ARCHE TREUHAND A.G. and VOLLENWEIDER v. ATTORNEY-GENERAL

SUPREME COURT (Kneller, C.J.): March 1st, 1995

Evidence—assistance from foreign court—letter of request—authority to issue letter of request—under Supreme Court Ordinance, ss. 12 and 15, English R.S.C., O.39, rr. 1 and 3 govern requests for assistance from foreign courts—Supreme Court alone empowered to issue letters of request

Evidence—assistance from foreign court—letter of request—authority to issue letter of request—no common law or statutory power for Attorney-General to gather evidence for furtherance of Gibraltar criminal investigation by letter of request to foreign court

Evidence—assistance from foreign court—letter of request—Gibraltar authorities may not seek assistance from foreign court to obtain evidence abroad if reciprocity required by requested court impossible under Gibraltar law

Evidence—assistance from foreign court—examination of documents and witnesses—evidence obtained pursuant to letter of request unlawfully obtained if requested court misled as to authority of issuer and not informed of material change in circumstances under which evidence sought

The plaintiffs sought declarations that the Attorney-General had unlawfully issued letters of request to the judicial authorities in Switzerland in response to which the plaintiffs had been ordered to give evidence in Switzerland and confidential financial information had been disclosed.

The first plaintiff was a trust company of which the second plaintiff was the general manager and a director. The Gibraltar police had been investigating the involvement of Gibraltar residents in fraudulent activities surrounding the development of land by a group of companies with which the plaintiff had dealings.

The Attorney-General was aware that the Danish prosecuting authorities had begun criminal proceedings against four persons in connection with the land development scheme and had, by a letter of request to the Swiss judicial authorities, sought assistance in the form of the taking of evidence from the second plaintiff.

The Attorney-General sent a similar letter of request to the Swiss Federal Police, seeking to obtain answers to the same questions which

had been put to the second plaintiff before the investigating judge in the Swiss court, and asking for certain banks to be ordered to provide details of relevant financial matters. He stated in the letter of request that he was in charge of criminal investigations which were being conducted in tandem with those in Denmark and that he therefore had unfettered power to issue the letter. The investigating judge ordered the evidence to be taken.

In response to a second letter of request from the Attorney-General, the Swiss authorities sought assurances that he had authority to issue it and that any assistance which they gave would be reciprocated by Gibraltar. The Attorney-General gave these assurances on both points.

The objections of the plaintiffs and several bank account holders were overruled by the Swiss court and their appeals to the Swiss Federal Court were dismissed. The plaintiffs then brought the present proceedings against the Attorney-General, pending the outcome of which the evidence obtained under the letters of request was held by the Swiss police authorities.

The plaintiffs submitted that (a) ss. 12 and 15 of the Supreme Court Ordinance conferred on the Supreme Court all the jurisdiction and powers, both substantive and procedural, of the English High Court, and since neither the Evidence Ordinance nor any other domestic legislation made provision for the issue of letters of request to foreign states, under r.8(1) of the Supreme Court Rules the practice and procedure to be followed was that applicable in the High Court; (b) whilst, under O.39, rr. 1 and 3 of the English Rules of the Supreme Court, the Supreme Court of Gibraltar had power in any cause or matter—including, by virtue of the Supreme Court Act 1981, s.151, criminal proceedings—to order the examination on oath of a person outside the jurisdiction, that power was not conferred on the Attorney-General; (c) nor was the Attorney-General entitled to issue a letter of request by reason of s.4 of the Criminal Procedure Ordinance, which provided that the Supreme Court should exercise its criminal jurisdiction in accordance with the law and practice of the English Crown Court, since such an interpretation of s.4 would conflict with the description of the Attorney-General's powers and duties in s.77 of the Constitution; (d) the statutory scheme now in place in the United Kingdom to implement the European Convention on Mutual Assistance in Criminal Matters 1959, permitting certain judicial authorities to issue letters of request, did not apply in this case, since the provisions of the Criminal Justice (International Co-operation) Act 1990 had not been extended to Gibraltar; (e) even if the Act did apply here, a letter of request could only be issued upon an application to a judge or magistrate under s.3 of the Act, which had not occurred here; (f) the Attorney-General would not be entitled to apply under s.3 in any event, since he was not mentioned on the list of persons designated by the Criminal Justice (International Co-operation) Act 1990 (Designation of Prosecuting Authorities) Order 1991 and although the English Director of Public Prosecutions was on that list, the Attorney-General of Gibraltar could not be equated to him for present purposes, but only for certain

other limited purposes under r.8(4) of the Supreme Court Rules; (g) consequently, only the Supreme Court could order the issue of a letter of request for obtaining evidence overseas for use in criminal proceedings in Gibraltar; and (h) the Attorney-General had also acted unlawfully in the manner in which he had issued the letter of request and dealt with inquiries from the Swiss authorities, since (i) he had failed to give full details of the involvement of one of the suspected offenders in the matters on which evidence was sought, (ii) he did not specify the documents and records which he required the Swiss authorities to produce, as required by O.39, (iii) he referred to criminal investigations conducted in Gibraltar, for which he claimed to be responsible, but no criminal proceedings had ever commenced here and, in any case, it was the Governor who was responsible for overseeing the work of the Gibraltar police, (iv) he gave an assurance of reciprocity to the Swiss authorities which, under the Evidence Ordinance, only the Supreme Court was empowered to give, and (v) he failed to inform them that the basis of the Danish authorities' allegations against the four suspects had changed some months after the issue of the letter, or to amend the request accordingly.

The defendant submitted in reply that (a) since a litigant in High Court proceedings was free to gather evidence to support his cause in any lawful way he saw fit, the mechanism for seeking the aid of a foreign jurisdiction was governed by common law and not by legislation or by the Rules of the Supreme Court; (b) in other common law jurisdictions, such a request need not come from a court of competent jurisdiction but could be made by any interested person, including a prosecuting official such as the Director of Public Prosecutions; (c) there was no requirement that criminal proceedings should have been commenced in the requesting state or that it should offer reciprocity to the requested authorities; (d) although Gibraltar was not a party to the 1959 Convention and was not bound by the provisions of the 1990 Criminal Justice (International Co-operation) Act, it should comply, for the purposes of comity, with the principles in it, one of which was that letters of request should emanate from "judicial authorities," namely judges, magistrates, courts and Directors of Public Prosecutions; (e) since under the Gibraltar Constitution, the Attorney-General for Gibraltar had the powers of the Attorney General for England and Wales and undertook "judicial duties" he thus was able to issue a letter of request on his own initiative and did not need to apply to the Supreme Court to do so; alternatively, (f) by analogy with the power of the Supreme Court under s.4 of the Criminal Procedure Ordinance to exercise its criminal jurisdiction in conformity with English Crown Court practice, other persons responsible for the administration of criminal law in Gibraltar, such as the Attorney-General, could also take advantage of English procedures; (g) since the common law of Gibraltar was that of England save to the extent that it was modified by, *inter alia*, Acts of Parliament, the procedures contained in the Criminal Justice (International Co-operation) Act, s.3 were relevant to

the exercise of the Attorney-General's jurisdiction in Gibraltar; (h) since, under r.8(4) and the Schedule to the Supreme Court Rules, the Attorney-General was equated to the Director of Public Prosecutions, and since the English Director of Public Prosecutions and Attorney General were enabled by the Designation of Prosecuting Authorities Order 1991 to issue a letter of request under s.3 of the 1990 Act provided criminal investigations were being undertaken in England, the Attorney-General had the same power in Gibraltar; and (i) since the manner in which the letter of request was received and the demands made by the requested state would depend on whether it was a signatory to the 1959 Convention—and if not, on its own domestic law—it was a matter for the Swiss authorities to ensure that the terms on which it was prepared to give judicial assistance were complied with.

