

COPYRIGHT

INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE DAVID IPP AO, QC, COMMISSIONER

PUBLIC HEARING

OPERATION CALPURNIA

Reference: Operation E09/1462

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON WEDNESDAY 3 FEBRUARY 2010

AT 2.00PM

Any person without publishes any part of this transcript in any way and to any person contrary to a Commission direction against publication commits an offence against section 112(2) of the Independent Commission Against Corruption Act 1988.

This transcript has been prepared in accordance with conventions used in the Supreme Court.

THE COMMISSIONER: Mr Gormly?

MR GORMLY: Commission, allegation 1 was always going to be the longest one. I think I can move faster now. Now, I think I've largely finished with allegation 2 as well.

THE COMMISSIONER: I think so.

MR GORMLY: Yes.

10

THE COMMISSIONER: That's where you said that allegation, the question of one recording is relevant to allegation 2, to a degree.

MR GORMLY: Yes. So that takes us to allegation four then.

THE COMMISSIONER: Now, can I just ask you. Allegation 2 is based on what Mr McGurk said to Ms Carson and to Mr Byrnes - - -

MR GORMLY: Three sources, yes.

20

THE COMMISSIONER: And the tape?

MR GORMLY: Yes.

THE COMMISSIONER: And the reference to Mr Haddad in allegation 2 comes from Mr Byrnes.

MR GORMLY: That's right.

30 THE COMMISSIONER: It doesn't come from Ms Carson or - - -

MR GORMLY: That's right/

THE COMMISSIONER: And it doesn't come from the tape?

MR GORMLY: That's right. It doesn't come from the tape.

THE COMMISSIONER: Not in relation to Badgerys Creek.

40 MR GORMLY: Yes, I see, yes, of course, yes, that's right.

THE COMMISSIONER: The reference to various Ministers of the Crown, I can't remember who that comes from.

MR GORMLY: I think it came from Mr Byrnes.

THE COMMISSIONER: Mr Byrnes. And the tape itself is really very general.

MR GORMLY: Yes. Well, the statement of various Ministers of the Crown alone is, says something.

THE COMMISSIONER: Yes, thank you.

MR GORMLY: Well that takes us then to the fourth allegation, allegation 4. And this is the one by which the BCC approval of rezoning as being delayed because information has got out about the tape.
10 Commissioner, I don't propose to go into the correctness of the statement, that is, as to whether it's true or false other than to make the submission that on the basis of the work done in investigation it's not sustainable. There's also - - -

THE COMMISSIONER: And that's because of Mr Haddad's evidence.

MR GORMLY: That's right, yes, well, it's part, yes. Well, there's really quite a lot of material, Commissioner, that goes - - -

20 THE COMMISSIONER: Yes, I don't mean just his credibility but his explanation of the various procedures involved.

MR GORMLY: That's right. So the essence of this one, Commissioner, is that there is no tape involvement in this one. The source is Mr Byrnes and he says that it came from Mr McGurk. There's no suggestion that this is something that was on a tape. I'd submit that it can be found that there's enough evidence of contact between Mr Byrnes and Mr McGurk that they did converse about these topics and there certainly seems to be some element in the allegation for which, well, that's emanated from the
30 6 February recording, that is, there's no assertion that it was, but some of it probably came from the 6 February recording taken by Mr McGurk. But there's obviously so much of the allegation that is not - - -

THE COMMISSIONER: And if allegation 2 fails, allegation 4 fails.

MR GORMLY: That's right, so it's, I suppose what it comes down to, your Honour, Commissioner, is that once the allegation is found to be false, there's no delay or rezoning, and one looks just at the sources to try and make a determination about that, the most that can be said, Commissioner,
40 and I put it this way, is that it's open to find that what Mr Byrnes was saying was what Mr McGurk told him. It's open to you to find that Mr Byrnes may not have been telling the truth. It's equally open to finding that Mr McGurk may have got the information, unlikely as it is, but nevertheless possible that Mr McGurk has been told this from some other source.

THE COMMISSIONER: That'll be a very speculative possibility because there's no evidence about that.

MR GORMLY: That's right. So it comes down to a question of what findings you would make the veracity of the sources. Probably difficult to make any decision about who said what about what in the circumstances. But it's probably unnecessary to, to decide it, Commissioner, in this case.

THE COMMISSIONER: Mr Gormly, my impression is that nobody has said anything about allegations 5 to 13 since you opened on it.

10 MR GORMLY: That's true. That's because, Commissioner, that most of them have been verifiably falsified. There's really not much to be said - - -

THE COMMISSIONER: No.

MR GORMLY: - - - about any of them and I, I certainly don't propose to - - -

20 THE COMMISSIONER: Well, you're saying there's nothing more to say other than, you don't want to say any more about it other than what you said in your opening.

MR GORMLY: That's really right, Commissioner, yeah.

THE COMMISSIONER: Yes, very well. Yes, thank you.

MR GORMLY: Thank you, Commissioner.

THE COMMISSIONER: Dr Renwick, I think it might be helpful if you went next.

30 DR RENWICK: Yes, I think that's the agreed position if it would please the Commission.

THE COMMISSIONER: Right.

40 DR RENWICK: But I can be very brief. Mr Haddad, as you know, Commissioner, has been brought in to answer four allegations initially, allegation 3 has gone and three remain. Now, the affidavit of the ICAC chief investigator shows that the first of those allegations as Mr Gormly has just demonstrated, is based about it says on the tape at pages 79 to 80 and that's a surreptitious but (not transcribable) recorded tape. Sorry. I'm not being amplified, am I. Of course, the most important point from Mr Haddad's point of view is Mr Gormly's submission that there is no basis for a finding that the allegation is true.

THE COMMISSIONER: Well, nobody contends that it is and there's no party here who contends that it is.

DR RENWICK: Yes, and unless, Commissioner, you're putting to me that that's a serious possibility - - -

THE COMMISSIONER: No.

DR RENWICK: - - - in a sense I need say no more but may I - - -

THE COMMISSIONER: You need say no more.

10 DR RENWICK: Yes. But may I just very briefly say this, in our submission a fair examination of the relevant portion of the tape as tendered does not support the allegation either and there are really four reasons for that. If you look, Commissioner - - -

THE COMMISSIONER: Which portion are you talking about?

DR RENWICK: I'm talking about pages 79 and 80 but in particular 80. Mr Gormly has taken you through the sequence of the conversation and has said, well, there's a reference to consultants, there's a reference to getting
20 things through, there's a reference to payment of money and then a little later there's a reference to Mr Haddad. Now, there are four reasons why, in my submission, the allegation as set out is not supported by this and they're as follows. Fundamentally - - -

THE COMMISSIONER: Not supported, you mean this extract doesn't mean that Mr Haddad was a connection who was paid money?

DR RENWICK: Yes.

30 THE COMMISSIONER: (not transcribable) would have difficulty in persuading me of that.

DR RENWICK: Well, may I just point out four factors very briefly.

THE COMMISSIONER: Yes.

DR RENWICK: The first is, as a matter of logic, it is incomplete. There are parts which are not transcribed and it's simply not possible when you don't have the full content and context and in particular, Commissioner, I
40 am talking here of page 80, lines 8 to about 12. The second point is this, Mr Medich obviously thought he was having a private conversation and his language may have been loose. The third point is, and this is very important, this was not a formal question and answer session or even a normal business dialogue. Mr Medich was fobbing off Mr McGurk. Each was sparring with the other and one cannot assume that each exchange or question or comment logically related to the one before.

THE COMMISSIONER: There's a problem in all of that. I can understand what you're saying.

DR RENWICK: Yes.

THE COMMISSIONER: But there is one fundamental problem - - -

DR RENWICK: Yes.

10 THE COMMISSIONER: - - - and that is what appears at line, after mentioning Mr Haddad's name Mr McGurk asked, "So he'd be your connection?" and the answer is either "Yeah," or "Mmm."

DR RENWICK: Yes.

THE COMMISSIONER: Both of which are in the affirmative.

DR RENWICK: Well, Mr Medich and - - -

20 THE COMMISSIONER: And, and Mr McGurk clearly understands that because he says, "All right." So whatever appears in the passage at 10 doesn't affect the position that, in response to the direct question that Mr Haddad was his connection Mr Medich replied in the affirmative.

DR RENWICK: Well, Mr Faulkner will no doubt have more to say about this but - - -

THE COMMISSIONER: Yes, I know.

30 DR RENWICK: - - - but, Mr Medich's answer to that, of course, is that he is not responding, the "mmm" is non-responsive and so on for (not transcribable).

THE COMMISSIONER: Yes. I'll listen to it again.

DR RENWICK: I know you've heard all of that but we say it has a - - -

THE COMMISSIONER: I will listen to the recording again.

40 DR RENWICK: Thank you, Commissioner. In any event, of course, Mr Medich denies he had that intention. Importantly though, and this at the crux, he says and Mr Haddad says the two of them had never met nor spoken and that's undoubted and that no favours have ever been given - - -

THE COMMISSIONER: That's a different point.

DR RENWICK: I understand that. And that is the, of course, why from Mr Haddad's point it's sufficient to say there's no evidence supporting the

allegation. You would also have noted, Commissioner, that Mr Medich in his statement and in the witness box has said that it was wrong to say what he did, he agreed it was a serious matter to use the name of someone not known to him in this way. He accepts the comments had potential to cause harm to Mr Haddad and he generally expresses his regrets.

