SUPREME COURT OF QUEENSLAND

CITATION:	*Powell v Chief Executive Officer of Customs* [2012] QCA 338
PARTIES:	**POWELL, Timothy Ian Charles** (applicant) **v** **CHIEF EXECUTIVE OFFICER OF CUSTOMS** (respondent)
FILE NO/S:	CA No 354 of 2011 DC No 3733 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	4 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2012
JUDGE:	Margaret McMurdo P, Atkinson and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave for the applicant to adduce additional evidence on the application is refused.** **2. The application for leave to appeal is refused.** **3. The applicant pay the respondent's costs of the application to be assessed on the standard basis.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – LEAVE TO APPEAL – where the applicant was convicted in Magistrates Court of importing a prohibited import, namely a part of a receiver for an M16 self-loading military firearm – where the applicant unsuccessfully appealed that decision to the District Court – where the applicant seeks leave to appeal that decision – where the applicant contends the conclusion that the imported item was a firearm was not open on the evidence, that the state of the evidence was sufficient to raise the defence of mistake of fact, and that leave should have been given to adduce fresh evidence – whether leave to appeal is necessary to correct a substantial injustice CRIMINAL LAW – APPEAL AND NEW TRIAL – LEAVE TO APPEAL – FRESH EVIDENCE – LAWYER INCOMPETENCE – where the applicant seeks leave on this application to adduce additional evidence – where that

evidence is sought to be used to demonstrate incompetence of his legal representatives in the District Court appeal in not raising the incompetence of his legal representatives at trial

Customs Act 1901 (Cth), s 233(1)(b)
Customs (Prohibited Imports) Regulations 1956 (Cth), reg 4F
Criminal Code 1995 (Cth), s 9.2

Brayley v Malkovic [2006] WASC 94, cited
Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
Pavlovic v Commissioner of Police [2007] 1 Qd R 344; [2006] QCA 134, cited

COUNSEL: B S de Plessis for the applicant
M Byrne QC, with K Copley, for the respondent

SOLICITORS: Jonathon C Whiting & Associates for the applicant
Australian Government Solicitor for the respondent

[1] **MARGARET McMURDO P:** I agree with Henry J's reasons for refusing the application for leave to appeal and with the orders he proposes.

[2] **ATKINSON J:** I have had the benefit of reading the reasons of Henry J.

[3] I agree with the orders proposed by Henry J for the reasons given by his Honour.

[4] **HENRY J:** The applicant seeks leave to appeal the decision of a District Court judge dismissing the applicant's appeal from his conviction in the Magistrates Court of importing a prohibited import.

Background

[5] The applicant imported part of a receiver for an M16 self-loading military firearm. He was charged with importing a prohibited import contrary to s 233(1)(b) of the *Customs Act* 1901 (Cth). That provision prohibits the importation of any "prohibited imports". Regulation 4F of the *Customs (Prohibited Imports) Regulations* 1956 (Cth) relevantly provides:

> "(1) ... the importation of a firearm... [or] a firearm part... is prohibited...
> (4) In this regulation:
> ...
> **firearm** means a device designed or adapted to discharge shot, bullets or other projectiles by means of an explosive charge or a compressed gas, whether that device is fitted with a magazine or other feeding device designed to be used with it or not...
> **firearm part,** for a firearm, means any of the following items...
> (d) a receiver..."

[6] The critical issue at first instance was whether the imported item, which became exhibit 1 at trial, was a "firearm part" as defined by reg 4F(4). The prosecution relied on a ballistics expert who identified the imported item as a damaged M16 lower

receiver. The effect of his evidence was that the receiver for such a weapon has two parts, an upper half and a lower half, and the imported item was part of the lower half of a receiver.

[7] He testified the item was a part for an automatic weapon, had markings indicating it was genuine and could be repaired. In particular, he explained a jagged edge on the item could be cut back to give a straight edge which could be joined in turn to a section of a legally imported lower receiver for a non-automatic firearm. In an exercise tending to support his opinion, the expert witness had cut an M16 lower receiver into two parts and welded them together with oxyacetylene and brazing rods.

[8] The learned presiding Magistrate had initially upheld a submission of no case to answer on the issue of whether the item was a prohibited import. On an appeal to the District Court, that finding was set aside and a finding that the defendant had a case to answer was substituted, it being found that the item was discernable as a firearm part, notwithstanding that part of it had been cut off, and it was impossible to regard the item as "useless" or "not functional".[1]

[9] When the matter returned before the learned presiding Magistrate, the prosecution relied on the evidence earlier adduced and the defence elected not to go into evidence.

