SUPREME COURT OF QUEENSLAND

CITATION:	*Hart v Commonwealth Director of Public Prosecutions* [2011] QCA 351
PARTIES:	**STEVEN IRVINE HART** (plaintiff/appellant) **v** **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (defendant/respondent)
FILE NO/S:	Appeal No 13541 of 2010 Appeal No 2504 of 2011 DC No 1416 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil Removal or Remission
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 December 2011
DELIVERED AT:	Brisbane
HEARING DATES:	26 July 2011; 27 July 2011
JUDGES:	Margaret McMurdo P, Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 13541 of 2010:** **1. The appellant have leave to read the affidavit of Steven Irvine Hart sworn 5 April 2011.** **2. The respondent have leave to read the affidavit of Kristy Adele Bell sworn 20 April 2011.** **3. The appeal be dismissed with costs including reserved costs if any.** **In Appeal No 2504 of 2011 on remitter from the High Court of Australia:** **1. The proceeding be dismissed.** **2. The plaintiff pay the defendant's costs of the proceedings including reserved costs as follows:** **a. the costs of the proceeding to 7 March 2011 (the date of remission) including the costs of the remitter be as ordered by Gummow J in the High Court of Australia; and** **b. thereafter according to the scale applicable to this Court.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – PECUNIARY PENALTY AND LIKE ORDERS – GENERALLY – where the appellant was a registered tax agent and principal of an accounting practice – where clients of the practice lodged income tax returns falsely claiming for moneys expended in the purchase of insurance bonds – where the appellant knew that the participants were not entitled to claim these expenses as a tax deduction – where the appellant was convicted of nine indictable offences of defrauding the Commonwealth – where the respondent CDPP made an application for pecuniary penalty orders to deprive the appellant of benefits derived by him from the commission of offences against the Commonwealth – where the appellant was found to have committed further offences against the Commonwealth involving unlawful activities – where the primary judge deducted the agreed refunds made by the appellant from the total benefits derived – where the appellant submitted that the primary judge relied on findings of fact not part of the prosecution's pleaded case in concluding that the appellant had committed the further offences – where the appellant submitted that the primary judge incorrectly assumed that tax deductibility turned on whether the documentation had been signed before or after the payment of interest – where the appellant submitted that the primary judge's ultimate conclusion depended upon the use of promissory notes in the schemes rather than cash – where the appellant submitted that the primary judge erred in assessing the benefits derived by the appellant from the offences – whether the scheme payments were tax deductible – whether tax deductibility was a prerequisite for an application for a pecuniary penalty order – whether the primary judge erred in finding that the appellant had committed the further offences – whether the primary judge erred in ordering that the appellant pay the respondent the penalty amount – whether the primary judge erred in calculating the benefits derived by the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – OTHER MATTERS – where the appellant submitted that the respondent CDPP had departed from it's pleaded case – where the respondent argued in it's closing address at first instance that the appellant knew that the purpose of the scheme was not to provide a benefit to his clients' employees – where the appellant submitted that the respondent's original contention did not relate to the purpose of the payments – whether the primary judge erred in finding that there was no departure from the respondent's pleaded case

CRIMINAL LAW – APPEAL AND NEW TRIAL –

MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the respondent sought to rely at first instance on some 40,000 documents obtained from the execution of search warrants overseas – where the appellant submitted that the documents were inadmissible or irrelevant – where no objection was raised at first instance to documents being tendered – whether the appellant was denied natural justice in preparing for trial – whether the admission of the subject documents gave rise to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was self represented at first instance – where counsel for the appellant submitted on appeal that the primary judge erred in treating submissions by the appellant as evidence admissible against him – where the appellant submitted that the respondent was under a duty to call a number of material witnesses at first instance – whether the primary judge's failure to warn the appellant of the right against self incrimination amounted to procedural unfairness – whether the primary judge erred in finding that it was unnecessary for the respondent to call additional witnesses – whether the appellant was denied natural justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – MISCELLANEOUS MATTERS – QUEENSLAND – CASE STATED AND REFERENCE OF QUESTION OF LAW – where the plaintiff submitted that the finding that he had committed indictable offences and was liable to pay a penalty amount could not be made except by jury verdict – where the appellant submitted that Pt 2-4 of the *Proceeds of Crime Act* 2002 (Cth) was inconsistent with s 80 of the *Constitution* (Cth) – whether the pecuniary penalty proceedings constituted a trial on indictment – whether Pt 2-4 of the *Proceeds of Crime Act* 2002 (Cth) was invalid

Bankruptcy Act 1966 (Cth), s 82(3A)
Constitution (Cth), s 80
Crimes Act 1914 (Cth), s 29D
Crimes Act 1958 (Vic), s 82
Criminal Code 1995 (Cth), s 135.1(5)
Criminal Proceeds Confiscation Act 2002 (Qld)
Evidence Act 1977 (Qld)
Income Tax Assessment Act 1936 (Cth), s 51(1), s 264
Judiciary Act 1903 (Cth), s 18
Proceeds of Crime Act 2002 (Cth), s 116, s 120, s 122, s 126, s 128, s 134, s 140, s 315, s 317, s 336, s 338, Pt 2-4
Uniform Civil Procedure Rules 1999 (Qld)

Adler v Australian Securities and Investments Commission (2003) 179 FLR 1; [2003] NSWCA 131, cited
Barker v The Queen (1994) 54 FCR 451; [1994] FCA 1577, considered
Briginshaw v Briginshaw (1938) 60 CLR 366, [1938] HCA 34, cited
Brown v The Queen (1986) 160 CLR 171; [1986] HCA 11, considered
Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353, cited
Cheng v The Queen (2000) 203 CLR 248; [2000] HCA 53, considered
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161; [2003] HCA 49, cited
Commissioner of Taxation v Sleight (2004) 136 FCR 211; [2004] FCAFC 94, cited
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55, considered
Federal Commissioner of Taxation v *Lau* (1984) 6 FCR 202; [1984] FCA 401, considered
Federal Commissioner of Taxation v Lenzo (2008) 167 FCR 255; [2008] FCAFC 50, cited
Fletcher v Federal Commissioner of Taxation (1991) 173 CLR 1; [1991] HCA 42, considered
Howland-Rose v Commissioner of Taxation (2002) 118 FCR 61; [2002] FCA 246, cited
Kingswell v The Queen (1985) 159 CLR 264; [1985] HCA 72, considered
McMunn v The Queen [2007] 69 ATR 384; [2007] VSCA 149, distinguished
Morley v Australian Securities and Investments Commission (2010) 274 ALR 205; [2010] NSWCA 331, distinguished
Munday v Gill (1930) 44 CLR 38; [1930] HCA 20, considered
Pearce v The Queen (2005) 216 ALR 690; [2005] WASCA 74, distinguished
R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556; [1938] HCA 10, considered
R v Ianelli (2003) 56 NSWLR 247; [2003] NSWCCA 1, cited
Re Colina; Ex parte Torney (1999) 200 CLR 386; [1999] HCA 57, considered
Re Parry v Federal Commissioner of Taxation (2004) 57 ATR 1343; [2004] AATA 1193, considered
Spies v The Queen (2000) 201 CLR 603; [2000] HCA 43, considered
State of Queensland v Brooks [2008] 1 Qd R 484; [2006] QCA 431, considered
Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54, cited
The King v Snow (1915) 20 CLR 315; [1915] HCA 90, cited

COUNSEL: Dr G C Dempsey, with Dr A J Greinke, for the plaintiff in Appeal No 2504 of 2011 and the appellant in Appeal No 13541 of 2010
R Orr QC, with G Del Villar, for the defendant in Appeal No 2504 of 2011
P J Flangan SC, with G Del Villar, for the respondent in Appeal No 13541 of 2010

SOLICITORS: Buchanan Law for the plaintiff in Appeal No 2504 of 2011 and the appellant in Appeal No 13541 of 2010
Australian Government Solicitor for the defendant in Appeal No 2504 of 2011
Director of Public Prosecutions (Cth) for the respondent in Appeal No 13541 of 2010

[1] **MARGARET McMURDO P:** The Commonwealth Director of Public Prosecutions (the CDPP), the respondent in Appeal No 13541 of 2010 and the defendant in Appeal No 2504 of 2011, applied for pecuniary penalty orders under Pt 2-4 *Proceeds of Crime Act* 2002 (Cth)[1] (the Act) against Steven Irvine Hart, the appellant in Appeal No 13541 of 2010, and the plaintiff in Appeal No 2504 of 2011. The application was determined by a District Court judge over 16 hearing days between July and September 2009, followed by written submissions which were delivered in October. The parties requested that consideration of the judgment be deferred to 20 November 2009. On 19 November 2010, the judge ordered Mr Hart to pay the CDPP $14,757,287.35. His Honour published his 138 page reasons for judgment on 30 November 2010. Mr Hart has appealed from that order (Appeal No 13541 of 2010).

[2] Prior to the hearing of that appeal, Mr Hart filed a summons in the High Court of Australia applying for an order under s 18 *Judiciary Act* 1903 (Cth) directing that the question of the validity of Pt 2-4 of the Act be argued before a Full Court of the High Court of Australia. On 7 March 2011, Gummow J ordered that the matter be remitted to this Court to be linked to Appeal No 13541 of 2010.[2] His Honour also ordered that the costs of the proceeding to date of remission, including the costs of his Honour's order, be according to the scale applicable to proceedings in the High Court and thereafter according to the scale applicable in this Court. His Honour further ordered that the costs of the summons be costs in the proceeding. This remitted matter is Appeal No 2504 of 2011.

Appeal No 2504 of 2011

[3] The CDPP's application to the primary judge under the Act was in two parts. The first concerned the alleged proceeds of $706,402.93 from nine offences against s 29D *Crimes Act* 1914 (Cth) of which Mr Hart was convicted by a jury in a criminal trial. The second concerned the alleged proceeds of a further $18,850,884.42, from further alleged offences against s 29D and its successor s 135.1(5) *Criminal Code* 1995 (Cth) which the CDPP claimed he had committed, but of which he had not been convicted. These further alleged offences were

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1 Act No 85 of 2002 compiled 13 July 2006 is the applicable reprint in force at the time the CDPP filed the application for pecuniary penalty orders in the District Court on 17 July 2006. This reprint was provided by both parties to the appeal.

2 His Honour's order mistakenly refers to "matter number 159 of 2011".

"serious offences" under the Act.[3] Mr Hart does not dispute his liability under the Act for the derived benefits arising out the offences of which he was convicted. He contends, however, that Pt 2-4 of the Act is unconstitutional and offends against s 80 of the *Constitution* insofar as it permits a court to impose a penalty in respect of serious crimes without any conviction for those crimes after a trial by jury on indictment.

[4] Section 80 of the *Constitution* relevantly provides:

> "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 …"

[5] The difficulty in Mr Hart's argument is that proceedings under Pt 2-4 of the Act are civil proceedings not criminal (s 315(1)). The CDPP must establish its claim on the balance of probabilities (s 317) according to the rules of evidence applicable in civil proceedings (s 315(2)). The sum payable under a pecuniary penalty order is a civil debt due to the Commonwealth (s 140(1)) and may be enforced as if it were an order made in civil proceedings (s 140(2)), although an amount payable under an a pecuniary penalty order is not provable in bankruptcy: s 82(3A) *Bankruptcy Act* 1966 (Cth). Part 2-4 of the Act comprised s 115 to s 150 and commenced with:

> "**115 Simplified outline of this Part**
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> | |
> |---|
> | If certain offences have been committed, pecuniary penalty orders can be made, ordering payments to the Commonwealth of amounts based on:
(a) the benefits that a person has derived from such an offence; and
(b) (in some cases) the benefits that the person has derived from other unlawful activity.
(It is not always a requirement that a person has been convicted of the offence.) |
>
> "

[6] The key provision, s 116, relevantly included:

> "**116 Making pecuniary penalty orders**
>
> (1) A court with *proceeds jurisdiction must make an order requiring a person to pay an amount to the Commonwealth if:
>
> (a) the *DPP applies for the order; and
>
> (b) the court is satisfied of either or both of the following:
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> (i) the person has been convicted of an *indictable offence, and has derived *benefits from the commission of the offence;
>
> (ii) the person has committed a *serious offence.
>
> (2) Subparagraph (1)(b)(ii) does not apply in relation to a *serious offence that is not a *terrorism offence unless the court is satisfied that the offence was committed:

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[3] See s 338 of the Act (Dictionary) "serious offence" (a)(iv).

> (a) within the 6 years preceding the application (or, if some or all of the *person's property is already covered by a *restraining order, preceding the application for the restraining order); or
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> (b) since the application was made.
>
> The period of 6 years may be a period that began before the commencement of this Act.
>
> …
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> * To find definitions of asterisked terms, see the Dictionary at section 338."

[7] As the primary judge recognised, it was not contentious that Mr Hart had been convicted by a jury of nine counts of the indictable offence of defrauding the Commonwealth and that he derived benefits from the commission of those offences[4] (s 116(1)(b)(i)). It is curious that the words "and has derived benefits from the commission of the offence" in s 116(1) are placed in s 116(1)(b)(i) instead of after s 116(b)(i) and (ii). But it is nonetheless clear from the terms s 115 and s 116(1) that the legislature intended to allow pecuniary penalty orders to be imposed on those who have committed serious offences of which they have not been convicted in the criminal courts. Indeed, even those who have been acquitted by a jury of offences may be subject to a pecuniary penalty orders (s 120).

[8] True it is that the term "serious offence" as defined in s 338 of the Act (Dictionary) includes various offences, all of which are indictable. And as this case demonstrates, the pecuniary penalties ordered under the Act can involve huge amounts of money. Penalties not infrequently flow from civil proceedings: see *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*.[5] Importantly, in my view the pecuniary penalty orders under the Act do not involve imprisonment, even by default. I reject as inconsistent with Ch III of the *Constitution* the remarkable submissions of Mr Hart's counsel that parliament could enact legislation to make a term of imprisonment or even the death penalty a civil penalty. It is clear from the scheme of Pt 2-4 of the Act that an application for a pecuniary penalty order is not a trial on indictment. It is a civil proceeding to determine the order a court with proceeds jurisdiction must make when the CDPP applies for a pecuniary penalty order in respect of a person who falls within the terms of s 116(1)(b). The determination of an application for a pecuniary penalty order under s 116(1)(b) involving a determination on the balance of probabilities by a judge without a jury as to whether the person has committed a serious offence does not contravene s 80 of the *Constitution*. For these reasons, together with those of Muir JA, Pt 2-4 of the Act is valid and Appeal No 2504 of 2011 must be dismissed. Mr Hart should pay the CDPP's costs including reserved costs.

Appeal No 13541 of 2010

[9] I agree with Muir JA's reasons for dismissing this appeal with costs.

[10] **MUIR JA**: **Introduction** The proceeding in Appeal No 1354 of 2010 was instituted by an application by the CDPP for pecuniary penalty orders to deprive the appellant of benefits allegedly derived by him from the commission of offences against the laws of the Commonwealth. It was tried in the District Court.

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4 *Commonwealth Director of Public Prosecutions v Hart* [2010] QDC 457, [10].

5 (2003) 216 CLR 161, Hayne J, 207 [139] with whom Gleeson CJ and McHugh J agreed; [2003] HCA 49.

[11] The primary judge found that the benefits derived by the appellant from the commission of nine offences of which the appellant had been found guilty in prior criminal proceedings amounted to $706,402.93. He found also that the appellant had committed further offences as claimed by the respondent and he assessed the benefits derived by the appellant therefrom at $18,850,884.42. After deducting $4,800,000, being the agreed value of forfeited property, his Honour found the appropriate pecuniary penalty to be $14,757,287.35 and ordered that the appellant pay that sum to the respondent.

