# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Cox; R v Cuffe; R v Morrison* [2013] QCA 10 |
| PARTIES: | **R**<br>**v**<br>**COX, Stephen Brian**<br>(appellant/applicant)<br><br>**R**<br>**v**<br>**CUFFE, John Reginald**<br>(appellant/applicant)<br><br>**R**<br>**v**<br>**MORRISON, Peter James**<br>(applicant) |
| FILE NO/S: | CA No 108 of 2011<br>CA No 205 of 2011<br>CA No 139 of 2011<br>CA No 176 of 2011<br>CA No 175 of 2011<br>SC No 704 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeals against Conviction & Sentence<br>Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 February 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 31 July 2012<br>1 August 2012<br>2 August 2012<br>20 November 2012 |
| JUDGES: | Holmes and Gotterson JJA and Philippides J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Dismiss the appeal against conviction by the appellant, Cox.**<br>**2. Dismiss the appeal against conviction by the appellant, Cuffe.**<br>**3. Refuse the application for leave to appeal against sentence by the applicant, Cox.** |

4. **Grant the application for leave to appeal against sentence by the applicant, Cuffe. Allow the appeal and vary the sentence by reducing the head sentence to five years imprisonment and fixing the non-parole period at two and a half years imprisonment.**
5. **Grant the application for leave to appeal against sentence by the applicant, Morrison. Allow the appeal and vary the sentence by reducing the head sentence to five years imprisonment and fixing the non-parole period at two and a half years imprisonment.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – NON-DISCLOSURE OF EVIDENCE – APPEAL DISMISSED – where the appellants Cox and Cuffe were charged with and convicted of conspiring to defraud the Commonwealth – where the appellants contended the learned trial judge erred in not allowing an adjournment and discharge of the jury after a large volume of documents were disclosed to the defence during the course of the trial – where Cox contended that late disclosure and non-disclosure of documents prejudiced his defence – where Cox complained of conduct of investigators as leading to loss of evidence – where Cuffe contended that relevant evidence was not produced – where no suggestion at trial that relevant evidence not available – whether the trial judge erred in not allowing an adjournment, or discharging the jury, upon the disclosure of documents to defence during the course of the trial – whether any material evidence not disclosed – whether complaints in relation to missing evidence not raised at trial should now be considered – whether any miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – BIAS, DELAY, CONDUCT OF PROSECUTION, CONDUCT OF COUNSEL – APPEAL DISMISSED – where the appellants Cox and Cuffe were charged with and convicted of conspiring to defraud the Commonwealth – where Cuffe contended that trial judge exhibited bias – where Cuffe contended that there was undue delay in proceeding to trial – where Cuffe contended that his counsel did not put submissions as he wished – where Cuffe contended that he was disadvantaged by the Crown's not proceeding against another individual – where no complaint made at trial of delay – whether allegation of bias had any foundation – whether any basis for complaint of counsel's conduct – whether any obligation on Crown to join identified individual – whether complaint in relation to delay not raised at trial

should now be entertained

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant Cuffe was charged with and convicted of conspiring to defraud the Commonwealth – where Cuffe contended that the trial judge erred in failing to instruct the jury that they had to agree on the particulars they found to be proved – where Cuffe contended that the trial judge erred in failing to tell the jury that an acquittal would not prevent other charges being laid – whether any misdirection

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where Cuffe contended that the Crown had not proved his knowledge of falsity of claims of access to funds – whether open to jury to infer knowledge from the evidence – whether the conviction was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicants Cox, Cuffe and Morrison were charged with and convicted of conspiring to defraud the Commonwealth – where Cox was sentenced to nine years and 11 months imprisonment with a non-parole period fixed at three years and four months – where Cuffe and Morrison were sentenced to terms of six years imprisonment with non-parole periods of three years – where each of the applicants sought leave to appeal against his sentence on the ground it was manifestly excessive – where the applicants each faced a maximum term of imprisonment of 20 years – where no evidence that the Commonwealth had suffered any loss as a result of the offence – where over 400 participants in the schemes had paid more than $4.25 million for a service they had not received, with some charged penalty tax – where the trial judge took the loss of those participants into account – where none of the applicants had shown any sign of genuine remorse or co-operated with investigations – where the applicants had co-operated in the facilitation of the trial process – where Cox contended that pre-trial custody was not taken into account – where Cox and Cuffe contended that the sentences imposed on them were excessive by reference to sentences in comparable cases – where Morrison contended that the trial judge had erred in finding that he expected to receive a large future reward for his part in the conspiracy – where Cuffe and Morrison contended that the delay in

prosecution and sentencing should be taken into account – where Cuffe and Morrison did not re-offend over an extensive period – where Morrison contended that he should have been regarded as less culpable than Cuffe – whether Cox's pre-sentence custody should have been taken into account – whether any error in trial judge's findings as to Morrison's expectation and his equal culpability with Cuffe – whether the trial judge erred in not taking into account the delay in prosecution – whether the sentences imposed were manifestly excessive

*Crimes Act* 1914 (Cth), s 19AL, s 29D, s 86(1)
*Criminal Code* 1995 (Cth)
*Criminal Code* 1899 (Qld), s 590AB

*Director of Public Prosecutions (Cth) v Gregory* (2011) 250 FLR 169; [2011] VSCA 145, considered
*Pearce v The Queen* (2005) 216 ALR 690; [2005] WASCA 74, considered
*R v Baldock* (2010) 269 ALR 674; [2010] WASCA 170, considered
*R v Hargraves & Stoten* [2010] QCA 328, considered
*R v Hart; ex parte Cth DPP* (2006) 159 A Crim R 428; [2006] QCA 39, considered
*R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP* [2011] QCA 350, considered
*R v L; ex parte Attorney-General* [1996] 2 Qd R 63; [1995] QCA 444, considered
*R v Peterson* [2008] QCA 70, considered
*R v Ronen* (2006) 161 A Crim R 300; [2006] NSWCCA 123, cited
*R v Walsh* (2002) 131 A Crim R 299; [2002] VSCA 98, discussed
*Ridley v R* (2008) 192 A Crim R 139; [2008] NSWCCA 324, considered

COUNSEL: The appellant/applicant Cox appeared on his own behalf
The appellant/applicant Cuffe appeared on his own behalf on his conviction appeal
K Prskalo for the appellant/applicant Cuffe on his sentence application
J J Allen for the applicant Morrison
J R Hunter SC, with M J Woodford, for the respondent

SOLICITORS: The appellant/applicant Cox appeared on his own behalf
The appellant/applicant Cuffe appeared on his own behalf on his conviction appeal
Legal Aid Queensland for the appellant/applicant Cuffe on his sentence application, and for the applicant Morrison
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA:** Messrs Cox, Cuffe and Morrison were charged with conspiring to defraud the Commonwealth. None of the three gave or called evidence at the trial, and all were convicted. Mr Cox was sentenced to nine years and 11 months imprisonment with a non-parole period fixed at three years and four months, while Mr Cuffe and Mr Morrison were both sentenced to terms of six years imprisonment with non-parole periods of three years. Mr Cox and Mr Cuffe appeal against their convictions and seek leave to appeal against sentence, while Mr Morrison makes only an application for leave to appeal against sentence.

***The Crown case***

[2] On the Crown case, the conspiracy was an agreement to defraud the Commonwealth by promoting tax minimisation schemes for the 1999 and 2000 tax years. The theory of the schemes was this: participating tax payers entered into loan agreements under which they notionally borrowed thousands of dollars at five per cent interest for 10 years, paying a fee to the promoters which was typically 12 per cent of the amount borrowed. Life bonds or insurance policies were issued as security against the loans. The funds were then purportedly invested in retirement village joint ventures or in employee welfare funds, or paid by way of donation to a church building fund, so as to produce an immediate tax deduction.

[3] The prosecution provided the following particulars of the dishonesty underlying the conspiracy:

> "The means by which the agreement was implemented were dishonest in that the promoted arrangements were in fact fictitious and documents produced as purporting to provide evidence of the financial arrangements were false or misleading because:
>
> "(a) There were no lending entities and therefore no loans provided as applied for by the taxpaying participants, so as to enable funds to be applied according to the terms of the arrangements; and/or
>
> (b) There were no genuine life bonds and/or insurance policies issued as security against the loans purportedly advanced by the finance company; and/or
>
> (c) Receipts were issued on behalf of the Caboolture Orthodox Catholic Church College Building Fund which were false and/or misleading as to the donation of sums of money; and/or
>
> (d) Various documents were backdated; and/or
>
> (e) There was no genuine contemplation of investment in any retirement village concept."

***The grounds of the appeals against conviction***

[4] Mr Cox's grounds of appeal were as follows:

> "1. The Learned Judge erred in, not allowing a Longer adjournment, Say 6 Months, and in not Discharging the Jury, after such a large volume of documents was disclosed late in the Trial.

2. The Conduct of the Prosecution, and Late Disclosure, and non Disclosure, and Documents were withheld from the Trial.

3. The Conduct of the Investigators, in not procuring Evidence, and Documents that should have been available for the Defence were allowed to be destroyed or were Lost or mislaid by Law Enforcement Agencies."

