference to the evidence that the 2nd applicant had then opened 11 sole proprietorship accounts with the Dao Heng Bank in North Point. All of these were in different names but all had the same correspondence address which was the address of the residence of the 2nd applicant and her husband. Mr. Chan Chow-ming, an employee of the branch, said that a year later the 2nd applicant came with the 1st applicant to the branch and opened 9 proprietorship accounts with the same names as the earlier accounts and that the 2nd applicant told him that she wanted to transfer the business to her husband.

The judge referred to the cross-examination of the 2nd applicant in which she admitted that $40,000 was withdrawn from an account in her name and deposited to the credit of the account of her mother, Madam Cheung York-cheung. Further that the cost of a cashier order payable to the School Medical Services Board was then debited to that account which would have contained insufficient funds to meet that payment had the $40,000 not been paid into it. She said that the $40,000 was payment of a debt which she owed her mother. The judge referred also to her evidence as to a payment of $10,260 from her funds to the credit of her mother and of the debiting of her mother's account in the sum of $10,260 to meet payment of a cashier order in favour of the School Medical Services Board in that sum. He referred also to two other cashier orders purchased with funds from her mother's account, one of which was in the 2nd applicant's handbag when she was arrested. These orders were to pay pupils' contribution due from schools which had nominated a doctor whose fees from the Board were to be paid into an account controlled by the 2nd applicant.

The case against the 1st applicant as put to the jury was that the 2nd applicant could not have carried out her activities on such a scale for the benefit of the practice unless he, the 1st applicant, was aware of what she was doing and approved of it. The judge also pointed to evidence that the 1st applicant had made approaches to schools and had attended the Dao Heng Bank with the 2nd applicant to change the names of the accounts, which then indicated that he was sole proprietor.

The trial judge then referred to the evidence of the 2nd applicant. It was her evidence that Mr. Carey had encouraged her and her husband, when they visited him to discuss the Scheme, to sponsor the student's participation fees and had said that it was a method approved by the I.C.A.C. She told him the extent of the services provided by her husband's clinic and the appreciation of the schools for the service which the clinic provided. She said that in 1981 or 1982 she had discussed with Carey a complaint that the Government was doing nothing to promote the Scheme among parents, and that she and her husband could sponsor in order to encourage parents to join. At this time they were not sponsoring, having ceased to do so as a result of a complaint to the I.C.A.C. She said that in 1984/85 she saw a circular sent to all participating doctors in which the Board's rule, disqualifying doctors who rebated, was mentioned. She admitted that her mother sponsored students and that in 1985 she became aware of the other two rules regarding pupil limitation and payment to individual accounts. She said that she discussed these rules with Carey who said that the individual payment would destroy partnerships and so was unworkable. She said that Carey told her that if she and her husband had 10 associates, they could, despite the limitation of 3,500 students, get 35,000 students, and that "all those rules were unworkable". She said that she didn't think it was necessary for the money

paid by the Board to go to the doctor named in the Board's records, and that, as the 1st applicant was head of the association, the money should be paid to him so that he could decide how it should be distributed among the associates.

The judge summarized her evidence in the following way:

> "She does not deny the truth of most of the evidence led by the prosecution. She agrees with the evidence to the extent that it shows her playing a leading role in the administration of her husband's practice by recruiting doctors to work for him or with him and the evidence about the opening of the various bank accounts.
>
> Her case is that she was not a party to any plan to cause the Board to act contrary to its public duty because Carey was the Board and everything she did was authorised by Carey.
>
> She doesn't say this, but Mr. Llewellyn puts her case on an alternative basis as well, namely, that if you did find that she was a party to a plan to breach the rules, she was not guilty of the conspiracies alleged because she did not have dishonest intentions. If she was mistaken in thinking that Carey was the Board, that mistaken belief led her to believe that procedures approved by Carey were proper procedures involving no taint of dishonesty.
>
> As to her assertion that she thought Carey was the Board, you might think, having seen and heard Carey yourselves, that he is capable of giving the impression that the School Medical Services Scheme is his own scheme, about which nobody else has any real understanding, about which nobody else has sufficient interest to stimulate enthusiastic support for it and about which nobody else has the expertise required to administer it as the form of medical insurance it was intended to be.

> If you think that Mrs. Ho might have gained the impression from Carey that the scheme was his, that if he said the rules were unworkable and need not be followed, that she might well have accepted that. Whilst you should in any event, having regard to her own assertion that she thought she was acting honestly, in considering this issue as to dishonesty, the evidence of Carey should also be given earnest consideration.
>
> If you think that either of the defendants may have thought that he or she had the authority of the Board through Carey to do what they did, they you could not find that defendant guilty.
>
> If you thought that either of them may have thought that what he or she was doing was honest, then you could not find that defendant guilty.
>
> But if you are in no doubt that a defendant used deceitful means in league with Carey, to cause the Board to make payments in contravention of any of the three rules and conclude that that conduct is obviously dishonest that the defendant could not have thought it to be honest, then you should find that defendant guilty."

The trial judge then turned to consider the evidence on the 12th count. Dr. Wong Ying-chiu gave evidence that he worked for 2 weeks in 1986 for the 3rd applicant. He said that he signed a Scheme form on which the bank details were not his and that he did not give any permission for an account to be opened in his name. The bank records showed that nine schools with 9,000 pupils had selected him and that that $677,946 was paid from Board funds to a bank account bearing his name between October 1987 to September 1988. This was, of course, long after the two weeks in 1986 when he working for the 3rd applicant.

Dr. Wong Wing-chiu gave evidence that he practised at his own clinic in Heung Sze Wui Road. He said he met the 3rd applicant in May or June 1987 and, at his request,

signed a Scheme form. He said the form was blank when he signed it but that he gave the 3rd applicant his business card and that the details on the form regarding his clinic address and consultation hours were correctly recorded. He said that he had never had a bank account with the Dao Heng Bank at King's Road, the account on the form, and that he had never received any communications from the Board regarding the form. He said he gave no authority to the 3rd applicant to open any bank account and that he knew nothing of the information in the Board's record which showed he had 3,000 students from 4 schools on his panel. He said he knew nothing about the payments made into the bank account.

Dr. Leung King-yuk gave evidence that he had signed a Scheme form, but that the bank account at North Point shown thereon was unknown to him. He said that the 3rd applicant had told him that he had 2,000 odd pupils from a total of 4 schools and that he was unaware that the Board's records showed that 9 schools, with participating pupils numbering 4,684, had selected him as their doctor.

