

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO 1/1996

DIRECTOR GENERAL DEPARTMENT OF LOCAL
GOVERNMENT

RE: JOHN NORMAN FRANK FISK, FORMER
COUNCILLOR, BURWOOD COUNCIL

STATEMENT OF DECISION

Dated: 12 November, 1996

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STATEMENT OF DECISION

THE COMPLAINT

On 8 February 1996 the Tribunal received from the Director-General, Department of Local Government, notice pursuant to section 465 of the Local Government Act, 1993 that he had made a complaint pursuant to section 460 of that Act in respect of allegations made against Mr John Norman Frank Fisk during his term of office as a Councillor of Burwood Council and had decided that the complaint should be the subject of an investigation under section 462 of the Act.

The substance of the complaint was that Mr Fisk, as a Councillor of Burwood Council, had a pecuniary interest in matters before the Council on 10 and 24 November 1992 relating to Chama Motors Pty Limited and Mr Michael Chama who operated a used car yard and car sales business under the name Chama Motors at 422-424 Parramatta Road, Burwood and that in contravention of Part IV, Division 9A, Section 46C of the Local Government Act 1919, did not disclose such interest.

The Director-General's complaint was made pursuant to Regulation 29 of the Local Government Act (Savings and Transitional) Regulation, 1993 which provides as follows:

“29(1) A person may make a complaint to the Director-General, or the Director-General may make a complaint, that a person has or may have contravened Division 9A of Part 4 of the old Act.

(2) Part 3 of Chapter 14 of the new Act applies to a complaint made under this clause in the same way as it applies to a complaint made under section 460 of the new Act.”

(The “old Act” referred to is the Local Government Act, 1919 and the “new Act” is the Local Government Act, 1993)

On 28 May 1996 the Tribunal received from the Director-General a Report dated 27 May 1996 of his investigation of the complaint. The Report was furnished pursuant to the requirements of section 468(1) of the Local Government Act, 1993. After considering the Report, the Tribunal, pursuant to section 469 of that Act, decided to conduct a hearing into the complaint.

Notice of the Tribunal's decision was given to the parties on 6 June 1996 (Exhibit A). The Notice contained particulars of the contravention alleged and the issues to be determined as derived by the Tribunal from the information contained in the Report. As these came to be the basis on which the Tribunal's later hearings of the complaint were conducted it is convenient to quote them here:

“PARTICULARS of the contravention alleged are as follows:

John Norman Frank Fisk being a member of Burwood Council having a pecuniary interest in matters with which the Council was concerned and being present at meetings of the Council at which the matters were the subject of consideration -

- **failed as soon as practicable after the commencement of the meetings or at all to disclose the nature of his interest to the meetings;**
- **took part in the consideration and discussion of the matters; and**
- **voted on questions with respect to the matters**

contrary to the provisions of section 46C of the Act.

The matters with which the Council was concerned and the meetings at which the matters were the subject of consideration were:

10 November 1992 Ordinary Meeting of Council-

1. A matter before the Council was what action should be taken with regard to complaints that Chama Motors had not complied and was not complying with conditions of development consent and building approval previously granted by the Council. At earlier Council meetings on 4 August and 8 September 1992 the Council had resolved that outstanding matters of non-compliance with such conditions be placed and left in the hands of the Council's solicitors for legal action to be taken against Chama Motors. At the meeting on 10 November 1992 the Council had before it for consideration a recommendation which contained the following:

A. That legal action be deferred pending further investigation of this matter by the Chief Town Planner.

B. That compliance with conditions of development and building approval be noted with the operation of the workshop at the rear of 422-424 Parramatta Road to be regularly monitored to ensure continued compliance with those conditions.

The Council did not adopt the above recommendation but resolved instead that "Council adhere to its previous resolution to enforce compliance with the conditions of Development Consent No. 152/91, through legal action."

Councillor Fisk opposed and voted against this resolution at the meeting and before the end of the meeting signed and gave written notice of a motion that Council rescind it.

2. Another matter before the Council at the same meeting was an application to the Council by Chama Motors received on 28 October 1992 for approval of an extension of its permitted trading hours from 8 am to 6 pm to 8 am to 8 pm for the sale of motor vehicles. The Council had before it for consideration at the meeting a recommendation that this application be refused with the condition of the Development Consent No 152/91 restricting the trading hours to 8 am to 6 pm being adhered to.

Contrary to the above recommendation Councillor Fisk moved a motion that the application for extended trading hours to 8 pm for the sale of cars only be agreed to during daylight saving time only and that the condition of the Development Consent be amended accordingly. A motion by other Councillors for an amendment that Council adopt the recommendation to refuse the application was put to the meeting and lost and Councillor Fisk's original motion was then carried and became the Council's

resolution. Councillor Fisk opposed and voted against the motion for amendment and supported and voted in favour of his motion that the extension of trading hours be approved.

24 November 1992 Ordinary Meeting of Council

The matter before Council was Councillor Fisk's above rescission motion of which he had given notice at the Council's meeting of 10 November 1992. The rescission motion was put to the meeting and carried with Councillor Fisk voting in favour of it. Councillor Fisk then moved a further motion by which the Council would adopt the recommendations A and B set forth in item 1 above. This further motion was also carried with Councillor Fisk voting in favour of it.

The pecuniary interest of Councillor Fisk in the above matters is alleged to have been as follows:

Mr Chama had expertise, knowledge and experience as a licensed used car dealer. He traded as such through Chama Motors Pty Limited (referred to in this notice as Chama Motors) at 422-424 Parramatta Road, Burwood, and specialised in purchasing used motor vehicles at auction for re-sale at a profit. Prior to the two Council Meetings listed above Councillor Fisk had made an arrangement with Mr Chama with a view to acquiring from or through him or Chama Motors a four wheel drive motor vehicle to be purchased at auction. Mr Chama had volunteered to Councillor Fisk to use his expertise, knowledge and experience to seek out, select, value, bid for and purchase a good vehicle at the right price and transfer the vehicle to Councillor Fisk at cost with no commission or other financial remuneration to Mr Chama or Chama Motors. Councillor Fisk had accepted Mr Chama's offer of such services and requested Mr Chama to proceed to carry them out. There were substantial financial benefits in the arrangement from Councillor Fisk's point of view. These included the cost free benefit of Mr Chama's expertise and efforts, a reduction of the risk of a person unfamiliar with the market purchasing at auction a vehicle in bad condition or paying an excessive price, acquiring the vehicle at the dealer's cost without mark-up for profit, and, by acquiring the vehicle from a licensed dealer instead of making a direct purchase at auction, the benefit of the warranty on the vehicle provided under the Motor Dealers Act, 1974.

This arrangement was on foot at the time of the Council meeting on 10 November 1992 and Mr Chama was continuing to look out for the right vehicle to bid for at auction for Councillor Fisk. The continuance of the arrangement and the financial benefits accruing from it could have been put in jeopardy by an outcome unfavourable to Chama Motors of the matters before the Council on that date or by failure on the part of

Councillor Fisk as a member of the Council to support the interests of Chama Motors in those matters.

The arrangement remained unfinalised at the time of the Council meeting on 24 November 1992 though Mr Chama had pursuant to the arrangement purchased in Chama Motors' name a vehicle for Councillor Fisk at an auction held on 17 November 1992. Shortly prior to the auction Councillor Fisk had contacted Mr Chama and requested him to attend the auction to bid for and buy at the right price pursuant to their arrangement a 1990 Mitsubishi Pajero four wheel drive motor vehicle which had been listed for sale at the auction. Councillor Fisk attended Chama Motors on 18 November 1992 to obtain a transfer of ownership from Chama Motors and delivery of the vehicle, offering in exchange another vehicle as a trade-in and an application to Australian Guarantee Corporation for a loan to finance the balance of the price paid at auction by Chama Motors. The amount of the loan required depended upon the value agreed for the trade-in vehicle. Mr Chama and Councillor Fisk were not in agreement as to the value of the trade-in. Negotiations took place between them on that matter. Although Councillor Fisk was permitted by Chama Motors to take possession of the Pajero on 18 November 1992 the finance from Australian Guarantee Corporation to pay the balance of the purchase price was not arranged until some date after 24 November 1992. In so far as agreement on the value of the trade-in and the procuring of an agreement by Australian Guarantee Corporation to finance the balance of the purchase price remained unfinalised at the time of the Council Meeting on 24 November 1992, the finalisation of the arrangement between Mr Chama and Councillor Fisk to the financial advantage of Councillor Fisk could have been jeopardised by an outcome unfavourable to Chama Motors of the matters before the Council on that date or by failure on the part of Councillor Fisk as a member of the Council to support the interests of Chama Motors in those matters.

ISSUES TO BE DETERMINED

It would appear from the contents of the Report by the Director-General of his investigation of this complaint (which was received by the Tribunal on 28 May 1996) that it is unlikely to be disputed that the Council meetings as listed and described above took place, that Councillor Fisk was present, that he did not disclose to the meetings his alleged or any pecuniary interest and that he took part in the consideration and discussion of and voted on the matters before the meetings in the manner particularised in this notice. On that basis, the principal issue for determination by the Tribunal would appear to be:

Whether, in relation to the matters dealt with at the meetings, Councillor Fisk had, at the relevant times, a pecuniary interest within the meaning

of Section 46C of the Act that he was required by that section to disclose to the meetings or either of them.

If the Tribunal were to find that any contravention by Councillor Fisk has been proved, an incidental issue will be whether any and, if so, what action should be taken by the Tribunal.”

(The parties having been invited by the Tribunal to raise other issues for determination, the Director-General raised the question whether the Tribunal had jurisdiction under the Local Government Act, 1993 to conduct hearings into and determine allegations of contraventions by Councillors where the person against whom the complaint was made had ceased to be a Councillor. Mr Fisk had ceased to be a Councillor on 18 May 1994 and the Director-General's complaint had not been made until 5 February 1996. On 15 August 1996 the Tribunal conducted a preliminary hearing at which submissions were received from both sides on this question. Counsel appeared for the Director-General and Mr Fisk appeared in person. After hearing their submissions the Tribunal decided that, under the relevant legislation, it had jurisdiction to hear and determine the complaint. A statement of the Tribunal's decision on the question of jurisdiction was delivered to the parties on 22 August 1996).

HEARINGS

The hearing of the complaint was conducted on 30 September and 14 October 1996. The Director-General was represented by Mr Todd Alexis of counsel. Mr Fisk appeared in person and conducted his own case.

A copy of the Director-General's Report of his investigation, containing a large amount of documentary material, was provided to Mr Fisk before the hearing and formed part of the material before the Tribunal (Exhibit "D"). The Director-General called as a witness to give oral evidence the person described throughout the documentary and oral evidence as Mr Michael Chama which is the name by which he is known and conducts business. He informed the Tribunal that his correct name is Mohammed Saad Chama and

that he is the managing director of Chama Motors Pty Limited. He will be referred to here as Mr Michael Chama. After giving his evidence he was cross-examined by Mr Fisk. Mr Fisk called as witnesses Mr Gary John Alfred Payne, the Director-General, Bernadette Anne Fisk, Mr Fisk's wife, and Mr Kerry John Smith, Chief Town Planner of Burwood Council in 1992 and presently Director Environmental Services. Mr Fisk submitted statements of evidence by his wife dated 11 September 1996 (Exhibit "K") and himself dated 11 September 1996 together with an additional statement tendered at the hearing on 14 October 1996 (Exhibit "L"). Mr Fisk also gave oral evidence. Mr Alexis cross-examined Mr Fisk and his witnesses.

The proceedings were recorded in a written transcript references to which will be prefixed by the letter "T".

BACKGROUND TO THE COMPLAINT

Although this Tribunal is concerned with only the pecuniary interest allegations made against Mr Fisk, a short reference to what was a lengthy and complex background to the complaint made by the Director-General is necessary to enable the allegations to be seen in their proper context and some of the evidence given by the witnesses at the hearing to be understood.

