SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hart* [2005] QCA 50
PARTIES:	**R** **v** **HART, Steven Irvine** (appellant)
FILE NO/S:	CA No 198 of 2004 DC No 2000 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2004
JUDGES:	McPherson and Davies JJA, and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. The convictions in counts 2 and 3 are set aside and a new trial is ordered of those two counts in the indictment**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – where the appellant, an accountant, was charged with defrauding the Commonwealth by making false statements on income tax returns of clients – the appellant set up a holding company, and had a loss making company and income earning companies as subsidiaries – the appellant purported to transfer tax losses from loss making subsidiaries to income earning subsidiaries, under s 80G *Income Tax Assessment Act* – the Crown alleged that the appellant had made false statements in tax returns that, *inter alia*, both legal and beneficial ownership of the subsidiaries vested in holding company – company searches revealed that legal ownership of subsidiaries vested in holding company – whether the Crown had proved beyond reasonable doubt that beneficial ownership of the shares of the subsidiaries did not vest in the holding company, and that the appellant knew that it did not

Income Tax Assessment Act 1936 (Cth), s 80G

DKLR Holding Co (No 2) v Commissioner of Stamp Duties (1980) 1 NSWLR 510, cited
Peters v R (1998) 192 CLR 493, cited

COUNSEL: B W Walker SC, with P J Davis, for the appellant
R V Hanson QC, with A J MacSporran, for the respondent

SOLICITORS: Ryan & Bosscher for the appellant
Director of Public Prosecutions (Cth) for the respondent

[1] **McPHERSON JA**: The appellant was charged in the District Court at Brisbane with four counts of defrauding the Commonwealth. He was found guilty on counts 2 and 3, both of which related to Lammey Bros Pty Ltd; but the jury were unable to agree, and were discharged from rendering verdicts, on counts 1 (Berwick Holdings Pty Ltd) and count 4 (Refwood Pty Ltd). These are the appellant's appeals against conviction on counts 2 and 3. A related application for leave to appeal against the sentences imposed was dismissed by this Court at the request of his counsel Mr Bret Walker SC.

[2] Before his conviction the appellant practised as an accountant in Brisbane, and the companies referred to in each of the counts were his clients at relevant times in 1996 or 1997 or, in the case of Lammey Bros Pty Ltd also in 1998 (count 3), for whom he prepared and lodged with the Commissioner for Taxation their annual income tax returns for the years specified. The averment in each count is that he defrauded the Commonwealth by causing the income tax returns (in counts 2 and 3, of Lammey Bros Pty Ltd) to understate the taxable income of those clients by particular amounts in each case, or by causing the income returns of another specified company (Lammey Bros Management Pty Ltd, in counts 2 and 3) to falsely claim that losses of that company in the same amount had been transferred from a third company (Chester Hill Centre Pty Ltd). In counts 2 and 3, the amount of income understated in the return lodged for the year ending 30 June 1996 was alleged to be $460,000, and for the year ending 30 June 1997 it was $469,641.

[3] The conception, of which the appellant sought to take advantage in preparing and lodging the clients' tax returns in a form that the prosecution claimed was fraudulent, took as its starting point s 80G of the *Income Tax Assessment Act 1936*, in the condition in which it stood in the relevant years. In calculating assessable income, s 80G(6) permits an agreement to be made transferring the loss incurred by one company (the loss company) to another (the income company) thus enabling the assessable income of that other company (the income company) in a particular year to be reduced by that amount: see s 80G(6)(c). In that event, s 80G(6) deems the amount of the loss to be a loss incurred by the income company. To utilise this procedure, certain statutory requirements or conditions must be satisfied. One is that, by sub-section (6A) of s 80G, an agreement complying with s 80G(6)(c) must be: (a) in writing and signed by the public officer of the loss company and of the income company; and (b) made before lodging the income tax return of the income company.

[4] It was the prosecution case at trial that the agreements to set income against losses in this way were not signed by the public officer of the companies either at all or before lodgement of the relevant tax returns of the income company, so that the

requirements of s 80G(6A) were never satisfied. But before considering this point or the submissions on appeal concerning it, it is desirable to refer to the other respect in which it has been submitted that s 80G was not complied with. It arises under s 80G(1) and (2) of the Act.