[5] Mr Cuffe's grounds of appeal were:

"1. The learned trial judge erred at law on 14th March 2011 when he denied an application to discharge the jury following the discovery of voluminous prosecution evidence not previously disclosed to the defen[c]e.

2. The evidence led was not capable of satisfying a jury, beyond reasonable doubt, that the Appellant had entered into an agreement to defraud the Commonwealth with either or all of the co[-]accused. Accordingly the verdict was unsafe and unsatisfactory."

***The appellants' roles in the schemes***

[6] The schemes were promoted under the name of a company, National Health and Aged Care Pty Ltd. The Crown alleged that Mr Cox was the architect of the schemes and had previously been associated with Mr Cuffe in respect of similar schemes in the past. Mr Cuffe was a priest of the Orthodox Catholic Church at Caboolture. He had obtained from the Australian Taxation Office approval for the establishment of a college building fund, donations to which would be tax deductable provided the fund met certain conditions. He issued receipts in the name of the fund for donations which were then relied on by the participants of the schemes to claim deductions. Mr Cuffe also took a role in relation to the purported retirement village investments, signing an agreement pursuant to which the Church's college building fund was to lend a developer $25 million for the purposes of developing a retirement village at Caloundra. Mr Morrison's involvement began in about February or March 2000 when he became office manager for National Health and Aged Care.

***The Harts schemes as a source of documentation***

[7] The Crown case was that Mr Cox had adapted for National Health and Aged Care's purposes documents used in employee welfare fund schemes organised by Harts Accountants. The prosecution called as a witness Geoff Todd, formerly Mr Cox's brother-in-law. He had been involved in working with Mr Cox for Steven Hart, the principal of Harts Accountants. Mr Todd's role was to act as trustee of a number of the Harts funds, while Mr Cox was involved in liaising with clients. On instructions, in June 1996, Mr Todd set up a company initially under the name "National Welfare Fund Limited"; later it became "National Welfare Trust (New Zealand) Limited" and, later still, "National Employee Trust (New Zealand) Limited", the last on Mr Hart's instruction. The settlor of the trust funds was a company called Golden Dream Pty Ltd. As director of the funds' trustee, Mr Todd signed hundreds of trust documents.

[8] Funds were set up by way of a loan represented by a promissory note from United Overseas Credit Limited, a Hong Kong based company. Mr Todd's dealings with

United Overseas Credit Limited were through a woman named Peggy Chan. The promissory note was then endorsed by the employer, assigned to the employee welfare fund and re-assigned as payment for a 10 year life insurance bond with European Grande Assurance SA, a company incorporated by Hart. At the end of the 10 years, the bond was to be used to pay back the original loan.

[9] At the end of 1998, Mr Cox and Mr Hart had a falling-out, as a result of which Mr Cox and Harts Accountants parted company. In March 1999, Mr Cox had asked Mr Todd to check whether the name "National Welfare Fund (New Zealand) Ltd" was available for registration. Soon after, Mr Todd reserved that name and a couple of other related company names for Mr Cox. At Mr Cox's request, he had incorporated National Welfare Trust (New Zealand) Limited on 31 March 1999, with himself as a director.

[10] Mr Todd was shown a pro forma letter which he said was the same as that which he sent to Harts clients once a welfare fund had been established; but it was on the letterhead of "National Welfare Fund (New Zealand) Limited", which was not a company Mr Todd was associated with. There was this variation: it referred to the payment of establishment fees to Global Finance Limited rather than United Overseas Credit Limited; the former was not a company Mr Todd was familiar with. A series of other documents was shown to him; he said they were identical to those used by Harts Accountants in setting up employee welfare funds, apart from references to "National Welfare Fund (New Zealand) Limited". When he and Mr Cox were working with Hart, he had provided to Mr Cox copies of any of the Harts' documents that he sought, but he had not authorised Mr Cox to use them independent of the Harts schemes.

[11] Mr Todd's name appeared on correspondence and documents provided to clients of National Health and Aged Care Pty Ltd putting money into the company's employee welfare funds scheme. However, he said that he did not enter any arrangements in relation to employee welfare funds with Mr Cox separately from his arrangements with Harts Accountants and was not involved with National Health and Aged Care Pty Ltd. Mr Todd was shown a number of documents with the letterhead "International Welfare Fund Limited" which bore his name or, in some instances, purported to be signed by him; he said he had nothing to do with any of the documents and had not signed them or authorised anyone else to do so. The position was similar in relation to documents with the letterhead "National Welfare Fund (New Zealand) Limited". He was shown a trust deed which described National Welfare Fund (New Zealand) Limited as trustee and Golden Dream as the settlor. It appeared to bear his signature for the trustee, but he had not signed it. Mr Todd denied that he had ever acted as a trustee for welfare funds set up by Mr Cox for his own clients, as opposed to Hart's clients.

***The lenders nominated in the scheme documents***

[12] Some of the participants investing in the schemes had completed loan agreements which named as the lender "Global Finance Limited", a company incorporated in the United States which was said to have its registered office at a New Jersey address. Other documents, however, showed it as a Hong Kong based company. A variety of Global Finance Limited loan documentation in electronic and hard copy form was seized from Mr Cox's home. It included pro forma documents for loan applications, loan offer letters and loan agreements. Stamps had been placed on the loan documents using a cut and paste procedure. The Crown invited the jury to draw the inference that Mr Cox had adapted documents used in the Hart schemes.

[13] The Crown and the accused made a joint admission at the trial that the only verified record of an entity named "Global Finance Limited" was a search report on a Hong Kong based company of that name, which was said to be a private local company. It was also admitted that enquiries conducted in Hong Kong indicated that it had an association with other entities operated there by Steven Hart and his associate, Michael Allardice.

[14] Later loan agreements, however, were with "SR Reeves and Associates Pty Ltd" and "SR Reeves and Associates Ltd". Sharon Reeves, the principal of the company SR Reeves and Associates Pty Ltd, gave evidence that Mr Cox asked her to set up the company and perform administrative work for him. He provided her with discs on which were financial programs and loan agreements which identified the lender as Global Finance. Mr Cox edited the documents to insert the name "SR Reeves and Associates" in place of Global Finance. Her contact thereafter was principally with Mr Morrison. Ms Reeves identified a pro forma loan agreement in which SR Reeves and Associates Ltd was described as the "lender" as a document provided by Mr Cox. The intention, she said, was that once Mr Cox had funds in place, the loans would be made through her company with the borrowers being led to believe that it was the financier, but she did not, in fact, sign off on any loan agreement as financier. At Mr Cox's request in June 2000, she provided him with an authority, retrospective and prospective in its terms, to act on her behalf "in relation to the provision of financial accommodation".

[15] An auditor who had analysed bank accounts associated with Mr Cox and National Health and Aged Care Pty Ltd said that he could find no evidence of any loan funds coming into the accounts. There was a single cheque butt which recorded payment of $50,000 to Global Finance, but the cheque itself was not recovered. The amount of $50,000 was deposited on the same day to one of Mr Cox's accounts, the inference being that it was the money represented by the cheque.

***The security providers nominated in the scheme documents***

[16] The schemes involved purchase of a life bond or insurance policy as security for the loans. The insurance bond provider was named in earlier versions of the scheme documents as "European Grande Assurance SA" and in later documents as "Security Life Insurance Co. Ltd". The joint admission recorded that European Grande Assurance SA had been incorporated on the instructions of Steven Hart. Again, the Crown case was that Mr Cox had made use of that entity's name without its actual involvement.

[17] The Crown called as a witness James Batty, who was the managing director of a group of Vanuatu registered companies which included Security Life Insurance Co Limited and Equity Investment Bank Limited. A man named Robert Agius was a non-executive director of those companies. The companies were also involved in employee welfare funds, Equity Investment Bank as lender and Security Life Insurance Co Limited as the provider of life insurance bonds. Mr Batty said he had met Mr Cox in March 2000. They had discussed the prospect of Security Life Insurance policies and bonds being used in connection with Mr Cox's employee benefit and joint venture retirement village schemes. Mr Batty and two employees had travelled to Brisbane to look further into the proposed arrangement, the upshot being that Mr Batty decided against going ahead.

[18] Mr Batty said that it was not apparent how participants in the schemes were to repay loans, nor was it evident that there were any funds with which to build retirement

villages. He had provided some pro forma documents to National Health and Aged Care Pty Ltd, which were later found among the documents held by the company's liquidator, Hall Chadwick. He had advised Mr Cox that Security Life Insurance Co Limited was not to be "used in any unauthorised way".

[19] Notwithstanding Mr Batty's decision not to proceed with any association with the Cox schemes, documents bearing the name "Security Life Insurance" were issued to participants. A single cheque butt was found amongst the National Health and Aged Care Pty Ltd documents which recorded a payment of $50,000 to Security Life. Again, there was a matching deposit into Mr Cox's company account on the same day on the basis of which the Crown invited the jury to infer that the butt did not reflect any actual payment to Security Life.