[10] The defence submitted the evidence of the prosecution expert was not credible. It emphasised the expert's exercise of welding two parts together did not exactly replicate what would be required to repair the exhibit and was not capable of establishing that it was repairable. However, the learned Magistrate regarded that exercise as supplemental rather than critical to the expert's opinion.

[11] The learned presiding Magistrate found the prosecution's expert to be a credible, well-qualified expert witness and was satisfied that the imported item was a firearm part within the meaning of reg 4F(4) and duly convicted the defendant.

The District Court appeal

[12] In the District Court appeal it was common ground that there were three live issues, namely:

> "1. Whether or not the evidence established beyond reasonable doubt that the imported item (Exhibit 1) was a firearm part for the purposes of the Commonwealth legislation.
> 2. Whether the defence of mistake of fact was open on the evidence in the proceedings below and, if it was, whether the respondent had excluded the operation of that defence beyond reasonable doubt.
> 3. Whether leave ought be given to allow the defendant to adduce new evidence in the hearing of this appeal."[2]

[13] That appeal was dismissed. It is that decision against which the applicant seeks leave to appeal.

The application for leave

[14] The grounds of the application are:

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1 *Chief Executive Officer of Customs v Powell* [2010] QDC 218.
2 *Powell v Chief Executive Officer of Customs* [2011] QDC 272, [6].

> "1. The conclusion, beyond reasonable doubt, that the imported item (Exhibit 1) was a firearm within the meaning of Regulation 4F of the *Customs (Prohibited Import) Regulations 1956 (Cth)* was not open on the evidence.
> 2. The learned Judge erred in finding the state of evidence was insufficient to raise or leave open the defence of mistake of fact.
> 3. The learned Judge erred in refusing leave to adduce additional evidence."

[15] The application is brought pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld). Section 118(3) requires the leave of the Court of Appeal for a party dissatisfied with a judgment of the District Court to appeal it. Leave will usually only be granted where an appeal is necessary to correct a substantial injustice to an applicant and there is a reasonable argument that there is an error to be corrected.[3] Nonetheless, s 118(3) confers a general discretion to grant or refuse leave to appeal, which is exercisable according to the nature of the case.[4]

[16] The notice of application for leave to appeal gives the following reasons why the court should grant leave for this further appeal to be brought:

> "1. There has been a miscarriage of justice.
> 2. The grounds of appeal are important as to the interpretation of the Customs Act 1901 (Cth) and Customs (Prohibited Imports) Regulation 1956 (Cth)."

[17] The arguments advanced on the application did not identify any matter of particular importance in respect of the interpretation of the Act and Regulation. Rather the arguments were essentially facts based.

[18] The applicant's approach was not to dwell upon the reasons why this court should grant leave and instead to focus upon the merits of the grounds it would agitate if leave was granted. The underlying merits of the matters sought to be agitated in the event of leave being granted are a relevant consideration, but not for the purpose of an aggrieved party re-litigating a case in which it has already been unsuccessful at first instance and on appeal. The merits are relevant for the purpose of demonstrating there is some feature of the case warranting the exercise of the discretion to grant leave to appeal, for instance the need to correct a substantial injustice.

Ground 1: The conclusion, beyond reasonable doubt, that the imported item (Exhibit 1) was a firearm within a meaning of reg 4F of the *Customs (Prohibited Import) Regulations* 1956 (Cth) was not open on the evidence.

[19] The learned District Court judge adopted the reasoning of Hasluck J in *Brayley v Malkovic*[5] that it is a matter of fact and degree whether an item can be regarded as a firearm part or whether it is so beyond repair or irretrievably useless that it is incapable of performing the function for which it was designed and thus cannot be characterised as a firearm part. His Honour found that the evidence of the prosecution expert, Mr Davies, which had not been contradicted by other evidence, left no room for

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3 *Pickering v McArthur* [2005] QCA 294, [3].

4 *Arnold Electrical and Data Installations Pty Ltd v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100, [5], *Smith v Ash* [2011] 2 Qd R 175, 189.

5 [2006] WASC 94.

reasonable doubt that exhibit 1 was part of a genuine firearm, notwithstanding its damaged state, and was capable of being repaired so as to be able to perform the function for which it was originally designed.

