IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S29 of 2013

BETWEEN:

JASON (A.K.A DO YOUNG) LEE
First Appellant

SEONG LEE
Second Appellant

and

NEW SOUTH WALES CRIME COMMISSION
Respondent

10

RESPONDENT'S SUBMISSIONS

20

Part I: SUITABILITY FOR PUBLICATION

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF ISSUES

2. Is it within the legislative competence of a State Parliament to abrogate or limit the privilege against self-incrimination in relation to compulsory examinations where related criminal proceedings remain on foot?

30

3. Did the NSW Parliament do so effectively in the *Criminal Assets Recovery Act* 1990 No 32 (NSW) (the '***CARA***')?

4. Did the Court of Appeal err in concluding on the proper construction of the *CARA* that an examination order should have been made against the appellants?

Filed by:

New South Wales Crime Commission
453-463 Kent Street
Sydney NSW 2000
PO Box Q566
QVB Post Office Sydney 1230
DX 13018 Market Street Sydney

Ref: Ms Alexandra Bishop
ABishop@crimecommission.nsw.gov.au
Tel: 02 9269 3819 (direct)
02 9269 3888 (switch)
Fax: 02 9269 3809

Part III: NOTICES UNDER s78B OF THE *JUDICIARY ACT* 1903 (CTH)

5. We certify that we have considered whether notices should be given in compliance with s78B *Judiciary Act* 1903 (Cth) and note that s78B notices specifying the nature of the matter said to arise under the Constitution have been issued by the appellants.

Part IV: CONTESTED FACTS

6. Subject to the following comments, the respondent does not dispute the facts set out in the Appellants' Chronology and at the appellants' submissions at [6]-[21] ('**AS[6]-[21]**').

7. *Re the entry in the appellants' chronology for 13 May 2010 and 11 June 2010.* The second paragraph refers to the respondent (the '**Crime Commission**') filing a summons '*in respect of property suspected to be that of the first appellant [Jason Lee] and his wife.*' At 11 June 2010, Elizabeth Park is again described as the wife of Jason Lee. The orders sought in the Crime Commission's summons were in respect of interests in property of Jason Lee and not that '*suspected to be that of* Jason Lee.[1] Further, there is no finding or evidence which suggests Elizabeth Park is Jason Lee's wife; whilst little turns on it, she is not.

8. *Re AS[21].* It is accepted that any examination of the appellants pursuant to the orders made by the Court of Appeal on 6 September 2012 the Crime Commission would touch on the matters referred to at AS[16] and that – at a factual level – there is an overlap between these matters the subject matter of the appeals (which were dismissed on 3 April 2013) and the two trials for different offences of money laundering. However, the Crime Commission disputes the implicit assertion at AS[21] that the orders made by the Court of Appeal on 6 September 2012 in some way dictate the manner and form of the examinations conducted pursuant to them.

9. *Re AS[19].* The appeals from the criminal convictions were dismissed by the Court of Criminal Appeal on 3 April 2013: see *Lee, Do Young v R; Lee, Seong Won v R* [2013] NSWCCA 66.

---

[1] AB12

Part V: APPLICABLE LEGISLATION

10. Save for one matter, the appellants' statement of applicable constitutional provisions, statutes and regulations is accepted. The Crime Commission adds reference to s71 *Civil Procedure Act* 2005 (NSW), a copy of which is contained in Annexure "A" to these submissions.

Part VI: RESPONDENT'S ARGUMENT

Power of the NSW Parliament to abrogate the privilege against self-incrimination

11. Parliament's capacity to abrogate or limit the privilege against self-incrimination in relation to compulsory examinations has long been recognized: see *Mortimer v Brown* (1970) 122 CLR 493 at 499 and 502; *Hammond v Commonwealth of Australia* (1982) 152 CLR 188 at 197.9 and 200.3; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309; and *Hamilton v Oades* (1989) 166 CLR 486 at 494.5, 500.9, 509.5 and 516.5.

12. As Mason CJ said in *Hamilton* (at 494.5), citing *Hammond* and *Sorby*, it is plain that compulsory examinations undertaken while charges are pending may expose the examinee to a risk of self-incrimination and, to that extent, may amount to an interference with the administration of criminal justice:

> *'But it is well established that Parliament is able to "interfere" with established common law protections, including the right to refuse to answer questions the answer to which may tend to incriminate the person asked'*

13. Dawson J (at 509) said:

> *'The privilege against self-incrimination is not under our system of law inviolable...'*

14. Toohey J, having noted (at 514.2) that the appeal involved *'a challenge to the whole examination proceeding while criminal charges are pending'* concluded the statute there under consideration had abrogated the self-incrimination protection and that the examination should be allowed to proceed.

