IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

278 279
Nos. S~~127~~/S~~128~~ of 2013

BETWEEN:

MICHAEL JOHN MILNE
Appellant

AND

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

PART I - CERTIFICATION THAT SUBMISSIONS ARE SUITABLE FOR PUBLICATION ON THE INTERNET

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

PART II – STATEMENT OF ISSUES

2) Was the Court of Criminal Appeal correct in finding that, in the circumstances alleged against the appellant at trial, the property referred to in count 1 of the indictment was capable of falling within the definition of 'instrument of crime' in s 400.1 of the *Criminal Code (Cth)*?

Filed on behalf of the Respondent
THE RESPONDENT'S SOLICITOR IS:
Commonwealth Director of Public Prosecutions,
Level 7, 66 – 68 Goulburn St Sydney NSW 2000
Telephone: 9321 1163; Facsimile: 9321 1192
Reference: Dimitrios Kapeleris

Dated: 19 December 2013

PART III – CERTIFICATION THAT NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT 1903 HAVE BEEN CONSIDERED

3) The respondent has considered whether or not notice should be given, pursuant to s 78B of the *Judiciary Act 1903*, and has concluded that no such notice is required.

PART IV – FACTUAL ISSUES IN CONTENTION

4) The statement of facts in the appellant's submissions and chronology is generally correct.[1] However, that brief summary of the facts does not disclose the complexity of the case. The relevant facts are more comprehensively summarised in the decision of the Court of Criminal Appeal at [9] to [77].

PART V – APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

5) The respondent accepts the appellant's statement of applicable constitutional provisions, statutes and regulations.

PART VI – ANSWER TO ARGUMENT OF THE APPELLANT

6) Relevantly, a person is guilty of the money laundering offence created by s 400.3(1) of the *Criminal Code* if:

i the person deals with property, and

ii the person intends that the property will become an instrument of crime.

[1] The incorrect reference in the appellant's submissions at [11] to Dutch companies (these companies were incorporated in St Vincent and the Grenadines) is inconsequential, and is corrected in the appellant's chronology

7) When the definition in s 400.1 of 'instrument of crime' is incorporated,[2] a person is guilty of that money laundering offence if:

i the person deals with property, and

ii the person intends that the property will be used in the commission of, or used to facilitate the commission of, an (indictable) offence.

8) The appellant's primary contention is that the money laundering offence can only apply if a person deals with property, intending that, *at some time in the future* (after the property has been dealt with), the property will become an instrument of crime.[3]

9) The terms of the provisions are not confined to the circumstances identified by the appellant. The provisions also contemplate offences in which a person deals with property intending that, *as a result of that dealing*, the property will facilitate the commission of a future offence and, as such, become an instrument of crime.

10) This broader construction of the provisions is open on the words of the provisions and is to be preferred because it gives effect to the legislative intention that the money laundering offences should be capable of flexible application and wide operation.

The prosecution case on 'instrument of crime'

11) The prosecution alleged that the appellant dealt with the 48 million Admerex shares by disposing of them in a swap for one million Temenos shares (within the concealment of a sophisticated offshore structure

[2] As that definition applied at the time of the alleged offence, and before amendment pursuant to the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010*, effective on 19 March 2010

[3] Appellant's submissions at [37], [41], [43], [46], [48], [53]

controlled by the appellant) intending that, as a result of that dealing, the shares would facilitate the commission of a future offence involving the lodgement of a tax return which dishonestly failed to declare the capital gain derived from the disposal of the Admerex shares.

12) On the prosecution case, the appellant intended that the Admerex shares would facilitate the commission of the future tax offence in two ways:

i First, as a result of the swap of Admerex shares for Temenos shares, there would be a capital gains tax event that would be the basis for the tax offence that he intended to later commit, in failing to declare the capital gain derived from the disposal of the Admerex shares.[4]

ii Secondly, as a result of the swap of Admerex shares for Temenos shares, he could obtain the benefit of the capital gain with greater concealment because the capital gain would be realised in cash by selling Temenos shares instead of by the direct sale of Admerex shares.[5]