[5] One of the other requirements to be satisfied before s 80G(6) will apply is that the loss company must be a "group company" in relation to the income company in both the loss year and the income year: see s 80G(6)(e). By s 80G(1), a company is a group company in relation to another company if either: (a) one of the companies was a subsidiary of the same company; or (b) "each of the companies was a subsidiary of the same company during the whole of the year of income or … during that part of the year of income during which both companies were in existence". It is alternative (b) that is relevant here. Section 80G(2) declares that one company is a subsidiary of another company ("the holding company") if at all times during the relevant period:

> "(a) all the shares in the subsidiary company were beneficially owned by:
>
> (i) the holding company …".

[6] It is not necessary here to set out the remaining part of s 80G(2) because the critical question in this appeal is whether the prosecution succeeded in proving that at the relevant times all the shares in the subsidiary company Lammey Management were *beneficially owned* by the holding company. In considering that question, it is necessary to bear in mind, that unless this was established as a fact, the prosecution would fail. Moreover, it was also necessary to prove that the appellant was, when he lodged the returns, aware of that fact. That was so because s 29D of the *Crimes Act 1914* (Cwth) under which the charges were laid requires proof of intention to defraud the Commonwealth. Unless, therefore, the shares were in fact not "beneficially owned" by the holding company *and* the appellant knew it to be so, the prosecution failed to establish an essential element of its case. As was said by Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493, 503, in discussing whether dishonesty is an indispensable ingredient of fraud, "the question is usually whether the statement was made with the knowledge of its falsity and with intent to deprive". That was so here. The issue on this aspect of the appeal is therefore whether the representation in the income tax returns prepared and lodged by the appellant that Lammey Management was entitled under s 80G to a deduction for transferred losses, and the Commonwealth acted on them, was, to his knowledge, false. If not, his conviction under s 29D of the *Crimes Act* cannot stand.

[7] It is necessary now to refer to some further details of the steps taken by the appellant in preparing to claim deductions under s 80G on behalf of his clients. He controlled Harts Consulting Pty Ltd which I will refer to as Harts Consulting. By a deed dated 30 June 1995, in which Harts Consulting was described as the "Acquirer", Harts Consulting agreed with Heaven Sea Pty Ltd as the "Facilitator" that, for a price of $1.2 million, Heaven Sea Pty Ltd would procure for Harts Consulting "all the legal and beneficial ownership of all the shares" in two other companies which in turn held all the issued share capital in Chester Hill Centre Pty Ltd. It was a company in liquidation, of which Mr M G Jones, chartered accountant of Sydney, was the liquidator. Chester Hill had incurred losses which the appellant was proposing to use as deductions to set against profits made by his clients or their companies in relevant years. In the case of counts 2 and 3 that company was

Lammey Management. If those losses were not claimable as deductions, then the assessable income of Lammey Bros Pty Ltd was understated.

[8] All the shares in the two companies holdings the shares in Chester Hill were duly transferred to Harts Consulting, which thus became the holding company and Chester Hill its subsidiary. With the authority of Lammey Bros Pty Ltd, the appellant formed or transformed another company to act in the role of management company for Lammey Bros Pty Ltd. It was named Lammey Bros Management Pty Ltd (Lammey Management) and it entered into a management agreement with Lammey Bros Pty Ltd (or the family trustees who were Mr Phillip Lammey and Mr Richard Lammey, who controlled it) by which it undertook the responsibility and liability for employing and paying the existing staff of that company and agreed to provide those and other specified services to Lammey Bros Pty Ltd. The written agreement to that effect between the trustees on behalf of Lammey Bros Pty Ltd and Lammey Management is dated 26 June 1996. Lammey Bros Pty carried on at Billata Roadhouse in New South Wales the business of a "truck-stop" or place at which truck drivers could break their journeys to obtain food and refreshments and refuel their vehicles in the course of travel. In substance or effect, the persons employed by Lammey Bros Pty Ltd at the truck-stop were transferred to Lammey Management. Lammey Bros Pty Ltd retained the assets of the business, although in at least one instance Lammey Management acquired a new asset in the form of a pizza oven which it used in providing services to Lammey Bros Pty Ltd under the agreement.

