IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M174 of 2017

Between

DONALD GALLOWAY (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

EDMUND HODGES (a pseudonym)
Third Respondent

TONY STRICKLAND (a pseudonym)
Fourth Respondent

RICK TUCKER (a pseudonym)
Fifth Respondent

APPELLANT'S REPLY TO THE FIRST RESPONDENT

Part I: Internet Publication

1. These submissions are suitable for publication on the internet.

Part II: Reply

2. The appellant adopts the reply submissions of Edmund Hodges and Rick Tucker.[1]

3. The first respondent criticises the appellant for attributing conclusions to the Court of Appeal that were findings of the trial judge.[2] However, the Court of Appeal accepted that the Australian Federal Police ('AFP') sought to use the compulsory examination powers of the Australian Crime Commission ('ACC') to get the appellant to make admissions, and to assist the AFP in its searches for evidence in assembling the briefs for prosecution. As held by the Court of Appeal:[3]

---

[1] Including the reply submissions of Edmund Hodges to the second respondent.
[2] First respondent's submission, [14], referring to appellant's submissions, [6.5].
[3] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) &* Ors [2017] VSCA 120, [208]-[209] (citations omitted) (emphasis added).

Filed on behalf of the Appellant
Hicks Oakley Chessell Williams
Level 14, 114 William Street
Melbourne VIC 3000

9 February 2018
Tel (03) 9629 7411
Fax (03) 9629 7422
DX 31331 Mid-town
Ref Matthew Hicks
matthew.hicks@hocw.com.au

> Her Honour found that one of the AFP's purposes in having the respondents examined by the ACC was to get them to make admissions, on oath, and thereby 'lock them in' to a version of events. She further found that Mr Sage knew that this was the ACC's objective...
>
> On the basis of her Honour's unchallenged findings, we would characterise what occurred here in the following way. The ACC's coercive powers, conferred on the Commission in order for it to pursue its own investigative purposes, were enlisted by and for the benefit of the AFP, solely in order to enable that separate statutory agency to pursue its own investigative purposes.

4. At the *voir dire*, Senior Investigative Officer ('SIO') Schwartz accepted that an ACC examination was a powerful investigative tool when a suspect had declined to participate in a record of interview,[4] with the advantages that: (1) a suspect is "locked in" to a version of events on oath, which can potentially be of assistance in later proceedings;[5] (2) the AFP can conduct investigations pursuant to intelligence gathered at the hearings;[6] (3) the accused cannot with any credibility produce a contrary version of events in their own prosecution;[7] and (4) the ACC examinations provided search terms to find relevant material amongst millions of documents.[8]

5. Schwartz expressly agreed that one of the benefits of an ACC examination was that it allowed investigators to know the suspect's response to various issues so they knew what to look for in order to respond when assembling the brief and the prosecution.[9]

6. However, even if there was not a forensic advantage to the AFP and the prosecution, it was not "common ground" that unlawfulness alone could not justify a stay.[10] In written submissions before the Court of Appeal, the appellant expressly submitted:[11]

> In any event, it is clear that the learned trial judge regarded what occurred as bringing the administration of justice into disrepute, and that was an independent basis to permanently stay the proceedings. That is because the matter involved the deliberate coercive questioning of suspects at the ACC for the very purpose of achieving an advantage to the AFP and CDPP and a forensic disadvantage to the ACC accused in foreseen future legal proceedings...

---

[4] *Voir dire*, T3704.19-23. Pages T3704-3708 were referred to in the Court of Appeal in the appellant's supplementary submissions in relation to CDPP Grounds 3 and 7 dated 14 November 2016, [32].
[5] *Ibid*, T3705.3-8. Any change in the appellant's account in his record of interview or at trial could result in bringing a charge of giving false or misleading evidence before the ACC, an indictable offence with a maximum penalty of 5 years' imprisonment pursuant to the *Australian Crime Commission Act 2002* (Cth), s 33.
[6] *Ibid*, T3705.9-21.
[7] *Ibid*, T3705.21-23.
[8] *Ibid*, T3708.14-17.
[9] *Ibid*, T3705.14-17. See *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym)* & Ors [2017] VSCA 120, [228].
[10] First respondent's submissions in the appeal of Edmund Hodges, [34].
[11] Supplementary submissions in relation to CDPP Grounds 3 and 7 dated 14 November 2016, [37] (citations omitted) (emphasis added). Reasons of the trial judge, [880], [883].