13) At the time of the swap, on 3 February 2005, the 48 million Admerex shares traded on the Australian Stock Exchange at a total value of between approximately $8,400,000 and $9,120,000.[6] At that time, the one million Temenos shares traded on the Swiss Stock Exchange at a total value of between approximately $8,469,090 and $8,728,018.[7] The relative equivalence in value between the Admerex shares and the Temenos shares was consistent with the prosecution case as to the appellant's motive for

[4] Written directions to the jury (MFI 40) at [17], [22]
[5] Written directions to the jury (MFI 40) at [22]; Judgment No. 3 dated 4 November 2010 (refusing application for directed verdicts) at [27]; summing up at 132.10 – 132.16, 151.5 – 151.11; see also extracts set out below
[6] Exhibit B (admissions by the accused) at [56]; 48 million Admerex shares trading at a value of between 17.5 cents and 19 cents per share = between $8,400,000 and $9,120,000
[7] Exhibit C1 at page 152; 1 million Temenos shares trading at a value of between 7.85 and 8.09 Swiss francs per share (at an exchange rate of 0.9269 Swiss francs for $1) = between $8,469,090 and $8,728,018

using the the Admerex shares to obtain the Temenos shares because, of itself, the share swap did not result in any profit to the appellant.

14) The prosecution argued that the appellant's intention as to the use of the Admerex shares was confirmed by his conduct following the share swap. Within five months after the share swap, the Temenos shares had been sold, realising over $8 million in cash. That cash was put to various uses for the personal benefit of the accused. Most relevantly, approximately $5.6 million of these proceeds were ultimately returned to Australia. When the appellant was later questioned by the accountants retained to prepare tax returns as to the source of the funds which were returned to Australia, the appellant did not disclose the disposal of the Admerex shares and, instead, dishonestly claimed that that the funds brought into Australia were loans from an offshore entity referred to as 'Clairmont'.

15) This deception was facilitated by the appellant's use of the Admerex shares to obtain the Temenos shares because the appellant's previous association with Admerex, as a director and a substantial shareholder (through his private company Barat Advisory Pty Limited), was public knowledge.[8] Moreover, the sale for cash of a large parcel of 48 million shares in a company listed on the Australian stock exchange may have attracted the attention of the local business community and the Australian Taxation Office. In comparison, the sale for cash of the Temenos shares was less open to scrutiny because it was a smaller parcel of only one million shares in an overseas company listed on the Swiss stock exchange.

16) The issue concerning 'instrument of crime' that is the subject of this appeal was raised at the end of the prosecution case, as one of several contentions advanced on behalf of the appellant in an application that the

[8] (2012) 219 A Crim R 237; 259 FLR 42 (Court of Criminal Appeal) at [14]-[15], [22]-[23]

trial judge should direct the jury to return verdicts of acquittal. The argument in response by the prosecution included the following:[9]

> My learned friend seems to make the point that there was no future ability to use the shares. I am getting off the track a bit but in our submission that was a use of the shares which is capable of constituting an offence, but it also had the facilitation of the offence because it then put Mr Milne in control of the Temenos shares which he was able to dispose of with a higher degree of anonymity and the better ability of concealing the outcome of his transactions.
>
> Because it was a disposal in our submission it amounted to a CGT event and generated a liability at that point, in capital gains tax.
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> As I indicated it is our case that it then presented Mr Milne with the opportunity of dealing in Temenos shares instead of Admerex shares so that he could embark upon the process of selling those shares without attracting attention.
>
> And that is reflected by the fact that immediately he commenced to sell the Temenos shares and to repatriate the proceeds of the funds to the benefit of himself initially by the two overseas payments to the antiquities company in Paris and to the exclusive resorts payment and thereafter continue to transfer the proceeds of the sale back to the Barat Advisory account in Australia.

