IN THE HIGH COURT OF AUSTRALIA

BRISBANE OFFICE OF THE REGISTRY No. B28 of 2011

BETWEEN

ADAM JOHN HARGRAVES

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSIONS

Part I – Certification

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

Part II – Statement of Issues

2. Except as otherwise indicated, the Respondent adopts its submissions made in the related matter of *Stoten v The Queen*, No B24 of 2011 ("SRS").

Part III – Section 78B of the Judiciary Act 1903

3. The Appellant has filed appropriate notices as required by s 78B of the Judiciary Act.

20 ### Part IV – Statement of Facts

4. The Respondent adopts its submission in the matter of *Stoten v The Queen*.

5. The Respondent adds the following matters particular to this Appellant.

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6. The Appellant's evidence at trial was inconsistent with, and did not account for, the objective evidence as to the establishment and operation of the scheme. In particular his evidence was unresponsive and evasive on a number of topics including in relation to the following issues:

(1) the fees charged by Strachans compared to the fees charged by Feddema;[1]

(2) the importance of the transactions involving the overseas entity being at arm's length according to the advice of Feddema;[2]

(3) the mark ups permitted for legitimate trust arrangements as compared to the trusts involved in this scheme;[3]

(4) the issue as to his belief as to whether he had control over the structure and the funds;[4]

(5) the fact that tax is still payable most often by the beneficiaries of distributions from such legitimate trusts;[5]

(6) his involvement in and knowledge of the terms of the agreement between PDC and Amber Rock Limited;[6]

(7) his reference to their money held overseas in "*our accounts*";[7]

(8) what services were actually performed by Amber Rock Limited;[8]

(9) the fact that their accountant Tony Coote had no role in and was not informed of the existence or nature of the scheme;[9]

(10) the cash receipts from Strachans whilst the Applicant was overseas;[10]

(11) the withdrawals from ATM's of cash as reflected in the 2002 and 2003 diaries kept by Kerry Downing at the Applicant's direction and the inconsistency between the Applicant's evidence on the one hand and the evidence of Kerry Downing on the other;[11] and

(12) the Applicant's denial of being a beneficiary of the overseas structure.[12]

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[1] T22-31 (18-40); T22-32 (1-20)
[2] T22-49 (22-38)
[3] T22-33 (1-60)
[4] T22-54 (21); T22-62 (8)
[5] T22-36 (40); T22-37 (1); T22-37 (10-30)
[6] T22-45 (55-60); T22-46 (1-5); T22-47 (35-40); T22-47 (55); T22-48 (1)
[7] T22-58 (35-60); T22-59 (5)
[8] T22-66 (10); T22-67 (35)
[9] T22-70 (15-30)
[10] T23-8 (45); T23-9 (20)
[11] T23-12 (40-55) (c.f: the evidence of Kerry Downing at T23-44 (48-60)); T23-13 (35-40) and at T23-45 (10-30)
[12] T23-15 (55); T23-16 (45)

Part V – Relevant Provisions

7. The Appellant's statement of applicable constitutional provisions and statutes is accepted.

Part VI – Summary of Argument

8. The Appellant contends that the direction that infringes the principles in *Robinson*:

   (1) is a significant denial of procedural fairness and as such the proviso has no application (AS [4]); and

   (2) the application of the proviso in s 668E(1A) of the *Criminal Code* (Qld) in relation to Commonwealth offences is inconsistent with s 80 of the *Constitution* (AS [3]).

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It is submitted that neither proposition is correct.

9. The Respondent adopts its submissions in the matter of *Stoten v The Queen.*

10. The Appellant's submissions in support of each proposition are intermingled.

11. Nonetheless it appears that the only aspects of the submission which are additional to those raised by the Appellant Stoten are that:

   (1) the Court below erroneously applied the principles in *Weiss v The Queen*[13] (AS [18][19][60][61]);

   (2) it is inconsistent with the guarantee of trial by jury for the appellate court to exercise any power not properly available to the trial judge within a jury trial (AS [26]);

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   (3) s 80 of the *Constitution* protects anything other than the limited encroachment of the Exchequer rule so as to allow only errors of "*mere technicality*" (AS [43]) or as reflected by s 75 of the *Judiciary Act* 1903 (AS [46]) or s 671 of the *Criminal Code* 1899 (Qld) (AS [41]).

12. The Respondent adds the following submissions in relation to those additional matters.

13. In relation to the first aspect, the Appellant's description (AS [18][60]) of the approach taken by the Court below to the application of the proviso is incorrect. However, that description underpins both aspects of the argument.