[9] For the services Lammey Management agreed to supply, cl 3.1 of the agreement provided that Lammey Bros Pty Ltd as the "client" should pay "a reasonable fee having regard to the services provided" to the contractor. Clause 3.3 provided that the client might pre-pay the fee for a period of time nominated by it, in which event the fee was to be discounted by 8% per month. Such a payment in advance was made in respect of the year 1996. The sum so pre-paid to Lammey Management was $460,000, which was then lent back to Lammey Bros Pty Ltd in a transaction which was effected by means of a "round-robin" of cheques. The result of these acts was, at least in theory, to produce a profit in Lammey Management, which would have been liable to taxation in its hands, in an amount coincidentally also of $460,000. To avoid its liability for income tax on that receipt, Lammey Management and Chester Hill agreed that "the right to a deduction for some of the losses incurred by" the latter would "be transferred to" Lammey Management in the 1996 financial year. The procedure was repeated in the following year 1997, in the tax returns in which the amount of the loss was alleged to be $70,396.00.

[10] Whether these actions would have withstood an exercise of the Commissioner's powers under Part IVA of the Act is not a question with which this Court or the jury at the trial has or had reason to concern themselves. The issue at trial was not whether the Commissioner could successfully have exercised powers under Part IVA to annihilate any or all the steps taken, so as to eliminate the deductions and produce assessable income and a liability for income tax in one or both of the Lammey companies. The immediate question was whether the appellant had, in claiming deductions under s 83G, in the returns which he prepared and lodged on behalf of those companies, made a false representation or representations with the intention of defrauding the Commonwealth. It was therefore perhaps unfortunate that, in redirecting the jury at the trial, his Honour at one stage referred to the impact of Part IVA. This was in the context of instructing the jury on an

alternative basis for conviction advanced by the prosecution at the trial, which was that the whole procedure adopted by the appellant was a "sham" designed to defraud the Commonwealth.

[11] To establish the appellant's fraudulent intention it was incumbent on the prosecution to prove that at least one of the companies (which were the loss company Chester Hill and the income company Lammey Management) was not in terms of s 80G(2)(b) a subsidiary of the same holding company (which was Harts Consulting) during the relevant period, and that the appellant knew this to be so. As to this, the shares in Chester Hill were plainly proved to be beneficially owned by Harts Consulting. The issued share capital in Chester Hill had with the authority of the liquidator Mr M G Jones been transferred to Harts Consulting under the agreement dated 30 June 1995. There was no dispute at trial or on appeal that those shares in Chester Hill were beneficially owned by Harts Consulting. It was the beneficial ownership of the shares in Lammey Management that presented the prosecution with problems of proof.

[12] I said earlier that Lammey Management was a company formed or transformed by the appellant to act as the management company for Lammey Bros Pty Ltd. Lammey Management was what is described as a "shelf" company and it is so described in one of the documents. The ASIC historical search extract shows it to have been registered under the name Lammey Management Pty Ltd on 20 June 1996, with an issued share capital of two fully paid ordinary shares and a membership consisting only of Harts Consulting Pty Ltd. Its directors are given as Phillip Lammey and Richard Lammey each appointed on 20 June 1996. It is perhaps not quite clear whether the shares were subscribers' shares or were obtained by an allotment; but an original notice of share allotment filed with ASIC on the same date gives the date of allotment as 20 June 1996, the number of shares allotted as two ordinary and the allottee's name as Harts Consulting Pty Ltd. The same information appears in the annual return of Lammey Management dated 29 December 1996 and filed on 7 January 1997. To the question, "Is the member [ie Harts Consulting] the beneficial owner of the shares?", the answer given is "Yes". The income tax return for 1996 likewise declares the immediate holding company to be Harts Consulting Pty Ltd.

[13] Lammey Management does not seem to have maintained a formal share register, or at least there is no evidence of its having done so. The documentary evidence at the trial about the ownership of the shares in it is that contained in the information provided by the extracts, notice of allotment, and annual return to which reference has been made. They consistently show Harts Consulting as the and the only shareholder in Lammey Management. Equitable or beneficial ownership may, subject to provisions in a company's constitution, subsist and be recognised in shares as in any other species of property. Ordinarily, however, the beneficial or equitable ownership of shares follows their legal ownership, unless there is evidence showing a contrary intention. In the case of land, the proprietor is not to be regarded as holding two estates, one legal and the other equitable or beneficial; but only one estate with all the rights and incidents attaching to it: *DKLR Holding Co (No 2) v Commissioner of Stamp Duties* (1980) 1 NSWLR 510, 519; and the same analysis applies to interests in shares. Unless and until something happens, or has happened, to change it, the owner of shares owns both the legal and the beneficial interest in those shares.

