IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No B24 of 2011

BETWEEN **DANIEL ARAN STOTEN**

Appellant

and **THE QUEEN**

Respondent

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Factual Matters

2. In the summing-up, the primary judge told the jury {Court of Appeal judgement at [160]}:

> "We would expect that for any one accused the verdict would be the same on each count, whether guilty or not guilty, although there is an exception to that. If you were satisfied beyond reasonable doubt that an accused acted dishonestly after about 14 February 2004 when the accused heard of Egglishaw being searched, but were not so satisfied for the period before then, then differential verdicts on the two charges would theoretically be possible."

3. This was the only identified basis for different verdicts on counts one and two. Immediately after the verdicts were taken, senior counsel for the respondent said, of the acquittals on count 1, "It's clearly, one would think, based upon the 14 February '04 events." {ibid at [161]}

4. Notwithstanding that concession, the respondent then persuaded the primary judge to sentence the applicant on the basis that the offending conduct commenced in April 2002. The Court of Appeal concluded the judge erred in departing from the terms of the direction. {ibid at [183]}

5. Even now, however, the respondent remains unwilling to acknowledge the effect of the acquittals. This was a retrial after a jury disagreement. Of the six charges that were before the jury, four resulted in a verdict of not guilty. As contended for by Hargraves, the

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only sensible reading of those verdicts must be that the jury had issues of credibility at the forefront of their minds.

6. The appellant makes the following points in response to the statement of facts set out in the respondent's outline (references are to the respondent's paragraph numbers):

8. The scheme was put into effect on the advice of Feddema and Egglishaw, both of whom were experienced chartered accountants. The amounts claimed as a deduction were not arbitrary, but based upon the notional Australian domestic cost of the service provided. {AB1087, 1098} The appellant did not have control over the funds in that he, having transferred the money to Strachans, trusted them to do with it as he had asked. The appellant was not a beneficiary, trustee nor a protector of the trust. The true level of control that he had over the funds is reflected in Strachan's continued retention of over $1m. {AB1237} Further, Glenn Hargraves also had possession of a "protector letter".

9. This paragraph oversimplifies the position. Feddema advised Adam Hargraves that any tax minimisation scheme had to be, unlike that from "Sovereign Capital", "legitimate and legal". {AB326 l 45} The legitimacy of the scheme was assumed from the tenor of the discussions at Zenbar and those that followed {Adam's evidence at AB892-905; the appellant's at AB1078-1084} Tony Coote was merely PDC's "compliance" accountant with limited or no annual contact with the appellants, and was not a source of strategic advice.

10. Contrary to what is asserted here, the notional domestic cost formed the basis of the mark-up. This was reflected in a comparison of PDC's books of account before and after the implementation of the scheme. {AB1098}

11. There *was* a contract between AR and PDC. {an early iteration of it is ex Z304, AB1311-1328} Its existence was pleaded against the appellant as an overt act.

13. The first transaction was undertaken on the basis that those that followed would allow a reconciliation to the notional annual domestic cost.

14. The tax return may have been filed in June 2001 and during the period covered by count 2, but that was still well before 14 February 2004. This evidence is not relevant.

16. The notes of the meetings with Strachans (also attended by Glenn Hargraves) do not contain the slightest suggestion of dishonesty.

25. The letter written by Mr Smibert was given to the appellant and the Hargraves brothers in April 2002. At the trial it was not contended to have the decisive character

the respondent now seeks to attribute to it. If its delivery was such a watershed moment, surely Glenn Hargraves would have been convicted, and the appellants convicted on count 1. Mr Smibert ceased his involvement with PDC, not because of any dismay at the illegality or dishonesty of the scheme, but because he was going overseas to undertake missionary work with his church. Indeed, at the time of his departure it was contemplated that he would return to PDC once that work had concluded. {AB481-482; ex DD0} Had he imagined that the scheme involved illegality, he would have immediately severed all ties with PDC, yet even after delivery of the letter, he continued to work for PDC as an employee until his departure overseas. {AB512} Mr Smibert was also a signatory to the original PDC-AR agreement. {AB585-486}

28. The search of Egglishaw *did* provoke enquiry by the appellant. The appellant telephoned Feddema immediately upon hearing of it, and both appellants spoke to Feddema by telephone for over 11 minutes on 20 February 2004. The appellant gave evidence that in that call, Feddema reassured them that what had occurred had no bearing upon the operation of their scheme. He spoke to de Figueiredo by telephone and then travelled to Brisbane to meet with Feddema, who again offered him reassurance. After that, the appellant flew to Geneva where he met with Egglishaw, who took pains to explain that the scheme remained sound. Upon his return to Australia, he again met with Feddema in Brisbane. {AB1123-1131} By way of contrast, although Feddema acknowledged the telephone call, and that he had met and spoken with the appellant, he was able to recall very little of what was actually discussed.{AB107-108; 431-437}

36. Although the appellant can be heard to be laughing during the course of the discussion with Catherine McGarry, set as it was against the background of a search of his home by armed police, this must surely be regarded as an example of black humour. Many of the other intercepted telephone calls suggested a much more sombre frame of mind. In particular, in a conversation with his wife, the following exchange took place:

> DS "I know it's really stupid and such a ridiculous situation considering what we, you know, that we thought, I mean what was the point of doing all that we did if we thought it was illegal. What's the whole bloody point, you know the risk of-sending it overseas, you know all that sort of stuff. The whole point of that was because we thought that's

the way to do it so it's legal, and this is where it ends up, it's just really, it's absolutely just rocks my mind.

...

KS But how, how do we explain the credit card though?... I mean it's in someone else's fricken name, I mean how fraudulent is that?...

DS ...it's the point that when we were told to use cards like that, the whole thing was that it was always about the fact that if we do it this way it will be legal, that's the whole point, that was the whole point, that was the whole point of JOHN FEDDEMA, the whole point of EGGLISHAW, the whole thing, it was about the fact that it was, it was okay to do all this because at the end of the day there was this loophole and it allowed us to get these funds through because we didn't have control over it, because it was legal." {ex DAS3T, AB1740}

Robinson v The Queen

7. The respondent, although contending that the direction did not breach *Robinson*, does not explain why or how the jury would not have understood the words used by the trial judge as applying to the appellant.

8. This Court's reasoning in *Robinson* derives its force from the fundamental departure occasioned by the direction in question from the requirements of a trial according to law. A breach of *Robinson* is therefore a "serious breach of the presuppositions of the trial" {*Wilde v The Queen* at [46]} and as such denies the application of the common form criminal appeal provision with its proviso.

Section 80

9. The constitutional point was left open in *Weiss*. There is a difference of substance between appellate evaluation that the error at trial could not have affected the result, and an approach calling for an appellate decision, based on the trial record, of guilt beyond reasonable doubt.

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