SUPREME COURT OF QUEENSLAND

CITATION:	*R v Huston; R v Fox; R v Henke* [2011] QCA 349
PARTIES:	**In CA No 54 of 2011:** **R** **v** **HUSTON, Robin David** (appellant) **In CA No 58 of 2011:** **R** **v** **FOX, Brian Francis** (appellant) **In CA No 86 of 2011:** **R** **v** **HENKE, Ian Sidney** (appellant)
FILE NO/S:	CA No 54 of 2011 CA No 58 of 2011 CA No 86 of 2011 SC No 1488 of 2009
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeals against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2011
JUDGES:	Muir and Chesterman JJA, and Margaret Wilson AJA Judgment of the Court
ORDERS:	**In CA No 54 of 2011** **1. Appeal dismissed** **In CA No 58 of 2011** **1. Appeal dismissed** **In CA No 86 of 2011** **1. Appeal dismissed**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – GENERAL MATTERS – CONSTRUCTION OF THE

CONSTITUTION – GENERALLY – where the appellants Huston and Fox were accountants in Queensland – where the appellant Henke was the controlling mind of a company in Melbourne – where others were involved in a scheme with the appellants – where the appellants were charged with conspiring with each other to devise, promote and implement a scheme – where the scheme was designed to avoid taxation liabilities – where the payments were not intended to create legal obligation and were a sham – where it was alleged that the scheme put at risk the revenue of the Commonwealth contrary to the *Crimes Act* 1914 (Cth) s 29D and s 86 – where the acts were said to have been committed in Australia and in Vanuatu – where the appellants were convicted after a trial of conspiring together to defraud the Commonwealth – where the appellant was at all material times resident in Melbourne – where the appellant argued that by s 80 of the *Constitution* (Cth) the trial against him ought to have been held in Victoria – where it was submitted on behalf of Huston and Fox that if Henke's conviction were set aside on the venue ground, their clients' convictions should also be set aside, and they should be granted re-trials – where the appellants argued that pursuant to s 80 of the *Constitution*, Henke ought to have been tried in Victoria – where the appellants submitted that the offences were complete as against Henke in Victoria upon the making of an agreement and the enlistment of directors – where the Crown submitted that the offence was completed in Queensland as the last person who joined the conspiracy, Fox, did so in Queensland and every conspirator could be charged with the offence in Queensland – whether the trial was properly held in Queensland

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where an income and expenditure statement was admitted into evidence at a pre-trial hearing – where the appellant Huston submitted that the statement was unreliable because the amounts contained therein were not supported by primary documentation – whether the judge erred in the exercise of his discretion in not excluding the statement from evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant Henke argued that recordings of Fox's interviews with investigating officers which were played at trial contained untested hearsay and were prejudicial – where the appellant Henke agued that the trial judge's direction was not sufficient to overcome the prejudice and that it prejudiced the verdict – whether the trial judge erred in dealing with the recordings

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellants submitted that the jury could not have been satisfied of their guilt beyond reasonable doubt without also being satisfied of other intermediate facts – where the appellants argued that the prosecution was required to prove knowledge not only of the fraud but also of the dishonest means by which the fraud was to be effected – whether it was open to the jury to conclude beyond reasonable doubt that the appellants had no intention of repaying the directors' loans – whether the jury could be satisfied beyond reasonable doubt that the appellant Huston had joined the conspiracy – whether it was open to the jury to be satisfied beyond reasonable doubt that the actions of the appellant Huston were performed with knowledge of the unlawful purpose of his alleged co-conspirators

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant Fox argued that he did not know of intermediate facts, including that the target companies assigned their directors' loans and that the assertions in certain letters were false – whether the jury could be satisfied that the appellant Fox entered into an agreement to use dishonest means to defraud the Commonwealth – whether the conviction was unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant Huston submitted that the primary judge erred in failing to direct the jurors that they had to be satisfied beyond reasonable doubt of certain intermediate facts before convicting the appellant – where the appellant Huston submitted that the primary judge should have directed the jury to draw the inference from the prosecution's failure to call particular witnesses that their evidence would not have assisted the prosecution case – whether the absence of directions gave rise to a miscarriage of justice

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – GENERAL MATTERS – CONSTRUCTION OF THE CONSTITUTION – GENERALLY – where the appellant Henke argued that he was disadvantaged in respect of the other defendants who were in their home state – where the appellant Henke argued that this violated his rights pursuant to s 117 of the *Constitution* (Cth) to not be subject to a disability or discrimination which would not be equally

applicable to him if he were a subject of the Queen resident in another State – whether the appellant Henke was disadvantaged in violation of a constitutional right

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – ADJOURNMENT – TO OBTAIN LEGAL REPRESENTATION – where the appellant Henke applied for legal aid – where the appellant was granted aid on the condition that his wife provided a charge over her property in Legal Aid Queensland's favour – where the trial judge refused to stay or adjourn the trial until Henke was provided with counsel at public expense – where the appellant Henke argues that he was deprived of his right to a fair trial and of a real chance of acquittal – whether the trial judge erred in refusing to stay or adjourn the trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE – where the appellant Henke argued that a miscarriage of justice resulted from the trial being conducted electronically using eTrial software – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE – where the appellants were charged with conspiracy between 1 July 1999 and 23 May 2001 – where search warrants were executed in June 2001 – where the appellants were tried in early 2011 – where the appellant Henke submitted that the delay was undue and unexplained – whether the delay resulted in a miscarriage of justice

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – where the appellant Henke submitted that the Crown failed to prove any acts of dishonesty committed by him or his co-accused – whether there was evidence from which the jury could conclude that the appellant Henke knew the transactions were a sham and the scheme involved dishonest means

Commonwealth Constitution (Cth), s 71, s 80, s 117
Crimes Act 1914 (Cth), s 16A(2), s 29D, s 86
Criminal Code 1899 (Qld), s 668D(1)(c)
Income Tax Assessment Act 1936 (Cth)
Judiciary Act 1903 (Cth), s 68, s 70, s 70A, s 78B

Ahern v The Queen (1988) 165 CLR 87; [1988] HCA 39, cited
Barton v The Queen (1980) 147 CLR 75; [1980] HCA 48, cited
Bell v Director of Public Prosecutions [1985] AC 937, cited

Carver v Attorney-General (NSW) (1987) 29 A Crim R 24, cited
DAO v R (2011) 278 ALR 765; [2011] NSWCCA 63, cited
Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57, considered
Director of Public Prosecutions v Doot [1973] AC 807, considered
Dyers v The Queen (2002) 210 CLR 285; [2002] HCA 45, considered
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55, considered
Gerakiteys v The Queen (1984) 153 CLR 317; [1984] HCA 8, cited
Gorman v Fitzpatrick (1987) 32 A Crim R 330, cited
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, considered
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, distinguished
Leeth v The Commonwealth (1992) 174 CLR 455; [1992] HCA 29, cited
Lipohar v The Queen (1999) 200 CLR 485; [1999] HCA 65, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7, considered
R v Aspinall (1876) 2 QBD 48, considered
R v Aston and Burnell (1987) 26 A Crim R 128, (1987); 44 SASR 436, considered
R v G, F, S and W [1974] 1 NSWLR 31, considered
R v LK (2010) 241 CLR 177; [2010] HCA 17, considered
R v Minuzzo and Williams (1984) 10 A Crim R 190; [1984] VR 417; [1984] VicRp 34, cited
R v Sang [1980] AC 402; [1979] UKHL 3, cited
R v Trudgeon (1988) 39 A Crim R 252, considered
Re Cooney (1987) 31 A Crim R 256; [1988] 1 Qd R 464, cited
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, cited
Street v Queensland Bar Association (1989) 168 CLR 461; [1989] HCA 53, considered
Woss v Jacobsen (1985) 60 ALR 313; [1985] FCA 185, considered

COUNSEL:

In CA No 54 of 2011
P J Davis SC and A J Kimmins, with K M Hillard and P Morreau, for the appellant
A J MacSporran SC, with D R Kent, for the respondent

In CA No 58 of 2011
T Glynn SC, with A M Hoare, for the appellant
A J MacSporran SC, with D R Kent, for the respondent

In CA No 86 of 2011
The appellant appeared on his own behalf
A J MacSporran SC, with D R Kent, for the respondent

SOLICITORS: **In CA No 54 of 2011**
Potts Lawyers for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

In CA No 58 of 2011
Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

In CA No 86 of 2011
The appellant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **THE COURT:** The appellants stood trial on an indictment which charged:

> "Between about the first day of July 1999 and about the twenty-third day of May 2001 at Brisbane … and elsewhere Robin David Huston, Ian Sidney Henke, Brian Francis Fox, Clarence Lawry Marae, Philip Bruce Northam, and Lance Stewart Miller did conspire together to defraud the Commonwealth."

Particulars of the conspiracy were that the appellants, and others,

> "… conspired with each other to devise, promote and implement a scheme, by the use of dishonest means as set out in the accompanying overt acts, to strip companies of their assets so that the companies were ultimately unable to meet their obligations to the Australian Taxation Office, thereby putting at risk the revenue of the Commonwealth."

The particulars included a table which identified 24 companies said to be those which were deprived of their assets rendering them unable to pay company tax. The "Overt Acts" was a document over 60 pages in length specifying what each appellant was said to have done in furtherance of the conspiracy.

[2] The offences were committed prior to the commencement of the *Criminal Code* (Cth). The offence charged was provided for by s 86 of the *Crimes Act* 1914 (Cth), and s 29D. The former provided:

> "(1) A person who conspires with another person to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.
>
> (2) Despite subsection (1), if the person conspires with another person to commit an offence against section 29D of this Act, the conspiracy is punishable by a fine not exceeding

> 2,000 penalty units, or imprisonment for a period not exceeding 20 years, or both.
>
> …
>
> (3) For the person to be guilty:
>
> (a) the person must have entered into an agreement with one or more other persons; and
>
> (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
>
> (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
>
> … ."

[3] Section 29D, headed "Fraud", provided:

> "A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence.
>
> Penalty: 1,000 penalty units or imprisonment for 10 years, or both."

[4] The appellants were tried over 18 days after which, on 11 March 2011, all were convicted. On 30 March 2011 the appellant Huston was sentenced to four years' imprisonment to be released on parole after serving 10 months. Fox was sentenced to three years and nine months' imprisonment, to be released on parole after serving nine months. Henke was sentenced to four and a half years' imprisonment to be released on parole after serving 12 months. In the case of all appellants five days spent in custody prior to sentence were declared time served under the sentences.

[5] Each of the appellants has appealed against his conviction. Henke has appealed, or sought leave to appeal, against his sentence. The Commonwealth Director of Public Prosecutions has separately appealed against the sentences imposed complaining that each is manifestly inadequate.

[6] The appellants Huston and Fox were accountants in practice in Queensland. Mr Henke was the controlling mind of a company Institute of Taxation Research Pty Ltd ("ITR") which carried on business in Melbourne. It euphemistically described its activities as assisting corporate tax payers to discover legitimate constitutional grounds for disputing or rejecting their obligations to pay company tax. From a remark made during his address on appeal Mr Henke appears to have regarded every amendment to the *Income Tax Assessment Act* 1936 (Cth) ("ITAA") as an opportunity to make money.

[7] The prosecution case was that the appellants, and their co-conspirators, all participated in a scheme which resulted in companies with income tax liabilities and the means to discharge those liabilities transferring the assets to their directors who, by a series of elaborate transactions said not to be genuine, avoided any obligation to their companies with respect to the company assets they had received. The result was that the companies were wound-up having no assets but having a liability to the Australian Taxation Office.

[8] The scheme by which this state of affairs was achieved was described by a forensic accountant, Mr Maynes. The existence of the scheme and its features as described were not challenged by the appellants. Their cases were, essentially, that they were not part of any conspiracy to implement the scheme.

[9] As described the scheme was:

> **Step 1**
> The company which had assets and a tax liability (called the target company) bought approximately $1,000 worth of shares in a listed company, Anvil Mining NL.
>
> **Step 2**
> The target company transferred its assets to its director or directors in exchange for a loan from the directors to the company for the amount of which exactly equalled the value of the assets.
>
> **Step 3**
> The shareholders of the target company sold all the shares in the company to another company, International Equity Acquisition (Aust) Limited ("IEAA") for $500.
>
> **Step 4**
> The director or directors of the target company resigned and appointed Mr Clarence Marae as sole director in their stead.
>
> **Step 5**
> The target company's registered office was transferred to the office of a solicitor Mr Wayne Levick.
>
> **Step 6**
> The target company assigned the director's loan to it to another company, International Equity Acquisition Limited. ("IEA")
>
> **Step 7**
> Mr Levick demanded payment of the director's loan which had been assigned to IEA.
>
> **Step 8**
> A company Athena Credit Company Ltd, ("Athena") lent money to the former directors to allow them to pay the debt demanded by Mr Levick. The loans to Athena were guaranteed by IEA. Mr Marae signed the guarantees for IEA.
>
> **Step 9**
> The directors prepaid five years' worth of interest on the loan from Athena and withholding tax. These payments were made to Mr Levick's trust account.
>
> **Step 10**
> Mr Levick paid the prepaid interest to Athena which then distributed the monies to the promoters of the scheme. The withheld tax was paid to the Australian Taxation Office.
>
> **Step 11**
> The former directors of the target company directed Athena to pay the amount of the loan to Mr Levick's trust account.

Step 12
Mr Levick advised the directors that the debt owed by them had been repaid from the loan monies and that provision had been made to pay the company's outstanding tax liabilities.

Step 13
IEAA directed Mr Levick to transfer the loan monies received from Athena to IEAA.

Step 14
The loan monies were transferred from IEAA to IEA.

Step 15
IEA transferred the monies paid to it to Athena (who had provided the loan monies in the first place).

Step 16
The shares which the target company owned in Anvil Mining NL were transferred to Administration Executives Pty Ltd ("AE") as payment *in specie* for services provided by AE to the target company.

Step 17
The target company by its sole director Marae resolves that it cannot meet its income tax liabilities and is wound-up.

[10] Mr Marae was an Australian citizen resident in Vanuatu. He incorporated IEA and Athena in Vanuatu. IEAA and Athena were both wholly owned subsidiaries of IEA. IEAA was an Australian company. He was the only director and the sole shareholder in IEA. The directors of IEAA were Mr Marae and Ms Kluyt. She was employed by ITR as an assistant to Mr Miller. Mr Marae attended to matters of administration in Vanuatu, which included winding-up the target companies.

[11] Mr Miller appears to have been the author and prime mover of the scheme. He was a director of ITR with Mr Henke and recruited Mr Marae to perform the functions just described in Vanuatu. His company, AE, had an office in Brisbane where employees prepared documents to be used to record the target companies' implementation of various steps in the scheme. Mr Miller died in 2006.

[12] Mr Northam was described as an agent of Mr Henke's company. His role was to promote and sell the scheme to accountants such as the appellants Huston and Fox.

[13] Mr Levick was a solicitor practising in Blacktown (Sydney). His offices became the registered offices of the target companies when their shares were sold by the existing directors/shareholders to IEAA. The prepayment of interest and withholding tax were also made to Mr Levick's trust account.

[14] The salient features of the scheme which Mr Maynes depicted were:

(a) The transfer of the target companies' assets to its directors in exchange for a loan from them equal in value to the assets.
(b) The sale of shares in the target companies for a nominal sum which represented a gross undervalue of the companies' assets, the directors' loans.
(c) The repayment of the loans to the target company, which Levick demanded, was by means of another loan made to the directors by Athena which then

recovered the money by a "round robin" of payments (Athena → director → IEAA → IEA → Athena).

(d) The loan from Athena to the directors was never repaid.

[15] The circuitous payments referred to in (c) in the preceding paragraph were not by themselves indicative of fraud or artifice. The transactions might have operated according to their terms, as payments by one company to another giving rise to the creation and satisfaction of debts. See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 486. It was not, however, in contest that the payments were not intended to create legal obligation, but were a sham in the sense in which the High Court described the word in *Equuscorp* (at 486):

> "… steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences." (footnote omitted)

[16] Perhaps the most significant indication that the transactions were a sham is that the loans from Athena to the directors were never repaid and payment was never demanded. In addition Mr Maynes relied upon features of the "round robin" which showed that its individual transactions were not intended to give rise to legally binding obligations. Each of Athena, IEA and IEAA had an account with Equity Investment Bank in Vanuatu whose executive director, Mr James Batty, provided a statement which recorded that each of the "payments" was effected by a book entry in the accounts of the three companies with Equity Investment Bank. There was no exchange of money or delivery of cheques. The instructions for the book entries were given by Mr Marae who was the sole director of Athena and of IEA and one of two directors of IEAA. He was also Legal and Special Projects Officer, and company secretary of the bank. Another unusual feature of the transaction was that the loan purportedly made by Athena to the directors was guaranteed by IEA, Athena's holding company. There was no connection between the directors and IEA which might explain the guarantee. IEA received no benefit from its guarantee. The entries in the books of account evidencing the inter company loans were all made on the same day.

[17] With the implementation of the steps, the result was that:

(a) The assets originally owned by the target companies had been transferred to their former directors.

(b) The debts which the directors had owed to their companies as consideration for the transfer of the companies' assets to them were no longer owed to the companies but to IEA.