[20] The applicant submits the learned District Court judge erred in those findings.

[21] The applicant in this court submitted, as he did below, that Mr Davies' evidence about the exercise of welding two parts together did not exactly replicate what would be required to repair the exhibit and was irrelevant. The applicant sought to characterise the exercise as critical to the expert's opinion but it was not. While the learned District Court judge found the exercise was of little, if any, probative value he also found that Mr Davies' opinions about the ability to repair the item were not in any way dependant upon the outcome of the exercise he had performed.

[22] The applicant in this court again sought to highlight aspects of Mr Davies' evidence, which it submitted, demonstrated a reluctance to make reasonable concessions and a lack of objectivity so that his evidence should have been so negatively affected that it ought not have been accepted. Both criticisms relied on a passage of cross-examination in which there was a difference of view between the expert and cross-examiner about the hypothetical point at which the number and sizes of separate pieces of a part could no longer be described as a part of a firearm. The applicant has identified no error in the learned District Court judge's rejection of the applicant's criticisms and identified no feature or features of Mr Davies' evidence that suggest his uncontradicted evidence was so lacking in credibility that the court should have harboured a reasonable doubt as to guilt.

[23] As to whether the item was a firearm within the meaning of reg 4F, the applicant did not expressly argue that a mere part of a receiver is not a receiver within the meaning of the regulation. Further, he accepted that whether the item was a firearm part was a question of fact and degree. He contended, however, that the prosecution had failed to prove the item had been designed as part of a genuine firearm and failed to prove that it was not beyond repair and irretrievably useless.

[24] As to the first contention it is contrary to the only evidence on the point, namely that of Mr Davies. An attempt was made in this court to have the court draw a contrary conclusion by inspecting an exhibit, however, there was nothing in what this court was shown which would compel the conclusion that the item was not part of a genuine receiver, as distinct from a replica, or raise a reasonable doubt about Mr Davies' evidence on the topic.

[25] In respect of the second contention, that the prosecution had failed to prove the item could be repaired to the point where it could be used as a firearm part, the argument again confronts the obstacle that Mr Davies' uncontradicted evidence to the contrary was accepted.

[26] No error of reasoning on the part of the learned District Court judge has been demonstrated.

[27] Nor is there any aspect of the evidence suggesting there has been a miscarriage of justice flowing from the conclusion that the item was part of a firearm. The only real issue of potential substance in this context was whether the item was not a firearm part because it was not "a receiver" (to adopt the words of reg 4F(4)) and was in fact only

part of a receiver. However, the test adopted by the learned District Court judge was reasonably open and supported by authority and was not challenged by the applicant.

[28] His Honour's approach was consistent with the purpose of the offence provisions. If the prohibition relating to receivers was interpreted as requiring that a receiver be whole, the provision could easily be circumvented by cutting a receiver into parts and reassembling it after importation. There will inevitably come a point where the degree of disassembly or severance of an item is so great that it cannot any longer be described as that item. To paraphrase the reasoning of Hasluck J in *Brayley v Malkovic*[6] that point will have been reached when the item is beyond repair or irretrievably useless and thus incapable of performing the function for which it was designed. It will not have been reached where, as here, the item was recognisable as part of a receiver and capable of being restored to a whole and functional state as a receiver.

[29] There is no potential injustice to be corrected associated with this ground.

Ground 2: The learned judge erred in finding the state of evidence was insufficient to raise or leave open the defence of mistake of fact

[30] Section 9.2 of the *Criminal Code* 1995 (Cth) excuses criminal responsibility where a defendant at the time of the alleged offending conduct considered whether or not facts existed and was under an honest and reasonable but mistaken belief as to the existing facts so that if those facts had existed the conduct would not have constituted an offence. Section 9.3 provides in effect that a mistake of law or ignorance as to the law will not avoid criminal responsibility.

[31] While the defence of mistake of fact was not submitted for at first instance, the learned District Court judge agreed that if it had been open it would nonetheless have been for the respondent to exclude the defence beyond a reasonable doubt. However, the learned District Court judge concluded that the state of the evidence at first instance was insufficient to raise or leave open the potential operation of the defence.

