IN THE HIGH COURT OF AUSTRALIA No. S 94 of 2015

SYDNEY OFFICE OF THE REGISTRY

B E T W E E N:

THE QUEEN
Appellant

AND

BARBARA BECKETT
Respondent

10 **APPELLANT'S ANNOTATED REPLY**

Part I: Certification

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

Part II: Reply

1. The Respondent submits that the CCA was correct to limit the s 319 offence to conduct after the commencement of judicial proceedings because it was well accepted at common law at the time s 319 was enacted that the course of justice did not begin until judicial proceedings had commenced (AWS [15]).

2. The respondent is correct that it was well accepted at the time s 319 was enacted that the course of justice began with the invocation of the jurisdiction of a court or
20 judicial tribunal.[1] However, the respondent is incorrect that the notion of intending to pervert the course of justice required "an intention to pervert an *existing* course of justice" (AWS [15] (emphasis in original)).That notion had been rejected almost 100 years earlier in the decision in ***Vreones***, which itself involved acts committed to impair future possible proceedings. The reason for not confining the offence in that way was that the capacity of a court to do justice may be impaired by acts committed before the jurisdiction had actually been invoked.[2]

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[1] ***R v Rogerson*** (1991 – 1992) 174 CLR 268 at 276.
[2] ***R v Rogerson*** (1991 – 1992) 174 CLR 268 at 280.

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3. The true position was that stated by this Court in ***Murphy***[3], namely, that in Australia and all comparable jurisdictions, including the UK, Canada and New Zealand, it was accepted that offences based on the ***Vreones*** formulation could be committed before judicial proceedings had begun.

4. That remains the accepted position in the UK[4], Canada[5] and New Zealand[6]. It was also the accepted position in NSW before the decision in the present case[7].

5. The s 319 offence is constituted by "any act" or "any omission" done with the intent to pervert the course of justice and is analogous to the ***Vreones*** formulation of "*the doing of some act which has a tendency and is intended to pervert the administration of public justice*": ***R v Vreones*** [1891] 1 QB 360 at 369 in that both are constituted by acts which are *intended* to pervert the course of justice without requiring proof that the course of justice was actually perverted.

Possible prosecution under sections 41 and 42

6. The respondent submits that her conduct in relation to the Darling Point transfer could not constitute an offence under ss 41 and 42 because it was not a condition of her approval that she must have the duty payable available before processing the transaction (RWS [36], [38] – [39]).

7. The respondent contends that this was the only breach on which the Crown case relied to constitute offences under s 41 and 42 of the *TAA* (RWS [8] (f)) and that it was no part of the Crown case that any other beaches had been committed or could reasonably have been considered to have been committed (RWS [8] (f), fn 1, [8](g) fn 2). Therefore, any prosecution for possible offences under ss 41 and 42 was foredoomed to fail. The respondent further contends that, as that possible prosecution under ss 41 and 42 could not have succeeded, the s 319 offence must also fail.

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[3] ***R v Murhpy*** (1985) 158 CLR 596 at 609.
[4] ***R v Rafique*** [1993] QB 843; ***R v Cotter*** [2003] QB 951 at [30]; ***R v Director of the Serious Fraud Office*** [2009] 1 A.C. 756 at [58].
[5] ***Wijesinha v R*** (1995) 127 DLR (4th) 242 at [31], [37]; ***R v Hoskins*** (2010) ABPC 83, 495 AR 44 at [27] – [28], [37].
[6] ***R v Machirus*** [1996] 3 NZLR 404 at 407.20; ***R v Butt*** [2014] NZCA 106 at [10]; ***R v Meyrick*** CA 513/04 14 June 2005 at [41] – [42]; ***McMahon v R*** [2009] NZCA 472 at [45] – [51].
[7] ***Cuneen v ICAC*** [2014] CCA 421 at [23], [195].

8. This submission presents 3 major difficulties. Firstly, the Crown case did not depend solely on one possible breach. Secondly, the sustainability of the s 319 offence does not depend on the prospects of success of the proceedings which were sought to be perverted. Thirdly, the prosecution of the ss 41 and 42 breaches was not "foredoomed to fail". The prospects of success of any possible prosecution under ss 41 and 42 are unknown.

9. The s 319 offence depends on proving that curial proceedings for breaches of the *TAA* or other Acts were imminent or possible at the time of the respondent's conduct and that the respondent acted with intent to pervert those possible proceedings. It was not essential to prove that the respondent was guilty of the possible charges being considered in the future proceedings. That is because in the present case, as in many instances of this offence, the conduct directed to perverting the course of justice occurs in the early stages of the investigation when any possible offences are still being assessed. The respondent is correct that one major focus of the investigation was the Darling Point transfer because no duty had been paid on that transaction at all, however, whether any other breaches had occurred in the respondent's EDR practice was still under review.