[12] The appellant appeals against that order.

[13] On 13 January 2011, the appellant commenced a proceeding in the High Court of Australia seeking a declaration that Part 2-4 of the Act was invalid as contrary to s 80 of the *Constitution* (Cth). On 7 March 2011, Gummow J ordered *inter alia* that the proceeding be remitted to this Court "to the intent that it be linked to the pending appeal [in matter No. 13541 of 2010]". In the High Court proceeding, Hart is the plaintiff and the Commonwealth Director of Public Prosecutions the defendant.

The High Court proceeding

[14] Counsel for the plaintiff's argument may be summarised as follows. Section 80 of the *Constitution* provides:

> "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."

[15] Section 80 is "a fundamental law of the Commonwealth"[6] and, as the subject offences were "serious offences" and identified in the Act as indictable offences, "the guarantee in s 80…is engaged". As a consequence of that, the plaintiff could not have been found to have committed an indictable offence and to thus having been exposed to a penalty except by the verdict of a jury.

[16] The plaintiff contended that the subject trial was a trial on an indictment within the meaning of s 80 of the *Constitution*. *Brown v The Queen*,[7] an article by Dr Clifford Pannam[8] and *Munday v Gill*[9] were cited in support of that proposition.

Consideration

[17] The plaintiff's argument seizes on the words emphasised in the following passage from the reasons of Gibbs CJ, Wilson and Dawson JJ in *Kingswell v The Queen*:[10]

> "It has been held that s. 80 does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, **but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily**." (emphasis added)

[18] The plaintiff's argument conveniently ignores the earlier part of the quotation and the passages which came before and after it, namely:

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6 *R v Snow* (1915) 20 CLR 315 at 323.
7 (1986) 160 CLR 171.
8 "Trial by Jury and Section 80 of the Constitution" (1968) 6 *SydLR* 1.
9 (1930) 44 CLR 38.
10 (1985) 159 CLR 264 at 276-277.

> "The fact that s. 80 has been given an interpretation which deprives it of much substantial effect provides a reason for refusing to import into the section restrictions on the legislative power which it does not express.
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> …
>
> This result has been criticized, but the Court has consistently refused to reopen the question and the construction of the section should be regarded as settled: *R. v. Archdall and Roskruge; Ex parte Carrigan and Brown*; *R. v. Federal Court of Bankruptcy; Ex parte Lowenstein*; *Sachter v. Attorney-General (Cth)*; *Zarb v. Kennedy*; *Li Chia Hsing v. Rankin*." (citations omitted)

[19] In *Cheng v The Queen*,[11] Gleeson CJ, Gummow and Hayne JJ noted that:

> "Since *Kingswell* was decided in 1985, courts and prosecuting authorities throughout the Commonwealth have acted on the basis of that decision, and many people have been convicted and sentenced upon the assumption that the law was as declared in *Kingswell*."

Their Honours continued, referring to *Kingswell*:

> "From the report, it appears that the arguments of all counsel proceeded upon an acceptance of the view as to the meaning and effect of s 80 which has prevailed since Federation, that is to say, that the constitutional requirement of trial by jury only applies where there is a trial on indictment. On that view, the section does not provide that all serious offences shall be tried, on indictment, by a jury; it provides that, if there is to be a trial of an offence on indictment, it shall be by jury."

[20] McHugh J observed in his reasons:[12]

> "Given the current interpretation of s 80, the section seems to serve little purpose. It certainly cannot be a guarantee of trial by jury: for on the current interpretation, it is for the Parliament to declare whether or not the offence is indictable, and no jury is required unless the offence is tried on indictment. At its highest, all that s 80 does is to guarantee that, once the Parliament makes an offence indictable, any trial on indictment must be by jury and not by a judge or magistrate and that the verdict of the jury must be unanimous…"

[21] In *Re Colina; Ex parte Torney*,[13] Gleeson CJ and Gummow J,[14] with whose reasons Hayne J agreed, after noting that the history of the Court's interpretation was considered in *Kingswell*, observed:

> "It has been held in a series of cases, of which *Kingswell* is an example, that s 80 is not a guarantee of trial by jury for all serious offences against a law of the Commonwealth, but applies only where there is a trial by indictment, and leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily..."

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11 (2000) 203 CLR 248 at 265.
12 At 290.
13 (1999) 200 CLR 386.
14 At 396.

[22] Callinan J, after quoting from the reasons of Gibbs CJ, Wilson and Dawson JJ in *Kingswell* at pp 276-277 at some length and noting Brennan J's dissenting reasons, observed that:[15]

> "The view of the majority in *Kingswell* accords with the intentions of the founding fathers…The framers made a conscious decision to limit the guarantee in s 80 to 'trial on indictment'."

[23] I turn now to the argument that the proceedings for a pecuniary penalty under Part 2-4 of the Act constituted a trial on indictment of an offence against a law of the Commonwealth. Under s 134 of the Act, the CDPP may apply for a pecuniary penalty order against a person. A pecuniary penalty order is an order which requires a person to pay moneys to the Commonwealth representing the value of benefits derived from "indictable offences" and "serious offences" against laws of the Commonwealth. A "serious offence" includes an "indictable offence" punishable by imprisonment for three or more years, involving unlawful conduct by a person that is intended to cause a benefit to the value of at least $10,000 for that person or another person.[16]

[24] The definition of "indictable offence" in s 338 of the Act is:

> "*Indictable offence* means an offence against a law of the Commonwealth, or a non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances)."

[25] The Court is obliged to make a pecuniary penalty order where the CDPP applies for an order and the Court is satisfied that:[17]

(a) the person has been convicted of an indictable offence and has derived benefits from the offence; and/or

(b) the person has committed a serious offence.

[26] Section 315(1) of the Act expressly provides that proceedings on an application for a confiscation order, which includes a pecuniary penalty[18] order, are not criminal proceedings and the CDPP has the onus of establishing any disputed factual matters on the balance of probabilities.[19] The rules of evidence applicable in civil proceedings apply to proceedings for a pecuniary penalty order.[20]

[27] Section 140(1) of the Act provides that a sum payable under a pecuniary penalty order is a civil debt due to the Commonwealth. Section 140(2) provides that a pecuniary penalty order may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.

[28] In *Re Colina; ex parte Torney*[21] it was held that a proceeding commenced in the Family Court by an application charging a person with contempt was not a trial on indictment for the purposes of s 80 of the *Constitution*. An argument was advanced to the Court that an "indictment" was capable of encompassing any written

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15 At 438.

16 *Proceeds of Crime Act* 2002 (Cth) s 338.

17 *Proceeds of Crime Act* 2002 (Cth) s 116.

18 *Proceeds of Crime Act* 2002 (Cth) s 338.

19 *Proceeds of Crime Act* 2002 (Cth) s 317.

20 *Proceeds of Crime Act* 2002 (Cth) s 315(2).

21 (1999) 200 CLR 386.

application filed in the Court charging a person with specific offences exposing the person to the risk of punishment, including the serious punishment of imprisonment.

[29] Gleeson CJ and Gummow J rejected the argument:[22]

> "There is, in the present case, no indictment. There is an application framed in accordance with O 35 of the Rules. An attempt was made to argue that, because the application alleges offences, it constitutes, for relevant purposes, an indictment. The argument is without substance. The history of the procedure followed in relation to contempt charges, summarised above, negates the conclusion that any written allegation of contempt amounts to an indictment. So also does the history of this Court's interpretation of s 80. That history was considered, for example, in *Kingswell v The Queen*.[23]"

[30] McHugh J merely observed:[24]

> "However, because Mr Torney has not been charged on indictment, s 80 has no application in this case." (citations omitted)

[31] Kirby J, in rejecting the argument, said:[25]

> "A trial on indictment is a trial of the person accused, ordinarily of a serious offence, commenced by a written accusation signed by a law officer of the Crown, the Director of Public Prosecutions or some other official authorised by law for that purpose." (citation omitted)

[32] Referring to the Family Court initiating process, his Honour said:

> "…it would be a distortion of language to describe the first respondent's application form as an "indictment". It neither purports to be nor, more importantly, is such an instrument. Valid or otherwise, the application is a purported invocation of summary process. It was not, and did not purport to be, a plea of the Crown for the bringing of an accused to trial." (citations omitted)

[33] The initiating process in this case was an application by the defendant under sections 116 and 134 of the Act in the form approved under the *Uniform Civil Procedure Rules* 1999 (Qld). It was calculated to and did invoke the Court's civil jurisdiction.

[34] The passage from the reasons of Dawson J in *Brown v The Queen*[26] on which the plaintiff relied is as follows:

> "At Federation, summary proceedings, which are the creature of statute, were reserved for less serious offences whereas trial on indictment was the ordinary method for the trial of all other offences, bearing in mind that trial on indictment has an extended meaning in this country which encompasses a 'trial…initiated by some step taken by the Crown or some instrument or agent of Government'." (citations omitted)

[35] There was no contention in *Brown* that the initiating process, an information of the Director of Public Prosecutions of the Commonwealth charging the appellant with possession of prohibited imports, was not an indictment.

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22 At 396.
23 (1985) 159 CLR 264.
24 At 405.
25 At 418.
26 (1986) 160 CLR 171 at 215.

[36] Dr Pannam expressed the view in the article relied on by the appellant that "trial on indictment" meant:

> "1. Any prosecution which is commenced by a written accusation signed by a Law Officer of the Crown or a Crown Prosecutor appointed for that purpose; or
>
> 2. Any other prosecution which is brought in the name of the Crown irrespective or how or by whom it is instituted."

[37] The first observation which may be made about the learned author's views is that they reveal an underlying assumption that a "trial on indictment" is a form of criminal prosecution. That perfectly orthodox assumption does not assist the plaintiff's argument. That orthodoxy aside, Dr Pannam's expansive approach is inconsistent with the following views of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*:[27]

> "What then is the essence of a 'trial upon indictment' which sec. 80 insists shall be by jury? For ourselves we should have thought that to find an answer it was necessary to look for the substantial elements common to the recognized forms of procedure so called and going to make up the conception of prosecution upon indictment. We think that the first of them would be seen to be that some authority constituted under the law to represent the public interest for the purpose took the responsibility of the step which put the accused on his trial; the grand jury, the coroner's jury or the coroner, the law officer or the court. A second element, we think, would be found in the liability of the offender to a term of imprisonment or to some graver form of punishment. We should not have taken the view that sec. 80 was intended to impose no real restriction upon the legislative power to provide what kind of tribunal shall decide the guilt or innocence on a criminal charge."

[38] That an indictment is not only an instrument of criminal procedure but an instrument used to initiate the processes of the criminal law for offences of the most serious kind may be seen also from the following discussion of Dixon J in *Munday v Gill*:[28]

> "There is, however, a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or *ex officio* information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society. In the one the prisoner is brought to the bar of the Court 'in his own proper person and being demanded concerning the premises in the indictment specified and charged upon him how he will acquit himself thereof he saith that he is not guilty thereof

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27 (1938) 59 CLR 556 at 583.

28 (1930) 44 CLR 38 at 86.

> and thereof for good and evil he puts himself upon the Country and he who prosecutes for our Lord the King doth the like.' In the other the defendant is given a sufficient opportunity to appear which (unless he be in custody because it is considered that he will abscond) he may exercise or not at his choice, and, whether he avails himself or not of his right to be present, he is dealt with by those assigned to keep the peace, who judge both law and fact."

[39] Deane J in *Kingswell v The Queen*,[29] referring to the joint reasons of Dixon and Evatt JJ in *Lowenstein*, said:

> "In my respectful view, Dixon and Evatt JJ. were correct in their conclusion that there lies at the heart of the concept of 'trial on indictment' in s. 80 the notion of the trial of a 'serious offence'."

[40] His Honour, however, did not accept the view of Dixon and Evatt JJ that the criterion of what constitutes a serious offence for the purposes under consideration was that it be punishable by a term of imprisonment. He concluded that "…the correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates."[30]

[41] As the above discussion demonstrates, a "trial on indictment" is a form of criminal prosecution by the Crown. The subject application was civil, not criminal, in nature, it did not expose the plaintiff to a term of imprisonment or other criminal sanction and the plaintiff was not obliged to enter an appearance and defend the proceeding.

[42] Parliament, by the terms of the Act, made it abundantly plain that proceedings for pecuniary penalty orders were to be civil proceedings in civil courts and, by necessary inference, that the trial of those proceedings would not be trial by jury on an indictment.

[43] For the above reasons, the plaintiff has failed to demonstrate that Part 2-4 of the Act is invalid and I would order that his application be dismissed with costs including reserved costs.

The pecuniary penalties appeal – Introduction

[44] There were some 28 grounds of appeal in the appellant's amended notice of appeal. It is not necessary, however, for each ground to be addressed separately. Counsel for the appellant amalgamated the grounds into six issues and addressed on those issues, admittedly deviating into sub-issues from time to time. These reasons will take the same course. But before addressing the issues, it is desirable to give a general explanation of the facts. The nine indictable offences of which the appellant had been convicted were defrauding the Commonwealth by causing to be lodged for the financial year ending 30 June 1990 nine income tax returns containing a false claim for a deduction.

[45] The application, which was made pursuant to ss 116 and 134 of the Act, was in respect of:

> (a) Benefits derived by the appellant from the nine offences of defrauding the Commonwealth contrary to s 29D of the *Crimes*

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29 (1985) 159 CLR 264.

30 At 310.

Act[31] ("the Crimes Act") between 1 June 1990 and 30 June 1991; and

(b) Benefits derived by the appellant from specified "unlawful activity". Four allegations were made of unlawful activity by the appellant "in that he prejudiced the right of the Commonwealth to tax payable by diverse persons".[32] A fifth allegation of unlawful activity was that the appellant "did dishonestly cause a risk of loss to … the Australian Taxation Office, knowing or believing that there was a substantial risk of the loss occurring contrary to section 135.5 of the Criminal Code (Commonwealth)."

[46] The five allegations of deriving benefits in respect of "unlawful activity" were particularised as follows:

1(b)(i) between the first day of June 1998 and the thirtieth day of June 1999 at various locations in the States of Queensland, Victoria and Western Australia [the appellant] did contrary to section 29D Crimes Act 1914 as amended, defraud the Commonwealth in that he prejudiced the right of the Commonwealth to tax payable by diverse persons.

Particulars

In relation to income tax returns to be lodged by taxpayers for the financial year ending 30 June 1998 and subsequent years [the appellant] caused the true nature of payments made to United Overseas Credit Limited by taxpayers who had entered into agreements with European Industrial Bank Limited, Dresdner Finance Company Pty Ltd and ASIACITI. Trust (New Zealand) Limited to be misrepresented.

1(b)(ii) between the first day of January 1998 and the thirtieth day of June 1999 at various locations in the States of Queensland, Victoria and Western Australia [the appellant] did contrary to section 29D Crimes Act 1914 as amended, defraud the Commonwealth in that he prejudiced the right of the Commonwealth to tax payable by diverse persons.

Particulars

In relation to income tax returns to be lodged by taxpayers for the financial year ending 30 June 1998 and subsequent years [the appellant] caused the true nature of Employee Welfare Funds and agreements between taxpayers and United Overseas Credit Limited and National Welfare Trust (New Zealand) Limited and agreements between National Welfare Trust (New Zealand) Limited, European Grande Assurance Limited and United Overseas Credit Limited and payments made by taxpayers to United Overseas Credit Limited to be misrepresented.

1(b)(iii) between the first day of January 1999 and the thirtieth day of June 2000 at various locations in the States of

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31 1914 (Cth).