A number of headmasters gave evidence saying that the 3rd applicant had offered to pay pupil's participation fees.

The trial judge then dealt with the evidence relating to the 17th count. Dr. Ng Sau-lai gave evidence that he started working for the 1st applicant and the 3rd applicant on 1st October 1986. He said that he was actually engaged for the work by the 2nd applicant and was paid a monthly salary by cheque drawn on an account bearing the names of all three applicants. He said that he signed a form when asked to do so by the 2nd applicant but that it was folded at the time. When this form was shown to him in court he said that the bank account mentioned thereon was not his, nor was the address in Kowloon Tong. He said that

he did not join the School Medical Scheme until November 1988.

Miss Ivy Hui, an employee of the board, gave evidence that the 2nd applicant was handed a cheque in the sum of $53,184 on 27th January 1987 representing back pay for Dr. Ng and that the 2nd applicant signed a receipt for this cheque. This receipt purported to bear the signature of Dr. Ng but, when he was shown it while giving evidence, he said that the signature was not his and that he did not receive any money.

Dr. Liu Yau-shan gave evidence she was employed to work for the 3rd applicant at a clinic in Taipo which when she began work on 1st March 1986, displayed a sign bearing the name "Chow & Ho". She said she was paid by cheque drawn on a joint account in those names. She said most of the pupils she saw were Scheme students who were charged $10, that this was the charge imposed by her predecessors and that the 3rd applicant had told her to charge the same but that she could waive the charge if the pupils forgot to bring the money. She said that she had signed a Scheme form but had not realized what it was. When shown the form, she said the address of the clinic and consultation hours were accurate but that she had no account at the Dao Heng Bank and did not know the Yau Tong address shown thereon. She said that she had given no one authority to open a bank account or to use her name to register a business. She said that she did not know that five schools had stated that they had chosen her under the Scheme. She said that the 3rd applicant had told her that he applied under her name under the scheme but that she never knew that more than 4,000 students had been allotted to her, nor that $349,269 had been paid by the Board to an account in her name.

Headmasters from the schools in respect of which the Board made payments to the credit of Dr. Ng's account said that the 2nd and 3rd applicants had canvassed them, that the 3rd applicant had promised donations directly and that the 2nd applicant had promised them through an enthusiastic supporter.

It is not necessary to deal with the summing-up in so far as it canvassed the alternate false accounting counts. The evidence set out above was, if believed, capable of establishing that the applicants were operating schemes designed to ensure that they received direct payments for pupils for whom they were not the nominated doctors. That this was so was not a real issue in the appeals.

The Submissions made on behalf of the First and Second Applicants

Mr. Sedgwick's first ground was that:

"(1) The learned judge erred in law in directing the jury 'that any person who combined or agreed with another to use dishonest means to cause the Board to remunerate a doctor in breach of any of those rules committed the offence of conspiracy to defraud.'

(2) By suggesting that:

(a) if a participating doctor paid the pupil's contribution such 'rebating and an economical medical insurance scheme could never form a matching pair'; and

(b) 'If a headmaster enrolled all his pupils irrespective of whether the parents consented, the Government would pay to the nominated doctor $65 for each of those pupils, even though some of them may not wish to participate in the scheme. Such a scheme could never

> fall within the definition of economical medical treatment',
>
> The learned judge misinterpreted to the jury the public duty of the Board which was "to operate the scheme to provide economical medical treatment for the pupils of schools participating therein".

The "Public Duty" Argument

Mr. Sedgwick attacked the judge's directions on the conspiracy charge and in particular his directions as to the public duty which he said was imposed upon the Board and contrary to which the applicants were said to have caused the Board to act. The citation upon which reliance is placed in Ground 1 does not appear until page fourteen of the summing up. It refers to "a breach of any of those rules" and was relied on by Mr. Sedgwick to demonstrate that the trial judge was wrong to direct the jury that the Board had been led to act contrary to its public duty. It was his argument that a breach of its own rules by the Board was not a breach of its public duty. This argument focuses narrowly upon the rules (we have heretofore referred to them as regulations) and suggests that the Board cannot by its own rules impose a public duty on itself. It seems to take no account of the direction of the judge, which commenced at page five of the summing-up, in which he asked the question: "What was the Board's public duty?" Having referred to the Ordinance his answer was:

> "That Ordinance says that its purposes is to make provision for the establishment and incorporation of a board to operate a scheme to provide economical medical treatment for the pupils of schools participating in the scheme.
>
> By the Ordinance the Board was given full power to manage, administer, and operate a scheme for the purpose of providing economical medical treatment for pupils

> attending any school. So the answer to the first question is that it was the duty of the Board to manage, administer, and operate not just any scheme at all for the provision of medical treatment for school pupils, but a scheme providing economical medical treatment." (Emphasis supplied.)

The judge told the jury that it was the duty of the Board to manage, administer and operate the Scheme which it set up to give effect to the intention of the Ordinance. This was its "public duty". In carrying out this public duty it made rules for the administration of the Scheme and for payment to participating doctors. These rules, we are satisfied, did not, as Mr. Sedgwick argues, create the public duty. Given, however, that they regulated the way in which the Board had determined it would carry out that duty, if the Board acted in a way which contravened them such action would be a failure to carry out its public duty. We reject the submission that the Board's duty to make payments in accordance with its rules was a duty which it imposed upon itself and that it could not, therefore, be a public duty. The rules did not impose the public duty but provided the mechanism whereby that duty was implemented. The public duty was the duty to administer the Scheme, and was one which was not imposed upon the Board by itself but by the Legislature through the Ordinance.

Mr. Sedgwick argued also that the duty of the Board was not a public duty as it was not one which could have been legally enforced. For the reasons set out above we also reject this argument. We are satisfied that the duty of the Board to administer the Scheme in accordance with its rules was one which could have been legally enforced.

The "Non-prohibitory" and Ultra Vires Arguments

Mr. Sedgwick next suggested that "the rules" were ultra vires as they sought to regulate matters beyond the lawful contemplation of the scheme. His submission, which seemed to embrace all three rules, was that their "only purpose was to make provision for the equitable distribution of assets available to the Board among members of the medical profession". He submitted that they could not, therefore, properly be regarded as part of a scheme to provide economical medical treatment.

We find it difficult to see how any such attack can be made upon the rebating regulation. Its purpose, we are satisfied, was clear - to ensure that pupils were not registered who, or, more importantly, whose parents, had no intention of using the scheme.