In 1992 Michael Chama was a licensed used car dealer. Prior to commencing operations at 422-424 Parramatta Road, Burwood, he had carried on business as such under the name Chama Motors at other premises. Chama Motors acquired the new site in 1991 and submitted to Burwood Council an application for approval to develop the site as a used car dealer's business. Conditional development approval was granted in October 1991 against some apprehension expressed by residents of neighbouring properties about possible detriment to the amenity of the neighbourhood. Prominent amongst the concerned neighbours was Mr & Mrs Fogliati whose residence adjoined Chama Motors' property. In giving his evidence Mr Smith recalled the Council receiving objections from the Fogliatis and other neighbours as early as the development application stage. Whether they

were objections or only expressions of concern (see letter 14 January 1994 Fogliatis to Director-General, second paragraph, Attachment 5, Exhibit D), they soon became objections when Chama Motors commenced operations. The development approval was later followed by a grant by the Council of building approval in February 1992.

Chama Motors moved in and commenced operations in March 1992 and from then on the Fogliatis and other neighbours began making complaints to the Council and to individual Councillors alleging undue noise and hours of operation and failures to comply with conditions imposed by the development and building approvals.

In June and July 1992 the Council wrote letters to Chama Motors demanding compliance with restrictions and conditions contained in the approvals and requiring an expert acoustics report to be furnished as well as other noise reducing work to be carried out. As a result of persistent and continuing complaints numerous inspections of the premises and Chama Motors operations had been conducted by Council staff. According to the Director-General's Report (Exhibit "D:") Chama Motors had been the subject of 18 Council inspections and 15 complaints by the Fogliatis and other neighbours by August 1992.

In August 1992 Mr & Mrs Fogliati threatened to take legal action themselves if the Council failed to take legal action against Chama Motors. Mr Fogliati had attended Council meetings and addressed the Council. On 4 August 1992 Mr Fogliati, claiming to speak as spokesperson for a number of residents, told a Council meeting that if the Council did not immediately undertake legal action against Chama Motors they would take their case to the Ombudsman, the Minister, members of Parliament and the media to illustrate "How derelict in their duties Burwood Council has been to its resident ratepayers." (Exhibit "D" - Attachment 31). The Council resolved (contrary to the recommendation of Mr Smith, as Chief Town Planner, that the Council should not proceed to take legal action) to instruct its solicitors to

take legal action and, as well, to request Chama Motors to cease using certain noise producing equipment. Following this resolution, the Council's solicitors wrote to Chama Motors demanding compliance with the conditions of its development approval and threatening that otherwise legal action would be commenced.

In the course of his evidence to the Tribunal Mr Chama said that he entertained no fear of legal action by the Council because, he claimed, he was doing nothing wrong in that he had complied with the conditions of his development approval and was doing his best to satisfy demands made by the neighbours and Council officers. However, the Fogliatis continued to make further complaints, writing detailed accounts of their grievances to Council staff and a number of Burwood Councillors.

COUNCIL MEETINGS 10 & 24 NOVEMBER, 1992 - COUNCILLOR FISK'S PARTICIPATION

Mr Fisk was elected to Burwood Council on 26 September 1987 and re-elected on 14 September 1991. Prior to the incidents with which the Tribunal is concerned, he was elected Deputy Mayor in 1988, 1999 and 1990 and Mayor on 24 September 1991. Thus he was the Mayor of Burwood Council in 1992 up to September of that year after which he was an ordinary Councillor in a Council of 12 members during 1992.

As appears from the above quotation from the Tribunal's Notice of Decision to Conduct a Hearing, the allegations of pecuniary interest against Councillor Fisk relate to the two ordinary meetings of Council held on 10 and 24 November 1992.

As noted in the orders and directions by the Tribunal made at the preliminary hearing on 15 August 1996 (Exhibit "E"), Mr Fisk has admitted for the purpose of these proceedings that the meetings as listed and described in that Notice of Decision took place and that he took part in the considerations and discussion of and voted on questions relating to the matters that were before those meetings. It is also noted therein that Mr Fisk

denied having had at the time of such meetings any pecuniary interest within the meaning of the Local Government Act, 1919 that he was required by section 46C of that Act to disclose but, subject to that denial, he admitted for the purposes of the hearing by the Tribunal that he did not make any disclosures to the meetings of the alleged or any other pecuniary interest in the questions that were before those meetings. The relevant matters before Council for decision at those meetings and Mr Fisk's participation as detailed in the Notice of Decision were not disputed at the hearing and it is sufficient to state here in summary form what the evidence established.

At the meeting of 10 November 1992 the Council had before it a report by Mr Smith, the Chief Town Planner, which recommended that the proposed legal action against Chama Motors be discontinued and that the Council acknowledge that the conditions of Chama Motors development approval had been complied with but that its future workshop operations be monitored to ensure continuing compliance. Against this recommendation, the Council resolved to adhere to its proposed legal proceedings to enforce the conditions against Chama Motors. Following this resolution Councillor Fisk and two other Councillors signed and lodged a rescission motion. Thereafter the Council dealt with an application dated 26 October 1992 by Chama Motors to the Council to extend the car yard trading hours from 6 p.m. to 8 p.m. Council staff had recommended to the Council that this application be refused and the trading hours stipulated by the development approval be adhered to. Against this recommendation, Councillor Fisk moved a motion and secured a resolution by the Council to extend Chama Motors trading hours to 8 p.m. during daylight saving time.

At the meeting on 24 November 1992 the Council voted on Mr Fisk's rescission motion. The vote was tied at six all and then carried on the Mayor's casting vote. Councillor Fisk voted in favour of the rescission motion, his vote, therefore, being vital to its success. Councillor Fisk then moved to defer legal action against Chama Motors pending further

investigation by the Chief Town Planner and that compliance with the conditions of the development and building approvals given to Chama Motors be noted with the operation of the workshop on the premises being regularly monitored to ensure continued compliance.

ORIGIN OF THE COMPLAINT

Complaints that Councillor Fisk had a pecuniary interest in the matters dealt with at the above two meetings which required him to make disclosure and refrain from participation appear to have been started and, if not started, were vigorously fostered by the Fogliatis who sought the assistance of a Councillor of Burwood Council who on 18 October 1993 forwarded their complaint to the Director-General of the Department of Local Government together with materials which had been furnished by the Fogliatis.

At this point the Tribunal should make it clear, as it did to the parties in the course of the hearing, that the Tribunal is not concerned with the merits of complaints made by the Fogliatis and other neighbours to the Burwood Council concerning Chama Motors and its operations, nor is it concerned with the validity of the complaints against Mr Fisk as formulated and put forward by the Fogliatis at that time or subsequently. The complaint with which the Tribunal is concerned is that which was made by the Director-General and advised to the Tribunal on 5 February 1996 and is the subject of the Director-General's Report of his investigation. It is that Report that initiates and invokes the exercise of jurisdiction by this Tribunal, not what went before. Steps taken previously to pursue allegations against Mr Fisk are mentioned but only briefly here to explain how some of the evidential material before the Tribunal came into existence and the course of events between the forwarding of the Fogliatis complaint to the Department of Local Government on 18 October 1993 and the decision by the Director-General to make a complaint on 5 February 1996.

The Department of Local Government took the view that the Fogliatis' allegations were such that the Department was required to forward the

material to the Independent Commission Against Corruption pursuant to section 11 of the Independent Commission Against Corruption Act, 1988.

On 9 December 1993 officers of the Independent Commission Against Corruption (ICAC) conducted an interview of Michael Chama and on 2 March 1994 they conducted an interview with Mr Smith the Chief Town Planner. Transcripts of those interviews form part of the material contained in the Director-General's Report (Attachments 12 and 9, Exhibit "D) and are therefore part of the material before the Tribunal. Further information later put forward by the Fogliatis was forwarded on by the Department of Local Government to the ICAC.

On 12 May 1994 the ICAC advised the Department of Local Government that it would be taking no further action in the matter but that it considered that investigation by the Department of Local Government in relation to pecuniary interest would be warranted. Subsequently the ICAC handed over to the Department of Local Government documents and other material which the ICAC had obtained in the course of its investigation.

On 16 August 1995 the Director-General wrote to Mr Fisk inviting his comments on the allegation that he had a pecuniary interest which he did not disclose at the meetings in question and Mr Fisk wrote a reply to that letter on 13 November 1995. It will be necessary to refer to these two letters again later.

THE PECUNIARY INTEREST ALLEGATIONS

It is against the foregoing background that the allegations of pecuniary interest against Mr Fisk are to be considered. The nature of the allegations are sufficiently stated in the particulars quoted above from the Notice of Decision to Conduct a Hearing. Before turning to the question whether the allegations have been proved by the evidence before the Tribunal the relevant provision of the Local Government Act 1919 alleged to have been contravened by Councillor Fisk should be stated:

"46C. Disclosure of Interests at Meetings.

- (1) If a member of a Council ... -
- (a) has any pecuniary interest, direct or indirect, ... in any ... matter with which the Council is concerned; and
 - (b) is present at a meeting of the Council ... at which the ... matter is the subject of consideration,
- the member shall, as soon as practicable after the commencement of the meeting, disclose the nature of the interest to the meeting and shall not take part in the consideration or discussion of, or vote on any question with respect to, the ... matter.”**

The question whether there was any arrangement between Mr Fisk and Mr Chama and, if so, the nature of the arrangement, and whether it constituted a pecuniary interest attracting the operation of section 46C at the date of the two meetings in question turns on the evidence of Mr Chama, Mr Fisk and Mr Fisk's wife.

It is not in dispute between them that they met by chance at a motor vehicle auction at Enfield in about August or September 1992. Mr Chama's method of business involved buying motor vehicles at auction in the name of Chama Motors for resale at a profit. He was attending the Enfield auction in the ordinary course of his business. Mr & Mrs Fisk were attending the auction because they were interested in acquiring a large 4-wheel drive vehicle suitable for taking their children away on holidays. There is an issue as to whether any relevant arrangement in relation to the acquisition of such a vehicle was made between Mr Chama and Mr Fisk when they met on this occasion.

It is also not in dispute that Mr Chama attended Christey's motor auctions on Tuesday 17 November 1992 and purchased for Mr & Mrs Fisk, but in the name of Chama Motors, a 1990 4-wheel drive Mitsubishi Pajero which they had selected the day before from the vehicles that were to be put up for auction the following day. It is not disputed that Mr Chama had bid for and purchased the Pajero at the request of Mr Fisk made on Monday 16 November 1992 or that subsequently Mr Fisk took possession of the vehicle after having, on Wednesday 18 November 1992, made a financial arrangement with Mr Chama for payment of the purchase price. Mr Fisk

contends that the only relevant transaction that took place between Mr Chama and him began on 16 November and ended on 18 November 1992 and, therefore, it could not be said that he had any pecuniary interest to which section 46C would apply in the matters concerning Chama Motors that were before the Council at its meetings on 10 and 24 November 1992.

THE MEETING AT ENFIELD MOTOR AUCTIONS

Although the parties diverge as to its significance, there is much common ground in the evidence as to what occurred at the meeting at Enfield Motor Auctions. Mr Chama noticed Mr Fisk and his wife at the auction. Mr Chama and Mr Fisk had had no previous personal dealings but Mr Chama thought that he recognised him as the Mayor of Burwood Council because Mr Chama had attended Council meetings at which his development application was under consideration and had seen Mr Fisk sitting as mayor at the meetings.

Having verified that it was Mr Fisk, Mr Chama introduced himself and was introduced by Mr Fisk to Mrs Fisk. Mr Chama said, "Can I help you, what are you looking for?" And the conversation proceeded from there: (Exhibit "D", Attachment 8, p.1/29-34; p.2/13-35; p.12/25-p.13/2). They told him that they were looking for a 4-wheel drive vehicle. He told them that he would be happy to assist them. He said that Enfield Auctions was not the best place to buy such a vehicle. He offered to look out for one for them, saying, according to him, that as he attended all the auctions they could leave it to him and he would do his best for them. They thanked him and told him that they would look around for themselves, but that, if he saw a vehicle that was suitable, he could let them know and they would look at it. He said that he would do so. There was more to the conversation than this but so much was not disputed.