[20] Under cross-examination, Mr Batty said that Mr Agius might have been present when he, Mr Batty, was talking to Mr Cox. When it was suggested to him that Mr Cox might by arrangement with Mr Agius have paid fees for insurance proposals to an Equity Bank account, Mr Batty said that he knew of no such thing. Asked if he knew a company called Bastille Investments Pty Ltd, Mr Batty answered,

> "No, doesn't make any recollection."

Mr Batty was asked by counsel for Mr Morrison if he knew a person called Geoff Todd, an accountant from New Zealand, and answered,

> "I don't think so, no."

That was the extent of Mr Batty's cross-examination about Bastille and Mr Todd.

***The charitable donations and retirement village investments***

[21] Mr Cuffe issued receipts for donations to the college building fund with a face value of some millions of dollars, although no actual funds were received. Instead he was given life assurance bonds purportedly issued by First Fidelity Assurance, (supposedly a United States company which did not, according to prosecution evidence, exist) guaranteeing the college building fund the nominated amount of the bond. The certificates were produced locally and signed by Mr Morrison. Some of Mr Cuffe's receipts, it could be demonstrated, were back-dated. He had received one payment from Mr Cox's company Y2K Advisors, in an amount of $83,000 which he characterised as interest; the prosecution suggested that the jury might regard it as a fee for services.

[22] One of the supposed uses of loan funds was by way of investment in a retirement village joint venture. A property developer gave evidence that he had discussed with Mr Cox and Mr Cuffe a proposal for National Health and Aged Care to provide funding through the Orthodox Catholic Church college building fund for a retirement village project; that resulted in the loan agreement signed by Mr Cuffe. The developer obtained an option to purchase property at Caloundra which he assigned to National Health and Aged Care Pty Ltd, but the property purchase was never settled. Nor did the proposed loan of $25 million to the developer eventuate.

***Late disclosure of documents***

[23] The first ground of appeal for each appellant arose from the prosecution's late disclosure of documents. The sequence of events was as follows. On the twelfth day of the trial, 8 March 2011, counsel for the three accused men sought a 24 hour adjournment because they wished to examine two additional boxes of material copied

by officers of the Australian Taxation Office, which the Australian Federal Police had now delivered to the Director of Public Prosecutions. On the following day, a further application was made for another 24 hour adjournment because the defence had become aware that there was more material contained in 13 archive boxes which had been in the possession of the Australian Federal Police. That application, which was made on a Thursday, resulted in an adjournment of the trial to the following Monday, 14 March 2011.

[24] When the court resumed on 14 March, counsel for Mr Cox and Mr Cuffe applied for the discharge of the jury on the basis of the large amount of material which had still to be examined. (Counsel for Mr Morrison was opposed to any discharge of the jury.) It was submitted that the late receipt of material could affect decisions made about the conduct of the case, including the putting of questions to Crown witnesses. After some discussion of the nature of the material which had been seen thus far, the learned judge decided to exercise his discretion to refuse the applications on the basis that, in the circumstances, adjournment for two weeks could overcome the problems encountered. Counsel for the Crown undertook to recall any witnesses needed for further cross-examination. The members of the jury were asked to consider whether a two week adjournment would cause them any difficulties; they responded in the negative. His Honour concluded by remarking that if things were to change, the position might have to be revised.

[25] On 23 March 2011, the trial was mentioned in the absence of the jury. Counsel for Mr Cox indicated that he had "for the large part" gone through the material and was proposing to identify documents which he would invite the Crown to tender. He raised the difficulty that the Crown had advised that supplementary statements from two witnesses were likely in light of the material now revealed. He hoped that the process would be completed by the end of that week. Counsel for Mr Morrison wanted the trial to resume the following day, 24 March, and counsel for Mr Cuffe had no view. Counsel for the Crown, like counsel for Mr Cox, submitted that it should resume the following Monday, 28 March.

[26] The trial judge noted that the question of which documents were to be tendered could be resolved between Friday lunchtime, when the court would adjourn, and the end of the weekend and that the Crown had indicated it would not call the witnesses from whom further statements were being obtained until the defence had proper opportunity to consider them. He concluded that the trial should resume the following day. The trial proceeded on 24 March 2011 with no further application for discharge of the jury or any further adjournment.

[27] The late disclosure of material was clearly unsatisfactory. However, the trial judge's decision to refuse the application for the discharge of the jury on 14 March was a prudent and proper one; it allowed defence counsel to establish exactly what confronted them, and it is to be noted that his Honour did not foreclose the possibility of taking a different course if the adjournment were not sufficient. On the mention of the trial on 23 March, counsel raised no complaint about the adequacy of the adjournment already given and did not renew the application for discharge of the jury. The obvious conclusion is that counsel considered that the time provided for the examination of material was adequate and that there remained no forensic disadvantage of such proportions as to require a further application for the jury's discharge. Counsel for all three accused were capable and experienced; there is no reason to suppose that they misjudged the situation. Mr Cox and Mr Cuffe cannot succeed on the first of their grounds.

***Non-disclosure of documents***

[28] The second of Mr Cox's grounds related to both that late disclosure (which appears to have been remedied by the adjournment) and non-disclosure of other documents, which fall into three groups: five particular documents which the Crown said had been provided for inspection in March 2011, but which Mr Cox asserted had not been amongst the material disclosed then; two affidavits of Mr Todd sworn in connection with proceedings against Mr Hart, and associated documents; and 39 compact discs copied from computers and discs seized during a search of Mr Todd's New Zealand property.

*Documents not provided for inspection during the trial*

[29] The trial proceeded with all parties having access to a large electronic database of documents, all of which were assigned document numbers and bar-coded. Only a small proportion of them became exhibits. In preparing for his appeal, Mr Cox obtained copies of a number of documents, some of which, it was contended, had not been made available at trial. In an affidavit, Mr Holliday, the Legal Aid Queensland solicitor who acted on Mr Cox's behalf at the trial, said that documents with the references "SC93" and "SC94" had not been disclosed to him. Mr Nelson, who was counsel for Mr Morrison, said that he had not previously seen documents marked "SC79", "SC93", "SC94", "SC152" and "SC153". The position of the Crown, on the other hand, was that all of that material had, in fact, been in the boxes inspected in March.

[30] Mr Holliday and Mr Nelson were called and cross-examined as part of Mr Cox's application to adduce those documents as fresh evidence. Mr Nelson maintained that he had not seen the documents he nominated; Mr Holliday conceded that SC93 might have been in amongst the materials he had seen, but the thrust of his evidence was that he did not believe that to be the case.

[31] An officer of the Director of Public Prosecutions office, Ms King, deposed that the material provided for inspection to Mr Cox after the trial was the same material produced in March 2011 for inspection by his and the other accused's legal representatives. She believed that she had identified SC93 as one of the documents disclosed in March because she had then had some concern as to whether it was privileged, although it had already been disclosed. She had then taken steps to place SC93 in an envelope marked "privileged". Ms King was not required for cross-examination by either appellant.

[32] I have not found it necessary to make any finding as to whether the documents were or were not among the records inspected by the defence, preferring to deal with the appeal ground on the assumption that they were not. The real question is whether they were material.

[33] SC79 requires no consideration; it was a property seizure record about which Mr Cox did not make submissions. But the remaining four documents, he said, contained vital information. SC94 was a request for assistance in the investigation of Steven Hart. It was made by an officer of the Attorney-General's Department on behalf of the Commonwealth Director of Public Prosecutions, the Australian Federal Police and the Australian Taxation Office, apparently to authorities in Hong Kong. SC93 was a summary of the basis on which the request was made. SC153 was an application by an Australian Federal Police officer for warrants to search premises

associated with the schemes. SC152 was a document headed "Brief Facts" apparently prepared in connection with that application.

[34] The significance of SC153, according to Mr Cox, was that it referred to the fact that officers of the Australian Taxation Office had established that Mr Cox had a storage unit at Slacks Creek, had entered the unit and had copied documents. It was noted that Mr Cox had not paid the account for storage fees and the manager of the storage company had advised that a number of items in his unit had been sold at auction. (That topic will be returned to in considering Mr Cox's third appeal ground.) Mr Cox asserted that he had been informed that the Australian Taxation Office had seized all the documents held and on the strength of that information, ceased to pay for the storage facility; SC153 was the first intimation that the documents had not been taken. In fact one of the Australian Taxation Office staff who copied the documents at the storage unit gave evidence at the trial and could have been cross-examined had Mr Cox's counsel held instructions to suggest any of the documents in the storage unit were of critical importance. In any event, identical information to that in SC153 was contained in another document, NZ2, a search warrant application in respect of the National Health and Aged Care schemes made under mutual assistance legislation in New Zealand; it was available to the defence at trial.

[35] The significance of SC93 and SC94 on Mr Cox's argument was that they went to contradict the Crown's case that there was in truth no financier for the schemes and no loans were actually made. The argument is not easy to follow, but it is necessary to set out some detail of what SC93 in particular contained. It asserted that Mr Cox and Mr Todd had been involved with Hart in setting up income tax evasion schemes using employee welfare funds, but Mr Cox had left Hart's employment and set up his own scheme. Hart's schemes, it was said in SC93, had run since the 1997 income year. There were a number of scheme lenders, but ultimately United Overseas Credit Limited took the role. The trustee was first Asiaciti, but later Mr Todd's company, National Employee Trust (New Zealand) Ltd, under its various names. The company named as providing insurance bonds was originally Strathford Life Insurance Company Ltd, but later European Grande Assurance SA.