Held, making the declarations sought:

(1) The power to issue a letter of request to a foreign state lay solely within the inherent jurisdiction of the Supreme Court of Gibraltar. The process was governed by O.39, rr. 1 and 3 of the Rules of the Supreme Court, as applied to the Supreme Court of Gibraltar by the Supreme Court Ordinance, ss. 12 and 15 (page 27, lines 19–31; page 41, line 40 – page 42, line 4).

(2) The Attorney-General was not empowered, either expressly or impliedly, to issue a letter of request by s.3 of the Criminal Justice (International Co-operation) Act 1990, since that Act had not been extended to Gibraltar. Nor was he a "judicial authority" within the meaning of the European Convention on Mutual Assistance in Criminal Matters 1959, since Gibraltar was not a signatory, and the expression had not been adopted by implementing legislation even in England (page 38, lines 33–37; page 42, lines 27–39; page 43, lines 9–14).

(3) Nor did the Criminal Procedure Ordinance, s.4 avail the Attorney-General, since it restricted the power to exercise criminal jurisdiction in conformity with English practice only to the Supreme Court and magistrates' court and did not extend it to any other person responsible for the administration of criminal law and procedure in Gibraltar; and in any case, it was to be read subject to the Supreme Court Ordinance, under which the English Rules of the Supreme Court governed the issue of letters of request (page 38, lines 29–33; page 43, lines 35–40).

(4) Whilst litigants were free to gather evidence in any lawful way for the purpose of presenting a case before the High Court of England or the Supreme Court of Gibraltar under common law, the principle did not apply to the Attorney-General, who was not preparing a civil case but seeking information for the furtherance of a criminal investigation which had not yet resulted in court proceedings of any kind (page 38, line 38 – page 39, line 17).

(5) Nor was the manner in which the Attorney-General sought to gather evidence lawful in the state from which he had requested it, since, as the Swiss authorities stipulated, evidence could only be provided on the understanding that Gibraltar was able to reciprocate in similar circumstances if there were a request from the Swiss court. The assurance given by the Attorney-General was incorrect, since, under ss. 9 and 12 of the Evidence Ordinance, the Supreme Court could assist the Swiss authorities in the context of criminal proceedings only if those proceedings were commenced in Switzerland, not in Denmark, and not if they were only at an investigatory stage (page 39, lines 21–35).

(6) The Supreme Court would not itself have issued a request for the taking of evidence in the form adopted by the Attorney-General, nor would the Gibraltar authorities have entertained a request in similar terms from the Swiss court, since it did not specify the documents to be produced, as required by the Evidence Ordinance, s.10(4)(*b*). Similarly, the depositions sought by the Attorney-General would be inadmissible in criminal proceedings in Gibraltar unless the deponents attended in person, and no such proceedings were envisaged (page 39, lines 41–44; page 41, lines 7–28; page 42, line 40 – page 43, line 3).

(7) The Attorney-General had misled the Swiss authorities as to his power to issue the letters of request since his role was not interchangeable with that of the Supreme Court or equivalent to that of the Attorney General or Director of Public Prosecutions in England, save for certain other limited purposes which were not relevant here. Nor was he charged with overseeing the criminal investigation in Gibraltar, since this was the responsibility of the Governor. He had also failed to inform the Swiss authorities that circumstances had changed after the issue of the letter of request. Consequently, the evidence which the plaintiffs had been compelled to provide had been improperly obtained (page 42, lines 11–16; page 43, line 22 – page 44, line 6).

Cases cited:

(1) *Antelope, The, Vice-Consuls of Spain & Portugal* (1825), 10 Wheat. 67; 25 U.S. 268.

(2) *Appeal Enterprises Ltd.* v. *First Natl. Bank of Chicago* (1984), 10 D.L.R. (4th) 317; 46 O.R. (2d) 590, considered.

(3) *Asbestos Ins. Coverage Cases, In re,* [1985] 1 W.L.R. 331; [1985] 1 All E.R. 716.

(4) *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.*, [1981] A.C. 909; [1981] 1 All E.R. 289.

(5) *Desilla* v. *Fells & Co.* (1879), 40 L.T. 423.

(6) *Frome United Breweries Co. Ltd.* v. *Bath JJ.*, [1926] A.C. 586; [1926] All E.R. Rep. 576, considered.

(7) *Letter of Request from UK Prosecution Service, In re* (1989), 870 F. (2d) 686.

(8) *Norway (State) Application (No. 2), In re*, [1990] 1 A.C. 723; [1989] 1 All E.R. 745.
(9) *Panayiotou* v. *Sony Music Entertainment (UK) Ltd*., [1994] Ch. 142; [1994] 1 All E.R. 755, considered.
(10) *R.* v. *Dublin Corp*., [1878] 2 L.R. Ir. 371.
(11) *R.* v. *Horseferry Rd. Mags.' Ct., ex p. Bennett*, [1994] 1 A.C. 42; [1993] 3 All E.R. 138; (1994), 98 Cr. App. R. 114, *dicta* of Lord Griffiths applied.
(12) *Rio Tinto Zinc. Corp.* v. *Westinghouse Elec. Corp.*, [1978] A.C. 547; [1978] 1 All E.R. 434, *dicta* of Lord Diplock applied.
(13) *Royal Aquarium & Summer & Winter Garden Socy. Ltd*. v. *Parkinson*, [1892] 1 Q.B. 431; [1891–4] All E.R. Rep. 429, considered.
(14) *Schooner Exchange* v. *M'Fadden* (1812), 7 Cranch. 116; 12 U.S. 287.
(15) *Seyfang* v. *G.D. Searle & Co*., [1973] Q.B. 148; [1973] 1 All E.R. 290, considered.
(16) *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V*., [1986] Q.B. 348; [1985] 3 All E.R. 1046; on appeal, [1987] A.C. 24; [1986] 3 All E.R. 487, distinguished.
(17) *Zingre* v. *R*., [1981] 2 S.C.R. 392; (1981), 127 D.L.R. (3d) 223; 61 C.C.C. (2d) 464, considered.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.4: The relevant terms of this section are set out at page 36, lines 13–18.

English Law (Application) Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at page 36, lines 28–43.

Evidence Ordinance (1984 Edition), s.9 (as adapted by s.12):

"Where an application is made to the court for an order for evidence to be obtained in Gibraltar and the court is satisfied—

. . .

(*b*) that the evidence to which the application relates is to be obtained for the purposes of criminal proceedings which have been instituted before the requested court,

the court shall have powers conferred on it by the following provisions of this Ordinance."

s.10(4): "An order under this section shall not require a person—

. . .

(*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power."

Supreme Court Ordinance (1984 Edition), s.12:

"The court shall in addition to any other jurisdiction conferred by this or any other Ordinance, within Gibraltar and subject as in this

Ordinance mentioned, possess and exercise all the jurisdiction, powers and authorities which are from time [*sic*] vested in and capable of being exercised by Her Majesty's High Court of Justice in England."

s.15: "The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this Ordinance or any other Ordinance and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

Supreme Court Rules (1984 Edition), r.8(1):

"Where no other provision is made by these rules or by any Ordinance, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court."

r.8(4): The relevant terms of this sub-rule are set out at page 30, lines 21–25.

Criminal Justice (International Co-operation) Act 1990 (c.5), s.3: The relevant terms of this section are set out at page 37, lines 20–33.

Criminal Justice (International Co-operation) Act 1990 (Designation of Prosecuting Authorities) Order 1991 (S.I. 1991/1224), Schedule: The relevant terms of this Schedule are set out at page 30, lines 17–18.