(c) The original directors had resigned and sold their shares in the companies so they had no further obligations or responsibilities with respect to the companies.

(d) The target companies were left without assets but retained their taxation liabilities to the ATO.

(e) The target companies were wound up with the tax debt unpaid.

(f) The promoters of the scheme had received the prepayment of interest and the shares in Anvil Mining NL.

[18] Some other facts should be noted. The debts owed by the former directors to their companies were replaced by one to Athena in respect of which the directors only

paid five years' interest (and withholding tax). The loans from Athena were taken by the directors to satisfy the demands made by Mr Levick for repayment of the loans to the companies. Mr Levick also wrote that their companies' taxation liabilities had been discharged by the monies advanced from Athena. The appellants rely upon these facts as showing they had no knowledge of any dishonesty in the transactions. The points will be addressed later in these reasons. It should be noted now that the sale of the companies' shares for a nominal sum of $500 effectively valued the directors' loans to those companies as negligible. If the loans were to be repaid, so that they were assets of value, the shares could not honestly have been sold for such a price.

[19] Step 6 in Mr Maynes' description of the scheme, the assignment of the directors' loans to the target company by those companies to IEA, was the mechanism by which the target companies were deprived of all their assets. The trial judge found, for the purposes of sentencing, that none of the appellants knew that step 6 had occurred. The respondent does not challenge that finding. The appellants' ignorance of step 6 assumed particular importance in the argument.

[20] The offence of conspiracy was explained in *Lipohar v The Queen* (1999) 200 CLR 485. Gleeson CJ said (at 496-497):

> "The elements of a common law conspiracy to defraud were considered in *Peters v The Queen*, where McHugh J said that, in most cases, a conspiracy to defraud arises when two or more persons agree to use dishonest means with the intention of obtaining, making use of or prejudicing another person's economic right or interest, or inducing another person to act or refrain from acting to his or her economic detriment. To that proposition, in its application to the present case, there should be added a significant rider. The fact that an offence of conspiracy is complete does not mean that it has come to an end. Parties can join, or leave, a conspiracy after it has been formed, and acts done in furtherance of a conspiracy will constitute continuing performance, as well as evidence, of the unlawful agreement." (footnotes omitted)

[21] In *Peters v The Queen* (1998) 192 CLR 493 Toohey and Gaudron JJ in their joint judgment pointed out (at 500) that the offence of conspiracy to defraud the Commonwealth was a statutory offence created by the *Crimes Act*, the relevant provision of which was, after 14 September 1995, s 86. Their Honours explained (at 500-501):

> "There being no express provision as to the elements of that offence, it is to be taken that s 86 … enacted the substance of the common law offence of conspiracy to defraud in its application to fraudulent agreements the intended victim of which was the Commonwealth … ."

[22] Their Honours later said (at 509):

> "But when properly analysed, the offence of conspiracy to defraud involves dishonesty at two levels. First, it involves an agreement to use dishonest means. Ordinarily, the means will be dishonest if they assert as true something which is false and which is known to be

> false or not believed to be true or if they are means which the conspirators know they have no right to use or do not believe that they have any right to use the means in question. And quite apart from the use of dishonest means, the offence involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. That, too, is dishonest by ordinary standards."

[23] *R v LK* (2010) 241 CLR 177 was concerned with a charge of conspiracy to commit the offence commonly known as money laundering. It called for examination of s 11.5(1) of the *Criminal Code* (Cth) and not s 86 of the *Crimes Act* 1914 but what the judgments said about conspiracy is relevant to an offence charged under the latter provision.

[24] French CJ said (at 205-6):

> "That conclusion is required by the importation of the common law concept of conspiracy in s 11.5(1). The common law defines the elements of the offence by reference, albeit not without some difficulty, to the agreement as the actus reus and the intention to do an unlawful act pursuant to the agreement as the mens rea. The text of s 11.5(2)(b) supports that conclusion. It requires, as the condition of a finding of guilt, an intention by the accused and at least one other party to the agreement to commit an offence pursuant to the agreement." (footnotes omitted)

[25] The Chief Justice noted (at 206) that:

> "The Code provisions relating to the offence of conspiracy are written against the background of the common law, which, subject to their text, informs their content."

His Honour went on (at 207):

> "A concise enunciation of the elements of conspiracy was given by the Court of Queen's Bench in *Mulcahy v The Queen* in 1868 in answer to questions proposed by the Lord Chancellor in relation to a prosecution under the *Crown and Government Security Act*. Willes J, delivering the opinion of the judges, said:
>
> > 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.'" (footnotes omitted)

[26] Gummow, Hayne, Crennan, Kiefel and Bell JJ said in their joint judgment (at 228):

> "The offence of conspiracy under the Code is confined to agreements that *an* offence be committed. A person who conspires with another to commit an offence is guilty of conspiring to commit *that* offence.

> It was incumbent on the prosecution to prove that LK and RK intentionally entered an agreement to commit the offence that it averred was the subject of the conspiracy. This required proof that each meant to enter into an agreement to commit that offence. As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is a subject of the agreement an offence (as distinct from having knowledge of, or belief in, the legal characterisation of the conduct). This is consistent with authority with respect to liability for the offence of conspiracy under the common law." (footnotes omitted)

CONSTITUTIONAL POINT

[27] Henke was at all material times a resident of Victoria. He submitted that by s 80 of the *Constitution* (Cth) the trial against him ought to have been held in Victoria.

[28] Before this court, counsel for Huston and Fox were given leave to amend their clients' notices of appeal to include the following ground –

> "(a) The co-accused Henke was tried in Queensland with the appellant, contrary to the provisions of s 80 of the *Constitution*;
>
> (b) As a consequence of the joint trial, evidence of Henke was admitted in the trial;
>
> (c) A miscarriage of justice occurred."

They made submissions in support of Henke's argument that he ought not to have been tried in Queensland. Henke adopted their submissions.

[29] Huston, Fox and Henke were tried together. Only Henke gave evidence, and his credit was destroyed in cross-examination. Their counsel submitted that if Henke's conviction were set aside on the venue ground, their clients' convictions should also be set aside, and they should be granted re-trials. Counsel for the Crown agreed that Huston and Fox should be granted re-trials if Henke's conviction were set aside on that ground.

Provisions of the *Constitution* and the *Judiciary Act* 1903 (Cth)

[30] Section 80 of the *Constitution* provides –

> "**Trial by jury**
>
> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

[31] Sections 70 and 70A of the *Judiciary Act* 1903 (Cth) were made pursuant to the concluding words of s 80 of the *Constitution*. They provide –

> "**70 Offences committed in several States**
>
> (1) When an offence against the laws of the Commonwealth is begun in one State or part of the Commonwealth and

completed in another, the offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein.

(2) This section has effect subject to section 68C.

70A Indictable offence not committed in a State

(1) The trial on indictment of an offence against a law of the Commonwealth not committed within any State and not being an offence to which section 70 applies may be held in any State or Territory.

(2) This section has effect subject to section 68C."

Notice pursuant to s 78B of the *Judiciary Act*

[32] The Attorney-General of the Commonwealth and the Attorneys-General of the States were given notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) that the following questions had arisen –

"(a) Does s 80 of the Commonwealth Constitution apply to an offence of conspiracy not committed wholly within one State?

(b) What is the location, if any, of such an offence for the purposes of s 80 of the Commonwealth Constitution?

(c) Is a conspiracy,

(i) the members of which become parties to it in different States,

(ii) in which the acts done in furtherance of it occur in several States, and in a foreign country,

(iii) which imperils the revenue of the Commonwealth an *offence committed in a State,* for the purposes of s 80 of the Commonwealth Constitution?"

[33] None of the Attorneys chose to intervene.

Submissions

[34] The appellants submitted that the offence was complete as against Henke upon the commission of the first overt act after he became a party to the agreement. He was one of the original conspirators. He and Miller made their agreement in Victoria. The first overt act pursuant to the agreement was Henke's enlistment of Kluyt and Duke as directors of the target companies. That occurred in Victoria. Accordingly, they submitted, the offence with which Henke was charged was commenced and completed in Victoria, and pursuant to s 80 of the *Constitution,* Henke ought to have been tried in Victoria.

[35] Counsel for the Crown submitted that it was necessary to look at the particular conspiracy charged. It involved the three people who were charged and others. At least one of them joined the conspiracy in Queensland. There were overt acts

committed in Queensland. Accordingly, they submitted, the offence was committed in Queensland, and Henke was properly tried in Queensland in accordance with s 80 of the *Constitution*.

[36] Alternatively, counsel for the Crown submitted that Henke was properly tried in Queensland pursuant to s 70 of the *Judiciary Act*. Two alternative arguments were advanced in reliance on s 70. The first was that the offence was completed in Queensland, as the last person who joined the conspiracy, Fox, did so in Queensland and the first overt act after he joined took place in Queensland. The second was that the offence was completed when the stage was reached that every conspirator could be charged with the offence, and that occurred in Queensland.

[37] In the further alternative, counsel for the Crown relied on s 70A of the *Judiciary Act*. If the offence was not completed until steps to wind up the companies were taken in Vanuatu, then it was not committed within any State, and the trial against Henke could properly be held in any State, including Queensland.

Section 80 of the *Constitution*

[38] The English common law drew a distinction between venue, being the place of trial in a particular county or locality, and vicinage, being the area from which the jury was drawn. Venue in conspiracy could be laid in any county in which an overt act in furtherance of the conspiracy was done by any one of the conspirators.[1]

[39] The jurisdiction of a State court to try an offence against a law of the Commonwealth rests on s 71 of the Constitution and s 68(2) of the *Judiciary Act*. The venue for a trial is determined pursuant to s 80 of the *Constitution*.

[40] Because s 80 refers to "the trial on indictment of any offence against any law of the Commonwealth," in determining venue it is necessary to analyse the offence charged – that is, the particular conspiracy charged.

[41] A similar approach has been adopted in the United States, whose constitution contains a venue provision very similar to s 80 of our *Constitution* – Article III section 2 clause 3, which provides –

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The *6th Amendment*, referred to as the vicinage provision, is in these terms –

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

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[1] See the discussion by District Court Judge Carland approved by the US Supreme Court in *Hyde v United States* (1912) 225 US 347 at 11.

The Supreme Court of the United States has held that in deciding where a crime was committed for the purposes of these provisions it is necessary to look at "the nature of the crime alleged and the location of the act or acts constituting it."[2]

[42] In this case analysis of the offence charged involves a conceptual analysis of conspiracy and an analysis of the particular conspiracy alleged against Henke.

[43] Section 80 of the *Constitution* makes two provisions for venue –

(a) "in the State where the offence was committed"; and

(b) "if the offence was not committed within any State….. at such place or places as the Parliament prescribes".

[44] The first of these venue provisions must be read in the context of the *Constitution* as a whole, and in the context of the rest of s 80 (including the second venue provision).

[45] The second venue provision is wide enough to encompass an offence committed in a Territory,[3] and an offence committed by an Australian citizen extraterritorially.[4] It is also wide enough to encompass an offence committed in more than one State, an offence committed in one or more States and a Territory, and one committed in one or more States and extraterritorially.

[46] Venue is necessarily to be determined at the outset of the trial. Thus it will be determined upon the basis of the matters alleged against a defendant, rather than on the basis of what is ultimately proved against him.[5]

The offence of conspiracy

[47] The offence of conspiracy under s 86 of the *Crimes Act* 1914 (Cth)[6] involves three elements – agreement, shared intention and an overt act. Even though it is complete, in the sense that a conspirator can by found guilty, once an overt act is performed, it is a continuing offence. If he withdraws from the agreement and takes all reasonable steps to prevent the commission of the offence before the performance of the first overt act, then he cannot be found guilty: that is because the elements of agreement and shared intention are not extant at the time of that overt act. On the other hand, he continues to commit the offence while he continues to be a party to the agreement, he and at least one other conspirator continue to hold the requisite intention, and overt acts are performed.

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2 *United States v Cabrales* (1998) 524 US 1 at 7; *United States v Anderson* (1946) 328 US 699 at 703.

3 For example, In *Putland v The Queen* (2004) 218 CLR 174 the appellant was charged with having committed an offence against Commonwealth law in the Northern Territory. By s 80, the trial was to be held "at such place …as the Parliament prescribe[d]". Section 70A of the *Judiciary Act* applied, with the result that he was able to be tried in the Supreme Court of the Northern Territory. See [28] per Gummow and Heydon JJ.

4 Section 51(xxix) of the *Constitution*, the external affairs power, permits the Commonwealth to assert extraterritorial jurisdiction over the conduct of its citizens or residents overseas: *XYZ v The Commonwealth* (2006) 227 CLR 532; [2006] HCA 25. In that case an Australian citizen was committed for trial in the County Court of Victoria on charges under Part IIIA of the *Crimes Act* 1914 (Cth) of child sex offences committed in Thailand.

5 *R v Toubya* [1993] 1 VR 226 at 234-235.

6 See compilation prepared on 4 May 2001, taking into account amendments up to Act No. 24 of 2001 This section is no longer in force.

[48] At common law an offence of conspiracy is committed by the making of an agreement to commit an offence, and overt acts are treated as evidence of the conspiracy. It seems that until the early 17th century the common law required an overt act as an element of the offence,[7] and in the United States an overt act is a necessary element of the offence of conspiracy to commit an offence against the United States or to defraud the United States.[8]

[49] Conspiracy has been described as a continuing offence both at English common law and in the United States,[9] and a charge of conspiracy is within the jurisdiction of their courts if the conspiracy continues there, even though the agreement was made elsewhere.

[50] In *Director of Public Prosecutions v Doot*[10] the respondents were charged with conspiracy to import dangerous drugs into the United Kingdom. Their counsel submitted that they could not be tried in England since the conspiracy had been formed abroad. The House of Lords held to the contrary. Viscount Dilhorne cited this passage from *R v Aspinall*[11] –

> "In order to apply these rules to the present case it is necessary next to determine what are the essential facts to be alleged in order to support a charge of conspiracy. Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed."

His Lordship said[12]-

> "I see no reason to criticise this passage unless it be interpreted to mean that the crime, though completed by the agreement, ends when the agreement is made. When there is agreement between two or more to commit an unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design.
>
> …
>
> If it is, as in my opinion it is, a continuing offence then the courts of England, in my view, have jurisdiction to try the offence if, and only if, the evidence suffices to show that the conspiracy whenever or wherever it was formed was in existence when the accused were in England. Here the acts of the respondents in England, to which

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7 See Bryan *The Development of the English Law of Conspiracy* (The Johns Hopkins Press, 1908) chapter 1; *The Poulterers' Case* (1611) 9 Co Rep 55b; 77 ER 813; Bronitt, Simon and McSherry, Bernadette, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 459-460.

8 18 USC § 371.

9 *Ford v United States* (1927) 273 US 593 at 601, 602, 620, 621 – 622; cited in *DPP v Doot* [1973] AC 807 at 824 per Viscount Dilhorne.

10 [1973] AC 807 at 822.

11 (1876) 2 QBD 48 at 58.

12 [1973] AC 807 at 822 – 824.

> I have referred, suffice to show that they were acting in concert in pursuance of an existing agreement to import cannabis, to show that there was then within the jurisdiction a conspiracy to import cannabis resin to which they were parties.
>
> …
>
> Why, one may ask, if the offence of conspiracy is completed when the agreement to do the unlawful act is made, should the conspiracy made abroad or on the high seas be triable at common law in any place where an overt act takes place? This, in my view, can only be on the basis that the overt act, coupled, it may be, with evidence of overt acts in other parts of England, shows that there was at the time of the overt act a conspiracy in England, no matter when or where it was formed."

Lord Pearson referred to the same passage from *R v Aspinall* and continued[13] -

> "But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.
>
> On principle, apart from authority, I think (and it would seem the Court of Appeal also thought) that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England. In such a case the conspiracy has been carried on in England with the consent and authority of all the conspirators. It is not necessary that they should all be present in England. One of them, acting on his own behalf and as agent for the others, has been performing their agreement, with their consent and authority, in England. In such a case the conspiracy has been committed by all of them in England."

[51] In Australia, too, conspiracy has been recognised as a continuing offence, both under Australian common law and under the *Crimes Act* 1914 (Cth).

[52] In *Lipohar v The Queen*[14] the High Court considered the jurisdiction of the Supreme Court of South Australia in relation to conspiracy to defraud at common law. The intended victim was a South Australian company. The scheme involved activity in Queensland, Victoria, Indonesia, and Thailand, as well as South Australia. Gleeson CJ observed[15] –

> "As the facts of the present case show, a conspiracy to defraud, unlike a conspiracy to go into another Territory and there commit a discrete crime, such as robbing a bank, or supplying prohibited

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13 [1973] AC 807 at 827.

14 (1999) 200 CLR 485; [1999] HCA 65.

15 At 503.

> drugs, may involve an agreement to engage in conduct where the dishonesty is practised by trans-jurisdictional communications, and where the inducement of another person to act to his or her economic detriment operates across jurisdictional boundaries."

And Gaudron, Gummow and Hayne JJ[16] agreed with the observation of Lord Wilberforce in *Director of Public Prosecutions v Doot*[17] -

> "The truth is that, in the normal case of a conspiracy carried out, or partly carried out, in this country, the location of the formation of the agreement is irrelevant: the attack upon the laws of this country is identical wherever the conspirators happened to meet; the 'conspiracy' is a complex, formed indeed, but not separably completed, at the first meeting of the plotters."