The remaining two allegations, Commissioner, are based on what Mr McGurk apparently told others was in the tape recording. It turns out the recording says no such thing but those allegations - - -

10

THE COMMISSIONER: Those are allegations?

DR RENWICK: 2 and 4. And in relation to allegation 2 I think I heard a minute ago you and Mr Gormly the exchange that the relevant portion of the tape, sorry, that allegation 2 relating to Mr Haddad is not to be found on the tape but in what other people said.

THE COMMISSIONER: That's right.

20

DR RENWICK: But what they said was in the tape. That is not in the tape so you can dismiss that as well. Finally can I just say this. You've heard evidence from Mr Haddad, a distinguished, respected and most senior public servant who has a very important role as you yourself have acknowledged. He's appeared before you, he's vehemently denied the allegations which have caused him and his family the greatest anguish. No one suggests the denials should not be accepted. Mr Game of senior counsel described Mr Haddad's evidence in this regard as heartfelt and compelling and we concur with that.

30

Of all the public officials about whom false allegations have been made on the tape and separately to it he's been alone in being named and called. Now, he understands why he is in that unique position.

THE COMMISSIONER: He's the only one against whom any direct evidence has been given.

DR RENWICK: Yes, I understand. But nevertheless that's singling out as undoubtedly exacerbated his personal burden.

40

THE COMMISSIONER: This is not going for compensation.

DR RENWICK: Can I get to the reason I'm saying this? You correctly identified, with respect, on the first day that there is a public interest in false allegations of political corruption being dispelled and we accept that, of course, but there is another aspect of the public interest here, Commissioner, which we do press, namely the consequences for the health, the morale and the work of public servants when allegations of that sort are made.

THE COMMISSIONER: I understand that, Doctor. It is a factor taken into account in having a public inquiry.

DR RENWICK: We understand that and we accept that. But we are simply saying that there is another aspect of the public interest, the human aspect in this case.

10 THE COMMISSIONER: You're saying that whatever reasons are given should make Mr Haddad's position quite clear in the opinion of the Commissioner?

DR RENWICK: Precisely. And as soon as is convenient. Those are our submissions.

THE COMMISSIONER: Now, who's next?

MR FAULKNER: Well, I say that I'm last because all fingers are pointed in my direction, Commissioner.

20 THE COMMISSIONER: I'm glad to see there's a smile on your face, Mr Faulkner. Yes, Mr Game.

MR GAME: Thank you. I have a few things that I wish to tender. There may be some argument about some and not others. But first is a newspaper article written by Ms Kate McClymont, 5 September, 2009.

THE COMMISSIONER: Are you tendering?

30 MR GAME: Yes, I tender.

MR FAULKNER: I object to the tender.

THE COMMISSIONER: What's the point of it, Mr Game?

MR GAME: Can I explain?

THE COMMISSIONER: Are we really going through all this again?

40 MR GORMLY: I do too, Commissioner, it's not what I thought it was. I object to this too.

MR GAME: Well, I haven't got to say what I wish to say about it.

THE COMMISSIONER: I know but people are jumping to conclusions may be wrong.

MR GAME: But, Commissioner, we have not, we have been asked if we wish to cross-examine Ms McClymont and we - - -

THE COMMISSIONER: Pardon?

MR GAME: Sorry. We have been asked if we wish to cross-examine Ms McClymont but we, our request to be provided with her notes or any of that material has been declined.

THE COMMISSIONER: The relevant part of Ms McClymont's evidence is in Mr Lang's statement.

10

MR GAME: Yes, I understand, but - - -

THE COMMISSIONER: And it would be very easy for you to, to ask Ms McClymont what she wanted to, but you didn't want to.

MR GAME: But, Commissioner, what I wanted to do is to draw some inferences from his report.

THE COMMISSIONER: I'm not going to allow it. You didn't call it. You had the chance. I'm not going to draw any inferences from this. I can't when you didn't call it.

20

MR GAME: But this is a document which is a representation made by her as to things said to her by Mr McGurk and therefore is evidence. The rules of evidence don't apply, but it is evidence of a representation made to - - -

THE COMMISSIONER: All right. I think you better just put your submissions.

30 MR GAME: About this particular document?

THE COMMISSIONER: Yes.

MR GAME: In, on the first page, first of all he said, he talked about a belief that a person who he named as (not transcribable) had been killed. Now further down it says, "When (not transcribable) hinted at corruption involving Labor politicians, both state and federal", that is to say the representation that Mr McGurk was being reluctant. Then in the next sentence - - -

40

THE COMMISSIONER: Where is that? I'm trying to find it.

MR GAME: About point 6, When (not transcribable) hinted at corruption involving Labor politicians, that's not making an allegation.

THE COMMISSIONER: What is it?

MR GAME: It's hinted, it's not, it's not a firm - - -

THE COMMISSIONER: I shouldn't laugh.

MR GAME: It's also - - -

THE COMMISSIONER: But I couldn't help it. It's a hint of an allegation is it?

10 MR GAME: Well, if you read the next sentence, it says McGurk later became expansive providing the Herald with a detailed list of names to investigate. Again, some portion and circumspection on Mr McGurk's part in representations that he makes to Ms McClymont. And then, and importantly at the end it also mentioned that he had been told that there was a plan to have him killed and he was extremely anxious as he believed the person had the means to carry out such a threat. Again, a representation made by him not long before he died or was executed and in my submission, a quite significant matter in terms of when you assess the colour or character if at all as to whether or he was lying or exaggerating. Because in my submission you should draw no inference of that kind.

20

THE COMMISSIONER: I don't, I don't see how this is relevant to that issue at all. Why has it got anything to do with it?

MR GAME: Because it shows, because it is evidence of Mr McGurk's state of mind at the time he spoke to Ms McClymont. Which she then reported in this article.

THE COMMISSIONER: And why is his state of mind on 5 September relevant?

30

MR GAME: Well, his state of mind is relevant because it's been, it's not 5 September, 3 September. He died on 3 September.

THE COMMISSIONER: The article was written on 5 September.

MR GAME: Yes. He died on 3 September.

40 THE COMMISSIONER: All right. So when did he, all right, this happened towards the end of August. But what's the relevance of his state of mind towards the end of August?

MR GAME: His state of mind, well for example, the fears that he entertained might well cover the representations he makes. And how that, whether or not that would be construed in any way, I'm afraid were (not transcribable) to him.

THE COMMISSIONER: Any more submissions, counsellor? Application refused.

MR GAME: Yes, Commissioner.

THE COMMISSIONER: I do not regard this as relevant and I also consider that the matter, any matters of this kind would've been far more reliably adduced had Ms McClymont been called to be cross examined. You did not wish to call her.

10 MR GAME: Well, I'm sorry to, I do wish to have it recorded that our request for her notes was declined by the Commission.

THE COMMISSIONER: Yes. Yes, very well. That is correct and that's recorded.

MR GAME: Thank you. Now - - -

20 THE COMMISSIONER: And it follows, I must say that it follows in my opinion that by reason of your decision not to call Ms McClymont or Mr Byrnes and Ms Carson, there's a strong reason to believe the truth of what they say. And I don't know how I can disbelieve them.

MR GAME: In respect of Ms McClymont, I'm not suggesting that representations of the kind suggested where not made.

THE COMMISSIONER: And Ms Carson too?

MR GAME: Yes. I'm not suggesting that.

30 THE COMMISSIONER: You accept that their, their reports are accurate.

MR GAME: Yes. I do accept that their reports are accurate. But I also submit that you should have regards to matters that may have coloured Mr McGurk's state of mind at the time until when he spoke to them. Particularly his fears concerning his life.

THE COMMISSIONER: Well, yes, I understand that.

MR GAME: And I wonder - - -

40 THE COMMISSIONER: Do I know, I think, I think I've got evidence of the dates on which Mr McGurk said the things to Ms McClymont and Ms Caron which they reported.

MR GAME: Yes. I'm not - - -

THE COMMISSIONER: That's (not transcribable) isn't it?

MR GORMLY: That's correct. The 29th, Commissioner (not transcribable)

MR GAME: Yes. But I'm not, yes, but the, there was a meeting, an important meeting on 20 August, which is not long before he died.

THE COMMISSIONER: Yes. I should (not transcribable) Mr Game, that I do regard that argument as persuasive anyway. The fact that he was in fear of his life in August, 2009, I'm not sure what that has to do with, whether he's telling the truth or not about a tape that he had, about what Mr Medich said to him. And whatever tape he's got in his possession.

10

MR GAME: It would cover, it would cover the actual content of the representations he makes. It could cover why he makes the representations.

THE COMMISSIONER: I suppose it could. But in all the circumstances, weighing up, one, the late, the fact that this report was written a month after the information was given by Mr McGurk by which they relied. The fact that Ms McClymont wasn't called. The fact that I regard the argument and credibility as tenuous lead to me to the conclusion that your application is refused.

20

MR GAME: The next document they run the same, both, make the application to tender is, it's an email, an email and I'll provide you Mr Commission with this document.