[36] The mechanism of the schemes as set out in SC93 was much as Mr Todd described in his evidence, with this additional information: they involved a round-robin in which no money changed hands except by payment of Hart's fees. The document noted that, on the advice of a Mr Robert Agius of Bastille Investments Limited, Hart provided a firm of solicitors with a copy of various insurance documents including the "Strathford Life Insurance Policy". It was believed Hart was seeking to have the solicitors prepare an insurance policy for his 1998 scheme.

[37] The assistance sought in SC93 included the execution of search warrants from a list of entities including United Overseas Credit Limited, a firm of accountants in Hong Kong and companies called Zetland Corporate Services Limited and Zetland Financial Group Limited. In respect of United Overseas Credit Limited and the firm of accountants, the request for search warrants was for all documentation in relation to dealings between that entity and various other listed entities including Mr Cox, Strathford Life Insurance Company Ltd and Robert Agius.

[38] In submitting for the relevance of SC93, Mr Cox pointed to a document which had been seized from his house. It was an unsigned deed expressed to be made between him, as trustee, and Bastille Investments Limited as beneficiary, care of Robert Agius. Under it, he declared that he held 700 shares in a company called

"National Employee Welfare Funds Pty Ltd". The document was signed by Mr Cox, but not by Bastille Investments or anyone else. Clearly, in its unexecuted form it proved nothing about whether there was any relationship between Mr Cox and Agius or Bastille. But SC93, Mr Cox argued, showed that there was a link between him, Robert Agius and Bastille. The fact that Mr Agius was named in association with Bastille also went to show that Mr Batty must have been lying when he denied any recollection of the company, since he and Mr Agius were co-directors of the Vanuatu companies.

[39] Another document which had been previously disclosed, "SC78", was a Hong Kong police report referring to the Zetland group of companies and to Global Finance Limited, the latter with a Hong Kong address. Among the material disclosed but not tendered by the Crown was an affidavit of Peggy Chan made in connection with the proceedings against Steven Hart. She worked for a company, Acceptor Professional Directors Limited, dealing with documents on Hart's behalf, including insurance documents and loan application forms. Her duties included transferring money from United Overseas Credit Limited. (One of the joint admissions made at the trial was that Peggy Chan took instructions from Steven Hart in providing administrative services for United Overseas Credit Limited and European Grande Assurance SA.) An Austrac search report showed that on 13 June 2000, a man called, Barber, who, Mr Cox said, was one of his clients, had sent $1,461 to Acceptor Professional Directors HK. That must, Mr Cox asserted, have been an interest payment made to that company. The Hong Kong police report SC78 showed that that agency had been asked to make inquiries about a range of companies, including the Zetland Group and Global Finance. Mr Cox's proposition was that that showed a connection between the Zetland companies and Global Finance.

[40] The lack of substance to the argument is self-evident: essentially it was that because the individuals and entities were all named in SC93 and SC78 (themselves hearsay) as subjects of interest, a connection between them of whatever type Mr Cox now chose to assert in submissions was established. From that it should be deduced that SC93 was of such vital importance the failure to produce it at trial (assuming that occurred) had caused a miscarriage of justice. The proposition is nonsense. Generally, the aim of Mr Cox's submissions seemed to be to seize on the mention of any entity connected with the Hart schemes with which he had earlier been associated and suggest that the same set of entities must have continued to play a role in his schemes. Apart from Mr Cox's assertions from the Bar table, there was no reason at all to suppose that they had done so.

[41] The five documents were inadmissible hearsay and should not be admitted now. Even assuming they were otherwise admissible, they had no relevance to any of the issues in the trial.

*Thirty-nine discs*

[42] Mr Cox advanced submissions about the Crown's failure to provide to him copies of 39 compact discs. The background was that a judge in New Zealand issued a search warrant in the investigation of Mr Cox under mutual assistance provisions, pursuant to which a search was carried out on Mr Todd's premises on 31 July 2002. Five computers and a number of floppy discs and compact discs were seized. The data on those computer hard-drives and discs were copied by police in New Zealand, and provided on 39 compact discs to the Australian Federal Police. Those discs were

sent with other seized material, arriving on 29 August 2002; the material was recorded on its receipt as seizure 913470. Apart from the 39 compact discs, the material was held by the Australian Federal Police property registrar and its movements duly recorded. The compact discs, however, were delivered to the Australian Federal Police computer forensic team and never made their way into the property register.

[43] Initially, the Crown asserted that the contents of the discs had been placed on a single disc provided to Mr Cox's legal representatives during the trial, but in the course of the appeal it became apparent that that was not so. A disc had been provided, but it did not represent the entirety of the information from the New Zealand police. Further inquiries were made resulting in the provision of a fresh affidavit, the effect of which was that the Australian Federal Police had in 2002 copied the compact discs to a hard drive, but neither discs nor hard drive could now be found. After the court had reserved its decision on the appeal, the compact discs came to light, further affidavits were provided, and the appellants were given the opportunity to cross-examine their deponents.

[44] The compact discs were not recorded in the property register, but their details were noted in the notebook of a member of the computer forensic team who had copied them to a hard drive. A computer forensic examiner, Mr Betts, said that he was asked if he could arrange for an examination of the data on them, using a key word search. He had extracted information from the compact discs, primarily emails, and copied it onto one disc in February 2003. It was a copy of that compact disc which was provided to the appellants' legal representatives. The 39 compact discs were placed in the Robina storeroom of the Australian Federal Police office. Mr Betts said that in August 2012 he attended the AFP Robina office to remove items in preparation for that office's closure. In the course of doing so, he found the discs but did not know to what they related. Later, another Federal Police officer, Mr Holder, asked him if he knew what had become of the compact discs provided by the New Zealand police; Mr Betts checked and confirmed that those at Robina were the ones sought.

[45] On 16 August 2012, the Director of Public Prosecutions office was provided with a copy of the 39 compact discs which were then subjected to various processes. A computer forensic examiner copied them to something he described as an "AFP evidence repository" and then extracted all email, correspondence, Word documents, PDF documents and spreadsheets, which he copied onto compact discs. A key words search was then performed. It was for any of the corporate entities mentioned in the evidence in connection with the scheme; any correspondence between Mr Todd and any of Mr Cox, Mr Cuffe, Mr Morrison, Mr Batty and Mr Agius; and any reference to 14 bank accounts mentioned in connection with the scheme over the period between 1 May 1999 and 6 February 2001. The process produced 5,376 entries of interest and all of the relevant documents were then examined. They included multiple copies of some documents and a large number of personal emails and business documents of Mr Todd, his family members and his clients. A small number of documents could not be opened.

[46] The end result was the identification of three documents for disclosure. They were, an unsigned deed of agreement between Mr Hart, Mr Cox and Mr Todd dated 29 April 1998, a copy of which had previously been disclosed; a notice to participants in the Harts schemes advising that Mr Cox would no longer be "assisting"; and a spreadsheet showing deposits and transfers of funds, one of which was a deposit to Y2K Advisors. That spreadsheet had not previously been disclosed but the deposit

itself appeared on an account statement and will be discussed later in these reasons. Mr Cox made two points: that all of the compact discs should have been disclosed during his trial and that it was possible that the discs now produced to the Court were not, in fact, the original discs. As to the documents now produced from them, it would have assisted had he been able to do a computer search to demonstrate that Mr Todd was the author of the unsigned deed of agreement. Mr Cox took no point about the notice to Harts scheme participants. He maintained that the spreadsheet was not accurate.

[47] Section 590AB contains the disclosure obligation of the prosecution. It is to give an accused person

> "full and early disclosure of –
>
> (a) all evidence the prosecution proposes to rely on in the proceeding; and
>
> (b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person."

[48] The obligation to give disclosure does not relate to every document which comes into the hands of the prosecution. Where large quantities of material have been seized from computer discs and hard-drives, as occurred with the search of Mr Todd's premises, there is no general obligation on the prosecution to provide all of that material to the defence. To do so in this case would have been a considerable breach of Mr Todd's privacy. The obligation was limited to the material which might tend to help the defence, and for that purpose, it was rational to conduct key word searches of the kind the prosecution undertook in 2003 and again in 2012. At no stage was there an obligation to hand over the 39 compact discs. As to the three documents which were identified as disclosable, the provenance of the Hart/Todd/Cox agreement was irrelevant; Mr Todd had given evidence about the notice sent to Harts scheme participants, so its content was already in evidence; and the accuracy of the spreadsheet was immaterial, since it contained no relevant information not already disclosed.