[32] The only potential evidence of a mistake in evidence at the trial was the evidence in exhibit 4, a document accompanying the imported item. Exhibit 4 was a type written note saying:

> "**ATTENTION ACS**
> This demilled piece is NOT a part, as defined under regulation 4F of the Customs PI Regs.
> AFP have ruled this, and have advised that a demilled piece is NOT controlled under 4F and no permit is reguired [sic].
> Refer to ROT #03/56
> ACS have also confirmed this in a court affidavit.
> Refer to ROT#02/948 & ROT 03/56
> Regards
> Tim Powell …"

[33] It was an obviously self serving document, as evidenced by exhibit 2 at the trial which was a written request to the applicant's supplier that he enclose exhibit 4 with the item when sent.

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6 [2006] WASC 94.

[34] A difficulty with the document relied upon by the applicant in the District Court appeal is identifying just what the mistake of fact is supposed to be. The document's assertion that the piece was not a part as defined under reg 4F involves, on the face of it, a mistake of law. In effect, it is nothing more than a mistaken assertion the applicant was not acting contrary to the law. The assertion the piece is a "demilled piece" is an assertion of fact, which might arguably evidence a belief, but the significance of the belief is obscure in the absence of further evidence.

[35] The learned District Court judge took the approach of proceeding on the basis exhibit 4 could potentially evidence a mistake of fact. He inferred that the term "demilled" "would appear to be a military term to cover circumstances when a firearm is rendered dysfunctional and incapable of being returned to a functional state". That was a generous inference given the absence of evidence as to what the applicant had meant by his use of the term in exhibit 4. The learned District Court judge found there was no evidence of any facts, circumstances or information upon which the applicant may have acted in purportedly forming his belief the item was demilled and therefore not subject to prohibition. In the absence of any evidence to support the honesty and reasonableness of the suggested belief the learned District Court judge found exhibit 4 was insufficient to raise or leave open the defence.

[36] No error of approach has been demonstrated. Nor is there any risk of injustice. Even if exhibit 4 had been regarded as sufficiently raising the defence for consideration it is inevitable that on the evidence before it, which did not include any evidence of the honesty or reasonableness of the belief, a court would regard the defence as excluded.

Ground 3: The learned judge erred in refusing leave to adduce additional evidence

[37] The additional evidence which the applicant sought to adduce in the District Court appeal was contained in an affidavit affirmed by the appellant. He deposed to having "held the honest and reasonable belief" that the item was not a firearm part as defined in reg 4F because it was permanently destroyed.

[38] Special grounds were required for leave to be given to adduce additional evidence.[7] The learned District Court judge was guided by three considerations described by Gibbs J in *Gallagher v The Queen*[8] as being relevant to a determination of whether a miscarriage of justice has occurred because evidence now available was not led at trial, namely:

1. whether the evidence relied on could, with reasonable diligence, have been produced by the accused at the trial;
2. whether the evidence is apparently credible or at least capable of belief;
3. whether the evidence if believed might reasonably have led a tribunal of fact to return a different verdict.[9]

[39] His Honour found it unnecessary to make any final determination on the issue of credibility attaching to the second consideration. As to the first consideration, he found that the evidence could readily and even without reasonable diligence have been produced at trial. That conclusion is unassailable. If the evidence is true then it was

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7 *Justices Act* 1886 (Qld) s 223 (repealed).

8 (1986) 160 CLR 392.

9 (1986) 160 CLR 392, 395.

necessarily within the knowledge of the applicant at the time of trial. It could easily have been adduced by the applicant giving the evidence but the applicant elected not to do so.

[40] As to the third consideration, the learned District Court judge concluded the evidence would not reasonably have led the court below to return a different verdict. He observed that most of the matters identified in the affidavit as the foundation for the purportedly honest and reasonable mistake were of little or no relevance. He noted the primary purported foundation for the belief lay in the applicant's advertisement seeking a "demilled" section of a lower receiver to suit a M16 or AR15 rifle and the advice he was given by his supplier that the piece to be supplied was a "demilled piece". However, the learned District Court judge observed there were internal inconsistencies in the affidavit, noting for example the inconsistency between the supposed emphasis on the item being demilled and the applicant having been told by the Australian Customs Service that it was only concerned with the importation of complete receivers. His Honour concluded the evidence was "not sufficiently strong to warrant its reception".[10]

[41] The applicant has identified no error of reasoning in His Honour's approach. Moreover, there can be no concern as to there being any risk of injustice in circumstances where the applicant made the deliberate choice not to adduce the evidence at trial. There are many potential reasons why a defendant may decide not to go into evidence. That decision will commonly, if not always involve weighing the pros and cons of giving evidence. That exercise involves assessing the extent the evidence the defendant might give can advance the defence case, weighed against the existing strength or weakness of the prosecution case and the risk the defendant may fare badly in cross-examination and take the defence case backwards. The appeal process is not a forum for attempts to litigate cases afresh in a manner different from that which was unsuccessful at first instance. As was observed in *Pavlovic v Commissioner of Police*[11] the consideration that evidence could with reasonable diligence have been produced at trial:

> "…reflects the primary importance of the trial in the administration of justice. A trial cannot be regarded as a dress rehearsal or as the first step in a process which inevitably leads to an appeal and a possible retrial."