THE COMMISSIONER: What is the part of it that you - - -

MR GAME: (not transcribable) this, particularly a and b, part b. And the point of this one is that you should regard it with some caution and I think that Mr Gormly may have ultimately accepted that you should regard it some caution whether or not representation comes from Mr Byrnes, the, shall I say, extent to which any allegation goes beyond that, which is represented either by Mr McGurk or from some other source, cannot be determined. That is to say in respect of the proposition - - -

30

THE COMMISSIONER: Yes. I understand, Mr Game. Let me say this, I, I heard Mr Byrnes give evidence in the compulsory examination, which I heard it private so that no one else here was present. As a result of hearing that evidence, I will approach the evidence of Mr Byrnes with caution, without looking at your email. And I am therefore returning your email to you.

40

MR GAME: Thank you.

MR GORMLY: Could the other parties perhaps return theirs.

Now, the third is this. I'm sorry, this is only done over lunch but my (not transcribable) original but I hand a copy to you. It's mine, your Honour, but we have, what has happened is that my instructing solicitor who has

attached what she believes to be the notes of the conference insofar as she can relate the conference with the actual - - -

THE COMMISSIONER: May I ask what the point of these notes are?

MR GORMLY: It just goes to Mr Medich's credibility in respect of the assertions that were made that Mr McGurk was not making notes during the meeting. That's the only question that goes to.

10 THE COMMISSIONER: You're not seeking to use the notes to contradict the transcript?

MR GORMLY: Not at all, only to establish that there were actually notes reported of the pertinent matters.

THE COMMISSIONER: All right. Mr Faulkner, do you dispute that?

MR FAULKNER: I haven't seen the document. Well, yes, I object to them. In my submission there is no prospect that you would conclude that
20 these notes were in fact taken by McGurk during the meeting.

THE COMMISSIONER: Mr Game?

MR GAME: Well, the question of comparing what's in the transcript with these notes.

THE COMMISSIONER: Mr Game, I'm not going to accept this, I'm afraid, but, I mean, it's very, it's not, it's, you may wish to argue that the transcript speaks for itself.
30

MR GAME: I do in terms of the notes.

THE COMMISSIONER: So I'm not going, I uphold Mr Faulkner's objection.

MR GAME: Commissioner. Now, in respect of the, sorry, just in a general sense, Commissioner, other than this question about whether or not representations made about the tape by Mr McGurk to others were inaccurate or more, I, in my submission nothing else should be on the table
40 in terms of adverse inferences and that's the questions about the suggested illegality of the tape, blackmail, misappropriation and the kind, so I'll put those matters to one side.

THE COMMISSIONER: No. There is, as I said to you, there is a, there's no need for you to deal with that.

MR GAME: Thank you.

THE COMMISSIONER: But I, I did mention to you that there is strong evidence that Mr Medich, sorry, Mr McGurk decided to have this meeting and to record it in the way that he did and to tell Mr Medich that it was being recorded by the taking of notes and conceding from him that it was being recorded by the digital recorder which was hidden, is strongly suggestive of an attempt by Mr McGurk to trap Mr Medich and I've told you that, I mentioned that before and that is something, an adverse inference.

10 MR GAME: Well, Commissioner - - -

THE COMMISSIONER: And intended to trap him to obtain information in a meeting which he could use against him in some way.

MR GAME: But the information with which he was concerned had nothing whatsoever to do with corruption. He was only concerned with matters in dispute between them which were (not transcribable).

20 THE COMMISSIONER: I agree. That doesn't detract from the quality of the morality of his conduct.

MR GAME: No, I understand that, but in my submission there could be no escaping the proposition that the introduction of these matters was entirely unprompted and came entirely from Mr Medich.

THE COMMISSIONER: I accept that.

30 MR GAME: Well, that's my, I can't really take that, the position any further than that. Now - - -

THE COMMISSIONER: No, but it does create, to use your phrase, a hint of a suspicion about Mr McGurk's character.

MR GAME: Yes, to a degree, Commissioner, but on the other side of the record Mr McGurk was dealing with what could safely be described as a very difficult customer who had a tendency to, shall I say, lie and exaggerate as he saw fit.

40 THE COMMISSIONER: The character of Mr McGurk is entirely irrelevant to the character of Mr Medich - - -

MR GAME: A hundred per cent.

THE COMMISSIONER: - - - even though they may have certain similarities.

MR GAME: Yes, but, but the point of this is that what Mr McGurk was actually doing in this, what can be seen, it was, he was seeking to protect particular interests which were identified by him.

THE COMMISSIONER: Yes, I know.

MR GAME: Now, if I may come then to a preliminary point about construing the relevant parts of the transcript of representations made by Mr Medich. Now, in my submission, there can be no doubt that Mr Medich
10 intended to say that which he said, namely, to convey, sorry, and critically intended to convey a corrupt meaning. That's to say he had an intention that Mr McGurk would receive that which he said as meaning what he said, namely (not transcribable).

THE COMMISSIONER: I understand the submission, Mr Game.

MR GAME: Now, insofar as Mr Medich said otherwise to the Commission, in my respectful submission he lied on oath to the Commission. And that
20 has been put to him and such a finding is open and he is not protected by his, he's not protected by a Section 38 statement in respect of that.

Now, in respect of the, and this is critical to representation to allegation 2, in my submission there is no more in this tape than is currently being given full credit to by counsel, and I mean no criticism but in my submission there is more in this tape in terms of what a person in Mr McGurk's position would infer from this than, and in my submission that - - -

THE COMMISSIONER: What do you mean? Do you mind just putting
30 your submission bluntly.

MR GAME: Yes, certainly. When you look at, when you look at allegation 2, in my submission there is more support in the, particularly in respect of Badgerys Creek, there is more support in the two excerpts that have been, that attention has been given to, there is more support in them, in the transcript than has currently been identified.

THE COMMISSIONER: Well, you'll have to, there is support in the transcript for statements by unnamed, well, statements that unnamed
40 persons in the Department of Planning were being paid or would be paid to get something done in relation to Badgerys Creek. You don't have to persuade me of that. That's my present view.

MR GAME: Yes.

THE COMMISSIONER: There is nothing in the tape that identifies Mr Richardson as one of the persons, as being involved in making payments in relation to Badgerys Creek and there is nothing in the tape that relates to

payments being made to Mr Haddad as a specific person in relation to Badgerys Creek.

MR GAME: No, but, but, Commissioner, if you take both extracts and you go first to the one at page 54 then imagine you (not transcribable) the first one by the time you get to the second one.

10 In the first one he goes into town and talks to some people and it's about protecting Badgerys Creek and "they" is not a reference just to Mr Richardson. "They" is a reference to - - -

THE COMMISSIONER: And where are you? Page 54?

MR GAME: 53.

THE COMMISSIONER: 53.

20 MR GAME: "And they wanted to know," that's to say that's not just a reference to Mr - - -

THE COMMISSIONER: Sorry, I - - -

MR GAME: 54, the top of 54.

THE COMMISSIONER: What is your submission, Mr Game? What does "they" mean?

30 MR GAME: "They" is not just a reference to Mr Richardson, "they" is a reference, in the mind of the receiver of that, that is a representation that goes beyond Mr Richardson.

THE COMMISSIONER: What does it mean?

MR GAME: It either means people in the Department or political people, both of which he refers to.

THE COMMISSIONER: Why do you say that?

40 MR GAME: I'll come to it in a moment but that, that's - - -

THE COMMISSIONER: Are you saying it's, just let me get that down, it's not just Mr Richardson it's political people you said.

MR GAME: Or people in the department, the people, that what he says, "The people I'm dealing with, I can't tell you who they are." That is to say it's not just Mr Richardson that he's talking about.

THE COMMISSIONER: But I don't know, what does the meaning of "what legs is there in this"?

MR GAME: They want to know, these people, whether it's going to be difficult because Mr Medich has now been connected with a fire.

THE COMMISSIONER: Where do you get that from?

10 MR GAME: Oh, well, because that's what the, "what legs is there in this" is the issue. That's - - -

THE COMMISSIONER: Well, I, I don't, see that. Can you explain that to me?

20 MR GAME: Yes, because that's what, that's what they're talking about and that's what he said they were talking about. Then it goes on, "heavies and whatever," that's all talking about the negative fallout from the press article the previous day connecting Mr Medich with the firebombing so the question is whether or not this is adversely affecting the Badgerys Creek development. That's - - -

THE COMMISSIONER: Well, all right, I understand - - -

MR GAME: So, so then - - -

THE COMMISSIONER: I understand that but I, you will have to persuade me and Mr Medich said that he was intending to refer to Mr Richardson, didn't he?

30 MR GAME: No, that's the lobbyist is Mr Richardson.

THE COMMISSIONER: Yes.

MR GAME: He's not saying that "they wanted to know" is Mr Richardson.

THE COMMISSIONER: What did he say "they" meant?

MR GAME: He said he didn't know.

40 THE COMMISSIONER: Well - - -

MR GAME: But, but it must be somebody that can influence the decision and - - -

THE COMMISSIONER: Who can influence the decision - - -

MR GAME: Well, I'll come to that.

THE COMMISSIONER: - - - as a matter of fact.

MR GAME: No, I'll come to that in a moment because he's, the implication is he's talking about people as high as ministers when you take both together.

THE COMMISSIONER: Both of what?