32 Paragraphs 1(b)(i), (ii), (iii) and (iv) of the Application.

Queensland, Victoria and Western Australia [the appellant] did contrary to section 29D Crimes Act 1914 as amended, defraud the Commonwealth in that he prejudiced the right of the Commonwealth to tax payable by diverse persons.

Particulars

(a) In relation to income tax returns to be lodged by taxpayers for the financial year ending 30 June 1999 and subsequent years [the appellant] caused the true nature of Employee Welfare Funds and agreements between taxpayers and United Overseas Credit Limited and National Employee Trust (NZ) Limited and agreements between National Employee Trust (NZ) Limited, European Grande Assurance Limited and United Overseas Credit Limited and payments made by taxpayers to United Overseas Credit Limited to be misrepresented.

(b) In relation to income tax returns to be lodged by taxpayers for the financial year ending 30 June 1999 and subsequent years [the appellant] caused the true nature of Non Complying Superannuation Funds and agreements between taxpayers and United Overseas Credit Limited and National Employee Trust (NZ) Limited and agreements between National Employee Trust (NZ) Limited, European Grande Assurance Limited and United Overseas Credit Limited and payments made by taxpayers to United Overseas Credit Limited to be misrepresented.

1(b)(iv) These particulars were as for 1(b)(iii) except that the financial years specified were 30 June 2000 and 30 June 2001.

1(b)(v) These particulars also were as for 1(b)(iii) except that the financial years specified were 30 June 2001 to 30 June 2003.

[47] It was agreed between the parties in a statement of agreed facts ("SAF") that the nine participants in the Employee Retention Plan ("ERP") were not entitled to claim amounts expended in purchasing insurance bonds and paying application fees and interest charged as a tax deduction in the year ending 30 June 1990. It was further agreed that the appellant knew that any such claim for a tax deduction by those clients for the year ended 30 June 1990 and any subsequent years was or was likely to be false.

[48] In relation to the benefits which the appellant derived from the commission of the nine indictable offences, it was agreed:

> "In the event that the court is satisfied that subsequent payments made by the nine client/employers to Mevton for the financial years ending 30 June 1991 to 30 June 1994 are directly or indirectly derived from the nine indictable offences for which [the appellant] was convicted on 26 May 2005, the amount of benefits derived by [the appellant] from the commission of those offences is $706,402.93.

> In the event that the court is not satisfied that subsequent payments by the nine client/employers to Mevton are directly or indirectly derived from the nine indictable offences for which [the appellant] was convicted on 26 May 2005, the amount of benefits derived by [the appellant] from the commission of those offences is $85,617.73."

[49] In each case, the claim on the Commissioner of Taxation was for moneys claimed to be expended in the purchase of an insurance bond when, in fact, no such expenditure had been incurred. Each of the claimants was a client of an accounting practice trading as "Harts". The appellant was a registered tax agent and principal of the practice.

[50] The application in respect of offences which the appellant was alleged to have committed, but for which he had not been tried and convicted, fell into two distinct categories. The first category was described as "the 1997 Employee Welfare Fund Scheme" ("the 1997 EWF Scheme"). The appellant promoted this scheme to clients of Harts. Under it:

> "a. The client/employer or director of the client/employer would obtain a loan from an overseas loan company called European Industrial Bank Limited ("Eurobank") which was incorporated in Western Samoa;
>
> b. The purpose of the loan was to purchase, in favour of a nominated employee, a life insurance bond which would mature in 10 years;
>
> c. The amount of the loan was forwarded to the Employee Welfare Fund Trustee, namely ASIACITI Trust (New Zealand) Limited ("ASIACITI");
>
> d. For a fee of 1% Dresdner Finance Pty Ltd ("Dresdner") agreed to provide bridging finance cheques on behalf of clients payable to ASIACITI;
>
> e. The cheques were endorsed in favour of Strathford Insurance Company Limited ("Strathford"), incorporated in Western Samoa, for the purchase of the insurance bond;
>
> f. Eurobank and Dresdner agreed that Strathford would endorse the cheques to Eurobank and Eurobank would receive the endorsed cheques;
>
> g. The transaction was accounted for by Eurobank via journal entries;
>
> h. The Eurobank loans to clients paid out the Dresdner loans."

The appellant had arranged for documentation to be prepared for clients to execute in order to formalise these arrangements.

[51] It will be more useful to detail the 1998 and subsequent Schemes particularised in paragraphs 1(b)(ii), (iii), (iv) and (v) of the Application after consideration of the 1997 EWF Scheme.

The 1997 EWF Scheme – The appellant's argument

[52] Counsel for the appellant argued that the primary judge concluded that the appellant had defrauded the Commonwealth in reliance on the following findings:[33]

- By his letter of 2 June 1998, the appellant asked for interest payments on the Eurobank loan to be paid to UOCL before 30 June 1998;
- The appellant knew that some or most client/employers would or were likely to claim payments for interest to UOCL as an expense in their income tax returns for the financial year ending 1998 and following;
- The appellant did not require, as a prerequisite to payment of interest to UOCL, that the client/employers first execute the new documentation;
- The appellant anticipated that some participants would pay UOCL without first executing the new documentation;
- Such interest payments were not tax deductible unless the new documentation had first been signed;
- The Commonwealth's right to tax payable by the participants was prejudiced.

[53] These findings were not part of the prosecution's pleaded case. The CDPP did not contend that the appellant had failed to ensure that participants would first sign the new documents or that participants who had not signed the documents fell into a different category of case. The primary judge was therefore wrong to make these findings and to conclude, by reference to them, that the appellant had acted dishonestly.

[54] Alternatively, the findings were wrong for three reasons. First, the primary judge incorrectly assumed that tax deductibility turned on whether the new documentation had been signed before or after the actual payment of interest to UOCL. It does not. There is nothing illegal or even unusual about an agreement being signed after payments have begun to be made under it.

[55] The primary judge made no finding that any particular client had failed to execute the documents prior to making the interest payment, or that Mr Hart knew of that failure. Each of the novation documents were dated June 1998. The CDPP specifically did not allege that the appellant was party to any backdating, if that in fact occurred.

[56] Even assuming some clients may never have signed the new documentation, the clients were still entitled to a tax deduction. The primary judge found that there was no agreement by 2 June 1998 to assign Eurobank's right to receive interest to UOCL and that this occurred, if at all, not before March 1999.

[57] Accordingly, even if the cash payments to UOCL were not, of themselves, deductible by reason of the failure of a client to sign the new documentation, that left such a client with an undischarged obligation to pay interest to Eurobank in FYE 1998.

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33 Reasons paragraphs [371], [374] and [377].

[58] Because a taxpayer claiming interest as a deduction is not required to disclose in a tax return the particular entity to which interest is paid, there was nothing improper about the returns lodged by clients in FYE 1998. The CDPP failed to prove that the clients were not entitled to a tax deduction for interest payable to Eurobank or that the appellant knew that to be the case.

[59] Further, if the effect of the settlement reached with the ASIACITI Group was that rights were later assigned from Eurobank to UOCL (as to which the primary judge makes no contrary finding) that would be sufficient to ratify any payments to UOCL made earlier.

[60] Also, the primary judge found that the appellant contemplated that his clients would sign the new documentation that he had prepared to novate the 1997 EWF Scheme. His intention that his clients formalise the novation by signing the new documentation to claim a tax deduction is inconsistent with the dishonesty alleged. That he failed in his letter of 2 June 1998 to insist upon the clients first executing the documents before the interest payments (if that has any significance for the tax deductibility of the payments) is at most negligent, and not dishonest.

The 1997 EWF Scheme – Consideration

[61] Contrary to the appellant's argument, the primary judge's finding that the Scheme interest payments were not tax deductible did not turn on whether the new Scheme documentation had been signed before or after the payment of interest to UOCL. The primary judge's reasoning in relation to the deductibility of the interest payments may be seen in the following part of his reasons:[34]

> "[144] One of the 28 employer participants in the 1997 EWF appears to have accepted an invitation from [the appellant] by letter of 2 June 1998 to sign a loan agreement from UOCL and other documents created for the 1998 EWF. I draw that inference from the facts referred to in *Re Parry and Federal Commissioner of Taxation*. I reject [the appellant's] submission that the case dealt with the 1997 EWF. It does appear to have considered claims disallowed relating to both the 1997 EWF and the 1998 EWF. The Senior Member Mr Beddoe wrote that 'I am satisfied on the material before me both sets arrangements as evidenced by the documents create a façade that there was a fund called the David Parry Pty Ltd Employee Welfare Fund…'. I infer that Mr Beddoe was referring to the documents which relate to the 1997 EWF and the 1998 EWF. At [47] Mr Beddoe described these arrangements as 'a paper façade with nothing behind it, or as Windeyer J said in Scott's case it was a mere façade behind which activities might be carried on which were not really directed to the stated purpose but to other ends, in this case the avoidance of income tax'. At [49] Mr Beddoe wrote 'I am satisfied that the essential character of the outgoings in so far as they were incurred by the Trustee, was to create a "mirage" of deductible outgoings. The outgoings were not incurred in the course of gaining or producing assessable income and were not

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34 *The Director of Public Prosecutions v Hart* [2010] QDC 457, Andrews J.

> incurred in carrying on business for that purpose.' On the material before me, the same can be said for any payments made to UOCL by the 28 participants in the 1997 EWF or for any payments made to UOCL or contributions claimed by participants in the 1998 EWF.
>
> …
>
> [150] The 28 participants in the 1997 EWF who were urged by [the appellant] to pay interest to UOCL instead of Eurobank fall into two categories. Some, such as Mr Cavill, and D Parry and Sons Pty Ltd may have paid interest to UOCL between 2 June 1998 and the end of FYE 1998 only after entering into a loan agreement of the kind used in the 1998 EWF which required the participant to pay "interest" to UOCL. The deductibility of 'interest' payments made by such persons is the same as the deductibility of interest payments by participants in the 1998 EWF. Such interest payments were not deductible for the reasons above.
>
> …
>
> [374] But [the appellant] also contemplated that some participants might, before paying interest to UOCL, first sign a fleet of documents such as Mr Cavill signed which made the participant liable to pay interest to UOCL. In respect of that group the CDPP's case in respect of the non-deductibility of such interest payments and whether [the appellant] was dishonest is in practical respects the same as its case with respect to the 1998 EWF or the 1999 EWF. For the reasons I explain elsewhere in these reasons relating to the 1998 EWF and the 1999 EWF: I find that by sending the letter of 2 June 1998 to the 28 participants anticipating that some would enter into arrangements with UOCL before making interest payments to UOCL **[the appellant] misrepresented the true nature of the interest payments knowing then and continuing to know that the participants who entered into a loan agreement with UOCL were not entitled to a tax deduction for their interest payments because [the appellant] knew then and continued to know that no money would be lent by UOCL to any of the 28 participants or received from UOCL by NET as a contribution on behalf of any of the 28 participants and that the purpose of payments by any of the 28 participants to UOCL was not to provide a benefit to the employees of those participants**." (citations omitted) (emphasis added)

[62] Central to the primary judge's reasons was his opinion that the interest payments were not incurred in the course of gaining or producing assessable income and were not incurred in carrying on business for that purpose. He found, implicitly, that the interest payments were not directed to such purpose but to the avoidance of income tax. Ostensibly, the object of the payments was to secure benefits to employees of Scheme participants but, to the appellant's knowledge, the Scheme was set up and would be administered in a way which would not lead to any funds being available to provide the benefits.

[63] There was no evidence of any "novation" of any agreement entered into with Eurobank. The appellant's counsel's outline of argument refers to some documents signed by a Mr Cavill. These documents provided for a new loan from UOCL and were unconnected by their terms with any prior documentation concerning Eurobank. The primary judge found expressly "that there was no agreement by 2 June 1998 to assign to UOCL, Eurobank's right to receive interest from the 28 participants." That finding was not challenged.

[64] The prosecution case, as emerges from the Further Amended Points of Claim ("FAPC"), included the allegation that Hart's clients could not lawfully claim a tax deduction for interest payments to UOCL and the appellant was aware of this.[35] The primary judge was entitled on the evidence to conclude that the appellant defrauded the Commonwealth in relation to the 1997 EWF scheme.

The 1998 and subsequent Schemes – The appellant's introductory allegations

[65] In relation to the new offences, the allegation of dishonesty in each case was that the appellant knew that the participants in the EWF Schemes and the Superannuation Schemes were not entitled to claim as a tax deduction their contribution, fees or interest payments on their loans.

[66] The prosecution case was that the appellant:

(a) Knew that there were "no funds" lent by UOCL to any of the participants and that there were "no funds" held by NET on behalf of any of the participants ("the No Funds allegation"); and

(b) Knew that UOCL did not have the financial capacity to make loans to participants in the Scheme ("the No Capacity allegation").

[67] Each of the Scheme transactions was executed using pro-forma documentation and was found by the primary judge to create legally effective obligations. The CDPP did not contend that any of the transactions constituted a sham.

[68] As a result of the transactions, the position was that:

(a) NET, as trustee, held the insurance bond issued by EGA as an asset of the Employee Welfare Fund or Superannuation Fund;

(b) EGA held the promissory note issued by UOCL;

(c) UOCL held a loan agreement with the employer; and

(d) UOCL received interest payments from the employer and an up front 12 percent fee.

[69] In relation to the use of promissory notes, the primary judge accepted that:

(a) The use of promissory notes by UOCL was lawful;

(b) Promissory notes can be valuable assets;

(c) They are common in Australia;

(d) There is nothing improper or unusual about the use of promissory notes;

(e) The issuers of promissory notes and bills of exchange may negotiate rollover facilities which allow them to use these instruments as sources of floating rate long-term funds; and

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35 Further amended points of claim, paras 9(m) and 9(n).

(f) They caused no concern to the auditors of UOCL or EGA.

Further, it was the case in relation to each of the client taxpayers that:

(a) They believed the scheme arrangements to be genuine;

(b) They paid the initial fees and continued to make repayments on the loans (in respect of which the clients sought tax deductions); and

(c) Some taxpayers redeemed the insurance bonds and were paid capital and interest on those redemptions.

The 1998 and subsequent Schemes – The appellant's "no funds" argument

[70] The primary judge erred in that his ultimate conclusion depended on the use of promissory notes in the Schemes rather than cash. Once it is accepted that the agreements were not shams, it does not matter that the schemes involved the use of promissory notes in lieu of cash transactions between the entities.

[71] The High court in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[36] rejected the contention that for a loan to be effective, "real money" must change hands. Similarly, the Full Federal Court has accepted that a "round robin" constitutes a genuine transaction, albeit that the paper transfer of funds may be indicative of a tax avoidance purpose for Part IVA.[37]

[72] The reliance by the primary judge on *McMunn v The Queen*[38] and *Pearce v The Queen*[39] was in error. Each of those cases is distinguishable from this case. *McMunn* was a sham case since there were never any loans made, nor was any business promised by the scheme carried out. The promoter in *McMunn* never intended to provide, and failed to provide, any of the agreed services. Similarly, *Pearce* was a sham case in that franchises were sold on the basis that the franchisor would incur $38,000 of expenses which were not, in fact, incurred. There was also a fictitious loan. To the extent the judgment relies on the financial capacity of the franchisor, that goes to whether the franchisor had any intention of carrying on a business for profit (as it had represented) or carrying out its obligations under the purported franchise agreements.

[73] The directors of EGA and its independent auditor prepared its accounts on a going concern basis, notwithstanding the use of promissory notes. The CDPP did not call the directors or the auditor as witnesses at trial. The CDPP did call the independent auditor for UOCL, Mr Tang, who also audited UOCL as a going concern despite the use of promissory notes.