[14] On the face of it, therefore, the material so far considered proves no more than that Harts Consulting was the owner, both legal and beneficial, of the issued share capital in Lammey Management. As indicating the contrary, Mr Hanson QC for the prosecution relied on the evidence of Mr Phillip Lammey, one of the trustees of the Lammey Family Trust, who testified at the trial. He recounted the advice, or some of it, received from the appellant concerning the setting up of Lammey Management and the proposal and procedures adopted to transfer to it the staff hitherto employed by Lammey Bros Pty Ltd. The only part of his evidence that bears directly on the issue of beneficial ownership of the shares in Lammey Management was his statement in response to the question put to him in chief, when he was asked "who owned that company, to your knowledge?". His answer was "Well, my brother and I thought we owned it, but that wasn't the case". His discovery that they did not own that company was, he said, made "basically when we got this bill from the tax department and Steve made the statement that it was his company not ours", which was in 1999. He was referring to the Commissioner's later reassessment of income tax. He went on to say that he did not remember signing any documents in June 1996, but that he knew he had done so "for this whole process"; and that he knew he had signed share transfer forms in favour of the appellant or his company "because I have seen a copy of it". He may there have been referring to the notice of allotment. He would not, he said, have gone ahead and set up "this structure if he had known Mr Hart or his company was going to be the owner of Lammey Management.

[15] Nothing Mr Lammey said on this subject amounted to evidence on which the jury could safely act to find that the beneficial, like the legal, ownership of the two issued shares in Lammey Management was not vested in Harts Consulting. The appellant was not charged with defrauding the Lammey brothers. For the purpose of establishing that part of the prosecution case, his impressions and assumptions on that subject, if admissible at all, were of little or no evidentiary value. Especially is this so when the question put to him about ownership of the company was qualified by the addition "to your knowledge", which is a common synonym for "to the best of your knowledge"; and by his concession that his thoughts on the subject had changed since 1999, when he had discovered that the appellant or his company Harts Consulting owned the shares in Lammey Management.

[16] In his submissions for the respondent on appeal as well as in his address to the jury at the trial, Mr Hanson QC suggested that Messrs Lammey, not Harts Consulting, were beneficially entitled to the shares in Lammey Management. This, he said or implied, was self-evident because they had, on the appellant's advice, arranged to set up the structure and had paid him to do so. The appellant or his company Harts Consulting could not have been intended to receive or retain the beneficial interest in those shares. Why, asked Mr Hanson:

> "would you get rid of a company into which you are putting your assets? Why would you pay money? Why would you transfer equipment, plant and equipment, into a company which is owned by Harts?"

In fact, the assets were being retained by Lammey Bros Pty Ltd. In any event, this looks very like a submission that Harts Consulting held the shares in Lammey Management on a resulting trust for the trustees Phillip and Richard Lammey. There are difficulties about inferring such an intention or result in a case where, like this, the parties had on one view the intention of taking advantage of s 80G, for the application of which it was an essential condition that the beneficial ownership of

the shares be retained by Harts Consulting. But, in any event, no direction was ever given to the jury about the operation in equity of a resulting trust or its possible application to the acts carried out by the appellant on behalf of his clients, or its relevance to the issue of beneficial ownership of the shares in Lammey Management.

[17] Reliance was also placed on evidence adduced at the trial in support of count 1 concerning Berwick Holdings Pty Ltd, and count 4 concerning Refwood Pty Ltd and BCD Management Pty Ltd. The evidence on these counts was admitted at the trial presumably on the footing that the appellant's intention in those instances was admissible to prove the "sham" or fraudulent intention of the appellant on counts 2 and 3 on which the appellant was convicted. To some extent it may be, or may have been, correct to approach all four charges in this way as demonstrating an intention on the part of the appellant to defraud the Commonwealth that was alleged to be common to all of them. In the case of count 4, the individual client Mr Williams insisted that the appellant sign and deliver a blank transfer to him or his company of the shares held by Harts Consulting in the relevant management company in that instance, which was BCD Management Pty Ltd, in case, as he said, the appellant's aeroplane "fell out of the sky" and he was killed. However, the fact that there is evidence in that instance that the client was concerned to ensure that he retained some control over the shares in the management company to safeguard against the appellant's death falls well short of establishing that it was the intention of Messrs Lammey that beneficial ownership of the corresponding shares in Lammey Management was not to be retained by Harts Consulting. It tends if anything to reinforce the impression that the appellant's personal understanding of "beneficial ownership" was by no means well founded or well focused.