Gibraltar Constitution Order 1969 (Unnumbered, S.I. 1969, p.3602), Annex 1, s.77: The relevant terms of this section are set out at page 28, line 42 – page 29, line 5.

Rules of the Supreme Court, O.39, r.1(1):

"The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order . . . for the examination on oath before a Judge, an officer or examiner of the Court or some other person at any place, of any person."

R.D. Amlot, Q.C. and *P.X. Nuñez* for the plaintiffs;
V. Temple, Q.C. and *P. Dean, Acting Attorney-General* for the defendant.

KNELLER, C.J.: Arche Treuhand A.G. (the first plaintiff) is a limited company registered in the Canton of Solothurn, Switzerland. It is a trust company engaged in the business of portfolio management and international finance. Mr. Max Vollenweider (the second plaintiff) is a director and the general manager of the first plaintiff. Her Majesty's Attorney-General for Gibraltar (the defendant) is sued by the plaintiffs in his capacity as the holder of that office which is provided for by the Gibraltar Constitution Order, 1969.

In February 1993, Mr. Flemming Kjaer, the Deputy Director of Public Prosecutions for Zealand, Denmark, asked a Danish court in Copenhagen

to issue a letter of request to the competent judicial authorities in Switzerland. In the criminal case begun by the Danish authorities, Mr. Henning Skov, Mr. Svende Vedde, Mr. Carl Evold Bakke-Jacobsen and Mr. Giethe Kristensen were charged with fraud totalling Kr. 57m. arising out of the development of land in Gibraltar by the Baltica group of companies. The letter of request was issued on March 4th.

The defendant wrote to the Federal Office for Police Matters in Berne, Switzerland on April 28th, 1993 enclosing a formal letter of request of the same date. It was in German and an English translation went with it. When the defendant issued the letter of request no one in Gibraltar had been arrested, charged or brought before a court in Gibraltar in connection with the allegations set out in it. The defendant issued it without making any application to any court or other judicial authority in Gibraltar. All that remains unchanged up to today.

The defendant stated in the letter of request that the information he sought was to assist an investigation undertaken by the Royal Gibraltar Police and the Danish Special Economic Crime Squad in Copenhagen into allegations of fraud by Mr. Henning Skov, Mr. Svende Vedde, Mr. Carl Evold Bakke-Jacobsen and Mr. Giethe Kristensen for the purpose of answering questions to be put to the second plaintiff which were the same as those for him to answer in the Danish letter of request. On May 6th, 1993 the investigating judge of the Canton of Solothurn ordered the second plaintiff to appear before him for the purpose of answering those questions, which he did. He also ordered the banks referred to in the letter of request to give the information asked for.

The defendant issued another letter of request to the Swiss judicial authorities with reference to the same investigation. He followed the same procedure for this one as he did for the original letter of request. The Swiss Federal Department of Justice and Police wrote to the defendant through the British Embassy on June 18th, 1993 asking for assurances that the defendant had followed the correct procedure and that it would be accorded the same help in Gibraltar and the defendant gave those assurances in his letter of July 9th, 1993.

Nevertheless, on September 1st, 1993 in the Upper Court of the Canton of Solothurn, the plaintiffs filed objections to the investigating judge's orders so far as the accounts of Centurion Properties Ltd. and Scott Marketing Ltd. with Credit Suisse were concerned. They followed up these with their own objections and those of three undisclosed account holders against the order made by the same judge to the Union Bank of Switzerland. The judge's orders were made for the purpose of obtaining the information the defendant asked for in his letter of request. The plaintiffs raised no objection to the Swiss Popular Bank and the Berner Kantonal Bank disclosing the information and records asked for in the defendant's letter of request and these two banks dutifully complied with the investigating judge's orders.

On November 3rd, 1993 the Danish authorities significantly changed the basis of their criminal case against Mr. Henning Skov and the others. But the defendant did not tell the Swiss authorities of the change in the allegations made by the Danes against those individuals. The objections of the plaintiffs were dismissed by the Solothurn Upper Court on December 7th, 1993 so they appealed, together with the three undisclosed account holders, to the Federal Court of Switzerland on January 14th, 1994 and a month later both appeals were dismissed.

The plaintiffs' solicitors in Gibraltar wrote to the defendant on March 20th, 1994 alleging that he had erred in law in issuing the letter of request, and on April 7th issued and served on him a writ in this action. The plaintiffs' solicitors in Gibraltar wrote again to the defendant on April 11th and he wrote two days later to the Federal Office for Police Matters in Berne, Switzerland telling the Swiss officials that the writ had been issued and asking them to collect the information sought in his letter of request, adding that it would not be used pending the outcome of this litigation.

Officers of the Union Bank of Switzerland and Credit Suisse appeared before the Solothurn Canton investigating judge at the end of April 1994 and gave him the information and records which the defendant had asked for in his letter of request.

Those are the agreed facts in this part of the action. The court has been asked at this stage to rule on some of the plaintiffs' claims set out in their statement of claim of April 7th, 1994. They were for the following:

1. A declaration that the provisions of the Criminal Justice (International Co-operation) Act 1990 and of s.29 of the Criminal Justice Act 1988, both of the United Kingdom, have not been extended to and are not applicable in Gibraltar;

2. A declaration that the provisions of s.4 of the Criminal Procedure Ordinance do not vest in the office of Her Majesty's Attorney-General for Gibraltar any statutory powers and authority which require or enable him to exercise in criminal matters the practice, procedure and powers exercised in England and Wales by the Crown Court and or by Her Majesty's Attorney General for England and Wales;

3. A declaration that under the laws of Gibraltar, the defendant was vested with no statutory authority or power to issue the letter of request to the Swiss judicial authorities asking them to order the plaintiffs to provide the information sought in that letter;

4. A declaration that on a true construction of O.39, r.1 of the Rules of the Supreme Court as read with the Laws of Gibraltar, the Supreme Court is the only body which is empowered to order the issue of a letter of request to the judicial authorities of a foreign state for the purpose of obtaining information from abroad; and

5. A declaration that under the Laws of Gibraltar the letter of request of the defendant is not a request issued by order or on behalf

of or under authority of the judicial authorities of Gibraltar to the Swiss judicial authorities.

The plaintiffs' other claims were for damages and other relief and for costs, but, by consent, the court will not deal with them at this stage.

The issue is one of law, namely, was the defendant entitled under the laws of Gibraltar to issue the letter of request to the Swiss authorities seeking help from them in a criminal investigation? Mr. Amlot in his submissions for the plaintiffs began with the lawful process of a letter of request from a foreign state for judicial assistance in respect of a criminal matter there and which is received in Gibraltar. Such an incoming letter of request can be processed in Gibraltar according to the relevant provisions of the Evidence Ordinance. Its long title includes the words "An Ordinance to . . . enable the Supreme Court to assist in obtaining evidence for proceedings in other jurisdictions" and it is in some respects a reflection of the provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975. The latter was brought into effect in the United Kingdom because at that time the United Kingdom had not ratified the European Convention on Mutual Assistance in Criminal Matters 1959.

So, if criminal proceedings have been instituted in a foreign state and one of its courts or tribunals issues a letter of request for judicial assistance, the Supreme Court of Gibraltar may make an order for the evidence sought to be obtained here in Gibraltar (see the Evidence Ordinance, ss. 9–12 inclusive). Under the Supreme Court Ordinance, s.12, the Supreme Court of Gibraltar possesses and exercises "all the jurisdiction, powers and authorities" which are from time to time vested in or capable of being exercised by the High Court of Justice in England. The jurisdiction vested in the Supreme Court is to be exercised in accordance with the laws and practice for the time being observed in the High Court unless otherwise provided for in the Laws of Gibraltar (*ibid.*, s.15). The Chief Justice of Gibraltar may make Rules of Court governing the practice and procedure of the Supreme Court (*ibid.*, s.38(1)).