By the *Supreme Court Act* 1935 (SA), s 17(2)(a), the court had "jurisdiction, in and for the State".[18] The majority's decision turned on the sufficiency of the connection between the subject matter of the charge and South Australia. Their Honours held that because the implementation of the conspiracy involved deceiving people in South Australia and inducing them to act to their detriment, the court had jurisdiction. The governing law, both as to substance and procedure, was that in force in South Australia.

[53] In *R v G, F, S and W*[19] the New South Wales Court of Criminal Appeal considered the nature of the offence in a context where an overt act was not necessary to complete it. The Court said –

> "...the crime of conspiracy is a crime not limited to the making of the unlawful agreement, but committed whilst ever the unlawful agreement is in existence. The agreement may exist but for a moment – because the conspirators are detected immediately after they make their agreement – or it may exist for years. Whilst ever the unlawful purpose or concert is shown to be in existence between the conspirators, the conspirators are conspiring and the crime of conspiracy is being committed. It is a crime of duration, a continuing offence. So viewed the overt acts proved will individually or collectively, of course, be indicative of the formation earlier of the unlawful purpose, but their full role is to establish the existence of the unlawful purpose from that earlier point in time to whenever the conspiracy was discovered. That will be the crime of conspiracy charged in the indictment. Conspiracy is invariably charged as having been committed between certain dates – it is the conspiring, the continuation in existence of the unlawful purpose, between the dates alleged which is the crime charged, and which is the matter to be proved."

[54] In *Woss v Jacobsen*[20] the appellant and others were charged under s 86 of the *Crimes Act* 1914 (Cth) with several counts of conspiracy to defraud the

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16 At 512.
17 [1973] AC 807 at 818.
18 Section 17(2)(a).
19 [1974] 1 NSWLR 31 at 44.
20 (1985) 60 ALR 313.

Commonwealth at Southport and other places within and outside the State of Queensland. Warrants for the appellant's apprehension were issued by a Queensland magistrate, endorsed for execution in Western Australia under the provisions of the *Service and Execution of Process Act* 1901 (Cth). He made an application to the Federal Court for judicial review of a decision of a Western Australian magistrate to order his return to Queensland. The application was dismissed at first instance, and an appeal to the Full Court of the Federal Court was dismissed. Without adverting to the need for an overt act to complete the offence under the *Crimes Act* (Cth), Toohey J said –

> "Although a conspiracy is complete as a crime when an agreement is made, it continues in existence so long as there are two or more parties intending to carry out its design. The court of a State has jurisdiction to try such an offence if the evidence shows that the conspiracy, whenever or wherever formed, was still in existence when the accused were in the State in which the court has jurisdiction: *Director of Public Prosecutions v Doot* [1973] AC 807. Although the essence of conspiracy is the unlawful agreement made by the conspirators, conspiracy as a crime is committed wherever and whenever it is shown that the agreement exists between the conspirators. It is a crime of duration, a continuing offence: *R v GFS and W* [1974] 1 NSWLR 31."

[55] Where conspiracy is alleged, there are two conceptually different scenarios:

(i) Where the first conspirators form a particular plan and other people join in it, without the plan changing, there is one conspiracy.

(ii) Where the plan changes as different conspirators join in it, there is more than one conspiracy.[21]

The particular conspiracy charged

[56] By the indictment, Henke was charged with having conspired with Huston, Fox, Marae, Northam and Miller to defraud the Commonwealth between about 1 July 1999 and about 23 May 2001 at Brisbane in the State of Queensland and elsewhere.

[57] The Crown provided particulars of the alleged conspiracy. It alleged –

(a) that the conspirators conspired with each other to devise, promote and implement a scheme to strip companies of their assets so that they would be unable to meet their tax obligations by the use of dishonest means set out in the "Overt Acts" document;

(b) that overt acts were performed in various places including Victoria, Queensland, New South Wales and Vanuatu; and

(c) that there was one conspiracy: that different people joined in it at different times and in different places, and that they did different things pursuant to it.

[58] Henke was charged with a continuing offence committed over more than 22 months. In effect he was charged with committing the offence upon the

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21 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 327 – 330 per Brennan J; [1984] HCA 8.

performance of each of the overt acts. The overt acts were alleged to have been performed in more than one State and extraterritorially.

Offence not committed within any State

[59] The venue for the trial was to be determined in accordance with s 80 of the *Constitution*.

[60] The offence charged was one "not committed within any State" within the meaning of the second venue provision of s 80 of the Constitution. The trial was required to be held "at such place or places as the Parliament prescribe[d]".

[61] The relevant prescription is that in s 70A of the *Judiciary Act*. That section is applicable to an offence "not committed within any State" – the same words as are used in the second venue provision in s 80 of the *Constitution*. There is no reason why their meaning in the *Judiciary Act* should differ from their meaning in the *Constitution*.

[62] Pursuant to s 70A of the *Judiciary Act*, the trial could have been held in any State or Territory. It was properly held in Queensland.

Answers to questions in notice pursuant to s 78B of the *Judiciary Act*

[63] In answer to the first question, s 80 of the *Constitution* applies to an offence of conspiracy (which is an offence against a law of the Commonwealth) not committed wholly within one State.

[64] In answer to the second question, an offence of conspiracy not wholly committed within one State has more than one location. It is committed at each place an overt act is committed.

[65] In answer to the third question, a conspiracy,

(i) the members of which become parties to it in different States,

(ii) in which the acts done in furtherance of it occur in several States, and in a foreign country,

(iii) which imperils the revenue of the Commonwealth

is an offence "not committed within any State" for the purposes of s 80 of the *Constitution*.

Conclusion

[66] The appellants have failed to establish this ground of appeal.

Appeals against Conviction

[67] It is necessary separately to consider each appellants' appeal.

Huston

[68] The case against Mr Huston, as particularised, was that he conspired with Messrs Henke, Fox, Marae, Northam and Miller to devise, promote and implement

a scheme by the use of dishonest means, as set out in a schedule of "overt acts", to strip companies of their assets so that the companies were ultimately unable to meet their obligations to the Australian Taxation Office, thereby putting at risk the revenue of the Commonwealth.

[69] Before considering Mr Huston's grounds of appeal it is instructive to review the substantial body of evidence relied on by the prosecution to link Mr Huston with the scheme and its promoters.

[70] Located in Mr Huston's office by police investigators was a document headed "CONTACTS" which described Mr Huston as a "Consultant Accountant" and provided his landline and mobile telephone numbers. This was under the heading "IEA". The other person referred to under that heading was Mr Wayne Levick. He was identified as "Company Solicitor". Mr Philip Northam was described as an IEA representative, Mr Lance Miller was described as "Director" and Ms Trudy Thorburn was referred to as "PA".

[71] In a letter dated 22 December 1999,[22] headed "Client Debit Loan Accounts", written by Mr Northam to Mr Huston, Mr Northam referred to his meeting with Mr Huston of 16 December 1999 and stated, "I have prepared the following procedures, for your information…". The letter discussed the scheme in broad outline and the basis upon which IEA wished to deal with scheme participants and their financial advisers. It identified the proposed fee to accountants acting in relation to the implementation of the scheme as 0.50 percent of "the loan advanced". Towards the end of the letter, Mr Northam advised that he would telephone "in a few days to discuss this matter further and to make the necessary arrangements to present the documentation…".

[72] Mr Miller introduced Mr Brown, a director of Nuradel Pty Ltd, to Mr Huston who then became Nuradel's accountant. Mr Brown was introduced to the scheme by Mr Henke. He asked Mr Huston's advice about the legal viability of the scheme on a number of occasions. He said that Mr Huston was "adamant" that it "was totally legal". Mr Brown caused Nuradel to implement the scheme.

[73] A copy of a letter from Mr Brown to Mr Henke dated 18 January 1999 advising that Mr Brown wished to become a "formal client of I.T.R" was found in Mr Huston's premises.[23] The reference to "Mr Huston's premises" here and elsewhere is a reference to either of Mr Huston's home or business premises in Toowong. The evidence was that he initially conducted his practice from home before establishing an office in Toowong.

[74] Mr Huston travelled to Vanuatu on the same flight as Mr Miller on 19 November 1999. The Vanuatu companies used in the scheme were incorporated on Mr Miller's instructions shortly after this visit to Vanuatu.

[75] On 10 January 2000, Mr Northam emailed Mr Huston, with a copy to Mr Miller, advising that accountants should itemise profit and loss statements.[24] It seems that Northam was concerned that unless this was done "sleazy accountants" could falsely claim tax deductible expenses so that "the loan account would be reduced,

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22 Ex 17.030

23 Ex 17.018.

24 MOSH10013.

thereby reducing the fee payable" to the scheme promoters. The email concluded, "I look forward to your comments in relation to this recommendation."

[76] A copy of Mr C J Stevens' QC opinion,[25] which had been obtained by Mr Levick, was located by investigators at Mr Huston's premises between 8 and 25 September 2000.

[77] Mr Northam sent an email on 27 January 2000 to Ms Kluyt, a director of IEA, with copies to Mr Miller and Mr Huston, the subject of which was "Alterations to Finance Agreement".[26] It advised that Mr Northam was still having "enormous trouble" getting accountants to recommend the scheme to their clients. The "principal objection" was the absence of clear provisions "protecting their clients from future come back". A revised deed[27] was attached to the email which concluded, "I look forward to receiving your recommendations and advises (sic) in relation to this matter".

[78] Mr Troy, a director of Mosstop Pty Ltd trading as Michael Troy Chiropractic Centre, attended a lecture given by Mr Miller concerning the scheme. Mr Huston was introduced to Mr Troy by Mr Brown. He became Mr Troy's accountant and acted for him in relation to Mosstop's participation in the scheme.

[79] As well as acting in connection with the scheme for Mosstop and Nuradel, Mr Huston acted for the controllers of five other companies[28] in the implementation by them of the scheme.

[80] On 1 February 2000, Mr Huston witnessed the signatures of Mr Brown and Mr Marae on the agreement of sale of shares in Nuradel entered into between Mr Brown and Mr Marae.[29] The sale price stated in the agreement was $500. The value of Nuradel's assets was to the order of $143,944.04.[30]

[81] An email of 10 February 2000 from Mr Northam to Mr Huston,[31] referred to "telephone discussions" with Mr Huston earlier that day and mentioned concerns expressed by an accountant, Mr Kane, who was said to consult with "a good many of the larger accountancy firms on the Sunshine Coast". Apparently, Mr Kane was concerned about the scheme and had said that he could not "recommend the proposal where there is any opportunity for the lender to come back at the borrower." Mr Kane was noted as having "given little credence" to the Stevens opinion and as wanting to see "a properly considered opinion, particularly in relation to the Taxation Crimes Act in respect of the director." The email concluded:

> "These issues need to be addressed if we are to bring him on board. At this stage he cannot recommend the proposal to his accountant clients.
>
> I look forward to your response in this matter."

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25 Ex 17.032.

26 Ex 17.025.

27 Ex 17.026.

28 The primary judge found that Mr Huston had acted in respect of eight target companies. Counsel for Mr Huston contended that his client had acted in respect of seven. Whether there were seven or eight companies is immaterial for present purposes.

29 POCM10018.

30 As at 15 December 1999; See ACH000002.

31 Ex 17.024.

[82] Between 1 February 2000 and 12 July 2001, Mr Huston sent completed documents in respect of the implementation of the scheme by companies, the shares in which were sold through the scheme, to a storage space rented by Mr Miller at Kennards Self Storage, Fortitude Valley. The documents included memoranda of fees rendered by Mr Huston to clients in respect of the implementation of the scheme. Mr Fox also sent documents used in the scheme to Administration Executives care of Kennards Self Storage. Documents were subsequently collected on Mr Miller's behalf from the storage centre between 29 May 2000 and 22 August 2001. Scheme documents seized in Vanuatu were in archive boxes marked "Administrative Executives – space w5 C/- Kennards Self Storage".

[83] On 18 February 2000, Mr Northam emailed Mr Huston, with a copy to Mr Levick, attaching a proposal concerning the involvement in the scheme of IEA and Masharchi Pty Ltd, the target company.[32] Mr Northam requested that Mr Huston telephone him that day so that he could "finalise preliminary discussions with the client". He commented, "…this is a good case and will generate substantial referrals" and thanked Mr Huston for his assistance. The proposal contemplated that 90 per cent of the shares in Masharchi, which had a net asset value of around $750,000, would be purchased by IEA for $500. The proposal made it quite plain that its implementation would strip Masharchi of its assets with a view to leaving the Commissioner of Taxation with no effective recourse against it, its directors or shareholders for any tax liabilities.

[84] An income and expenditure statement, as at 7 September 2000,[33] which was found by the primary judge to have been created by Ms Thorburn at the request of Mr Miller using records held by Administration Executives and information provided by Mr Miller,[34] showed various payments to Mr Levick, a payment of $145,000 to Mr Henke and a payment of $40,000 to Mr Huston.

[85] A letter retrieved from Mr Marae's computer at Equity Investment Bank stated that "Robin D Huston and Company" were Athena Credit Co Ltd's Australian accountants.[35]

[86] Mr Huston provided a reference dated 26 March 2001 recommending Mr Levick "as a Banking Client".[36]

[87] An intercepted telephone conversation between Mr Miller and Mr Huston of 26 June 2001 concerned the seizing by police of documents in relation to the scheme.[37] Another intercepted conversation between Mr Miller and Mr Huston on 29 June 2001 involved discussion of strategy in relation to challenging a search warrant.[38]

[88] A floppy disc with the heading "Millennium DUP Robin" was seized from Mr Huston's premises. It contained pro-forma documents that were ultimately utilised in the scheme. Mr Henke had obtained the documents from Mr Kerin, a solicitor at Millennium Law, and the documents were paid for by Administration Executives (Mr Miller's company).

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32 Ex 17.013.
33 Ex 4.181.
34 Transcript (Revised Sentence) 1-8, ll 50-60.
35 POCM12010.
36 HUST10016.
37 Ex 104.004.
38 Ex 104.006.

[89] Mr Miller arranged for Ms Kluyt to become a director of IEA (later IEAA).

[90] On 3 March 2000, Mr Miller and Mr Huston discussed the purchase of $1,000 worth of shares in Anvil Mining NL and Ms Thorburn emailed Mr Huston in that regard.[39]

[91] A number of documents, including correspondence by email between Mr Huston and IEA (Ms Thorburn) in relation to Sylvia Consulting's participation in the scheme, were seized from Mr Huston's premises. The documents included a scheme flowchart and a flowchart of a sale to IEA.

[92] Documents in relation to the sale of Mosstop seized from Mr Huston's premises included the "CONTRACTS" document referred to earlier; a letter dated 22 December 1999 from Mr Northam on IEAA letterhead to Mr Huston entitled "Re: Division 7 Loans";[40] a letter of 22 December 1999 from Mr Northam to Mr Huston outlining procedures for IEA agents and enclosing pro-forma scheme documents;[41] an email of 10 January 2000 from Mr Northam to Mr Huston, with a copy to Mr Miller, stating that accountants of target companies should itemise profit and loss statements so that the directors' loans are not artificially inflated[42] and a facsimile of 20 October 2000 from Mr Northam to Mr Huston entitled "CASE UPDATE".[43] The latter document described the stage reached in the implementation of the scheme by the target companies, which were grouped by reference to the accountants acting in their respective scheme implementations. Six companies were listed under the heading "Independent Cases * Australia Wide".

[93] The above correspondence and the documentation found in Mr Huston's possession makes it abundantly plain that his role went far beyond mere performance of accounting work associated with the implementation of the scheme by the seven target companies in respect of which he acted. It may be inferred from his unequivocal advice to Mr Brown as to the legalities of the scheme that Mr Huston was acquainted with, at least, the substance of the scheme. There was, however, strong evidence that Mr Huston was also aware of the scheme details.

[94] Counsel for Mr Huston contended that, although he received some pro-forma documents, he did not receive them all and certainly not the deed of assignment. He referred to many of the documents listed above and submitted in respect of each of them that there was nothing about it which was necessarily incriminating. In respect of the documents found either at Mr Huston's home or office, it was submitted that it had not been shown that he had read them or even that he was aware of their existence, there being no evidence of the actual location in Mr Huston's premises in which the documents had been found.

[95] The latter submission had an air of desperation about it. There was clear evidence that Mr Huston was personally engaged in the work done for his clients in respect of the seven target companies with which he was involved. There was also evidence of his active engagement in relation to the scheme with Mr Miller, the scheme's prime mover.

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39 MOSH10005.
40 MOSH10011.
41 MOSH10012.
42 MOSH10013.
43 MOSH10015.

[96] There is no reason to suppose that he did not receive and peruse the emails sent to him. In some of them Mr Miller sought his advice and assistance in relation to the structure and promotion of the scheme. Some made express reference to earlier discussion or discussions. When regard is had to these clear links between the scheme documentation and Mr Huston, it was well open to the jury to conclude that he had knowledge of the existence and content of the scheme documentation found in his office. There was no evidence that an employee or partner of Mr Huston may have had relevant responsibility.