MR GAME: This, this extract with the latter extract.

10

THE COMMISSIONER: Which is the latter one?

MR GAME: The one at the end. I'll come to it shortly but can I just finish this one?

THE COMMISSIONER: All right, yes.

20

MR GAME: Now, this says, "The people I'm dealing with, I can't tell you who they are," i.e. it's a secret. Now then, "They reckon," this is now further down on page - - -

THE COMMISSIONER: Sorry, there's obviously some, I'm under a disadvantage in knowing "what legs in this" means?

MR GAME: Well, "the legs in this" - - -

THE COMMISSIONER: Do we need an interpreter?

30

MR GAME: No, but in my submission it's tolerably clear if you go back to two-thirds of the way through - - -

THE COMMISSIONER: Well, I mean, normally if one uses that in the vernacular it means if something has legs it means will it proceed or will it fail. If it hasn't got legs it'll fail. If it's got legs it will succeed.

MR GAME: Yes.

40

THE COMMISSIONER: Now I'm applying that meaning to this. I just don't see how it relates to this.

MR GAME: Well, because on the previous, on the page 53 it says, he's seen the article, he knows everything about the newspaper article and everything and then it comes into this so it's, it's clear and Mr Medich himself accepted in cross - - -

THE COMMISSIONER: Who is he?

MR GAME: Oh, that's a different he but we now swing in from that into - -
-

THE COMMISSIONER: But who is the he?

MR GAME: That's Mathieson, he.

THE COMMISSIONER: Who's Mathieson?

10 MR GAME: He's the person that rang Mr McGurk the night before to tell him that Mr Medich had threatened him on the phone that night.

UNIDENTIFIED PERSON: Amazing Loans.

MR GAME: And he's in respect of, he's in substance on the other side of the dispute in Amazing Loans.

THE COMMISSIONER: So - - -

20 MR GAME: Yeah. And then he says, "And by the way," so he's swinging into what flows from that article.

THE COMMISSIONER: "And they wanted to know what legs is there in this," meaning?

MR GAME: Meaning that this is, that this newspaper article is going to get in the way of, of the Badgerys Creek project being pushed through. "Yeah, I know. Is there legs in the allegation?" That is to say, is there legs in the, the - - -

30

THE COMMISSIONER: I can understand that.

MR GAME: Now, and then he says, "the people I'm dealing with."

THE COMMISSIONER: With the help of, with the help of the sotto of (not transcribable). I actually feel that she's pulling at my gown.

MR GAME: Now - - -

40 THE COMMISSIONER: All right. Understandably, and now, and I'm sorry you've had such difficulty in explaining it to me but I now understand what you say what legs there is in this in the Badgerys Creek, yeah, I have to say that I think that it's extremely vague.

MR GAME: No, I understand that too. But then it goes on, then it goes on page 54, and it says, "They reckon I've been mentioned in four different places," and then McGurk says, I don't say they are these, whoever these people - - -

THE COMMISSIONER: Where is “they”?

MR GAME: It’s about line 13 on page 54.

THE COMMISSIONER: Yes, I’ve got it, yes.

MR GAME: One of my problems, Commissioner, is I noted up an earlier
10 version and so I’ve got to change the numbers. Now then, sorry, and then
we come to the bottom of that page, “Yeah, he’s a lobbyist.”

THE COMMISSIONER: “It’s a lobbyist.”

MR GAME: Sorry, “It’s a lobbyist but close to the government.”

THE COMMISSIONER: “Who’s putting pressure on you?” that’s the
question.

MR GAME: That’s right.
20

THE COMMISSIONER: “Who’s putting pressure on you,” but is there
pressure, the pressure comes from what legs is there on this?

MR GAME: That’s correct. The pressure is - - -

THE COMMISSIONER: So it’s a lobbyist who’s putting the pressure so
why is, why is “they” not the lobbyist?

MR GAME: Well, because then when you go on it, “they”, “they” seems to
30 go beyond the singular, “the people I’m dealing with it” but then on top of,
sorry, then towards the - - -

THE COMMISSIONER: You better, look, Mr Medich is no grammarian. I
mean, the fact that he uses plural instead of singular has no persuasive effect
on me.

MR GAME: I’m more of a subjunctive person myself. Now, but then we
go on, “Here you are getting this up and you’re asking the government to
40 push the f-ing thing through.” So the implication is - - -

THE COMMISSIONER: Yes, somebody (not transcribable) that.

MR GAME: - - - that there is some corruption higher up. This is all
coming from Mr Medich, this is not - - -

THE COMMISSIONER: That’s not necessarily an inference, is it?

MR GAME: Well, then when you come - - -

THE COMMISSIONER: I mean, why is it, assume, assume that it's Mr Richardson who he's talking about and Mr Richardson is trying to persuade the government perfectly legitimately to give an approval for Badgerys Creek and here comes this newspaper report about, and where Mr Medich is mentioned four times which does nothing for his reputation and nothing to assist the lobbyist and, and the lobbyist says to him and you're asking the government to push this through, it's ridiculous.

10 MR GAME: If that was all there was that might be so but this is in the context of other bits of conversation, including later things, and the overall context is a corrupt one.

THE COMMISSIONER: What else, okay, all right. Let's - - -

MR GAME: All right. And he says, "I've said it's got no legs to it. It's b-shit," and then, "That's the type of headache I've been reading in the newspaper." Then it goes on, then McGurk says, "Would that even have an impact on you getting that thing at Badgerys Creek," a legitimate question
20 to ask. Medich says, "I don't think it should have any impact but." McGurk, "But why, why would they think it would?" "Well, you know why." Now this is, this is a suggestion, he's trying to make Mr McGurk conclude that there is some corrupt arrangement. He says, "Well, you know why, i.e., wink wink, nudge nudge." Then, "Why?" "Now, if they don't put it through as asked bloody so, I won't, so what I might, well, bloody bump them or something like that particularly if they're being paid or whatever, you know." So what he's saying is the politicians, why would they put it through or the politician or whoever else has the influence capable of pushing this thing through, why would they do that even if they
30 are being paid when they may be bumped off. That's the inference.

THE COMMISSIONER: All right. That's your submission?

MR GAME: Yes.

THE COMMISSIONER: And how does that help - assuming all that's correct - - -

40 MR GAME: Yes. I've just got to take you to a short part of the second conversation.

THE COMMISSIONER: Yes.

MR GAME: Now, so when you go to page 79, sorry, when you go to page 80 line 20 it says (not transcribable), says, "Your preference to Sam", sorry, page 80 first of all at line 3.

THE COMMISSIONER: He's now talking about Gerroa?

MR GAME: No, but he's talking about Gerroa but he's referring back to Badgerys Creek.

THE COMMISSIONER: Where do you get that?

MR GAME: That's the inference from this conversation that he's referring back to Badgerys Creek.

10 THE COMMISSIONER: What conversation?

MR GAME: This conversation about Gerroa is Mr Medich's conveying something about what he has done in respect of Badgerys Creek.

THE COMMISSIONER: Well, you'll have to explain that to me. Because he starts off at page 79, Medich asks, "What do you intend to do with Gerroa?" Then there's a discussion about Gerroa all along that page.

20 MR GAME: Gerroa is in the future so nothing to do with any corruption in respect of Gerroa so far, it's all about something that may happen in the future.

THE COMMISSIONER: That's right.

MR GAME: In fact some time in the next two years before the Labour Government gets thrown out according to Mr Medich.

THE COMMISSIONER: Yes. Yes.

30 MR GAME: So it's about the future but Mr Medich is conveying the corrupt arrangements he has in place, that's what he's conveying.

THE COMMISSIONER: Yes. About Gerroa, to do with Gerroa?

40 MR GAME: No. Yes, but - no, from Badgerys Creek but to do with what will happen in respect, what can happen in respect of Gerroa. So he's, as it were, feeding from the earlier conversation about Badgerys Creek and then he's feeding that into this in respect of what may happen in respect of Gerroa. It's got nothing to do with anything at all that's happened in respect of Gerroa already. That's all prospective. This is telling him about the corrupt arrangements he has in place in respect of Badgerys Creek, nothing is in place in respect of Gerroa itself and nothing has happened.

THE COMMISSIONER: Right.

MR GAME: Now, Commissioner, then when Medich comes back at page 79 line, sorry, towards the bottom of page 79 when he says, "Well, I've got connections there too, again, if they can get it through they can get it

through but I can get it through too.” And then Medich says, “You’ve still got to pay them though, they don’t do it for nothing.” And he’s talking about his corrupt relations that he’s asserted in respect of Badgerys Creek.

THE COMMISSIONER: It doesn’t follow necessarily that because he says that he has existing corrupt connections including Mr Haddad and when he is talking about “them” or “they” then he’s referring to Mr Haddad is he?

MR GAME: No. Mr Haddad is a throw-in at page 80.

10

THE COMMISSIONER: Yes. “So it’s the whole bloody lot of them” is what he says.

MR GAME: That’s right.

THE COMMISSIONER: So that doesn’t mean that the whole bloody lot of them are the people who he’s talking about at page 55.

MR GAME: No, but if you were in the position of Mr McGurk you would treat those, because he’s talking about something that’s in place in respect of Badgerys Creek you would treat them as being one of the connected pieces of information.