17) The Crown prosecutor returned to this topic later in the argument:[10]

> That is consistent with, in our submission, with the way in which I expressed the case and that is preparatory steps were taken after the purported assignment on 11 June, and then specifically on the 3rd of February 2005, the shares were used as an instrument of crime and had an ongoing function because the result of the exchange was that the Temenos shares came into the possession of Mr Milne and enabled him to gain access to the proceeds of the allotment of the Admerex shares by selling off the Temenos shares. So, it was a use and an ongoing use in our submission as a result of the transaction leading up to the end of that financial year.
>
> The same argument I think meets the further reason, in the sense that whilst you [sic] do say that the accused always had in mind that Barat would avoid the payments of capital gains tax it was not until the swap on the 3rd of February that that conduct became an offence against section 400.3 for the reasons I have already expressed resulting in the Temenos shares substituting for Admerex shares, the advantage that they could be disposed of more readily and more discreetly, and in that way, facilitate or enhance the non declaration of the capital gain in the relevant income tax return.

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[9] Transcript 707.39 – 708.8

[10] Transcript 709.17 – 709.43; see also 712.33 – 713.14

> The same argument in broad terms I think applies in relation to the fourth reason given by my learned friend in relation to the fact that the shares were just shares and that there was nothing in their character which rendered them an instrument of crime.
>
> At the risk of repetition we make the same point and that is that by swapping them for the Temenos shares with their increased ability to be sold and discreetly, the Admerex shares, facilitated the offence.

18) To similar effect, the prosecution case as to how the appellant intended that the Admerex shares would facilitate the commission of the later tax offence was explained, as follows, near the conclusion of the closing address to the jury:[11]

> In a way the transfer to the Stichting companies and the creation of the Stichtings contributed to the concealment of the trail of disposal of Admerex shares, but the one dealing which we suggest facilitated the deception later on was the conversion of the shares into the Temenos shares and that was where, whatever the inquiries embarked upon by Mr Thurn and Mr Shew and Mr Samuel were, they were always going to run into that dead end when it came to independently trying to establish the facts.
>
> So what we suggest is that there seems to be quite a significant internal conflict between what appears to be the arguments being put by the defence through the cross-examination of the witnesses. On the one hand it seems to be suggested that there was no ongoing use of the Admerex shares, the 48 [sic] Admerex shares in facilitating the obtaining of a financial advantage by deceiving the Commissioner of Taxation as to capital gains, but on the other hand it seems to be suggested that the accountants could have investigated and established the facts.
>
> The point we make is that if the accountants did have that obligation, and we suggest that they didn't, in any event they would have run into this brick wall because of the fact that the 48 million shares had been swapped for the Temenos shares and the inquiries would have led nowhere. Whereas in fact what did happen, we suggest, is that the deception was facilitated because in actual fact the monies were able to come back to Barat and appear in the accounts, but the true character of those payments was concealed because of the conversion of the 48 million Admerex shares into the 1 million Temenos shares. So that even if the accountants had got to that point they never would have been able to go back beyond the swap.
>
> So in those circumstances what we invite you to conclude is that there is this significant overlap between the first and second counts, but more particularly

[11] Transcript 823.29 – 824.15; see also closing address at 755.18 - 755.26, 780.36 - 780.46, 795.6 – 795.13

> when it comes to the first count which alleges that the accused used the shares as an instrument of crime in order to facilitate obtaining a financial advantage by deception it becomes quite starkly apparent how effective the swap was in achieving that purpose in the light of the cross-examination put to the accountants because in the end result they had little or no capacity to establish the true circumstances relating to the payments going into the Barat account because of the device used by the accused.

19) The two ways in which the prosecution alleged that appellant intended that the Admerex shares would facilitate the commission of the future tax offence were also reflected in the decision of the Court of Criminal Appeal:

> More significantly, in the present matter, the Admerex shares did not cease to exist upon their disposal. They remained wholly in existence but were now hidden behind the additional curtain of the Temenos shares.[12]...
>
> ...The disposal of the Admerex shares in the present matter had two features that were relevant to proof of the appellant's intention that the shares would be used to facilitate the commission of the s 134.2 offence. First, the share swap created the CGT event which provided the basis for the commission of the future crime. Second, it provided a facilitating mechanism for the commission of the offence in that it provided a further cloak or curtain behind which the act of ultimate deception (the lodgement of a return) would be more likely to succeed. It had the capacity to assist the very advantage the deception (by lodgement of the tax returns) was intended to secure.[13]

20) The appellant's submissions are, with respect, based upon a false premise because they do not adequately reflect the prosecution case in relation to 'instrument of crime':

i First, they fail to take into account the second way in which the prosecution alleged that the appellant intended that the Admerex shares would facilitate the commission of the future tax offence, namely, that as a result of the swap of Admerex shares for Temenos shares, he could obtain the benefit of the capital gain with greater concealment because the capital gain would be realised in cash by selling Temenos shares instead of by the direct sale of Admerex shares.