[49] The Australian Federal Police management of the compact discs seems to have been remarkably casual, but there is no reason to suppose that the items produced in Court were not the original discs provided by the New Zealand Police. Their markings correspond with what was recorded in the notebook of the officer who had copied them in 2002. The prosecution seems to have laboured under and disseminated the misapprehension that the disc it provided to the legal practitioners contained the entirety of the 39 discs. That was an unfortunate piece of miscommunication, but it made no practical difference. If the Crown was right in its identification of the material on the compact discs which might tend to help the defence and which was then handed over, the physical whereabouts of the 39 discs themselves was immaterial. There is nothing to make this Court suppose that what was done to identify material on the discs failed to bring to light anything of relevance to the defence. The search for the 39 discs has been an interesting excursion into how not to manage copies of seized documents, but it has raised nothing which would suggest any miscarriage of justice.

*The affidavits of Mr Todd*

[50] Mr Cox complained that affidavits sworn by Mr Todd in 2004 and 2005, and associated documents, had been withheld from him. The affidavits were sworn in confiscation proceedings against Mr Hart. Among the documents which attracted Mr Cox's interest were some emails exchanged with Hart and an exercise book with notes in Mr Todd's handwriting. In an email dated 25 November 1999, Mr Todd mentioned that he had telephoned Mr Batty in relation to the transfer of trusteeship of a superannuation fund and anticipated meeting him. The handwritten notes also referred to an expected meeting.

[51] The effect of that, Mr Cox maintained, was to show that there must have been a relationship between Mr Batty and Mr Todd and hence with him also, since he was working with Mr Todd, and thus that Mr Batty was lying when he said he had not dealt with Mr Cox and when he said he did not think he knew a person called Geoff Todd. All of that, of course, is speculative in the extreme. The contact to which Mr Todd referred was made on behalf of Steven Hart, whom Mr Batty said that he did know, so the lack of recollection does not suggest any avoidance of the subject matter. More importantly, if Mr Cox had given his counsel instructions that Mr Batty had some relevant business connection with Mr Todd or had, in fact, himself entered into a business arrangement with Mr Cox, those matters would inevitably have been the subject of cross-examination. They were not.

[52] Mr Cox also relied on bank statements for National Welfare Trust (NZ) Ltd, marked to the attention of Mr G Todd, which showed on 31 August a withdrawal of $99,900. Another set of bank statements for a business cheque account in the name of "Mr SB Cox National Employees Funds", contained for 31 August 1999, a credit entry of $99,890, recorded as "PAYMENT OF Y2K FEES- NATIONAL WELFARE TRU". This must, Mr Cox said, be the same amount. Other entries in the New Zealand account showed that funds had been deposited to it from United Overseas Credit. This showed, Mr Cox said, that funds were being moved from Hong Kong to Mr Cox's account which, Mr Cox said from the bar table, would have been fees from bonds. There are a number of problems with that assertion, one of which is that there was no evidence as to what the transfer from National Welfare Trust (NZ) Ltd represented; another, that the deposits to the New Zealand account from United Overseas Credit seem to have been made several years later, in 2004 and 2005; and a third, that it was not suggested to Mr Todd at the trial that he had forwarded funds to Mr Cox in respect of the latter's schemes.

***The conduct of the investigators***

[53] Mr Cox asserted that on a search of his home in 2000, officers of the Australian Federal Police and Australian Taxation Office had damaged software on his computers so that exculpatory emails and accounting programs were destroyed. In addition, in late 2000, officers of the Australian Taxation Office had entered his storage facility and copied documents and then replaced the lock on the shed. Mr Cox's complaint was that because the Australian Taxation Office had not paid for the storage thereafter, the owner of the facility had ultimately disposed of the contents. Whatever the validity of any of those statements, all of the issues concerning lost documents were known at trial and could have been explored there, if there were anything in them. If it were to be suggested that there was some difficulty in receiving a fair trial because of the destruction of evidence, an application for a stay might have been made.

[54] Mr Cox also claimed that the Australian Federal Police had not done sufficient to explore the possible existence of Global Finance Limited in Hong Kong. Again, if questions were to be raised about the extent of investigation, they could readily have been raised at trial. Instead, the status of Global Finance Limited was the subject of an admission.

[55] The difficulty in accepting Mr Cox's theme that somewhere there existed a full set of exculpatory documents is that, not only did he not give evidence at his trial about any of the transactions which they are supposed to have shown, but questions put by his counsel in cross-examination did not suggest any of the financial arrangements for which he now contends.

[56] Mr Cox has raised nothing which would suggest there was any miscarriage of justice in his conviction. The appeal against conviction must be dismissed.

***Mr Cuffe's contentions on his appeal against conviction***

[57] Mr Cuffe's first appeal ground has already been dealt with. His second ground was that the evidence could not have satisfied the jury to the required standard of his guilt, but he advanced little in relation to it. (Mr Cuffe appeared for himself on his appeal against conviction, although he was represented by counsel on his application for leave to appeal against sentence.) Instead, he raised a number of disparate complaints. The Crown did not take objection to their being considered by the Court and I will, accordingly, deal with each of them.

[58] Mr Cuffe contended that the trial judge had exhibited bias because, on his count, there were 10 instances of legal argument in which the prosecution point of view prevailed. A presumption of innocence and the inequity of resources as between prosecution and defence should have disposed the judge to ruling in favour of the defence. Mr Cuffe did not isolate the incidents to which he referred. But, as counsel for the respondent pointed out, the trial judge did rule against the Crown on a major point. Its argument that proof of particulars (b) and (c) would be sufficient to make out a dishonest conspiracy was rejected, on the basis that the absence of genuine security and the issuing of misleading receipts were not capable of causing financial detriment to the Commonwealth. In any event the thesis that rulings must operate by reference to some law of averages is, of course, misconceived, and must be rejected.

[59] Mr Cuffe pointed to the fact that documents had been lost or destroyed. A tape-recording of his interview with officers of the Australian Taxation Office could not be found and only a transcript of it was produced. However, Mr Cuffe's counsel indicated that he wished the transcript to go into evidence, later basing submissions about his client's co-operation with the Australian Taxation Office on it to mount an argument that it showed an honest intent. There is no reason to suppose that the absence of the tape itself caused Mr Cuffe any prejudice.

[60] A cheque for $50,000 written on the church building fund had been referred to but not produced. It was drawn against the funds paid by Y2K Advisors. Mr Cuffe's chief annoyance about this seemed to be that because the cheque could not be produced, the jury was left with the impression that he might have signed the cheque when, according to Mr Cuffe's oral submissions here, the cheque was actually signed by his wife and the church treasurer. If he had signed it, it would have been a breach of the *Bankruptcy Act* because he was, at the time, an undischarged bankrupt. But the Crown took no point about Mr Cuffe's bankrupt status, and it seems most unlikely

that he jury perceived that there was any issue arising from it. Certainly his counsel raised no concern in that regard. The significance of the cheque was not who had signed it but who had benefited from it.

[61] Mr Cuffe also raised a complaint that bond certificates taken from his church had not been produced at trial. Those taken, he said, were bond certificates signed by Mr Morrison. He asserted that he had refused to accept a set of certificates tendered at trial which were marked as life assurance bonds and bore the signature of Mr Cox. (They were seized from National Health and Aged Care's Milton office.) He personally considered the difference significant because he had been promised corporate bonds which would maintain constant capital value as opposed to assurance bonds which would have a present worth of less than their face value. However, given that none of this was put at trial – that the bonds were not those he had accepted or that there was any difference in their features – Mr Cuffe's submissions in this regard amounted to a late attempt to give evidence.

[62] The undoubted delay in the prosecution was also the subject of a submission by Mr Cuffe. He had first met with Australian Taxation Office officers in 2000 and had made a statement for provision to the Australian Federal Police in 2003. His memory had faded by the time of trial and he was not able to obtain a copy of his 2003 statement. When the matter came to trial, it was difficult to test the veracity of witnesses. However, if it were to be said that an unfair trial was rendered impossible, that was a matter for an application at first instance, not something to be raised for the first time here.

[63] Mr Cuffe made some complaints of his lawyers' conduct of the trial. He said that his lawyers had refused to challenge minor factual inaccuracies in witness statements. Plainly, there may well have been good forensic reasons for counsel not to do so. The prosecutor had asked the jury to draw an inference that Mr Cuffe had used the funds paid by Y2K Advisors to reduce the balance of the mortgage on a relative's property. Mr Cuffe considered that his counsel should, during his address, have challenged that conclusion by reference to property records which were in the public domain. What the complaint amounts to is that Mr Cuffe, while choosing not to give evidence, nonetheless wanted his position put, impermissibly, through submissions. Counsel could not, of course, have made submissions on material not in evidence.

[64] An argument which Mr Cuffe advanced about the discouraging effect of his conviction could not constitute any conceivable appeal ground. Mr Cuffe also raised complaints about claims of privilege. He referred to the claim of privilege over SC93. But the argument as to SC93 was whether it had been disclosed to the defence at all; the prosecution's account of its being put it into an envelope marked "privileged" related to what happened after the March disclosure of documents. In addition, Mr Cuffe asserted that there was a claim of privilege in respect of the bond certificates taken from his church at the committal hearing. Whether that is right or wrong, no privilege claim was made over any document at the trial.