20

THE COMMISSIONER: I understand the argument.

MR GAME: Now, then he says, then he names Sam Haddad, “You’ve still got to pay them again (not transcribable)” he means the corrupt connections. Then he’s referring to Sam Haddad, “the whole bloody lot of them”, that means whatever the largest group of people he needs to pay to get his plan through. Then he says, it comes to him, before it goes elsewhere, the Minister he signed off on it. Now, he made that same representation back on the earlier page and it’s a false representation but he’s suggesting - - -

30

THE COMMISSIONER: Sorry, the earlier page? Which page?

MR GAME: The previously, sorry, the next page, sorry. The Minister here signed off on it, there is a false representation that the Minister has signed off on it with respect to Badgerys Creek.

40 THE COMMISSIONER: Now, what line are you talking?

MR GAME: Page 80 line 22.

THE COMMISSIONER: I know that. Where else is it?

MR GAME: It’s coming up in a minute. Then he says, “So he be your connection, yeah.” And that is an admission by Mr Medich and in my submission when he said it was - and that was again an attempt to distance

him from it. Then he goes on, Mr McGurk says he'd rather go down his path. And then Mr Medich says that in page 81 in the middle, at line, middle of page, "Well, at the moment this slow mob mightn't be here for any longer than two years the way things are looking i.e. he's got some means of getting it through while the Labour Government's in which he won't have when they're gone." And he's made a number of corrupt references so that he would leave in the mind of Mr McGurk that it went as far as politicians and that's why he says it.

10 And then McGurk says, "Well, that's right (not transcribable)." Then Medich says, "You've got to get it rammed through now, i.e. you've got to get it rammed through now before the Labour Government is thrown out." So that what he's saying is that his corrupt connections will only work while the Labour Government is there and they won't work at some later time. And that he's already mentioned the Minister before, he's about to mention the Minister again. So as I say when you look at the whole thing it goes a lot further than the limited life it's been given by counsel assisting.

20 Then he says, "I don't know if you want to use him on your Badgerys Creek thing." So McGurk brings it back. Then if we go on. Then you can see at page 82 that it's clear that they're talking about Badgerys Creek, they are talking about what's happened in respect of Badgerys Creek because that's the infrastructure levies. And then he says, again he says, "It's been", sorry, and then he said, it may or may not be significant, "I've had a tip-off again - - -

THE COMMISSIONER: Where's that?

30 MR GAME: 82 about line 7. "I've had a tip-off." So again he's suggesting he's got some improper source of information that gives him tip-offs.

THE COMMISSIONER: Yeah.

MR GAME: And then he says, "It's been past the Planning Minister and all those things." That is false but that is a representation that somehow or another the Planning Minister has approved it and it implies - - -

THE COMMISSIONER: Yes.

40 MR GAME: So that implies corruption. And it's that combination of things, Commissioner, which in my submission gives these conversations much more life than - - -

THE COMMISSIONER: Well, again why is it various Ministers of the Crown?

MR GAME: Well, I'm not - all I can do is make a submission - - -

THE COMMISSIONER: Well, the allegation - - -

MR GAME: No, I understand that. But it implies - - -

THE COMMISSIONER: The fact that X might be corrupt does not justify one in alleging corruption against Y.

MR GAME: I understand that. But this extends to the allegation that it, it extends to those who can ultimately make decisions that enable the thing to
10 be put through, that's to say before the Labour Government gets thrown out.

THE COMMISSIONER: The allegation, the statement has been past the Planning Minister carries with it no suggestion of corruption on the part of the Planning Minister.

MR GAME: No, Commissioner, but - - -

THE COMMISSIONER: Do you agree with that?

MR GAME: Well, I don't, I agree with it if you talk about it in a purely
20 specific way.

THE COMMISSIONER: Do you agree?

MR GAME: No, I don't agree that it doesn't satisfy the description of Ministers in terms of allegation 2.

THE COMMISSIONER: These are very serious allegations.

MR GAME: I understand that.
30

THE COMMISSIONER: I think it's very important that before people make these allegations they should be reasonably careful - - -

MR GAME: I understand all of that.

THE COMMISSIONER: - - - before a basis for it. Now what you have done is put together, very well if I may say so, a lot of pieces of straw which may make a brick and I'm not sure if the brick's the Planning Minister and
40 I'm even less sure that it's Mr Haddad.

MR GAME: I'm not, well, Commissioner, you understand that my position means I can do no more than put to you what is being inferred from this because - - -

THE COMMISSIONER: And is, and the thing is whether, the question is, I mean, all this long debate and I'm not saying it's not necessary, is all to do with whether there should be some adverse inference drawn against

Mr McGurk for reporting to people what is set out in allegation 2 and for that to get home, for you to persuade me that there should be no allegation on that, it's not enough I think to show me that there are a lot of small things which, when put together, could possibly show that somebody in the government was corrupt. You'd have to actually show - - -

MR GAME: Well - - -

10 THE COMMISSIONER: Because that's one thing but here he could have been identified.

MR GAME: Well, Commissioner, all I need to put is, in my submission, that this is a reasonable, that a reasonable inference that is the, is, can be drawn from this material, the inference that is to say that I've been bringing together. Then in terms of this allegation that's a question for you, Commissioner, ultimately whether or not - - -

THE COMMISSIONER: I can assure you I'll think about this carefully.

20 MR GAME: And again, it's no part of my case, my interest to prove that anything is true.

THE COMMISSIONER: Is true, I understand.

MR GAME: What I want to do is to prove that Mr Medich - - -

THE COMMISSIONER: I understand.

30 MR GAME: - - - did make these representations.

THE COMMISSIONER: Yes, so you want to avoid an adverse inference in - - -

MR GAME: That's correct.

THE COMMISSIONER: - - - in relation to allegation 2.

40 MR GAME: Yes. Now, I've said what I wanted to say about ones that come from Mr Byrnes. In respect of - - -

THE COMMISSIONER: Yes. Some that come from Mr Byrnes are supported by the journalists.

MR GAME: I think, I, yes, I - - -

THE COMMISSIONER: And when they're supported by the journalists I will accept what the journalists say.

MR GAME: Yes, and I won't do the exercise but one can (not transcribable) analysing Mr Lang's statement apart from representations in, allegations might come from Mr Byrnes and part might come from, from the journalists or that they - - -

THE COMMISSIONER: But I think that it's, I think that it is, I think it's important just to go to it, Mr Game, so that we know exactly what we're talking about. Let's just, I think that it's, this is sufficiently important to go to each particular allegation and the next allegation is 4.

10

MR GAME: Now 4 - - -

THE COMMISSIONER: Now 4 depends on Mr Byrnes, doesn't it?

MR GAME: Yes.

THE COMMISSIONER: All right. And now, that's got nothing to do with the recording. Four has got nothing to do with the recording.

20

MR GAME: That's correct.

THE COMMISSIONER: So the position that I am placed in is you don't cross-examine Mr Byrnes, there's no, I've got no evidence about anyone else telling Mr Byrnes, Mr McGurk anything and I can't, can't quite imagine anyone telling him but I mean whatever it is it's a completely notional or theoretical or speculative possibility and so really where, the decision depends on whether I'm sufficiently satisfied by Mr Byrnes's evidence that, that Mr McGurk said to him what Mr Byrnes said he said to him, is that right?

30

MR GAME: Yes.

THE COMMISSIONER: Now, there is an issue here and I mean I, I've not made by my mind up about it at all but it's troubling me. And that is where, that Mr Byrnes and the journalists often coincide. There's no allegation in 4 about the journalists. By the journalists I mean the reports that they made. But if the journalists corroborate Mr McGurk on some matters thereby showing him to be a witness of accuracy in relation to those matters - - -

40

MR GAME: You mean Mr Byrnes.

THE COMMISSIONER: Yes, I beg your pardon. Isn't that a relevant feature of the inquiry in relation to a, typically an allegation such as allegation 4 where it's based on Byrnes alone.

MR GAME: Well, Commissioner, in my submission - - -

THE COMMISSIONER: So you understand, why would Mr Byrnes be telling the truth in relation to some but not others?

MR GAME: Well, Commissioner - - -

THE COMMISSIONER: That's a legitimate question.

MR GAME: Also of corroboration in defence but I don't mean critically but it is - - -

10

THE COMMISSIONER: Look, I'm not, I need to know what your answer is to this because this is a real issue.

MR GAME: Well, Commissioner, my submission is that where Byrnes and McClymont and Carson coincide then it does strengthen that allegation but in my submission you would be cautious about saying that it strengthens any other allegation if, if you have reason to exercise caution about Mr Byrnes's evidence.

20 THE COMMISSIONER: Generally.

MR GAME: Yes. That's, that's where the answer to that decision would be found.

THE COMMISSIONER: Well, that's a matter, it's a matter of weighing it up then and just deciding how, what I, where, what, what weight I believe could be attached to Mr Byrnes alone, taking into account the fact that in a number of the allegations he says more or less the same as Ms McClymont and Ms Carson and they are to be believed.

30

MR GAME: Yes, but the question that you're raising is whether or not allegation 4 gets credibility from - - -

THE COMMISSIONER: From that.

MR GAME: Yes, I'm, my submission is that if you have doubts about Mr Byrnes's reliability, then you should exercise considerable caution.