The due process of an incoming letter of request in Gibraltar is a civil proceeding although it is concerned with evidence for a criminal matter in a foreign jurisdiction, but no provision has been made in the laws of Gibraltar for the practice and procedure for dealing with an incoming letter of request. Therefore, by the Supreme Court Rules, r.8(1) the rules of court that for the time being apply to all original civil proceedings in the High Court in England apply to the same in the Supreme Court in Gibraltar.

Turning, therefore, to the Rules of the Supreme Court, we find that O.70 prescribes the practice and procedure for treating incoming letters of request in England. Mr. Amlot submitted that O.70 also applies in Gibraltar to incoming letters of request here but without the substantial amendments in English law created by the Criminal Justice (International Co-operation) Act 1990, because the Act does not apply in Gibraltar. It is

essential to refer to O.70 and the notes on it in 1 *The Supreme Court Practice 1988,* paras. 70/1–6/1—70/1–6/23, at 1069–1076.

Mr. Amlot explored the steps to be taken when the authorities in Gibraltar want to obtain evidence in a foreign state by issuing an outgoing letter of request. The Evidence Ordinance does not refer to outgoing letters of request and does not apply to them. There is no provision in any other Ordinance which deals with them. There is no local primary legislation which indicates who or what has the power to issue an outgoing letter of request. He turns back, however, to the fact that this court—the Supreme Court of Gibraltar—in the absence of local legislation has the jurisdiction, power and authority of the High Court of England and Wales and, because the Rules of the Supreme Court apply in Gibraltar, recourse may be had to O.39, rr. 1 and 3 which provide that the court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination on oath before a judge of any person outside the jurisdiction.

Is that only for the obtaining of evidence for civil proceedings held in Gibraltar? Mr. Amlot submits it is not so because "cause" means "any action or criminal proceeding" according to the Supreme Court Act 1981, s.151. He concludes that only the Supreme Court may make an order in criminal proceedings here for the issue of outgoing letters of request for the obtaining of evidence in a foreign state. If that is not accepted by this court, then Mr. Amlot beckons it to follow another route to the answer. This begins with s.4 of the Criminal Procedure Ordinance which provides that, subject to its own provisions and those of any other Ordinance, the criminal jurisdiction of the courts in Gibraltar shall, as regards practice, procedure and powers, be exercised "by the Supreme Court [of Gibraltar] in conformity with the law and practice for the time being observed in England in the Crown Court" and "by the magistrates' court [in Gibraltar] in conformity with the law and practice for the time being observed in England in magistrates' courts."

So s.4 of the Criminal Procedure Ordinance leads back to the provisions of "any other Ordinance" conferring criminal jurisdiction which are only to be found in ss. 12 and 15 of the Supreme Court Ordinance and those provisions lead in turn, in the absence of local legislation, to O.39. In itself the Criminal Procedure Ordinance gives jurisdiction in matters of practice, procedure and powers only to the Supreme Court or the magistrates' court and not to any office holder or person, such as the Attorney-General for Gibraltar. His powers, in relation to criminal proceedings, are defined in s.77 of the Gibraltar Constitution. Thus by s.77(1)(*a*), in cases in which he considers it desirable so to do, he may "institute and undertake criminal proceedings before any court of law not being a court established by a disciplinary law," and under sub-s. (1)(*b*) only he may "take over and continue any such criminal proceedings that may have been instituted by any other

person or authority," and under para. (*c*) "discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or by any other person or authority." By s.77(4) he is not "subject to the direction or control of any other person or authority." Mr. Amlot observed that any other interpretation of s.4 of the Criminal Procedure Ordinance than that proposed by him would extend and conflict with the powers of the Attorney-General set out in the Gibraltar Constitution.

The recent history of the authority to issue outgoing letters of request in England is this. Before 1988 they were issued according to the provisions of O.39, rr. 1 and 3. During 1988 the United Kingdom ratified the European Convention on Mutual Assistance in Criminal Matters dated April 20th, 1959 with its additional Protocol of March 17th, 1978. This led to the enactment of s.29 of the Criminal Justice Act 1988 whereby a justice of the peace or a judge was empowered, where criminal proceedings had been or were likely to be instituted, to order that an outgoing letter of request be issued.

The 1959 European Convention on Mutual Assistance in Criminal Matters, the additional Protocol of March 17th, 1978 and s.29 of the Criminal Justice Act 1988 were not incorporated into the laws of Gibraltar. When the United Kingdom decided to ratify the European Convention on Mutual Assistance in Criminal Matters and its additional Protocol, the Criminal Justice (International Co-operation) Act 1990 was passed by Parliament with the object of bringing the United Kingdom's legislation into line with the provisions of the 1959 Convention and 1978 Protocol and also the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), which the United Kingdom signed on December 20th, 1988. This has not been extended to Gibraltar (see the explanatory memorandum to the Criminal Justice (International Co-operation) Bill).

One consequence of the Criminal Justice (International Co-operation) Act 1990 was that s.29 of the Criminal Justice Act 1988 was repealed. Another was that its provisions could be extended by an Order in Council to Gibraltar (see s.32(4) of the Criminal Justice (International Co-operation) Act 1990) but so far it has not been extended to Gibraltar. Mr. Amlot submits its provisions cannot have been incorporated into the laws of Gibraltar by reason of the terms of s.4 of the Criminal Procedure Ordinance.

Suppose, however, that they are the ones relating to outgoing letters of request? An application may be made to a justice of the peace or a judge in England for the issue of a letter of request where an offence has or is reasonably suspected of having been committed and criminal proceedings have been instituted or the offence is being investigated (see s.3(1) of the Criminal Justice (International Co-operation) Act 1990). No reliance can be placed on that section by the defendant because no application for an

outgoing letter of request was made to a justice of the peace or a judge in Gibraltar and consequently no order for one was made.

The standard required for an incoming letter of request is higher than for an outgoing one. Criminal proceedings must have been commenced before an incoming letter of request is processed and that is not necessary before an outgoing one can be applied for (see ss. 3 and 4 of the 1990 Act).

Who may apply for an outgoing letter of request in England and Wales? A designated prosecuting authority or, if proceedings have been instituted, the person charged in those proceedings (*ibid.*, s.3(2) and (3)). Prosecuting authorities for the purposes of the Act have been designated in England by the Criminal Justice (International Co-operation) Act 1990 (Designation of Prosecuting Authorities) Order 1991 in which, among others, officers in Northern Ireland are listed but not Her Majesty's Attorney-General for Gibraltar. The defendant in this action could not therefore rely on s.3(2) and (3) and, as we all know, he did not do so. The Designation of Prosecuting Authorities Order 1991 includes "The Director of Public Prosecutions and any Crown Prosecutor."

According to r.8(4) of the Supreme Court Rules of Gibraltar, in rules applied by r.8(1) and (2)—which are rules of court applied for the time being in England in the High Court—"there shall, where the context permits, be substituted for the words and phrases set out in the first column of Schedule 1 [the Director of Public Prosecutions], the words and phrases set out opposite them in the second column of Schedule 1 [the Attorney-General of Gibraltar]." Rule 8(1) however, deals with original civil proceedings and r.8(2) applies to specific rules formerly in force in England. Therefore r.8(4) does not apply to the facts in this case.

The defendant's letter of request was condemned on other grounds by Mr. Amlot. It did not state that Mr. Henning Skov was involved in or linked to the various accounts or moneys in them which were the subject of the questions posed in it. The documents and records which the defendant required to be produced were not specified, contrary to the provisions of O.39 and O.70. He referred to investigations being conducted in Gibraltar but no criminal proceedings had or have been commenced and the plaintiffs claim they are not likely to be commenced. The Danes had already begun them in Denmark.

