IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 278 of 2013
No. S 279 of 2013

BETWEEN:

MICHAEL JOHN MILNE
Appellant

And

THE QUEEN
Respondent

APPELLANT'S REPLY

Part 1: Certification

1. This reply is in a form suitable for publication on the internet.

Part 2: Reply

2. The respondent in its written submissions, ('RWS') takes issue with the appellant's submission that the offence is committed where a person "deals with property, intending that, at some time in the future, (after the property has been dealt with), the property will become an instrument of crime".[1] The respondent's submission in this regard is contrary to the Court of Criminal Appeal's position. Their Honours said:[2]

> We accept, for present purposes, the preliminary proposition advanced by [the appellant's counsel] that, as a matter of construction, the offence will only be committed where the person intends that, after the disposal of the property (or other dealing with it), the property will be used to facilitate the commission of an offence, that is at some point in the future the property will be used in that manner.[3]

3. The conclusion flows from the words of s400.3(1) of the *Criminal Code, Criminal Code Act 1995* (Cth) ('the *Criminal Code*'). As presently relevant, that section provides that an offence is committed:

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[1] At RWS [8].
[2] *Milne v R* (2012) 219 A Crim R 237; 259 FLR 42 (Court of Criminal Appeal) at [138].
[3] See also *Chen v Director of Public Prosecutions (Cth)* [2011] NSWCCA 205, particularly at [83]- [86] (also referred to in the Appellant's Submissions ('AWS') at [37], fn 14.

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i. when a person "deals with … property"; and

ii. "the person intends that the … property will become an instrument of crime".

4. Thus the person must, at the time of the dealing intend that the property *will be used* to facilitate the commission of an offence. Indeed, this is accepted by the respondent (at RWS [7]).

5. However, when dealing the appellant's argument, at RWS [9], the respondent submits that the provision contemplates "offences in which a person deals with property intending that, as a result of that dealing, the property will facilitate the commission of a future offence". The word "used" is conspicuously absent. That is, the requirement that the person intend that the property will be "*used* to facilitate the commission of an offence" is absent (cf RWS [7]). The respondent conflates the "dealing" and the "use". Even if the dealing could be said to facilitate the future offence, the shares did not.

6. The omission of the word "use" in the formulation at RWS [9], contending that it is sufficient that the person "deals with property intending that, as a result of that dealing, the property will facilitate the commission of a future offence", exposes, it is respectfully submitted, the respondent's position as reliant on the dealing as facilitating the commission of the offence rather than any use of the property.

7. The word "use" is also absent from the respondent's description of the prosecution case at RWS [11] and RWS [12].

8. The respondent submits (at RWS [12]) that the prosecution case was that appellant intended the Admerex shares themselves "would facilitate" (as opposed to "would be used to facilitate"), the commission of the future tax offence in two ways. The first of these is put as being that "as a result of the swap … there would be a capital gains tax offence that would be the basis for [the future tax offence]". The swap was, of course the sale or disposal of the shares. This disposal did not (and could not) contemplate any future use of the shares.

9. The second way in which it is said the shares themselves "would facilitate" the commission of the future tax offence is that "as a result of the swap" the appellant "could obtain the benefit of the capital gain with greater concealment" (at RWS [12](ii)). This does not advance the respondent's argument with respect to the "use" of the shares. The

swap was the disposal. Whatever advantage the appellant hoped to gain from the method of disposal, there was no intended future use of the shares themselves.

10. Thus, while the respondent makes the point (at RWS [15]) that, on the Crown case, the deception of accountants was facilitated by the manner of the disposal of the shares, the appellant was not then "using" the shares.

11. The respondent relies on arguments put to the trial judge (at RWS [16] – [17]). Those submissions, it is respectfully submitted, do not, or at least do not adequately, deal with the requirement of proof of an intention to "use" the shares. The submission set out at RWS [17], refers to the disposal of the shares on 3 February 2005 as the relevant "use". The argument, again, is put in terms of the Admerex shares having "facilitated the offence"[4], without regard for how it was that, at the time of the dealing, the appellant had an intention that the shares themselves "will become an instrument of crime".

12. The address to the jury (as relied upon at RWS [18]) also highlights the prosecution's reliance on the dealing rather than an intention to use the shares.[5]

13. The respondent's reliance on the reasons of the Court of Criminal Appeal (as set out at RWS [19]), does not advance the respondent's argument. The reasoning extracted exposes the disposal on 3 February 2005 as the relevant dealing. As previously submitted[6] while the shares "did not cease to exist upon their disposal", they were not, once disposed of, capable of being used by the appellant. Neither the contention that the disposal of the shares "created the CGT event which provided the basis for the commission of the future crime", nor the contention that the disposal "provided a facilitating mechanism for the commission of the [contemplated future] offence"[7], was capable of establishing the appellant's intention that the shares would be used to facilitate the commission of the future offence.