40 THE COMMISSIONER: I understand, I understand that. I accept that, but I'm, anyway I put the point to you. All right. Now, let's go to, are finished with that?

MR GAME: Yes.

THE COMMISSIONER: Then allegation 5 and 6, now, they come from Mr McGurk and they are based on Ms McClymont's account and Ms Carson's account, no Byrnes. And what are you saying about that one?

MR GAME: Well, Commissioner, I have a rather obvious problem which is I don't have a client to take instructions from.

THE COMMISSIONER: I know, and I have got a rather obvious problem in that I've got no evidence.

MR GAME: No, I understand, but all I can put to you, I can't put to you that those representations were not made by Mr McGurk. I don't - - -

10 THE COMMISSIONER: I, I will, my present, my present intention unless you can, and I think that you accept that, is that I, there is nothing to show that anything the two journalists said is other than entirely reliable.

MR GAME: Yes. There is this area that I put to you before which didn't appear to be a winning submission but in my submission one does have to exercise some caution about what, what may have been in Mr McGurk's mind or his (not transcribable) representations.

20 THE COMMISSIONER: I don't know what that's got to do with it.

MR GAME: All it's got to do with is, well - - -

THE COMMISSIONER: You mean that he can go and - - -

MR GAME: No, no, I - - -

THE COMMISSIONER: - - - and say these awful things about people because he's a bit, because he's nervous?

30 MR GAME: He's in fear for his life (not transcribable).

THE COMMISSIONER: Yes, fear for his life but what's that got to do with the council and his mayor and his wife?

MR GAME: Well, I don't know, but a person might exaggerate for that reason. A person might minimize for that reason.

THE COMMISSIONER: All right.

40 MR GAME: That's the, that's the area that I'm trying to put to you.

THE COMMISSIONER: It's very difficult because I'm not in a position to assess the degree of fair if any, by Mr McGurk. Even the article that you've shown me, I mean the fact that he tells a journalist this, doesn't mean that it's true. I mean, I just have no idea what the truth of any of this is, but I do have cogent evidence from the journalist that this is what Mr McGurk said.

MR GAME: Yes. Now I think the same goes for allegation 6, which - - -

THE COMMISSIONER: The final six are together.

MR GAME: Oh, that's right. Then 7, I think is just Mr Byrnes.

THE COMMISSIONER: 7 is Mr Byrne's (not transcribable) but Mr Byrnes is supported by the recorded conversation.

MR GAME: Oh, yes.

10

THE COMMISSIONER: And there you can get nowhere, I don't think, from, from hopping from one little bit to another and taking stuff out. I don't think there's anything in the transcript relating to 7. Am I right?

MR GAME: Well, there is one where he says he got through a DA in record time.

THE COMMISSIONER: Now, in the local area council area in question?

20

MR GAME: I don't know, Commissioner. I don't know what that local area is.

THE COMMISSIONER: Well, it's the allegation in 5, but I'm not sure, I don't know what it is either.

MR GAME: Well, all I can refer you on allegation 7 is the portion of the transcript where he says - - -

THE COMMISSIONER: Right. Can you just give me the page, please.

30

MR GAME: Yes. Page 17. I've had a DA on a house in four months, which is still a record there. Now, I don't know if it's that council or not.

THE COMMISSIONER: And does he say, make payments?

MR GAME: No. But the implication is that he's able to do it quicker than anybody else.

THE COMMISSIONER: All right. All right.

40

MR GAME: There's no way that guy, the barrister would've got it through.

THE COMMISSIONER: According to Mr Byrnes, Mr McGurk told him that Mr Medich admitted making these corrupt payments or causing them to be made. And then he says it's in the transcript and it's not. Now, it's a long bow to get from what you've referred to in the transcript to these specific allegations that Mr McGurk makes.

MR GAME: I understand that, Commissioner.

THE COMMISSIONER: You know, look, I also understand your position. I'll have to weigh it up. And I will. And 8 is falls away.

MR GAME: I think 8's gone.

THE COMMISSIONER: 8's gone. And 9 and 10 are the same as 4.

MR GAME: And then - - -

10

THE COMMISSIONER: So 4, 9 and 10 are together. Because that's Byrnes alone, no journalists, no recording.

MR GAME: Yes. Now - - -

THE COMMISSIONER: 11 has nothing to do with McGurk, so you can forget it. 12 doesn't apply and 13 is not McGurk. So we've dealt with them all.

20

MR GAME: Yes, I think so, Commissioner. The only, I won't dwell on it but I, I began by stating the interest that I represented particularly focused on the reputation of Mr McGurk.

THE COMMISSIONER: I understand. Yes. Now before you go, do you want to go last, Mr Faulkner. What about Mrs Kelly? Do you want to say anything Mrs Kelly?

MRS KELLY: No thank you, Commissioner.

30

THE COMMISSIONER: No thank you. Right the floor is yours Mr Faulkner.

MR FAULKNER: Thank you, Commissioner. In making my submissions, Commission, I'm bearing in mind the implications, to use my words, my word, that you have given so far as to where, where your findings may be getting and you've given those indications from day one. So I have to front up and deal with them.

40

THE COMMISSIONER: Well, it would be a disaster if I didn't give you indications. A disaster, not for me.

MR FAULKNER: If I could hand up a short, I've written out my submissions. It's only two a bit pages. If you would then just take a minute to read through that and then I'll speak from there.

THE COMMISSIONER: Yes. Thank you. That's helpful. All right. I understand, I understand most of them, but not all, Mr Faulkner. Do you want me to tell you what I, what I have problems with or do you want to

start at the beginning. It was very helpful. Thank you. And I really don't think that there's much more you can say about some of things unless you really want to.

MR FAULKNER: That's right. So I'm going to confirm the, the balance of my submissions to just a few specific things.

THE COMMISSIONER: I don't, can I just tell you what I don't understand?

10

MR FAULKNER: Yes.

THE COMMISSIONER: Paragraph 6, well, 5 and 6 or 4, 5 and 6. There's no, I don't understand that because there's been an allegation that Mr Medich, there's no suggestion that Mr Medich was guilty of corrupt conduct because this Commission has got no jurisdiction against Mr Medich. The issue is whether Mr Haddad or public officials are guilty of corrupt conduct. And, and the point about the transcript, the really important point about the transcript as far as the Commission was concerned is that it constituted its prima facie evidence given in a private conversation by a, by an experienced property developer that he was bribing (not transcribable) people in the Department of Planning. And in the particular circumstances in which this was found, it was, it seemed to be a matter of some importance and certainly it was taken by the public as that. Now, if, if what, if Mr Gormly's construction of what was said is correct, that said by Mr Medich is correct, Mr Medich was saying that he had Mr Haddad and (not transcribable) people in the Department of Planning and perhaps ministers in his pocket. That he could pay them and they would do things. That's corrupt conduct on any of the statutory definitions.

20

30

So I don't understand 4, 5 and 6 because that seems to go to the question whether Mr Medich was guilty of corrupt conduct and that's not what we're looking at.

MR FAULKNER: Well, we thought we were. You see - - -

THE COMMISSIONER: How can we look at Mr Medich, we've got no jurisdiction.

40 MR FAULKNER: Well if we look at paragraph 5 - - -

THE COMMISSIONER: We do, Mr Gormly, we do.

MR FAULKNER: Yes, we do and it's set out in paragraph 5.

THE COMMISSIONER: I see.

MR FAULKNER: And we were not certain, well, we're certain now and we understand that there is no allegation made.

THE COMMISSIONER: Well, no one has said that whatever adverse inference is drawn against Mr Medich it would be of corrupt conduct. So do 4, 5 and 6 fall away then?

10 MR FAULKNER: Well, 4 and 5 might fall away. 6 is part of the explanation as to the words, the relevant words used in the transcript that I'll come to in a moment. But it's a matter for you, Commissioner, (not transcribable)

THE COMMISSIONER: But I'm just trying to understand what you're getting at. If you read that 4 and 5 don't, in the light of our discussion don't apply but 6, why does 6 apply? As I've explained we are looking, the corrupt conduct that this inquiry is investigating is corrupt conduct alleged to be against various persons in the Department of Planning and Ministers of the Crown. So why, what's 6 got to do with that?

20 MR FAULKNER: Well, I'm not going to withdraw 6.

THE COMMISSIONER: Well, can you just explain to me what it has to do with that? Once you get - that representation by Mr Medich if it is what Mr Gormly submits it is a piece of evidence intending to establish the existence of that corruption. It doesn't mean that it's proved but it's a piece of evidence. So it means that on that kind of evidence the Commission could act.

30 MR FAULKNER: Yes.

THE COMMISSIONER: And it has acted to hold this inquiry partly. All right. 8. I'm not sure what you mean by policing. I mean I actually don't quite understand the fuss that's been made of all of this by you and Mr Game really unless it relates to the private civil litigation. I mean, the worst that we can do is say we don't believe Mr McGurk, we don't believe Mr Medich.

MR FAULKNER: What we're saying - - -

40 THE COMMISSIONER: What is the - - -

MR FAULKNER: What we're saying in paragraph 8 is in support of a submission that I'll make in a moment that this was after all a very private conversation, private and lawful conversation, it wasn't a conspiracy - - -

THE COMMISSIONER: That's why it becomes so powerful.