Mr Fisk sought to convey to the Tribunal in his evidence and his submissions that the meeting concluded with no arrangement made with Mr Chama for him to do anything towards finding a suitable vehicle for them. In his written statements of evidence, Exhibit "L", he played down the extent of

the conversation with Mr Chama at Enfield Auctions in both of his statements and in his second statement (at p.4) he said, "I took on board what he said but no commitment was given by me or no contract or arrangement was entered into." An equally sparse account of the conversation was contained in Mrs Fisk's written statement of evidence (Exhibit "K") and, when Mr Fisk called her as a witness, he referred her to the fact that in her statement she said that Mr Chama offered to look for a car for them and asked, "Did you or your husband accept this offer?" To which she replied:

"No we didn't. We said we would look for one for ourselves. If he saw one that he thought was suitable, he could tell us, but we didn't enter into any arrangement with him. We thought we would just keep on looking, because I had never met the man before. I didn't know him"
(T170/54-T171/6)

It may be that Mr & Mrs Fisk were baulking at or putting a narrow construction upon the word "arrangement" but the evidence leaves no doubt that the meeting at Enfield Auctions concluded with an understanding on the part of all three participants that, whilst the Fisks would go on looking for themselves, Mr Chama, as a result of their conversation, would also be looking out for them for the kind of vehicle they were seeking. This he had volunteered to do for them and it is to be inferred from the evidence that far from rejecting this offer, they accepted it and let Mr Chama believe that they had done so. When asked to tell the Tribunal in her own words the conversation that took place after Mr Chama introduced himself, Mrs Fisk said:

"A. Mr Chama said, 'Why are you here?' and we said, 'Well, we are looking for a car.' He said, 'What are you looking for?' We said, 'We are looking for a 4-wheel drive.'

... ..

I am not exactly sure whether I said it or John said it. Then Mr Chama said, 'Do you want me to have a look for a car for you?' and we said - he said 'Because I go to all the auctions,' and we said 'Well, we will keep on looking ourselves because we want one before we go on holidays, but if you see one that you think is good, can you let us know and we will have a look at it?'" (T178/20-36)

Mrs Fisk also said in her evidence that they were “quite specific” to Mr Chama about the kind of vehicle they were looking for. There would have been little point in this if they were not expecting Mr Chama to be looking also. In giving his recollection of the conversation, Mr Chama claimed to have said to them, “If you are looking for one, I’ll look for one, and if I find one I’ll let you know and if you like it I’ll buy it.” (T58/11-14) When asked about this, Mrs Fisk said:

“I don’t remember him saying ‘I’ll buy it.’ I remember him saying, ‘I’ll have a look and see if there are any around, and I’ll let you know if I see any that are good. I’ll let you know if it is a suitable one - sorry, ‘anything like you have described’ that we wanted.”

She was then asked to state what description of the vehicle they were looking for had been given by her or her husband to Mr Chama and she replied:

“We said we wanted a 4-wheel drive but one that wasn’t very old, a few years old, and we wanted a big one with seven seats because of our children. Travelling to Queensland we wanted it to be comfortable. So we told him that. So it is quite specific ...” (T179/19-40)

Mr Fisk was asked about his state of mind at the end of the conversation and gave the following evidence:

“Q. ... When the conversation with Mr Chama ended at the Enfield motor auctions, you had in your mind that Mr Chama would, as an experienced secondhand motor dealer, keep his eye out for a 4-wheel drive vehicle that might be suitable for your purposes?

A. Yes.

Q. And if he found such a vehicle he would get in touch with you and let you know what he found?

A. Yes, with myself and my wife.

Q. And you at that point of time would decide whether you would take him up with what he had found for you or not?

A. I think Bernadette and I would go and have a look at any car he suggested we should buy.

... ..

Q. You knew he was an experienced person and you knew that he would apply that experience to try and find a car that satisfied your needs?

A. That is what he offered, yes. (T215/47-T216/5, T216/19-22)

Mr Fisk had earlier admitted that he had no experience in the second hand motor trade industry: (T214/43). If Mr Fisk had not accepted Mr Chama's offer to look out for a vehicle for them he would have had no occasion afterwards to contact Mr Chama to find out how he was going. Likewise Mr Chama would have had no occasion to contact Mr Fisk to report his endeavours. However, the evidence was that they were in contact with each other between the meeting at Enfield and Mr Fisk's request to Mr Chama to attend Christey's auction to buy the Pajero. Mr Chama said that he telephoned Mr Fisk a couple of times to tell him that he was sorry that he could not find the right vehicle yet. He said that he told Mr Fisk that there were plenty to buy but "You have to find the right one. And when I find the right one I'll let you know." Mr Chama said that he also received a couple of telephone calls from Mr Fisk in this period asking him what was happening. Mr Chama told Mr Fisk that it was not easy to find a 4-wheel drive that the Fisks were looking for but he was still looking. Mr Fisk's evidence was that he telephoned Mr Chama a couple of times to see if there were any cars around or if he had seen any. (Exhibit "D", Attachment 8, p.3/16-21, p.13/3-15; T76/57-77/4; THE220/22)

FINDINGS - ARRANGEMENT MADE AT ENFIELD

On the evidence and the probabilities that arise from the course of events that has been described, the Tribunal concludes that Mr Fisk and his wife did accept Mr Chama's offer of his services to look out for them in the course of his used car business for a 4-wheel drive vehicle of the kind they had described to him and to let them know when he found such a vehicle and, further, that it was mutually understood and accepted that, in doing so, Mr Chama would be using for their benefit his knowledge and expertise in the

trade. Mr & Mrs Fisk rejected any suggestion that this could be properly described as “an arrangement”. It is not necessary to put a label upon the relationship which arose between Mr Fisk and Mr Chama as a result of their conversations at the Enfield motor auction but “arrangement” would seem to the Tribunal to be an accurate as well as a reasonable description. A question remains as to whether the services offered by Mr Chama and accepted by Mr Fisk went beyond what has just been described.

As mentioned above, Mrs Fisk said in evidence that she had no recollection of Mr Chama saying to them in the course of the conversation at Enfield that if he found them a car and they liked it “he would buy it”. Mr Fisk also said that he had no such recollection: (T247/8-10). Mr Chama eventually did buy a car for the Fisks at an auction and this is consistent with his having offered to do so during the conversation at Enfield. It is also consistent with Mr Chama’s apparent willingness to put his services generally at their disposal in the acquisition of a suitable vehicle. Another significant fact is that when, in November 1992, the Fisks selected the Pajero that they wanted to acquire at Christey’s auction, Mr Fisk apparently felt at liberty to contact Mr Chama and request him to attend the auction and bid for the vehicle they had selected. There is no reason, therefore, on the probabilities, not to accept Mr Chama’s evidence that he did express to them his willingness to buy the vehicle for them. However, I do not think that it follows that Mr & Mrs Fisk, at that time, would have accepted, or said anything to lead Mr Chama to believe that that they had then accepted a suggestion by him that he actually purchase the vehicle for them: (T222/6, 42; T247/8-10) Nevertheless, it is reasonable to infer that they became aware at that time of Mr Chama’s willingness to actually buy the vehicle for them if they wished him to do so.

Mr Chama’s evidence was that he had told Mr and Mrs Fisk at Enfield that if in their searches they found a car themselves, they should let him know and, “At least I do my best so you don’t pay top dollar.” (T55/57-56/1) Mrs

Fisk said that she could not recall him saying that: (T179/13-17) Mr Fisk said, "He quite possibly could have said it, not that I recollect": (T246/22). The fact that Mr Fisk conceded that it could have been said indicates that the tenor of the conversation on Mr Chama's part was that he was willing to give them the benefit of his expertise in any way that would assist them in their search for the vehicle they were looking for. There was further evidence of this in that it was common ground that Mr Chama had advised them at the Enfield Auction that in order to find the kind of vehicle they were looking for they should look at auctions of government cars as these were in good order and that Christey's auctions specialised in sales of such vehicles. He also mentioned other places to look which they did in fact follow up: (Mrs Fisk T178/53)

In giving his evidence of the conversation at Enfield Mr Chama said that when Mr & Mrs Fisk told him that they would continue to look for a vehicle themselves, he said, "If you find one let me know so I can do a check-up for you." (T58/17) Mrs Fisk said that she did not remember him saying that: (T180/5-7) Mr Fisk at first said that this did not happen: (T214/34-37); but later when Mr Chama's evidence was put to Mr Fisk, Mr Fisk said, "He may have said that": (T247/12-20, 50).

Mr Chama explained in his evidence that by "check-up" he meant, "I check it whether it's a good buy or not." (T58/31). When asked to elaborate he described only a superficial inspection to check the vehicle's originality, external appearance, whether the vehicle had been in an accident or contained rust and the mileage. He said that he considered himself to be an expert and needed a very short time to make up his mind, and seldom bothered to open the bonnet to look at the engine unless the vehicle looked old or not looked after: (T58/33-59/58) When this evidence was put to Mr Fisk, he correctly commented that Mr Chama was describing his thoughts and not what he had said to them at the time: (T58/20-31; T247/22-41); Mr Fisk

did not recollect that Mr Chama had explained that he would check to see whether the vehicle was a good buy or not. (T247/45).

I do not doubt Mr Chama's evidence that he had in mind at the time that if the Fisks found a vehicle he would look at it for them to carry out the kind of check-up he described. In the context of the conversation it is likely that he made such an offer as he says but not likely that he would have elaborated on what he meant by a "check-up" as it would have been taken for granted that in looking at the vehicle he would carry out whatever kind of check he made for his own business in appraising a vehicle. Even so, the Tribunal could not conclude with confidence on the evidence that part of the arrangement made at Enfield was that Mr Chama would do a check-up for them on any vehicle they selected for purchase. Whilst it is probable that the offer was made by Mr Chama, the evidence does not enable the Tribunal to find that it was or would have been accepted by Mr and Mrs Fisk at this time.

Mr Fisk gave evidence that he had brought to the Enfield Auction a Ford Laser Stationwagon owned by his father, Mr Alex Fisk. It was parked outside about 50 metres away from the doorway to the auction room. Mr Fisk says that he took Mr Chama to the doorway, pointed out the Ford Laser in the distance and asked him what the car would be worth. According to him, Mr Chama looked at the car from the doorway, did not go out to inspect it (because the auction was going on at the time and Mr Chama was keeping an eye on it) but told Mr Fisk the car would be worth \$10,000: (T220/52-T221/15). Mrs Fisk said she was not present at this part of the conversation but her husband afterwards told her that Mr Chama had valued the Ford Laser at \$10,000: (T172/20-33).

Mr Fisk said that their intention at the time was to sell the Ford Laser to help pay for the vehicle they were looking for and, to the best of his knowledge, this is what he told Mr Chama but not that they were thinking of trading it in on the new vehicle: (T221/17-T222/6). Later the Ford Laser came to be traded in on the Pajero purchased in November 1992.

In cross-examining Mr Chama, Mr Fisk asked him to agree that the events relating to the Ford Laser just described took place. Mr Chama was very vague in his response, saying that it “might have” happened and “maybe I remember, yes.” (T138/52, 55; T139/3).

On this matter the Tribunal accepts the evidence of Mr Fisk relating to the Ford Laser at the Enfield Auction but, as will be seen later, it is probable that Mr Chama had forgotten about the incident when he purchased the Pajero in November 1992.

On the question whether Mr Chama was to be remunerated for his services, the Tribunal is satisfied on the evidence that Mr Chama offered his services free of charge and that this was understood and accepted by Mr and Mrs Fisk in their meeting with Mr Chama at the Enfield Auction. The evidence of Mr Chama shows that he had no intention of charging any fee. Mr Fisk said that he expected that if Mr Chama located a suitable vehicle it would be purchased wholesale at auction and they were hoping he would locate what they wanted at a very competitive price. He said that he expected that if Mr Chama was successful they would not have incurred a fee for Mr Chama’s services: (T65/58-66-3; T66/5-15, 31-38; T222/8-27, 45-51).

While dealing with the encounter at Enfield Auctions it is appropriate to mention that the evidence does not suggest that there was any discussion whatever between Mr Chama and Mr Fisk of the problems Mr Chama had been or was then having with the local residents or Burwood Council. Mr Fisk was aware at the time that there were matters affecting Mr Chama before the Council: (T212/9) but Mrs Fisk had no knowledge of them. Not knowing Mr Chama, she asked her husband privately who he was and he replied, “He is a used car dealer from Parramatta Road in Burwood and he’s been having problems with Burwood Council”: (T172/35-41). He also told her that the problems concerned trouble with his neighbours who were complaining about noise from his car yard and he was getting a “pretty hard time” from the Council: (T175/17). However the Tribunal is satisfied on the evidence that,

apart from this conversation between Mr and Mrs Fisk, there was no discussion or mention made of the subject between Mr Chama and Mr Fisk at the Enfield Auction.