[18] This impression is confirmed by the other matter on which even greater reliance was placed for the Crown on appeal, which was the contents of certain letters written by the appellant principally to another accountant Bryce Karrasch. He took over as accountant for Berwick Holdings Pty Ltd (count 1) and Mr and Mrs Oxman on 15 August 1997 at a time when the Commissioner for Taxation had begun to interest himself in what had taken place. Mr Karrasch wrote to the appellant in December 1997 noting that Harts Consulting was the shareholder in the corresponding management company in this instance, which was N & L Management Pty Ltd. Mr Karrasch said in his letter that he found this "somewhat unusual" and that the transaction was very unlikely to withstand scrutiny by the Tax Office. The appellant's reply in a letter dated 23 December 1997 advised that Harts Consulting is "not the shareholder of N & L Management Pty Ltd", but had been the shareholder "only for the formation of the company, and the shares were transferred to Mr and Mrs Oxman when they became involved in the company in June or July of last year". The shareholders of N & L Management, he claimed, were Mr and Mrs Oxman. That company had been set up not to buy losses "as there were none in Harts Consulting Pty Ltd for sale"; but "to make it easier for them to transfer their assets to various people upon their deaths".

[19] This was plainly a tissue of falsehoods from beginning to end. Mr and Mrs Oxman were, unfortunately, both dead by the time of the trial, although the transcript of Mr Oxman's evidence in chief and in cross-examination at the committal proceedings was tendered at the trial over defence objection. To the extent it was admissible and admitted, it showed that Mr Oxman believed that he and his wife were the owners of the shares, but also that the late Mrs Oxman had a

better grasp than Mr Oxman of the proposal being put forward by the appellant when they consulted him. She was the bookkeeper in their business, and made notes at the meeting one of which suggested that they were told the shares in the management company were to be beneficially held by the appellant or his company. If so, it detracted from the prosecution case. In contemporaneous letters to the Commissioner the appellant said there had been an "error" in the N & L tax return.

[20] Both the Crown and the appellant at trial acknowledged that these statements were false. The question is, however, not what he at that later stage thought or believed but what the evidence of Mr Oxman and the letter from the appellant went to prove about the beneficial ownership of the shares in N & L Management at the time the arrangements were brought into being. If the contents of the appellant's letter were false, it did not logically prove that the contrary was true, which was that Mr and Mrs Oxman were indeed the beneficial owners of the shares in N & L Management. Rather, it would have damaged his credibility as a witness of the truth if he had given evidence by tending to show that he was prepared to say whatever was needed to extricate himself from the difficulty in which he now found himself. But the appellant did not testify at the trial; and what he said in his letters failed to prove that the beneficial ownership in Lammey Management was not vested in Harts Consulting throughout the relevant years of 1996 and 1997 covered by returns he prepared and lodged. Without proof beyond reasonable doubt of that matter, the prosecution failed at the trial to establish the falsity of the appellant's representation or his own knowledge of its falsity.

[21] The appellant's demonstrated lack of consistency in what he said or represented about the Oxman shareholdings in N & L Management was, it is true, some evidence that went in support of the Crown case that each of the transactions was a "sham" designed to deceive and so defraud the Commonwealth of the income due to it. It was the allegation in paragraph (a) of the three sets of particulars (a), (b), and (c), incorporated in counts 2 and 3 of the indictment or information in respect of the tax returns for Lammey Bros Pty Ltd and Lammey Management. There were corresponding sets of particulars (a), (b) and (c) in relation to counts 1 and 4 with reference to the other clients whose returns the appellant was alleged to have falsified. The jury were unable to agree on verdicts in respect of counts 1 and 4, and were discharged from doing so. They did, however, return verdicts of guilty in counts 2 and 3 concerning the Lammey income tax return. They might, however, have done so on the ground that in each instance the transaction was a "sham" as the prosecution contended.

[22] The problem for the Crown in seeking to sustain the convictions on counts 2 and 3 on appeal is that it is not clear whether the jury verdicts of guilty were founded on that particular view of the evidence. Paragraph (a) alleged that the management fee to Lammey Management was paid in a transaction that was in fact a sham. Paragraph (b) alleged that loses of $460,000 were falsely claimed as having been transferred, in that Chester Hill and Lammey Management were not "group companies" for the purposes of s 80G of the Act because the shares in Lammey Management were not beneficially owned by Harts Consulting. Paragraph (c) alleged that there was no agreement in writing as required by s 80G(6)(c) and 80G(6A) of the Act signed by the public officer of each of Chester Hill and Lammey Management before the relevant tax return was lodged. The verdicts of guilty returned in relation to counts 2 and 3 might have been based on the jury's

acceptance of the evidence presented by the prosecution in relation to any one or more of paragraphs (a), (b) and (c) of the particulars.