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[13] (2005) 224 CLR 300

14. At the outset it is to be noted that the Appellant's description that there was a *"substantial misdirection"* (AS [18]) is not borne out by a proper reading of the judgment below. To the contrary the Court analysed the direction in the context of the trial and made findings as to at its effect (see SRS [47]). Those findings included that the direction *"would not have been understood by the jury 'as meaning that the evidence of [each] appellant had to be scrutinized more carefully than that of any other witness'"* (at [128]). The Appellant has not challenged those findings. Rather the submission is based on a characterisation of the nature of the error considered in a vacuum. It ignores the direction given in the circumstances of this particular trial (for example AS [65]).

15. Contrary to the Appellant's contention (AS [18][60][61]) the Court below did not proceed on the basis that *Weiss* required the appellate court to sustain a guilty verdict in the circumstances posited. Rather, the Court properly approached the issue by deciding whether a substantial miscarriage of justice had occurred (at [151] – [159]). The Court correctly rejected that a direction which infringed *Robinson* necessarily prevented the application of the proviso; the issue was whether it occasioned a miscarriage of justice.

16. It does not follow that simply because the Appellant was found not guilty on count 1 (AS [66]) that the Court below should have found that there was a substantial miscarriage of justice. The Court was conscious of that verdict in reaching its decision. The Appellant's contention ignores the nature of the direction given and the circumstances of this particular case. It entirely ignores the particular events which occurred during the period the subject of count 2 which were relevant to the Appellant's state of mind (see SRS [24] – [34]).[14]

17. The Appellant appears (AS [21]) to have taken out of context the Court's conclusion *"that it may be doubted"* that the misdirection gave rise to a miscarriage of justice (at [154]). That conclusion relates to the first stage of the two stage process in the application of s 668E of the *Criminal Code 1899* (Qld) (see SRS at [78]). Where the limb of s 668E which is sought to be established, as here, is miscarriage of justice,

[14] For example: Mr Smibert expressing concerns as to the legitimacy of the scheme and the changes to the scheme after Mr Egglishaw was detained (cards in the names of foreign nationals and instructions to be given orally to ensure there was no record of them).

simply finding error is not sufficient. It was necessary for the court to find that there was a miscarriage of justice before the proviso fell to be considered.[15]

18. If, as it appears to be, the "*acknowledged 'doubt'*" referred to in the Appellant's contention that follows thereafter (AS [22]) is a reference to the passage of the judgment (at [154]) referred to above, that submission is misconceived. There were no matters of "*acknowledged 'doubt'*" (AS [22]). Nor, contrary to the Appellant's contention (AS [22]), were there issues that "*should have raised doubt.*"

19. As to the second aspect, the Appellant's contention that an appellate court could not "*exercise any power not properly available to the trial judge within the trial by jury itself*" (AS [26]) entirely ignores the role of an appellate court. Taken to its logical conclusion it would follow from the submission that an appellate court could not allow an appeal on the basis that the verdict was unsupported by the evidence (or on any other ground). If the Appellant is correct, arguably no appellate intervention is ever permitted, even if in favour of the appellant, as that intervention is equally an interference with the jury verdict.[16]

20. As to the third aspect, the conduct of jury trials has always been subject to appellate intervention (see SRS [70] – [71]). This aspect of the Appellant's submission is dependent on its characterisation of the court's task in considering the proviso (for example AS [26][30]). The contention (AS [22] – [25]) which underlies the argument, that an appellate court applying the proviso usurps the jury function, mischaracterises the nature of the appellate process; the court is determining whether a substantial miscarriage of justice has actually occurred (see SRS [70] - [71]).[17]

21. In *Weiss v The Queen* this Court described that in applying the proviso the task is to be undertaken in the same way as an appellate court decides whether a verdict of a jury should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.[18] In undertaking the task an appellate court must make due allowance for the "*natural limitations*" that exist in the case of proceeding on the record[19] and the fact that a jury returned a verdict of guilty cannot be disregarded.[20] In *Weiss* the Court

[15] For example: *Cesan v The Queen* (2008) 236 CLR 358 at [112] – [122]
[16] For example: *R v JS* (2007) 175 A Crim R 108 at [182][183]
[17] *Weiss v The Queen* (supra) at [35]
[18] *Weiss v The Queen* (supra) at [41] and see *Darkan v The Queen* (2006) 227 CLR 373 at [84]
[19] *Weiss v The Queen* (supra) at [41]
[20] *Weiss v The Queen* (supra) at [43]

recognised that "*there will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction*".[21]

22. In *M v The Queen*,[22] the plurality said of the court's task where it is exercised to set aside a verdict of guilty:

> *"In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."*[23]

10 23. Equally, when the proviso is applied, the appellate function does not involve a substitution of 'trial by jury' within the meaning of s 80 of the *Constitution* for something else.