[65] Mr Cuffe complained that his defence had been disadvantaged because whereas at committal he had been charged with conspiring with three other persons, Mr Cox, Mr Morrison and another man named Choy, Mr Choy was not a defendant at the trial. Since he was someone with whom Mr Cuffe had had very little contact, his presence as an accused would have made it easier for him, Mr Cuffe, to prove that the charge against him was implausible. At least, there should have been another committal.

The committal depositions were not, as is usual, before this Court, but if, as Mr Cuffe asserts, he had very little to do with Mr Choy, the case against the latter seems unlikely to have had much bearing on the conspiracy alleged against Mr Cuffe. There could be no reason then, for thinking that Mr Cuffe was not properly committed for trial. The prosecution could hardly be expected to continue with a case which it did not think it could make out against Mr Choy in order to cast Mr Cuffe in a better light.

[66] Mr Cuffe said that the indictment for conspiracy was "duplicitous" and hence, defective, but it became apparent that he meant that it was underhanded and improper rather than using the word in any legal sense. Part of his argument concerned attributing a motive to the prosecution of wanting to ensure that Mr Cox was convicted. In addition, he said, the prosecution had not demonstrated that he had any knowledge that Mr Cox's claims to have access to funds were false. It should have been evident that if he back-dated receipts it was because he was given incorrect information; none of the witnesses who received back-dated receipts had claimed to have entered into any arrangement with Mr Cuffe to obtain them. The prosecution had slandered his character. But it was properly a matter of inference whether the back-dating of the bond certificates, in circumstances where the church itself received nothing from funds supposedly paid, was done in furtherance of the conspiracy. It was open to the jury to conclude from the evidence that Mr Cuffe acted as he did in the knowledge that the schemes had no substance. As to the slander, Mr Cuffe did not point to precisely what he had in mind apart from the allegation that he had issued back-dated receipts.

[67] Two directions by the trial judge were the subject of Mr Cuffe's submissions. The first was that his Honour had declined to instruct the jury that it was necessary that they agree on which of the particulars they found to be proved. Mr Cuffe said that in consequence, his small part in what had occurred might have been overshadowed in the jury members' minds by the different aspects of what had to be considered. The jury had not been specifically directed to consider whether he knew of dishonesty or had been deceived by others. But the trial judge's approach was in accordance with *R v Walsh*[1] in which it was held that, where the crime was conspiracy to defraud by means of false representations, the agreement to make any particular representation was not an essential element of the crime. What was essential was the agreement to act dishonestly; the particulars were simply what the prosecution relied on in inviting the jury to infer the dishonest agreement. There was no need in *Walsh*, or in the present case, to direct the jury about a need for unanimity as to any particular aspect of dishonesty. As to Mr Cuffe's concern about the lack of attention to his own role, the jury was repeatedly instructed to consider the questions of knowledge and intention separately in respect of each of the accused. The trial judge specifically reminded them of Mr Cuffe's counsel's submissions about Mr Cuffe's belief in the genuineness of the arrangements and his having been deceived by Mr Cox.

[68] Secondly, the jury had sought a redirection as to whether they could convict one of the accused on the basis of conspiracy with another person not named on the indictment. The judge had directed that they could not do so; that they could not convict unless satisfied of the guilt of at least two of the accused. Mr Cuffe did not take issue with that but with the judge's failure to tell the jury that a not guilty verdict would not prevent other charges being laid. The result, he said, was that the jury may have felt compelled to convict him in order to convict Mr Cox. But it would have

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1 (2002) 131 A Crim R 299.

been entirely improper for the trial judge to invite the jury to speculate as Mr Cuffe suggested.

[69] Mr Cuffe has raised nothing of substance in his appeal against conviction. It must be dismissed.

***The applications for leave to appeal against sentence***

[70] Each of the applicants sought leave to appeal against his sentence on the ground that it was manifestly excessive. Mr Morrison was permitted in the course of argument to add a further ground, that the trial judge had erred in finding that he expected to receive a large future reward for his part in the conspiracy.

[71] The applicants each faced a maximum term of imprisonment of 20 years. The Crown acknowledged, however, the relevance of the repeal of the relevant offence provision in 2001, and its replacement by a series of offences in the *Criminal Code* (Cth) which prescribed a maximum penalty of 10 years imprisonment, as some indication of a change of attitude by Parliament with regard to such fraud offences.[2]

***The applicants' antecedents***

[72] Mr Cox was between 40 and 42 years of age at the time of the offence. He had four adult non-dependent children. His criminal history consisted of convictions for weapons offences for which he was fined in October 2003 and 11 counts of misappropriation with a circumstance of aggravation under the *Criminal Code* (Qld), committed between November 1995 and January 1997. He had defrauded investors in a company he had promoted, in an amount of $312,500. Having absconded on bail on those offences in November 2003, he was re-arrested in June 2008 and convicted in April 2009 after a 15 day trial. He was sentenced to concurrent terms of imprisonment, the longest of which was six years. His parole eligibility date on that sentence was 29 September 2011 and his full-time release date 1 May 2015.

[73] Mr Cuffe was aged between 50 and 51 at the time of the offence. He had been convicted in 1999 of being knowingly concerned in the management of a company while a bankrupt. The trial judge regarded a submission that he was naive and trusting as inconsistent with his objective conduct. He had indirectly benefited by about $94,000 for his role in the charity donation scheme and the retirement village scheme. The false documents he created were critical to the schemes. His involvement continued over substantially the whole of the period charged. The trial judge rejected a submission that most of the money was used for the church. A number of references from family members and friends spoke well of Mr Cuffe. He had a large dependent family, the youngest of his children being aged 11.

[74] Mr Morrison was aged between 37 and 39 at the time of the offence. No references were placed before the Court on his behalf. Mr Morrison was living in a relationship but it was not suggested that his partner was dependent on him. It was submitted that he was receiving modest wages for his work, but the trial judge inferred that he was working in the expectation of a large future reward. That was based on answers in Mr Morrison's record of interview when he said that he had intended to go to university but was "given a Godfather offer". He had made a decision on the basis of that offer;

> "the income aspect of it was too – you know, the promise of things to come was probably better than a further two-and-a-half – two years at university."

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[2] *R v Ronen* (2006) 161 A Crim R 300 at 318.

***The matters considered by the sentencing judge***

[75] Generally in respect of the offending, the trial judge noted that there was no evidence that the Commonwealth had suffered any loss as a result of the offence. However, over 400 participants in the schemes had paid more than $4.25 million for a service which they had not received and some had been charged penalty tax. That loss was to be taken into account. None of the accused had shown any sign of genuine remorse or co-operated with investigations. Mr Cuffe and Mr Morrison took part in recorded interviews but sought to exculpate themselves. However, all three deserved credit for co-operating in the facilitation of the trial process; they had not taken technical objections which might have slowed things considerably, given the large number of documents involved and the late disclosure of some of them. The learned sentencing judge said this in relation to prospects of rehabilitation:

> "There is little evidence to indicate that any of the prisoners has good prospects for rehabilitation. They continue to deny their guilt. None gave evidence of any plans for the future which might give rise to hope in this respect. It is true that none has committed any further offence since being charged, but that fact carries little weight. Cox has been in custody and having regard to the nature of the offending, it would have been surprising had either of the other two done so."

***The sentencing of Mr Cox***

[76] The sentencing judge described Mr Cox as the "controlling mind and driving force of the whole operation". He acted as the primary salesman for the schemes, recruited agents and received most of the profit. It was necessary to impose a sentence on him which would act as a personal deterrent; the judge considered him "a dishonest, untrustworthy rogue". General deterrence was a predominant consideration in offences of defrauding the revenue. After a review of comparable decisions, the learned judge concluded that Cox's culpability, the need for personal as well as general deterrence and the need to denounce the conduct while allowing for some mitigation to reflect co-operation, pointed to a sentence of eight years imprisonment.

[77] However, Mr Cox's sentencing presented the complexity of totality considerations while at the same time parity with his co-offenders had to be accommodated. Although a sentence of eight years imprisonment was warranted, if it were imposed so as to be entirely cumulative on the sentence for the State offences, Mr Cox would be facing a total period of imprisonment of 14 years and 10 months. The criminality in total warranted a period of imprisonment somewhat over 13 years. His Honour would have imposed a sentence of 10 years to achieve that effect, but noting that release on parole would then require the Attorney-General's exercise of discretion under s 19AL of the *Crimes Act* 1914, reduced that period by a month so as to give Mr Cox the assurance of release on parole in January 2015. In the end result, he sentenced him to imprisonment for nine years and 11 months commencing on 29 September 2011 (the parole eligibility date for the State offences) with a non-parole period fixed of three years and four months. The effect of the sentence was that Mr Cox's non-parole period would end on 29 January 2015 while his full-time discharge date was 29 August 2021.

***Mr Cox's submission as to pre-sentence custody***

[78] His first submission was that pre-sentence custody was not taken into account. However, as the pre-sentence custody to which he referred entailed a period during

which he was also on remand in relation to the State offences, for which he was given credit in his sentence for those offences, the submission has no substance.