It is fair, however, to say that the thrust of his attack upon the rebating rule was not that it was ultra vires but that it was not, in any sense, a prohibitory rule. We will, before turning to the ultra vires argument deal with that submission. Mr. Sedgwick argued that the rebating rule did not prohibit rebating but was no more than an indication of the action which the Board would take if rebating by a doctor was proved. He submitted that the judge was wrong to ask the jury whether they could see any other interpretation "than that the Board would no longer remunerate a doctor who entered into an arrangement whereby he paid the pupils' contribution." He submitted that there was nothing which suggested that he would not be entitled to remuneration for work done prior to the time of his forced resignation and that the rule did no more than indicate that if a doctor was found to have paid a pupil's remuneration the Board would demand his resignation. Such observations while correct do not, in our view, establish the narrow interpretation of the rule urged upon us by Mr. Sedgwick.

It is true that the rule only provided the sanction and that it did not specifically forbid the act. However we are satisfied that it made plain, and can have left doubt in no one's mind, that the practice was forbidden. Mr. Sedgwick's argument ignores the valid reasons to which we have earlier referred, and which we are satisfied were in the mind of the Board, for prohibiting the payment of pupils' contributions by doctors. A doctor who entered into rebating arrangements and concealed them from the Board clearly did so to ensure that the Board would continue to remunerate him. Given that it was the public duty of the Board to administer the scheme in accordance with the mechanism it had adopted, such actions clearly caused the Board to act contrary to its public duty.

We now turn to the ultra vires argument which was primarily directed at the other two regulations.

We are satisfied that they were both properly enacted by the Board. Having carefully examined the relevant minutes and the evidence to which reference was made, we find no merit in the suggestions to the contrary.

The principal attack upon them is that they are ultra vires as they were passed for the purpose of distributing money among the medical profession and not for the proper administration of the Scheme.

Considerable argument was addressed to us by Mr. Sedgwick as to the wording of the first of these two rules. He, at first, appeared to be suggesting that the Review Committee, which laid down the rule, was not empowered to enact a rule on behalf of the Board. The rule was approved on Friday 10th May 1985 by a meeting which is referred to in the minutes as a meeting of the "Review Committee of the Board". This argument was not, however, pursued as, in the outcome, Mr. Sedgwick's submission

appeared to be not that the rule was not properly passed but that it was an amalgam of a foreshadowed rule, which appears in the minutes of the Board Meeting of 17th January 1985, and of the rule that appears in the minutes of the Review Committee held on Friday 10th of May. He suggested that the amalgam created by combining the foreshadowed rule and the rule passed by the Review Committee did not prohibit the making of some payment as regards students in excess of 3,500. We reject this suggestion. We are satisfied that the Review Committee was empowered to make the rule and that the rule which it made was that promulgated in a circular on 25th July 1985 headed "Notes to Doctors". This read:

> "The upper limit of pupils per doctor shall be 3,500, but doctors with over 3,500 will be permitted to retain their present numbers while those pupils phase out of Form III."

That document also detailed the other rule with which we are concerned:

> "Doctors will be remunerated personally, not the organization to which they are attached, be it partnership or any other form of corporate entity."

The application of these rules was made clear by the preamble to the circular which read:

> "The following rules, laid down by the Board in May 1985, will govern the distribution of pupils and payment to doctors with effect from 1st October 1985."

As regards the first rule, the intention of the Board was, we are satisfied, to ensure that each doctor did not have more than a manageable number of pupil patients allocated to him. We reject the suggestion that the principal reason for making the rule was to distribute payment equitably among the medical profession.

The second rule was clearly complementary to the first. It ensured that the responsible doctor received direct payment for the pupils allocated to him. The rules were, it is true, flouted by the secretary. Carey said that he refused to observe them because they worked against his view, which was that maximum enrolment was all that really mattered. This does not, however, in any way detract from their propriety or validity. Further the fact that the rules may also have had the effect of spreading the work among the medical profession is not a matter towards which any suggestion of ultra vires can be properly directed. It was clearly within the proper purview of the board that it maintain the goodwill of the medical profession in the administration of the Scheme. This, while was only a side effect of the rules, was not one which, as Mr. Sedgwick suggests, was outside the proper purview of the Scheme.

As regards the Board's public duty and the three rules, we are satisfied:

(i) that the public duty of the board was, as the judge told the jury, to manage, administer, and operate the Scheme;

(ii) that pursuant to that public duty it made rules for the management, administration and operation of the scheme;

(iii) that its management, administration and operation of the scheme in accordance with the rules was part of its public duty;

(iv) that the three rules were not passed for any extraneous or improper motive but that each was made properly to further the objects of the scheme;

(v) that the duty of the board to administer the scheme in accordance with the rules was one which could have been legally enforced.

Ground 3:

> "There was material irregularity in the trial in that the trial judge caused the submission to be made by defence counsel of no case prior to the conclusion of the prosecution case and thereafter gave a ruling which had the effect of preventing defence counsel from fully developing the case of the defence in the course of the trial."

The trial commenced on Tuesday 25th September 1990 with the evidence of Sir Albert Rodrigues, who was Chairman of the Board from its inception in 1964 until 1st September 1986. On the afternoon of Wednesday 26th September 1990, Barnes, J. said to counsel for the applicants, Mr. Llewellyn:

> "...at least part of your case is that if the prosecution establish everything that they want to establish by way of their evidence, you would submit there was still no offence."

Mr. Llewellyn said that that was so and that 90% of the evidence was agreed. He informed the court that the area of disagreement concerned the issue of "dishonesty". Mr. Llewellyn said to the court that he firmly believed "that most of this case can be reduced to a two-page summary of admitted facts under s.65C, and I think indeed my learned friend is turning his mind to try to do that".

Although the record is not altogether clear, the impression gained from it is that, when the court adjourned at 4.25 p.m. on Wednesday 26th September with the intention of resuming at 10 a.m. on the following day without the jury, it was to allow prosecuting counsel, Mr. Reading, to attempt to reduce a large part of the evidence to an agreed summary. This certainly appears to have been the judge's impression as he said, when the court resumed on Thursday, 27th September, that he was "under the impression that we were going to come in and discuss, or the two of you inform me how far you proceeded". The following exchange then occurred:

> "Mr. Llewellyn:
>
> My Lord, I was not proposing to make that argument at this stage. There are certainly some more evidence that I was anticipating will be called before I would ask your Lordship to hear me on that, but as the matter is now being generally canvassed, let me make it clear that those are matters that I will argue on.
>
> Court:
>
> Isn't it a little ridiculous if we go ahead to hear three months of evidence, you then put up this argument to me and I agree with you.
>
> Mr. Llewellyn:
>
> My Lord I have no intention that that should be the case. I was proposing that the court should, first of all, hear two more witnesses, not three more months, I was thinking of more in the nature of probably a week and a bit."