[74] Mr Vincent, the expert witness called by the CDPP, agreed that UOCL could issue a promissory note if it knew that EGA were not going to call for payment immediately, which was the case as found by the primary judge (see below).

The "no funds" allegation – Consideration

[75] The following account of the 1998 EWF Scheme is extracted from the SAF:

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36 (2004) 218 CLR 471.

37 *Commissioner of Taxation v Lenzo* (2008) 167 FCR 255 at [153] to [155]; *Commissioner of Taxation v Sleight* (2004) 136 FCR 211 at [142].

38 [2007] 69 ATR 384; [2007] VSCA 149.

39 (2005) 216 ALR 690; [2005] WASCA 74.

"**APPLICATION 1(b)(ii) – 1998 EWF SCHEME**

Background to the Scheme

57. In or about early 1998 [the appellant] developed a 1998 EWF Scheme based on the 1997 EWF Scheme.

Operation of the Scheme

58. The 1998 EWF Scheme was promoted to operate in the following way:

    a. The director of the client/employer applies for a loan from UOCL;

    b. The purpose of the loan is to purchase an insurance bond in favour of a nominated employee;

    c. UOCL promises to pay the relevant director the loan amount by way of promissory note;

    d. The relevant director loans money to the client/employer company by endorsing the promissory note in favour of the client/employer company;

    e. The client/employer company then endorses the promissory note in favour of the trustee of the Employee Welfare Fund, NET;

    f. NET, as trustee, then invests in a 10 year insurance bond with EGA by endorsing the promissory note in favour of EGA;

    g. NET assigns the rights in the EGA insurance bond to UOCL as security for the loan;

    h. The nominated employee may make claims to NET, as trustee of the welfare fund, for reimbursement of medical, dental, medical insurance, life insurance, redundancy, sickness and trauma expenses.

…

61. The pro-forma documents explain that the initial contribution was not used for the purpose of paying claims within the relevant period but for the purpose of purchasing an Insurance Bond from EGA.

62. Where the nominated employee made a claim to NET, as trustee of the welfare fund, the client/employer was to send a cheque to cover the cost of the amount claimed together with a cheque in the sum of $10 to cover administration costs. The welfare fund would then pay the claim by reimbursement to the employee of the claimed sum.

…

63. In or about 1998 [the appellant] personally and through his staff, presented information and promoted the 1998 EWF

Scheme and its benefits to [other accountants and to clients of Harts].

67. [The appellant] provided to managers and other staff of Hart's accounting practice and other accounting practices, pro-forma documents for the 1998 EWF Scheme.

…

Fees and Payments by Client/Employers

70. The client/employers paid fees, which were normally 12% of the amount of the loan.

71. Client/employers made interest payments to UOCL, normally by cheque and/or directly into a nominated account.

72. Interest on the loan was calculated as simple interest and levied on a quarterly basis.

73. Interest was generally paid at the rate of 5%.

74. The rate of interest varied from client to client.

…

Client tax returns

76. [The appellant] knew that some or most client/employers in the 1998 EWF Scheme would, or were likely to, claim payments by way of the initial contribution, fees and/or interest payments paid to UCOL as an expense in the participant's income tax return for the financial year ending 30 June 1998 and following.

77. The client/employers and accountants believed that loans had been made and funds invested by the trustee by the use of promissory notes.

78. The initial contribution, fees and interest payments on the loans to UOCL claimed as tax deductions by client/employers in the 1998 EWF were disallowed.

…

Client Tax Returns

84. [The appellant] believed that for client/employers in the 1999 EWF Scheme to be entitled to a deduction for a contribution made to the trustee of the EWF, the contribution had to be for the purpose of providing a benefit to an employee of the fund.

85. The client/employers believed that the initial contributions made were for the purpose of purchasing an insurance bond.

86. [The appellant] knew that some or most client/employers in the 1999 EWF Scheme would, or were likely to, claim payments by way of the initial contribution, fees and/or interest payments made to UOCL as an expense in the participant's income tax return for the financial year ending 30 June 1999 and following.

87. The client/employers and accountants believed that loans had been made and funds invested by the trustee by the use of promissory notes.

88. The initial contribution, fees and interest payments on the loans to UOCL claimed as tax deductions by client/employers in the 1999 EWF were disallowed."

[76] A central thrust of the appellant's argument was that the primary judge's reasoning was based on the premise that the relevant funds could not have been made available by the use of promissory notes rather than by the provision of cash or by means of a loan. That view of the findings is erroneous. The primary judge relevantly found in respect of the 1999 EWF and the 1999 Superannuation Schemes that:

> "The 1999 EWF and 1999 Superannuation schemes were based on documents which may not be non-recourse according to their terms. That arguable interpretation raised the hypothesis for consideration that participants might pay principal at term's end. While the Loan Agreement did refer to a promissory note, it was only by reference to another document in a fleet of documents that a reader would discern that the initial advance was to be made by a promissory note. The documents did not reveal that the promissory notes were not to be presented or that the trustee's investment in an insurance bond was in a bond given by an insurer which had no income earning investments. [The appellant] caused the setting up of UOCL and EGA and had sufficient knowledge of and control over UOCL, EGA and NET to know at all material times that UOCL made no loans, only provided promissory notes, that the notes would not be presented to UOCL for payment, that UOCL had insufficient capacity to ever pay the notes, that the trustee's investment of the alleged contribution provided no benefit to the employee beneficiaries, that EGA received no contribution money to invest, otherwise had no money invested and that its insurance bond was not a benefit and that the payments to UOCL of fees and interest provided no benefit to the beneficiaries. [The appellant] believed that for claims to be deductible the contribution had to be for the purpose of providing a benefit to an employee or to the beneficiary of the superannuation fund. [The appellant] knew sufficient facts to know that the claims were not deductible. Despite the arguable interpretation that the loans gave UOCL recourse against the participant for the contribution [the appellant] regarded them as non-recourse at material times. If principal was paid at term's end the notional contributions made and claimed a decade earlier would not have retrospectively become the source of a benefit to the beneficiary of the trust."

[77] It may be seen from the above paragraph that the primary judge attached no particular significance to the mere fact that promissory notes were to be used in the Scheme. His Honour's conclusions as to the deductibility of interest payments stemmed from his conclusion that the appellant never contemplated that the promissory notes would be honoured or that the beneficiaries would benefit from the Scheme.

[78] In the course of oral submissions, counsel for the appellant abandoned the contention that *McMunn v The Queen*[40] and *Pearce v The Queen*[41] were wrongly decided and should not be followed. Counsel, however, maintained that those cases were distinguishable on the facts. Neither counsel for the appellant nor counsel for the respondent identified any principle articulated in either *McMunn* or *Pearce* which was suggested to be either inapplicable or applicable. Absent the identification of such a principle, it is difficult to arrive at any conclusion as to whether those cases are distinguishable or, if not, whether that matters. The primary judge, after discussing *McMunn* and *Pearce* concluded:

> "If *McMunn* and *Pearce* are properly decided I do not accept that the validity of an agreement pursuant to which a payment was made qualifies the payment as deductible from income. A payment may be due pursuant to a lawful agreement without qualifying as a deduction. Senior counsel for [the appellant] did not dispute the premise in the submission of senior counsel for the CDPP that the payments in this case must have a purpose of benefiting an employee. It was a premise consistent with an agreed fact, namely that [the appellant] believed that for client/employers in EWF or Superannuation schemes to be entitled to a deduction for contributions, fees and/or interest payments made to the trustee of the EWF or Superannuation fund, the contribution had to be for the purpose of providing a benefit to an employee or member of the Superannuation fund."

[79] His Honour's conclusions that a payment under a lawful agreement is not necessarily tax deductible and that for contributions, fees and/or interest payments to the trustee of the EWF to be deductible they had to be for the purpose of providing a benefit to an employee or member of the relevant fund were hardly contentious or in need of support from *McMunn* and *Pearce* or other authorities.

[80] It was no part of the prosecution case in *Pearce* that the franchisee participants in the subject scheme were not legally entitled to a deduction for expenditure made by them on account of franchise fees, an initial "franchise grant and establishment fee" and a training fee. Murray J summarised the Crown case[42] in his reasons as follows:

> "Steytler J has discussed at length the way in which the Crown case was put. It was asserted and, in my opinion it was properly open to assert, that the dishonest means to be employed pursuant to the agreement was to provide information to taxpayers who invested in the scheme which was calculated to support a certain level of deductibility of money which the investors were to pay, or assume a liability to pay, without revealing to taxpayer investors, and therefore to the ATO should it audit the scheme as anticipated, that there were other elements to the scheme which, if known, would be relevant considerations for the ATO in determining whether the deduction claimed was necessarily incurred in carrying on a business for the purpose of generating or producing assessable income. Alternatively, the ATO would be prevented from properly considering whether the scheme in question was one, the dominant

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40 [2007] VSCA 149.

41 (2005) 216 ALR 690; [2005] WASCA 74.

42 At para [215].

> purpose of which was to obtain a tax benefit by way of deduction of expenditure made or liability incurred in connection with the scheme, in which case the deduction might be disallowed and the amount claimed included in the taxpayer's assessable income."

[81] Steytler J is his reasons[43] explained that, although the promotional material for the franchise scheme provided to franchisees was calculated to lead them to believe that the sum of $39,500 charged to them would be used by the franchisor to provide the services contracted for by it within the first 13 months after the expenditure had been incurred, each appellant knew that only about $10,393.75 would be available to the franchisor within that period. His Honour noted that each appellant knew that loan agreements employed in the scheme would not result in any genuine transfer of funds but were designed solely to facilitate claims for tax deductions which would be artificially inflated to a point at which each franchisee could fund the entire investment from a refund obtained from the ATO. His Honour observed:[44]

> "There can consequently be no doubt that, in failing to disclose the true circumstances to the taxpayers, and by providing them with information designed to mislead them (in circumstances in which they might well otherwise have declined to acquire a franchise and take up the loan), and hence to mislead the ATO, if that should become necessary, the conspirators acted dishonestly."

[82] There was no evidence led to establish that the ATO was in fact deceived or that, if it knew of the true facts, it would have disallowed the subject deductions or would have otherwise challenged the scheme.[45]

[83] It was the prosecution case in *McMunn* that the appellant scheme promoters had encouraged scheme participants to invest in the scheme and make claims for tax deductions on the basis of wrong and misleading information provided to them by the promoters. Referring to the fact that the ATO had not obtained full information regarding the subject scheme from the promoter and its inability to obtain such information from investors who were not privy to it, Ashley JA, with whose reasons the other members of the Court agreed, said:[46]

> "In all, the paper showed that although the ATO then had sufficient information to form an opinion about the non-deductibility of moneys paid and moneys apparently borrowed, it did not know the full story. It had not got the full story from the applicant. Further, as the Crown asserted, it could not get all relevant information from the investors – for they did not know the full story."

[84] McMunn was convicted of 16 counts of defrauding the Commonwealth contrary to s 29D of the *Crimes Act* 1914 (Cth) and 16 counts of dishonestly obtaining a financial advantage by deception contrary to s 82 of the *Crimes Act* 1958 (Vic). It does not emerge from the report whether it was part of the prosecution case that claims for deductions by scheme participants pursuant to the scheme would, in fact, have been non-deductible.

[85] As counsel for the appellant pointed out, *McMunn* was a sham case in which the applicant promoter never intended to provide, and failed to provide, the services promised under the scheme.

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43 At para [296].

44 At para [297].

45 At para [308].

46 *McMunn v R* [2007] VSCA 149 at para [77].

[86] For the reasons discussed later under the heading "Tax Deductibility", Scheme payments in the present case were not tax deductible. The evidence clearly supported the finding of dishonesty on the part of the appellant for the reasons given later under the heading "*The primary judge erred in finding that the respondent was not required to prove that the issuing of assessment notices was based on fraudulent claims*". Such evidence also supported the conclusion that the appellant "defrauded the Commonwealth" in that he "prejudiced the right of the Commonwealth to tax payable by diverse persons" and made good the particular that he did this by causing the true nature of payments made by taxpayers to corporations pursuant to the Scheme to be misrepresented.

[87] The evidence that the client taxpayers were led to believe that the Scheme arrangements were genuine and the fact that insurance bond redemption payments were made do not falsify the relevant findings of the primary judge. There is no reason to conclude that the primary judge did not take those matters into account in concluding that the appellant never contemplated that the promissory notes would be honoured or that the beneficiaries would benefit from the Schemes.

[88] Finally, the appellant's case derives little, if any, assistance from the evidence of Mr Tang, UOCL's auditor. His evidence was to the effect that but for the presentation of letters from EGA indicating that the promissory notes were not to be presented for payment within 12 months, he would have treated the promissory notes as a current liability and UOCL's liquidity would have been in question. Practical consequences of the non-presentation of the notes are referred to later.

[89] This ground of appeal was not made out.

The 1998 and subsequent Schemes – The appellant's "no capacity" argument

[90] The case for the CDPP was that this required UOCL to have, from the outset, $94m in liquid cash, on the theory that real money was required for the loans to be effective. The pleaded case for the CDPP~~,~~ therefore alleged that UOCL lacked the capacity to make loans *at the time that the loans were first made*. The primary judge accepted this contention on the basis that there was only a paper transfer of funds at the inception of the Scheme. This was in error for the reasons set out above.

[91] More broadly than the case pleaded, the CDPP also alleged that UOCL had no capacity to meet any promissory notes, which may be presented within 180 days of issue. The primary judge also found, however, that the appellant knew that EGA would not present the promissory notes to UOCL for payment before the associated loan agreements were terminated either at the end of its term or upon the earlier termination of the agreement by a borrower or by UOCL.

[92] It follows that UOCL's obligation to pay the promissory notes was, in the ordinary course, postponed to match the maturity of the loan to the client/employers. The appellant's knowledge of the capacity of UOCL to meet a promissory note was therefore to be assessed, if at all, at the time of maturity, 10 years after issue.

[93] In this respect, it was no part of the pleaded case for the CDPP that UOCL would not have had capacity to meet the promissory note after 10 years. It carried out no investigation of the matter and offered no evidence directly on that question.

[94] In particular, the CDPP did not lead any evidence by any of the clients as to whether they expected the loan to run the full course or intended to continue repayments of

interest and principal on their loan to UOCL. To the contrary, the CDPP accepted as an agreed fact that each of the clients believed the arrangements to be genuine.

[95] The CDPP did not investigate nor lead any evidence as to whether UOCL did, or would have, the capacity to borrow funds to answer the promissory note on maturity.

[96] In particular, it was no part of Mr Vincent's[47] brief to determine the capacity of UOCL to honour, if necessary, the promissory notes.

[97] The primary judge was, therefore, wrong to find against the appellant on the basis of findings of fact in respect of matters that were not pleaded by the CDPP and in respect of which the CDPP had carried out no investigation and presented no direct evidence.

[98] In determining the future capacity of UOCL to meet the promissory notes, the primary judge wrongly disregarded the fact that under the Scheme agreements the client/employers were required to pay UOCL over the course of ten years:

(a) An initial fee of 12 per cent of the value of the loan;

(b) Interest at a rate of 5 per cent per annum (although that varied for some clients) for each year of the ten years of the loan; and

(c) The loan principal on maturity.

[99] It was uncontroversial that the client/employers did in fact pay the initial fees and paid interest annually. It was also accepted that the loan agreements created real obligations on the borrowers.

[100] The primary judge relied on the terms of the 1998 EWF Scheme under which the loans were "non-recourse" to the clients (provided interest payments were made) to reject the possibility that the appellant expected that any client might repay the principal to UOCL.