***Comparable sentences relied on by Mr Cox***

[79] Mr Cox submitted that a head sentence of between four and six years was appropriate for his offending. He relied on a number of previous decisions for that proposition which were not of assistance: they concerned fraud, stealing as a servant, and other forms of misappropriation, and did not involve loss to the revenue. He did however refer also to a series of cases which involved tax frauds.

[80] The first was *Director of Public Prosecutions (Cth) v Gregory*,[3] in which the respondent was a solicitor who advised on a scheme to disguise a profit of $400,000 as a business expense and hence as a tax deduction. His financial benefit was limited to a commission of $22,000. He pleaded guilty and was sentenced to two years imprisonment with release on recognizance after 12 months imprisonment. He had no prior convictions and was said to have excellent prospects for rehabilitation. The sentencing judge noted that he was not a resident of Victoria where he was to be imprisoned and would find imprisonment more burdensome as a result. The Commonwealth Director of Public Prosecutions appealed against the sentence as manifestly inadequate. The Victorian Court of Appeal considered that the respondent should have been required to serve between three and four years imprisonment before release, but exercised its discretion against intervening because of delay and other factors.

[81] *R v Hargraves & Stoten*[4] concerned two appellants convicted after a trial of one count of conspiracy to dishonestly cause a loss to the Commonwealth. They used a scheme which involved their claiming tax deductions for inflated amounts through an off-shore trail of trusts and companies. The funds were ultimately returned to Australia and withdrawn as cash by the appellants using credit and debit cards. There was a loss to the Commonwealth of approximately $2.2 million, which had been repaid with interest and penalty tax. The Court of Appeal, setting aside the sentence imposed at first instance on each appellant of six and a half years imprisonment, noted that the appellants had no relevant criminal history; they were aged in their early 30s; both had been active contributors to charities and the community generally; their prospects of rehabilitation were good. It was significant that they had already been punished by way of penalty tax in excess of $1 million. The offending conduct was of a relatively short duration. They had not set up an unlawful scheme intentionally and they had not abused a position of trust. A sentence of five years imprisonment with a non-parole period of two years and six months was substituted in each case.

[82] *R v Hart*[5] concerned the instigator of the schemes with which Mr Cox was originally involved. Hart was convicted of nine counts of defrauding the Commonwealth and one count of fraud in respect of an employee retention plan through which clients purchased insurance bonds to be held in trust for employees. The arrangements were bogus and Hart misappropriated the funds. The loss to the revenue was $650,000 and Hart's clients were exposed to some $2 million in tax and penalties. He was sentenced to seven years imprisonment with a non-parole period of two years and nine months. The non-parole period took into account eight months he had served in

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3 (2011) 250 FLR 169.

4 [2010] QCA 328.

5 (2006) 159 A Crim R 428.

custody on a conviction which was ultimately quashed. This Court rejected both an application for leave to appeal against sentence and an appeal against sentence by the Director of Public Prosecutions. Jerrard JA, with whom the other members of the Court agreed, observed that a head sentence of seven years with a non-parole period of three and a half years seemed appropriate for the offences of dishonesty involved there. They had been committed 15 years earlier by (as he described Hart) "a mature aged first offender with some health problems".[6]

[83] In *R v Peterson*,[7] the applicant was convicted on his pleas of guilty of one count of defrauding the Commonwealth, one of obtaining a financial advantage by deception, one of attempting to obtain a financial advantage by deception and one of using forged documents. He was sentenced to concurrent terms of seven years imprisonment on each, with a non-parole period of three years and six months. The applicant had a criminal history for offences of dishonesty and had previously served a short period of imprisonment for false pretences. His fraud was not complex. He registered as the operator of a non-existent importing business and lodged false business activity statements in order to claim refunds of goods and services tax, providing forged documents which purported to be evidence of payments made to suppliers of stock. Through his fraudulent activity, he obtained payments of $722,309. Eventually, after a series of audits over some three years, he admitted that his documentation was false. None of the money was recovered. This Court refused his application for leave to appeal against sentence, concluding that the sentence imposed was not outside the range established by previous decisions of the Court.

[84] In *R v Ronen*,[8] the applicants, a mother and her two sons, were convicted of two counts of conspiracy to defraud the Commonwealth. They had concealed cash income from a chain of clothing outlets they operated, going to the extent of creating false cash register records. Mrs Ronen was sentenced on an additional count of avoiding reporting requirements under the *Financial Transaction Reports Act* 1988 (Cth). She was sentenced to a total of eight and a half years imprisonment with a non-parole period of four and a half years. Each of her sons was sentenced to a total of eight and a half years imprisonment with a five and a half year non-parole period. Mrs Ronen was aged 72 and was in poor physical health. Her sons were middle-aged with young children. All had been previously of good character and had references attesting to their charitable work. They had paid some $7 million in penalty tax. The amount obtained through the conspiracy over a decade was somewhere between $15 million and $17 million. The New South Wales Court of Appeal concluded that the criminality was so great that the payment of penalty tax was of limited weight, while denunciation of a decade of persistent fraud was crucial. The sentences imposed were within a proper range.

[85] In *Ridley v The Queen*,[9] the appellant was sentenced after a trial to an effective overall period of imprisonment of eight years with a non-parole period of five years on nine counts of defrauding the Commonwealth and three counts of attempting by deception to obtain a financial advantage. He had made false claims for refunds for goods and services tax, using false invoicing and licensing agreements to create the appearance that property had been acquired. The total amount paid by way of refund

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6 At [80].
7 [2008] QCA 70.
8 (2006) 161 A Crim R 300.
9 (2008) 192 A Crim R 139.

was some $2.8 million. The appellant had no previous convictions and had good prospects of rehabilitation. His appeal against sentence was dismissed.

[86] Mr Cox also referred to *Baldock*[10] for the unremarkable proposition that a lower penalty was to be expected where the offender had not personally benefited from the fraud. In this regard, he took issue with the sentencing judge's observation that his company had obtained $4.25 million through the schemes, as was established from the company's receipt books, and that most of the balance left after expenses had gone to him. Mr Cox suggested that a scrutiny of cheque butts would show that some clients had received a fee reduction; he referred to a cheque butt which, he said, represented as much. Unfortunately, that claim required his giving evidence from the Bar table of matters not raised at sentence, and must be rejected. The sentencing judge properly acted on the basis that Mr Cox had received the best part of $4.25 million.

***Conclusions on Mr Cox's application***

[87] None of the comparable decisions Mr Cox referred to leads me to the view that his Honour was wrong in considering a sentence of eight years imprisonment a proper notional starting point for Mr Cox. The imposition of the head sentence of nine years and 11 months was then necessary to give the sentence some cumulative effect. The fraud was elaborate and extensive in terms of numbers of people involved, documentation and implementation, and duration; the amount that Mr Cox gained from it was substantial; and it had the potential to cause a very large loss to the revenue. It was in a different category from the single set of transactions involved in *Gregory*. Unlike any other of the decisions relied on, with the exception of Hart, this case involved not merely an individual's fraud on the revenue but the enlisting of large numbers of taxpayers into fraudulent schemes for their promoters' benefit.

[88] Mr Cox, unlike the appellants in the other cases to which I have referred, apart from *Peterson*, had significant criminal history; but unlike Mr Peterson, he did not plead guilty. He had not the advantage of youth and previous good character possessed by the applicants in *Hargrave & Stoten* or the Ronen family. Nor was he in the position of those appellants of having already been subject to punishment in the form of penalty tax. The combined sentence of 13 years for the State and Commonwealth offences was not excessive, and the assurance of parole in January 2015 produced an outcome which was not unduly harsh. I would dismiss Mr Cox's application for leave to appeal against sentence.

***The sentencing of Mr Cuffe and Mr Morrison***

[89] The learned sentencing judge observed that there was not as pressing a need for personal deterrence in respect of Mr Cuffe and Mr Morrison as there was in respect of Mr Cox. His Honour noted that Mr Cuffe had played a critical role in facilitating the charity scheme and had been involved in the retirement village scheme in order to deceive investigators from the Australian Taxation Office. He had received a substantial amount of money, but he was entitled to some consideration for his co-operation and for his community work. Mr Morrison was not involved in the conspiracy for as long as he, but he was intimately concerned with implementing all of the schemes and continued to seek money from participants after he became aware that their schemes were fraudulent. He was also entitled to credit for his co-operation. Although their roles and conduct were different, it was appropriate that he and Mr Cuffe receive the same sentence of six years imprisonment.

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10 (2010) 269 ALR 674.

[90] The sentencing judge observed that there had been an excessive delay in the prosecution of the offence, which was only partly explicable by Mr Cox's disappearance. To some extent, the delay could be explained by the complexity of the investigation. It was submitted on behalf of Mr Cuffe that had he been prosecuted promptly, he could have served his sentence before his youngest child developed a disability; it was more onerous for him to commence his sentence at the age of 61; and he had lived for the intervening period with the threat of prosecution. The learned sentencing judge considered that there was no basis for concluding that Mr Cuffe's imprisonment would have any greater effect on the child for having been delayed; apprehension at the prospect of prosecution did not amount to unfairness; and there was no reason to suppose that there was any significant difference in commencing imprisonment at 61 as opposed to 55.