After further discussion, it transpired that the two further witnesses Mr. Llewellyn considered should be called before he made his submission were a Miss Lai and a Miss Chan. The following exchange then occurred:

"Mr. Reading:

Miss Chan could take a day. Miss Lai will be ... I will not have a lot to ask myself. I anticipate my learned friend ...

Court:

So anyway it looks like by the middle of next week, we would be in a position to deal with the submission of yours.

Mr. Llewellyn:

I hope so, my Lord."

It is not clear, from the curtailed transcript which we have in the appeal bundle, what occurred on Thursday afternoon or on Friday, 28th September, but at 10.02 a.m. on Monday, 1st October, the following exchange occurred in the absence of the jury:

"Court:

Yes, Mr. Llewellyn.

Mr. Llewellyn:

Good morning, my Lord. The matters of law, which I wish to raise before Your Lordship this morning, can I say at the outset, only affect - are only in relation to three conspiracy counts, but Your Lordship may still feel it worthwhile to hear those matters now, and I make these submissions at Your Lordship's invitation because the evidence in this case may quite conveniently be divided into two types."

Mr. Llewellyn and Mr. Reading then addressed the court and Mr. Llewellyn replied.

At the conclusion of the argument, the judge ruled that he was against Mr. Llewellyn's submission that the conspiracy charges should be withdrawn from the jury and stated that if Mr. Llewellyn thought it important to have his reasons, he would reduce them to writing and supply them at a later stage. It seems that a request was made as the judge did later supply his reasons. We have no indication as to exactly when this was done.

In the course of those reasons, the judge indicated that, in his view, the "submission that the rules were never made relies upon an analysis of the minutes of the Board involving finicky attention to detail without according proper weight to matters of substance".

It is now submitted that this ruling had the effect of preventing defence counsel at trial from fully exploring matters which bore upon the ultra vires argument. The only passage in the transcript to which Mr. Sedgwick referred in this regard was one in which Mr. Llewellyn said that he was not seeking to go behind the view that the court had expressed concerning the rules of the Board. Mr. Sedgwick submitted that the ruling had the effect of shutting off this important area of the defence case. We are by no means satisfied that that was so. It is, however, not necessary for us to dwell upon this matter as Mr. Sedgwick conceded that, if the ruling was correct, he would not be able to show any damage. As we have already indicated, we are satisfied that the ruling was correct.

Ground 4

The thrust of this ground was that the trial judge had never given any proper direction to the jury "regarding the ingredient of agreement in the law of criminal conspiracies and thereby misdirected the jury on an essential ingredient of the charge".

This ground arose out of the following exchange which occurred when the foreman directed a question to the judge after the summing-up:

"Foreman:

Yes. We want to make sure is there anything like agreement by conduct in the Common Law. That is by among the persons involved in the charge they may not have verbal agreement or written agreement but ...

Court:

I understand what you mean. Yes a conspiracy is spoken of as an agreement. But a conspiracy to defraud is a criminal conspiracy. When criminals enter into an agreement to do something unlawful, they do not go along to a solicitor and say, 'Look, we want to enter into this agreement to rob a bank, will you reduce it to writing for us?' So what happens with conspiracy - there is never any document on which the parties have agreed that says 'we are going to do this.'

So whether there is an agreement is a matter of inference. And how do you know whether people have agreed on something? You look at what they have done and said at the particular time. Supposing that after this case was over and I met one of you in the street. Somebody who saw us may not have even been able to hear what we said to one another, but if they saw us go into Pacific Place, go and sit down in a restaurant there and have a meal together and appear to be chatting together, now without having heard what we said would they not draw the inference those two have decided to go to that place in Pacific Place and have a meal together? Nothing in writing, overheard none of the conversation, but from what that observer would have seen us do, the observer draws the common sense inference. We would not be there together unless we had agreed to go together. We would not be there.

So if you see evidence of people acting together, combining together to do something, that does not happen by accident. You would say, they must have agreed to do that. They have done it together, they must have agreed to do it together. That is what the kind of agreement we are talking about when we are talking about a conspiracy.

> If you see two men go in together into a bank, one with a gun and the other with a bag, they get inside the bank one points the gun at the teller, the other stuffs money into the bag, they leave the bank together, they get into a car, there is another man in the car, they all drive off - you have not heard a word that any of them have said, but all three have obviously conspired to commit the offence of robbery. You know they have because that is what you have seen them do if that is what the evidence establishes. You say 'Oh, that establishes a conspiracy to rob.'
>
> Does that help you?
>
> Foreman:
>
> Yes. No further questions, my Lord."

It was unfortunate that the judge did not allow the jury to finish formulating their question. Nonetheless it seems quite clear from the answer of the foreman that the judge correctly anticipated the question to which they were seeking an answer. Mr. Sedgwick submits that the question, in so far as the foreman was allowed to articulate it, was not directed towards inferences that might be drawn from conduct but was an enquiry whether there could be such a thing as an "agreement by conduct", that is to say, whether conduct by itself could amount to agreement, and that the judge failed to answer that question. We appreciate the force of Mr. Sedgwick's submission based upon the words used by the jury, but must also, when considering this matter, take into account that the trial judge, having made his explanation, asked the foreman whether it had helped, and the foreman said that it had and that he had no further questions. That being so, we are satisfied that we must proceed upon the basis that the judge had correctly divined the question to which the jury were seeking an answer, and that they received an answer which satisfied them.

Ground 5

In this ground Mr. Sedgwick argued that the trial judge misdirected the jury as to the evidence which, the Crown suggested, showed that Carey was dishonest in the dealings which the 1st and 2nd applicants had with the Board.