14. Thus, neither basis on which the prosecution case was put was capable of establishing that, at the time he disposed of the shares, the appellant had an intention that the shares "will become an instrument of crime".

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[4] In the last line of the quote at RWS [17], at p7.10
[5] In the third line of the quote (RWS [18], at p 7.18) the submission is "but the one dealing which we suggest facilitated the deception ...".
[6] AWS [37]
[7] Court of Criminal Appeal at [150] as set out by the respondent at RWS [19]

15. Ultimately, the respondent is forced to the position that, absent any structure or complexity to the dealing, the simple sale of the shares, would, on its argument, be sufficient to establish the commission of the offence (see RWS [21]). This, it is respectfully submitted, highlights the flaw in the appellant's argument. The simple sale of the shares could not satisfy the requirement that, at that time, the appellant intended that there "will" be a "use" of the shares to "facilitate the commission of" an offence.

Judicial consideration of "use"

16. The respondent, it is respectfully submitted, fails to deal with the appellant's submissions concerning judicial consideration of the word "use". The respondent does point out that in the various cases referred to by the appellant the particular provision under consideration did not use the expression "used to facilitate the commission of an offence". However, no specific reference is made by the respondent to *Sultan v The Queen* (2008) 191 A Crim R 8[8] or the cases discussed in that decision. No submission is made as to why "use" in the context of using an instrument, as considered in *Sultan v The Queen*, should have any different meaning from "use" in the context of using property "to facilitate" the commission of an offence.

17. The respondent does refer to the decision of this Court in *White v Director of Public Prosecutions for the State of Western Australia* (2011) 243 CLR 478; [2011] HCA 20 and to the related decision of the Western Australian Court of Appeal in *Director of Public Prosecutions (WA) v White* (2010) 41 WAR 249; [2010] WASCA 47.

18. The respondent (at RWS [41]) extracts the entirety of paragraph [21] of the reasons of French CJ, Crennan and Bell JJ in *White v Director of Public Prosecutions for the State of Western Australia*. The particular provision under consideration was s146(1)(c) of the *Criminal Property Confiscation Act 2000* (WA) which provided property is "crime-used" if "any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence".[9] Central to the extension of the ordinary meaning of the word "use" in the construction of that provision were the words "in connection with" between any "act or omission done in or on the property" and "the commission of a confiscation offence". Indeed it should be noted that the word

[8] Referred to by the appellant at Appellant's Submissions [51]-[53].
[9] The provision is set out in *White v The Director of Public Prosecutions (WA)* at [9].

"use" was not used in the definition in s146(1)(c) but rather in the term being defined ("crime used" property).

19. The observations of French CJ, Crennan and Bell JJ at [21] in *White v Director of Public Prosecutions for the State of Western Australia*, insofar as they are particular to the definition there under consideration do not assist the respondent in this case (cf RWS [42]).

20. Insofar as the respondent relies on the decision of the Western Australian Court of Appeal[10] in construing s146(1)(a) of the *Criminal Property Confiscation Act,* for present purposes it is sufficient to note that McLure P required that there be a "use" of the property (without qualifying that term). Her Honour determined the matter based on the relationship between that use and the confiscation offence. Indeed, as previously submitted[11], in all of the cases discussed in the Appellant's Submissions, it appears that a person, in order to "use" property must have the capacity to access that property.

The proper approach to the construction of the provision

21. The respondent, consistently with the approach of the Court of Criminal Appeal, submits the provisions are "intended to be flexible and of wide application". As previously submitted, the present case does not involve a choice between available interpretations.[12] While the Australian Law Reform Commission report[13] refers to a "formulation" to which would capture "activity relating to money or property that can be proved beyond reasonable doubt to be preparatory to, or associated with, the commission of the relevant predicate offence" these words are not used in s400.3 and cannot be substituted for the words actually used. In the alternative, and as previously submitted, the appellant's construction should be preferred.

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[10] RWS [37], where the respondent sets out a passage from *Director of Public Prosecutions (WA) v White* at [39].
[11] AWS [64]
[12] See Appellant's submission at [64].
[13] Confiscation that Counts: A Review of the Proceeds of Crime Act 1987, Report 87 (1999), referred to by the respondent at [24].