[42] There is no potential injustice to be corrected associated with this ground.

New application to adduce further evidence

[43] The applicant seeks leave on this application to adduce additional evidence contained in an affidavit of the applicant sworn 11 September 2012. To determine whether this court should allow the additional evidence to be adduced on the application it is appropriate to have regard to its content.

[44] The affidavit is 33 pages long and exhibits 32 documents. The affidavit is so undiscerning in the range and nature of its content that its purpose in the context of this application for leave to appeal is not readily apparent. The applicant's counsel submits its purpose is to explain why there was a "failure to adduce relevant evidence at the relevant time".[12] The reason for that failure is said to be the incompetence of the

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10 See, *Pavlovic v Commissioner of Police* [2006] QCA 134, [38].

11 Ibid [31].

12 Applicant's Outline [46].

applicant's legal representatives. In essence, the applicant blames the incompetence of his lawyers at trial for not adducing evidence from him and not using other evidence and information he had provided to his lawyers.

[45] Incompetence of legal representatives is a difficult ground of appeal to make out,[13] although here it is not actually a ground of the appeal for which leave is sought. The applicant's counsel did not seek to add it as an additional ground. It appears the alleged incompetence is, at best, of indirect relevance to a consideration, in respect of the existing grounds of the proposed appeal, as to whether there may have been a miscarriage of justice.

[46] A fundamental difficulty confronting this attempt to adduce additional evidence is that it occurred in the context of an application for leave to appeal the decision of an appeal court below. The alleged incompetence of the applicant's trial lawyers was not raised in the District Court appeal. It would therefore be contrary to principle to allow that issue to be raised now except in the most exceptional circumstances.[14] In purporting to meet that challenge the applicant alleged incompetence on the part not only of his lawyers at trial but also on the part of his lawyers in the District Court appeal for failing to raise in that appeal the incompetence of his lawyers at trial.

[47] The affidavit explains the applicant was represented at the trial by a firm of solicitors ("the trial solicitors"). Several solicitors from that firm acted for him in the history of the Magistrates proceeding. The same counsel ("the first counsel") was briefed for the initial stage of the trial as well the first District Court appeal that overturned the no case ruling.

[48] The applicant deposes to various instructions and information he provided to his solicitors and the first counsel, which, he claims, were largely ignored by them in their litigation of the case, culminating in the initially successful no case to answer submission. He claims his instructions to contradict a prosecution submission made during the ensuing appeal hearing were not followed. He claims he gave instructions to appeal the decision in the first District Court appeal to this Court but that those instructions were not followed. It is noteworthy that even in the present application the applicant accepts the matter of fact and degree test, applied in the first District Court appeal, as to whether an imported item is a firearm part. It is therefore unsurprising there was no application for leave to appeal the decision in the first District Court appeal.

[49] The applicant deposes that on a date almost one month prior to the eventual resumption of the trial, his trial solicitors applied to withdraw from acting for him on the basis the solicitor client relationship was unworkable. He says he successfully opposed that application. He continued to use his trial solicitors, who allocated a different solicitor to the case.

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[13] Ultimately, the test is whether there has been a miscarriage of justice: see, eg, *R v DBB* [2012] QCA 96, [35]; *TKWJ v The Queen* (2002) 212 CLR 124, [17], [31], [77]; *Nudd v The Queen* (2006) 80 ALJR 614, [25]. This can be shown if, objectively, the conduct of counsel is incapable of explanation on forensic grounds: see, *R v DBB* [2012] QCA 96, [27] – [33] applying *TKWJ v The Queen* (2002) 212 CLR 124, [17], [25] - [27], [107]. Flagrant incompetence can also assist in demonstrating there has been a miscarriage of justice: see, eg, *TKWJ v The Queen* (2002) 212 CLR 124, [80]; *Nudd v The Queen* (2006) 80 ALJR 614, [24]-[25].