The first complaint is as to a document, Exhibit 17, setting out the names and addresses of certain doctors which was given by Carey to Grace Chan, the head clerk of the Board. The second page of this document is in handwriting of the 2nd applicant. It sets out the names of Dr. Chiou Eng-choun and Dr. Luk Cheung-kan and gives their addresses and account number with the Hongkong and Shanghai Bank. At the foot of the page in Carey's handwriting are the words "All individual doctors". It was the Crown case that this direction was written by Carey as part of the conspiracy to breach the individual payment rule. The trial judge when addressing the jury said "Why did Carey do that? Whatever his reason, the effect of what he did was, you may think, to create a false impression in the Board's records, a false impression which could be helpful in disguising breaches of the individual payment rule." It is submitted that the judge failed to put Carey's explanation and that, by using those words, had indicated that, whatever the reason given by Carey, what he did was dishonest. This is, however, not the meaning which we give to the words. The judge told the jury, quite correctly in our view, that, however Carey sought to explain it, they might conclude that the effect of the words was to create an impression, which was a false one, that the payments were being made to individual doctors.

We do not have a transcript of the evidence of Dr. Luk Cheung-kan. The evidence of Dr. Chiou Eng-choun, which we do have, establishes that he was an Indonesian born doctor who obtained his original medical qualifications in Mainland China. He then came to Hong Kong and passed the licentiate examination for medical practitioners in 1981. He said that he had been approached by the 2nd applicant and had been sent Scheme forms in blank. He said that the Hongkong and Shanghai Bank account number on the form he was shown was not his account. He said that he had commenced to see students who were directed to him by Mrs. Ho, and that he had received payments, but not from the Board, in relation thereto. Dr. Chiou added that he thought that Mrs. Ho was the representative of the government and that he was working for the government. The evidence established that the payments were being made into a bank account controlled by the 2nd applicant about which Dr. Chiou had no knowledge.

The explanation which it is suggested should have been outlined to the jury was, to use Carey's own words: "I think that this must have meant the individual doctors, that means one per address per clinic. I think so .. I don't think we are referring to the accounting side. I don't think so." This "explanation" was, in our view, of so little cogence that the judge's failure to outline it would have worked no prejudice to the defence.

The next matter of which complaint was made concerned Exhibit P571. This was a letter dated 1st May 1984 written by Carey, signed at his direction by Miss Wong and addressed to Messrs. Lowe Bingham and Matthews. It stated:

"I refer to my letter of 29th February 1984, and to our telephone conversation of this morning:

Dr. Young Pung-fook	Wing Lung Bank
Code No. 577	(Central Main Branch)
	A/C 01-002-0437-8
	(Chang York-cheung)

2. I understand from Mr. Yong that his account is in the name of his daughter Chang York-cheung. He regretted he had not informed us earlier."

The person Chang York-cheung, referred to in the letter, was in fact not the daughter of Dr. Yong but the 2nd applicant's mother. The trial judge dealt with this in the following way in his summing up:

"He admitted that he drafted the letter which Mr. Wong sent to Lowe Bingham and Matthews to enable a payment in favour of Dr. Yong to be made into a bank account controlled by Mrs. Ho. That letter is Exhibit P571 and your copy is in Vol.VI p.1021. If you thought from the way he gave evidence that Mr. Carey is a man who chooses his words carefully, striving for accuracy in expression, then would not it be out of character for him to send an important letter carelessly phrased? That letter would lead any reader to believe that Carey, or a member of his staff had spoken to Dr. Yong about the matter and that the information supplied had come to the Board directly from Dr. Yong. That was not true and Carey during his evidence agreed that it was not true. Carey now acknowledges that the information must have come from Mrs. Ho and not from Dr. Yong. It could not have come directly to him from Dr. Yong because he said the two of them had never spoken to one another. Was it careless phrasing by Mr. Carey or a deliberate act done to conceal and help the actual source of his information? When he was asked why the letter was so phrased he paused for a long time before replying. When he did reply he said this: 'I suppose I was adding assurance to Lowe Bingham & Matthews on this matter'. He was then asked:

> 'Assurance of what?' and his reply was: 'That it was my authority, I suppose." So, on Carey's own evidence he did what you may think was a very strange thing. If what he supposes is the truth that in order to lend his authority to a request to the Board's accountants, instead of personally signing the letter and giving the request authority in that way, he gets the subordinate to sign, but ensures that the letter contains a statement which Carey knew to be untrue. Why was it necessary to do that if the transaction was open and honest? The letter also contains misinformation about the relationship between Dr. Yong and Mrs. Ho's mother. What was his purpose in conveying the impression that the source of the misinformation was Dr. Yong, whereas in fact it was Mrs. Ho? If the Board's records were to show that Dr. Yong had personally directed the Board to make payment to an account with which he appeared to have some connection then the Board's record would show a regular payment of Board funds. If that was the real purpose behind the drafting of the letter in that way then you could find that Carey was prepared to, and did, act deceitfully to help the Hos obtain government funds in contravention of the Board's rules. That then would be a matter relevant in determining whether Carey did agree to a plan to use dishonest means as alleged in the first count." (Emphasis supplied)

It is submitted that the judge, when he spoke of rules, must have been referring to the Board rule against payment to individual doctors and that, as the letter was dated 1st May 1984 and this rule did not come into effect until 1st October 1985, this was a misdirection.

Mr. Bruce, who with Mr. Reading appeared for the respondent at the hearing of these applications, points that the evidence showed that Dr. Yong was old, that he did not practise and that the 2nd applicant had admitted in evidence that he was muddle headed and that, while he sometimes came into the surgery, he wasn't allowed to diagnose the students. Mr. Bruce pointed out that this account was used

until the end of the conspiracy, that $900,000 was paid into it and that Mrs. Ho was the signatory and the one who operated the account.

It was, we are satisfied, wrong for the judge to suggest that "the real purpose behind the drafting of the letter" was to help the Hos obtain government funds "in contravention of the Board's rules". The real thrust of his comment, however, went to the honesty of Carey. While he was in error in saying what he did, he would have been quite correct had he told the jury that they might come to the conclusion that the original purpose of the letter was deceitful and that it was later relied on to contravene the Board's rules. This misdirection was, we are satisfied, a slip which, in the outcome, was of no real consequence.

The next complaint concerned the judge's direction concerning the evidence of Madam Mona Lo who was, at the relevant time, the administrator of the Kwun Tong Community Health Project of the United Christian Medical Service. He said:

> "Madam Lo said that when she received notice of the rule regarding limitation of pupils she spoke to Carey about the matter because her service had more pupils than the rule permitted. She told him that her service could look after more than that, that they had 23,000 at the service's four clinics and she was concerned that she might have to send 10,000 children elsewhere. According to her, Carey said that the Board thought that 3,500 was all that a private doctor could look after. As a result her project gradually reduced their pupils to 3,500 per doctor. If you accept Madam Lo's evidence then it will appear that a rule unworkable on one side of Lion Rock, was workable on the other."