The Appellant's Record of Interview

7. The first respondent is incorrect to assert that the appellant "ignores" that he voluntarily agreed to participate in an AFP record of interview.[12] That was expressly referred to in the appellant's submissions.[13]

8. The ACC examination occurred in circumstances where the appellant had not responded to the AFP request for a record of interview. The fact that, after having been subjected to an unlawful compulsory examination, the appellant then acquiesced to further AFP request for a record of interview, during which he was unrepresented, does not remedy that unlawfulness. Nor does it remedy the fact that the administration of justice was brought into disrepute. That does not change because, at committal, counsel for the appellant relied on some of the appellant's answers before the ACC, with the appellant discharged because the evidence was not of sufficient weight to support a conviction.[14]

9. Further, the first respondent fails to properly consider that the appellant's ACC examination occurred on 12 April 2010, and the AFP interview was conducted on 6 and 7 October 2010. During the interim, and armed with his ACC examination, the AFP conducted enquiries, including those referred to in the appellant's submissions.[15] As held by the trial judge, at that time the AFP knew the appellant's defences and could tailor questions accordingly.[16]

10. It is incorrect for the first respondent to assert that the evidence of "lack of use" was not challenged by the appellant.[17] That is inconsistent with latter submissions.[18] Contrary to the first respondent's submissions,[19] there was puttage.[20] The trial judge did find that the AFP members who attended the ACC examinations could not have put what they learned out of their minds and would have been significantly assisted by that information.[21] The Court of Appeal accepted that it was impossible to know how access to the examination material affected the thought processes of a relevant AFP investigator.[22] It is unreasonable to expect the appellant to 'unscramble the egg' in those circumstances.[23]

---

[12] First respondent's submission, [16], [3](5).
[13] Appellant's submissions, [5.13], [6.34].
[14] *Criminal Procedure Act 2009* (Vic), s 141(4)(b).
[15] Appellant's submissions, [6.16]-[6.28].
[16] Reasons of the trial judge, [795].
[17] First respondent's submissions, [3](3).
[18] *Ibid*, [20].
[19] First respondent's submission, [23], [26](1).
[20] *Voir dire*, T904.11-T905.16, after it was established that he attended the ACC examination at T898.14-15.
[21] Reasons of the trial judge, [872]-[873].
[22] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym)* & Ors [2017] VSCA 120, [246].
[23] Reasons of the trial judge, [879].

The Evidence of Senior Investigative Officer Schwartz

11. The first respondent submits that, with limited exception, the appellant's transcript references in his submissions at [6.32] in relation to Schwartz' committal evidence were not in evidence before the trial judge.[24] However, as set out below at [15], the key evidence of Schwartz at committal was before the trial judge.[25]

12. Further, there was ample evidence before the trial judge from when Schwartz was called at the *voir dire* about his attitude as SIO which supports the inference that he and the AFP officers under his command would have regarded themselves as entitled to use the appellants' ACC examination material when conducting further enquiries.[26]

10 13. In addition to the matters referred to above at [4]-[5], when Schwartz was asked an open-ended question about the benefits of having a suspect give a version of events before the ACC, he replied:[27]

> Two main ones, that we can conduct investigations pursuant to the intelligence gathered at the hearings; and secondly that they can't with any credibility produce a contrary version of events in their own prosecution.