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[12] Court of Criminal Appeal at [140]; see also at [93]
[13] Court of Criminal Appeal at [150]

ii Secondly, the appellant's submissions overstate the role played by the offshore structure in the prosecution case.[14] Although the offshore structure offered additional concealment of the capital gain, and was an important part of the prosecution case, particularly in establishing the appellant's overarching dishonest intention to evade tax, it was the appellant's use of the Admerex shares to obtain the Temenos shares that was the focus of the prosecution case on instrument of crime. This is made clear in the extract from the conclusion of the Crown prosecutor's closing address to the jury, set out above.

21) The misunderstanding of the prosecution case is apparent in the appellant's submission, set out below, contrasting the position if no offshore structure had been used:[15]

> Having regard to the way in which the Crown put its case, it would appear that the Crown, in the absence of the use of such a structure, (even if it was clear the appellant had no intention to declare the sale in the relevant tax return), would not suggest the appellant on the sale, intended that *the shares* would be used to facilitate the commission of the future offence.

22) To the contrary, even in the absence of the additional concealment afforded by the offshore structure, the two ways in which the prosecution put its case on 'instrument of crime' (set out above at paragraph 12), would have been open, albeit with less force.

The money laundering provisions are intended to be flexible and of wide application

23) The legislative intention that this category of offences be flexible and of wide application is apparent from the broad wording of the money

[14] Appellant's submissions at [30], [35]
[15] Appellant's submissions at [35]

laundering provisions.[16] That intention is also disclosed in the relevant secondary legislative materials.

24) In June 1999 the Australian Law Reform Commission published a report entitled *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*.[17] The ALRC report dealt generally with the regulation of proceeds of crime and included a review of the money laundering offences previously available under ss 81 and 82 of the *Proceeds of Crime Act 1987*. One of the key recommendations made in the ALRC report was that the offence of money laundering should be broadened to apply in circumstances where a person deals with property for the purpose of committing or facilitating the commission of a future offence.[18]

25) In this regard, the ALRC report commented as follows:[19]

> On the other hand, the Commission believes that the submissions referred to above make a significant case for reforms that would enable the offence of money laundering to be provable by reference to a wider range of activity, namely, proscribed activity relating to money or property that can be proved beyond reasonable doubt to be preparatory to, or associated with, the commission of the relevant predicate offence or a consequence of the commission of such an offence. This last mentioned formulation would encompass, but not be limited to, proceeds as defined.

26) The ALRC recommendations were reflected in the legislative scheme incorporating the various money laundering offences in Part 10.2 of the *Criminal Code*, effective from 1 January 2003.[20]

27) The intention that this new scheme for money laundering offences would be of broad application, consistent with the recommendations in the ALRC

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[16] *R v Ansari* (2007) 70 NSWLR 89 at [119]-[120]

[17] Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report 87 (1999)

[18] ALRC report, 'Part 7, Laundering of property and money', in particular Recommendation 22; see also Recommendations 23, 24, 25 and 28

[19] ALRC report at paragraph 7.19

[20] Those provisions were inserted into the *Criminal Code* by the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002*, effective from 1 January 2003.

report, is apparent from the following passages in the Explanatory Memorandum:

i In relation to the amendments generally:

> The Bill repeals the existing money laundering offences in the *Proceeds of Crime Act 1987* and replaces them with new provisions in the *Criminal Code* which are graded both in terms of the mental element required to be established and the value of the property the subject of the dealing which constitutes money laundering.

ii In relation to the definition of 'instrument of crime':