24. In any event there is no basis to contend that it is an essential feature of a trial by jury that it is a trial free from legal error, subject only to a limited encroachment of the Exchequer rule such as "*mere technicalities*" (AS [43]), or as reflected by s 75 of the *Judiciary Act* (AS [46]) or s 671 of the *Criminal Code* 1899 (Qld) (AS [41]).

25. The power to appeal is not a facility of the common law; it is a creation of statute.[24] As this Court noted in *Conway v The Queen*,[25] prior to the enactment of the relevant appeals statutes there were only four quite limited avenues for challenging criminal
20 convictions or sentences. Historically if a challenge did establish error appeals have been refused unless the error had brought about a miscarriage of justice.[26]

26. The Appellant's contention that s 80 has as an essential feature trial free from legal error subject only to the consequences of the limited avenues available at common law (or s 671 or s 75 above), would have the logical consequence that there are no appeals

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[21] *Weiss v The Queen* (supra) at [41].
[22] (1994) 181 CLR 487 at 494-5
[23] citing *Chidiac v. The Queen* (1991) 171 CLR 432 at 443, 451, 458, 461-462 The statement has subsequently been cited with approval in *The Queen v Hillier* (2007) 228 CLR 618 at [20]; *The Queen v Nguyen* (2010) 85 ALJR 8 at [33]
[24] *Conway v The Queen* (2002) 209 CLR 203 at [7]; *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225; *Grierson v The King* (1938) 60 CLR 431 at 436
[25] (2001) 209 CLR 203
[26] *Conway v The Queen* (supra) at [31] and see [32] – [39]

against conviction, as the common law knew of no such appeal.[27] Neither of the provisions referred to provides a right to appeal in the common form.

27. The common law procedures compare unfavourably to the rights that a common form appeal statute now gives to convicted persons.[28]

28. A retrial where in truth no miscarriage of justice had occurred in the trial *"is not conducive to the proper administration of criminal law."*[29]

29. Underlying the Appellant's submission on both limbs of the argument (AS [25][30][43][46]) is the contention that where there is an issue of credibility involved, as in this case (see SRS [54] – [55]), it is impossible for an appellate court to conclude that there was no miscarriage of justice. There is no basis for that proposition.

30. In *Weiss v The Queen* this Court stated that *"there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury."*[30] The Appellant has not (and could not) challenge the correctness of that statement. That being so, whether it can be concluded that no substantial miscarriage of justice actually occurred must depend on the particular circumstances of each case.

31. This Court in *Glennon v The Queen*[31] rejected the submission that the proviso can never be applied where the misdirection goes to the accused's credibility. That is because whether there is a miscarriage of justice must depend on the particular circumstances of the case. The Appellant's submission does not challenge the correctness of that decision. The misdirection under consideration in that case related to an accused's right to silence. As the Court concluded *"the assessment of whether the proviso should be applied depends on the circumstances of each case, and it would not be appropriate to lay down such an absolute rule as contended for by the Applicant."*[32] On the Appellant's submission it would necessarily follow that the proviso could never have any application if an accused gave evidence; a court could never determine that there was no substantial miscarriage of justice. However as a

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[27] *R v JS* (supra) at [182][183]
[28] *Conway v The Queen* (supra) at [7]
[29] *Driscoll v The Queen* (1977) 137 CLR 517 at 527; *Conway v The Queen* (supra) at [29]
[30] *Weiss v The Queen* (supra) at [43]
[31] (1993) 179 CLR 1 at 9 – 10 and see at 8
[32] *Glennon v The Queen* (supra) at 10

matter of logic the submission is much broader (AS [25]); it would preclude applying the proviso whenever there was a factual dispute at trial.

32. As this Court observed in *Conway v The Queen* if retrials were ordered when there was no miscarriage of justice *"the administration of justice would be frustrated and made hostage to 'outworn technicality'"*[33]

Part VII – Notice of Contention

33. The Respondent relies on its submission in the matter of *Stoten v The Queen*.

34. The Appeal should be dismissed.

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[33] *Conway v The Queen* (2002) 209 CLR 203 at [29]