The trial judge was here saying that Carey's evidence, that he was disregarding the pupils per doctor rule in the best interests of making the scheme workable, was given the lie by the evidence of Madam Lo. It is suggested that the trial judge's comment was both inaccurate and misleading. We have considered this suggestion with care but are unable to find any substance therein. It seems to us clear from Madam Lo's evidence that Carey had never suggested to her that she should disregard the Board's ruling. It is plain from what she said that he had indicated to her that she should have regard to it, and that she did so. Indeed, the judge would have been quite entitled to have made much stronger comment, telling the jury that, if Carey was truthful in his evidence that, for the good of the Scheme, he had been disregarding the rule, then it was surprising that he did not suggest to Madam Lo that she too should disregard it.

The fourth matter of complaint concerns the evidence of a Mr. Tai Hon-kwai, head teacher at the Tang Shiu Kin Primary School. He wrote a letter to the Board on 25th February 1986. It is suggested that it was wrong of the judge to have said that Carey persuaded Mr. Tai to write this letter. We find nothing in this suggestion. The letter was written at the instigation of Carey and its clear intention was to ensure that the Board was informed that there was no complaint against Dr. Ho, the 1st applicant. Indeed, in our view, the judge could, in this instance also, justifiably, also have made much much stronger comment upon the part that Carey played in the writing of that letter.

Ground 6

This ground suggested that there was a misdirection to the jury in the following observation in the summing-up:

> "The point was made by Mr. Reading in his opening address that if pupils who had no intention of using the scheme were enrolled, the Government would pay $65 in respect of each such student to a doctor who was undertaking no risk of having to provide treatment. If the headmaster enrolled all his pupils irrespective of whether the parents consented, the Government would pay to the nominated doctor $65 for each of those pupils, even though some of them may not wish to participate in the scheme. Such a scheme could never fall within the definition of economical medical treatment.
>
> Just imagine the possibility for abuse. A school has 1,000 pupils. A doctor contributes $10,000 to meet the contributions of all the pupils of the school, the school enrols all pupils, the doctor receives from the Board $75,000. His investment of $10,000 brings him a return of $75,000 from which he will get a net profit of $65,000 less whatever it costs him to provide medical service to a proportion of those students."

It is suggested that this was a misdirection as there was no evidence that the Scheme had ever been abused by the enrolment of students whose parents had no intention of using it. This ground, in our view, has no substance whatever. The judge was perfectly right to indicate to the jury the manifestly obvious possibility of such abuse. If a pupil was enrolled whose parents had no intention of using the scheme then, as we have already remarked, the government would be paying its contribution quite unnecessarily. We have already also indicated that the Board itself seems to have overlooked the importance of parent participation. While the participation of the schools and the doctors was important, the real key to ensuring that the Scheme was working effectively was the participation of the parents. No pupil should ever have been enrolled without an indication from the parents that they understood the nature of the Scheme and that they intended that their child would, when necessary, take advantage of it.

Ground 7

In this ground it is submitted that the judge misdirected the jury on the element of dishonesty concerning the rebating of the $10 pupil's fee. It was submitted that after the rebating rule was introduced, the United Christian Hospital and the Lutheran Church continued to rebate and that this was known to the applicants. It was suggested that this was a consideration which should have been brought to the attention of the jury when considering whether or not the applicants were dishonest. The rebating rule dealt with the payment by a "doctor" of a pupil's contribution. We find it difficult, as did the judge, to see how it could be suggested that the applicants, knowing that rebating by doctors was forbidden, might have thought that what they were doing was honest because it was being done by others who were under no injunction to refrain from rebating.

The direction which the trial judge gave as to the test to be applied when determining whether or not the applicants were acting dishonestly is set out at p.29 of this judgment.

We are satisfied that this direction was a proper one appropriate to the circumstances of this prosecution.

Ground 8

This ground suggested that the judge "erred in directing the jury that the gravamen of the wrong done by D1 (the 1st applicant) in relation to his treating more than 3,500 pupils in contravention of the Board's rule was in submitting claims for payment in respect of that part of his

panel of students which exceeded 3,500 in number when that was neither the case put by the prosecution nor an accurate interpretation of the Board's rule."

This ground relies upon the argument, which we have already rejected, that the rule was an amalgam which did not prohibit some payment with regard to students in excess of 3,500 who were treated by an individual doctor. As we have indicated we are satisfied that the rule was that which was promulgated and that this did limit payments to 3,500 except where a doctor was retaining pupils already registered.

Ground 9

This ground complained that the trial judge failed adequately to sum up to the jury the case in respect of count 17, which was the third conspiracy count, involving all three applicants. It was submitted that the trial judge failed to indicate evidence from which the jury might infer that the applicants were "acting together and that they had the combined aim to obtain payment in contravention of the Board's rules".

The judge referred, inter alia, to the evidence of Dr. Ng Sau-lai. He said that he worked with the 1st and 3rd applicants commencing on 1st October 1986 and that his employment was arranged by the 2nd applicant. His evidence was that he signed a form which was dated December 1986 which was folded so that he was unable to see it after he had been given it by the 2nd applicant. When shown the form, he said that the bank account therein was not his, that he was never told of the number of pupils allocated to him and that he did not personally join the Scheme until November 1988.

The evidence of this witness, if accepted, clearly establishes that he was employed by the 1st and 3rd applicants through the agency of the 2nd applicant to work without any real knowledge of the extent of his participation in the Scheme and without receiving any payment from the Board in relation to the pupils he treated.

The judge referred also to the evidence of Miss Ivy Hui who said that the 2nd applicant was handed a cheque in the sum of $53,148 on 27th January 1987, representing back-pay due to Dr. Ng, that she signed a receipt for this cheque. Dr. Ng on being shown a receipt purportedly signed by him said that he had neither appended his signature thereto nor received any money in relation thereto.

The judge referred also to the evidence of Dr. Liu Yau-shan who said that she was employed by the 3rd applicant to work at a clinic in Tai Po commencing from 1st March 1987. She said that although the clinic bore the name "Chow & Ho" she never met Dr. Ho. She said she was paid by cheque drawn on a joint account in their names. She said that most of her patients were School Medical Service students, and that, in accordance with the existing practice, each was charged $10. She said that the 3rd applicant told her that she was to continue the practice, but that she could waive the charge if the student forgot to bring money. She said she had signed a participating doctor's form without knowing what it was, that the account shown was not her account and that the address shown was not her address. She said that the 3rd applicant had told her that he wanted to apply for her and, later, that he had applied in her name. She had never known, however, that 4,000 students had been allotted to her and that $349,269 had been paid into the account in her name.

