IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M175 of 2017

Between

EDMUND HODGES (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent
DONALD GALLOWAY (a pseudonym)
Third Respondent
TONY STRICKLAND (a pseudonym)
Fourth Respondent
RICK TUCKER (a pseudonym)
Fifth Respondent

APPELLANT'S REPLY TO FIRST RESPONDENT'S SUBMISSIONS (FRS) - REDACTED

Part I: Internet Publication

1 These submissions are suitable for publication on the internet.

Part II: Reply

The AFP and ACIC conduct was not '*bona fide*'

10 **2** The first respondent's submissions (FRS) rely on the contention that the conduct of the ACIC and the AFP occurred in the *bona fide* belief that it was lawful: FRS [3](1), [3](7), [7]. A factor mitigating against the ordering of a stay in *X7(2)* was the finding at [111] that the unlawful examination of X7 by the ACIC was "*bona fide*" in that it had been carried out in the honest and reasonable belief that it was lawful. The ACIC sought to establish that the examinations of the appellants were conducted in the reasonable belief that they were lawful. This contention was rejected by the trial judge and by the CA: SC [694], [849]-[868]; CA [57]-[60].

3 No court has made a finding to support the "*bona fide*" contention. Relevant findings by the trial judge and CA are to the contrary. In *Moti* at [60] this court identified the inquiry as what "the Australian officials did or did not do". In the case of the ACIC that question is

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answered by reference to SC [694], CA [116], CA [107], SC [707], and SC [708]-[709], [880]. And in the case of the AFP by reference to SC [1119] and SC [1122].

Practical or actual unfairness

4 The Court of Appeal in *X7(2)* recognised the *Hammond* principle as explained in *X7(1)* at [124] {X7(2) at [21]-[24]}, approved by a majority of the court in *Lee(1)* {X7(2) at [30]-[52] and applied in *Lee(2)* {X7(2) at [54]-[55]}. This aspect of the case was but one element of the unfairness occasioned to the trial of the appellants by the unlawful conduct of the executive.

5 In *X7(2)* the potential unfairness to the trial was the fact of the unlawful examination. No dissemination or use of the examination material had occurred. At the time of the unlawful examination it was reasonable for the ACC to have acted on the basis that the examination was lawful, provided that quarantining directions were in place and adhered to, which they were: *X7(2)* at [110].

6 Before the principle explicated in *Hammond* and *X7(1)* at [124] engages, it must be demonstrated that the person facing trial had been compelled to answer questions about the matters the subject of the trial. A stay was not granted to *X7* for the very reason that, on the evidence, the principle could not be engaged, because the record of the examination (which would have revealed the nature of the questioning) was not before the court. The content of the examination may have been anodyne: *X7(2)* [110]-[111] per Bathurst CJ (with whom Beazley P, Hidden, Fullerton, Hulme JJ agreed), [115] per Beazley P; SC [222]-[227] especially at [226]-[227]. The extreme measure of a stay could not be granted on such a basis.

7 The appellant's case is not that *X7(2)* is wrong. It was wrongly applied by the CA and is wrongly relied upon by the first respondent. In this case the record of the compelled testimony was tendered before and analysed by her Honour as against the case and charges faced by the appellant, at SC [718]-[727]. At SC [722] her Honour found

At SC [766] her Honour made the express finding that the appellant is "now constrained in the conduct of his trial, by reason of the answers given on oath, in precisely the same way envisaged by the majority in X7(1)."

8 The appellant's case has always been that the content of his examination plainly engaged the *Hammond* principle as described in *X7(2)* at [124]: AS [43]-[46], [71][-[73]. SC [766] and fell within the description provided by Bathurst CJ in *Seller(2)* at [104]; *cf* FRS [35] and [44].

9 In the case of the appellant, actual prejudice to his fair trial as described in *Hammond* and *X7(1)* at [124] was established. Contrary to the findings of the CA, nothing further was required. In particular, there was no prerequisite that the appellant prove that specific pieces of evidence had been obtained by the AFP only by virtue of the compelled testimony. In *X7(2)* the question of derivative use simply did not arise. The examination material was quarantined from investigators and prosecutors.

10 At FRS [43]-[44], [50], [53], the decision in *X7(2)* and its application to the case of the appellant is misunderstood. The issue in *X7(2)* was not the existence of the *Hammond* principle or that its engagement did not warrant a stay but rather, its engagement in the case of X7 had not been made out, because there was no evidence that X7 had been compelled to answer questions "as to the circumstances of the alleged offence": *Hammond* [220], *X7(1)* [136]. The court identified the remedy as putting the record of the examination before the court: *X7(2)* [110], [111], [115]. As set out above, in this case the appellant did just that.

11 The FRS at [48]-[54] refer to a concession said to have been made regarding the applicability of the *Hammond* principle. No such concession was made and the CDPP submission (which was accepted by the CA) should be rejected for the reasons set out at paragraph 31 of the appellant's response to the ACIC submissions: AS [62].

12 *The Hammond* principle was not the only basis upon which the appellants submitted and the trial judge found that a stay was required. In addition to a finding of unfairness in the trial on the *Hammond* basis {SC [712], [718]-[727], [766]} her Honour found unfairness occasioned by the unlawful dissemination of examination material on the basis that the AFP had been assisted in document selection and brief preparation as explained by Schwartz {SC [713], [776]-[817]} and the forensic choices of the appellants had been further constrained because of the interference with their capacity to test the prosecution case at trial {SC [714], [818]-[819]}.