[14] *University of Wollongong v Metwally (No 2)* (1985) 60 ALR 68, 71; *Coulton v Holcombe* (1986) 162 CLR 1, 7-8. Both decisions have been applied in this Court: see, eg, *McElligott v Boyce & Ors* [2011] QCA 117, [15]-[16].

[50] Senior counsel ("the second counsel") was briefed to appear as counsel on the resumption of the trial, which was to continue, in effect, as if the prosecution case had just closed. The applicant deposes that at a conference two days prior to the trial the second counsel expressed the view that the prosecution had not proved the charge beyond a reasonable doubt and that the prosecution could use a defence witness to correct the mistakes of the prosecution witness. It is inherently unlikely senior counsel would have expressed such certainty that the prosecution had not proved its case beyond a reasonable doubt. That is supported by the fact that senior counsel also saw fit to point out the risk of going into evidence. The impression arising irresistibly even from the applicant's account, is that the second counsel engaged in the common assessment exercise, described above, of weighing the pros and cons of going into evidence. The applicant says the second counsel recommended the applicant not give evidence and the applicant accepted that recommendation.

[51] The applicant goes on to complain he was not warned there was any danger in not calling evidence. By this stage that danger would have been self evident to the applicant. In any event, it is inherently unbelievable the applicant was, as he acknowledges, told of the danger of going into evidence but not told of the risk of not doing so.

[52] Between the applicant's conviction at trial and his appeal to the District Court the applicant changed solicitors ("the appeal solicitor"). He deposes that when he indicated he wanted to raise the issue of lawyer incompetence the appeal solicitor told him the second counsel would not be able to represent him. The applicant replied he believed the incompetence lay with the first counsel and one of the earlier trial solicitors. At an ensuing conference, prior to the appeal, the applicant says he raised a potential appeal ground of incompetence but the second counsel, "said there were no grounds".

[53] The applicant later saw the second counsel's written outline of submissions and expressed concern that the failure to raise mistake of fact at first instance was lawyer incompetence. This was an irrelevancy in that the defence itself could still be raised on the appeal, and was.

[54] Notwithstanding knowing of his lawyer's intention not to pursue lawyer incompetence in the District Court appeal the applicant chose to continue to be represented by the appeal solicitor and the second counsel. Consistently with the obvious pattern of his discontent, the applicant's complaint it was incompetent of his lawyers in the District Court appeal not to raise the alleged incompetence of his lawyers at first instance ignores his contemporary and apparently knowing acceptance of his lawyers' preferred approach to how the litigation should be conducted.

[55] The applicant's counsel in the present appeal has not identified how the applicant's lawyers in the appeal below were incompetent for not raising alleged lawyer incompetence at first instance. The applicant's complaints of lawyer incompetence at first instance, including the first appeal, are in substance complaints that apparently unremarkable decision making and advice about how the litigation should be conducted did not result in successful outcomes. It is unsurprising that his lawyers in the appeal below did not pursue complaints of incompetence on the appeal. Had they done so such complaints were doomed to fail and would have detracted from the force of those lines of argument with a better prospect of success. To adopt the observations

of Gleeson CJ in *Ali v The Queen*,[15] it would be the hallmark of incompetent advocacy to pursue on appeal every line of argument that can be imagined regardless of its impact upon other arguments and regardless of its prospect of success.

[56] The non-pursuit of alleged lawyer incompetence by the applicant's lawyers in the appeal does not suggest there has been any injustice. Beyond the affidavit's complaints of incompetence, the evidentiary information and potential arguments to which it refers are at best material that might potentially have been used at trial in cross-examining Mr Davies, or adduced in the defence case, had the defence gone into evidence, to contradict Mr Davies and bolster a mistake of fact defence. There is nothing so compelling or of such significance about that material as to suggest a miscarriage of justice was caused by its non-use or to suggest there is any substantial injustice associated with any of the matters to which the proposed grounds of appeal relate.

Orders

[57] I would refuse leave to adduce additional evidence on the application and refuse the application.

[58] Costs should follow the event.

[59] The orders should be:

1. Leave for the applicant to adduce additional evidence on the application is refused.
2. The application for leave to appeal is refused.
3. The applicant pay the respondent's costs of the application to be assessed on the standard basis.

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[15] (2005) 214 ALR 1, 4.