ARRANGEMENT FOR THE PURCHASE OF THE PAJERO

On Saturday 14 November 1992 Christeys Motor Auctions advertised in the Sydney Morning Herald under the heading "NSW Government State Fleet Services" the sale by auction on Tuesday 17 November 1992 of a number of ex-Government vehicles, including a 1990 Mitsubishi 4-wheel drive Pajero. This was the kind of opportunity that Mr Chama had advised them at Enfield to look out for. The advertisement said that the vehicles were open for inspection on Monday 16 November 1992, that a \$500 deposit was payable on the fall of the hammer and the balance by bank cheque by noon on Wednesday 18 November 1992: (Exhibit D, Attachment 40).

According to the statements of Mr and Mrs Fisk (Exhibits K and L) Mrs Fisk saw the advertisement and brought it to Mr Fisk's attention. They decided to view the vehicles. They attended the auction premises on the following Monday, found that the Pajero matched their requirements and decided to purchase it. According to them, they could not attend the auction on the Tuesday due to work commitments so they decided to seek help from Michael Chama as he had told them he attended all the car auctions. In his statement, Mr Fisk said, "I asked Mr Chama if he was going to that auction on Tuesday 17th. On a positive response I asked Mr Chama if he would purchase the vehicle on our behalf." Mr Chama gave similar evidence: (T78/1-50).

When interviewed by ICAC investigators on 9 December 1993, which was much closer to the time of the events in question than when Mr Chama gave his evidence, he said that Mr Fisk phoned him and said that he had seen a vehicle at Christeys and asked him to buy it. He told the investigators that Mr Fisk said, "If you get right price buy it." (Exhibit D, Attachment 8, page 13/19-21, 26-29). Asked about the expression "the right price", Mr

Chama said that it was common terminology in the motor trade: (T143/29), and it meant, in effect, a wholesale price, that is, a price which will leave room for a profit to be made by the used car dealer on a resale: (T140/28, 45, 49-57). It follows that the expression means a price lower than the current market retail price for the vehicle in question and that the lower the price at which the vehicle could be acquired at auction the higher the profit that could be made on resale.

Mr Fisk denied having used the expression “the right price”. He said that he told Mr Chama that they wanted to buy that particular vehicle and told him how much they wanted to pay. Mr Fisk’s evidence was:

“I did give Mr Chama some latitude. I suggested that we go to - we were looking at \$20,000 and I said, ‘We really need this, if you must, go to \$22,000- and that was our upper limit.’” (T224/9-15)

Mr Chama’s evidence was to the same effect: (T79/18). When pressed about whether Mr Fisk had used the expression “the right price” Mr Chama’s response was that his memory would not allow him to say that he had used those words: (T79/48); but, he said, whether Mr Fisk used those words or not, did not matter because Mr Fisk must have known that Mr Chama would not be stupid enough to pay more than the right price and in any event he would not have done so: (T79/25-52). Mr Chama explained why.

He attended the auction knowing that Mr Fisk wanted to buy the particular vehicle they had selected and its lot number and how much they wanted to pay for it. In bidding for the vehicle there was competition from other dealers and he had to go to \$24,600 to get it. He was aware that he was going above Mr Fisk’s limit but he would not have gone and did not go above what Mr Chama considered to be the “right price” for the vehicle in the sense in which he used that term. He explained that this put him in the position that he had secured the desired vehicle for Mr Fisk and, if Mr Fisk wanted to take it at the price Mr Chama had paid for it, he could take it at that price with no profit to Mr Chama and, if Mr Fisk did not want to take it at that price, it would not have troubled Mr Chama because he had secured the

vehicle at a price which would allow him to resell it at a profit to someone else. To Mr Chama, that was buying the vehicle at “the right price”; his interests were protected if the Fisks decided not to take the vehicle. Mr Chama said this is what he always did when anyone asked him to buy a vehicle for them at auction. He never went beyond what he thought was the “right price” so that he would be covered if the person decided not to take the vehicle: (T78/55-T79/7; T79/54-T80/31). Mr Chama said that in the case of this Pajero, he expected to be able to sell it for a couple of thousand dollars or more above what he had paid for it if Mr Fisk declined to take it at \$24,600: (T80/33-43).

FINDINGS - PAJERO - TERMS OF ARRANGEMENT

On the evidence, the Tribunal does not conclude that Mr Fisk ever used the expression “the right price” to Mr Chama; but otherwise the Tribunal accepts the foregoing evidence of Mr Chama and, on the present question, the Tribunal finds that on 16 November 1992 Mr Fisk requested Mr Chama to purchase the Pajero for them at the auction but did not commit themselves to pay more than \$22,000 for it and that, in the context in which it was made, the request implied and both Mr Fisk and Mr Chama understood that Mr Chama was expected to and would use his expertise to endeavour to acquire the vehicle at a price equivalent to the wholesale price a dealer would pay for the vehicle at auction with a view to its resale and which was the best possible price at that auction: (T225/57-T226/16).

It was common ground in the evidence and the Tribunal finds that in the arrangement made on 16 November 1992 for Mr Chama to bid for the Pajero at the auction there was no agreement or expectation between them that any fee or profit would be payable to Chama Motors for Mr Chama’s services. It is a clear inference to be drawn from the circumstances and the conversations that had taken place before and after the purchase of the Pajero that part of the arrangement was that if Mr Chama were to succeed in purchasing the Pajero and Mr and Mrs Fisk decided to take it they would pay

the same price as Mr Chama had bid for the vehicle: (T99/42-58; T100/30-35; T149/22-29; T224/31-T225/16; THE233/7-17).

PURCHASE OF THE PAJERO

At the auction on Tuesday 17 November 1992, Mr Chama purchased the Pajero in the name of Chama Motors as a licensed used car dealer and had thereby committed his company to paying the price. Christeys Motor Auctions' invoice for \$24,600 is addressed to Chama Motors and provides for delivery "COD": (Exhibit D, Attachment 41).

Mr Fisk gave evidence that after the auction he telephoned Mr Chama who told him that he had got the car and it was \$24,600. Mr Fisk told Mr Chama that the price was a lot more than they intended to pay and he would discuss with his wife whether they wanted to take the car. They were upset about the price overrun but decided that they would take the car at the price of \$24,600. Subsequently Mr Fisk informed Mr Chama of their decision: (Exhibits K and L; T227/13-T228/3).

Mr Fisk said that he telephoned Chama Motors on either the Tuesday afternoon of the auction or the following Wednesday morning and was surprised to find that Mr Chama had already taken possession of the vehicle and had it at his car yard: (T228/28-T299/18). Mr Fisk said that he went down there to have a look at the vehicle to see whether it was the correct one and, if it was, to arrange to take possession: (T228/17; T229/24-34). He said that it was then that he discovered for the first time that the car had been purchased in the name of Chama Motors: (T230/7); and this further upset him because not only had he expected the car to be purchased for no more than \$22,000 but also he expected it to have been bought in their name. He said that he had "presumed" that Mr Chama would purchase the car in their name and that they would then write out a cheque to the auction; however, he said that now he found that he had to deal with having to purchase the car from Chama Motors instead of Christey's Motor Auctions: (T230/12-52; T231/42-T232/19; T146/7-14).

It is not easy to understand why Mr Fisk should have been surprised to find that Mr Chama purchased the vehicle in the name of Chama Motors when Mr Fisk had intended not to be present at the auction. As mentioned earlier Mr Fisk gave evidence that his wife had drawn his attention to the auction advertisement. That stated that a \$500 deposit was payable on the fall of the hammer and the balance by bank cheque the following day. Mr Chama said that if anyone asked him to bid for them at an auction and intended to be present he would tell them to bring a deposit and subsequently they would have to pay the balance; but if they were not going to be present and he trusted them he would buy it but would have to do so in his own name and pay the price: (T74/8-53). Mr Fisk, according to his evidence, had a different understanding:

“Q. It is a bit of a puzzle to me ... how you would expect the car to be purchased in your name when neither you nor your wife was going to be present at the auction, and you knew that, and you were asking Mr Chama, as he was going to the auction, to buy the car. In whose name was he supposed to buy it?”

A. In our name. I presumed he would purchase it in our name and we would write a cheque out to the auction.

Q. The thing that puzzles me is that there doesn't seem to have been any discussion at all, between you and Mr Chama, when you asked him to go and bid for the car for you, as to what the financial arrangements would be about paying the auctioneer?”

A. No, that's correct.

Q. It seems to be more consistent with the assumption, on your part, that he would buy it in his name, as a dealer, with all the advantages a dealer has at an auction, and you would sort it out with him later, rather than the position being that you expected him to buy it in your name?”

A. No. I - well, to the best of my knowledge, we expected him to bid in our name. When they say who's the buyer, they just put J Fisk or B Fisk, whatever it may be, and then we go and pick the car up in 24 or 48 hours, whatever it is, with the cheque. When I rang up and found out the car was there, I was quite surprised.” (T230/19-52).

Although Mr Fisk's evidence was that he was expecting to write out a cheque to the auction, when Mr Fisk came to make arrangements with Mr Chama to take delivery of the Pajero he did not offer Mr Chama a cheque for price payable by Chama Motors to Christey's Motor Auctions. He offered his father's Ford Laser as a trade-in in part payment with the balance to be provided by a loan from Australian Guarantee Corporation (AGC) on a loan application yet to be made.

Mr Chama told the ICAC investigators in December 1993 that this took him unawares as he was expecting Mr Fisk to pay cash and was surprised when he said he had to trade-in and seek finance but, said Mr Chama, "I could not go back on my word": (Exhibit D, Attachment 8, page 16/15-17). He also told those investigators that he and Mr Fisk negotiated over the value to be allowed for the trade-in. According to him, Mr Fisk proposed \$12,000, Mr Chama offered \$9,000, Mr Fisk came down to \$11,000 which Mr Chama declined and they finally agreed on \$10,000, the value Mr Fisk said Mr Chama had put on the Ford Laser at Enfield: (Exhibit D, Attachment 8, pages 17/6-18/4). In his evidence before the Tribunal, Mr Chama's recollection appeared to have changed. He was not sure that he had expected cash with no trade-in or that there had been bargaining about the value of the trade-in but he was sure that \$10,000 came to be agreed: (T82/6-28; T90/91; T94/3-98/58). Mr Fisk's evidence agreed in substance with what Mr Chama had told the ICAC investigators: (T235/20-49).

The figure of \$9,000 for the trade-in appeared in two Chama Motors' documents recording the transaction. Mr Chama kept one and gave the other to Mr Fisk. In the one he kept the figure was corrected to \$10,000; in the one he gave Mr Fisk it remained at \$9,000. Mr Fisk noticed the error and drew it to Mr Chama's attention but was told by Mr Chama that it was a mistake Mr Chama had made and was of no consequence. It appeared possible that Mr Chama had filled out the documents in anticipation of allowing \$9,000 when

eventually the value agreed for the Ford Laser was \$10,000: (T86/40-46; T96/4-32; T146/35-T148/17; Exhibit L; T235/51-T239/5).

The Tribunal is satisfied on the evidence that the events that took place in relation to the proposed trade-in of the Ford Laser were as described above. In brief, the parties bargained and finally agreed on \$10,000 and the figure of \$9,000 contained in the documentation was never agreed to by Mr Fisk and, in that sense, was incorrect.

The agreement to allow \$10,000 on the trade-in meant that the application to AGC would have to be for a loan of \$14,600. Documents produced by AGC show that this was the amount eventually advanced to Mr and Mrs Fisk on the Pajero but a question arises as to when the loan application was made.

The loan application produced by AGC is dated 14 December 1992. It is signed by Mr and Mrs Fisk. An invoice from Chama Motors Pty Limited to Mr Fisk for the price of the vehicle at \$24,600 less a trade-in allowance of \$10,000 signed by Mr Chama is also dated 14 December 1992. The executed loan contract for \$14,600, plus charges, issued by AGC bears the same date: (Exhibits F, G and H). A cheque from AGC for \$14,600 was deposited by Chama Motors in its bank account on 4 January 1993. These dates gave rise to the possible inference that the transaction between Mr Fisk and Mr Chama concerning the acquisition of the Pajero, including the amount to be allowed for the trade-in, remained unfinalised at the time of the Council meeting of 24 November 1992 at which Mr Fisk moved his rescission motion. However, Mr Fisk claims that the transaction was in fact finalised on 18 November 1992 when on that date he signed a loan application to AGC for \$14,600. He claims that the AGC documents dated 14 December 1992 were "substitute documents" because of mistakes made by Mr Chama on the AGC documents originally signed by him.