[23] Unfortunately, we cannot tell which of them it was. The jury may have accepted the prosecution evidence in relation to para (b); namely that Lammey Management and Chester Hill were not "group companies" in that Harts Consulting did not beneficially own the shares in Lammey Management. If so, they would have been wrong in doing so because, for the reasons I have given, the evidence on this question succeeded in showing no more than that Harts Consulting was on the face of it the owner, both legally and beneficially, of the issued share capital in Lammey Management. The contrary was not established by evidence of the impressions or understanding formed by Phillip Lammey on this issue; nor by the appellant's later prevarications in the case of Mr and Mrs Oxman in relation to N & L Management. That the jury were alive to the importance of the Crown case of the allegation concerning beneficial ownership of the shares in Lammey Management is shown by a question in writing which they delivered to the trial judge seeking redirections. It asked:

> "Is a company beneficially owned if the only benefit to that company is not due to the core business of the company, but is actually due to a side effect of the business, which is the sale of tax breaks?".

Later, they sought a further redirection referable to the same issue:

> "Are we, the jury, to assume that Mr Hart knowingly/was aware/understood/what the beneficially owned clause in section 80G meant *totally*, that being what beneficially *totally* meant?".

[24] The learned judge's direction in response to this request was that the jury was not to assume anything, but that they must be satisfied beyond doubt of the appellant's guilt "and in that process you can't go assuming something". There were further submissions from counsel about the impact of this redirection taken with an earlier redirection (which was one of seven or eight in all in the summing up) in which his Honour had said in effect that, because the appellant was an accountant or tax agent, the jury could assume that he was conversant with the provisions of s 80G of the *Income Tax Assessment Act*. The appellant's actions may be said to have shown plainly enough that he was conscious of its provisions. Whether or not he understood what they meant, and in particular whether he was aware of the meaning of beneficial ownership or "beneficially owned" in s 80G(2)(i) may be doubted. It was, of course, critical to the prosecution case to establish that he did understand the concept; for, without that element, they could not properly find that the appellant had misled the Commonwealth in claiming that the shares in Lammey Management were beneficially owned by Harts Consulting, and had done so fraudulently.

[25] The summing up cannot, I consider, be faulted for any failure on his Honour's part to explain the concept of beneficial ownership to the jury. He did so on several occasions and in several ways. I think that, given the difficulties of doing so, the directions to the jury were as full and as informative as could be expected in the circumstances. The real problem confronting the prosecution and the judge at the trial was that there was simply no reliable evidence to show that Harts Consulting did not beneficially own the shares in Lammey Management; and that the appellant was aware that this was so when he prepared and lodged the relevant income tax returns that sought to take advantage of s 80G(6). The primary documents, so far as they went, showed that Harts Consulting owned those shares. According to the

notice of share allotment they were originally allotted to it on 20 June 1996; similar information appears in the annual return dated 29 December 1996. On the information in those documents, Harts Consulting was the owner of those shares both legally and beneficially. So far as can be seen, ownership of the shares remained in that state. There was nothing to show that legal or beneficial ownership in those shares was transferred or vested in anyone else, and nothing except the initial impression, assumption or understanding of Mr Phillip Lammey to suggest the contrary.

[26] The appellant himself did not give evidence and so was not cross-examined at the trial. The letter or letters in which the appellant, when challenged by Bryce Karrasch, later sought to put a different complexion on what had happened proved nothing except that out of court he was prepared to say anything that suited his immediate needs in the case of the Oxmans and N & L Management (count 1). It or they proved nothing relevant to the beneficial ownership of the shares in Lammey Management; or that, if he had been challenged about it, he would have given (for what it was worth) a similar false explanation in that instance.

[27] There was, in short, nothing to prove that Harts Consulting was, contrary to what he had asserted in the income tax returns, not the beneficial owner of the shares in Lammey Management, and that he knew that it was not. Whether something more might have been made of the prosecution case and evidence if it had been squarely put on the basis that the shares in Lammey Management were held by Harts Consulting on some form of resulting trust for the trustees Phillip and Richard Lammey, or for someone else, I need not stay to see. No such direction was asked for or given at the trial. It was not enough for the Crown simply to urge upon the jury that the outcome it contended for was obvious or self-evident. For it was not.