MR FAULKNER: - - - between private persons and so all we wish to do is to remind the Commission that it is dealing with rights of my client as a private person to engage in private conversation. I know the Commission is entitled to investigate it but it's - - -

THE COMMISSIONER: Mr Faulkner, I mean I don't want to indulge in hyperbole but no kind of private conversation, the fact that our conversation is private does not justify lies that harm other people if that is what happened.

10

MR FAULKNER: I'm not putting before this is justification. I'm not doing that. All I'm saying is that that is to be borne in mind when you come to be considering what it was that Mr Medich was intending to convey and that Mr McGurk might've understood.

THE COMMISSIONER: All right. Well, I think I've said enough now about your written submissions because you understand where I am at them and I certainly understand all the rest of it and I've got no questions about those.

20

MR FAULKNER: I submit that it's not necessary for the Commission to determine whether Medich boasted to McGurk that he could achieve his goals by corruption. What I mean by that is the Commission need go no further and as it will do in my submission except without qualification the evidence of Mr Haddad and also - - -

THE COMMISSIONER: That's quite right. The Commission actually does not have to make any adverse finding against Mr McGurk or against Mr Medich. It is not absolutely necessary for the findings of the Commission in this case. There is a temptation to do that (not transcribable) there is. Only the temptation is not one that arises lightly or is precious or is based on a subjective view. It's simply to express disapproval of conduct that if, if false has unjustifiably caused a great deal of harm and expense.

30

MR FAULKNER: My submission is that the Commission would not go on and make findings that were not necessary to determine the outcome of the allegations, that is, if the Commission determines those allegations as I submit it will without having to find whether or not Mr Medich boasted to McGurk that he could achieve goals by corruption but the Commission will refrain from doing so. Alternatively if the Commission finds, was of the view that it ought to go ahead and make that finding in support of some primary issue or in support of a, what I'll call a public interest issue then in my submission the Commission will not find that Mr Medich did intend to boast that he could achieve goals by corruption, that is, that Mr Medich did not have that intention. And I want to confine my submissions now to that point alone. And I bear in mind as I've said earlier what - - -

40

THE COMMISSIONER: That he did not have the intention to do what?

MR FAULKNER: Did not have the intention to boast to McGurk to use the expression the counsel assist - - -

THE COMMISSIONER: Ought to distance himself from Mr McGurk.

MR FAULKNER: Ought to distance himself from McGurk by contending that he could achieve goals by - - -

10 THE COMMISSIONER: So what do you say he was doing?

MR FAULKNER: I say he was doing what he says in his evidence.

THE COMMISSIONER: He was talking about consultants?

MR FAULKNER: He was talking about everybody in one context but he was not talking about anyone other than consultants insofar as he was talking about paying persons.

20 THE COMMISSIONER: I understand. All right.

MR FAULKNER: I'll get there shortly, Commissioner. Can I say this. Overall I was in error when I stood up a while ago and said all fingers were pointed at me, I'm grateful for Dr Renwick's submissions and I support those insofar as he was making submissions by way of caution as to how to use or the extent to which the Commission would use the tape recording and the transcript of it.

30 THE COMMISSIONER: I would've thought that Mr Game would've thought that very often fingers would be pointed at him so I don't think that there's been any favouritism with regard to the pointing of fingers.

MR FAULKNER: Yesterday I think and Monday and I think perhaps today, Commissioner, you have used the expression in different contexts as to the plain meaning of words used that we're going to have a look at in a moment. Now, I want to dissuade you from a consideration of the words on that basis. In my respectful submission you will never hear a conversation in looser or more inexact words than what you've heard here so far as looseness, inexactness, talking over each other, coming from different
40 directions this is a gold medal winner.

I mean, and there is a temptation, there is a strong temptation and we've all engaged in it when we've been considering the transcript, to go straight to the, when considering the tape recording, the audio, to go straight to the transcript but the moment you look at the transcript it has, for example, a pause between every question and answer. The tape itself is not like that and my submission is, Commissioner, that the transcript should be used only as an aid and when you're going to determine, which you must if you go

down that path, you will need to make findings as to what was said but you, but you must do so, in my respectful submission, only from the audio, aided of course by the transcript that's come forward. But it must be the audio because of its, its, it is, it is the only perfect record as to what was said and done and it's, I'll withdraw that. It is the only record, grossly imperfect as it is, as to what was said, as to what the expressions were and, and, and, and the, the reactions or, or emphasis by way of body language of the participants which we will never know.

10 THE COMMISSIONER: We do know one thing, and I want to ask you about that, one thing that may be quite powerful. Mr McGurk had a very clear meaning of what was said. He, not just from what he said to people about what he'd been told, it's what he did. He went and made about, I think it is, seven copies of this transcript and he distributed them around a whole lot of solicitors and got them to keep these transcripts and it's obvious, it's obvious why he did that. He had, there are two reasons. One is it's quite plain from the money he spent and the trouble he went to in making copies of the disc that he thought it was very important and that he could use it against Medich. He told people that.

20

MR FAULKNER: Yes.

THE COMMISSIONER: That's one. Two is he thought that somebody would try and steal them from him or take them away because there'd been the interrupted break-in at his home and he wanted to have more than one copy around so he made seven. Now, it is very difficult to suggest that Mr McGurk didn't think that he had the goods on Mr Medich because of what Mr Medich had said in that conversation and those goods Mr McGurk described. He told everybody that what he had been told was that

30 Mr Medich had been saying that he'd got, he'd bribed all these people and they were in his pocket, et cetera, et cetera. Now, it's quite obvious that Mr McGurk understood this conversation in a particular way. These are people who knew each other, had done business together with each other. They have their own language almost. Why should I go behind that to go further than that?

40 MR FAULKNER: Well, I'll need to develop why but I would seek to dissuade you from a position that Mr McGurk, that you would that Mr McGurk simply accepted what was said without question as meaning that Mr Medich was what, had the capacity or had corrupted officials. There was another reason why Mr McGurk might have sought to, might have sought to ensure the, the, the existence of the tape and that is if he intended to continue to use it in a, in a - - -

THE COMMISSIONER: He did.

MR FAULKNER: - - - against Mr Medich.

THE COMMISSIONER: He did.

MR FAULKNER: And for no other reason, not that he, not as to what he thought was the correct or different version of the words but what he thought - - -

THE COMMISSIONER: But, what, he could only use it against him if he thought it meant something.

10 MR FAULKNER: If they thought he could create trouble for Mr Medich's business.

THE COMMISSIONER: All right.

MR FAULKNER: What you don't have when you come to consider the audio is the body language of the parties. We do know that it was a, a, a, a tense atmosphere between two business, former business colleagues who were falling out and, and making allegations each against the other. We do know that, that Mr Medich did not wish to attend and we do know that, now
20 that Mr McGurk had his own agenda. I'm mentioning those matters to indicate that the body language between the parties must, would, if known, had it been videoed, would have given you a better appreciation as to words, the meaning of words when they were spoken.

I want to give you two examples. The first, neither of them are original but in relation to spoken words, the old example is I can say, "You're right, I'm wrong, I should apologise," or I can say, "You're right? I'm wrong? I should apologise? The same words, completely different meaning. We know the difference there because you've heard the different intonation.
30 When it comes to Mr Medich saying, "mmm" or "yeah" on page 82, it'd be, you could consider it on this basis if, if you and I were having a conversation and you'd said something to me and I had my back to you and said, "mmm" or "yeah" you would not know if I was saying that with a look of despair or distain or if I was expressionless. Now, I'm mentioning that because when, as when in appellate courts the judges of appeal are testing allegations, are testing submissions by way of challenge for a trial judge's finding of fact in relation to a witness.

I will say that the trial judge had an advantage and that the advantage was
40 hearing and seeing the witnesses where you don't have, you only have one of those and what is absent is seeing these people. Now, when they, and observing the body language. That's what the advantage is that we talk about in the, on appeals. It is, in layman's terms, the judge's advantage of observing the body language. So when you come to deal with that part of the transcript at the critical page 82 I'd ask you to bear those matters in mind and not move hastily towards any conclusion that appears merely from an examination of a nicely set out transcript with questions and answers by the two parties involved.

If I can turn then to, if I could ask you, Commissioner, to look at page 82 of the transcript please. Perhaps because I have a fixation about this having begun my consideration of it by looking at an earlier model of this transcript, can I hand to you, please, an earlier marked up version of what is now page 82.

Now, I'll look at, I'll go first to the transcript.

10 THE COMMISSIONER: This is a different page.

MR FAULKNER: Yes, and so you will, you will see - - -

THE COMMISSIONER: I mean, this is an entirely different page.

MR FAULKNER: It's only, well, I'll come to it in a moment. If, if we go -
--

20 THE COMMISSIONER: Nothing on them, nothing on, the present page 82 is on the page I've been given.

MR FAULKNER: No, no, it's not. That, that's the point I wanted to make. If you, on the page I've given you, if you look on the right hand side, I've got there, I've handwritten page 80(1).

THE COMMISSIONER: Yes.

30 MR FAULKNER: And so in the transcript that's the exhibit you'll find that line at page 80.

THE COMMISSIONER: So one point, what must I look at?