The evidence supported Mr Fisk's claim. Mr Chama had told the ICAC investigators that Mr Fisk filled in the loan application when he took delivery

of the vehicle of 18 November 1992 but Mr Chama had to call him back for further signatures twice because of mistakes in the forms and there was a delay caused by Mr Fisk being away on holidays: (Exhibit D, Attachment 8, page 18/13, page 20/5-17; T122/10-53; T123/13-23). Mrs Fisk says that her husband came home with the Pajero on 18 or 19 November 1992 and showed her a copy of the paper he had signed for the hire purchase with AGC. A week later he told her that a AGC required her signature also and brought home another paper from Chama Motors for her to sign: (T172/49-T173/13). She says that they went on holidays at the end of November for two weeks and on their return she had to sign yet another paper because the earlier one she signed had been messed up: (T176/25-T177/15).

AGC had produced its documents in response to a notice from the Tribunal under section 476 of the Local Government Act 1993 calling for all documents relating to the transaction. None dated earlier than 14 December 1992 were amongst those produced. However, Mr Chama said that his experience with AGC was that if there was any mistake in the documents submitted on a loan application, AGC insisted on a new set of documents to be signed before it would advance the money: (T122/26-36). This could account for the absence of any earlier, presumably incorrect, documents and for the delay in payment to Chama Motors.

FINAL ARRANGEMENT - PAYMENT FOR PAJERO

The Tribunal finds on the evidence that, as between Mr Chama and Chama Motors on the one hand and Mr Fisk on the other, arrangements for payment for the Pajero and delivery to Mr Fisk were finalised on 18 November 1992 and consisted of a transfer to Chama Motors of Mr Fisk's father's Ford Laser at an agreed value of \$10,000 and payment to Chama Motors of \$14,600 to be made by AGC on the basis of a loan agreement with Mr Fisk. AGC later insisted on Mrs Fisk becoming a party to the loan agreement and the advance of the money was delayed due to error in the documentation.

The transfers of the registrations of the Pajero and the Ford Laser were arranged by Mr Fisk personally. They were carried out at the Burwood Motor Registry where he effected a change of number plates between the two vehicles with the result that the Pajero became registered in his father's name with the Ford Laser's number plate and the Ford Laser became registered in Chama Motor's name with the Pajero's number plate. The Road Transport Authority's records of this transaction show that it occurred on 19 November 1992: (Exhibit D, Attachment 11); so that it would appear that Mr Fisk actually took delivery of the Pajero on 19 November although he had finalised his arrangements for payment with Mr Chama on 18 November 1992. This accords with Mr Fisk's recollection as given in his evidence to the Tribunal: (T198/35, 54; T199/2, 20; T233/34-T234/33). He told the Tribunal that the reason for retaining the Ford Laser's number plates for the Pajero was that they were "special one-off" Bicentennial number plates created in the Bicentennial year 1988: (T233/44). The Ford Laser was in fact a 1988 model. Whilst this may explain why the plates were retained it does not explain why registration of the Pajero was effected in Mr Fisk's father's name. This question arises again later.

THE QUESTION OF WARRANTY

The particulars of the alleged pecuniary interest contained in the Notice of Decision to Conduct a Hearing set out above included a statement of the financial benefits gained or to be gained by Mr Fisk from his alleged arrangement with Mr Chama. One of the alleged financial benefits was that he would obtain a used car dealer's warranty under the Motor Dealers Act 1974 if he purchased a vehicle from Chama Motors but he would obtain no warranty if he purchased the vehicle in his own name at auction. The warranty would have covered the present vehicle for three months or 5,000 kilometres: (T71/52); and under the Motor Dealers Act it is required to be in writing in a form called Form 4. A Form 4 warranty dated 18 November 1992 signed by Mr Chama was given to Mr Fisk on the sale of the Pajero by

Chama Motors to him. The document provides for the purchaser to sign but this one was not signed by Mr Fisk: (Exhibit D, Attachment 43).

The evidence of Mr Chama and Mr Fisk agreed that whatever legal rights the issue of this document might have given Mr Fisk, neither of them intended that it should have any effect between them. Mr Chama explained that, as a licensed used car dealer, he was obliged by law when he purchased a vehicle in his company's name to enter it in what he called "the police book" and issue the Form 4 warranty; but in this particular case he had pointed out to Mr Fisk that, as Mr Fisk had selected the Pajero himself and asked Mr Chama to buy it for him and transfer it to him without profit, he would not give him a warranty even though he had to give him the Form 4 document. Mr Chama acknowledged that he was at risk and would be liable to carry out the warranty work if the buyer insisted but he said that if the buyer was "a gentleman" this would never happen: (T71/7-T74/23; T100/42-T101/27). Mr Fisk said that he never expected a warranty from Chama Motors on the Pajero but understood that Mr Chama was required by law to give him a warranty. He said that it was for this reason that he did not sign the document and did not return the vehicle for warranty work: (Exhibit L; T239/11-43). Mrs Fisk also said that they did not expect a warranty because they thought you did not get one when you bought a car at auction: (T172/4).

FINDING ON WARRANTY

The Tribunal finds that though the warranty form was issued to Mr Fisk by Chama Motors and may have had legal force, their mutual agreement and common intention that there was not to be a warranty on the Pajero and that the warranty document issued was to have no effect between them mean that, in a practical sense, a warranty on the vehicle was not one of the financial benefits flowing to Mr Fisk from his arrangement with Mr Chama for the acquisition of that vehicle and that the allegation in the particulars referred to above is in this respect not established by the evidence.

REGISTRATION OF PAJERO

Coming back to the registration of the Pajero in the name of Mr Fisk's father, Mr Fisk failed, in this Tribunal's view, to give a satisfactory explanation. Although at one point of his evidence he suggested that he, his wife and his father purchased the vehicle: (T200/43); he later agreed that his father had nothing to do with the purchase of the vehicle, had had no discussions with Mr Chama prior to its purchase and had nothing to do with the financing of the purchase through AGC or repayment of the loan or with the arrangements for registration of the vehicle after it was purchased: (T200/45; T206/20-38). He agreed that at the time of the purchase he and his wife wanted to acquire the vehicle for their holidays and afterwards it was always garaged at their home and they paid the registration fees, insurance and running costs: (T201/5-15). Later Mr Fisk acknowledged several times that it was he who had purchased the Pajero: (T208/39, T209/20, T210/20).

When asked to explain the registration, Mr Fisk said, "It was registered in my father's name basically because it was for his use when he comes to Sydney": (T201/1). He said that his father, who was 74 years of age in 1992, had his own car up at the Central Coast where he lived but preferred to take the train to Sydney rather than drive down. His father would then have the use of the Pajero which occurred sometimes three times a month and then he might not drive it for a couple of months: (T201/25-43). The trouble with this explanation is that the vehicle did not need to be registered in the father's name for him to be given the use of it when he came to Sydney or at any other time. However Mr Fisk gave a further reason. He said, "Well the reason was that the Laser was his car and that was half the price, and he had the use of the vehicle" (T201/37).

Registration in the father's name could make sense if the purpose was to give the father some security for the trade-in value received by Mr and Mrs Fisk when the Laser was traded in as part payment for the Pajero but this would imply that there was some arrangement for the father to be paid its

value; but no such reason was advanced by Mr Fisk. On the contrary, Mr Fisk said that he did not pay anything to his father for the use of his Ford Laser as the trade-in: (T200/49-51); and offered no further explanation. This could be because the father, owning another car which he kept up the coast where he lived, simply made a gift of his Ford Laser to Mr and Mrs Fisk to assist them to purchase the Pajero because he no longer needed the Laser. It would follow that, when purchased, the Pajero was to belong to them and, although they intended Mr Fisk's father to have occasional use of it, there would still be no reason for it to be registered in the father's name.

Mr Fisk's father's name is Alex Angus Scott Fisk. He was not called to give evidence to this Tribunal but he made a formal statement of evidence to the ICAC on 1 December 1993 in which he stated that he had accurately set out the evidence which he would be prepared, if necessary, to give in court as a witness and that it was true to the best of his knowledge and belief: (Exhibit D, Attachment 10).

Referring to the Laser, the statement contains the following: "About 12 months ago I allowed my son, John Fisk, to trade it in on a beige 4-wheel drive (I don't know the type) because they were going up to Brisbane on a holiday." It went on to say, "I gave the Laser to my son and he paid the difference when it was traded in on the 4-wheel drive. I kept the ownership and he drove me around when I wanted to go on trips." The statement offered no explanation for the claim that he "kept the ownership" but it contained indications that he knew little about the transaction or the vehicle. Having said that he did not know the type of vehicle he went on to say:

"5. I do not know where the 4-wheel drive was purchased from. My son handled the transaction. The 4-wheel drive was normally at my son's house but here at my home when I wanted it. My son pays the registration fees for this vehicle, but as far as I know, the 4-wheel drive is still registered in my name. I do not know ... what the registration number of the 4-wheel drive is.

6. I can't remember the last time I drove the 4-wheel drive but I only drive it a little bit."

The two statements, “I gave the Laser to my son” and “I kept the ownership” are contradictory. The Tribunal concludes that, on the evidence, it is more probable than not that Mr Fisk’s father made a gift of the Laser to his son prior to or at the time the Pajero was purchased and that there was no intention between them that the father would receive any payment or other consideration for the Laser or have any right of ownership in the Pajero. If this is correct, it raises the possibility that there was some other reason for registering the Pajero in the father’s name.

In his cross-examination of Mr Fisk, Mr Alexis for the Director-General put it to Mr Fisk that the purpose of registering the Pajero in his father’s name was an endeavour to conceal any connection between Mr Fisk and Chama Motors in his purchase of the Pajero and was brought about by the fact that, contrary to Mr Fisk’s expectation, the Pajero had been purchased in Chama Motors’ name and not in their name so that a transfer to them from Chama Motors became necessary at an inopportune time, namely, about a week prior to the Council meeting on 24 November at which Mr Fisk’s rescission motion was to be put to the Council. Mr Alexis suggested that this was the reason why Mr Fisk got upset when he discovered that the vehicle had been sold by Christeys Motor Auctions to Chama Motors so that the only way that they could obtain it would be to buy it from Chama Motors instead of from Christeys Auctions. Mr Fisk denied this. His response appears in the following question and answer:

“Q. What I’m suggesting to you is that when you learnt that the vehicle had been purchased in the name of Chama Motors, you decided that the vehicle ought to be transferred to your father’s name so there could be no documentary connection between you, as the purchaser of a motor vehicle from Chama Motors, given that the sale took place about a week or so prior to this meeting of Council on 24 November?”

A. No. The reason that I was upset was the fact that the car was purchased with an upper limit of \$22,000 for \$24,600, and we assumed we would be paying at the most \$22,000. Then we assumed we would be buying from Christeys Auctions, and I think it was a culmination of all those things that, well, I know upset me. (T232/4-19)

Mr Alexis drew Mr Fisk's attention to the fact that in the above answer Mr Fisk attributed his upset to finding out that he would not be buying from Christeys Auctions thereby avoiding having to state the real reason which he had previously given in his evidence, namely, that it was having to buy from Chama Motors that had upset him, not that he had lost the opportunity to buy direct from Christeys: (Exhibit L; T232/21, T231/42-48). Mr Alexis had earlier asked, "When you learned it was purchased in Chama Motors' name, you then decided to have the Pajero registered in your father's name; that's true, isn't it?" And Mr Fisk's answer was, "No. It was always going to be registered in my father's name." (T231/35-40). It was put to Mr Fisk that, if this were true, it would have made no difference whether the transfer to his father was made by Christeys Motor Auctions or Chama Motors and, therefore, he would have had no cause to be upset by the vehicle having been bought in the name of Chama Motors. Mr Fisk replied that it was the fact that, "The whole sale had to go through Chama Motors" that had upset him: (T231/50-T232/2).

There was reason in the evidence to question Mr Fisk's claim that it had always been his intention to register the vehicle in his father's name. Chama Motors had issued to Mr Fisk on 18 November 1992 a Road Transport Authority (RTA) document called "Notice of Sale". It contained particulars of the vehicle and the sale, naming John Fisk as the purchaser. It also contained a section headed "Application for Transfer of Registration" which provided for the name of the "person ... to be named on registration" to be inserted. The name originally inserted was "John Norman Fisk" but "John Norman" has been later crossed out and "Alex" the name of Mr Fisk's father substituted. This section of the document bears the signature of John Fisk but the alteration is not initialled, so there is no internal evidence of whether it was signed by Mr Fisk before or after the alteration: (Exhibit D, Attachment 13).