[97] Counsel for Mr Huston's contention that the documents which he singled out for discussion were not, in themselves, incriminating, although correct in the case of some documents, is largely beside the point. The prosecution case against Mr Huston was circumstantial in nature. It relied on the inferences to be drawn from the totality of the evidence. That consisted not merely of individual documents but of what was revealed by the contents of documents, including associations with conspirators and patterns of behaviour.

[98] It is now convenient to address specifically the grounds of appeal. Ground 1 was that the trial judge erred in admitting exhibit 4.181, the 7 September 2000 income and expenditure statement.

[99] It was not argued that the document was inadmissible. Rather, it was contended that the evidence showed that it was unreliable. This was said to be because Ms Thorburn conceded that instructions to enter the payment of $40,000 must have come from Mr Miller verbally and that the subject entry on the document was not supported by primary documentation. Consequently, the argument amounted to an implied contention that the primary judge erred in the exercise of his discretion in not excluding the document.

[100] Mr Huston can succeed on this ground only by demonstrating that the exercise of the trial judge's discretion miscarried.[44] That has not been shown. From the evidence recited earlier, it would have been surprising had Mr Huston not been a recipient of payments in respect of the scheme. The document was shown to have been carefully prepared, for the most part, from business records. There was no reason to exclude it. It was open to counsel for Mr Huston to address the jury in respect of its deficiencies and this was done.[45]

[101] The thrust of the arguments advanced under grounds 2 and 3 were as follows. The prosecution was required to prove knowledge, not only of the planned fraud, but of the dishonest means by which the fraud was to be effected. The critical step in the scheme which placed the tax revenue at risk was the assignment of the directors' loans to IEA following the transfer of control of the companies to IEAA. This was "the dishonest means" by which the fraud was to be effected.[46] As the preceding steps in the scheme were lawful *per se* and of a routine accounting nature, Mr Huston's knowledge of the step by which the assignment of directors' loans was to be effected was an intermediate fact which was an indispensable basis for an inference of guilt. Consequently, proof beyond reasonable doubt of Mr Huston's knowledge in this regard was required.[47]

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44 *DAO v R* [2011] NSWCCA 63.

45 Transcript 16-60.

46 *Peters v The Queen* (1998) 192 CLR 493.

47 *Shepherd v The Queen* (1990) 170 CLR 573 at 576.

[102] Reliance was placed on the following observation of Gleeson CJ in *R v Trudgeon*:[48]

> "No doubt the inference was open, and even compelling, that both Cheung and the applicant would have expected that the applicant would on-supply the material in whole or in part. However, it is one thing to say that, and a very different thing to say that there was an agreement between Cheung and the applicant, of the kind essential to the crime of conspiracy, that the applicant would deal with the material in that way. It is consistent with the objective facts that Cheung, having been paid for the material, had no further interest in what happened to it, and that as far as he was concerned the applicant could do with it what he pleased. Of course, commonsense would indicate that Cheung would not have expected to received (sic) such a high price for the material unless the applicant intended to deal with it in some commercial manner. Even so, it is one thing to say that Cheung fully expected that the applicant would in turn supply the substance to a further person or persons, and quite a different thing to say that the applicant's anticipated conduct in that regard was a part of their conspiracy.
>
> ...
>
> One thing that is clear, however, is that to be liable as a conspirator an accused person must have an intention that (so far as is presently relevant) an unlawful act occur. The agreement consists in the manifestation of a common intention that an unlawful act occur. It does not suffice that there is an expectation that such an act will occur. In argument before this Court the Crown relied upon the proposition that a person's foresight that something will certainly occur may amount in law to an intention that it occur. That proposition needs to be related to the circumstances of the particular case. Cheung sold and delivered to the applicant what they both thought was heroin, and received what was apparently payment in full. The quantity of heroin involved, and the price paid for it, no doubt made it highly probable that the applicant was buying it for resale. The critical step, however, is that which involves the conclusion that there was agreement between Cheung and the applicant that the applicant should resell the heroin; in other words, that it was a part of their common design, a matter of shared intention, that the applicant should resell the heroin."

[103] As was the case with Mr Fox, there was ample evidence from which the jury could infer that the directors' loans were shams. They were to be repaid from loans made to them by Athena, a Vanuatu based company. It would not have made sense for a director to have implemented the scheme if he was liable to repay a loan, the amount of which approximated the net asset value of the target company. Mr Huston was aware also that an initial problem in the marketing of the scheme was the lack of clear provision in the scheme documentation concerning the ability of the lender "to come back at the borrower" director. It is significant that Mr Northam's email of 10 February 2000[49] did not suggest that the scheme documents could not or ought not contain such provision.

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48 (1988) 39 A Crim R 252 at 254, 256.

49 MOSH10006.

[104] Like Mr Fox, Mr Huston knew that an early step in the scheme was the sale of the shares in the target company for a nominal value. He must have appreciated also that the shares could have no value if the directors' loans had no value. It may be inferred, quite safely, that he was aware of the contents of the share sale agreements. They were relatively brief documents which, conspicuously, contained no warranties in relation to the assets of the company the shares in which were being sold. These steps in the scheme were thus hardly "routine accounting steps" as counsel for Huston contended.

[105] These considerations together with: the nature and extent of Mr Huston's involvement with Mr Miller concerning the mechanics of the scheme; Mr Huston's advising Mr Brown about the scheme; Mr Huston's involvement in the implementation of the scheme in respect of seven companies; the payment of $40,000 to Mr Huston; the depositing and planned depositing by Mr Huston and others of scheme documents in storage facilities hired by Mr Miller and the lack of any genuine commercial purpose in the scheme, left it open to the jury to conclude beyond reasonable doubt that Mr Huston was aware that there was no intention that any directors' loans would be repayable or repaid.

[106] Two other matters which serve to fortify this conclusion also bear mentioning. Evidence of "acts and declarations of co-conspirators done or made in pursuance of the combination" of the conspirators is admissible once there is a *prima facie* case that the accused is connected with the conspiracy.[50] That principle made admissible against Mr Huston documents such as the 3 March 2000 letters to Mr Fox from Mr Northam, one of which had enclosed pro-forma documents, found in Mr Fox's business premises and discussed earlier in relation to Mr Fox's appeal.

[107] Mr Eykamp, who caused the scheme to be implemented with Mr Huston's assistance in respect of Eykemp Kikuyu Co Pty Ltd, gave evidence to the effect that at a meeting with Mr Northam prior to Mr Eykamp's implementing the scheme it was implied that the loan from Athena "might be buried". Reference was made earlier to generally similar advice given to another director of a target company, Mr Roberts, concerning the absence of an obligation to repay the Athena loan. Either Mr Miller or Mr Northam told Mr Brown that the loan to him was non-recourse or did not have to be repaid. Mr Troy denied ever receiving loan moneys from Athena.

[108] It was contended that the trial judge erred in not directing the jury that they had to be satisfied beyond reasonable doubt of Mr Huston's knowledge of the step in the scheme which "'stripped' the assets from the companies and thereby placed the ATO's revenue at risk [namely] the assignment of the directors' loans to IEA, following the transfer of control of the companies to IEAA". Such knowledge was said to be an "intermediate fact" within the meaning of the principles expressed in *Shepherd v The Queen*.[51]

[109] As was discussed in relation to Mr Fox, it is not a necessary element of the offence of conspiracy to defraud that the conspirators know all of the details of the dishonest means. Also as discussed in relation to Mr Fox, the prosecution case was adequately particularised and it was open to the jury to find that case proved beyond reasonable doubt.

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50 *R v Minuzzo and Williams* [1984] VR 417 at 431 and *Ahern v The Queen* (1988) 165 CLR 87 at 102, 103.

51 (1990) 170 CLR 573.

[110] Because the prosecution's case was circumstantial, it would have been erroneous for the trial judge to direct as counsel for Mr Huston contended. The prosecution did not need to rely on Mr Huston's knowledge of the particular step identified by counsel for Huston.

[111] Grounds 4, 7 and 10 overlapped. They were that it was not open to the jury to be satisfied beyond reasonable doubt:

- of any or all of the intermediate facts (ground 4);
- that the appellant had joined the conspiracy charged on the indictment (ground 7);
- that the actions of Mr Huston (which were all *prima facie* lawful) were performed with knowledge of the unlawful purpose of the alleged co-conspirators (ground 10).

[112] The arguments advanced by Mr Huston's counsel in support of these grounds have already been discussed save for the arguments that suspicions of fraudulent conduct would not suffice to establish guilt and that Mr Huston was entitled to rely on Mr Levick's letters of comfort. The "letters of comfort" were letters in which Mr Levick certified to former directors of the target company that the moneys advanced by Athena to the relevant director had actually been paid by Athena.

[113] It is accepted that the raising of mere suspicions would have been insufficient to sustain a conviction but the prosecution never contended, and the trial judge never directed, to the contrary. Mr Levick's certification is but one piece of evidence to be weighed against the other evidence earlier recited. It is only to be expected that there will be steps in a fraudulent tax scheme which, on their face, have an appearance of legitimacy or which may be unexceptional in themselves.

[114] The earlier discussion establishes that these grounds cannot be made out. It is also relevant to note that the trial judge held in her sentencing remarks that Mr Huston "knew how the scheme worked and, in particular, that the loan that the director received from Athena did not have to be repaid."

[115] Ground 8 was that the trial judge erred in not directing the jury to draw the inference from the prosecution's failure to call as witnesses Mr Rodney Sylvia, Mrs Andrea Izzard-Sylvia and Mr Danny Raiz that their evidence would not have assisted the prosecution. Mr Sylvia and Mr Raiz were directors or controllers of target companies.

[116] Mr Huston's argument was to this effect. Out of a possible five directors of target companies only three were called: Messrs Brown, Eykamp and Troy. No reason was given by the prosecution for not calling Messrs Sylvia and Raiz. The prosecution case was put on the basis that Mr Huston had "promoted" the scheme and the direction contended for was in the interests of justice. That was said to flow from the alleged fact that Mr Huston's role was an essentially administrative one and that the directors who had not given evidence each approached Mr Huston in relation to the scheme and had been introduced to the scheme by either Mr Miller or Mr Northam.

[117] The trial judge directed the jury:

> "You should not speculate about what those witnesses who were not called might have said if they had been called. Obviously you

> should act on the basis of the evidence that has been called and only that evidence."

[118] The direction was appropriate and sufficient. What is known as the rule in *Jones v Dunkel*[52] does not apply in criminal cases in the same way that it does in civil cases. Gaudron and Hayne JJ explained in *Dyers v The Queen*:[53]

> "Further, as a general rule, a trial judge should not direct the jury in a criminal trial that the prosecution would be expected to have called persons to give evidence other than those it did call as witnesses. It follows that, as a general rule, the judge should not direct the jury that they are entitled to infer that the evidence of those who were not called would not have assisted the prosecution. A direction not to speculate about what the person might have said should be given. Again, exceptions to these general rules will be rare and will arise only in cases where it is shown that the prosecution's failure to call the person in question was in breach of the prosecution's duty to call all material witnesses."

[119] There was no submission that the failure to call these witnesses was in breach of the prosecutor's duty and there was no evidence of their availability to give evidence. Also, as counsel for the respondent submitted, the evidence of the directors who were called was that they were not introduced to the scheme by Mr Huston. Two of them swore that Mr Huston did not advise them in relation to the efficacy of the scheme. It is thus unclear whether the evidence of the persons under discussion could have assisted the defence case materially.

[120] Ground 11 is that the conviction was unsupported by the evidence, contrary to the weight of the evidence and unreasonable. For the reasons given above, there is no substance in this ground. It was well open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt of Mr Huston's guilt.

[121] The grounds of appeal not addressed above were abandoned. None of the grounds relied on were made out. Mr Huston's appeal against conviction should be dismissed.

Fox

[122] Particulars of the charge against the appellant Fox were that he conspired with Northam and Miller to use his position as an accountant to promote the scheme to his clients whose companies became "targets." The clients were Philip and Frederick Roberts (Dirkminster Pty Ltd), David Freyling (Megacorp Developments Pty Ltd, Sunacco No. 5 Pty Ltd), Trevor O'Reilly (Mad Rooster Pty Ltd), Leon Power (LPP Mildura Pty Ltd) and Wilhelmus Van Zetten (Vanz Pty Ltd). Miller's role, as mentioned, was to initiate the scheme as well as to market it. It was he who arranged the incorporation of the companies in Vanuatu and Marae's appointment to them. Mr Miller is alleged to have used his company, AE, to prepare and complete documentation to evidence some of the steps in the scheme and to effect the transfers of the pre-payments of interest to Mr Levick's trust account. Mr Northam's role was said to be a promoter of the scheme. He brought it to the

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52 (1959) 101 CLR 298.

53 (2002) 210 CLR 285 at 291.

attention of accountants such as Mr Fox and advertised its financial advantages to those companies which participated in it. Mr Northam gave Mr Fox information to pass on to his clients.

[123] The basis for charging dishonesty was that a qualified accountant, such as Mr Fox, who was familiar with the scheme could not have honestly believed that the tax owed by his client companies which took part in the scheme would be paid. The scheme was to strip companies of their assets so that they were unable to meet their obligations to the ATO. Particular reference was made to the fact that the companies invited to join the scheme all had taxation liabilities, and transferred all their assets to their directors who resigned their offices and sold their shares for a nominal figure. Mr Fox knew, and the directors knew, that the loans from Athena ostensibly taken out to repay the debts owed to the companies were never intended to be repaid and were known to be an artifice designed to give an appearance of legitimacy to the transactions in the scheme. If the loans from Athena were shams the target companies had nothing with which to pay tax.

[124] The appellant Fox was given leave to amend his notice of appeal. The grounds of appeal, as amended, were:

> "Ground 1
> In order for the jury to be satisfied beyond reasonable doubt of the guilt of the appellant, it was necessary for the jury to be satisfied beyond a reasonable doubt of the following intermediate facts:
>
> (a) That the appellant knew that following the transfer of shares from their individual directors to Clarence Marae, the companies would assign the loaned funds to International Equity Acquisitions Ltd.
>
> (b) That the appellant knew that Athena Credit Co Ltd would not in fact extend loaned funds to the directors in accordance with the loan agreements, part of which was to be set aside to meet taxation obligations.
>
> (c) That the appellant knew that the statement of Wayne Levick, contained in correspondence, that certified that the loan funds had been advanced, was false;
>
> (d) That the appellant knew that the overall effect of the transactions was to leave each of the companies incapable of meeting their tax liabilities;
>
> (e) That the appellant knew that the tax liabilities of the companies would not be met. ("the intermediate facts").
>
> Ground 2
> The trial judge erred in not directing the jury that before they could convict the appellant, they had to be satisfied beyond reasonable doubt of each of the intermediate facts.
>
> Ground 3
> It was not open to the jury to be satisfied beyond reasonable doubt that the actions of the appellant, which were all prima facie lawful, were performed with knowledge of the unlawful purpose of the alleged co-conspirators.

Ground 4
The conviction is otherwise:
(a) Unsupported by the evidence;
(b) Contrary to the weight of the evidence;
(c) Unreasonable."

[125] The case advanced for the appellant Fox was that transactions which he recommended to his clients and which he assisted them to perform were all on their face lawful. He could not, therefore, be convicted of conspiracy unless the prosecution proved that he knew the transactions were part of a scheme which was itself dishonest and which had as its object the defrauding of the Commonwealth by removing from his client companies the assets which were their only means of satisfying their taxation obligations. The grounds of appeal raise arguments that there was inadequate proof that Mr Fox knew the companies would be stripped of their assets and/or be unable to pay their taxation liabilities and that the directions given by the trial judge on the points were inadequate. Before dealing with the arguments it is necessary to mention some of the evidence.

[126] Federal Police officers executed a search warrant on Mr Fox's business premises in June 2001 and seized a number of documents. Years later, on 26 August 2008, Mr Fox was interviewed by federal agents. In the course of his interview he admitted to knowing both Northam and Miller, and to a lesser extent, Mr Henke and ITR. He said that either Mr Northam or Mr Miller telephoned him and drew his attention to "a particular program … which (he) may want to … look at." He was told that the purpose of the program was to provide monies for ITR. After that initial conversation Mr Northam again rang him and asked for advice "on some of the issues within that program … in relation to … taxation aspects and accounting entries in relation to it." Mr Fox gave "some information" and then later was again approached by Mr Northam who provided him with the "paperwork" and asked for comments, which Mr Fox gave.

[127] Mr Fox provided his understanding of the scheme:

> "The way it was explained to me was that there'd be a fee paid up front … roughly fourteen or fifteen per cent of whatever the deemed tax was. That was to be invested. … that's where the Vanuatu company came in. … it was explained to me that they had an investment scheme that was returning forty or sixty per cent a month or something like that … and that would fund ITR and leave sufficient funds to pay the tax at the end… ."

[128] Mr Fox said that he told Mr Northam that he wanted "some sort of proof" that "this tax" would be paid. He did not want "to get involved in any infamous dealings with a tax scheme, and … didn't want … any of (his) clients getting involved in something that was … to avoid tax." As a consequence "we got a statement from their barrister … that assured me that any tax outstanding would be paid by ITR or by their organisation … And on that basis … I went to the clients … and I put that to them and … they agreed to go with it."

