IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M174 of 2017

Between

DONALD GALLOWAY (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

EDMUND HODGES (a pseudonym)
Third Respondent

TONY STRICKLAND (a pseudonym)
Fourth Respondent

RICK TUCKER (a pseudonym)
Fifth Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

1. This outline is suitable for publication on the internet.

Part II: Outline of propositions to be advanced by the Appellant

Proposition 1: It was reasonably open to the learned trial judge, in the exercise of her Honour's discretion, to order a permanent stay in order to prevent the administration of justice being brought into disrepute.

2. The appellant adopts the submissions of Hodges and Tucker.

3. As the appellant submitted before the Court of Appeal,[1] this was an independent basis to permanently stay the proceedings.[2] This did not require a finding of unfairness.[3]

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[1] Appellant's Supplementary Submissions in the Court of Appeal, 14 November 2016, [37]; AB13 4436.
[2] Reasons of the learned trial judge, [225](c); AB7 2238, [880]-[883]; AB7 2367. Appellant's submissions, [6.4].
[3] Appellant's submissions, [6.9].

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8 May 2018
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Proposition 2: In the alternative to proposition 1, it was reasonably open to the learned trial judge to find that there was demonstrable unfairness due to the appellant's compulsory examination.

4. At his ACC examination the appellant disclosed his defences.[4]

5. It was open for the learned trial judge to find that:[5]

> Having observed [the appellant's] examination, [AFP Officer Singleton] knew what [the appellant's] defences were. He had an opportunity to tailor his questions and decide which documents to show [witnesses Mitchell and Russell], using that knowledge.

10 6. The learned trial judge was correct to conclude that, given the AFP officers thought they were entitled to use information obtained in the examination to generate further enquiries and target witnesses, it was highly probable they did so.[6] Further, her Honour found that it was also possible that such information was used (at least indirectly) in obtaining witness statements, dealing with the ACC accused, and compiling the briefs.[7]

7. The Court of Appeal accepted that it was 'undoubtedly correct' that it was impossible to know how access to the ACC examination material might have affected the thought processes of the relevant AFP investigator.[8]

8. However, for the reasons explained in the appellant's submissions,[9] the Court of Appeal was wrong to find that the issue of forensic advantage was not explored in evidence,[10]
20 and that there was no attempt made by the appellant to substantiate that the unlawful examination process had been used to assemble the prosecution case, beyond the reference to Schwartz's concession that the knowledge gained from the examinations had been used to guide the selection of documents.[11]

Proposition 3: The forensic advantage to the prosecution is not remedied by the appellant's subsequent record of interview and conduct of the committal proceeding.

9. The ACC examination occurred in circumstances where the appellant had not responded to the AFP request for a record of interview. That the appellant acquiesced to a

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[4] Reasons of the learned trial judge, [741]-[746]; AB7 2339-2341.
[5] Ibid, [795]; AB7 2350.
[6] Ibid, [873]; AB7 2365.
[7] Ibid.
[8] Reasons of the Court of Appeal, [246]; AB15 4917-4918.
[9] Appellant's submissions, [6.17]-[6.31]. See further appellant's reply, [11]-[17].
[10] Reasons of the Court of Appeal, [276]; AB15 4927.
[11] Ibid.

subsequent record of interview should not be divorced from the coercive nature of the unlawful examination.[12]

10. The appellant's disclosure at the record of interview does not remedy that unlawfulness, nor prevent his ACC examination from bringing the administration of justice into disrepute.

11. Further, the first respondent fails to properly consider that the appellant's ACC examination occurred on 12 April 2010, and the AFP interview was conducted on 6 and 7 October 2010.[13] During that six month period the AFP conducted enquiries, including those referred to in the appellant's submissions.[14] As held by the learned trial judge, the AFP knew the appellant's defences and could tailor questions accordingly.[15]

12. The appellant was forced to conduct his committal proceeding knowing investigators had, through his ACC examination, locked him into a version of events on oath and that this was known by the prosecution.[16] The cross-examination into evidence of some of the appellant's answers during the ACC examination does not remedy the forensic advantage investigators obtained from their access to the examination information.

Proposition 4: In relation to the charges of conspiracy, a forensic disadvantage to one co-accused is a forensic disadvantage to all co-accused.

13. In order to establish the existence, nature and scope of the conspiracy, the prosecution relies on events involving the co-accused who were also subjected to unlawful ACC examinations. The prosecution relies on the jury drawing inferences from documents which include communications to which the appellant was not a party.[17]

14. To the extent that the other co-accused are constrained in their forensic choices, and where that is relevant to the prosecution seeking to establish the existence, nature and scope of the alleged conspiracy, the appellant has suffered a forensic disadvantage.

8 May 2018

Michael Cahill **Michael Stanton**

Counsel for the Appellant

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[12] Appellant's submissions, [6.34]; Appellant's reply, [8].
[13] Appellant's reply, [9].
[14] Appellant's submissions, [6.16]-[6.28].
[15] Reasons of the learned trial judge, [795]; AB7 2350.
[16] Appellant's reply, [8].
[17] Appellant's submissions, [6.35]-[6.37].