[101] As the High Court found in *Fletcher*,[48] the fact that a loan incidental to a scheme may have been non-recourse does not itself lead to the conclusion that the scheme would inevitably have ended prior to maturity.

[102] The terms of the loan agreements were changed for the 1999 Schemes such that UOCL had full recourse to the client/employers for repayment of those loans. The loans expressly provided for repayment of the principal by the due date. Notwithstanding this change, the primary judge still rejected the possibility that any client might repay the loans under the 1999 Scheme. In doing so, the primary judge wrongly placed the burden of proof on the appellant to lead evidence that he expected that participants would repay the loans and was wrong to draw adverse inferences from his failure to do so.

[103] The primary judge was wrong to treat the requirement for 12 month's written notice for repayment of the principal as having any real significance. Of far more

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47 Mr Vincent is an accountant who gave expert opinion evidence on accounting and financial matters in the respondent's case. In particular, he prepared a forensic accounting report known as the "Task 3 Report."

48 *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1.

significance was the following evidence to which the primary judge failed to have regard or wrongly rejected:

(a) An employee, Ms Anderson, in her response to a s 264 Notice by the ATO dated 17 July 2000, stated that she had explained to clients that they should start principal repayments at the end of three to five years and that she had been trained personally by the appellant as to what to explain to clients. The primary judge was wrong to reject that evidence as a matter of credit without Ms Anderson being called or subjected to cross-examination;

(b) A client, Mr Stewart, in his s 264 Response understood that his loan had to be repaid within 10 years with one year's notice of any early repayments. His understanding arose from an explanation by the appellant;

(c) Mr Todd in cross-examination stated that he recommended to clients that they pay off their loans as quickly as they could.

[104] This evidence is striking in light of the primary judge's observations that:[49]

> "If [the appellant] had been instructing his managers to inform the participants that they should repay their loans from UOCL it may have been significant. If the clients had paid UOCL the full amount of the loans it would have put UOCL in funds. If UOCL had been in funds, EGA would have been in a position reasonably to expect that UOCL had capacity to pay EGA if EGA presented to UOCL promissory notes issued by UOCL."

The primary judge also failed to have regard to the agreed fact that the employer participants in the Schemes genuinely believed the loans to have been made.

[105] For the above reasons, the primary judge was wrong to draw the inference that the appellant knew that clients would never repay the loans to UCOL, particularly in the context of a *Briginshaw*[50] standard involving allegations of intentional dishonesty.

The "no capacity" allegation – Consideration

[106] It was not correct that the prosecution's pleaded case was limited to UOCL's lack of capacity to make loans "at the time that the loans were first made." This was said to be an inference to be drawn from paragraph 9(n)(iii) of the further amended points of claim. Paragraph 9(n) provides particulars of the offence alleged in paragraph 8, namely:

> "8. [The appellant] committed the following alleged offence which constitutes unlawful activity:
>
> (a) between the first day of June 1998 and the thirtieth day of June 1999 at various locations in the States of Queensland, Victoria and Western Australia, [the appellant] did, contrary to section 29D *Crimes Act* 1914 as amended, defraud the Commonwealth in that he prejudiced the right of the Commonwealth to tax payable by diverse persons.
>
> Particulars
>
> In relation to income tax returns to be lodged by tax payers for the financial year ending 30 June 1998 and subsequent

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49 Reasons paragraph [170].

50 *Briginshaw v Briginshaw* (1938) 60 CLR 366; [1938] HCA 34.

years, [the appellant] caused the true nature of payments made to United Overseas Credit Limited by tax payers who had entered into agreements with European Industrial Bank Limited, Dresdner Finance Company Pty Ltd and ASIACITI Trust (New Zealand) Limited to be misrepresented."

[107] Paragraph 9 commences:

"The offence alleged in paragraph 8 above arises from the following facts, matters and circumstances:"

[108] Paragraph 9(n) is as follows:

"9(n) [The appellant] knew that his clients who participated in the 1997 EWF were not entitled to claim the interest payments on their loans to UOCL as a tax deduction.

Particulars

(i) [The appellant] knew **and continued to know** that there were no funds loaned by UOCL to any of his clients who participated in the 1997 EWF or any subsequent schemes;

(ii) **[The appellant] knew there were no funds ever received from UOCL or held by NET** on behalf of any of his clients who participated in the 1997 EWF;

(iii) [The appellant] knew **and continued to know** that UOCL did not have the financial capacity to make the loans to each of his clients **who participated in the 1997 EWF or any subsequent scheme**. [The appellant's] knowledge that UOCL did not have the financial capacity to provide funds by way of loans to his clients who participated in the 1997 EWF or any participants in subsequent schemes is to be inferred from the following facts, matters and circumstances:

(A) [The appellant] had to borrow money to fund the setting up of UOCL;

(B) UOCL was set up at [the appellant's] request and Acceptor Corporation Limited ("Acceptor") operated UOCL as a nominee for [the appellant] and in accordance with [the appellant's] instructions as principal up to 7 September 2000. From 7 September 2000, Zetland Financial Group Ltd operated UOCL as a nominee for [the appellant] and in accordance with [the appellant's] instructions as principal;

(C) UOCL was not issued with a money lenders licence until 17 September 1998;

(D) UOCL reported to [the appellant] on the status of deposits and bank balances of UOCL, when requested by [the appellant];

Particulars

i. see Schedule A attached

(E) UOCL prepared spreadsheets of amounts banked to the UOCL accounts and presented these spreadsheets to [the appellant] when he was in Hong Kong;

(F) UOCL transferred moneys from UOCL to specified accounts and entities at the direction of [the appellant];

Particulars

i. see Schedule B attached

(iv) as late as 24 February 1999 [the appellant] knew that EGA had not issued any insurance bonds in relation to the 1997 EWF or the 1998 EWF scheme;

…" (emphasis added)

[109] It is plain from subparagraphs (i), (ii), (iii) and (iv) that the introductory words of paragraph (n) are not referring merely to the time at which the loans were first made, assuming that loans were made.

[110] Paragraph 9(o) reinforces this conclusion as does the fact that Schedule A, referred to in paragraph 9(n)(iii)(D), covers the period between 13 August 1998 and 19 June 2000.

[111] As discussed earlier, the primary judge did not base his findings merely on the use of promissory notes and paper, as opposed to cash transactions. In arriving at his conclusions concerning UOCL's financial capacity, the primary judge placed considerable reliance on Mr Vincent's Task 3 Report. In this regard, his Honour observed:

> "Mr Vincent's Task 3 Report collates some matters relevant to UOCL's capacity to lend or to pay promissory notes. UOCL did not have a bank account until 7 July 1998. UOCL did not have a money lenders licence until 17 September 1998. For loans UOCL "took over" from the 1997 EWF it would be reasonable to expect that the previous lender would have been paid out. The paid up Share Capital of UOCL is nominal: $1 for the 2000 and 2001 years and $2,237 for the 2002 and 2003 years. UOCL had nominal Fixed Assets. It appears that the initial fixed assets of $893 in 2000 have been depreciated at the rate of 17.5% per year. The records of UOCL show no monies were paid out in respect of each loan. The records of UOCL show that this did not occur. At any year's end, the loans made to the borrowers were all made by way of Promissory Notes being:

	Loans Receivable ($)	Promissory Notes ($)
2000	94,684,000	98,684,000
2001	91,119,000	91,119,000
2002	80,658,000	81,158,000

> There were no financial statements prepared for the years ended 30 June 1997, 1998 and 1999, however it appears that the profit and loss account for the year ended 30 June 2000 includes all income and expenses from 27 June 1997 to 30 June 2000. This is highly irregular. Mr Vincent wrote the following comments in relation to that summary:
>
> - Total income reported as being earned by UOCL from its nominal Capital invested (less than $5,000) for the period summarised was **$26,660,620.**
> - This income is recorded as being earned from "Loan Interest Income" totalling **$17,342,848** on loans where no real monies were ever advanced and from "Application Fees" for the establishment of loans where no real monies were ever advanced, totalling **$9,317,772.**
>
> In his Addendum Task 3 Report, Mr Vincent identifies that approximately $14,508,140.63 was paid from UOCL to [the appellant] related entities." (footnotes omitted)

[112] After considering EGA's letters to UOCL's auditor confirming that EGA would not present the promissory notes for payment within the next 12 months, the primary judge said:

> "By not presenting notes, EGA remained incapable of investing for the benefit of the relevant employee or for superannuation purposes.
>
> I am satisfied that [the appellant] had such control of UOCL and of EGA that he was able to ensure that EGA would not present the promissory notes and am satisfied that at all material times he intended that they would not be presented before a loan agreement was terminated either at the end of its term or upon the earlier termination of the agreement by a borrower or by UOCL."

[113] Dealing with a submission by the appellant that, while it did not have available to it $94m in liquid cash assets, UOCL could have paid the promissory notes by arranging a facility with its bank to honour the promissory notes and, as part of the arrangement, EGA could have agreed to put the equivalent amount of money on deposit with the bank as security for UOCL's borrowing against the facility, his Honour said:

> "[This]…depends upon a bank's willingness to lend funds to UOCL. With its income, UOCL could have serviced some borrowings if it could persuade a lender that its liabilities pursuant to the promissory notes were postponed. There is no evidence in the financial accounts of UOCL that apart from the asset of the purported loans, it had any other substantial assets. UOCL had a nominal share capital and nominal fixed assets. Its primary source of income was the payment of establishment fees and interest by participants in the scheme. There was no evidence that UOCL had arranged a facility for borrowing funds to repay $98,000,000 or any of it at any time, and no evidence that UOCL had contemplated the contingency of paying EGA or prepared for it. I accept that Sek Sum's expectation was correct and consistent with the evidence. He understood no claims were to be paid out. The promissory note would have been matched against the claim, and there would be no claim paid. Sek Sum understood the risk for EGA was flat or nil." (footnotes omitted)

[114] The above discussion shows that the assertions that it was not part of the prosecution's pleaded case and that there was no evidence to support the view that UOCL would not have had the capacity to meet the promissory note after 10 years were unsubstantiated. Critical to these issues was what in fact happened to the funds, the lack of substance of the entities involved and the lack of evidence of any intention or plan that the promissory notes would be honoured and loans repaid. As the primary judge noted[51] in his reasons, only one deposit consisting of $200,000 out of a total of more than $17m received by UOCL was recorded as principal: the rest being recorded as interest and establishment fees. His Honour also noted that it would be reasonable for a promoter of the Schemes to expect that pursuit of the participants would involve expense, loss of goodwill for Harts and the risk of litigation. Also referred to, and discussed elsewhere, was the dissipation of the moneys paid into the Scheme by Scheme participants. There was thus ample support for the primary judge's conclusion[52] that the appellant at all material times regarded the 1999 EWF and the 1999 Superannuation Schemes as non-recourse.

[115] It was complained that it was no part of Mr Vincent's brief to determine the capacity of UOCL to honour the promissory notes if that proved necessary. Mr Vincent may not have addressed that matter directly but he did address UOCL's handling of Scheme moneys received by it and there is much in Mr Vincent's report which supported the relevant findings of the primary judge. The report stated variously:

> "…the Schemes were a paper façade with nothing behind it.
>
> …
>
> the Schemes were devoid of commercial reality and there is nothing which leads me to believe that the loans or insurance bonds were themselves commercial.
>
> …
>
> Firstly, EGA claims to have issued Insurance Bonds crediting interest to the participants yet there is no interest expense in the profit and loss account. Secondly, as there was no income generated by EGA, (nor were there any real funds in the bank) it had no ability to be in a position to pay any interest to the participants. The Bond Statements therefore cannot be seen as anything other than piece of paper created to give the participants the impression that something existed."

[116] Mr Vincent's analysis showed that the subject Schemes differed from what could have been expected in normal commercial transactions in that the Schemes, unlike such transactions: did not require the provision of financial information by the borrower to the lender; the Scheme loans were pre-approved instead of being approved after relevant assessment; no credit checks were undertaken by the lender; the lender had no funds available for the borrower; no funds were actually transferred to the lender's account; the funds received were never invested appropriately or at all; the investment product offered by the insurance company did not provide a commercial or market return; no moneys were to be made available to provide employee benefits; the lender, trustee and insurance company were not at arm's length and the lender undertook no risk as no funds were committed to the loan.

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51 At para [145].

52 At para [146].

[117] It is not correct that the primary judge wrongly imposed the onus of proof on the appellant. The primary judge carefully analysed the subject transactions and related evidence, and reached his conclusions by reference to that evidence. It amply supported his findings.

[118] The primary judge did have regard to the evidence of Ms Anderson, Mr Stewart and Mr Todd. Ms Anderson was a branch office manager of Harts between 1 July 1996 and 24 November 1999. Her written advice to the ATO, consequent upon a Notice issued to her by the ATO pursuant to s 264 of the *Income Tax Assessment Act* 1936 (Cth), stated that she had been trained by the appellant to advise that "[a] 10 year, interest only loan was set up but it was explained that after 3-5 years, this would be expected to convert to principal and interest repayments." His Honour held, correctly, that this "expectation is not consistent with any loan agreement." The primary judge also pointed out that any such expectation was not consistent with the appellant's opening statement and that there were inconsistencies between Ms Anderson's evidence concerning the Scheme and the workings of the Scheme as established by the evidence.[53]

[119] Mr Stewart was an accountant and Scheme participant. He had a close association with Harts. In his response to a notice under s 264 of the *Income Tax Assessment Act* 1936 (Cth), he recorded that a substantial part of his income for the year ended 30 June 2001 was provided by Harts and that he controlled Harts Staff Superannuation Pty Ltd. He informed the ATO of an understanding that if he had not repaid the loan within 10 years "the insurance bond would be cashed and any loan monies owed would be deducted from the proceeds". He did not state that he understood that he had incurred a personal obligation to repay the loan. A reasonable inference to be drawn from his communication with the ATO was that he did not understand that he had any such obligation.

[120] Mr Todd was the sole director of National Employee Trust (New Zealand) Limited ("NET"). Mr Todd gave oral evidence that it was his "recommendation to people, that if they – particularly with the superannuation fund, it's meant to be a form of savings, so therefore pay off your loan as quick as you can. And so, that's the way it would have been."[54]

[121] Mr Todd gave no examples of the loans having been paid out and the evidence does not reveal the extent, if any, to which he had contacted Scheme participants prior to their entering into a Scheme. The evidence reveals that if Mr Todd made any recommendations of early repayment of loans, the recommendations had little or no effect.

[122] The evidence of Mr Stewart, Ms Anderson and Mr Todd was not, and should not have been, accepted by the primary judge as overwhelming the great bulk of cogent evidence to the contrary.

The tax deductibility of 1998 and subsequent Schemes – The appellant's argument

[123] The ultimate financial viability of a Scheme does not affect the tax deductibility of payments made by a taxpayer under a Scheme.[55] The proper approach is that stated by Beaumont J in *Federal Commissioner of Taxation* v *Lau*:[56]

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53 Reasons para [285].

54 Transcript 7-47.

55 *Howland-Rose v Commissioner of Taxation* (2002) 118 FCR 61 at [102], [124].

56 (1984) 6 FCR 202 at 218.

> "Once it is concluded that the moneys were outlaid by the taxpayer for a real or genuine commercial purpose, any inquiry as to the manner in which those funds were subsequently applied by their recipients is immaterial for the purposes of s 51."

[124] It does not depend upon what the taxpayer actually receives, but upon what it was that the taxpayer paid for. Characterisation of the payment does not depend upon its effectiveness, either economically, in the sense that it was earned or was likely to earn a profit, or legally.