[129] Mr Fox was asked what he had told his clients about the loans the directors of the target companies would take from Athena. His answer was that he:

> "… went through with the clients what the paperwork was and … basically made it clear that … if the director defaulted and didn't pay

> the loan back at the end of the term … then ITR or whichever company it was in relation to that guarantee, would repay the loan on the director's behalf. … it was a concern of ours to make sure that the director wasn't going to … repay the loan. It was part of the thing that they weren't going to suddenly … front up with this … loan and that was all part of the overall arrangement … that … ITR would in fact finish up with responsibility for the loan and the taxation."

[130] Mr Fox was asked what benefit his clients gained from their companies entering the scheme. He said it was to reduce the tax they paid from 39 cents in the dollar to 15 cents. When asked whether that did not make the scheme one to avoid tax he said:

> "… (Miller) made it clear to me that they had investment that out of the fifteen cents or whatever they finished up with, ten cents, they'd invest that, and by the time this was due, they had enough money to pay the tax. … that's why they were using Vanuatu, because they had an investment company in Vanuatu that was … returning these sorts of funds, this sort of income. … I had actually heard … other people come and tell me that they were getting that sort of money … ."

[131] Mr Fox was shown a Loan Agreement which recorded a loan to Mr Van Zetten from Athena of $702,690 with respect to which he had paid $91,349.70 interest in advance. Mr Fox verified the accuracy of the documents. He was asked what would happen if Mr Van Zetten did not repay the loan. His answer was that his understanding was that if Mr Van Zetten did not pay them IEA would. It will be remembered that IEA had guaranteed the repayment of the loans to Athena.

[132] Mr Fox was then questioned about the sale of shares in the target companies. The consideration was usually $500. The companies all had assets, being the loans owed by their directors to them, of more than $100,000. The value of some of the companies on that basis was several hundred thousand dollars. When asked why the consideration for the sale of the shares was so small Mr Fox answered:

> "… it was a particular question that was asked (by) … one or two of the clients. … The answer is, it's just part of the arrangement and, I don't know how you try and justify it at the end of the day because … it's part of the arrangement … that's the simplistic thing of it all, it's part of the arrangement to do this whole transaction … remembering that from the director's point of view, the client's point of view, and our point of view, he knew he wasn't going to have to repay the loan. So selling the company for five hundred dollars did not become an issue for them, once they understood the situation.
>
> From the realistic point of view, why would you sell it for that?
>
> I can't answer you. … The commercial reality is hard to prove. … if they would … have had to repay … the loan to Athena, things would have been totally different."

[133] The questioning on the point continued. Mr Fox was asked whether he had explained to his clients that the reason for selling the companies' shares at a gross

undervalue was that "the crucial difference is that this loan here is in fact a loan you're not repaying. … So even though it's appearing on there, it's really a loan that you're not repaying?" Mr Fox replied:

> "Well they're not repaying and they're not responsible for it. They're not repaying that to the company. They have paid that back to the company. They don't have to pay it back to Athena. From the company's point of view, that loan has been paid. … my understanding was that they were looking for this nice big investment to put in and earn some nice big money, some good returns of, you know forty … or sixty per cent … per month."

[134] When asked why those behind the scheme would not "simply go to Athena themselves and get a loan … to use that money to get those returns" Mr Fox replied that he did not know; he said he had "no idea".

[135] In the search of Mr Fox's business premises, Federal agents seized a number of documents. One of them, dated 3 March 2000 on IEAA's letterhead, was signed by Mr Northam. Attached to it were pro-forma documents to give effect to a number of the steps in the scheme. The letter was headed "RE: Division 7 Loan Accounts" and read:

> "Further to our recent discussions … we have attached … a sample copy of the relevant documentation for your perusal. Further, we have prepared a sequence of events, which would lead up to the completion of the sale of the target company and the repayment of any and all Debit Loan Account(s).
>
> As discussed, it is the intention of (IEA) to acquire companies, which hold 2nd board listed company shares. Further, in the event that a client is desirous of selling their company to I.E.A, we will prepare all of the required documentation … .
>
> There are a number of reasons for such a sale, ranging from the favourable loan facility being made available to the Director … to liquidate their personal Debit Loan Account(s); the opportunity to restructure their corporate position by transferring assets out of the old company into a newly formed, non-trading company, protecting those assets … .
>
> At the shareholders meeting it would need to be resolved that the company acquire the listed shares … to the value of one thousand dollars (A$1,000), so as to comply with the purchasing criteria of I.E.A. …
>
> Having resolved the target company is to be sold, the new trading entity needs to be incorporated and, where there are assets in the target company, not included in the sale, a Holding Company … needs to be incorporated to buy the assets from the target company.
>
> Once the sale of the target company has been completed, the newly appointed director will issue a demand for the immediate repayment of the Debit Loan Account(s). … This is normal procedure … .
>
> The loan agreement for the repayment of a Debit Loan Account … has been attached for your perusal … . As with the Agreement for

> the sale of the shares … please read this agreement and advise the writer of any questions, clarifications or changes you may feel need to be addressed, for the consideration of the Lender, who will advise us immediately of their position … .
>
> In addition to the Loan Agreement, there are two other letters which will be required being, a letter to the Solicitor for I.E.A and a letter to the Financier … . The letter to the Solicitor is to instruct and authorise him to disburse the funds held in his trust, once the Debit Loan Account has been repaid in full, while the letter to the Financier is to instruct them to pay the loan being advanced, directly to the trust account of Target Pty Ltd's solicitor. This is normal lending procedures … .
>
> Once the loan facility has been completed and the Debit Loan repaid, the Financier will advise I.E.A's Solicitor … requesting the transfer of the interest held in trust. …
>
> …
>
> The procedure for the payment of the interest protects your clients funds at all times, as … (they) are held in trust and therefore, are subject to Australian Trust Law and the Solicitors Fidelity Trust Fund.
>
> Finally, once the debit loan account has been repaid in full, the Solicitor for Target Pty Ltd will confirm to the borrower that all of the loans funds have been repaid in full and nothing more is owing.
>
> As I.E.A has no desire to become involved with your clients, I.E.A will require your firm to attend to all of the documentation in relation to the sale of your clients company. To this end, the following is an itemised list to assist … . … These documents are to be bundled and delivered to (Mr Northam's address) for checking and forwarding to I.E.A's solicitor."

[136] The documents attached to the letter were:

- A notice of special meeting of a company.
- An authority to a stockbroker to buy shares.
- A "non-disclosure statement" warranting that all of the liabilities of the target company were disclosed in the accounts presented in relation to the sale of the company.
- Minutes of a General Meeting of shareholders resolving to transfer their shares to IEAA and appoint new directors.
- An agreement for the sale and purchase of the shares.
- A demand for the payment of the "loan amount" outstanding and owing to the company within seven days.
- A loan and security deed and deed of guarantee and indemnity and a schedule to which identified the retiring director as the borrower and the loan as one for interest only. This was for the Athena loans.

- A letter addressed to Mr Levick authorising him to "disburse the funds from your trust account once the loan funds for the repayment of my debit loan account with (Target Pty Ltd) has been received by you from (Financier)."

- A letter addressed to the "(Finance Company)" from the retiring director directing the finance company to pay the loan amount "which I have borrowed from your company to Wayne Levick & Associates Trust Account on behalf of (Target Pty Ltd) at your earliest convenience."

- A letter from the finance company to Mr Levick advising that a loan has been advanced to his trust account and requesting distribution of those funds "in the following manner".

- A letter from Mr Levick to the retired director of the target company:

"We acknowledge receipt of payment of ($Total Amount Received) as full and final payment of your loan account currently held by the company. This amount also includes interest and all outstanding charges claimable up to date. We further acknowledge, as agreed prior to the sale of (Target Pty Ltd) to (IEAA), that an amount equal to the provision for taxation identified in the balance sheet of (Target Pty Ltd) as supplied to (IEAA) has been set aside and earmarked for the express purpose of meeting the said tax obligation."

[137] Mr Northam wrote another letter on 3 March 2000. This one was addressed to Mr Fox and referred to a meeting of that date. Mr Northam wrote that he had prepared "procedures" for Mr Fox's "information". The procedures were:

"1. Our group is desirous of purchasing companies, which have share investments in 2nd board listed companies. As discussed, if any client does not have any such shares … arrangements should be made for them to purchase $1,000 worth of shares so they comply with I.E.A purchasing criteria.

2. Should your client's company meet I.E.A's criteria you will need to arrange for the establishment of your clients new trading entity (if any) and the transfer of any assets to the new entity from the company to be sold.

3. In relation to companies that have not lodged their 98/99 tax returns, please refrain from doing so and prepare the 98/99 financial statement for submission to I.E.A. This is important as, I.E.A will be submitting any outstanding tax returns to the A.T.O … .

4. I.E.A will require you to prepare a final set of financial statements … showing the total of any director/shareholder loans and the provision for any taxation liability which you have determined, could be payable.

> 5. I.E.A will then require you to forward the abovementioned … information … the Division 7 debt account agreement and a cheque for the payment of the calculated interest of 13% of the debit loan amount to be advanced, plus withholding tax, currently 10% of the interest. The interest is to be made payable to "Wayne Levick & Associates Trust Account"… .
>
> 6. Upon receipt of all the abovementioned documentation and interest payment, I.E.A will prepare the necessary documentation for the entire transaction. …"

[138] The letter went on to give substantial further details which it is not necessary to rehearse save that Mr Northam offered Mr Fox payment equal to 0.5 per cent of all loans advanced to his clients in order to repay their loans to their companies. There was no evidence that Mr Fox in fact received any payment from Mr Northam, IEA, IEAA or Athena (or ITR). His sole remuneration appears to have been professional fees paid by his clients for the services he provided.

[139] It will be noted that the documents sent under cover of Mr Northam's letter of 3 March 2000 did not include any form of assignment to give effect to step 6 in the scheme. There were examples of such an assignment in evidence. That in respect of Vanz Pty Ltd provided:

> "DEED OF ASSIGNMENT AND ACCEPTANCE
>
> 1. This deed of assignment and acceptance between Vanz … of … Blacktown … (the Assignor) and (IEA) of … Vanuatu (the Assignee) was entered into on behalf of the parties on this 17th day of August 2000.
>
> 2. By the terms of this deed the Assignor transfers and assigns receivables in the amount of AUD$702,690.00 being a wholly owned asset of the Assignor company to the Assignee with all rights to the proceeds, if any, of the receivables from this date forward. The Assignee shall have an unfettered right to seek recovery.
>
> 3. By the terms of this deed the Assignee accepts the said assignment and in consideration of the assignment accepts full liability for any debts, liens, taxation assessments or other liabilities incurred by the Assignor company either prior to the date of this deed or subsequently incurred and undertakes to preserve and indemnify the Assignor company and its directors against all actions arising from any such debt, lien, taxation assessment or other liabilities."

[140] The trial judge recorded that no copy of any assignment was found in Mr Fox's premises or otherwise in his possession. It was for this reason that her Honour found that he did not know of step 6.

[141] It should be observed that no written notice of any of the assignments appears to have been given to the debtors, the directors of the target companies', ownership and control of which had passed to IEA.

[142] Another feature worth noting is that at the time of the assignments from target companies to IEA Mr Marae was the only director of the target companies, the assignors. He had always been the only director of IEA, the assignee. Notwithstanding that fact the deeds of assignment were executed on behalf of IEA, by someone other than Mr Marae. That (unidentified) person was also the witness to Mr Marae's signature when he signed on behalf of the assignor. Equally curious is the fact that the demands by Mr Levick for repayment of the directors' loans to the target companies bears the same date as the assignment, but were made on behalf of the assignor. The assignments and the notices of demand in respect of all Mr Fox's clients which became target companies were signed on that same day, 17 August, apparently as a "batch".

[143] It is also relevant to note what some of Mr Fox's clients were told about the enforceability of the loans to them from Athena.

[144] Mr Freyling said of the loan to him of $706,522 that he did not believe he ever "received it or paid it." Nor did he ever receive the letter of demand from Wayne Levick and Associates. He did not believe that he had repaid the loan to his company.

[145] Mr Roberts (Dirkminster Pty Ltd) said that he had discussions with Mr Fox about "ways of minimising (his) tax". As a result he met with Mr Fox and Mr Northam. The latter "conducted the meeting and ... basically said that there was a way of liquidating the company that we wouldn't have any liabilities whatsoever." Mr Northam explained things on a whiteboard: "he drew circles and arrows and whatnot (but Mr Roberts) couldn't really tell … what he actually said", though he did recall Mr Northam saying "(t)his goes here, that goes there, and it all goes round in a circle and that's it."

[146] About the loans from Athena Mr Roberts said:

> "I don't remember (Northam) saying anything about an … offshore loan, but when I got all the documents from Fox, there was a great stack of documents, and in one of those bits of paper was an offshore loan. … (s)o, we just signed all the documents with Fox and we said, "That's it" … "We're finished". … We had to pay some money up front … for interest and to cover the interest on the loans for five years. There was about 51,000 each, I think.
>
> And what about repayment of that loan itself? – No, I don't think the loan was eventually going to be repaid, because it was all … organised with this paperwork that he'd done.
>
> Who told you that? – Well, Northam told me that. … Northam did the sales pitch and Fox did the paperwork. … ."

[147] The legal advice which Mr Fox referred to in his record of interview was an opinion from Mr CJ Stevens QC of 25 January 2000. Mr Stevens was briefed to give an opinion by Mr Levick who had been requested by Mr Henke to obtain it. Mr Stevens answered eight questions put to him by Mr Levick. They were:

> "(1) If any company is sold whilst it still has outstanding taxation obligations but with sufficient liquid assets to pay the company's obligations and with the appropriate indemnities

at the time of the transfer, do the directors have any continuing obligations in relation to the taxation?

(2) If the taxation has not been paid due to a genuine dispute with the ATO but the funds to pay the tax are being held separately in the company's control, does this alter the above?

(3) If the company directors, having been the recipients of directors' loans, have borrowed sufficient funds to repay all outstanding obligations and placed these in the company's accounts, do they have further obligations?

(4) If the directors have borrowed this money on the basis of full recourse loans guaranteed by an asset or by a third party guarantor can there be any negative effects on the situation outlined in Question 3?

(5) If the borrowings are on the basis of limited recourse loans, does this change the situation. If so, how?

(6) Does the source of the funds (on the proviso that they are not company funds in any way) have any effect on the situation outlined in Question 3?

(7) …

(8) At what point do directors' obligations cease in relation to company debts generally and to taxation principally?"

[148] The opinion does not address the question of the consequences for the legitimacy of the scheme should the loans to the directors be shams. The advice was predicated, naturally enough, on the basis that each of the transactions examined was genuine, and was intended by the parties to it to take effect according to the terms recording the transactions. Nor does the advice contain the assurance that Mr Fox mentioned: that "any tax outstanding would be paid by ITR."

[149] It is apparent from this recitation of evidence that Mr Fox was given a thorough briefing on the scheme and the transactions comprising it (with the exception of step 6). He also knew that as a result of the transactions his clients' companies would be left without assets to pay their taxation liabilities and that the loans from Athena were not intended to provide the wherewithal for the satisfaction of the liabilities. Mr Fox's position was that tax was to be paid by one or other of the companies involved in the promotion of the scheme from the proceeds of investing the "pre-paid interest".

[150] It is convenient now to consider the arguments. Counsel for Mr Fox conceded that the prosecution had proved a conspiracy "to operate a scheme to dishonestly evade tax." The point taken for the appellant was that it was not proved that he was a conspirator, because it had not been proved that he knew the intermediate facts. Without that knowledge it was said that there was no proof he had agreed to defraud the Commonwealth of revenue.

[151] This argument, which is ground 1 of the amended notice of appeal, can be considered with ground 2, which was that the trial judge refused to direct the jury

that they could not convict unless satisfied beyond reasonable doubt that each of the intermediate facts identified earlier, had been proved.

[152] The facts said to be intermediate which were given emphasis were that the target companies assigned their directors' loans to IEA thereby disposing of their only asset, and that the assertion in Mr Levick's letters that monies had been retained from the Athena loans to the directors which they had onpaid to the target companies to enable them to discharge their taxation liabilities was false.

[153] The argument takes as a starting point the principle that for there to be a conspiracy to defraud the parties to it must have agreed to use dishonest means, and have agreed, in this case, to commit the offence of defrauding the Commonwealth. This required proof that Mr Fox knew or believed in the existence of facts that made the conduct the subject of the agreement the offence of defrauding the Commonwealth. The particular means by which the Commonwealth revenue was imperilled was that the target companies were deprived of their assets thereby destroying their capacity to discharge their taxation liabilities. That came about by reason of the assignment. If Mr Fox did not know of the assignment, the argument ran, he could not have known that the revenue of the Commonwealth was being imperilled.

[154] The assertion contained in Mr Levick's letters is put in the same category. The argument was that unless Mr Fox knew the assertion was false he did not know that the target companies did not have available means to pay their tax.

[155] Accordingly it is said that the intermediate facts were indispensable links in a chain of reasoning necessary to prove Mr Fox's agreement to commit the offence alleged, defrauding the Commonwealth. Applying the principle explained in *Shepherd v The Queen* (1990) 170 CLR 573, the intermediate facts had to be proved beyond reasonable doubt. *Shepherd* also established that only intermediate facts which are a necessary basis for the ultimate inference of guilt need to be proved beyond reasonable doubt.