The defendant claimed in the letter of request that the Attorney-General here was responsible for investigations in Gibraltar but s.77 of the Gibraltar Constitution indicates that that is incorrect. The basis of the Danes' allegations was changed on November 3rd, 1993, which was six months after the letter of request was issued and yet it was never amended or withdrawn. He could not have known in April 1993 when he sent the outgoing letter of request what the proper basis for the allegations was. The Swiss authorities enforced the letter of request of the defendant because of the defendant's assurance of reciprocity but a return to the

provisions of the Evidence Ordinance for dealing with incoming letters of request here in Gibraltar indicates clearly that only the Supreme Court can furnish such reciprocity.

All that was met by Mr. Temple, Q.C. for the defendant with the proposition of law that the Attorney-General of Gibraltar has the power to issue a letter of request. The power is derived from the common law and/or from statute. Mr. Temple's first way of supporting that proposition begins with the principle that each party to a proceeding in the High Court in England is free in the common law system to gather and present the evidence which he needs by his own means, provided that the means are lawful in the country in which the means are used and that they are not unconscionable. In *South Carolina Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.* (16), the defendants in an English action wished to inspect documents in the possession of a US company which was not a party to the proceedings, concerning a series of re-insurance contracts. So the defendants sought an order from the US District Court for production of the documents. The plaintiff succeeded before Hobhouse, J. and the Court of Appeal in restraining the defendant from applying for or enforcing such an order of the District Court but the House of Lords unanimously allowed the defendants' appeal. Lord Brandon of Oakbrook in his speech ([1987] A.C. at 41–42) said:

> "I consider, first, the ground that the re-re-insurers' conduct was an interference with the court's control of its own process. It is not clear to me why this should be so. Under the civil procedure of the High Court the court does not, in general, exercise any control over the manner in which a party obtains the evidence which he needs to support his case. The court may give him help, certainly; for instance by discovery of documents inter partes under R.S.C. Ord. 24; by allowing evidence to be obtained or presented at the trial in various ways under Orders 38 and 39; and by the issue of subpoenas under Part II of Order 38 . . . . Subject, however, to the help of the court in these various ways, the basic principle underlying the preparation and presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used. It was not in dispute that, if P.G.A. & Campbell-Husted, uninfluenced by the control exercised over them by South Carolina on the advice of the latter's English solicitors, had freely and voluntarily allowed the re-re-insurers to inspect, and where necessary to copy, all the documents referred to in the latter's application, it could not possibly have been said that there had been any interference with the English court's control of its own process. That being so, I cannot see why, since the Federal law of the United States authorises an application of the kind made by the re-re-insurers in this case, the

making of such application, which may or may not succeed in whole or in part, should be regarded as being such an interference either. I cannot, therefore, agree with the first ground of decision relied on by the Court of Appeal.

I consider, secondly, the ground that the procedure of United States courts is significantly different from that of English courts, and the parties, by submitting to the jurisdiction of an English court, must be taken to have accepted its procedure. It is, no doubt, true that the re-re-insurers, by entering unconditional appearances in the two English actions, can be said in a certain sense to have accepted the procedure of that court. Your Lordships were not, however, informed of any ground on which the re-re-insurers could, with any prospect of success, have contested the jurisdiction of the High Court in England in respect of the disputes which are the subject matter of the two actions concerned. Be that as it may, I cannot see that the re-re-insurers, by seeking to exercise a right potentially available to them under the Federal law of the United States, have in any way departed from, or interfered with, the procedure of the English court. All they have done is what any party preparing his case in the High Court here is entitled to do, namely try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case. It was said that the re-re-insurers could have applied to the High Court under R.S.C., Ord. 39, r.2, for letters of request to issue to the proper judicial authorities in the United States. But 28 United States Code, section 1782, allows an application to be made either indirectly by the foreign court concerned or directly by an interested party, and I can see no good reason why the re-re-insurers should have not chosen whichever of these two alternatives they preferred. It is, I think, of the utmost importance to appreciate that the reason why English procedure does not permit pre-trial discovery of documents against persons who are not parties to an action is for the protection of those third parties, and not for the protection of either of the persons who are parties to the action. I cannot, therefore, agree with the second ground of decision relied on by the Court of Appeal."

Dickson, J. in delivering the judgment of the Supreme Court of Canada in *Zingre* v. *R.* (17) ([1981] 2 S.C.R. at 408) explained that—

"in continental systems of criminal justice, there are three distinct stages to criminal procedure. The first is a preliminary investigation conducted by police officials and [the] prosecution. This is followed by a judicial phase in which there is an investigation by career judges known as 'examining magistrates' or '*juges d'instruction*'. Witnesses are required to testify and documents are examined. If,

following this judicial inquiry, the case is deemed by the prosecuting attorneys to be an appropriate one for trial a formal trial is held."

Mr. Temple followed this with the submission that at common law it was legitimate nowadays to provide assistance to a foreign country in enforcing foreign law in foreign proceedings. It did not constitute enforcement, direct or indirect, of that foreign law in England. In earlier times, it was said that "the courts of no country execute the penal laws of another" (*The Antelope* (1) (10 Wheat. at 123, *per* Marshall, C.J.)). Criminal activity in those days was nearly always local. The common law, however, moved with the times and letters of request which sought evidence for use in Norwegian court proceedings relating to allegedly unpaid taxes were executed in the United Kingdom in *In re State of Norway's Application (No. 2)* (8).

The basis of the High Court's power to issue letters of request is its inherent jurisdiction to do those acts which the court needs must have to maintain its character as a court of justice: see Lord Diplock in *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.* (4) ([1981] A.C. at 977–978) and Nicholls, V.-C. in *Panayiotou* v. *Sony Music Entertainment (UK) Ltd.* (9) ([1994] Ch. at 149–151). Mr. Temple drew from those passages in the Vice-Chancellor's judgment the proposition that the issue of letters of request in United Kingdom law is at large and not regulated by statute or O.39.

Turning aside from that, he pointed out that in the United States an application for material to be used in foreign proceedings may be made to the District Court for the area in which a person resides or is found, to order him to give his testimony or statement or to produce a document, and the application may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or any interested person (28 US Code, 1994 ed., para. 1782, at 410). The application may be made directly by any interested person, a litigant, a foreign government official or a prosecutor such as the United Kingdom's Director of Public Prosecutions (see *Re Letter of Request from the UK Crown Prosecution Service* (7) (870 F. (2d) at 689)). The foreign proceedings need not be pending or even instituted and there is no requirement of reciprocity. The application may be made in respect of criminal or civil matters in the foreign country.

The Supreme Court of Canada in *Zingre* v. *R.* (17) ([1981] 2 S.C.R. at 406) rejected the submission that the request for assistance had to emanate from a court or tribunal of competent criminal jurisdiction in the foreign country. The Canada Evidence Act, s.43 required only an application on which it was made to appear that the foreign court or tribunal was desirous of obtaining testimony.

So far as an incoming letter is concerned, it would be dealt with according to the relevant convention such as The Hague or European Convention on Mutual Assistance in Criminal Matters if the requesting

and requested party are signatories to it but, if not, then according to the domestic law of the requested party since it is a matter of procedure: see Griffiths, L.J. in *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.* (16) ([1986] Q.B. at 355–356). The request can be rejected or acceded to in whole or in part. Lord Diplock in *Rio Tinto Zinc Corp.* v. *Westinghouse Elec. Corp.* (12) ([1978] 1 All E.R. at 461) pointed out that "the jurisdiction of English Courts to order persons within [their] jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory." And, if the application is successful, the court orders the evidence to be obtained.

