

CRIME AND MISCONDUCT COMMISSION IN THE MATTER OF:

INQUIRY INTO ALLEGATIONS CONCERNING THE GOVERNMENT OF GRAND  
COUNCIL ELECTION HELD IN MARCH

EXHIBIT No. 50  
Clerk

Submissions seeking directions as to the content and manner of questioning  
of candidates about alleged breaches of section 436  
of the *Local Government Act 1993*

1. LGAQ submits that:-

- (a) the aggressive questioning of Cr Pforr alleging or inferring that he breached the election donation disclosure provisions of the *Local Government Act 1993* ("LGA") by not inquiring as to the ultimate source of the Hickey Lawyers trust funds was; and
- (b) any similar questioning of other candidates who received donations from the Hickey Lawyers' trust account and declared that trust account as the source of the gift will be,

grossly unfair and inappropriate in circumstances where, on any realistic view, the course adopted by the candidates clearly complied in full with the relevant provisions of the Act.

2. Section 427(2)(b)(iii) requires a candidate to disclose "*the relevant details for each gift made by a person to the candidate, if the total value of all gifts made by the person to the candidate during the disclosure period is the prescribed amount or more*" - the prescribed amount being \$200<sup>1</sup>.
3. Giving a return containing particulars that are, to the knowledge of the person, false or misleading in a material particular is an offence under section 436(2), attracting a maximum penalty, in the case of a candidate, of 100 penalty units (\$7,500).
4. Under section 222 of the LGA, conviction of such an offence also carries the possibility of:-
  - (a) disqualification to seek to hold the office of councillor for a period of 4 years after the conviction; and
  - (b) for a candidate who was successful at the election and has become a councillor, vacation of that office.
5. Section 428, though not itself creating an offence, supports these provisions by:-

---

<sup>1</sup> LGA, Section 414, definition of "*prescribed amount*".

- (a) providing that it is unlawful for a candidate or candidate's agent to receive a gift unless the "relevant details" are known to the recipient, or are provided to the recipient by the giver of the gift (with the recipient having no reasonable grounds to believe that the details given are incorrect); and
  - (b) establishing a civil liability to pay to the local government the amount of any gift which has been unlawfully received because the "relevant details" were not known or supplied at the time of receipt.
6. The issue is therefore, self-evidently, a serious one in respect of which allegations that a section 436 offence has been or may have been committed should not, it is submitted, be raised or put lightly, or in circumstances where there is in fact no substantive basis on the available evidence for suggesting that an offence of this type may have been committed.
7. Where a gift is made by a trustee out of trust funds, the "relevant details" are defined in section 414 as follows:-  
*"for a gift purportedly made out of a trust fund.... —*
  - (i) *the names and residential or business addresses of the trustees of the fund.....; and*
  - (ii) *the title or other description of the trust fund...."*
8. The trust account of a firm of solicitors is an account established under the *Trust Accounts Act 1973*. No one other than partners of the relevant firm are capable of being a "trustee" under that Act of funds held in a trust account established under that Act<sup>2</sup>.
9. Therefore, for a gift which purports to have been made from funds in a solicitor's trust account, the "relevant details" are:-
  - (a) the names and residential or business addresses of the partners of the relevant firm, in this case Hickey Lawyers;
  - (b) the fact that the gift was made from "Hickey Lawyers trust account".
10. To the extent that there is any argument or debate as to whether these particulars were provided, or provided to the full extent required by the legislation in any particular case, that is certainly a matter for submissions after completion of the evidence.
11. However, a suggestion that an individual candidate is required to go further and identify the ultimate or original source of the funds which it has received from a trust account is, in LGAQ's submission, entirely without foundation in the Act and plainly wrong.
12. Therefore, with respect, counsel assisting's proposition, put direct to the witness Cr Pforr on at least 2 occasions, that he was obliged by the Act to find out the

---

<sup>2</sup> See definition of "trustee" in section 4.

ultimate source of the funds paid into the trust account is unsupported by reference to anything in the Act. In the circumstances, this approach to questioning on the issue is submitted to be patently inappropriate and unfair.

13. Where such funds are ultimately sourced from gifts made by third parties to a trustee, the trustee will be required to make third-party disclosure under section 430. Although it appears that there may be some later debate about the way in which the identity of this particular third party was disclosed (eg "Lionel Barden Trust" vs "Hickey Lawyers Trust Account"), that does not affect:
  - (a) the clear statutory position of that disclosure of the ultimate source of the election gifts and received and disbursed by a trustee is the responsibility of the trustee, not the candidate; or
  - (b) on the evidence presently given and available in this Inquiry, the apparent fact that the source of each third-party gift to Hickey Lawyers trust account was in fact accurately disclosed under section 430.
  
14. It may be that strengthening of the legislation to cover "layered" trusts will be a recommendation coming out of this Inquiry, in order to prevent the ultimate donors "hiding" behind a further trust structure interposed between the trustee holding the funds and the true source of those funds. However, there is no evidence that any issue of that kind arises in relation to the ultimate source of funds gifted to Hickey Lawyers trust account.
  
15. It is acknowledged that the Department of Local Government "Disclosure of Election gifts Handbook" contains the following statement:-
 

***"2.5.15 Gifts via solicitors' or accountants' trust accounts***

*Where a gift is made by a client through a solicitor's/accountant's trust account, the return must include the name and address of the client who made the donation. The relationship between solicitor/accountant and client is that of agent and principal. For the purposes of the Act's disclosure provisions, a gift paid by an agent at the direction of his/her principal is a gift made by the principal and not the agent".*
  
16. The source of authority for this statement is unknown. There is nothing in the disclosure provisions which states that a gift paid by an agent, from monies legally vested in the "agent" as trustee, is a gift made by the principal and not the agent. The entire structure of section 430 suggests directly to the contrary, given that of the recipients of gifts which are then applied to third-party expenditure are more than likely, as a simple matter of commonsense and common experience, to expend those monies for purposes directed, or at least concurred in and approved by, the persons making the gifts.
  
17. Except (arguably) in the case of an entirely passive agent who merely facilitates movement of a particular amount from donor direct to particular candidate, the Department's statement is, with due respect, again unsupported by anything in the Act, and plainly wrong as a matter of law.
  
18. LGAQ respectfully submits, against this background, that the Commission should give appropriate directions to counsel assisting with respect the content

and manner of questioning of candidates in relation to any allegation that they have acted unlawfully or otherwise improperly in not seeking out or disclosing of the ultimate source of election gifts paid by donors into a trust account from which gifts were then made to candidates by a trustee of that account.

**S P Fynes-Clinton**

Counsel for LGAQ

13.10.2005