[28] This leaves for consideration the question of whether or not a new trial should be ordered in respect of counts 2 and 3. It is to my mind doubtful if the prosecution would succeed at such a trial in adducing any more persuasive evidence that someone other than Harts Consulting held the beneficial ownership in the share capital of Lammey Management, and that the appellant was aware of this. Still, it is entitled if it is so minded to insist on a new trial in order to seek to do so; more to the point, it is entitled to have the question of the appellant's guilt determined by reference to particulars (a) or (c) of counts 2 and 3. If it elects to do so, however, something will have to be done at any such future trial to ensure that the jury's general verdict of guilty does not on that occasion leave it uncertain which of the three paragraphs in the indictment is found to have been proved against the appellant. For if the evidence supports one and not the other, it will again not be possible to tell on which of those particulars the jury based a general verdict.

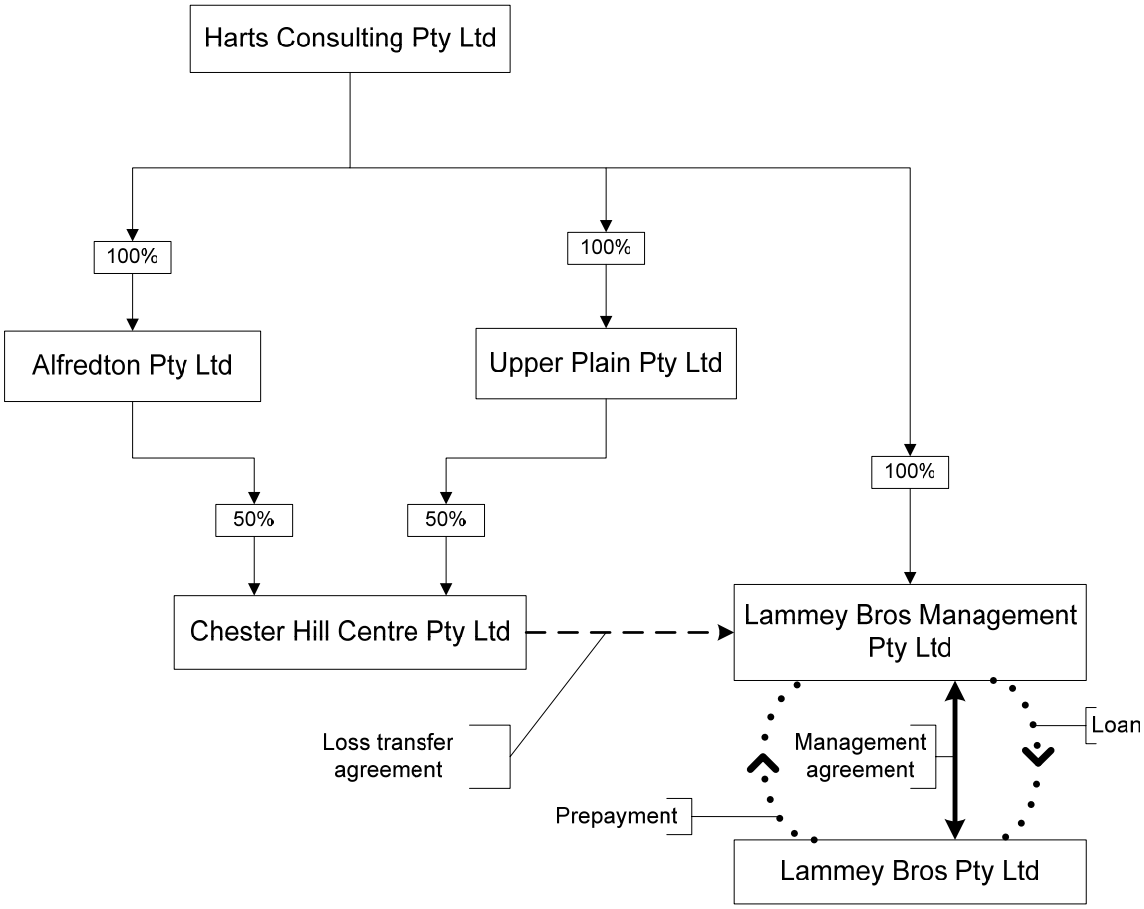
[29] In my opinion the appeal should be allowed and the convictions in counts 2 and 3 set aside. There should be an order for a new trial of those two counts in the indictment.

[30] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the orders he proposes.