[125] In this case, each of the taxpayers believed the arrangements and investments to be genuine. The Scheme involved the purchase of an insurance bond for the EWF or Superannuation Fund. The funds were constituted by trust deeds under which NET, as trustee, was required to hold the assets of the funds only for the purposes of employee welfare or superannuation.

[126] The net effect of the transactions, so far as the client employers were concerned, was:

(a) They had entered into a loan under which they were obliged to pay fees, interest and principal to UOCL;
(b) They had made a contribution, by endorsement of the promissory note to the EWF or Superannuation Fund, for their employees;
(c) The trustee of the Fund had purchased and held a 10 year insurance bond.

[127] The primary judge erred in finding that the insurance bond provided no benefit to the employee beneficiaries.[57] The extent of the benefit ultimately provided to the employees turned upon the extent to which EGA, the insurer, could call upon the promissory notes issued by UOCL which, in turn, depended upon the extent to which the loans were repaid to UOCL.

[128] UOCL had some funds as a result of fees and interest. The extent to which it would have funds after 10 years was, at most, subject to uncertainty.

[129] It may well have been the case that the commercial interest of the client/employer in the Scheme was less certain than the tax benefit. Nevertheless, the employers had a genuine commercial interest in the relevant funds.

[130] The primary judge erred in relying on findings of the Administrative Appeals Tribunal in *Re Parry v Federal Commissioner of Taxation*[58] as a factual basis for the drawing of inferences adverse to the appellant. While the Tribunal's decision involved a participant in one of the Schemes, the appellant was not a party to that proceeding and cannot be bound by any of its factual or legal findings.

Tax deductibility – Consideration

[131] Counsel for the respondent argued that the contention that the primary judge was wrong in finding that the insurance bond provided no benefit whatsoever to the employee beneficiaries was misguided as the primary judge did not find that the interest was not tax deductible because the Scheme was not financially viable. Counsel for the respondent submitted that the primary judge's reasoning was that

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57 Reasons para [459].
58 [2004] AATA 1193.

UOCL's financial capacity formed part of the circumstances from which it was to be inferred that the appellant knew that the promissory notes would not be presented for payment and that, if presented, would not be paid and that the payments made by the participants were therefore not for a tax deductible purpose. This analysis is able to be drawn from paragraphs [141], [142] and [144] of the reasons. Nor did the primary judge, contrary to the appellant's contentions, find that the Schemes' lack of financial viability affected the deductibility of the participants' contributions. His Honour's relevant findings[59] were to the effect that the moneys paid by the participants into the Scheme "were not for the benefit of the beneficiaries of the trust funds" as there was no prospect that funds would be available for the benefit of employees.

[132] Counsel for the respondent contended that the appellant argued that the claims for deductibility of Scheme expenditure by Scheme participants were disallowed on the basis of Part IVA determinations issued by the Commissioner of Taxation. That does not accurately state the appellant's case. It was that, even if the Scheme had a tax avoidance purpose and some participants were issued with Part IVA determinations, that would not make the Scheme fraudulent. The submissions went on to assert, accurately, that Mr Singh of the ATO could not give admissible evidence as to whether payments to UOCL were deductible.

[133] It does not appear to me that, on a fair reading of paragraph [144] of the reasons, the primary judge relied on findings of fact in *Re Parry* as asserted by counsel for the appellant, except to the extent of holding that one of the 28 employer participants in the 1997 EWF appears to have accepted an invitation from the appellant to sign a loan agreement with UOCL and other documents created for the 1998 EWF. These facts do not appear to have been contentious.

[134] What was contentious was whether Scheme payments were tax deductible. In order to support the contention that the Scheme payments were not tax deductible, counsel for the respondent relied on the decision in *Re Parry* and on the explanation given by Mr Singh of the ATO in an affidavit[60] that:

> "Deductions claimed in respect of interest and associated borrowing expenses related to the making of a contribution were not allowable deductions because there was no loan and in any event the purpose of the initial contributions were not for a deductible purpose therefore any deductions claimed in respect of the related expenses was also not for a deductible purpose. The establishment fees were in reality promoters fees paid for an entry into a tax avoidance arrangement and as such were not deductible and interest fees were paid as commission to [the appellant] for the maintenance of the arrangement and similarly were not deductible."

[135] The respondent derives little or no assistance from *Re Parry* for the reasons stated by counsel for the appellant. Moreover, the Senior Member held that the taxpayer had avoided tax due to fraud or evasion as its claim was justified by "a façade of documents properly characterised as a sham". In this case, it was not contended that the Scheme documentation was entered into as a sham.

[136] The primary judge's conclusion that such payments were non-deductible depended in part on his applying the decisions in *McMunn* and *Pearce*. The primary judge

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59 Reasons para [142].

60 Sworn 17 July 2006.

reasoned that the Scheme, at least as implemented, would not result in the payment of benefits to the beneficiaries of the trust funds. He found that the payments, ostensibly by way of "interest" paid to UOCL pursuant to the agreement "to provide the illusory contribution were not for the benefit of the beneficiaries…".[61]

[137] As discussed above, neither *McMunn* nor *Pearce* provides any useful guidance on the question of deductibility of the types of payments now under consideration. More pertinent are the following observations of Beaumont J in *Federal Commissioner of Taxation v Lau*:[62]

> "It is a truism that it is not for the court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income but only how much he has spent (see *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 60). Once it is concluded that the moneys were outlaid by the taxpayer for a real or genuine commercial purpose, any inquiry as to the manner in which those funds were subsequently applied by their recipients is immaterial for the purposes of s 51. The reason is that, where, as here, the parties are at arm's length, the use made of the funds by the other parties to the transactions is not capable of throwing any light upon the purpose for which the taxpayer incurred the outgoings. The suggestion that, in this case, a tracing exercise should be embarked upon in order to establish, in the context of s 51, the 'true' purpose of the liabilities incurred by the taxpayer, should be rejected. Whether these matters bear upon the application of s 260 of the Act is a different question.
>
> In support of his contention that a deduction under s 51 is not available, the Commissioner points to a number of features of these transactions which, he says, afford important clues as to their true character, and, in particular, the absence of any substantial commercial flavour in what was done: the prepayment of a large sum was involved; no security was given for the repayment of this amount or for the performance of the manager's obligations; the taxpayer had little legal control over the manager; and the manager was granted grazing rights under the management agreement (cl 4). **But, with the possible exception of the prepayment, none of these considerations can cast any serious doubt upon the essentially commercial character of the transactions entered into**. The prepayment apart, the matters complained of are at best equivocal on the point sought to be made. The more likely explanation is that the taxpayer, not unnaturally, preferred to rely upon the business judgment and expertise of Messrs Aschman and Ray rather than to impose tight legal constraints upon the conduct of their business activities. For the taxpayer to insist upon rigid legal guidelines for the operation of the project may well have been commercially counterproductive in the long run." (emphasis added)

[138] Although *Pearce* provides little direct assistance for present purposes, Malcolm CJ's discussion of relevant authority, with respect, is useful. His Honour relevantly said:[63]

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61 Reasons para [142].

62 (1984) 6 FCR 202 at 217-218.

63 *Pearce v The Queen* (2005) 216 ALR 690 at paras [147]-[148].

"Further, deductibility is not conditional upon the economic viability or the economic desirability of the payment or its amount. As the High Court said in *Ronpibon Tin NL v FCT* (1949) 78 CLR 47 at 60 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ:

> 'It is not for the Court or the commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent: see per Ferguson J in *Tooheys Ltd v Commissioner of Taxation* [(1922) 22 SR (NSW) 432], at p 440; per Williams J in *Tweddle v Federal Commissioner of Taxation* [(1942) 7 ATD 186], at p 190.'

As Beaumont J said in *Federal Commissioner of Taxation v Lau*, above, at FCR 218; ALR 122:

> 'Once it is concluded that the moneys were outlaid by the taxpayer for a real or genuine commercial purpose, any inquiry regarding the manner in which the funds were subsequently applied by their recipients is immaterial for the purposes of s 51.'

The fact that there is a disproportion between the outgoing expenses and income does not affect the proper characterisation of the payment, unless the disproportion is to be explained by reference to an independent pursuit of an objective other than the gaining of assessable income: *Fletcher v FCT*, above. In that case, their Honours also said (at CLR 14; ALR 104–5) that:

> 'The fact that the relevant "payments" were purportedly made by "round robins" of bills of exchange which were not supported by equivalent amounts of cash and which all ended up in the hands of the original drawees does not, once arguments of sham and fiscal nullity are rejected, necessarily preclude those "payments" from being effective and legally binding. Depending upon the circumstances, they could constitute counterbalancing set-offs of credit and debit amounts. Prima facie, it would seem that they so operated in the circumstances of the present case. Whether they did is, however, a mixed question of law and fact. The Commissioner has, by his conduct of the case, allowed that question to be effectively resolved by default against him in both the Tribunal and the Federal Court. In the circumstances of these already over-protracted proceedings, it is now too late for him to raise the argument for the first time in this Court'."

[139] In *Fletcher v Federal Commissioner of Taxation*, the court said:[64]

> "The question whether an outgoing was, for the purposes of s. 51(1), wholly or partly 'incurred in gaining or producing the assessable income' is a question of characterization. The relationship between the outgoing and the assessable income must be such as to impart to the outgoing the character of an outgoing of the relevant kind. It has

64 (1991) 173 CLR 1 at 17-18.

> been pointed out on many occasions in the cases that an outgoing will not properly be characterized as having been incurred in gaining or producing assessable income unless it was 'incidental and relevant to that end'. It has also been said that the test of deductibility under the first limb of s. 51(1) is that 'it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income'. So to say is not, however, to exclude the motive of the taxpayer in making the outgoing as a possibly relevant factor in characterization for the purposes of the first limb of s. 51(1). At least in a case where the outgoing has been voluntarily incurred, the end which the taxpayer subjectively had in view in incurring it may, depending upon the circumstances of the particular case, constitute an element, and possibly the decisive element, in characterization of either the whole or part of the outgoing for the purposes of the sub-section. In that regard and in the context of the sub-section's clear contemplation of apportionment, statements in the cases to the effect that it is sufficient for the purposes of s. 51(1) that the production of assessable income is 'the occasion' of the outgoing or that the outgoing is a 'cost of a step taken in the process of gaining or producing income' are to be understood as referring to a genuine and not colourable relationship between the whole of the expenditure and the production of such income." (citations omitted)

[140] Although the end which "the taxpayer subjectively had in view in incurring [an outgoing] may…constitute an element, and possibly the decisive element, in characterization of either the whole or part of the outgoing" for the purposes of s 51(1) of the *Income Tax Assessment Act* 1936 (Cth),[65] it does not appear to me that the authorities contemplate that, in characterising the outgoing, the true facts can be disregarded. The Schemes were highly artificial and bereft of commerciality. The insurance bonds had no value. Payments into the Scheme could never have produced any benefit to employees of Scheme participants, and hence to the participant taxpayers themselves. There was no actual or genuine relationship between Scheme participants' expenditure and the accomplishment of any relevant business purpose. If the true facts were known, the Scheme participants could not have believed that the Scheme payments were for a relevant purpose and it could not have been concluded that the subject moneys were "outlaid by the taxpayer for a real or genuine commercial purpose".[66]

[141] For these reasons, I conclude that this ground has not been made out. Additionally, for the reasons explained under the next two headings, a finding that Scheme payments were not tax deductible by Scheme participants was not a prerequisite for proof of the respondent's case.

The primary judge erred in finding that the respondent was not required to prove that the issuing of assessment notices was based on fraudulent claims

[142] The respondent's claims, as particularised, were relatively straight forward. Claim 1(a) was for the benefits derived from the nine offences of defrauding the

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65 *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 17.

66 *Federal Commissioner of Taxation v Lau* (1984) 6 FCR 202 at 218.

Commonwealth. The FAPC alleged, in respect of each offence, that the appellant defrauded the Commonwealth by causing an income tax return to be lodged for the financial year ending 30 June 1990 which contained a false claim for a deduction.

[143] Claims 1(b)(i) to 1(b)(iii) inclusive were for benefits derived by the appellant from defrauding the Commonwealth by prejudicing the right of the Commonwealth to tax payable by scheme participants through causing, in relation to income tax returns to be lodged (for 1(b)(i)), the true nature of payments made to UOCL by scheme participants to be misrepresented and, for 1(b)(ii), (iii) and (iv), causing the true nature of Employee Welfare Trusts and specified agreements between the scheme participants and specified entities to be misrepresented. Claim 1(b)(iv) was for benefits derived by the appellant from defrauding the Commonwealth of tax payable by diverse persons. Claim 1(b)(v) was based on a risk of loss to the Commonwealth (in the form of the ATO) through misrepresenting the true nature of Scheme agreements and funds.

[144] The FAPC alleged in respect of claim 1(b)(i) that:

(a) the appellant knew that each client who participated in the 1997 EWF would, or would be likely to, claim a tax deduction for Scheme interest payments; and

(b) the appellant knew that Scheme participants were not entitled to make such claims because of the matters particularised in 9(n) of the FAPC, which matters demonstrated that, to the appellant's knowledge, there would never be moneys available to fulfil the objects of the scheme.

[145] The FAPC alleged in respect of claim 1(b)(ii) that:

(a) the appellant set up his own scheme, the 1998 EWF Scheme, borrowing $250,000 for the purpose;

(b) the appellant promoted the 1998 EWF Scheme;

(c) the appellant personally, and through his staff, explained to clients that interest was payable on moneys purportedly borrowed under the Scheme from UOCL and that such payments were tax deductible;

(d) the appellant caused UOCL to be established as a finance company in Hong Kong and EGA as an insurance company in Mauritius;

(e) the appellant was the only person who could provide instructions in relation to UOCL and he directed the operations of UOCL and EGA;

(f) the appellant knew that the participants in the 1998 EWF Scheme were not entitled to claim deductions for the interest, contributions and fees payable under the Scheme because he knew that:

  (i) there were no funds lent by UOCL to any Scheme participant;

  (ii) no insurance bonds had been purchased as at 30 June 1998;

  (iii) UOCL did not have the financial capacity to make the loans the Scheme contemplated because of the matters in 9(n)(iii);

  (iv) as late as 24 February 1999, EGA had not issued any insurance bonds in relation to the 1998 EWF Scheme.

[146] The allegations in the FAPC in relation to claim 1(b)(iii), which relates to the 1999 EWF Scheme and the 1999 Superannuation Scheme, pick up the allegations in 9(n)(iii) and the allegations in respect of claim 1(b)(ii). There are separate allegations concerning the appellant's promotion of the Schemes, his knowledge that Scheme participants would, or would be likely to, claim deductions for Scheme contributions, fees and interest payments and his knowledge that the participants in the Schemes were not entitled to make such claims.

[147] The allegations in the FAPC in relation to claim 1(b)(iv), which also relates to the 1999 EWF Scheme and the 1999 Superannuation Scheme, pick up the allegations in 9(n)(iii) and those in respect of claims 1(b)(ii) and 1(b)(iii).

[148] The allegations in respect of claim 1(b)(v) concern income tax returns lodged for the financial year ending 30 June 2001 and subsequent years. The respondent repeated and relied on the allegations in paragraph 15 of the FAPC in respect of claim 1(b)(iv) which picked up the allegations in respect of claims 1(b)(ii) and 1(b)(iii) and paragraph 9(n)(iii).

[149] It will be seen from the foregoing analysis that the respondent's case was not dependent on establishing that Scheme participants in the 1998 EWF Scheme, the 1999 EWF Scheme and the 1999 Superannuation Scheme could not have succeeded in obtaining deductions for Scheme payments. The essence of claims 1(b)(i) to 1(b)(iv) is that the Commonwealth's right to tax payable by Scheme participants was prejudiced by the appellant's misrepresenting the true nature of Scheme payments and/or Scheme agreements and funds.