The requested party will look for reciprocity, although not precise reciprocity, in the requesting party's country: see *Appeal Enterprises Ltd.* v. *First Natl. Bank of Chicago* (3) (10 D.L.R. (4th) at 319). While "the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation, not imposed by itself . . . common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other . . . ." (*The Schooner Exchange* v. *M'Faddon* (14) (7 Cranch. at 136–137, *per* Marshall, C.J.)). In *Appeal Enterprises*, Zuber, J. quoted Dickson, J. in the Supreme Court of Canada in *Zingre* v. *R.* (17) when he observed (10 D.L.R. (4th) at 318):

> "It is upon this comity of nations that international legal assistance rests. Thus, the courts of one jurisdiction will give effect to the law and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it would be contrary to public policy of the jurisdiction to which the request is directed (see *Gulf Oil Corporation v. Gulf Canada Limited et al* . . .) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction."

In England the principle used to be that the courts "ought to afford foreign courts the fullest benefits . . ." (see *Desilla* v. *Fells* (5) (40 L.T. at 424, *per* Cockburn, C.J.)) but now it is that the English courts will ordinarily give effect to an incoming letter of request so far as it is proper and practicable and if it is permissible under English law because that reflects judicial and international comity (*Seyfang* v. *G.D. Searle & Co.* (15) ([1973] Q.B. at 151, *per* Cooke, J.)). Other matters that will be investigated by a court in England before making an appropriate order from an incoming letter of request include (a) whether the request is *bona fide*; (b) whether it is politically motivated; (c) whether it is issued by a responsible source which can give reassurances as to reciprocity, *bona fides* and lack of political motivation; (d) whether there is any element of taxation in the allegations being investigated; and (e) whether there is anything in previous proceedings that give rise to *autrefois acquit* or *autrefois convict*.

Reciprocity is a possible factor for consideration but Mr. Temple points out that it is not required under the Criminal Justice (International Co-operation) Act 1990 and a lack of it outside the European Convention on Mutual Assistance in Criminal Matters would not necessarily impede the execution of an incoming letter of request.

The official Explanatory Report to that Convention defined a letter of request as a "mandate by a judicial authority of one country to a foreign judicial authority to perform in its place one or more specified actions." Article 3 of the Convention specifies letters rogatory relating to a criminal matter addressed to a requested party by the judicial authorities of the requesting party. A note by the Secretariat to the Convention states that among those to be considered "judicial authorities" for the purposes of the Convention are judges, magistrates, courts and Directors of Public Prosecutions and Assistant Public Prosecutors.

Switzerland was a party to that Convention but Gibraltar has never been one, so in the case of a letter of request from Gibraltar, Switzerland will not be bound by the Convention but, Mr. Temple urges, in accordance with the principles of comity, it will be guided by the Convention's principles. He concluded by claiming that, by virtue of the provisions of the Gibraltar Constitution Order 1969, the Attorney-General for Gibraltar had the powers of the Attorney General for England and Wales and undertook "judicial duties" so he is in a position to give valid assurances to foreign authorities. He cited two authorities demonstrating that "judicial" has two meanings. Lopes, L.J. in *Royal Aquarium & Summer & Winter Garden Socy. Ltd.* v. *Parkinson* (13) put it thus ([1892] 1 Q.B. at 452):

> "It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, as, for instance, levying a rate."

The second is Lord Atkinson who in *Frome United Breweries Co. Ltd.* v. *Bath JJ.* (6) approved of the definition by May, C.J. in the Irish case of *R.* v. *Dublin Corp.* (10) ([1878] 2 L.R. Ir. at 377) stating that ([1926] A.C. at 602)—

> "the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

Mr. Temple also reminded the court of the general rule of common law that anyone may institute and undertake a criminal prosecution.

He concludes, therefore, that the Attorney-General for Gibraltar may at common law issue a letter of request of his own accord because there is no legal or procedural requirement that it should be directed through or under the supervision of the Supreme Court of Gibraltar. He goes further. He says any person may issue a letter of request because there is no prohibition or sanction that comes into play if the letter is sent by any means other than through the Supreme Court.

Mr. Temple has a second approach to solving the question of whether or not the Attorney-General for Gibraltar can issue a letter of request to some foreign tribunal or authority without applying to the Supreme Court here. He begins with s.4(*a*) of the Criminal Procedure Ordinance which applies English procedure. I will set it out again:

> "Subject to the provisions of this and any other Ordinance, criminal jurisdiction, shall, as regards practice, procedure and powers, be exercised—
>
> (*a*) by the Supreme Court in its original jurisdiction in conformity with the law and practice for the time being observed in England in the Crown Court."

So those responsible for the administration and practice of the criminal law in Gibraltar, such as the Attorney-General, are similarly placed and may act under English procedures. He tacks on s.77 of the Gibraltar Constitution, which sets out the powers and duties of the Attorney-General I have laid out earlier in this judgment. Then there are ss. 12 and 15 of the Supreme Court Ordinance which Mr. Amlot had prayed in aid and I do not need to set those out again.

Mr. Temple cites s.2 of the English Law (Application) Ordinance which is this:

> "(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent in which the common law or any rule of equity may from time to time be modified or excluded by—
>
> (*a*) any Order of Her Majesty in Council which applies to Gibraltar; or
>
> (*b*) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
>
> (*c*) any Ordinance.
>
> (2) In all causes or matters in which there is any conflict or variance between the common law and the rules of equity with reference to the same subject, the rules of equity shall prevail."

All this takes Mr. Temple back to English Crown Court procedure and he begins with the Criminal Justice Act 1988. The long title to the Act is:

"An Act to make fresh provision for extradition; to amend the rules of evidence in criminal proceedings; to provide for the reference by the Attorney General of certain questions relating to sentencing to the Court of Appeal . . . ."

Mr. Temple alights on s.29 of the 1988 Act which deals with the issue of letters of request. That section, however, has been repealed and replaced by s.3 of the Criminal Justice (International Co-operation) Act 1990. The 1990 Act was passed to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations. Section 3 sets out the procedures for the obtaining of overseas evidence for use in the United Kingdom. The Act provides that a court in England may issue a letter of request but provides that certain designated authorities may also issue such letters. He submits that it is important to distinguish between substantive law on the one hand and procedural provisions on the other. The passing of the 1990 Act enabled the United Kingdom to comply with the requirements of the European Convention affecting criminal matters. Treaties only take effect as part of domestic law to the extent that they are incorporated by statute. Section 3 of the 1990 Act states:

> "(1) Where on an application made in accordance with sub-section (2) below, it appears to a justice of the peace or a judge or, in Scotland, to a sheriff or a judge—
>
> (a) that an offence is being committed or that there are reasonable grounds for suspecting that an offence has been committed; and
>
> (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,
>
> he may issue a letter ('a letter of request') requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation.
>
> (2) An application under subsection (1) above may be made by a prosecuting authority or, if proceedings have been instituted, by the person in charge of those proceedings."

This is different from s.12(1)(*a*) of the Evidence Ordinance of Gibraltar because here it applies only to proceedings which have been instituted.

Delving deeper into the Criminal Justice (International Co-operation) Act 1990 and the Schedule to the Designation of Prosecuting Authorities Order 1991 we find that they provide that the following authorities, among others, are designated for the purposes of s.3 of the 1990 Act—the Attorney General for England and Wales, the Director of Public Prosecutions and any Crown Prosecutor. So in England the Attorney General, the Director of Public Prosecutions and any Crown Prosecutor may issue a letter of request providing that the requirements of s.3(1) are satisfied, namely that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed

and that the offence in question is being investigated or the authority has instituted proceedings in respect of it. This is a matter of procedure.