[31] **FRYBERG J**: To understand the issues in this appeal it is necessary to read s 80G of the *Income-Tax Assessment Act 1936* as it stood on 30 June 1996 and 30 June

1997. I need not quote the section here. It has been summarised by McPherson JA and is available online (if one disregards sub-s (1A) and some other irrelevant amendments to sub-ss (6), (17) and (18) which have been inserted since then)[1].

[32] The scheme which the appellant devised for his clients to take advantage of that section postulated the following model:



The operation of the model has been described by McPherson JA and I shall not repeat what his Honour has said.

[33] As tax avoidance schemes go, this one was clumsy and impractical. Its major weakness was that it required the appellant's client (Lammey Bros Pty Ltd) to incur a major indebtedness to a management company which neither it nor its associates owned. That made it uncommercial. Even if a client trusted the appellant not to enforce the loan, there was always the risk that he might (to take an example raised by one of the clients) be on an aeroplane which fell out of the sky. Legally these problems might be overcome by giving the client an option or contract over the shares in the management company, or by a non-recourse agreement in respect of the loan; but those steps would probably run foul of s 80G(2)(b) and Part IVA of the Act. That would make the whole exercise worthless. Despite these difficulties, the scheme was not unmarketable, as this case shows. It might still be sold to the trusting or the naive; or something might be done to vary it without disclosing that step to the Commissioner of Taxation. But that might be dishonest.

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1. http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D4454924AC3DEFCECA256F7100517B9B/$file/ITA1936Vol04.pdf

[34] Dishonesty was what the Crown alleged in the present case. It alleged that the dishonest conduct consisted of causing false statements in the tax returns of Lammey Bros and the management company. First it alleged that the claim by Lammey Bros for a deduction in respect of the pre-payment was false because that transaction was a sham. Second it alleged that the management company falsely claimed losses transferred from Chester Hill Centre Pty Ltd because:

(a) it and Chester Hill were not group companies under the section because Harts Consulting was not the beneficial owner of the shares in the management company;

(b) the loss transfer agreements did not comply with the section because they were not signed before the tax returns were lodged and were not signed by the public officer of Chester Hill.

[35] The arrangements and transactions constituting the scheme were effected in writing. For the scheme to work it was essential that the documents be meticulously prepared and the necessary steps carefully taken and taken in the correct order. There was a good deal of evidence to suggest that this did not happen. Whether the evidence went so far as to disclose a sham was a question for the jury. So was the question whether the loss transfer agreements were signed before lodgment of the tax returns (there was evidence that they were not produced to a tax investigator who went to the appellant's office seeking the records of Chester Hill, but were later produced to him by the appellant). So was the question whether the appellant, who signed the agreements on behalf of Chester Hill, was at the relevant time the public officer of Chester Hill. So, provided there was evidence on the point, was the question whether all the shares in the management company were beneficially owned by Harts Consulting.

[36] As McPherson JA has pointed out in his reasons, an owner of shares does not own two separate interests, legal and equitable, in them. Unless something happens to cause an equitable estate to be vested in someone other than the owner of the legal estate, it has no existence. It was incumbent upon the Crown to prove either that Harts Consulting was not the registered owner of the shares; or that if it was the registered owner, it was not the beneficial owner. The evidence on these points was unsatisfactory. It was not proved whether a register existed. If it did, documents filed with the Australian Securities and Investment Commission (copies of which were put in evidence) would suggest that Harts Consulting was the registered owner. There was very little evidence of the transactions by which this state of affairs might have come about or who might have paid for the shares or who might have the legal title if there were no register. It was not open to the jury to conclude that Harts Consulting was not the registered owner; nor was it possible to discern any event which might have given rise to an equitable interest in some other person. I agree generally with what McPherson JA has written in relation to these matters.

[37] In my judgment it was not incumbent upon the prosecution to prove that the appellant was aware of the meaning of "beneficially owned" in s 80G or of beneficial ownership as a legal concept. It did have to prove that he acted fraudulently; and it would be difficult to prove dishonesty if the prosecution were unable to prove that he had some awareness of the concept. There was however evidence from which inferences might have been drawn. Whether it was sufficient

to exclude other inferences consistent with innocence need not now be determined. The case was left to the jury on the basis that it was open to them to find that the shares in the management company were not beneficially owned by Harts Consulting. They might have done so. That finding was not open. The appellant may have been wrongly convicted.

[38] I agree with the orders proposed by McPherson JA.