> ***'Instrument of crime'*** introduces a new concept for the purposes of the money laundering offences which were previously only concerned with 'proceeds of crime.' Consistent with recommendation 22 of the ALRC report, the definition extends the coverage to money or property used in the commission of, or to facilitate the commission of, an indictable offence. However, it is not a new concept in the context of proceeds of crime legislation. A similar concept is used as part of the definition of 'tainted property' in section 4 of the PoC (Proceeds of Crime) Act 1987 and in clause 338 of the PoC Bill.

iii In relation to s 400.13 – Proof of other offences is not required:

> Money laundering is often linked to other offences, usually referred to as the 'predicate offence'. This provision makes it clear that it is not necessary to prove those other offences with particularity about the exact offence or the particular offender.

iv In relation to s 400.15 – Geographical jurisdiction:

> This recognises that there is scope for money launderers based in Australia to try to avoid authorities in Australia by dealing in the money or other property off-shore.

28) Given the broad wording of the money laundering provisions, and the secondary legislative materials referred to above, the Court of Criminal

Appeal was correct to apply a purposive interpretation to those provisions.[21]

29) The appellant's construction should not be accepted because it imposes a restricted operation of the money laundering offence, which is not required by the terms of the provision, and undermines the legislative intention that this category of offence be flexible and capable of application to a wide variety of circumstances and criminal activity. In particular, the appellant's construction would substantially impair the capacity of the money laundering provisions to address continually evolving sophisticated tax evasion schemes that are designed to disguise the source of funds with increasing complexity and ingenuity.

30) In light of the circumstances in which the appellant disposed of the Admerex shares, it was consistent with both the terms of the money laundering provisions, and their intended broad application, that the indictment included both the money laundering count and the tax evasion count, in order to properly reflect the full extent of the appellant's criminal conduct. The overlap between the offences was taken into account on sentence, in accordance with *Pearce v The Queen*,[22] so that the appellant was not subject to any double punishment.[23]

Authorities considering the meaning of 'use'

31) The appellant's submissions include reference to numerous cases considering the meaning of 'use' in the context of different legislation, which does not include the composite phrase 'used to facilitate the commission of an offence' that defines instrument of crime in the money laundering provisions. Moreover, none of the confiscation of criminal assets

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[21] Court of Criminal Appeal at [135]; see also at [146]
[22] (1998) 194 CLR 610
[23] *R v Milne (No. 6)* [2010] NSWSC 1467 at [182]-[198]

cases referred to by the appellant consider property being used in connection with a revenue offence.

32) Some of the propositions drawn from those cases by the appellant beg the question of statutory construction in the present appeal, because they appear to assume (as the appellant contends) that the money laundering offence can only apply if a person deals with property, intending that, at some time in the future after the property has been dealt with, the property will become an instrument of crime.[24]

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33) *White v Director of Public Prosecutions for the State of Western Australia*[25] involved an appeal against a decision of the Court of Appeal of Western Australia. The Court of Appeal held that premises leased by the appellant in that case were 'crime used property', within the definition in s 146(1)(a) of the *Criminal Property Confiscation Act 2000 (WA)*, in circumstances where he had arranged for the gates to the premises to be locked and then shot an associate on the premises, behind the locked gates.[26]

34) Section 146(1) of the *Criminal Property Confiscation Act 2000 (WA)* is set
20 out below:[27]

> (1) For the purposes of this Act, property is crime-used if —
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> (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;
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> (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence; or
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> 30
>
> (c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.

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[24] Appellant's submissions at [53]
[25] (2011) 243 CLR 478
[26] (2011) 243 CLR 478 at [17]
[27] (2011) 243 CLR 478 at [9]

35) Of these definitions, s 146(1)(a) bears the closest analogy to the definition of 'instrument of crime' that is the subject of the present appeal because it also includes the notion of 'facilitating' the commission of an offence.