40 MR FAULKNER: If we can go first of all to the transcript that is the exhibit, just put my single page aside for the moment and you've now been taken to this by others often. Can I just summarise it briefly then. At page 79 of the formal transcript, the exhibit, at line 14, "What do you intend to do with Gerroa?" and then there's discussion about that and then at line 27 Mr McGurk, "They now's the time to go back in and do whatever you got to do now in terms of development since now's the time for it." Mr Medich, "Well, I've got connections too so I don't care. They can get it through, they can get it through, I can get it through too." And Mr McGurk, "Well, if you think your connections are better, you should use your connections." "Yeah" - - -

THE COMMISSIONER: Mr Faulkner, I don't want to be rude but I'm really, it has been read to me about four, five times and can't you get to the real point that you want to make?

MR FAULKNER: I am. Now, if we pause there. There is, that is the only, the only, no, I'll withdraw that and start again. Without that line, "Yeah, you've still got to pay 'em though, they don't do it for nothing" of course we would not be in this inquiry, in my submission. That's the only reference here from my understanding as to payment and in the end what's - -

THE COMMISSIONER: Well, where is the other one in relation to Badgerys Creek?

10

MR FAULKNER: On this page what you are being asked to do is to connect line 3 with line 21 so that where there's a reference to connection there it's a reference to payment at line 3. Now, if we go down then to the, on page 80 at line, not, line 9, "Well, he's a consultant and that's what he gets paid to do. In terms of the other connections you've got, are they consultants?"

20

Now, I just want you, if you would, Commissioner, look at the page that I've given you which is the old page 82 and at line 23 and that is what, I just find it easier to read and deal with and make submissions about without having to do adjustments all the time as to what everybody else's contentions are as to what it means. We say this is what you will conclude when you listen to the tape it says. "He's a consultant and that's, that's what he gets paid to do. In terms of the other connections you've got, what do they do? Are they consultants or council or - -" Well now, can I point these things out. You are being asked to make a finding on the basis that where Mr Medich used the word "connections" including in answer to Mr McGurk's question at the top of page 80 line 2 with a reference to connections, that he means something different from consultants. And I want to submit to you that both Mr Medich and Mr McGurk used those phrases interchangeably, used those expressions, I should say, interchangeably.

30

So if we look at the transcript now at page, the formal transcript at, I'm sorry, can I do it this way. If you can look at the single page that I've handed to you with the old page 82 and at line 11 on that page Mr Medich says, "Well, I've got connections there too so I don't care. If they can get it through they can get it through too."

40

Mr McGurk has just been discussing Mr Boys and Mr Furlong, who are consultants. And so the first submission I make to you is when Medich replied there, he was, he was comparing Mr Boys and Mr Furlong, although they are consultants as persons who could be described as having connections too. If you look at the next line, Mr McGurk says, "Well, if you think that your connections are better, you should use your connections." Now if you go down to line 23 on that page, Mr McGurk says, we all agree now we're referring to Mr Furlong, I think, isn't it?

THE COMMISSIONER: Yes.

MR FAULKNER: “Well, he’s a consultant. And that’s what he gets paid to do. In terms of the other, the other connections that you’ve got I, do they, are they consultants or councillor?”. And so here we have Mr McGurk referring to consultants or a councillor as connections. Now that, they, that is in my submission the only conclusion that can be drawn from that part of the transcript. That is that McGurk uses connections and consultants interchangeably. Now if we move down, further down that page, that single
10 page I’ve given you at line 26, Mr Medich says, “You’re right there.” Now, first of all that does not appear to be an answer to anything or a comment on anything to what Mr McGurk has just said, except the first sentence.

THE COMMISSIONER: Well, he could be agreeing that they are councillors. That they, his connections are councillors. Well, Sam Haddad, the whole bloody lot of them. That’s what he’s meaning.

MR FAULKNER: Well, well - - -

20 THE COMMISSIONER: They’re not, he’s distinguishing between consultants and councillors. And that’s why he mentions Sam Haddad and the rest, because they are not consultants, they are involved in the government capacity. I mean, that’s one interpretation.

MR FAULKNER: Well, but the difficulty is the words, “You’re right there”, don’t, don’t appear to have anything to do with a question as to who are your connections or consultants. I mean, and what I want to emphasise, Commissioner, is that in my submission, Mr Medich was there answering the first question, more likely than not. Because not only has he done that
30 throughout, sorry, and answered that alone. Not only has he done that from time to time throughout this transcript of the conversation, but he did it in his evidence, when he was giving oral evidence. He, he, we would have to agree, does not listen to the question that he’s asked or often does not do so and answers what he perceives to be the inquiry that’s being made of him. Now for, for us to go on and, and conclude on the next part of the formal transcript at page 80, if you could go back to the formal transcript now, I’ll put that page aside, we get to the bottom of that page, he says he knows Sam Haddad. So he’d be your connection. Yeah. Mmm. Now, in my
40 submission, it is, it’s, it’s bordering on the unfair to seek, to form the opinion against, I’ll withdraw that and start again. My submission, the Commission should not conclude as a fact that where he says there, “So, he’d be your connection” and to which there’s an answer from Medich. But that means, and means only on the probabilities that he’s referring to the people that he said above were his connections who he would pay, for the reasons that I’ve just stated.

THE COMMISSIONER: And who else could they be?

MR FAULKNER: His consultants.

THE COMMISSIONER: How could the Director General, Planning Department be a consultant?

MR FAULKNER: No, no, sorry, I thought you were asking me in relation to who he would pay. Now, at the bottom of the page he's clearly referring to the Minister as, as a connection. What I'm saying, when, when you're dealing with connections at the top of the page, which is 80, line 2, line 3
10 answering the question in line 2, you should not readily conclude that he, that he's using that word in the same meaning.

THE COMMISSIONER: You have made that point.

MR FAULKNER: (not transcribable). I asked you in, in, in considering this issue to observe that he never expressly said that he had paid Sam Haddad. He uses the expression to draw Mr Haddad into the conversation by, now I can't find it, just a moment. In, in, in, in the transcript exhibit at page 80 at line 15 when he uses the expression, "Sam Haddad, the whole
20 bloody lot of them," really, well, first of all, does not easily flow from the questions and answers immediately above and I, I'd made that submission a moment ago except for this. That when Mr Medich in my respectful submission was saying, "Sam Haddad, the whole bloody lot of them," it is consistent with his position, Commissioner, that he was not referring there to people who might be in his employ but all of the people, connections and consultants, who he has to deal with, to use his expression, from top to bottom to be able to get a planning matter through. If I could just have a moment.

30 I do submit that in determining this issue because of its, its potential seriousness as a matter of morality and reputation, that you will apply a test akin to the Briggenshaw test. That is, all I'm doing is asking you, Commissioner, when making that finding, with respect, to continually bear in mind the potential serious issue with which you're dealing and the potential serious outcome on reputation that it can have.

But my submission in conclusion then is that there is no reason to reject Mr Medich's explanation. He was not conveying an ability to corrupt and the context, although on a, on a, on an application of a test of plain English
40 meaning, is capable of producing a conclusion in the direction which you have indicated you are considering, I would seek or persuade you to the contrary.

I ask you to bear in mind also this finally, that when Mr Medich was involved in this discussion with Mr McGurk, he at all times was expressly guarded in what he was saying, not, I withdraw that. He was, he indicated often that he did not want to reveal information to Mr McGurk, he was guarded. He didn't, for example, at page 55, want to tell him who his

lobbyist was and in my submission it would be unlikely that Mr Medich would indicate to Mr McGurk that he had the ability to corrupt officials.

Yes, those are my submissions.

THE COMMISSIONER: Thank you, Fr Faulkner. Mr Gormly?

10 MR GORMLY: Commissioner, literally five seconds. I just noticed that paragraph 7 of Mr Faulkner's submission deals with one of the matters that your Honour, that you, Commissioner, are not, I think have ruled out. I would submit that paragraph 8 is the same, Commissioner.

MR FAULKNER: Yes, I agree with 7. Just let me look at that. Yes. I'd ask you to ignore 7 and 8, Commissioner.

20 MR GORMLY: Commissioner, could I just direct attention of Mr Faulkner. I'm (not transcribable) to section 13(3) of the Commission's Act where it defines one of the principal functions of the Commission to include the power of findings under investigations even where there isn't corrupt conduct but it really (not transcribable) to the area we're dealing with. And Section 8. Anyway, that's enough.

MR GAME: Can I trouble you to say one tiny - - -

THE COMMISSIONER: Yes, Mr Game.

30 MR GAME: When I said Mr McGurk's reputation, I'm sorry I dwell on this. My client is Mrs McGurk and it's her and the children obviously that are the interests that I'm concerned with.

THE COMMISSIONER: Yes. Now, because of all the points that have been raised and the need to take time to consider, I'm not sure when I'll be able to deliver this report. I'm going to do my best to do it early, perhaps Friday, perhaps not. Now, I think it will be necessary to delivery it orally. I need to know whether parties will be able to have their representatives here if that's what they wish if they get a few hours notice between now and some time next week?

40 MR FAULKNER: Yes.

MR GAME: Yes.

MR GORMLY: Yes.

THE COMMISSIONER: Yes, very well, thank you. Well, we'll adjourn on that basis.

AT 3.57 THE MATTER WAS ADJOURNED ACCORDINGLY [3.57]