In cross-examination the document was drawn to Mr Fisk's attention and he was asked whether at some point of time he had intended to have the Pajero registered in his name and he answered, "No. I think it was to be registered in my father's name". The alteration of name in the document was then pointed out to him with the suggestion that it had been made by him. He said, "No, that's not my writing." When asked if the alteration was made prior to his signing the document he said, "I couldn't say." (T199/56-T200/21). When Mr Chama was asked about the transfer of registration of the Pajero after Chama Motors had purchased it, Mr Chama said he thought that the registration went to John Fisk but he added that he was not involved in the transfer of registration as Mr Fisk did it himself: (THE84/44-55).

The alteration of the name for registration in the RTA document proves that the name was changed from Mr Fisk to his father but the evidence does not disclose who made the change or why it was made. There is evidence in the document that the registration details were filled in by someone else for Mr Fisk to sign because it has been marked with an "X" to indicate the place for signature but, even if Mr Fisk did not write in the alteration, it is highly probable that it was done on his instructions and with his knowledge because he was the only one who attended to the registration of the Pajero in his father's name at the motor registry. However this leaves unanswered the question why was the name altered? The fact that it was altered is as consistent with ignorance or error on the part of the person who wrote the original name on the document as it is with a change of mind after the original name had been correctly entered. This means only that the altered document itself is inconclusive on the question why the vehicle was registered in the father's name and whether Mr Fisk would have had the Pajero registered in his or his and his wife's name but for the fact that the registration of the vehicle had to be transferred from Chama Motors instead of directly from Christeys Motor Auctions.

FINDING - REASON FOR REGISTERING PAJERO IN FATHER'S NAME

On the balance of probabilities the Tribunal finds that Mr Fisk registered the Pajero in his father's name to avoid the existence of a public record in the RTA showing that he had purchased a vehicle from Chama Motors at a time when he was actively supporting the interests of Chama Motors in matters then pending before the Burwood Council. It is clear that he or he and his wife were the real purchasers of the vehicle even though Mr Fisk's father gave them his Ford Laser to assist them in the purchase. This being so, no sufficient reason has been advanced by Mr Fisk as to why the transfer of the vehicle from Chama Motors should not have been registered in his own name. The intention to allow the father to have the use of the vehicle from time to time did not require the vehicle to be registered in the father's name. If it had always been intended to register it in the father's name there would have been no occasion to be upset at the fact that Mr Chama had made the purchase in Chama Motors name instead of theirs because it would have made no difference to the achievement of that intention. For this reason the more probable cause of Mr Fisk's upset was the prospect for Mr Fisk of not only having to transact the purchase with Chama Motors but also of having the transfer of registration to him from Chama Motors on the public record. Having it registered in his father's name would assist in avoiding Mr Fisk's being personally linked to Chama Motors in the purchase of the vehicle and having to account for his relationship with Mr Chama at a time when Mr Fisk appeared to be using his position on the Council to favour Chama Motors' interests. As mentioned above, Mr Fisk denied that this was his purpose at the time but nevertheless he appears to have sought to take advantage of the registration of the Pajero in his father's name when later he was invited by the Director-General to comment on the allegations of pecuniary interest which had been made against him.

MR FISK'S REPLY TO THE DIRECTOR-GENERAL'S LETTER

The Director-General wrote to Mr Fisk on 16 August 1995: (Exhibit D, Attachment 14). His letter referred to allegations that Mr Fisk had a pecuniary interest in matters before the Council meetings on 10 and 24 November relating to Chama Motors and said, "It is alleged that the pecuniary interest arose by virtue of an arrangement you had entered into in August 1992 with Mr Michael Chama of Chama Motors for him to assist you in the purchase of a 4-wheel drive vehicle". Included in the letter was a statement that the Director-General had been informed that on 18 November 1992 Mr Fisk purchased a 1990 Mitsubishi Pajero from Chama Motors, trading in a 1988 Ford Laser. The letter concluded:

"Before a decision is made on whether any action should be taken in respect of the above allegations, I am providing you with the opportunity to comment on the matter. It would be appreciated if your response to the Department could be made within three weeks of the date of this letter."

Mr Fisk replied by letter dated 3 November 1995: (Exhibit D, Attachment 19). Mr Fisk's letter complained that no copy of the complaint and no documents supporting it had been furnished by the Department in response to a request made by his solicitor and it stated:

"I am thus unaware as to what sections of the Local Government Act 1919 I have allegedly breached and I make these comments without the benefit of knowing precisely what it is I have allegedly done and how my actions constitute breaches of the Local Government Act."

The comments followed in numbered paragraphs. The first objected to delay by the Director-General in notifying him of the complaint. Paragraphs 2 and 3 stated that Mr Fisk had no pecuniary interest in matters before the Council on 10 and 24 November 1992. The next two paragraphs were as follows:

4. The registered owner of the 1988 Ford Laser was Alex Angus Scott Fisk.

5. The registered owner of the 1990 Mitsubishi Pajero is Alex Angus Scott Fisk."

These two paragraphs totally ignored the statements in the Director-General's letter that he was alleged to have entered into an arrangement with Mr Chama for Mr Chama to assist him in the purchase of a 4-wheel drive vehicle and that on 18 November 1992 he had purchased the Pajero from Chama Motors, trading in the Ford Laser. The rest of the letter made no reference to Chama Motors and no further reference to either of the two vehicles.

The letter clearly was deliberately evasive but, as well, paragraphs 4 and 5 were designed to mislead the reader. Saying that the registered owner of the Pajero is the same person as the registered owner of the Ford Laser traded in for the purpose of purchasing the Pajero implies that it was that person, not Mr Fisk, who was the purchaser because it is being said in the context of Mr Fisk responding to an allegation that it was he who had purchased the Pajero from Chama Motors. The Director-General's letter had given Mr Fisk the opportunity to give a true and full account of the transaction in question and his relationship with Mr Chama concerning the transaction. By not only failing to take that opportunity but also putting forward statements liable to mislead, Mr Fisk brings suspicion upon himself of some impropriety in the matter that he wanted to conceal.

When being cross-examined before the Tribunal on this letter, Mr Fisk sought to excuse himself from its contents on the ground that the letter was prepared for him by his solicitor who advised him to write it and send it in the form it was in: (T205/9); but then he agreed that he had adopted the letter, signed it and put it forward as his own: (T205/27-35). He also agreed that the letter was open to the construction that he was saying that he did not buy the Pajero, his father did: (T209/29-39); but Mr Fisk said that that was not "the idea of the letter:" (T209/45-55). He said that the Director-General had not revealed what documents he held supporting the complaint or precisely how Mr Fisk's actions were alleged to constitute breaches of the Local Government Act: (T210/1); and the advice he had received was not to give

answers “When you don’t know what the question is.”: (T210/49). In the Tribunal’s view this explanation does not excuse the attempt in the letter to mislead or remove the suspicion arising from Mr Fisk’s failure to respond to the Director-General’s letter with a proper account of his dealings with Mr Chama that Mr Fisk had something to conceal.

However, by itself, suspicion does not prove a case and it remains to consider whether or not the facts found by the Tribunal on the evidence and information before it establishes that in relation to the matters dealt with at the meetings in question, Mr Fisk had a pecuniary interest within the meaning of the Local Government Act 1919. As Mr Fisk in his closing address made a general submission that the Director-General’s case was “flawed and faulty in many places” and as it is apparent that the findings by the Tribunal differ in some respects from the particulars given in the Notice of Decision to Conduct a Hearing, mention should be made of section 478 of the 1993 Act which applies to the present proceedings. That section provides that if during the proceedings it appeared to the Tribunal that, having regard to any matters that have arisen, another complaint could have been made, whether instead of or in addition to the complaint which was made, the Tribunal may take that other complaint to have been referred to it and may deal with it in the same proceedings. The Tribunal construes this section to apply as well to a variation of a complaint that has been made as to any separate or different complaint arising from the facts proved at the hearing.

DID MR FISK HAVE A PECUNIARY INTEREST?

The expression “any pecuniary interest direct or indirect” was not defined in the 1919 Act but there were many decided cases on what was meant by it and similar expressions in comparable legislation the like of which had been in existence in Australia and other countries for a long time. The principles to be applied in construing such expressions became well established. Difficulties of construction arose because of the generality of the words used to describe what it was that would disqualify a Councillor from

participation in decision making. As Wells J in the Supreme Court of South Australia said in **The Queen v District Council of Victor Harbour** (1983) 50 LGRA 255 at p.261:

“The reason for this is that such provisions attempt to bring a host of cases, which are almost as various as human life itself, within the compass of a single formula comprising a few words of very general import.”

In **Nutton v Wilson** (1889) 22 QBD 744 at p.748, Linley LJ said:

“To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent a conflict between interest and duty that might otherwise inevitably arise.”

These principles were adopted by **Rands v Olroyd** (1958) QBD 204 per Lord Parker CJ at pp.211-212; **Downward v Babington** (1975) 31 LGRA 314 at p.319; and in the Canadian cases **Re Moll and Fisher et al** (1979) 96 DLR (3D:) 506 at pp.508-0; **Re Greene and Borins** (1985) 18 DLR (4th) 260 at p.269 and **Re Sacks and Campbell** (1991) 87 DLR (4th) 342 at p.347.

A further principle of construction widely adopted was that this kind of legislation should not be narrowly interpreted but should be broadly construed so as to achieve its object: for example, **Allen v Tobias** (High Court) 1598 5 LGRA 28 at p.37; **Downward v Babington** (supra); **Re Moll and Fisher** (supra), Robins J pp.508-9. Gowans J in **Downward v Babington** dealing with a provision of the Victorian Local Government Act 1958 using the same form of words as here, said (at p.319) “The statutory provision should be treated as extending to the achievement of that object so far as the language permits.”

Attempts were made to formulate tests for determining whether a Councillor should be held to have a pecuniary interest in a matter before the Council. Gowans J, acknowledging as he did so the dangers of attempting definition, held in **Downward v Babington** (supra) that a Councillor should be held to have such a interest -

“...if the matter would, if dealt with in a particular way, result in the payment of money to him or by him or would give rise to an expectation (so long as it was not too remote) of the payment or receipt, or gain or saving or loss of money by or to him.” (pp. 321, 323)

It is clear from his judgment that Gowans J was not attempting an exclusive definition of what might constitute a pecuniary interest but was postulating a case that would do so. In **Attorney-General ex Rel Anka (Contractors) Pty Limited v Legg** (1979) 39 LGRA 399, McLelland J, in relation to the same form of words in the New South Wales Local Government Act 1919-1979, quoted the above statement by Gowans J and said as follows:

“I respectfully adopt this as a useful statement applicable to section 30A; it is open to the observation that the expression ‘expectation which is not too remote’ raises questions of degree, but it may well be that the statutory expression does not permit of any greater precision. Perhaps another way of putting the matter is to say that there is a pecuniary interest if there is a reasonable likelihood or expectation of appreciable financial loss or gain.” (p.402)

This statement is also not to be read as an exclusive definition of what might be found to be a pecuniary interest. The law as it stood when Mr McLelland J made his observations was, in relevant respects, no different in 1992 when the events here in question occurred. Each case falls to be considered on its own facts bearing in mind the object of the legislation and construing its provisions broadly to achieve that object so far as the language permits.

In the Tribunal's view the proper approach in the present case is to consider objectively whether in approaching the matters relating to Chama Motors before the Council at the meetings in question, there was a potential conflict of private interest and public duty for Mr Fisk by virtue of the arrangement with Mr Chama which the Tribunal finds to have existed at the relevant time, bearing in mind that before the requirements of s.46C apply the nature of the interest must be directly or indirectly pecuniary in character, that is, financial, relating to money, as distinct from any other kind of interest.

COUNCIL MEETING 10 NOVEMBER 1992

In relation to the meeting on 10 November 1992 the relevant findings which have been made by the Tribunal are that as from August or September and continuing at 10 November 1992 Mr Fisk had an arrangement with Mr Chama for Mr Chama to look out for him and his wife in the course of his used car business for a 4-wheel drive motor vehicle of the kind they had described to him and let them know when he found such a vehicle. It was part of the arrangement that Mr Chama would be using for their benefit his knowledge and experience in the trade in looking out for the vehicle and would make no charge for his services. Mr Chama had at the same time as this arrangement was made expressed his willingness to purchase a vehicle for them but Mr Fisk had not accepted that offer at that time.