The trial judge also referred to the evidence from headmasters of schools in respect of whose pupils the Board had made payments to the credit of Dr. Ng's account. They said that both the 2nd and the 3rd applicants had canvassed them, that the 3rd applicant had promised donations directly and that the 2nd applicant had promised donations through an enthusiastic supporter. Given the above evidence to which the judge directed the jury's attention, we are satisfied that he was right to tell them that there was evidence from which they could "draw the inference that all three were acting together and they had a combined aim to obtain payment in contravention of the Board's rules."

Ground 10:

> "The Judge erred in failing to direct the Jury that in August 1985, D2 had applied to the Business Registration Office to register the names of the participating doctors as the names under which D2 carried on business and that accordingly such use of those doctors' names was openly done. The Judge further erred in directing the Jury (at page 27-K) that the Board's accountants 'must have thought they were paying directly to the doctor named' when (a) no evidence was given to this effect and (b) if the accountants had investigated the matter they would have readily learned that the named accounts at the Chekiang Bank belonged beneficially to D1/D2. By so directing the Jury, the Judge was in effect usurping the function of the Jury.".

The fact that the 2nd applicant applied to the Business Registration Office to register the name of participating doctors is not in our view an indication of any openness with the Board or its accountants. The registration was a necessary part of the plan. If the submission of "openness" involves a suggestion that she acted in a way which was likely to come to the attention of the Board or its accountants, we wholly reject it.

We do not see how any criticism can properly be made of the statement by the judge that the accountants must have thought they were making payments to the doctors named. Given that they had the doctor's name and an account number which appeared to be his, it seems to us clear that they must have thought, when they paid moneys into that account, that they were paying them to the doctor. Further it seems to us naive to suggest that if the accountants had made investigations they might have discovered that matters were not as they thought them to be. Of course this is so. The accountants were, however, not employed by the Board to make investigations. It was their job to make payments in accordance with the directions they received from the Board. We find no substance in this ground.

Ground 11:

> "The judge erred in directing the Jury that D2 produced a form for Dr. Ng Sau Lai's signature after the I.C.A.C. investigation into D1 and D2 had started (page 44-0) when in fact the form was signed some ten months before the investigation began. The signing of the doctor's participation form by Dr. Ng Sau Lai was on 15th December 1986 while the I.C.A.C. investigation did not commence until October 1987."

This ground relies upon a mistake made by the witness which was repeated by the judge. This was, however, an error without any real significance and we are satisfied that it did not occasion any prejudice to the 1st or 2nd applicants.

As to Ground 12, we say no more than that we have considered it and find no merit therein.

The Submissions made on behalf of the Third Applicant

Mr. Macrae, who appeared for the 3rd applicant, argued seven grounds of appeal. The first two grounds were:

> "1. The learned judge erred in law in directing the jury that any person who combined or agreed with another to use dishonest means to cause the Board to remunerate a doctor in breach of any of those rules committed the offence of conspiracy to defraud."
>
> "2 By suggesting that -
>
> (a) if a participating doctor paid the pupil's contribution such 'rebating' and an economical medical insurance scheme could never form a matching pair;" and
>
> (b) "if a headmaster enrolled all his pupils irrespective of whether the parents consented, the Government would pay to the nominated doctor $65 for each of those pupils, even though some of them may not wish to participate in the scheme. Such a scheme could never fall within the definition of economical medical treatment."

Before turning to argue those two grounds, Mr. Macrae outlined the system which he said was adopted by the 3rd applicant. He submitted that there was no evidence that any pupil ever went without medical treatment and that the applicant, whatever the ethics of what he was doing, provided efficient and economical medical service to the pupils on the panels of doctors controlled by him. He adopted the arguments of Mr. Sedgwick in so far as they had application to the matters covered by his own Grounds 1 and 2. In particular, he argued that the trial judge had wrongly identified the public duty which he said was "not to provide anything other than economical medical treatment for pupils, i.e. cheap medical treatment." It was his

submission that "economical", which he equated with "cheap", was the key word. He argued that the purpose of the Scheme was to provide cheap treatment for students and not a cheap scheme for government. We consider that this approach is quite wrong. That the Scheme was to provide economical medical treatment is true, but we have no doubt that the legislature equally intended that it be appropriate medical treatment, i.e. economical and proper treatment under a properly administered scheme.

Mr. Macrae's Ground 3 dealt with suggested misdirections by the judge on essential matters bearing on Carey's dishonesty. In this regard, Mr. Macrae again relied on submissions made by Mr. Sedgwick with which we have already dealt.

In his Ground 4 he argued that the judged "erred in law in refusing to admit evidence of the Executive Committee Meeting of the School Medical Services Board of 3rd May 1988 which was both relevant and admissible as to the state of mind of the alleged co-conspirator, Carey". At this meeting, Carey made a number of statements which were consistent with his not having dishonestly participated in any scheme to defraud the Board. After submissions which touched upon several possible approaches, Mr. Macrae, in the outcome, argued that this evidence was admissible as part of the res gestae: (Roberts [1942] 28 Cr.App.R. 102). He contended that it revealed the mind of Carey during the currency of the conspiracy period. His alternative submission was that it should have been let in as a matter of fairness as the minutes of the meeting had already been exhibited. We reject both submissions. Such evidence would only have been admissible if it was being suggested that Carey had recently concocted the evidence which he gave. There was no such suggestion. It was never the Crown's case that Carey had been otherwise than consistent in maintaining

that he had not been dishonestly involved in any conspiracy. The argument that it should have gone in as a matter of fairness was not elaborated upon and we are unable to find any merit in it.

We have already dealt with Grounds 5 and 6 which involved the judge's directions regarding rebating and the sufficiency of his direction as to the evidence on count 17 respectively. Mr. Macrae also submitted that there was failure to direct as to the sufficiency of the evidence on count 12. This latter submission was not pursued at any length. Suffice to say that we are satisfied that the direction was sufficient to indicate evidence from which the jury might infer the existence of a conspiracy. Mr. Macrae also relied in this regard on the suggested failure by the judge properly to deal with the jury's final question. This again we have already dealt with.