[150] The allegations that the appellant knew that Scheme participants were not entitled to claim deductions for Scheme payments is sufficiently broad to accommodate the appellant's understanding that such claims could not be substantiated if the true facts in relation to the intended and actual operation of the Schemes was made known to the Commissioner of Taxation.

[151] Section 29D of the *Crimes Act* 1914 (Cth)[67] provided:

> "A person who defrauds the Commonwealth or a public authority under the Commonwealth is guilty of an indictable offence."

[152] The particulars do not assert that the fraud was perpetrated merely by the setting up, promotion and implementation of the various Schemes. Rather, the substance of the alleged fraudulent conduct was the procuration of participants to make claims for deductions on the basis of documentation which ignored the reality that, because of the appellant's intention and acts giving effect to that intention, the ostensible objects of the Scheme could never be realised.

[153] The appellant submitted that an offence under s 29D could not be committed in the present circumstances unless there had been a wrongful claim for a deduction which had led to the issue of an assessment notice. The submission cannot be accepted. The offence of defrauding may be committed without actual loss having been established. So much is apparent from the following passage from the reasons of Gaudron, McHugh, Gummow and Hayne JJ in *Spies v The Queen*:[68]

> "In *Peters*, Toohey and Gaudron JJ said:
>
> > 'Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to "some lawful right, interest, opportunity or advantage", knowing that he or she has no right to deprive

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67 Claims 1(b)(i), 1(b)(ii), 1(b)(iii) and 1(b)(iv) relate to s 29D of the *Crimes Act* (Cth) 1914. Claim 1(b)(v) concerned an offence against s 135.1(5) of the *Criminal Code* 1995 (Cth) but the appellant's submissions relate only to s 29D of the *Crimes Act* 1914 (Cth).

68 (2000) 201 CLR 603 at 630, 631.

> that person of that money or property or to prejudice his or her interests. Thus, to take a simple example, a "sting" involving an agreement by two or more persons to use dishonest means to obtain property which they believe they are legally entitled to take is not a conspiracy to defraud.'

In the same case, McHugh J said:

> 'In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's rights or interest or performance of public duty by:
>
> - making or taking advantage of representations or promises which they knew were false or would not be carried out;
> - concealing facts which they had a duty to disclose; or
> - engaging in conduct which they had no right to engage in'." (citations omitted)

[154] In rejecting the contention that the Commonwealth could not establish that it had been defrauded without proof of loss, Jenkinson and O'Loughlin JJ said in *Barker, Harper and Campbell v The Queen*:[69]

> "In *Wai Yu-tsang v The Queen* [1992] 1 AC 269 it was held sufficient to constitute a defrauding that a deceit, and the same may be said of concealment, has caused the imperilment of the economic interest of the person deceived or, in the case of bodies corporate and polities, the economic interest of the body on behalf of which that person is acting. The Judicial Committee approved reasoning of the English Court of Appeal in *R v Allsop* (1976) 64 Cr App R 29 which included the following observations (at 31, 32):
>
> > 'Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.
> >
> > We see nothing in Lord Diplock's speech to suggest a different view. "Economic loss" may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists it (sic) may be measured in terms of money.
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> > …
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> > Interests which are imperilled are less valuable in terms of money than those same interests when they are secure and

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69 (1994) 54 FCR 451 at 483; see also *Pearce v The Queen* (2005) 216 ALR 690 at 723 and 752, 753 and *R v Ianelli* (2003) 56 NSWLR 247 at paras [21], [55], [117] and [118].

> protected. Where a person intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context.'
>
> The Supreme Court of Canada has also approved that reasoning: *R v Olan* (1978) 41 CCC (2d) 145 at 150; *Vezina v The Queen* (1986) 25 DLR (4th) 82 at 96. Nor is it in our opinion inconsistent with any authority binding on this Court."

[155] *Pearce*[70] provides another example of a case in which it was held that the Commonwealth had been defrauded despite the absence of proof of loss.

The respondent's departure from its pleaded case – The appellant's contentions

[156] Counsel for the appellant submitted that, in the respondent's closing submissions at first instance, the respondent contended that the appellant knew that the purpose of the Scheme payments was not to provide a benefit to the employees of the Scheme participants and that, in fact, employees would not receive a benefit from UOCL honouring the promissory notes. This, it was asserted, was a further departure from the pleaded case which the primary judge should not have permitted. In support of this submission, reference was made to the agreed facts that the appellant promoted the Schemes as an effective way in which to promote employee loyalty and retention, and that the client/employers and accountants believed that the investments were made by the trustees. The true contention by the respondent did not relate to the purpose of the payments, which was inherent from the proforma documents, but to whether the employees in fact would receive a benefit from UOCL honouring the promissory notes.

The respondent's departure from its pleaded case – Consideration

[157] The primary judge held that there was no departure from the pleaded case on the basis that the appellant's knowledge that employees would not benefit was an inference which fairly arose from the FAPC, paragraphs 9(n)(ii) and 11(jj)(ii) and (iv). His Honour said:[71]

> "I accept that the CDPP has pleaded in a broad way that [the appellant] knew that the purpose of payments by client taxpayers was not to provide a benefit to the employees of those client taxpayers. It is an inference which fairly arises from the Further Amended Points of Claim at paragraph 9(n) particular (ii) and paragraph 11(jj) particular (ii) and (iv). To allege that [the appellant] knew that his clients who participated in an employee welfare scheme were not entitled to claim interest payments in respect of their loans from UOCL with a particular that he knew that no funds were received by the trustee of the employee welfare fund from UOCL on behalf of his clients does broadly and fairly raise as an issue that [the appellant] knew that his clients were not entitled to claim interest payments as a deduction because he knew there was no benefit for their employees. This emerges from paragraph 9(n) particular (ii). To plead that [the appellant] knew that the participants in the 1998 EWF

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70 (2005) 216 ALR 690.

71 At para [157].

> scheme were not entitled to claim the contribution, the fees and the interest payments on their loans fairly raised the issue that [the appellant] knew that the participants in the 1998 EWF scheme were not entitled to claim the contribution, the fees and the interest payments on their loans to UOCL as a tax deduction and to give particulars that he knew there were no funds loaned by UOCL, that he knew no insurance bonds had been purchased as at 30 June 1998, and that as late as 24 February 1999 he knew that EGA (the insurer) had not issued any insurance bonds in relation to the 1998 EWF scheme was to broadly and fairly raise that he knew that the participants in the 1998 EWF were not entitled to their payments as deductions because the payments did not provide a benefit to the employees. This arises from paragraph 11(jj) Particulars (ii) and (iv). The parties agreed a substantial quantity of facts which were reduced to a statement of agreed facts ('SAF' or 'SOAF'). SAF, was agreed before the CDPP opened its case. In SAF paragraph 84 is an agreed fact that '[the appellant] believed that for the client/employers in the 1999 EWF Scheme to be entitled to a deduction for a contribution made to the trustee of the EWF, the contribution had to be for the purpose of providing a benefit to an employee of the fund.' At SAF paragraph 99 it is agreed that '[the appellant] believed that for clients in the 1999 EWF or Superannuation Schemes to be entitled to a deduction for a contribution made to the trustee of the EWF or Superannuation Fund, the contribution had to be for the purpose of providing a benefit to an employee or member of the Superannuation Fund.' Facts were agreed to similar effect at paragraphs 110 and 122 of the SAF. It was only in respect of the 1998 EWF that there was not an agreed fact that [the appellant] believed that for clients in the 1998 EWF to be entitled to a deduction for a contribution made to the trustee of the EWF the contribution had to be for the purpose of providing a benefit to an employee. I infer that [the appellant] believed that also with respect to the 1998 EWF scheme." (citations omitted)

[158] The appellant has failed to demonstrate a flaw in the primary judge's reasoning. The conclusions reached by the primary judge can be reached by an even more direct route. As earlier discussion shows, a central part of the respondent's case was that the appellant was aware throughout that the elaborate Scheme structures erected by him would not operate to fulfil the ostensible purposes of the Schemes. It was an obvious inference to be drawn from the expressly pleaded allegations that the Scheme payments would not result in any future benefit to employees of the client participants and that this was known to the appellant at all relevant times. This ground was not made out.

The primary judge erred in admitting into evidence documents obtained from the execution of search warrants – The appellant's submissions

[159] At first instance, the respondent sought to rely upon, as evidence of their own truth, some 40,000 documents obtained as a result of the execution of search warrants in Hong Kong, New Zealand, Mauritius and elsewhere. The tender of these documents was improper. Except for documents proven through witnesses on the hearing, none of the seized documents were admissible as their authenticity had not been established. To the extent that the documents constituted hearsay, the maker

of the documents was not called and the exceptions to admissibility under the *Evidence Act* 1977 (Qld) did not apply.

[160] The respondent's reliance on these documents was productive of substantial procedural unfairness to the appellant. The respondent had prepared a "significant documents folder", including some of the seized documents, prior to the trial. That folder was shown to the appellant only a week prior to the commencement of the trial. Four days after the close of evidence, the respondent sought to substitute a new "significant documents folder", which increased the number of pages from 496 to 1305. The additional documents came from the seized documents. Counsel for the respondent relied on the expanded documents in closing submissions. The burden placed on the appellant of having to prepare his case and cross-examine on guesses as to which of the 40,000 documents would be relied on by the respondent, particularly when the respondent had purported to have identified the "significant documents" during the opening of its case, constituted a denial of natural justice. There has been a miscarriage of justice requiring a retrial.

The primary judge erred in admitting into evidence documents obtained from the execution of search warrants – Consideration

[161] As counsel for the respondent submitted, counsel for the appellant did not identify the documents claimed to be inadmissible or irrelevant. In the absence of such identification, it is impossible to determine whether inadmissible evidence was received and whether any prejudice was suffered as a result of the respondent's reliance on such documents. No objection was made at the trial to the tender of the subject documents.

[162] There was no denial of natural justice. The appellant was served with the respondent's application and affidavits exhibiting the seized documents upon which it wished to rely more than four years before the commencement of the trial. The appellant was legally represented at that time. Much of the seized documentation consisted of client files for Scheme participants. The files contained pro forma documents with which the appellant was familiar.

[163] The significant documents folder was assembled for the assistance of the primary judge. It was not required by any order and the respondent never suggested to the appellant that its case was limited to documents contained in the folder. The appellant was invited to add any documents he viewed as significant to the folder and documents put to witnesses in cross-examination were added to the folder on the appellant's request. Before closing its case, the respondent indicated that the folder would be replaced with an updated folder consisting of documents tendered in the respondent's case and the appellant consented to this course. The appellant did not request an adjournment to familiarise himself with the updated folder of documents. Moreover, in the course of final addresses the appellant tendered, by consent, his own two volumes of documents which he had identified as significant. There is thus no substance in these complaints.

The applications to adduce further evidence in the appeal

[164] Relevant to these contentions, the appellant's counsel applied to adduce evidence from the appellant in an affidavit sworn on 5 April 2011 concerning the difficulties he had in preparing for trial as a self-represented litigant, especially in light of the multiple pieces of complex litigation he was conducting and that he was released

from custody only on 15 March 2008. The respondent did not object to the Court's receipt of this evidence provided it was also permitted to adduce evidence from its Kristy Adele Bell in an affidavit sworn on 20 April 2011. Ms Bell deposed that the appellant was initially legally represented in this application for a pecuniary penalty order when it was served on him in custody in July 2006; in his application to strike out parts of that application on 15 December 2006;[72] and in the resulting appeal.[73] Ms Bell also deposed that on 18 December 2007 Mr Hart's solicitors advised the CDPP that he was without funds, and on 16 October 2008 he filed a formal notice that he was acting in person.

[165] The material in these affidavits is uncontentious and is relevant to the above ground of appeal. It provides pertinent background and context. In the circumstances, I would give leave to the appellant to read his affidavit sworn 5 April 2011, and to the respondent to read the affidavit of Kristy Adele Bell sworn 20 April 2011.

The primary judge erred in treating submissions made by the appellant as evidence admissible against him – The appellant's submissions

[166] The primary judge treated written submissions and oral statements from the bar table by the appellant as evidence of his state of mind at the time the Schemes were established. The primary judge failed to warn the appellant that his submissions and statements could be used against him in that manner. That "evidence" had a considerable impact on the primary judge's assessment of the appellant's expectations in relation to repayment of the loans, which issue was central to the primary judge's findings of dishonesty. Moreover, the failure to warn the appellant amounted to procedural unfairness, as appellant was thus denied privilege against self incrimination.

The primary judge erred in treating submissions made by the appellant as evidence admissible against him – Consideration

[167] The passage in the reasons on which reliance was placed is:

> "A submission by [the appellant] as to how schemes worked is a matter I can consider in determining what [the appellant] believed at earlier material times to be the way in which schemes would work. [The appellant's] submission is relevant to the issue of whether [the appellant] anticipated at material times that the amount of 'loans' for participants' initial contributions in each scheme would generally remain unpaid by participants to UOCL."[74]

[168] The above remarks cannot be considered in isolation. After referring to there being some evidence to support "the expectation at material times by [the appellant] that some participants would pay principal", the primary judge referred to the evidence of Ms Anderson in this regard. In that context the primary judge said:

> "[The appellant's] submission on the third day of oral submissions did not explain whose expectation he referred to. [The appellant] did not expressly submit that it was his expectation. If he had, it would not have been consistent with his opening; it would not have been consistent with the 1997 EWF or the 1998 EWF or with page 204 of [the appellant's] closing facts submission at schedule A, note 1, paragraph 2. It would be no surprise that some accountants or

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72 *Commonwealth DPP v Hart & Ors* [2007] QDC 26.

73 *Commonwealth DPP v Hart & Ors* [2007] QCA 184.

74 Reasons para [283].

> participants would expect that principal was to be repaid if they assumed that money had been lent. [**The appellant's] oral submission on the third day of addresses is not sworn evidence. I draw no inference from it. If I were entitled to draw an inference about the facts from [the appellant's] oral submission, I would reject it as inconsistent with evidence I do accept and reject it as being inconsistent with the part of [the appellant's] opening to which I referred**."[75] [emphasis added]

[169] Furthermore, I do not accept that anything said by the appellant in his opening or in addresses had a material, let alone significant, impact on the primary judge's assessment of the appellant's expectations in relation to whether loans would be repaid by Scheme participants. A finding that the appellant expected that Scheme participants would repay loans would have been inconsistent with the primary judge's findings as to the artificiality of the Schemes, the appellant's belief that there would never be funds available to provide benefits to employees and concerning the dissipation of Scheme moneys. There was ample evidence to support those findings. Any actual commitment on the part of Scheme participants to pay the whole of the loan moneys rather than the 12 per cent provided under the Scheme would have rendered the Scheme pointless for practical purposes and, if participants were obliged to repay the loans, the appellant could have anticipated awkward questions from participants as to the whereabouts of Scheme contributions.

[170] If, which I do not accept, the appellant was denied procedural fairness, the denial would not have made a difference to the outcome of the case and thus does not entitle the appellant to have the decision of the primary judge set aside.[76]

The primary judge erred in assessing the benefits derived by the appellant from the offences – The appellant's argument

[171] The primary judge made no finding as to whether Mevton Pty Ltd ("Mevton") was under the effective control of the appellant and, in relation to the nine offences, it was not the case that the payments to Mevton were derived from the acts of causing false returns to be lodged. The nine offences were in relation to the year ended 30 June 1990. The relevant payments to Mevton were made in subsequent financial years. No causal link was established between the lodgement of the incorrect tax returns and the payment of interest to Mevton. The loan agreements were entered into prior to any tax return being submitted and prior to any assessments being made.