The outcome of the questions before the Council on 10 November 1992 could be decisions contrary to the interests of Chama Motors and detrimental to its business. Mr Fisk was confronted with the prospects of the continuance of his arrangement with Mr Chama being jeopardised if the outcome was unfavourable or if he failed to support the interests of Chama Motors. If the outcome was unfavourable but Mr Fisk had supported those interests by voting against it, there would be a chance that Mr Chama would be less disposed to discontinue the arrangement. Thus Mr Fisk had, in consequence of the arrangement, a clear interest in the outcome of the matters before Council and this leaves the question whether the nature of the interest was financial.

In the Tribunal's opinion Mr Fisk's interest must be described as financial because of the benefits the arrangement bestowed of providing expert services free of charge. There was financial benefit in receiving the services without charge and also in the expertise that would be employed. That expertise could avoid the risk of loss and expense in choosing a poor quality or overpriced vehicle. Indeed the whole point of having Mr Chama looking out for a car for them was an endeavour to obtain value for money,

something that Mr and Mrs Fisk being inexperienced could not be sure of doing by themselves in their search for a suitable second hand vehicle. It enhanced Mr Fisk's financial interests to keep rather than lose the arrangement he had made with Mr Chama. But for one further question, Mr Fisk's interest was, in the Tribunal's opinion, properly to be described as a pecuniary interest within the meaning of the legislation.

The further question is whether the degree of financial benefit is relevant, that is, whether, though financial in character, the interest must be shown to be of such value as to be reasonably regarded as liable to result in bias or influence in the performance of duty before it can be held to attract the operation of the pecuniary interest provisions.

At common law there was a conclusive presumption of bias from the mere fact of the existence of an interest of a pecuniary kind: **The King v Justices of Sunderland** (1901) 2 KB 357 at p.371. In the modern Canadian cases it has become firmly established that if an interest in the relevant sense can be said to exist, motives are irrelevant, "and the court is not to measure or weigh the extent or amount of the interest": **Re Wanamaker and Patterson** (1973) 37 DLR (3d) 575 at p.582; **Re Guimond and Sornberger** (1980) 115 DLR (3d) 321 at pp.327-328. In the **Guimond case** the legislation provided in section 30(2)(d) that "A member of a Council shall not vote in the Council on any question in which he has a direct or indirect pecuniary interest". The court had this to say (at p.330):

"Section 30(2)(d) affirms a public policy of importance, unrelated to attitudinal bias It sustains the right of an elector to the even-handed, independent consideration of his elected representatives on questions before Council, unaffected by any influence that could potentially flow from a direct or indirect pecuniary interest. The only inquiry that is permitted is whether such interest exists, whatever its extent or degree. Once that is determined to exist in any degree, there can be no further inquiry: a presumption of bias is mandatory. It is irrelevant to inquire whether the Councillor cast his vote for the question or against it. He may have voted favourably to his pecuniary interest or he may have "leaned over backward" and voted against it. The latter course may be acceptable morally, but it does not achieve the disinterested consideration of the question on its merits, which the

elector is entitled to expect and to receive from his representatives, and which the statute commands. The neutrality of the Councillors is not to be disturbed one way or the other by the potentials of pecuniary interest.”

The same policy underlies section 46C of the Local Government Act, 1919 but the definitions put forward by Gowans J and McLelland J in the two local cases of **Downward** and **Anka** quoted above, expressed some modification of the strictness of the Canadian position. Gowans J excluded the case where the expectation of monetary gain, saving or loss was “too remote” and McLelland J, in describing a pecuniary interest, added the adjective “appreciable” to the words “financial loss or gain”.

If these considerations were to be applied to the present case, the word “appreciable” would exclude the insignificant but would not, in the Tribunal's opinion, require a calculation or valuation to be made of the monetary worth of a material benefit so long as it was a benefit of a financial character and one which a reasonable person would prefer to retain than to lose. That test is satisfied here for the reasons already given. Though not capable of any precise calculation, it would be correct to say on the evidence that appreciable savings could flow to Mr Fisk from having Mr Chama looking for a vehicle for him without charge.

The test of remoteness put forward by Gowans J related to the expectation of gain or loss as a result of the way a matter might be dealt with by the Council. In the opinion of the Tribunal, the prospects of Mr Chama terminating the arrangement if the Council's decision went against him or Mr Fisk voted against Mr Chama's interests would not have been too remote to be regarded as capable of influencing Mr Fisk's decision as to how he might vote on the matters before Burwood Council on 10 November 1996.

Mr Fisk said in his statement of evidence (Exhibit L), “I had on 10/11/92 no contract, agreement or arrangement with Mr Chama so I was to entitled to vote on any matter concerning his business.” In his submissions at the end of the hearing he maintained this position. There does not have to

be a legally enforceable contract or other binding arrangement for a pecuniary interest to arise. Whatever the relationship, if it gives rise to the requisite expectation of financial gain or loss from a Council decision it can be a pecuniary interest. The Tribunal has called what arose at Enfield an “arrangement”. It might also have been called an “understanding” or something else. Even though it was not binding, as both parties remained free to abandon it or refrain from acting on it, it was subsisting at 10 November 1992 and that is what matters because it gave rise to a pecuniary interest in Mr Fisk at that time.

Mr Chama had said in evidence that although it was commonplace in the trade for a spotter’s fee of a couple of a hundred dollars to be paid if a suitable vehicle was found or bought for a customer it was not his practice to charge such a fee if he offered or was asked to find someone a suitable vehicle: (T67/54-T69/44). Mr Fisk submitted that, having regard to this evidence, it could not be said that he obtained any financial benefit from the fact that he got Mr Chama’s services free of charge; but that does not follow. It means that it was his good fortune that it was Mr Chama who had offered his services but not that, the arrangement having been arrived at with Mr Chama, there was no financial benefit in having Mr Chama’s services provided free of charge.

In his statement (Exhibit L, p.5) Mr Fisk referred to the Council staff recommendation before the meeting on 10 November 1992 that legal action against Chama Motors be deferred and to the acknowledgment by the staff which was before the meeting that the conditions of the development and building approvals had been complied with. Mr Fisk then said:

“It would have been a failure of my duties to the people of Burwood to institute legal action that would have failed and cost the ratepayers of Burwood substantial dollars.”

In the decided cases over many years as well as in the more recent experience of this Tribunal it is very common to find Councillors who voted on a matter in which they are alleged or have been found to have had a

pecuniary interest seeking to justify their action on grounds of public duty or other good motives, including even that they voted against their own interests. It cannot be emphasised too strongly for the benefit of Councillors that these kinds of justification are not countenanced by the legislation. If they have a pecuniary interest they must not vote at all: see **Ex Parte Elliott; Re Mowle** (1935) 12 LGLR 157 at pp.159-160; **Brown v Director of Public Prosecutions** (1965) 2 QB 369 at pp.374, 376; **Rands v Oldroyd** (supra) at p.214; **Re Greene and Borins** (supra) at p.270; and the decision of this Tribunal in the case of **Councillor Roberts, Hastings Council, PIT1/1995**, 3 August 1995 at pp.54-56. Of course putting forward such justifications may be relevant when it comes to the imposition of penalties or sanctions upon Councillors for pecuniary interest breaches.

COUNCIL MEETING 24 NOVEMBER 1992

It is necessary to summarise the Tribunal's findings relevant to the time of the Council's meeting on 24 November 1992:

1. In August or September 1992 Mr Chama had offered to purchase a vehicle for Mr and Mrs Fisk but they had not then accepted his offer.
2. On 16 November 1992 Mr Fisk had arranged with Mr Chama for Mr Chama to purchase at auction on 17 November 1992 a Pajero 4-wheel drive vehicle that Mr and Mrs Fisk had selected using his expertise to endeavour to purchase it at a wholesale price being the best possible price at the auction up to \$22,000.
3. It was part of the arrangement that if Mr Chama were to succeed in purchasing the vehicle and Mr and Mrs Fisk decided to take it they would pay the same price as Mr Chama had bid for the vehicle with no fee or profit for Mr Chama.
4. On 17 November 1992 Mr Chama succeeded in purchasing the vehicle for \$24,600 in Chama Motors' name and Mr and Mrs Fisk decided to take the vehicle at that price from Chama Motors.
5. On 18 November 1992 Mr Chama and Mr Fisk agreed -

- (i) that payment for the vehicle would be made by -
 - (a) transfer to Chama Motors of a 1988 Ford Laser registered in the name of Mr Fisk's father at an agreed trade-in value of \$10,000;
 - (b) \$14,600 cash to be raised by Mr Fisk by way of a loan from AGC; and
 - (ii) that, although a warranty document would be issued by Chama Motors to Mr Fisk, there would be no warranty on the vehicle given or claimed between them.
6. Arrangements for payment and delivery of the vehicle to Mr Fisk were made and finalised as between Mr Chama and Mr Fisk on 18 November 1992 although delivery of the Pajero did not occur until 19 November 1992 and, due to delay in the paperwork, payment from AGC to Chama Motors was not made until 4 January 1993.
7. The Ford Laser traded in on the purchase of the Pajero was a gift to Mr Fisk from his father to assist him in the purchase of the Pajero.
8. The actual purchasers of the Pajero were Mr Fisk or Mr Fisk and his wife.
9. On 19 November 1992 Mr Fisk personally procured the Pajero to be registered in his father's name and took delivery and possession of the vehicle from Chama Motors on that date.

Mr Alexis submitted for the Director-General that the transaction between Mr Chama and Mr Fisk was not completed until the finance was approved by AGC and, as, at the earliest, that would be on the date of the last loan application, 14 December 1992, the arrangement with Mr Chama from which Mr Fisk derived financial benefit was still on foot at 24 November 1992 and gave him a pecuniary interest in the matters before the Council on that date.

Alternatively, Mr Alexis submitted that the obligation under the Act to disclose a pecuniary interest did not necessarily expire because the transaction concerned had been completed before the meeting. He submitted that, even if the arrangement had been finalised on 18 November 1992, the financial benefit derived from it by Mr Fisk was subsisting at the date of the meeting. He contended that it would make “nonsense” of the scheme of the Act if a Councillor could escape the obligation to disclose his interest by making sure that the transaction which gave rise to that obligation was finalised before the meeting at which he would have been obliged to disclose it.

Mr Fisk claimed in his statement of evidence (Exhibit L, p.6) that at the time of the meeting on 24 November 1992 he had no arrangement with Mr Chama and was not aware that the AGC documents had been sent back to Mr Chama. He claimed that by that time his interest was with AGC not Mr Chama. He submitted that the AGC documents signed on 14 December 1992 were “replacement” documents for those signed on 18 November 1992.

The Tribunal accepts Mr Fisk’s contention that the arrangements with Mr Chama, first to look for, and later to buy, a vehicle for them had come to an end by 19 November 1992 even though the AGC loan was not approved or paid until later. That must have been the view of both parties otherwise Mr Chama would not have given up possession of the vehicle. Both parties took the AGC approval for granted at the time and there was no reason in the evidence to doubt that approval would have been given: (T125/40-T126/4). When the paperwork turned out to be faulty no doubt the law would have said that Mr Fisk was bound to pursue the application by aiding in its rectification and would remain liable to Chama Motors for the money if the loan were not approved but the rights of the parties would have crystallised by 19 November 1992 and Mr Fisk’s financial position did not stand to be made better or worse by any decision of the Council on 24 November 1992.

However, in the Tribunal's view, that is not the end of the question whether Mr Fisk had a direct or indirect pecuniary interest in the matter before the meeting on that date. That meeting was, in a practical sense, an extension of the meeting of 10 November 1992. The Notice of Motion to rescind the Council's decision which Mr Fisk gave on that date kept the issue of taking legal proceedings against Chama Motors or adoption of the staff recommendation against such proceedings before the Council until its next meeting. On the Tribunal's earlier findings, Mr Fisk's arrangement with Mr Chama gave him an interest of a financial character in the outcome of that issue. At the meeting on 10 November 1992 Mr Fisk had espoused a position on the issue that favoured Chama Motors' interests and, when unsuccessful, had pursued that position by taking steps to postpone and possibly prevent an unfavourable outcome by joining in the notice of a rescission motion. Thus the matter concerning Chama Motors before the Council on 24 November 1992 was a continuation of the same issue as that before the Council on 10 November 1992.