10. The Notice of Investigation made it clear that the investigation was not in respect of any particular breach but in relation to "*any breaches of the Stated Acts or Ors found to have occurred by individuals*" (AB 186.38). The Notice alerted the respondent that all her dutiable transactions were to be reviewed and, if any breaches of the *TAA* or other legislation were found, prosecution action may be considered. Similarly, the s 72 Notice requiring the respondent to attend to give evidence did not specify particular breaches. The stated purpose of the examination was to determine "*if there have been any breaches pursuant to the Duties Act, 1997 and Taxation Administration Act, 1996*" (AB index item 82)

11. The determination of whether or not any of the breaches were sustainable and constituted an offence under ss 41 and 42 of the *TAA* was an adjudication for a court to make (s 125 *TAA*). The respondent's conduct in falsifying evidence was an attempt to interfere with that process of adjudication.

12. It is not known what the prospects of success might have been for charges relating to any such possible breaches. Those charges were not before the court and the

material adduced was not directed to establishing any such breaches. The evidence adduced of the Darling Point transaction and of the respondent's conduct in relation to the investigation was directed to establishing that the possibility of a future prosecution in relation to that transaction, and the respondent's EDR practice more generally, was in the contemplation of the OSR and of the respondent and that she attempted to pervert those possible proceedings.

13. The investigation was at an early stage when the respondent produced the falsified evidence and the respondent is therefore correct to point out that it would be more correct to say that breaches were suspected rather than that they had occurred as that was very much in issue at that stage of the investigation. The suspected breaches may not have proceeded. Other matters may have been discovered.

14. The respondent is also correct that her Notice of Approval did not specify conditions, other than two examples listed. That was because, as the Notice stated, the conditions were detailed elsewhere, namely, in the Procedural Guidelines: "*The conditions of approval are detailed in the Procedural Guidelines* ...."(AB 179.40). Those guidelines were issued under s 39 of the *TAA* which provided that the Chief Commissioner may impose conditions by "subsequent written notice": s 39 (1) *TAA*.

15. Written Directions for using the EDR scheme were issued in April 2007 to all EDR clients, including the respondent. Those Directions stated that approval to operate "is subject to an approved person agreeing to all the terms and conditions referenced in this document" (AB 241.35). All EDR clients, including the respondent, were requested to re-apply for approval in accordance with these new Directions. The respondent re-applied for approval in June 2007 (AB 235.40).

16. The Directions comprised 16 pages of terms and conditions (AB 241 – 257). The respondent submits that the Settlement Policy requiring receipt of the duty before stamping was not a condition of approval because it was not one of the 19 conditions listed under the heading "Conditions of Approval" and it was not otherwise specified as a condition (RWS [40]). It is true that it was not listed as a condition of approval but the Directions were quite explicit that approval was

subject to agreement to all the terms and conditions in the Directions and the Settlement Policy was plainly a part of the Directions.

17. The Settlement Policy in the Directions was expressed in mandatory terms requiring that "*An approved person must have the duty payable available to them prior to processing transactions online.*" (AB 2151.27). It is true that there was an exception specified for payment at settlement however the respondent breached that exception as well as she did not pay the duty at all. It was still not paid at the time of the interview 3 months later. That was arguably a breach of a condition of approval in itself as the third condition listed in the Directions was a requirement that payment be made by the due date. The due date for payment of duty specified in the Notice of Assessment for the Darling Point transfer was 17 June 2010 (AB 181.30).

18. During the interview the respondent acknowledged that she knew the Directions (AB 281.45) and considered herself responsible for any breaches of them (AB 282.45). She said she realised she may have breached some conditions in relation to the Darling Point transfer (AB 320.35), including the requirement to retain all documents related to a transaction (AB 332.20).

19. Whether or not any of these suggested breaches was a breach of a condition of approval and constituted a possible offence under ss 41 and 42 was a matter for adjudication in the proceedings that may have eventuated. It is not known whether those contemplated charges, or other possible charges, would have succeeded.

20. However, the respondent was aware that an investigation which may have resulted in curial proceedings was underway. It was not known what breaches the investigation may have uncovered. However, the respondent took the extraordinary step of producing altered documents and giving false evidence under oath about one of the major focusses of the investigation with the clear intent of preventing the matter going any further.

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