[156] The trial judge did not accept that analysis. Her Honour ruled that the charge of conspiracy could be proved if the jury was satisfied beyond reasonable doubt that the appellant Fox (and others) had agreed to participate in a scheme to strip companies of their assets to render them unable to pay their tax and that by their agreement Fox and the others intended that dishonest means would be used to bring about that incapacity. The trial judge ruled that it was not necessary that the appellants knew or believed that the assignment was the particular means by which that incapacity would be achieved.

[157] In summing up the trial judge gave the jury a written direction:

> "**What the Prosecution must prove Beyond Reasonable Doubt**
>
> For any of the defendants to be found guilty of conspiracy, the prosecution must prove beyond reasonable doubt that:
>
> (a) the relevant defendant entered into an agreement with one or more of the other persons named in the charge to devise, promote and implement a scheme to strip companies of their assets, so that the companies were unable to meet their obligations to the Australian Taxation Office; and

(b) at the time of entering into the agreement, that defendant and at least one other party to the agreement (the other party) must have intended that the offence of defrauding the Commonwealth would be committed pursuant to the agreement which requires proof that:

(i) the defendant and the other party knew or believed that the implementation of the scheme would involve the stripping of the target company's assets, leaving the target company unable to pay the company's income tax;

(ii) the defendant and the other party knew or believed that the revenue of the Commonwealth would thereby be put at risk arising from the target company not having funds to pay its income tax; and

(iii) the defendant and the other party knew or believed that dishonest means, namely the use of a sham transaction, would be used in carrying out this scheme, such as **either** the assignment by the target company to IEA the right to be repaid the original director's loan in exchange for a promise to meet the target company's taxation liabilities that was never intended to be kept by IEA, **or** the loan to the original director from Athena Credit Co Ltd; and

(c) that defendant, or at least one party to the agreement must have committed an overt act pursuant to the agreement."

[158] Her Honour expanded on the explanation in her oral directions. She said:

"In paragraph (b)(iii) I have suggested possibilities … to consider as to whether you are satisfied that the relevant defendant and the other party knew or believed that dishonest means would be used in carrying out this scheme.

Now, the suggestions I have put there have come about as a result of … listening to the evidence … and … if you are looking for dishonest means in this case, you have got to look at the Vanuatu end of the transactions, and so I just suggested two possibilities that you might like to consider. I am not intending to close off the possibilities to you.

Although the prosecution has identified numerous steps in the scheme, when all the evidence is taken into account, … you will need to focus on the knowledge or belief of the parties about the Vanuatu end of the transaction if you think that is where that dishonesty occurred, and you need to be satisfied beyond reasonable doubt … about the knowledge or belief on the part of the relevant defendant and the other party as to the use of dishonest means.

…

Now, because the Deed of Assignment … and clause 3 … there was … a promise … the assignment of the debt. And if that promise had

> been made good … there would have been funds for paying the tax liability. It seems to me that for there to be dishonest means, you'd need to be satisfied that that promise was illusory by IEA … . … Another possibility … to consider is whether this was a sham transaction that amounted to dishonest means … (it) is the loan to the original director from Athena … .
>
> When you do look at the loan … from the point of view of the target company, the loan … on the face of the documents was received by the target company and was meant to be there to pay the tax obligation.
>
> So when you look in the case of a particular defendant as to what their knowledge or belief was, if you are going to rely on the loan to the original director from … Athena … you will need to look at that, in … Mr Fox's case … in conjunction with the other documents they had about the payment of the tax liability by the purchaser of the shares of the target company.
>
> It is a matter for you what you consider on the facts the prosecution can show amounts to dishonest means, but you will see when you look at paragraph (b)(iii), it is not just proving there was dishonesty taking place in Vanuatu … it is whether the relevant defendant and the other party that you are considering for the purpose of (b)(iii) …, what they knew or believed about whether dishonest means would be used in carrying out the scheme."

[159] The appellant's argument that before Mr Fox could be convicted he had to know of the assignment of the target companies' only asset to IEA, and the falseness of Mr Levick's assertion that the companies' tax liabilities would be discharged, should not be accepted for two reasons. The *first* is that step 6 in Mr Mayne's depiction of the scheme was not in fact the means by which the target companies were deprived of their assets. That happened earlier, when they transferred their assets to their directors. The consideration for the transfer was only an asset in the hands of the companies if the transferees' promises to pay the company an amount equal to the value of the assets was intended to be binding. Only if they were meant to be binding were the assignments of the debt the step that separated the target companies from their assets. If there was no intention to repay the companies lost their assets when they were transferred to their directors.

[160] There was ample evidence to justify the jury inferring that the directors' loans were shams in the sense described in *Equuscorp*. The repayments of the directors' loans were to be made not from their own resources but from loans to them from a foreign company, Athena, which the appellant Fox conceded were not to be repaid. The loans from Athena were obviously shams. Mr Fox and his clients knew they were, and that the means by which the directors intended to discharge their indebtedness to their companies were fictitious.

[161] Another factor in support of this conclusion has already been mentioned. It is that the sale of the shares in the target companies for a nominal sum could only be justified to Mr Fox's clients if he and they knew that the companies had no value. That could only be so if the directors' loans had no value. Mr Fox had particular difficulty, as well he might, in explaining in his record of interview why the

consideration for the sale of company shares was only $500. There is only one answer and that points inevitably to the intended disregard of the directors' obligations contained in their loan agreements. That is to say the companies were to transfer their assets to their directors for no valuable consideration leaving them unable to discharge their taxation liabilities.

[162] There is no doubt on the evidence that Mr Fox knew that the Athena loans were put forward as evidence that the directors were to repay their loans to their companies but that the repayments would not in fact take place. That is, he knew that the directors' loans were, from the companies' point of view, worthless. There was, as well, evidence that Mr Fox knew that his client companies had taxation liabilities. It follows from the analysis just undertaken that he knew they could not pay those liabilities unless the loans to the directors, and from them to their companies, were in fact assets of value. As indicated there was evidence that Mr Fox knew the contrary was true. These facts amply supported an inference that Mr Fox knew the purpose of the scheme was effectively to make a gift of the companies' assets to the directors, (less the cost of pre-paid interest) at the expense of Commonwealth revenue. To add a cloak of legitimacy to the transfers, transactions, known by Mr Fox to be shams, were documented.

[163] The jury was entitled to regard the scheme as dishonest.

[164] The *second* reason is that it is not, as a matter of law, necessary for a conspiracy that the conspirators knew all the details of the dishonest means. In *Aston and Burnell* (1987) 26 A Crim R 128 the appellants were convicted of conspiring to defraud the Commonwealth. The scheme involved the creation of documents which purported to record trading in commodity futures which resulted in losses to the tax payers which they set off against assessable income. There was no trading and there were no transactions. The records were fictitious. It was not proved that the appellants knew that the fraudulent scheme involved use of fictitious documents to record losses. They argued that before they could be convicted of perjury the prosecution had to prove they knew that circumstance.

[165] O'Loughlin J (with whom King CJ and Cox J agreed) said (at 132):

> "This cannot possibly be the case; a person can be a willing conspirator in a fraudulent scheme, well knowing that the scheme is fraudulent, but having no idea of the manner in which it is implemented – not knowing any of the essential steps leading up to its implementation. If a person knows that a scheme is fraudulent and, nevertheless, participates in it, then he is as much guilty of the conspiracy to defraud as is the mastermind of the scheme. For example, if an accused person knows that a particular plan will enable a taxpayer (with apparent justification) to claim a deduction against his assessable income, and the accused knows that that deduction is or will be false – even though he does not know the details of the falsity or the means by which the falsehood was contrived – he can, if he appropriately participates in the plan, be guilty of conspiracy. In those circumstances it matters not whether the false deduction was contrived by use of false documents or by some other means: the actual method of operation is of no significance."

[166] The judgment cites no authority for that proposition, and this aspect of the case does not appear to have been the subject of discussion in subsequent appellant decisions. There is, however, no reason to doubt the proposition. The offence charged against the appellants was that they agreed to commit the offence of defrauding the Commonwealth, that is, they agreed to use unlawful means to deprive the Commonwealth of its revenue or at least to put its receipt of that revenue at risk. The subject matter of the agreement was particularised as being the scheme, or the implementation of steps, to strip companies of their assets making them unable to meet their taxation obligations by the transfer of assets from companies with taxation liabilities to their directors, the sale of the shares in the company for a nominal amount, the transfer of directorships to the resident of a foreign country and the sham of loans which were the only way the companies had to pay their tax.

[167] The particulars provided were more comprehensive than the summary contained in the preceding paragraph. They described the features of the scheme analysed by Mr Mayne. It is true they did not include his step 6, the assignment of assets by the target companies to IEA. That detail is of no consequence. The particulars given of the subject matter of the agreement clearly and comprehensively described dishonest means which it was alleged the appellants had agreed to use to achieve the purpose of putting taxpayers in a position where they could not pay their tax whereas, before the implementation of the agreement, they had that capacity.

[168] There is no complaint that particulars provided were insufficient or did not sufficiently identify the dishonest means, those by which the prosecution alleged the Commonwealth's revenue was imperilled.

[169] The omission of one detail or one aspect of the means is immaterial. The particulars given, and the evidence led in support of them, were sufficient to prove the offence charged.

[170] These points are a complete answer to Mr Fox's argument in grounds 1 and 2. It was not necessary for the prosecution to prove that Fox knew of the intermediate facts. The trial judge was right to so direct the jury.

[171] Ground 3 was that the jury could not be satisfied that Mr Fox's actions, which were all lawful on their face, were performed in the knowledge that his co-conspirators intended them to have an unlawful purpose. There was ample evidence from which the jury could infer that the appellant Fox knew that the scheme being promoted by Miller and Northam and to which he recommended his clients involved dishonest means for the evasion of tax by those clients. The facts giving rise to the inference have already been identified. It is enough to summarise them.

(i) Mr Fox admitted in his record of interview that the purpose of the scheme was to reduce his clients' tax liability from 39 cents in the dollar to 15 cents. The larger amount was no doubt a reference to the rate of company tax. The 15 cents was a reference to the amount paid by way of pre-paid interest. The amount was actually 14.3 per cent of the notional loans from Athena which were the equivalent value of the target companies' accumulated profits. The 15 cents was paid, of course, not to the ATO but to the scheme promoters.

(ii) The scheme lacked any genuine commercial purpose as Mr Fox was forced to admit.

(iii) As a result of the scheme the companies transferred assets to their directors who sold their shares on the basis that the companies were worthless, and resigned their directorships.

(iv) The scheme's transactions meant to indicate that the companies would be in a position to pay their tax liabilities had as their centrepiece the loans from Athena to the directors. Mr Fox admitted to knowing that the loans were not to be repaid. That is to say he knew they were shams. It must follow that he knew the assertions in Mr Levick's letters that monies had been retained from the loan funds to meet taxation liabilities were fraudulent.

(v) The alternative basis for contending that IEA might have means other than the Athena loan to discharge the companies' tax liabilities was that they would invest the amounts paid by way of interest and receive returns of between 40 and 60 per cent per month i.e. about 500 per cent per annum. An acceptance by the jury of that evidence, in the absence of proof that there was such investment and it had made such returns, would have been perverse. If such a return could be had it beggars belief that those behind IEA would not have invested their money in it rather than devising an elaborate scheme by which they took on the taxation liabilities of the companies they bought and had to discharge the liabilities from the proceeds of their investment. The jury was entitled to infer that Mr Fox could not have honestly believed the promoters of the scheme would invest so profitably to pay third party taxation liabilities rather than for their own enrichment.

(vi) As pointed out the evidence establishes that Mr Fox had adequate notice that the directors' loans to their companies to pay for the transfer of assets were valueless and those of the demand were parts of the sham.

[172] It is necessary to mention some particular arguments raised on behalf of the appellant. It was said that there was no, or insufficient, evidence that the appellant knew that the assertion in Mr Levick's letter that the tax would be paid was false. It was pointed out that Mr Levick was a practising solicitor and the assertion was required by the appellant in order to protect his clients. Mr Fox said when interviewed that he regarded the assertion as genuine and convincing. Against these arguments are the facts already mentioned pointing the other way. It is also of great significance that the assertion appeared in the template of documents forwarded by Mr Northam on 3 March 2000, before any of Mr Fox's clients had entered a scheme.

[173] A more substantial argument concerns the operation and effect of Division 7A of the *ITAA*.

[174] In 1997 the *ITAA* was amended to insert Division 7A into Part III. Section 109D was enacted and operated to treat "loans … as dividends". The section provides that if a private company made a loan to a director or shareholder in an income year the loan was deemed to be a dividend and was taxed accordingly. By s 109N such loans are not deemed dividends if the agreement for the loan is in writing, the rate of interest equals or is greater that a benchmark interest rate, fixed by reference to bank variable housing rates published by the Reserve Bank of Australia, and the term of the loan was not more than seven years for unsecured loans and 25 years for loans secured by a mortgage.

[175] It was argued on behalf of Mr Fox, and asserted by him in his interview, that the motivation for his clients entering into the scheme was to avoid the consequences of Division 7A. Some of the correspondence sent by Mr Northam to Mr Fox had a heading "Division 7 Tax". Mr Fox's clients' companies which he introduced to the scheme had all made loans to their directors and/or shareholders so that the loans would be treated as dividends in the borrowers' hands and taxed accordingly pursuant to Division 7A. There was evidence from Mr Fox's clients, Messrs Freyling, Roberts, O'Reilly, Van Zetten and Power that they understood the scheme in which the companies entered would avoid the loans to them being taxed as dividends. It should be noted however that their evidence was also to the effect they agreed to enter the scheme to reduce or avoid their overall tax liabilities, not just Division 7A tax.

[176] It was submitted that from Mr Fox's point of view the scheme was not one to defraud the Commonwealth of revenue but to comply with the terms of Division 7A so as to avoid the loans being treated as dividends.

[177] It was not made clear in any evidence to which the court was referred, or in argument, how the scheme might have lawfully reduced or avoided the burden imposed by s 109D. Pursuant to s 109N, income tax on the deemed dividends would not have been payable had the borrower from the company agreed in writing to pay interest at the benchmark rate, and agreed to repay the loan at the expiration of seven years.

[178] If the scheme were one to bring the companies within the ambit of s 109N all that was necessary was that the loans be recorded in writing, that the term be for less than seven years and the rate be the statutory one. What was done instead was to repay the loan in the year of income but by means of a transaction which, the jurors were entitled to infer, was a sham (i.e. the loans from Athena). As well as that the transfer of the companies' assets to its directors, the resignation of the directors and the sale of the shares in the company to IEA for a nominal sum can have had no relevance to a liability in the directors or shareholders to pay Division 7A tax.

[179] The jury was entitled to infer that Mr Fox's protestations that his involvement in the scheme was limited to circumventing the operation of Division 7A were false.

[180] Ground 4, that the conviction is unsupported by the evidence and unreasonable relies upon the well known passages in *M v The Queen* (1994) 181 CLR 487 at 492-493 and 494-495. The ground is really an alternative to ground 3, that the evidence was insufficient to support a conviction. For the reasons demonstrated there is ample evidence to support an inference that Mr Fox agreed with Northam and Miller at least to participate in the scheme to use dishonest means to save his clients' tax and thereby defraud the revenues of the Commonwealth.

[181] The case against him was strong. The appeal by Mr Fox should be dismissed.

Henke

[182] The crux of the Crown case against Henke was that he and Miller were responsible for creating and setting up the scheme as well as for some marketing of it.

[183] Mr Graham Brown was a chiropractor who conducted his practice through Arundel Chiropractic Centre Pty Ltd (later called Nuradel Pty Ltd). Henke approached him,

and introduced him to the scheme.[54] About that time Henke arranged for Jodie Anne Duke and Leanne Kluyt (two office assistants) to become directors of the two Australian companies which were to be used as purchasers of the target companies.[55]

[184] Henke wrote to Levick on 18 January 2000, setting out eight questions on which the opinion of Clarrie Stevens QC was to be sought.[56] He wrote to Marae stressing the importance of strictly following the advice of the QC "who we understand has advised you in relation to your proposed Australian business".[57]

[185] On 27 January 2000 Northam sent an email to Kluyt, asking her pass it on to Henke as soon as possible. He said that accountants were demanding "clear clauses protecting their clients from future come back", and asked Henke to peruse a revised draft deed he had prepared and to advise on it.[58]

[186] At Miller's request Henke sent instructions to Millennium Law to prepare template documents which were used in the operation of the scheme.[59]

[187] Henke received payment for his role; in this regard the Crown relied on the income and expenditure statement as at 7 September 2000 prepared by Miller's assistant Ms Thorburn which showed a payment of $145,000 to Henke.[60]

The Henke appeals

[188] Henke was convicted on 11 March 2011 and sentenced on 30 March 2011. On 19 April 2011 he filed an application for an extension of time within which to appeal against the conviction, to which was attached a draft notice of appeal against conviction and sentence. On 3 June 2011 this court ordered that the time to lodge an appeal against conviction and an application for leave to appeal against sentence be extended to 20 April 2011.