In the opinion of the Tribunal, as the matter before the Council was still the same, the pecuniary interest that precluded Mr Fisk from voting on 10 November 1992, enlarged as it was by the further arrangements made with Mr Chama in relation to the Pajero between 16 and 19 November 1992, should be regarded as continuing on 24 November 1992 until the outcome was decided by the vote on the rescission motion.

It should be mentioned that it will be a rare case in which a disqualifying pecuniary interest will not consist of a prospect of financial gain or loss that is dependent on the Council's decision on the matter at the meeting in respect of which the question of disqualification arises; but the wording of section 46C was wide enough to include a case where there was not such dependency. Though the dependency, which did exist on 10 November, did not continue to 24 November 1992, it would defeat the object of the Act if a Councillor who was disqualified by pecuniary interest from

voting on a matter could cause or assist in causing a decision on that same matter to be postponed until after he had obtained the financial benefits of the transaction that had previously disqualified him and then vote on it. In such a case it is proper to treat the pecuniary interest as if it were still on foot at the later meeting.

CONCLUSIONS AS TO BOTH MEETINGS - FINDING ON COMPLAINT

The Tribunal finds that John Norman Frank Fisk, when a member of Burwood Council, had a pecuniary interest in matters relating to Chama Motors with which the Council was concerned at its meetings on 10 and 24 November 1992 and did not disclose the nature of the interest to the meetings and took part in the consideration and discussion of and voted on questions with respect to those matters in contravention of section 46C of Division 9A of Part 4 of the Local Government Act, 1919. The Tribunal finds, therefore, that the complaint has been proved.

STATUTORY DEFENCE

Regulation 29, quoted earlier, applies Part 3 of Chapter 14 of the 1993 Act to the present complaint. That Part contains section 457 which provides in the circumstances stated in the section a defence of ignorance. Mr Fisk did not rely on it and it is sufficient to say that on the facts found by the Tribunal that defence would not have been available to him.

The same would apply to both the defence provided by section 46G(2) of the 1919 Act and the defence of honest and reasonable mistake that had been held to be available to answer charges of offences under that Act. As the facts would not support either of these defences, it is not necessary to discuss whether they are applicable in proceedings under the 1993 Act but it may be noted that regulation 29 would appear to exclude section 46G(2) and the Tribunal has held in the **Roberts case** mentioned above that the defence of honest and reasonable mistake was no longer available (see pp.51-53).

MATTERS RELEVANT TO ACTION BY THE TRIBUNAL

It remains to consider what action should be taken by the Tribunal having regard to its findings. There are a number of relevant matters.

In the witness box, Mr Chama complained bitterly and objected strongly to the mental stress and financial ordeal to which he said he had been subjected by the news media and various authorities as a result of the allegations made against him in relation to Mr Fisk: (T87/45-T88/31; T133/6-19; T150/41-53). He said he was greatly upset by suggestions that he had acted corruptly, suggestions which he strongly denied: (T87/55-T88/2). He said that he had complied with Council requirements and was not in fear of legal proceedings against him at the time in question here because he was confident that he would win as in fact he did when later the Fogliatis sued him in the Supreme Court for noise nuisance. He said that he had had no need to, would not, and did not seek any favours from Mr Fisk nor did Mr Fisk seek any from him: (Exhibit D, Attachment 8, p.14; T151/31-T154/53; T158/42). He said that it was in his nature to help people as well as that being the custom of the country he came from. He said:

“... I was going to do my best for him or for anybody else. If I could help anybody I help. It’s just my custom. If you know my custom where I come from, from which country, we want help here today. Our custom is to help people if we could, especially we treat them better, not like Sydney. Our government treats them better. The people themselves they say look after these people after the police, after any official people. This is our custom.” (T62/32-38; T66/18-29; T138/1-29)

He was asked by Mr Fisk why he had introduced himself to them at the Enfield Motor Auctions:

“Q. When you first met me at Enfield Motor Auctions the question was, the question you asked this morning, why did you introduce yourself? I just wonder if you could just clarify that. If you saw me at Enfield Motor Auctions why would you introduce yourself?”

A. I thought I was doing the right thing. I thought if he was Mr Fisk I’d better ask and it’s natural for me to help people like in this position and even anyone in that position. So it’s for me, I come to you to see what you were doing here and if I could help.” (T144/40-51)

In the witness box Mr Chama addressed the Tribunal expressing regret that, by having offered to help Mr Fisk as he had helped many others, he had caused so much trouble for him: (T158/44). He concluded his evidence by saying, "I am sorry I cause trouble for this gentleman. I'm confused if I help somebody he may end in corruption court." (T159/29).

Mr Chama impressed the Tribunal as having a sincere conviction that he and Mr Fisk had not been guilty of any wrongdoing or impropriety in their dealings with regard to the purchase of the motor vehicle. He appeared to be giving his evidence honestly and spoke as one who had nothing to fear in giving a full account of the events. Apart from his obvious resentment at the repercussions for himself he also appeared to be genuinely upset at the consequences for Mr Fisk that had resulted from his offer of help.

Mr Fisk denied that there was any exchange of favours involved in his dealings with Mr Chama over the purchase of the vehicle. He said that he had treated all matters concerning Mr Chama and the Burwood Council in which he was involved as being in the normal course of Council business, had referred them to the appropriate Council staff to be processed in the ordinary way and had never sought preferential treatment for Mr Chama. He said that he always kept Council business and his own business separate.

Mr Fisk called Mr Kerry John Smith, Chief Town Planner for Burwood Council at the period here in question and presently the Council's Director of Environmental Services. Mr Smith had been directly involved with the Fogliatis complaints against Chama Motors and was aware of the development and building approvals granted by Council. The Tribunal declined to permit Mr Fisk to pursue with Mr Smith matters that did not bear upon the pecuniary interest issues before the Tribunal, in particular, the validity of the Fogliatis complaints and claims by Mr Fisk that the pursuit of those complaints had been encouraged and influenced by politically motivated Councillors and opposing factions on the Council. However,

evidence by Mr Smith as to Mr Fisk's conduct as a Councillor in dealing with matters affecting Chama Motors and the business before the Council meetings of 10 and 24 November 1992 was relevant to present issues.

Mr Fisk showed concern that the Tribunal was aware of and had before it in the Director-General's Report a letter dated 14 January 1994 from Mr and Mrs Fogliati to the Director-General alleging that actions by Councillor Fisk had "overfavoured, protected and strongly influenced" the Council's approval of Chama Motors' development application and that, "Lack of legal action could only have been obtained through the influence of the then Mayor, J Fisk." (Exhibit D, Attachment 5, pp.1, 2).

Mr Smith said that the Chama Motors' development application had been "run-of-the-mill". He said that Mr Fisk had not asked for any favours in relation to it or to any other matter of Chama Motors: (T187/19; T192/51-55). As to the lack of legal action by the Council, Mr Smith said that the recommendation to Council that legal action against Chama Motors be not pursued which was before the Council at its meetings on 10 and 24 November 1992 was his recommendation based upon his own view and the view of the Council's solicitors with whom he had been in touch over that period of time that the Council would have to have fairly strong evidence for any injunction to be granted and that Council "did not have sufficient and direct evidence" against Chama Motors to get the case before the Land and Environment Court with a better than even chance of getting an injunction: (T189/18-43). He said that he was also concerned at that time as to whether the Council was becoming too heavy handed and seemed to be hounding Chama Motors unmercifully and unreasonably: (T190/9-16). Mr Smith said that Mr Fisk did not attempt to and did not have any influence on the recommendation he had made to Council on that subject: (T193/39-50).

On the Council's files in the Engineering Department there is a memorandum dated 20 November 1992 to the effect that an officer of that department had contacted Mr Chama by phone, "At the request of Mr J Fisk"

in regard to a “damage deposit” which Chama Motors had made as security for the cost of carrying out certain work in relation to its development and building: (Exhibit D, Attachments 12 and 47). Mr Chama was asked about this. He recalled that Burwood Council was “holding the money for no apparent reason”: (T158/29); but could not recollect ever talking to Mr Fisk about it and denied referring to Mr Fisk in any telephone call to Council staff: (T156/45-T158/36). He said, “I didn’t refer to Mr Fisk. I have never used his name to influence or used his position for benefit. So it has never happened”: (T158/34). However, Mr Fisk did recall the matter although not in terms of a deposit with Council. He recalled, “Mr Chama mentioned to me that Council owed him money.”: (T241/41, 52). Mr Fisk said he could not be sure when it happened but he presumed that it was when he was at Chama Motors’ car yard on 18 or 19 November 1992: (T242/7-27). He said that he had no idea what Mr Chama was talking about so he mentioned to one of the Council staff that Mr Chama thought the Council owed him some money and asked the staff member to check the records and contact Mr Chama directly to explain the position: (T241/54-T242/5). The staff member’s memorandum of 20 November 1992 is entirely consistent with Mr Fisk’s recollection. Mr Smith’s evidence was that it would be normal practice and fairly common for a Councillor to whom such an inquiry or complaint had been made to refer it to a Council staff member and ask the member to check on the matter and then contact directly the person who had inquired or complained: (T191/6-20; T194/34-T195/3). Mr Smith said that although he could recall seeing the memorandum, he did not think he would have had any contact with Councillor Fisk about the matter and certainly did not recall any: (T195/29-34).

The Tribunal accepts Mr Fisk’s account of the “damage deposit” episode and is satisfied that it was a separate matter and was not part of or connected with the arrangements relating to the purchase of a motor vehicle for Mr and Mrs Fisk.

Mr Smith's evidence supported the evidence of Mr Chama and Mr Fisk that favours were neither sought nor given in relation to Chama Motors' development or building applications or to the complaint made by its neighbours or action or proposed action by the Council concerning the conduct of Chama Motors' business. If such favours had been sought or given there would be a case of corruption in office to consider and, if there had been a seeking of favours from Mr Fisk in Council which were found to be linked to or involved in the arrangements for Mr Chama's help in acquiring a vehicle, the contraventions of the pecuniary interest provisions of the law would be such as to attract a severe penalty.

However, in the Tribunal's opinion, the evidence before it does not establish any corrupt conduct between Mr Chama and Mr Fisk. The Tribunal finds that there was no exchange of favours or intention to exchange favours relative to Mr Chama's problems involved in the arrangements that grew out of the meeting at Enfield Motor Auctions. The Tribunal is satisfied that the arrangements flowed from a purely by-chance meeting and an unsolicited offer of assistance made by Mr Chama that Mr Fisk took the opportunity to accept and which they later acted on. Having found that, on the facts proved, the arrangements gave rise to a pecuniary interest in Mr Fisk in the matters before Council at the two meetings in November 1992 it follows that Mr Fisk was legally bound to refrain from participating and voting and obliged to disclose his interest. His failure to comply was a contravention of section 46C. He said that he acted out of a sense of duty to the electors of Burwood Council and on his view of the merits of the case. The evidence does not disprove his claim; but, as already pointed out, it cannot relieve him of the breach.

At the end of the case, Mr Fisk submitted: "If any interpretation is to be placed on my actions of some four years ago, then it is that they may have been commercially and politically inept but certainly not illegal.", to which the

Tribunal must reply, "They were contraventions of section 46C and, therefore, illegal."

ACTION BY THE TRIBUNAL - SECTION 482(1)

Under section 482(1) of the 1993 Act, if the Tribunal finds the complaint is proved, it may counsel or reprimand the Councillor, suspend the Councillor for a period or disqualify the Councillor from holding civic office for up to five years. The Tribunal has already held in these proceedings that, in this section, the word "Councillor" refers to the person who was a Councillor at the time of the contravention and thus includes a contravener who has ceased to hold the office but, in that case, although the other powers remain, the power to suspend ceases to be a consideration.

At the hearing the parties made no submissions on what action the Tribunal should take in the event that the Tribunal should find the complaint to be proved. This Statement of Decision contains the Tribunal's decision, findings and reasons in relation to the complaint. It will be furnished forthwith to both parties on the basis that the question of such action is reserved to allow submissions in writing to be made within a limited period after which the Tribunal will make its decision on that question.

DATED: 12 November, 1996



K J HOLLAND Q.C.
Pecuniary Interest Tribunal