Going next to Schedule 1 of the Supreme Court Rules, the Attorney-General of Gibraltar is regarded, for certain limited purposes, as the equivalent of the English Director of Public Prosecutions. He enjoys similar powers to a Crown Prosecutor as regards the instigation, undertaking and continuation of criminal proceedings. Mr. Temple pulls all these provisions together and submits that the Attorney-General of Gibraltar is entitled to issue a letter of request because his position is equated with that of a Crown Prosecutor in England and Wales, if not the Attorney General for England and Wales. His letter of request may be acted upon by whoever receives it in a foreign jurisdiction or it may be ignored. If the requesting party is not a signatory to the European Convention on Mutual Assistance in Criminal Matters 1959, then whoever receives it in a foreign jurisdiction is entitled to demand that the letter of request is the result of an application to the Supreme Court of Gibraltar, which will reciprocate the facility if the authority in the foreign jurisdiction demands it in Gibraltar, or any additional condition.

So much for counsel's submissions. There is no doubt that this court has a power to issue a letter of request to a foreign court or tribunal or authority and this springs from its inherent jurisdiction to do those acts which a court needs must have to maintain its character as a court of justice (see *Panayiotou* v. *Sony Music Entertainment (UK) Ltd.* (9) ([1994] Ch. at 148)). I do not find any authority in that report for the submissions that the Attorney-General for Gibraltar enjoys the same power as this court. The court may issue a letter of request according to the Supreme Court Ordinance as read with O.39 of the Rules of the Supreme Court and the Supreme Court Act 1981.

Section 4 of the Criminal Procedure Ordinance has nothing to do with the issue of letters of request because it is subject to the provisions of that Ordinance and any other Ordinance which goes straight back to the Supreme Court Ordinance where provisions for the issue of letters of request are to be found. Section 3 of the Criminal Justice (International Co-operation) Act 1990 does not give the Attorney-General of Gibraltar the power that he has claimed, since it has not been extended to Gibraltar. The Act provides that, if it is to apply to Gibraltar, it only confers this power on the Supreme Court and not on any other authority or person.

The parties are free to gather evidence for presentation of their case in the High Court of England and Wales or the Supreme Court here in civil proceedings but not in criminal proceedings. Lord Brandon in the case of *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.* (16) refers to the civil procedure of the High Court of England and Wales. There, on the facts of the case, the House of Lords was looking at a US statute which allowed either a foreign court or an interested party to apply to the US court for the assistance of that court in

gathering evidence. It is limited to the application of the provisions of that US law and a party to proceedings before the High Court of England and Wales had an option before it of how to gather the evidence before the US courts. The House of Lords went on to decide that it would be improper to restrict or to interfere in the exercise of the rights which that US statute gave to a person who appeared before the US court.

The defendant relies on that part of Lord Brandon's speech which reads ([1987] A.C. at 41): "All they have done is what any party preparing his case in the High Court here is entitled to do, namely, try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case." The defendant in this case was not preparing or purporting to prepare a case before the Supreme Court of Gibraltar in its civil jurisdiction. What the defendant did was to ask for help in obtaining information "in relation to a criminal investigation being conducted jointly by officers of the Royal Gibraltar Police and the Danish Special Economic Crime Squad, Copenhagen." He went on to declare "I am Her Majesty's Attorney-General for Gibraltar and I am charged with overseeing the above investigation. Accordingly, I am empowered to issue this letter."

The party seeking the documentary evidence must do so by means that are lawful in that country according to Lord Brandon and in the *South Carolina Ins. Co.* case (16) the US statute expressly gave an interested party the right to seek such documentary evidence. Here in the present case before this court, Swiss law requires that there must be reciprocity. The letter from the Federal Police in Berne of June 18th, 1993 asked for the legal basis for the assurance of reciprocity. The author went on to ask whether there were existing laws in Gibraltar permitting information on bank accounts of third parties in Gibraltar to be revealed against their will for a Swiss fraud case. The defendant in his letter of July 9th, 1993 said that the Evidence Ordinance assured reciprocity. This statement is incorrect because the effect of ss. 9(*a*) and (*b*) and 12(1)(*a*) of the Evidence Ordinance is that the Supreme Court of Gibraltar would assist the Swiss authorities only if criminal proceedings had been instituted in Switzerland.

Moreover, the defendant referred to a "request issued by or on behalf of a court or tribunal" ("the requesting court"), so in the same letter on the question of reciprocity he acknowledged the defect in the process which he had adopted. To date he could never say that he was acting "by and on behalf of a court or tribunal."

What the defendant was asking for lacked particularity and the Supreme Court of Gibraltar would or should in parallel circumstances refuse to allow the letter of request to be processed in the form in which it was worded. The Vice-Chancellor, Sir Donald Nicholls, said in *Panayiotou* v. *Sony Music Entertainment (UK) Ltd.* (9) ([1994] Ch. at 150):

"In accordance with English legal procedures, and leaving aside special cases such as *Norwich Pharmacal Co v. Customs & Excise Commissioners* . . . discovery of documents is obtainable only from persons who are parties to the action. In the normal way, parties are compelled to produce for inspection all their documents relating to matters in issue in the action. Persons who are not parties are not subject to such a wide, far-reaching obligation. They can be compelled to give evidence at the trial, either by way of oral testimony or by being required to produce documents. But it is established that a subpoena to produce documents cannot be drawn so widely as to amount to requiring the witness to give discovery. The object of the subpoena is to compel the witness to produce evidence directly material to the issues in the case. The object is not to require him to produce documents just because they may be useful for the purpose of corroborating or challenging a witness, or because they may lead to a train of enquiry which may result in the discovery of evidence or may, in some other way, advance one party's case or damage the other's. Nor is the witness to be required to undertake an unfairly burdensome search through his records to find this or that document or see if he has any documents relating to a particular subject matter. All this is well established in relation to a subpoena to produce documents at trial. The position is the same regarding an order to produce documents before the trial, under R.S.C., Ord. 38, r.13: see rule 13(2) and *Elder v. Carter* . . . .

The English courts apply a similar approach to the production of documents under a letter of request."

Lord Fraser in *In re Asbestos Ins. Coverage Cases* (3) declared ([1985] 1 All E.R. at 721):

"The meaning of the expression 'particular documents specified in the order' in sub-s. (4)(*b*) was considered by several of the noble and learned Lords that took part in the *Westinghouse* decision. They were all emphatic that the expression should be given a strict construction. Having regard to the purpose of sub-s. (4), which, as I have already mentioned, is to preclude pre-trial discovery, it is to be construed so as not to permit mere 'fishing' expeditions . . . . If I may borrow (and slightly amplify) the apt illustration given by Slade, L.J. in the present case, an order for the production of the respondents' 'monthly bank statements for the year 1984 relating to his current account' with a named bank satisfied the requirement of the paragraph, provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But a general request for 'all the respondent's bank statements in 1984' would in my view refer to a class of documents and would not be admissible.

> The second test of particular documents is that they must be actual documents, about which there is evidence which has satisfied the judge that they exist, or at least that they did exist, and that they are likely to be in the respondents' possession. Actual documents are to be contrasted with conjectural documents, which may or may not exist."

It is documentary evidence being sought by the interested party from persons in the United States which Lord Brandon is speaking of in the *South Carolina Ins. Co.* case (16). Here it is *viva voce* evidence by witnesses in the foreign jurisdiction which is being sought in criminal proceedings which would be inadmissible as hearsay evidence in this jurisdiction if that witness did not come to this court to give his evidence.