[189] Subsequently he filed submissions in support of the appeal dated 6 July 2011 and amended submissions dated 18 August 2011, as well as two applications for leave to adduce further evidence, dated 27 July 2011 and 16 August 2011 respectively. In support of the applications to adduce further evidence he filed affidavits by Marlene Elva Broadley sworn 25 July 2011 and Bernhard Hendrik Loois sworn 27 July 2011, and one sworn by himself on 19 August 2011. He filed written submissions dated 8 August 2011 in response to the Crown's appeal against sentence.

[190] Henke sought to read the three affidavits. Counsel for the respondent opposed leave being granted in relation to the affidavit of Broadley, which was relied on with respect to the appeal against conviction. For the reasons given at paragraph [234] – [237], leave should be refused.

[191] Counsel for the respondent did not object to Henke's being given leave to read the affidavit of Loois for what it was worth on the sentence appeals, although there was no express grant of leave. In the circumstances, leave should be granted.

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54 Trial transcript 2-91.
55 Trial transcript 4-34; 6-8 – 6-9.
56 Trial transcript 13-69; Exhibit 12.001.
57 Exhibit 4.139.
58 Exhibit 17.025.
59 Trial transcript 13-79 – 13-84; Exhibit 4.013.
60 Exhibit 4.181.

[192] Henke was given leave to read his own affidavit, which he relied on in the sentence appeals.

Section 117 of the *Constitution*

[193] In his written submissions Henke said –

> "**Forced move**
>
> 92. A unique feature of this trial was the decision of the DPP to conduct the proceedings in Queensland contrary to the provisions of Section 80 of the Commonwealth Constitution and contrary to S70 of the Judiciary Act 1903. The clears [sic] intention was [t]o deny the Appellant due process. This has already been dealt with above. As the direct result the Appellant was disadvantaged in respect of the other defendants who were in their home state. The move also deprived the Appellant of the Internet access critical to involvement in the ETrial process.
>
> 93. Contrary to the provisions of S117 of the Commonwealth Constitution the Appellant alone was forced to move away from his home to a place where he totally lacked any legal, medical or personal support. Given the gravity of his heart condition and other ailments this was a critical extra load placed on him.
>
> 94. These difficulties were not imposed on either of the other defendants both of whom had families resident in Queensland. During pre-trial hearings the Appellant was asked by the Court 'if he had relocated to Brisbane yet?' This imposition substantially increased the Appellant's disadvantage arising from being unrepresented."

Counsel for the Crown responded –

> "**FORCED MOVE**
>
> 66. As outlined above, the prosecution was entitled to bring the case against the Appellant and others in Queensland. That permissible decision resulted necessarily in the Appellant having to relocate to Queensland for the duration of the trial.
>
> 67. In accordance with s.117 of the Constitution, the Appellant would also have been subject to prosecution if he had resided in Queensland."

[194] Section 117 of the Constitution, which is in chapter V "the States", provides –

> "**117 Rights of residents in States**
>
> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

[195] One State cannot impose a disability on residents of another State that is not equally applicable to its own residents. As McHugh J said in *Street v Queensland Bar Association*[61] –

> "If a law operates so that an interstate resident would be worse off by reason of his residence than he would be if he were a resident in the State in question, s 117 will prevent the law operating to his detriment."

[196] Whether s 117 applies to federal law has not been decided.[62]

[197] Henke was charged with conspiracy committed "at Brisbane in the State of Queensland and elsewhere," and the various places at which overt acts were alleged to have occurred were subsequently particularised. He was properly tried in Queensland pursuant to s 70A of the *Judiciary Act* 1903 (Cth).

[198] Henke has not argued that by virtue of s 70A (or any other law he has identified) he was made worse off by reason of his residence in Victoria than he would have been if resident in Queensland. Rather, his complaint is that the decision of the DPP to present an indictment before the Supreme Court of Queensland (a decision open to the DPP under s 70A) had that effect.

[199] Section 80 of the *Constitution* provides for the place of trial on indictment of any offence against a law of the Commonwealth. Its prescription that the trial should take place in the State where the offence was committed could be expected to result in a resident of State A having to stand trial in State B. Its prescription that where the offence was not committed within any State, the trial should take place at such place or places as Parliament prescribes could be expected to have a similar result. That a defendant who stands trial outside his home State may encounter expense and logistical difficulties which he might not encounter if the trial were in his home State is a consequence of s 80 of the *Constitution*, and not within the scope of s 117 of the *Constitution*.

[200] It follows that this ground of appeal is without substance.

Self-representation

[201] At trial (and on appeal) Henke was self-represented.

[202] In a ruling made on the eve of trial, the trial judge refused to stay or adjourn the trial until Henke was provided with counsel at public expense. Henke has submitted that in all the circumstances of the case he was deprived of his right to a fair trial and of a real chance of acquittal.

[203] In *Dietrich v The Queen*[63] Mason CJ and McHugh J said:

> "… it should be accepted that Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian

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61 (1989) 168 CLR 461 at 582; [1989] HCA 53.

62 See *Leeth v Commonwealth* (1992) 174 CLR 455 at 468 per Mason CJ, Dawson and McHugh JJ and at 488 per Deane and Toohey JJ; [1992] HCA 29.

63 (1992) 177 CLR 292 at 311; [1992] HCA 57.

> law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.
>
> A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained."

[204] In the same case Deane J said:[64]

> "In determining the practical content of the requirement that a criminal trial be fair, regard must be had 'to the interests of the Crown acting on behalf of the community as well as to the interests of the accused'. There are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented. The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available. Another category of case in which that is so is where the accused has the financial means to engage legal representation but decides not to incur the expense. It is true that, in the context of the current level of legal fees, it is arguable that no accused should be required to devote a substantial part of his possessions to obtaining legal representation in resisting a prosecution for an alleged offence of which the law presumes him to be innocent. Nonetheless, it appears to me that it cannot be said that a trial is unfair by reason of lack of legal representation in a case where the accused possesses the means to obtain such representation but elects not to utilize them."

[205] Henke was charged in April 2008, and committed for trial in May 2009. He was represented at the committal. Prior to the committal, his legal representatives were provided with a full hard copy of the Crown brief. The original exhibits were tendered during the committal. So far as Henke was concerned, it was a full hand-up committal.

[206] The indictment was presented on 2 November 2009.

[207] From early in the pre-trial phase, all parties knew that the trial was to be conducted electronically, using the eTrial software.

[208] In March 2010 the parties were told that the court calendar had not been set, but that it was in preparation with a view to this trial commencing at the end of

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64 At 335 – 336.

January 2011. At a pre-trial hearing before the Chief Justice on 3 June 2010 they were told that it had been listed for 10 weeks commencing 24 January 2011. There was some fine tuning of the date the trial was to commence. The court calendar was released on 26 August 2010: it provided for the trial to commence on 31 January 2011. There was further fine tuning and the commencement date was set as 1 February 2011.

[209] After the committal Henke took various steps to avoid the trial, including applications to the High Court and a perjury allegation against a Crown witness.

[210] From mid-2008 (before the committal) until August 2010 Mr Fitzgibbon, a New South Wales barrister, appeared for Henke *pro bono* in the Brisbane Magistrates Court and the Supreme Court of Queensland. He was instructed by Mr Waters, a Melbourne solicitor.

[211] Mr Fitzgibbon was the respondent in disciplinary proceedings in his home State brought by the New South Wales Bar Association. From December 2010 Henke knew that he would be unable to appear at the trial. On 9 December 2010 Mr Waters raised the difficulty he was having in contacting Mr Fitzgibbon, and said he would be unable to appear at trial.

[212] A pre-trial review took place before Byrne SJA on 20 January 2011. Mr Waters appeared by telephone from his Melbourne office. Henke was present in the office. Mr Waters told the court that his instructions had been withdrawn, and he was given leave to withdraw as solicitor on the record. Then Henke participated in the review as a self-represented litigant. The prosecutor had arranged for someone from Legal Aid Queensland ("LAQ") to be present, and arrangements were made for Henke to apply for legal aid.

[213] Four days later LAQ gave its decision. It had applied a means test and would grant aid only on condition that Mrs Henke provided a charge over her property in its favour. She declined to do so. Subsequently LAQ's decision was confirmed by an external reviewer.

[214] On 8 February 2011 the trial judge conducted a review, at which Henke was self-represented. Her Honour gave the parties a draft of what she proposed to say at the commencement of the trial about empanelling a jury, rights to cross-examination, and rights to give and call evidence (as well as the consequences of doing so).

[215] On 14 February 2011 Henke applied for a stay on nine bases including his lack of legal representation. Her Honour refused the stay, and gave her reasons for doing so the next morning.

(a) In her Honour's view, Henke had made a deliberate choice not to pursue other representation, preferring to keep with his *pro bono* representation, even though it was unlikely the barrister would be able to appear. Her Honour described Henke as an articulate, intelligent man who had adopted a "head in the sand" attitude. He had known since December 2010 that Mr Fitzgibbon would definitely not be able to appear.

(b) Her Honour referred to the undesirability of a self-represented defendant in a conspiracy trial. The other defendants' preference was for the trial to

proceed, and there was a public interest in not vacating the trial date. There was also a public interest in there being one rather than two trials of similar length.

(c) Her Honour concluded that any prejudice to Henke was outweighed by factors favouring the trial proceeding.

Her Honour foreshadowed that, to allow for as fair a trial as possible, whatever steps could be taken to accommodate issues arising from Henke's self-representation would be taken. She noted the late provision of documents by the Crown, which would have to be accommodated. She distributed an amended version of what she proposed saying at the commencement of the trial.

[216] The trial commenced. As counsel for the Crown conceded before this court, the trial was complex in some respects. It involved many documents, but the documents largely spoke for themselves. The points in contention were reasonably narrow – essentially, the question of Henke's knowledge of the fraudulent nature of the scheme.

[217] The trial judge was assiduous to ensure Henke was not unfairly disadvantaged by his being self-represented. At the commencement of the trial her Honour addressed him about procedure, along the lines of the draft document she had already given the parties. She made every effort to distil the issues and to allow Henke a full opportunity to cross-examine relevant witnesses. She referred him to the *Queensland Supreme and District Courts Benchbook* so that he might have some understanding of the issues that might arise during the trial. At times she stood the matter down to allow him to consider his position when issues potentially detrimental to his case arose.

[218] The trial judge did not err in refusing to stay or adjourn the trial. Henke had no right to representation at public expense. Her Honour carefully weighed the competing factors and, in the exercise of her judicial discretion, refused his application for a stay. Throughout the trial she deftly made appropriate allowances for the fact of his self-representation while maintaining her obligation to be fair to all parties. There was no miscarriage of justice by reason of his being self-represented.

eTrial

[219] Before this court Henke complained for the first time about the adoption of the eTrial software. He submitted that it was unknown to anyone outside Queensland, and that it prevented examination of documents for authenticity and alterations: he said the best evidence rule could not be applied.

[220] Pursuant to s 68(1) of the *Judiciary Act* 1903 (Cth), the procedural aspects of the trial were regulated by Queensland law. In this State (as elsewhere) large litigation such as this is now routinely conducted electronically. The parties knew the trial was to be conducted electronically from early in the pre-trial phase. Neither Henke's legal representatives nor Henke himself after he became self-represented raised any objection to the use of the eTrial software. He raised no complaint during the trial, and he did not ask to see the original documents (which had been tendered at the committal) or question the authenticity of anything on the screen. He still has not identified any particular instance of his being disadvantaged by the use of eTrial. No miscarriage of justice resulted from the trial being conducted electronically, or from the use of the eTrial software.

Delay

[221] Henke and his two co-defendants were charged with conspiracy between 1 July 1999 and 23 May 2001. Search warrants were executed in June 2001, but the defendants were not tried until early 2011. Henke submitted that the delay was "undue" and unexplained. To succeed on this ground of appeal Henke had to show that the delay resulted in his being denied a fair trial – that is, that it resulted in a miscarriage of justice.

[222] Delay was one of the grounds upon which Henke sought a stay on the eve of trial. In her reasons for refusing that application the trial judge recorded that the prosecution had explained the delay by reference to the complexity of the investigation and difficulties in investigating Vanuatuan entities and witnesses. Her Honour implicitly accepted that explanation.

[223] In *Jago v District Court (NSW)*[65] the High Court recognised that a court may order that criminal proceedings be stayed to prevent injustice to the accused caused by undue delay. Mason CJ said:[66]

> "In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed.
>
> …
>
> Once it is recognized that the courts may order that criminal proceedings be stayed for the purpose of preventing injustice to the accused caused by undue delay, it necessarily follows that other orders may be made in cases of undue delay for that purpose. There is no reason to confine the discretionary power of the courts by arbitrarily stipulating that a stay is the only proper remedy for undue delay. A second and related point may also be made. In appropriate cases, orders may be made to prevent injustice notwithstanding that there is no reason to suspect that the actual trial, when held, will not be fair. Thus orders may be directed to ensuring fairness in pre-trial procedures; in particular, a court may order that a trial be expedited where it sees the delay as warranting such action but not as being of such a kind as to justify staying the proceedings.
>
> …
>
> In the safeguarding of the interests of the accused in the manner I have described, the touchstone in every case is fairness.
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> ...
>
> The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in

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65 (1989) 168 CLR 23; [1989] HCA 46.

66 At 30, 31, 33, 33-34

> isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial.[67] At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused.[68] In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare."[69]

Deane J said:[70]

> "For my part, I do not think that it is possible to give an unqualified affirmative or negative answer to the question whether, in the absence of relevant constitutional or statutory provision, the law of this country recognizes what is sought to be conveyed by the notion of a 'right' to be tried without unreasonable delay. On the one hand, I am not persuaded that there is any general principle of law to the effect that unreasonable delay in bringing a matter to trial of itself means that there can be no trial at all or necessarily vitiates a conviction on a trial that has followed such delay. On the other hand, as I have indicated, unreasonable delay on the part of the prosecution in bringing proceedings to trial will entitle an accused to apply for appropriate orders to avoid or mitigate the effects of further delay and may, in the limited circumstances which I have indicated, either entitle an accused to a permanent stay of proceedings or, if the effect of the delay has been to render an overall trial unfair, to an order quashing any conviction. It is, in my view, only to that extent that the law of this country recognizes and protects the entitlement of an accused to be tried without unreasonable delay. That entitlement is more confined in its scope and more derivative or incidental in its legal basis than the constitutional, statutory or traditional 'right' which is established or recognized in some other countries."

[224] It is well accepted that, with the passage of time, oral evidence based on recollections unaided by contemporaneous written records may deteriorate in quality and quantity. But as Deane J observed in *Jago*:[71]

> "In that regard, it is relevant to note that, in the context of an accused being entitled to the benefit of any reasonable doubt, the vagueness and uncertainty of memory and evidence which is likely to result

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67 See *Barton v The Queen* (1980) 147 CLR 75 at 102, 106; [1980] HCA 48; *R v Sang* [1980] AC 402 at 437; [1979] UKHL 3; *Carver v Attorney-Gene*ral (NSW) (1987) 29 A Crim R 24, at 31, 32.

68 *Barker v Wingo* (1972) 407 US 514; *Bell v DPP* [1985] AC 937, as explained in *Watson, and Gorman v Fitzpatrick* (1987) 42 A Crim R 330.

69 *Re Cooney* (1987) 31 A Crim R 256 at 263 – 264.

70 At 59 – 60.

71 At 60.

> from delay is more likely to be damaging to the prosecution than to the defence case."

[225] Henke failed to establish that the delay resulted in his being denied a fair trial.

[226] In his written submissions[72] Henke referred to the statement Federal Agent Holder took from him in 2004, asserting that in May 2006 (four months after Miller's death) the agent had told Mr Waters (Henke's solicitor) that no proceedings involving the contents of the interview would be taken. There was no evidence to support this assertion, and the Crown disputed it. It does not assist Henke in showing that the delay resulted in a miscarriage of justice.

[227] The income and expenditure statement as at 7 September 2000 prepared by Miller's assistant Ms Thorburn[73] showed (*inter alia*) a payment of $145,000 to Henke.

[228] Bank records that were available showed that Henke received payments of $30,000 and $115,000, totalling $145,000. These were referred to in the evidence of Mr Harris, a forensic accountant employed by the Australian Federal Police.[74] The deposit of $115,000 was referred to by Ms Sadler, a compliance officer employed by the Commonwealth Bank.[75]

[229] At trial Henke acknowledged receiving $145,000 from Miller's company, but said it comprised $30,000 reimbursement of moneys Miller had used that belonged to ITR, $100,000 reimbursement of moneys he had personally expended for ITR's office fit-out, and $15,000 reimbursement of ITR expenses charged to Henke's credit card.[76]

[230] Under the heading "Other errors of fact or law" in his written submissions, Henke referred to his cross-examination of Federal Agent Holder which had revealed that Holder had not checked three separate bank accounts to verify information Henke had given him about payments he had made for ITR relocation expenses.[77] His point seemed to be that the trial judge erred in not expressly drawing Holder's failure to do so to the attention of the jury. However, the trial judge was not obliged to refer to every piece of evidence in her summing up. It remained open to the jury to take Holder's omission to do so into account, and to consider whether it had any consequence given the evidence of Mr Harris and Ms Sadler.

