

MILNE v THE QUEEN (S278/2013 & S279/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2012] NSWCCA 24

Date of judgment: 2 March 2012

Special leave granted: 8 November 2013

In November 2010 the Appellant was found guilty of one count of "money laundering" contrary to s 400.3(1) of the *Criminal Code Act* 1995 (Cth) ("the Code"). He was also found guilty of one count of doing an act with the intention of dishonestly obtaining a gain from the Commonwealth contrary to s 135.1(1) of the Code. Justice Johnson then sentenced him to 8½ years imprisonment, with a non-parole period of 4 years and 9 months.

The Crown alleged that the Appellant had acquired a significant parcel of shares (at a negligible cost) in Admerex Limited ("Admerex") through his own private company, Barat Advisory Pty Ltd ("Barat"). He then received tax advice and proceeded to establish certain tax-deferral arrangements involving numbers of overseas entities through which those shares were ultimately disposed. The short term feature of those arrangements was the necessity to pass both the legal and beneficial ownership of those shares to those overseas entities. A critical dealing in which was the "swap" of approximately 48 million Admerex shares for 1 million shares in Temenos Group AG.

The Crown alleged that prior to the swap, the Appellant both deliberately and significantly departed from the terms of his tax advice. It further alleged that he did so with the intention of avoiding Capital Gains Tax ("CGT"). In particular, the Crown alleged that Barat had retained the beneficial ownership of the shares. It also alleged that when the Appellant ultimately disposed of the Admerex shares, he did so with the intention of avoiding CGT. The relevant transactions forming the subject of the money laundering offence occurred in both Australia and overseas between January 2003 and September 2005, with the CGT liability arising in the 2005 financial year.

The circumstances relating to the second count concerned the Appellant's dealings with his accountants relating to the production of Barat's accounts and income tax returns. The Crown alleged that the Appellant intentionally omitted the true CGT position in his 2005 tax return, with the consequence of avoiding a liability of between \$1.9 million and \$2.4 million.

On 2 March 2012 the Court of Criminal Appeal (Whealey JA, Latham & Harrison JJ) unanimously refused the Appellant's appeal against both his conviction and his sentence. Their Honours rejected all of the Appellant's grounds of appeal, specifically finding that there was no failure on Justice Johnson's behalf to adequately direct the jury concerning either of the counts. They further noted that they themselves had no doubt as to the Appellant's guilt and that it was likewise open to the jury to be satisfied beyond reasonable doubt.

With respect to the sentence, the Court of Criminal Appeal found that there was no error in how Justice Johnson approached this task. In particular, their Honours noted the trial judge's careful consideration of the proper sentencing principles concerning the complex considerations of totality, overlapping criminality and the need to avoid double punishment. They further noted that Justice Johnson had recognised that there was a clear overlap between the offences in this matter, but he had correctly concluded that count 1 involved significant additional criminality over count 2. They additionally found that the sentences imposed were not manifestly excessive.

The grounds of appeal in both matters are:

- The Court of Criminal Appeal erred in its interpretation of the definition "instrument of crime" in s 400.1 of the Code and as a result erred in finding that the property referred to in count 1 of the indictment was capable of falling within that definition in the circumstances alleged against the Appellant at trial.