Mr. Macrae then pursued an argument, which had been touched on but not developed by Mr. Sedgwick, submitting that the questions whether or not the rules were properly made by the Board and whether or not they were consistent with the objects of the Ordinance, were both matters for the jury and that the trial judge had, by his directions, had taken them from the jury's consideration. The first limb of this argument overlooks the direction given by the judge in the following terms:

> "But, as far as these resolutions are concerned, I simply remind you that you are concerned with matters of evidence and the evidence is that the Board decided to perform its public duty by adopting those rules. <u>If you accept that evidence</u>, then I tell you, as a matter of law, that any person who combined or agreed with another to use dishonest means to cause the Board to remunerate a doctor in breach of any of those rules committed the offence of conspiracy to defraud." (Emphasis supplied)

The judge was here clearly leaving to the jury the question as to whether or not the Board had adopted the rules. That he did not dwell upon the matter is not surprising as the evidence, which we have already said, overwhelmingly indicated that the Board did adopt the rules.

In the second limb of this argument Mr. Macrae submitted that whether the rules were consistent with the objects of the Ordinance were matters for the jury and this was not left for their determination. It is correct that the judge did proceed upon the basis that the rules were consistent with the objects of the Ordinance and that this is a matter which, arguably, should have been left to the jury. The rules were, however, as we have already indicated, so clearly within the objects of the Ordinance that even if he was wrong in so proceeding, there was no prejudice to the applicants.

Mr. Macrae's final submission was not the subject of any specific ground of appeal. He sought to argue it under Ground 7 upon the basis that it rendered the conviction unsafe and unsatisfactory.

Mr. Sedgwick, at the eleventh hour, allied himself with Mr. Macrae in this regard although he, too, had no specific ground of appeal in relation thereto.

Mr. Macrae submitted that there had been a material misdirection of fact when the judge indicated to the jury that unchallenged and uncontradicted evidence indicated that the 1st applicant had 21,000 pupils on his panel in 1986/87 and that the 3rd applicant had 31,000 in the same period. Mr. Macrae referred to the following passage in the summing-up:

> "The unchallenged and uncontradicted evidence of Miss Ivy Hui, an employee of the Board at the material time, is that the first defendant's personal panel jumped from 16,000 odd in 1985/1986 to 21,000 odd in 1986/87 and the third defendant's from 23,000 odd in 1985/86 to 31,000 odd in 1986/87; and those figures leave out of account the number of students allotted to doctors whose names they used to open bank accounts into which Board funds were paid in what the prosecution allege was a breach of another Board rule."

He submitted, correctly, that this evidence was at variance with the Agreed Facts.

We indicated to Mr. Macrae that, to understand the significance of this submission, we would need to have placed before us the transcript of the evidence relating to the number of pupils on each applicant's panel at the relevant times. After a short adjournment Mr. Macrae announced that he and Mr. Bruce had agreed that there were discrepancies between the Admitted Facts and Ivy Hui's "unchallenged and uncontradicted evidence" as to what appeared in the Board's records. He stated that it was agreed that, due to the way in which some of the headmasters' directions to the Board as to their selected doctors were phrased, the Board's record for payment purposes showed pupils on the first and third applicants' accounts for payment who were not on their panels for treatment. He stated further that Ivy Hui, having looked at the Board's records and relying thereon, gave the evidence to which the judge referred.

Given this agreement, it would appear that the judge did misdirect the jury when he referred to the figures in the two applicants' "personal panels" as this would have conveyed to them that those numbers were on the doctors personal panels for treatment. This was not so. Those numbers were, however, allocated to the applicants in the Board's accounts for the purpose of payment. As the real

issue was not whether the applicants were treating more than 3,500 pupils but whether they were receiving payment for more than that number, the misdirection was, we are satisfied, not of any real materiality. It would not in any way have affected the jury's consideration as to whether there was a scheme which involved dishonesty, and whose aim was to obtain payments from the Board contrary to the public duty which it exercised in administering the scheme.

For all the above reasons, we are satisfied that the applications for leave to appeal against the convictions must fail.

Re Sentence:

The 1st and 2nd applicants were sentenced on count 1 each to two years' imprisonment and each was fined $3,000,000 to be paid within 12 months from 22nd November 1990 and in default of payment they were ordered to serve a further nine months' imprisonment. On count 17 a further sentence of two years' imprisonment was imposed but this was ordered to be served concurrently with the sentence on count 1. Each applicant was ordered to pay one-third of the taxed cost of prosecution. The 3rd applicant on count 12 was sentenced to imprisonment for two year and he was also fined $3,000,000 with the same terms as to payment attached. On count 17 the same sentencing order was made as was made in relation to the 1st and 2nd applicants, that is two years concurrent, and an order to pay a share of the taxed costs of the prosecution.

Having given full weight to the fact that all of the applicants had unblemished records and to the grave consequences that will follow these convictions, particularly for the 1st and 3rd applicants who are professional men, we are nonetheless satisfied, given the magnitude of the deception and the period over which it was

practised, that the sentences of imprisonment were not unduly severe.

A complaint is further made as to the amount of the fine and to the orders that costs be paid. We are mindful that a fine should not be imposed unless it be shown that a defendant has the means to pay and that no inquiry was made in the instant case. There was, however, clear evidence of very large payments from the scheme which in all totalled $18,000,000, a substantial amount whereof was obtained as a direct result of the criminal conduct of the applicants. We are satisfied that this must have resulted in very substantial profits to them and that the trial judge was entitled to act upon that basis. Nonetheless the amounts imposed were, in our view, in excess of what it was proper to order the applicants to pay.

The cost orders will stand. However, the orders as to the fines will be varied to make the amount of the fines to be paid $1,000,000 instead of $3,000,000.

The applicants are given leave to appeal against sentence. The hearing of each application is treated as the hearing of the appeal and in each case the amount of the fine is ordered to be varied from $3,000,000 to $1,000,000. In each case the appellant is given six months to pay the fine and in default each will serve in addition to the sentences imposed a further six months' imprisonment.

(William Silke)	(N.P. Power)	(Neil Macdougall)
Vice-President	Justice of Appeal	Justice of Appeal

Mr. A.A. Bruce, Mr. J. Reading and Mr. Holmes (Crown Prosecutors) for the Respondent.

Mr. A. Sedgwick, Q.C., and Mr. S. Llewellyn (Messrs. K.C. Ho & Fong) for the 1st and 2nd Applicants.

Mr. Andrew Macrae (Messrs. Paul Kwong & Co.) for the 3rd Applicant.