[91] Mr Morrison submitted that he had also had to bear the mental burden of delayed prosecution. He had established a part-time home with his partner in Indonesia and he had been inconvenienced in travelling there by having to submit an itinerary while on bail. In the intervening period, he had converted to Islam. The learned judge did not regard any of those factors of significance and in particular, noted that no evidence was presented to show that the delay had oppressed Mr Morrison to the point of unfairness. As to the fact that Mr Morrison had not re-offended in the intervening period, he observed that "for white-collar offences the absence of other offending carries little weight".

***The submissions on behalf of Mr Cuffe***

[92] Counsel for Mr Cuffe submitted that the sentencing judge had erred in failing to mitigate the sentence because of the delay in prosecution. It had led to unfairness to Mr Cuffe because he was left in a state of uncertainty. In addition, the lapse of time between the offending and the sentence provided evidence of rehabilitation. It was submitted that there was a disparity in sentencing as between Mr Cuffe and Mr Cox because the former had received a non-parole period of three years while Mr Cox's non-parole period was three years and four months.

[93] It was relevant too, counsel submitted, that revenue had been put at risk but not lost. In this regard, counsel cited *R v Huston; ex parte Cth DPP; R v Fox; ex parte Cth DPP; R v Henke; ex parte Cth DPP*.[11] The applicants were convicted of conspiracy to defraud the Commonwealth. The conspiracy involved a scheme described as a

> "complex, sophisticated international tax evasion scheme making the detection and investigation of the offence ... difficult."

Among other things, it involved stripping companies of their assets and transferring their ownership to Vanuatu. The conspiracy had operated over a little short of two years. The amount of income tax imperilled was $4.5 million, but there was no actual loss to revenue. This Court made the fairly obvious point that actual loss of revenue would, all other things being equal, be more serious than the potential loss of revenue. That may readily be accepted, but the potential loss to the revenue here was very large: 138 of 410 participants in the schemes claimed deductions which would have resulted in a $3.2 million tax shortfall had they been allowed. In addition there was the actual loss to the participants of the $4.25 million paid to National Health and Aged Care.

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[11] [2011] QCA 350.

[94] It was contended that the proper range for sentence for Mr Cuffe was between four and five years imprisonment, and that he ought now to be re-sentenced to four years imprisonment with a non-parole period of two years. Reliance was placed on a decision of the Court of Criminal Appeal of Western Australia in *Pearce v The Queen*[12] in which the promoters of a tax evasion scheme which involved tax payers obtaining tax refunds through the purported purchase of business franchises were sentenced in each case to five years imprisonment with an order for release on a recognizance after 18 months. If the scheme had succeeded, taxation refunds totalling $20 million would have resulted. Some $1.5 million in refunds were paid before an audit and consequent investigation put an end to the scheme. Two of the applicants were working as accountants marketing the scheme, providing taxpayers with false information to be furnished to the Australian Taxation Office. The third played a larger role than the other two and stood to gain considerably more, but received the same sentence because his wife was terminally ill. The case is of limited assistance however, because the appeal against sentence in each case failed; so it can be said only that the sentences imposed were not manifestly excessive.

***The submissions on behalf of Mr Morrison***

[95] Mr Morrison also relied on *Pearce*. He contended that his sentence did not properly take into account the significant difference between his culpability and that of Mr Cox and Mr Cuffe. He was a mere employee and had no criminal history. The sentencing judge had observed on the one hand that there was little evidence of good prospects for rehabilitation, while on the other noting that Mr Morrison had not committed any further offences since being charged. He had been first interviewed in March 2001; the delay had been oppressive.

[96] It was suggested that Mr Morrison's involvement in the conspiracy was relatively brief. He had commenced employment in March 2000 as office manager for National Health and Aged Care, but the Crown had not contended that he knew at that point that the scheme was illegal. The trial judge, however, found that Mr Morrison became aware of the extent of dishonesty involved in the schemes "reasonably soon after commencing work for the company" and that finding was not challenged. His Honour found that although Mr Morrison's period of involvement was a good deal shorter than that of Mr Cox and Mr Cuffe, it was his effort which kept the schemes going.

[97] Mr Morrison was given leave to amend his application to assert that there was error in his Honour's finding that he was working in the expectation of a large future reward. Counsel submitted that the learned sentencing judge's reference to Mr Morrison's having been made an "offer which he could not refuse" was inconsistent with the finding that Mr Morrison did not know when he took the job that it involved illegality. But the inference of an expected large future reward from the conversation Mr Morrison described in his interview was entirely rational. It is reasonable to suppose that it was in that expectation that Mr Morrison continued to work in and make possible the operation of the scheme he knew to be a sham.

***Conclusions on Mr Cuffe's and Mr Morrison's applications***

[98] In my view, the learned judge committed no error in regarding Mr Cuffe and Mr Morrison as equally culpable, although playing quite different parts. Mr Morrison's period of involvement was shorter, but it was intense and critical to

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12 [2005] WASCA 74.

the daily operation of the enterprise. Mr Cuffe was less involved on a daily basis, but the charitable donation and retirement village schemes depended on his lending his name and position. The sentences of six years imprisonment, although heavy, would not have been open to challenge had it not been for the delay in prosecution and its implications.

[99] Mr Cuffe was first interviewed in relation to the schemes by officers of the Australian Taxation Office in July 2000. In the ensuing months, the office used its coercive powers to visit the premises of a number of parties, including Mr Morrison. Australian Federal Police investigations into the offence commenced in April 2001 and warrants seeking records were executed on premises including those of Mr Morrison and Mr Cuffe 15 months later. Proceedings were not commenced, however, until November 2007.

[100] In *R v L; ex parte Attorney-General*[13] this Court discussed the question of when delay could be said to have a mitigating effect:

> "There are two obvious cases in which that will be so and in which, consequently, it has been said that that unfairness should mitigate the sentence which should otherwise be imposed.
>
> The first is where there is delay between the date of apprehension of the offender, or first indication to him by some person in authority that he is likely to be prosecuted, and the date of sentence, in consequence of which the offender may have had his liberty curtailed or his reputation called in question or, at least, left in a state of uncertainty caused by a failure to prosecute his case more quickly. ... The rationale for mitigation in these cases is analogous to that for which, in jurisdictions where a right to a speedy trial is constitutionally or legislatively guaranteed, proceedings may be stayed because of such delay. ….
>
> The second is where the time between commission of the offence and sentence is sufficient to enable the court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress."[14]

[101] One would not ordinarily regard the fact that there has been sufficient time for rehabilitation to be demonstrated as itself unfair; the second reference in *R v L* can only be to its being unfair in such circumstances not to take that feature into account. The focus must be on whether there is either a significant element of punishment in the delay because of the uncertainty and anxiety involved or the interval of delay is of sufficient length to make a law-abiding life in the interim a promising indication of rehabilitation. The learned judge in the present case declined to accept that there was anything of the first, essentially because neither Mr Cuffe nor Mr Morrison had given evidence to that effect. He described the fact that Mr Morrison had not re-offended in the intervening period as of little weight because of the white collar nature of the offending.

[102] The fact that an offender has expressed remorse for a plea of guilty may be an important indicium of rehabilitation, but the failure to do so does not exclude it. Nor is it imperative, in my view, that there be direct evidence that delay has had an impact

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13 [1996] 2 Qd R 63.

14 At 66.

through the protracted anxiety of the threat of prosecution; in a sufficiently obvious case an inference to that effect may be drawn. In my respectful view, the learned judge did not give appropriate weight in sentencing to the very long period that had elapsed between Mr Cuffe's and Mr Morrison's being made aware of the prospect of charges and their sentence, during which they must inevitably have been subjected to considerable strain. The fact that they did not admit guilt did not preclude rehabilitation, and the period for which they had gone in each case without re-offending was an extensive and significant one. Those factors, and the fact that they operated as a distinguishing feature from Mr Cox's case, ought to have been given some recognition. The net result of the failure to give any such allowance is that the sentences imposed are manifestly excessive.

[103] I would vary the head sentences imposed on Mr Cuffe and Mr Morrison by, in each case, reducing them to imprisonment for five years, fixing non-parole periods of two and a half years in respect of each sentence. The sentences should otherwise be as imposed by his Honour.

***Orders***

[104] I would make the following orders:

1. Dismiss the appeal against conviction by the appellant Cox.

2. Dismiss the appeal against conviction by the appellant Cuffe.

3. Refuse the application for leave to appeal against sentence by the applicant Cox.

4. Grant the application for leave to appeal against sentence by the applicant Cuffe. Allow the appeal and vary the sentence by reducing the head sentence to five years imprisonment and fixing the non-parole period at two and a half years imprisonment.

5. Grant the application for leave to appeal against sentence by the applicant Morrison. Allow the appeal and vary the sentence by reducing the head sentence to five years imprisonment and fixing the non-parole period at two and a half years imprisonment.

[105] **GOTTERSON JA:** I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.

[106] **PHILIPPIDES J:** I agree with the judgment of Holmes JA and with the orders proposed.