13 Further, a core submission in favour of a stay was, from the outset, based upon the fact that each aspect of unfairness or forensic detriment to the appellant and forensic benefit to the prosecution was in this case deliberately engineered by the AFP, ACIC and CDPP: see Appellant's written submissions at first instance at [6]-[8], [26(f), (g), (n)], [27], [142], [145]-[148], [155], [170]-[178], [179]-249], [330], [334]-[338], [384], [394(d)], [541], [534]-[547]. As her Honour found, the very purpose of the unlawful examinations and the unlawful disseminations was to achieve forensic disadvantage to the appellants and advantage to the prosecution, in foreseen future legal proceedings; the very prejudice that the statute sought to avoid: SC [41 (g)], [42], [563], [597], [622], [647], [708]-[710],[722], [726]-[727], [865],

[868], [880]. And it was achieved.[1] The acceptance of this contention did not depend upon or require a finding that Sage was recklessly indifferent in relation to his failure to comply with his s 25A obligations.

'Salami slicing' approach

14 The first respondent's submissions at FRS [65]-[75] reflect the flawed approach adopted in the appeal to the CA, and adopted by the CA itself. The CA failed to have regard to the multi-factorial basis for the trial judge's decision. Her Honour's conclusion that Sage's conduct was reckless to his obligations to an unacceptable degree was but one of many factors leading to the decision. The adjective was of less significance than her Honour's findings as to what the executive actually did. It did not "underpin" any aspect of the decision: *cf* FRS [65]-[67]. Her Honour could have used different terminology to describe the conduct; it matters not, because the power to grant a stay is not dependent upon satisfaction of a particular legal test for recklessness. If such a point needed to be made clear it was made clear by this court in *Moti* at paragraph [60]. Now, the first respondent seeks to elevate the significance of the 'reckless' finding to the ultimate decision to the grant of stay.

15 The approach, adopted by the first respondent in its appeal, then by the CA in its reasons, and again now by the first respondent in its defence of the CA's decision (FRS [65], [66], [67], [74], runs against the principles that apply to the determination of an interlocutory appeal against a decision to grant a permanent stay of a trial.[2] The principles in *House v The King* apply to such an appeal, and the authority of the trial judge is preserved in the interlocutory appeals process and should not lightly be interfered with: *Joud v R* (2011) 32 VR 400 at [132]-[133]; *DPP v Pace, Collins and Baker (pseudonyms)* [2015] VSCA 18. An appeal should not succeed merely because the appellate court reaches a different conclusion on

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[1] This was not a matter of inference, it was the direct evidence of the Senior Investigating Officer Schwartz: T3703.31-T3705.28, T3707.7-11, T3707.22-T3708.20, T3711.20-29. The FRS at [60] is simply not the evidence. The cross-examination of Schwartz at T3700 and following was plainly directed to disputing his assertion that the examinations were a "waste of time", and resulted in him giving direct evidence of the matters found by her Honour, including the assistance provided to document identification and brief compilation and the forensic disadvantage to an accused of being locked in to a version of events on oath: T3705, for example; SC [772], [783]-[790], [808]-[810], [817], [876]. Contrary to the CA's observations, there was nothing controversial about these findings. They flowed as a matter of course from the evidence of Schwartz and the circumstances of the case as explained by her Honour. They were not in conflict with evidence of other AFP Officers, none of whom denied the forensic benefits explained by Schwartz. Their statements contained only a narrow denial, not relating to derivative use but rather confirming that they did not include the record of examinations of the appellants on the briefs of evidence and did not take the evidence into account when making any decision to charge. To the extent that the FRS at [60] rely on the "very limited nature of (Schwartz's) evidence" in this regard, the amount of time taken to obtain the responses from Schwartz on any topic was a function of his desire to address the questions truthfully: see SC [29]-[31], [33]-[34], [38], [432].

[2] See Respondents' Joint Submissions to CA on Grounds 3, 4, 5, 6, 7 and 8 at paragraphs [1]-[7].

weighing up the discretionary factors: *The Queen v FJL* [2014] VSCA 57 at [31]. There is danger in a 'salami-slicing', factor-by-factor approach on review of a permanent stay decision where the ultimate decision was based upon an accumulation of factors.[3]

Other matters in reply

16 If the account of the examination process given by the first respondent at paragraphs FRS [14]-[21] is intended to suggest that the examinations were conducted by the ACIC other than simply as a 'hearing room for hire' for the AFP, then it is at odds with the findings of the trial judge, which were accepted by the CA, and the CA's own findings that the examinations were for an improper purpose: CA [187]-[189], [209]-[211].

17 As to FRS [23], the spreadsheet referred to in the appellant's submissions (AS [81]) was relied upon by the first respondent in argument [T198.26-T200.12] and by the CA in its reasons: CA [261]. The email dated 14 July 2017 at AS [83] post-dates the CA's decision, but reveals information that was not known at the time of the CA appeal regarding the extent of the unlawful dissemination of the examination material within the AFP.

18 FRS [48]-[50] do not fairly or accurately summarise the course of proceedings below. No concession was made by the Appellant's senior counsel to the effect that the appellant suffered no constraint if it be assumed that he provided truthful instructions to counsel. To the contrary, it was squarely in contest. Twice senior counsel was asked by Maxwell P if he took issue with that proposition, and twice senior counsel responded 'absolutely': [T166.15 – 167.19]. The concept that a person suffers no limitation on their forensic choices at trial by being coercively examined about the circumstances of their alleged criminality because it must be assumed that they would provide truthful instructions to counsel is unsupported by authority (Indeed it is contrary to *Hammond*, *X7(1)*, *Lee(2)* and a majority of the court in *Lee(1)*) and misconceived, as explained by Hayne J in *Lee(1)* especially at [82]).

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[3] For example *R v Hussain* 2013 EWCA Crim 707, per Lord Justice Treacy at [17].