Documentary evidence may or may not be hearsay and therefore inadmissible and that depends on the use which is going to be made of it at the trial. This is different from all evidence given by a witness which would be hearsay and inadmissible. An English court might consider with some favour a request for documentary evidence which may be admissible in evidence at the trial but there will be no purpose in trying to get a deposition of the oral evidence of a witness which, at the trial in criminal proceedings, would be hearsay and inadmissible. It was for a criminal investigation in Gibraltar that the defendant asked for help and not for any proceedings in any court here. Again in the *South Carolina Ins. Co.* case, the witnesses did not appear before the US court on the motion of the defendant, so Lord Brandon inferred that those witnesses did not object to producing the documents and to their being copied. Here, the plaintiffs in this case were unwilling to provide this evidence and what was sought was vague, so the *South Carolina Ins. Co.* case is easy to distinguish from the facts in this one.

So far as *In re State of Norway's Application (No. 2)* (8) is concerned, the defendant has drawn an incorrect conclusion from it. It does not support the proposition that at common law the provision of assistance in criminal matters to a foreign court does not constitute enforcement of that law in England and is therefore lawful. Lord Diplock in the *Rio Tinto Zinc Corp.* case (12) said that for incoming letters of request the jurisdiction of the English courts has always been exclusively statutory. Thus, in *In re State of Norway*, the decision was based on the construction by the court of the Evidence (Proceedings in Other Jurisdictions) Act 1975 which dealt with incoming letters of request, and there was no judicial finding on the law relating to outgoing letters of request.

The *Panayiotou* v. *Sony Music Entertainment (UK) Ltd.* (9) authority, as has been stated, refers to the jurisdiction of the High Court of England and Wales only and the power to issue letters of request stems from the jurisdiction inherent in that court. An ordinary litigant or an intended litigant cannot share the same power of the inherent jurisdiction of the High Court. Order 39 is simply a rule of procedure by which the court, in

the exercise of its inherent jurisdiction, can ask for the assistance of a foreign court, so any other procedure used would only give effect to the inherent jurisdiction of the court. There may be other routes but that does not mean that they are available to a litigant or an interested party. Counsel for the defendant referred to the law of the United States and, more particularly, 28 US Code, 1994 ed., para. 1782, at 410, which deals with incoming letters of request or requests by interested parties for judicial assistance. This is of no value because the jurisdiction for incoming letters of request is statutory, as Lord Diplock said in the *Rio Tinto Zinc Corp.* case (12).

Although it is suggested that the requested party should consider the nature and effect of the incoming letter of request, the requested party may have been misled by the ambiguous content of the letter and the exchange of correspondence that followed. It is not correct to say that this court has no jurisdiction to oversee the nature and effect of the act of the defendant or that the court should not see that the law is followed. Lord Griffiths in *R.* v. *Horseferry Road Mags.' Ct., ex p. Bennett* (11) (98 Cr. App. R. at 125) said "the judiciary accept the responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." If it comes to the attention of the court that there has been a serious abuse of a power, it should express its disapproval by refusing to act upon it. In this case the requested party was misled by the assurances which the defendant gave in answer to the question whether the request came from a responsible source who could properly give assurances as to reciprocity.

There have been references by counsel for the defendant to the Convention on Mutual Assistance in Criminal Matters 1959. Under English law the obligations accepted under the Convention are treaty obligations, so legislation is required for them to become a part of the domestic law. The defendant admitted that this Convention does not apply to Gibraltar. Switzerland is a party to it. Reference to the Convention is of no help in this case except to show that the use of the expression "letter of request" by the defendant misled the Swiss judicial authorities into believing that the request from the defendant is one which complied with the definition given in the Convention, *i.e.* that it was issued by a judicial authority. The Convention is of no assistance to the defendant and the note by the Secretariat referred to by the defendant is also of no help.

The plaintiffs in this case are asking for a declaration that the evidence was obtained improperly and they do not address the issue as to whether or not in future criminal proceedings in Gibraltar such evidence will be admissible. There seems to be no suggestion that there will be any criminal proceedings in Gibraltar. The defendant cannot therefore rely on any argument that in the future a criminal court in proceedings against

other parties would control the introduction of evidence of the confidential information belonging to the plaintiffs which they say was improperly obtained.

The defendant said in his letter of April 28th, 1993 that he was "charged with overseeing the criminal investigation." This is constitutionally incorrect. He is not in a position to give binding assurances to foreign sovereign states because on matters of law, only the Supreme Court can make such a determination and only the Governor can give an assurance that binds the Crown. The defendant's submissions on the words "judicial authority" or "judicial duties" do not succeed because what the court has to determine is the scope of the domestic statute which purports to apply the terms of the Convention, and not the words of the Convention. The domestic statute does not use these expressions and so the propositions of the defendant have no application to the facts of this case.

There has also been a confusion over judicial functions and judicial office. It is true that a judicial officer such as a justice of the peace may exercise judicial functions in and out of his court. The fact that someone has to perform duties which entail his having to act judicially in the sense of determining what is right and fair does not make that person the holder of a judicial office. Tax inspectors and similar officials cannot be classed as judicial officers.

Her Majesty's Attorney-General for Gibraltar may issue a request to a foreign court but it would not be a "letter of request" because that is a term of art with a specific meaning in international law. If he issues his own request to a foreign court he must disclose the true facts in it or supply them if they come to his knowledge after he has sent his request, so that the foreign court is not misled. Here the defendant was wrong when he said he was charged with overseeing the criminal investigation in Gibraltar because the Royal Gibraltar Police Force answers to the Governor. The factual basis for the investigation changed and the foreign court was not told of this by the Attorney-General. He gave an assurance of reciprocity and he was not the proper person to do that. There was no legal basis for this assurance of reciprocity so far as the law of Gibraltar was concerned.

As regards practice, procedure and powers, the Supreme Court exercises its criminal jurisdiction in conformity with the law and practice observed for the time being in the English Crown Court, as s.4 of the Criminal Procedure Ordinance states, but this does not mean that those responsible for the administration of criminal law in Gibraltar are similarly placed and may act according to English practice. The Attorney-General, according to Schedule 1 of the Supreme Court Rules, is for limited purposes to be substituted for the Director of Public Prosecutions in applying certain rules of court which do not apply to the circumstances of this case and so that is no assistance to the defendant. Her Majesty's Attorney-General cannot be equated with a Crown Prosecutor in England

and Wales. Only for the purpose of interpreting certain rules of court is the Attorney-General to be substituted for a specified English office-holder according to the Supreme Court Ordinance.

It is clear, therefore, that the evidence obtained by the defendant as a result of his request misrepresented the legal and factual situation and was therefore obtained improperly. How did this come about? As far as I can make out, someone in Gibraltar called in New Scotland Yard to investigate allegations that residents of Gibraltar had taken part in or profited from the alleged fraudulent acts of those in the Baltica troubles. The investigations went on for two years and so far have come to nothing or, at any rate, no charges have been preferred here against anyone. The Danish investigation team asked the relevant Danish court for a letter of request to go to the Swiss judicial authorities for assistance, obtained one and charged some men in the Danish court with some criminal offences.

Back here in Gibraltar the investigators wanted some questions answered and documents produced by individuals or institutions in Switzerland. They provided English letters of request which the defendant adapted. There was no approach to the Supreme Court for them because it was assumed the defendant was in the same legal position as the Attorney General, the Director of Public Prosecutions and Crown Prosecutors for England and Wales and had the authority to issue letters of request. But, in my judgment, he is not and he is not even deemed to have that authority.

The plaintiffs must and will have the declarations they seek. If their claims include one for costs so far and cannot be agreed it must be set down by the Registrar on application for hearing in chambers by this court.

Orders accordingly.