[172] To be "derived" it is not sufficient for benefits to accrue to entities in the Scheme generally. The lack of causation between the offences and the benefit cannot be overcome by reference to the expanded definition, no matter how broadly "indirectly" is construed. In order for payments to Mevton or UOCL to be benefits derived by the appellant, they had to be received by Mevton or UOCL "at the request or direction of" the appellant.[77] But if Mevton or UOCL derived any benefit it was by reason of the terms of the loan agreements, not by reason of any request or direction on the part of the appellant.

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75 Reasons para [285].

76 See *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 and *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at 11-13.

77 *Proceeds of Crime Act* 2002 (Cth) s 336.

[173] In assessing the "benefits" to Mevton and UOCL, the primary judge looked only at the total payments made to those companies and, in the case of UOCL, deducted some refunds to participants from early cancellations of the insurance bond and loan which Mr Vincent had been able to identify. But the Schemes involved the lender to the Scheme assuming obligations to honour the promissory notes it issued. The payments of interest were a source of funds to honour the promissory notes which were legal and enforceable.

The primary judge erred in assessing the benefits derived by the appellant from the offences – Consideration

[174] Section 122(1) of the Act relevantly provided:

> "(1) In assessing the value of benefits that a person has derived from the commission of an offence or offences (the ***illegal activity***), the court is to have regard to the evidence before it concerning all or any of the following:
>
> (a) the money, or the value of the property other than money, that, because of the illegal activity, came into possession or under the control of:
>
> (i) the person; or
> (ii) another person at the person's request or direction"

[175] "Derived" was defined in s 336 of the Act as:

> "A reference to a person having ***derived*** proceeds, a benefit…includes a reference to:
>
> (a) the person; or
>
> (b) another person at the request or direction of the first person;
>
> having derived the proceeds, benefit…directly or indirectly."

[176] In assessing the value of benefits derived by a person from the commission of an offence, expenses or outgoings incurred by the person in relation to the commission of the offence are not to be deducted. Nor is the value of any benefits the person derived as agent for or otherwise on behalf of another person to be deducted.[78]

[177] Section 128 of the Act provides:

> "In assessing the value of benefits that a person has derived, the court may treat as property of the person any property that, in the court's opinion, is subject to the person's effective control."

[178] Counsel for the respondent summarised the findings of the primary judge relevant to the question of whether the payments to Mevton in respect of the ERP Scheme could be regarded as moneys derived by the appellant as follows:

> "(a) the ERP scheme was promoted to the nine clients by the appellant on the bases that if the client's application for finance was approved by 30 June 1990, the relevant client would receive a tax deduction in its return for the financial year ending 30 June 1990;[79]

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78 *Proceeds of Crime Act* 2002 (Cth) s 126.

79 Reasons at para [46].

(b) loans for the purchase of insurance bonds were not made by 30 June 1990 and the ERP scheme was not in place by that date;[80]

(c) the nine clients were advised that the loan had been provided by Mevton Pty Ltd rather than Chase AMP and that payments for the purchase of the insurance bonds should be made to Mevton. The clients then commenced paying Mevton;[81]

(d) the payments were made at the appellant's direction;[82]

(e) the directions in about November 1990 to the nine clients to pay Mevton were necessary for maintaining the claims for a deduction in the income tax returns for the financial year ending 30 June 1990;[83]

(f) during the 1991 to 1994 financial years payments made by the nine clients to Mevton in respect of application fees, interest charged and repayments of principal totalled $620,785.20. The payments were made to continue participation in the ERP scheme;[84] and

(g) the arrangements between the nine clients and Mevton which resulted in the clients paying Mevton were necessary to facilitate the commission of the offences for which the appellant was convicted. Payments to Mevton facilitated the commission of an offence by maintaining appearances of either a loan made by Mevton in June 1990 or of the client's definitive commitment in June 1990 to accept a loan from Mevton. That appearance was created to support the claim for a deduction against income for FYE 1990 for the amount Mevton supposedly lent."[85]

[179] This summary is accurate. It was not challenged by counsel for the appellant and it establishes that the primary judge did not err, as contended, in relation to the benefits derived from the nine offences. The reality was that the appellant provided documentation to the Scheme participants which, in accordance with the Scheme, required the subject payments to be made to Mevton.

[180] The finding that the payments in question were made at the appellant's direction was based on matters including:

(a) an implicit finding that the appellant caused his clients to execute the Scheme documents under which the payments were made;

(b) evidence given in the appellant's criminal trial.

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80 Reasons at para [47].

81 Reasons at para [49].

82 Reasons at para [50]. The primary judge pointed out that the CDPP relied on extracts of evidence from the appellant's criminal trial. He also pointed out that no contrary submission was made by the appellant.

83 Reasons at para [53].

84 Reasons at para [53].

85 Reasons at para [78].

Even if the payments to Mevton were provided for in Scheme documentation, that would not require the conclusion that Mevton did not derive the payments at the appellant's request "directly or indirectly".

[181] The Scheme involved a highly artificial, non-commercial series of transactions which were not intended by the appellant to produce the result represented to potential Scheme participants: the securing of an advantage to employees of the Scheme. Participants, in making payments under the Scheme, may properly be regarded as following directions or requests from the appellant, as the Scheme's promoter. That conclusion requires no stretching of the language.

[182] Whether the Scheme participants did have a contractual obligation to pay the money that was paid to UOCL is difficult to discern. One form of "loan agreement" had a limited recourse provision which gave the "lender" illusory rights only in respect of a charge on an insurance policy. Another form of loan agreement, discussed by the primary judge in paragraph [287] of his reasons, although purporting to afford the lender limited rights of recourse, appears, in substance, to offer no practical protection to the borrower. However, it may be greatly doubted that this form of "loan agreement" imposed on the borrower an obligation to repay a loan that was never made. Even if such an obligation had existed, the money paid would have been benefits derived indirectly from the appellant's unlawful activity. Any money finding its way to UOCL came into that company's possession as a result of the Scheme implemented at the direction of the appellant for the reasons given in relation to the ERP Scheme.

[183] Considering the generally similar language of the *Criminal Proceeds Confiscation Act* 2002 (Qld), Keane JA in *Queensland v Brooks*[86] made the following observations which have application to the subject provisions of the Act:

> "There is, in my view, no stretching of language involved in reaching the conclusion that the profit realised on the resale of the apartment represents the value of the proceeds of Mr Brooks's fraud. This conclusion is fully in accord with the statement in s. 4(1) of the Act where the 'main object of the Act' is stated to be 'to remove the financial gain … associated with illegal activity …'. There can be no doubt that this gain was associated with the fraud on the bank. More importantly, the concern of the Act is to capture the proceeds of 'illegal activity'. This concern to capture the proceeds of illegal activity should not be defeated by a narrow focus on what is obtained directly in the commission of a crime. The expansion of the definition of the expression 'derived' to include 'indirectly derived' is quite inconsistent with such a narrow focus. It is sufficiently broad to encompass a combination of legal and illegal activity as the cause of a benefit within the meaning of s. 18 of the Act. A thief who deposits stolen money with a bank could not be heard to say that the interest on the deposit is not the proceeds of his theft merely because it was also, and more directly, derived from a lawful deposit. So Mr Brooks cannot claim that the profit he intended to make was not the proceeds of his fraud merely because part of his scheme involved the lawful purchase and sale of the apartment."

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86 [2008] 1 Qd R 484 at [58].

[184] It is incorrect that the primary judge did not include in his calculations the refunds to participants in the Mevton and UOCL Schemes. His Honour deducted the refunds agreed between the appellant and the respondent from the total benefits of the Mevton offences.[87] He also deducted refunds to participants in the UOCL Schemes that the appellant had identified in Schedule C to his closing submissions.[88] This ground was not made out.

The primary judge erred in finding that it was unnecessary for the respondent to call a number of material witnesses – The appellant's argument

[185] Counsel for the appellant advanced the following argument. The respondent in this proceeding was in the position of a prosecutor, having regard to the allegations that the appellant had committed indictable offences constituting "serious offences" under the Act. Consequently, the respondent had the duties of a prosecutor in the conduct of the proceeding.[89] Alternatively, the appellant was in an "intermediate position" under which it had a duty to ensure a fair trial. A fair trial could not be achieved unless the following witnesses were called: participants who gave evidence relevant to their intention to repay the loans to UOCL, their knowledge or understanding, if any, of the non-recourse clauses in the loan agreements and whether they had been encouraged by the appellant or his employees to repay the loans earlier than usual; Ms Anderson to give evidence as to whether she had, in fact, stated matters to participants consistent with her statement to the ATO; Ms Campbell to give evidence on whether she was telling clients that they must repay the loan they borrowed from UOCL and when; Mr Allerdice, who had a central role in the establishment of the Schemes and the operation of its entities, "to give direct evidence relevant to several factual matters material to the decision [at first instance]"; Mr Olesnicky of Baker McKenzie Hong Kong, which firm prepared the documentation for the Schemes.

The primary judge erred in finding that it was unnecessary for the respondent to call a number of material witnesses – Consideration

[186] The evidence-in-chief on the trial was in the form of affidavits. Witnesses included:

(a) Clients of Harts who had participated in the Schemes. They gave direct evidence of conversations with Scheme promoters, including the appellant, and produced Scheme documents. They were available but were not required for cross-examination.

(b) Accountants who had promoted the Schemes, who gave evidence of conversations with the appellant and of meetings attended by the appellant together with their respective clients. One such witness, Mr Peter Andrew, was cross-examined. The remainder were not. Mr Todd, a director of NET, exhibited to his affidavit various documents forming part of the business records of NET in relation to the trusts established for Scheme purposes. He was cross-examined.

(c) Mr Chooramun swore to executing a search warrant in Mauritius at the business premises of EGA and First Island Trust Company Ltd, a company which provided fiduciary services for EGA in Mauritius, and to seizing EGA files. Documents in the files were admitted

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87 Reasons at para [48].

88 Reasons at paras [548], [556] and [557].

89 *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1.

through Mr Sek Sum, a resident director of EGA in Mauritius and the managing director of First Island Trust Company Ltd. He exhibited to his affidavit copies of documents from the EGA files and swore that they were part of the business records of EGA. He was not required for cross-examination.

(d) Ms Chan gave evidence of the maintenance and storage of the files in the ordinary course of business of Acceptor in providing fiduciary and administrative services to UOCL, EGA and Merrell up to August 2000; the entry of data on a computer owned by UOCL, the sending and receiving of emails in the ordinary course of business with UOCL, EGA and Merrell.

(e) Ms Chan, whose role it was to look after the affairs of UOCL, EGA and Merrell, gave direct evidence of her dealings with the appellant. She swore to the appellant's having purchased a computer for the use of those companies and to his having designed and installed computer programs on the computer. She swore also that she was instructed by the appellant as to how to perform her secretarial functions and to various email communications with the appellant, Mr Todd and Scheme participants. She was cross-examined.

(f) In addition to the above witnesses, officers from the Corporation's offices in New Zealand, Mauritius and Hong Kong exhibited to their respective affidavits relevant company records of NET, EGA and UOCL. Records relating to the affairs of EGA were produced through Ms Ramessur, an executive of the Financial Services Commission of Mauritius. Employees of the Standard Chartered Bank of Hong Kong, the Hong Kong and Shanghai Banking Corporation, and the Hong Kong and Shanghai Banking Corporation of Mauritius produced records kept by their respective banks in relation to UOCL, Merrell and EGA. Bank statements produced by them were analysed by Mr Vincent.

[187] The respondent can be expected to conduct itself in litigation of this kind as a model litigant[90] by acting honestly and fairly but it was not incumbent on the respondent to call every person as a witness who had had a connection with the Scheme. Rather, its function was to call such witnesses to give whatever evidence was necessary to prove the respondent's case. There is no evidence that Ms Anderson, Mr Allerdice or Mr Olesnicky would have been available or willing to give evidence. Mr Olesnicky, who was based in Hong Kong, had provided legal advice and services to the appellant. It would seem improbable that a duty of fairness required the respondent to call him.

[188] The plethora of witnesses who did give evidence gave the appellant ample opportunity to adduce evidence on the issues which the appellant now claims could have been addressed by the evidence of other Scheme participants, Mr Olesnicky, Ms Campbell and Mr Allerdice. Mr Allerdice was the senior general manager of Acceptor Trust Corporation Limited, a Hong Kong company which provided secretarial services including the provision of office space and equipment.[91]

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90 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, per Griffith CJ, at p 342; see also *Australian Capital Territory Commissioner for Revenue v Slaven* (2009) 178 FCR 334; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.

91 Reasons para [205].

Mr Allerdice assisted with the setting up of UOCL and EGA and in obtaining a money lender's licence for UOCL.[92] The appellant did not submit that Mr Allerdice had a role in the devising or operation of the Schemes beyond providing services of a secretarial nature. The person who primarily carried out the relevant work was Ms Chan. She gave evidence and she made it plain that the affairs of UOCL and EGA were conducted at the appellant's direction.

[189] Ms Campbell was a manager employed by Harts. What she could have said if called to give evidence was not identified. Nor was it established that she was available or willing to give evidence. Other employees of Harts associated with the Schemes did give evidence and were available for cross-examination. It was not explained why the appellant did not or could not call Ms Campbell, Ms Anderson, Mr Allerdice or Mr Olesnicky as witnesses in his own case.

[190] Even if, as the appellant contended, the respondent had a duty to act fairly in the conduct of the subject litigation,[93] no breach of that duty was established. Unlike in *Morley v ASIC*, on which the appellant relies, the witnesses whose absence was relied on by the appellant were not witnesses of "central significance to critical issues".[94] They were peripheral. The evidence that Mr Allerdice, Mr Olesnicky and Ms Campbell could have given all bore on matters within the appellant's own knowledge. Also, the failure to call the witnesses did not leave the primary judge in a position where he had to rely on the drawing of inferences from unsatisfactory evidence.

[191] The contention that the respondent had the duties of a prosecutor in the conduct of proceedings was but faintly pursued and is unsustainable.[95] This ground of appeal was not made out.

Conclusion

[192] For the above reasons, I would order that:

In Appeal No 13541 of 2010:

1. The appellant have leave to read the affidavit Steven Irvine Hart sworn 5 April 2011;
2. The respondent have leave to read the affidavit of Kristy Adele Bell sworn 20 April 2011;
3. The appeal be dismissed with costs including reserved costs if any.

In Appeal No 2504 of 2011 on remitter from the High Court of Australia:

1. The proceeding be dismissed;
2. The plaintiff pay the defendant's costs of the proceeding including reserved costs as follows:
   (i) the costs of the proceeding to 7 March 2011 (the date of remission) including the costs of the remitter be as ordered by Gummow J in the High Court of Australia;

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92 Reasons para [271].

93 See *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205. Although Morley applied for special leave to appeal to the High Court of Australia (application S41 of 2011), that application was dismissed with no order as to costs on 13 May 2011: *Australian Securities and Investments Commission v Shafron & Ors; Shafron & Anor v Australian Securities and Investments Commission* [2011] HCATrans 128, per French CJ, at p 13.

94 *Morley v ASIC* (supra) at 347.

95 *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1 and *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205.

(ii) thereafter to be assessed on the standard basis and where any scale is applicable according to that scale.

[193] **WHITE JA:** In Appeal No 13541 of 2010 I agree with Muir JA's reasons for dismissing this appeal with costs.

[194] In Appeal No 2504 of 2011 I agree with Muir JA's reasons for holding that Pt 2-4 of the *Proceeds of Crime Act* 2002 (Cth) does not contravene s 80 of the *Constitution* (Cth) and agree with the further observations of the President.