36) In *White*, the primary judge accepted that the gates and fence of the premises were used in connection with the murder. However, her Honour held that s 146(1)(a) had no application because it strained the ordinary meaning of 'used' to find that the land and buildings which comprised the premises were also used in connection with the murder.[28]

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37) On appeal, the Court of Appeal adopted a wider interpretation of s 146(1)(a) and found that the premises were 'crime used' property within the meaning of that provision. The construction adopted by the Court of Appeal was influenced by the reference in s 146(1)(a) to 'facilitating' the commission of an offence. This is clear in the following passage from the judgement of McClure P, with whom Owen and Buss JJA agreed (emphasis added):[29]

> It may be accepted that the use of property requires a deliberate act (or omission). However, it is not a requirement that the act or acts constituting the
20 relevant use must (although they may) be done with the intention or purpose of committing the specific unlawful act that eventuated (that is, the confiscation offence). The use must, at its widest, be indirectly in connection with the facilitation of a confiscation offence. **There is a sufficient relationship between the act or acts constituting the use and the specific confiscation offence if the acts have the consequence or effect of facilitating that offence.** The intentional locking of the gates was for the purpose, and had the effect, of preventing or impeding Tapley's departure from the Maddington land before the respondent had finished dealing with him. That use of the land facilitated Tapley's murder. The subsequent conduct
30 in using the land to store the body away from public view pending its disposal is also a relevant use. Accordingly, the Maddington land was crime-used under s 146(1)(a) of the Act.

38) By analogy, the broad ambit of operation that was found by the Court of Appeal to flow from 'facilitating' the commission of an offence also flows

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[28] *Director of Public Prosecutions v White* (2010) 41 WAR 249 at [13]-[14]
[29] *Director of Public Prosecutions v White* (2010) 41 WAR 249 at [39]

from the same language in the definition of 'instrument of crime' that is the subject of the present appeal.

39) In this regard, it is also relevant that the Court of Appeal in *White* did not accept the narrow construction of the term 'use' adopted in *R v Rintel* by the majority of the Court of Criminal Appeal of Western Australia,[30] and noted that the terms of s 146(1)(a) were significantly wider than the legislation considered in *Rintel*.[31]

10 40) On the appeal in *White* to this Court, concessions were made that focused the decision of this Court on the definition in s 146(1)(c), without the need for detailed consideration of the definition in s 146(1)(a).[32] In the result, the Court of Appeal's finding that the premises were 'crime used' property within the definition in s 146(1)(a) was affirmed.

41) The submissions of the appellant quote a passage from the judgment in *White* of French CJ, Crennan and Bell JJ,[33] which is better understood when read in the context of the entire paragraph (emphasis added):[34]

20 > As was submitted by the appellant, s 146(1)(c) has a broad application. It covers cases in which acts or omissions were done or facilitated in or on the property in connection with the commission of a confiscation offence. On the face of it, the mere doing of an act in or on a property in connection with the commission of a confiscation offence, does not necessarily fit comfortably within the concept of use applied to property. The relevant ordinary meaning of the verb "use" is to "[m]ake use of (a thing), esp for a particular end or purpose; utilize, turn to account" (33). According to that ordinary meaning, "use" would be a subset of the class of conduct described in s 146(1)(c). However, the relationship which the words "in connection with" forge between
30 > "act or omission done on the property" and "the commission of a confiscation offence" **suggests that even though it may involve an extension of the verb "use"**, the conduct described in s 146(1)(c) can be brought within the meaning "makes criminal use of property" in s 147, without doing violence to

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[30] *R v Rintel* (1991) 3 WAR 527
[31] (2010) 41 WAR 249 at [22]-[25], [28], [30]
[32] (2011) 243 CLR 478 at [19]-[20]
[33] Appellant's submissions at [55]
[34] (2011) 243 CLR 478 at [21]

the language of the latter section. In this case, purpose and context favour that interpretation.

42) To the extent that an analogy can be drawn for the purposes of construing the definition of 'instrument of crime', the reasoning outlined in the extract quoted above supports an extended meaning of the word 'use', beyond its ordinary meaning, to give proper effect to the legislative intention that the money laundering provisions be flexible and of wide application.

10 **PART VII – ARGUMENT IN SUPPORT OF NOTICE OF CONTENTION OR CROSS APPEAL**

43) The respondent does not rely upon any notice of contention or cross appeal.

PART VIII – ESTIMATED TIME FOR ORAL ARGUMENT

44) The respondent estimates that no more than two hours will be required for the presentation of the respondent's oral argument.

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19 December 2013

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