14. There is no issue that Schwartz gave evidence at committal that he saw nothing wrong with informing a witness or allowing them to believe that the AFP had a particular view or theory about the matters that were being asked about.[28]

15. Contrary to the submissions of the first respondent,[29] it was in evidence that:

20 (1) The AFP prepared "statement guides" and "helpful hints" documents that were shown to witnesses containing the AFP view of the case and representations of other witnesses, and that the taking of witness statements was described as a process of negotiation;[30]

---

[24] First respondent's submission, [24] fn 13, see also [11] fn 9. The list in the second respondent's submissions at [44](d) fn 83 are inconsistent with the first respondent.
[25] Most notably Schwartz' committal evidence at T4279-4285 (ECB 449 on the *voir dire*) and at T4290-4291 (ECB 464 on the *voir dire*).
[26] See in particular Schwartz' evidence on the *voir dire* at T3630-3632, T3704-3708, and T3743-T3752.
[27] *Ibid*, T3705.19-23.
[28] Appellant's submissions, [6.32](3), fn 81, T4283 (ECB 43) (ECB 449).
[29] First respondent's submission, [24] fn 13, referring to [6.32] of the appellant's submissions, where the first respondent submits "[o]f the nine subparagraphs in AS [6.32] only subparagraphs (1), (3) and the second sentence of (5) are supported by evidence before the trial judge".
[30] ECB 464 (committal transcript T4290-4291). Referred to in the appellant's submissions at [6.32](2), fn 80. See *voir dire*, T3630-3632. Schwartz also gave evidence on the *voir dire* about giving a witness a "helpful hints" document (Ex 161) at T3552-T3555, which stated to the witness, *inter alia*, "we will *negotiate* your statement via email and possibly another face to face meeting when you are available" (emphasis added).

(2) Schwartz thought that it was not wrong to obtain the cooperation of witnesses by telling them or allowing them to think that they might be in trouble, or indeed might be charged, if they did not provide incriminating information;[31] and

(3) Schwartz thought there was nothing wrong with putting false propositions to witnesses.[32]

16. It was in that context that Schwartz was warned by the magistrate about the privilege against self-incrimination.[33]

17. The above material supports the appellant's submission that the approach of Schwartz as SIO influenced the enquiries conducted by the AFP while armed with knowledge of the content of the ACC examinations.[34] That includes when preparing Russell's statement,[35] in circumstances where Singleton gave evidence that alterations were made to the statement at the request of Schwartz,[36] and where Schwartz himself made "contributions" to the statement.[37] As found by the trial judge, the AFP officers thought that they were entitled to use the information from the ACC examinations.[38]

The Charge of Conspiracy

18. The first respondent has failed to address how, if a forensic disadvantage is established by one appellant, and that is relevant to establishing the existence, nature and scope of the alleged conspiracy, that is not a forensic disadvantage to all appellants. That must also be considered in circumstances where, on the Crown case, the appellant entered the conspiracy at a very late stage, indeed it appears long after it is alleged that the substantive offence had been completed.[39]

9 February 2018

Michael Cahill

Tel: (03) 9225 8151
Fax: (03) 9221 8480
E: michael.cahill@vicbar.com.au
Counsel for the Appellant

Michael Stanton

Tel: (03) 9225 7853
Fax: (03) 9225 8480
E: michael.stanton@vicbar.com.au

[31] ECB 449 (committal transcript, T4282-4). Referred to in the appellant's submissions at [6.32](6), fn 86.
[32] ECB 449 (committal transcript, T4283). Referred to in the appellant's submissions at [6.32](6), fn 87.
[33] ECB 449 (committal transcript, T4284-5). Referred to in the appellant's submissions at [6.32](1), fn 79.
[34] Appellant's submissions, [6.32].
[35] Appellant's submissions, [6.22]-[6.27]. See reasons of the trial judge, [795]-[797], [872]-[873], [879].
[36] *Voir dire,* T899.1-6.
[37] *Voir dire*, T901.6.
[38] Reasons of the trial judge, [872]-[873].
[39] Appellant's submissions, [6.36].