[231] Henke's written submissions continued –

> "3. Contrary to Section 590AB of the Queensland Criminal Code 1899 the prosecution also withheld from the court the record of an interview between the Appellant, Agent Holder and Mr. Bartley of the ATO, in which Mr. Holder was referred to these three sources of information. The non-disclosed interview also included the appellant's statements that the scheme he knew of did not include asset stripping and did not include company tax. Her Honour was not

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72 Amended Submission in Support of Appeal page 16, [76] – [78].
73 Exhibit 4.181.
74 Trial transcript 7-34.
75 Exhibit 93.00.
76 See summing up day 17, 17-54 lines 5 – 20.
77 Trial transcript 10-51.

> informed of the existence of an interview until the sentencing and did not require its production to the court."

[232] This submission did not assist him. The prosecution's disclosure obligation is an obligation to disclose evidence and other things in its possession to the accused person; it is not an obligation to lead all such evidence at trial. The prosecutor's duty was "to call all available material witnesses unless there [was] some good reason not to do so."[78] Counsel for the respondent explained in his written submissions that the interview was inadmissible because it contained self-serving statements by Henke. In the circumstances no legitimate complaint could be made about the prosecution's failure to tender the interview at trial.

[233] On the appeal Henke submitted that because of the prosecution's delay evidence relevant to the $145,000 shown as paid to him was no longer available:[79]

(a) his own bank statements "for the period 2000 in which the money went out and the money came back in";

(b) records of ITR's bank accounts "to show where the money went";

(c) bank records which would have shown he did not receive $145,000, but rather $115,000 [sic].

He merely made assertions from the Bar table that these records had been destroyed, and produced no evidence to that effect. He gave no particulars of the accounts. He also said that seven or eight people who had worked with ITR had "scattered to the winds". He did not name them or give any indication of the substance of the evidence he would have expected them to give.

[234] Henke sought to read an affidavit sworn on 25 July 2011 (after the trial) by Mrs Marlene Elva Broadley, the office manager at ITR in August 1999. The Crown objected. An appellate court will generally receive further evidence where the evidence could not, with reasonable diligence, have been called at trial and where, if it were excluded, there would be a miscarriage of justice.

[235] The substance of Mrs Broadley's affidavit was –

(a) that Henke transferred $100,000 from his personal account into the ITR business account as a loan to finance a relocation of ITR's office premises;

(b) that during 2000 the company employing her "changed its name" from ITR to ITRA;

(c) that that was the only business in which Henke participated on a daily basis;

(d) that whilst Miller was a director of ITRA, he was not involved in its day to day affairs;

(e) that as far as she was concerned, Henke did not have any involvement with Miller's company or business dealings in Queensland;

(f) that she had no knowledge of the co-accused Huston and Fox.

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78 *Dyers v The Queen* (2002) 210 CLR 285 at 293; [2002] HCA 45.

79 Appeal transcript 1-61 – 1-63; Amended Submission in Support of Appeal page 4 [1].

[236] Henke told the court that –

> "…part of the reason for Mrs Broadley not being called was the 10-year delay the Crown took in bringing the charges"

which was hardly an explanation for the evidence not being called at trial. In any event the affidavit had very little probative value; it did not overcome the bank records that were available and the evidence of Mr Harris and Ms Sadler.

[237] The evidence of Mrs Broadley and the evidence Henke purported to give from the Bar table should be rejected.

Fraud

[238] Henke submitted that the Crown failed to prove any acts of dishonesty committed by him or his co-accused. His argument that the prosecution identified only two acts of dishonesty during the trial (false statements by Levick in letters to directors and Marae's production of the deed of acceptance and guarantee in the absence of sufficient funds to meet the obligation incurred in the deed), neither of which involved him or the co-accused, is premised on a misunderstanding of the case against him. The Crown case was that he and the other conspirators entered into an agreement to use dishonest means to strip companies of their assets so that they would be unable to meet their obligations to the Australian Taxation Office. It was fortuitous that there was no actual loss to the revenue: after the scheme was unravelled by the investigating authorities, the companies' taxation obligations were met.

[239] The Crown case against Henke was a circumstantial one. There was evidence from which the jury could conclude that he knew the Athena loans were a sham and that the scheme involved dishonest means, including –

(a) evidence that Henke was the architect of the scheme;

(b) in cross-examination it was put to Henke that he knew the Athena loans would not need to be repaid; he responded (in effect) that they would not have to be repaid because of some statutory provision;[80] it would have been open to the jury to treat his response as evidence of his knowledge that there were no genuine loans;

(c) Henke prepared the questions put to Mr Stevens QC;[81] they included questions about "full recourse" and "limited recourse" loans;

(d) Henke requested the pro forma documentation from Millennium Law; those documents included the Athena loan agreement.[82]

(e) Henke witnessed Levick's signature on one of the Athena loan agreements.[83]

Counsel for the respondent explained the significance of the QC's advice in the Crown case in this way: it was evidence that Henke and the other conspirators were on notice about what would be necessary to avoid the scheme falling foul of the

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80 Trial transcript 13-78.
81 Exhibit 12.001.
82 Trial transcript 13-80 – 13-84.
83 Trial transcript 13-85; exhibit 12.002.

Australian Taxation Office. He submitted that the jury could infer from the knowledge Henke gained from reading the QC's opinion coupled with his understanding of the documentation to be used in the operation of the scheme, that he was aware of the dishonest means by which the scheme was to be put into effect. As counsel for the respondent submitted, that issue was properly before the jury, and the jury clearly rejected Henke's evidence that he was not aware of any dishonesty involved in the operation of the scheme.

[240] In his written submissions[84] Henke argued –

> "88. …the charge under S29D of the *Crimes Act* 1914 was one of defrauding the Commonwealth.
>
> 88. No evidence was placed before the court at any time alleging fraud by the accused who were before the Court
>
> 89. The Particulars of the indictment sought to apply a quite different charge. 'that by dishonest means placed the revenue of the Commonwealth at risk.'
>
> 90. No manipulation of words can make these two phrases synonymous. They are totally different propositions.
>
> 91. The evidence offered to the court only supports the proposition of placing the revenue at risk. No evidence of fraud was ever offered. No person was defrauded and the Commonwealth was not defrauded."

[241] This submission is based on a misunderstanding of the charge. The charge was conspiracy to commit the offence of defrauding the Commonwealth. It was not necessary for the Crown to prove that the Commonwealth was actually defrauded; it was enough that Henke entered into an agreement to use dishonest means to put the revenue of the Commonwealth at risk.[85]

[242] Henke submitted that there was no risk to the revenue – that the Crown had wrongly added together three components, two of which always remained the personal liability of the directors. These were –

> "genuine company tax which was due and payable";
>
> "personal tax deriving from 'deemed dividends' which may not have been legally due and payable by individual directors"; and
>
> "'deemed' capital gains tax unsupported by any valuations or inventories".[86]

He repeated, and expanded upon, this submission in his reply to the respondent's submissions on its sentence appeals.[87]

[243] Henke's case that what was done involved no more than legitimate avoidance of directors' liabilities for taxation on deemed dividends pursuant to Division 7A of

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84 Amended Submission in Support of Appeal page 18.

85 *Peters v The Queen* (1998) 192 CLR 493 at 509 per Toohey and Gaudron JJ; [1998] HCA 7.

86 Amended Submission in support of Appeal page 3 paragraph (xvii).

87 Response to Crown Submission page 2 para 10.

the *ITAA* was never made clear in evidence or argument, and was obviously rejected by the jury.

[244] A schedule summarising the total amount of revenue that had been put at risk was tendered by the Crown on sentence, and admitted without objection.[88] It summarised relevant exhibits at trial[89] and one other document tendered without objection on sentence.[90]

[245] At trial there was no challenge to the composition of the revenue alleged to have been put at risk in relation to each of the target companies. On appeal Henke did not support his argument that the Crown had wrongly included directors' personal liabilities for tax on deemed dividends and capital gains tax by reference to specific evidence or specific arguments put before the jury.

[246] Henke drew attention to the fact that none of the accused had seen or had knowledge of the deed of assignment and acceptance, which was produced in Vanuatu, and inferentially challenged what he described as "the remarkable conclusion that the appellants were guilty of dishonesty by means of a document they knew nothing about created by a lawyer in another country according to its laws."[91] This issue was fully canvassed in Fox's appeal, and discussed in paras [139] – [141] of these reasons.

[247] In his written submissions, Henke observed that IEA may have been in a position to meet the company tax obligations of the companies which took part in the scheme.[92] He said that –

> "the identified funds held in the Equity Bank by the Vanuatu owned and registered company, IEA Pty. Ltd, or its associated companies or persons, might have met any real company tax obligations assumed under Step 6."

His assertion that the prosecution had not led any evidence showing that this could not have been done ignored the evidence of Mr Maynes that there was no money in relevant Equity Investment Bank accounts available to pay the loans, and that the transfers were just book entries.[93]

The tapes of Fox's interviews

[248] Recordings of Fox's interviews with investigating officers were played at trial,[94] and the jury had the recordings and equipment to play them in the jury room during their deliberations.

[249] Henke complained –

(a) that the recordings included allegations about ITR and a non-existent ITR Group of companies were untested hearsay and prejudicial to him;

(b) that he was not allowed to challenge these allegations by cross-examination;

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88 Sentence exhibit 15; Sentence transcript 1-28.

89 Trial exhibits 97.015, 97.016, 97.017, 97.018, 97.019, 97.020, 97.021, 97.022, 97.023, 97.024, 97.034, 97.026, 97.027, 97.025.

90 Sentence exhibit 3.

91 Amended Submission in support of Appeal page 4 paras (xviii) and (xix).

92 Amended Submission in support of the Appeal page 7 para 22.

93 Trial transcript 11-15 – 11-16. This was based on evidence in Exhibit 92 – Foreign Evidence Affidavit of James Batty (page 17 of 73).

94 Exhibits 102.001, 102.002, 103.001 and 103.002; Trial transcript 8-22; 9-10; 9-25; 10-4 – 10-7.

(c) that her Honour's direction to the jury was insufficiently robust to overcome the prejudice; and

(d) that the presence of this untested false evidence in the jury room materially prejudiced the verdict.[95]

[250] The trial judge told the jury that anything Fox said in the interview was admissible only against him.[96] While the recordings were being played, Henke raised his concern that they contained "some 70 mentions of ITR" and "at least a dozen" mentions of him, and asked whether he would have the opportunity to cross-examine Agent Holder. The trial judge responded –

> "Well, I don't know what the rest of the Crown evidence is, but I've already told the jury that anything that Mr Fox says is admissible in his case only and on what I've picked up from the interview, it seems to me that there was a lot of ignorance on Mr Fox's part about who was dispatching documents. Now, it might be that there's other evidence from the Crown that I'm not aware of, but I was thinking that I would have to give a direction to deal with that specifically."[97]

In her summing up, her Honour told the jury –

> "It is also important that you remember that the electronic record of interview of Mr Fox is the evidence that must be considered only in relation to the prosecution's case against Mr Fox, and I will give you a couple of examples to illustrate what I mean.
>
> During the course of that interview, there were frequent references made by Mr Fox to ITR. None of those statements made by him should in any way whatsoever be taken into account by you in considering the prosecution case against Mr Henke. The prosecution quite properly does not seek to rely on assertions made by Mr Fox about ITR's role in relation to its case against Mr Henke. Likewise, the fact that Mr Fox is an accountant and arguably expresses a professional view about the commerciality of the transactions that he was asked to speak about in the record of interview, that is in no way part of the prosecution's case against Mr Huston, as to what a professional accountant should think."[98]

[251] The trial judge did not err in the manner in which she dealt with the recordings. She made it plain to the jury before they were played that they were evidence only against Fox, and she gave an appropriately worded and sufficiently forceful direction to the jury. Frequently when co-accused are tried together, there is evidence admissible against only one of them. Properly instructed juries can be expected to understand and follow directions not to use evidence admissible against one in their consideration of the case against another.

Other matters

[252] In his written submissions Henke asserted that the pro forma documents were prepared before Athena was incorporated, and that references to Athena in the

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95 Amended Submission in support of Appeal page 8 paras 25 – 29.

96 Trial transcript 8-25.

97 Trial transcript 9-27.

98 Trial transcript 17-12.

documents on the CD found in Huston's office must have been added later.[99] However, the Profile of Registration of the company obtained from the Vanuatu Financial Services Commission showed that it was "established" in Vanuatu on 27 November 1999 but "registered" on 3 December 1999.[100] Millennium Law's tax invoice for providing the pro forma documents referred to their being settled and engrossed and sent to Henke by facsimile on 1 December 1999.[101]

[253] Henke pointed to his having no relationship with his co-accused Huston and Fox and his never having met Marae.[102] But the Crown case was that he and Miller were the instigators of the scheme, that they brought others into it, and that those others recruited further people (such as Fox). Northam was described as an agent of ITR: it was his role to promote and sell the scheme to accountants such as Huston and Fox. Thus the Crown did not have to establish that Henke had relationships with Huston, Fox and Marae. In any event, Henke admitted having met Huston, albeit in company with a large number of other people. And there was evidence of his corresponding with Marae about the importance of following the QC's opinion.[103]

[254] Henke pointed to "the unexplained absence of Phillip Northam" from whom, he said, all of the emails which motivated Fox, Huston and other accountants came.[104] It was the jury's task to determine whether the Crown case against Henke had been proved beyond reasonable doubt on the evidence actually led at trial. The Crown was under no obligation to explain why Northam was not joined as a co-accused or called as a witness. Nor was it for the jury to speculate on these matters or to speculate on the evidence he might have given.

[255] Henke argued that the scheme on which Mr Stevens QC advised was substantially altered by Northam, Fox and Huston,

> "who added company tax to director's pre-existing personal loans. Any company tax offence was created by these men and their clients.
>
> 66. Two emails sent by Phillip Northam, and only discovered in Queensland premises, were attempts by Northam to change the scheme to include company tax which had been excluded from Mr Stevens QC's considerations and was not provided for in Mr Kerin's documents. The Crown presented these emails which could not have been delivered as evidence of the Appellants [sic] involvement. The emails, both authored by Northam are actually proof of Northam's intentions and nothing else."[105]

He did not identify the emails, but it seems likely he was referring to the two letters of 3 March 2000 discussed in paras [135] and [137] in relation to Fox's appeal.[106]

[256] Those letters did not evidence any significant change in the conspiracy. Rather, they were consistent with the Crown case that there was one conspiracy, which different people joined at different times and in different places, and pursuant to which they did different things.

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99 Amended Submission in support of Appeal page 9 para 31.
100 Exhibit 83.000, Foreign Evidence Affidavit of Jenny Tari page 15 (MW/VFSC/9).
101 Exhibit 4.013.
102 Amended Submission in support of Appeal page 9 para 32.
103 Exhibit 4.139.
104 Amended Submission in support of Appeal page 6 para 13.
105 Amended Submission in support of Appeal paras 65 and 66.
106 Exhibits 3.053 and 3.054.

[257] Henke complained that the trial judge had not allowed him to cross-examine Mr Brown (the chiropractor who practised through Arundel Chiropractic Centre Pty Ltd) on the contents of the transcript of a proceeding before the High Court on 28 September 2000.[107] It is apparent from the trial transcript that he misunderstood the direction her Honour gave him. When he wanted to "introduce" the High Court transcript during his cross-examination of Mr Brown, her Honour correctly told him –

> "Well, it's normal to take the witness to a piece of evidence if you want to cross-examine the witness on it, and maybe you should ask the question-----
>
> -----that you're concerned about and get the witness' answer, and then if you need to, you can refer to the High Court transcript."[108]

After Henke asked Mr Brown more questions, there was the following exchange between him and her Honour –

> "DEFENDANT HENKE: And, in fact, I'd like, your Honour, if possible, now, to take Dr Brown to the actual transcript of those proceedings?
>
> HER HONOUR: Well, do you want to see if he disagrees with the proposition that you put to him, because there's no point in putting it up or taking him to it unless you know that you need to do that in order to cross-examine on the topic that you're interested in.
>
> DEFENDANT HENKE: Thank you, your Honour.
>
> HER HONOUR: So, do you want to just put the proposition-----
>
> DEFENDANT HENKE: Yes, your Honour, I will."[109]

[258] Henke did not follow the course suggested by her Honour, and in the course of oral argument on the appeal, he acknowledged that he had misunderstood what she had said.[110]

[259] Under the heading "Particulars" Henke raised matters relating to what he described as "ATO pressure on [him] which [had] been sustained for 12 years." Those matters are irrelevant to the appeal.[111]

[260] Henke submitted that it was only after the trial had been in progress for some weeks that the Crown revealed its "offence origin argument", by which time it was too late to ask Kluyt and Duke relevant questions in cross-examination.[112] The Crown provided the particulars on which it relied before the trial commenced, and its case was adequately opened by counsel. There is no substance in this point.

Conclusion

[261] None of the grounds of appeal relied on by Henke has been made out. His appeal against conviction should be dismissed.

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107 Amended Submission in support of Appeal pages 10 – 11 paras 43 – 46.
108 Transcript 13-14.
109 Transcript 13-17.
110 Appeal transcript 1-70.
111 Amended Submission in support of Appeal page 9 paras 33 – 35.
112 Amended Submission in support of Appeal page 10 paras 39 – 42.

Orders

[262] The orders are:

1. In CA No 54 of 2011:
   (a) Appeal dismissed

2. In CA No 58 of 2011:
   (a) Appeal dismissed

3. In CA No 86 of 2011:
   (a) Appeal dismissed