15. *Hamilton* was a case remarkably like the present: criminal charges pending, an examination to be conducted by an officer of the Supreme Court, the possibility of self-incriminating answers being given which touch upon the criminal charges, and an

express abrogation of the privilege against self-incrimination. The correctness of *Hamilton* is not challenged by the appellants.

16. In *Sorby* (at 298.3), Gibbs CJ expressly rejected the proposition that the privilege against self-incrimination is protected by the Constitution; either as an incident to the guarantee given by s80 or of the unfettered exercise of judicial power. In reaching the same conclusion, the plurality held (at 308.2):

> *'The privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch. III of the Constitution. It is a privilege that has been abrogated by legislative action in Australia, the United Kingdom and Canada without anyone having previously suggested that it involved the elimination of an integral element in the exercise of judicial power in a democratic society.*
>
> ...
>
> *No doubt, like other features of our system of criminal justice, it has a long history and confers a very valuable protection. But it is quite another thing to say that it is an immutable characteristic of the exercise of judicial power.'*

17. The Parliament's power to adjust the balance between competing public interests in the context of criminal proceedings was affirmed by this Court in *Nicholas v The Queen* (1998) 193 CLR 173 per Brennan CJ at 197 [37], Toohey J at 203 [55], Gummow J at 239 [164]-[167] and Hayne J at 275 [241]-[242]. As Mason CJ said in *Hamilton* (at 496.5) it is a permissible legislative resolution of the conflict between public and private interests to provide for a compulsory examination and to give specific protection in relation to the principle matter covered by the privilege but not otherwise, except to the extent that protection is afforded by other statutory and inherent powers available to the Court. However, the inherent powers cannot be exercised so as to defeat the clearly expressed legislative intention: *Hamilton* per Mason CJ at 499.5, Dawson J at 510.5 and Toohey J at 516.8.

18. Once this is accepted, it cannot be said that requiring the Supreme Court to order an examination during which the examinee may be required to give self-incriminating evidence – where the circumstances otherwise warrant such an order – compromises the institutional integrity in a manner which offends Ch. III.

19. By abrogating the privilege against self-incrimination in the context of compulsory examinations Parliament does not direct the manner in which judicial power is to be

exercised in the sense discussed in *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [50], 355 [56]-[57]. If anything, requiring that such examinations take place despite the risk of self-incrimination merely prescribes the Court's practice or procedure in the sense contemplated by Brennan CJ in *Nicholas v The Queen* at 188 [20] and 232 [143].

20. Acknowledging the force of the principle referred to in AS[62] it does not go as far as is suggested in AS[63]. Abrogating the privilege against self-incrimination does not render 'unfair' any subsequent (or concurrent) criminal trial touching on the same subject matter as the examination; this conclusion must follow from the principles referred to in paragraphs 11 to 17 above. Moreover, when giving content to the requirement that a criminal trial be 'fair' there must be borne in mind this Court's acceptance of the proposition that even a complete reversal of the onus of proof in criminal proceedings would not be substantially inconsistent or incompatible with the continuing subsistence of judicial power: *Nicholas v The Queen* per Brennan CJ at 189-90 [24] and the cases cited therein. It must follow that abrogating the privilege against self-incrimination in the context of compulsory examinations does not confer a power on a Court which is repugnant to or incompatible with the exercise of judicial power or its institutional integrity in the sense most recently discussed by the plurality in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [123]-[126].

21. In so doing, the Parliament does not confine the powers exercisable by a Court at the time an examination is fixed for hearing or conducted. On each of those occasions, the Court retains all the statutory and inherent powers available to it to prevent or minimise any interference with the administration of justice: *Hamilton* at 498.8.

22. Most significantly, the abrogation of the privilege against self-incrimination in this context leaves untouched the performance by the court seized of the criminal proceedings of the essential steps involved in judicial power: *Nicholas v The Queen* per Brennan CJ at 187 [19] and Gaudron J at 208-9 [74]. That court retains all of its powers to prevent any abuse of process or miscarriage of justice from occurring, including the power to permanently stay the criminal proceedings should it become apparent that there has been a substantial and irremediable interference with the administration of justice: *Dupas v The Queen* (2010) 241 CLR 237 at 245-247.

23. For these reasons, the institutional integrity of the Supreme Court – insofar as any related criminal proceedings are concerned – is entirely preserved: *Condon v Pompano* per French CJ at [39]-[50], and [88], the plurality at [167] and Gageler J at [212].

Abrogation of the privilege against self-incrimination by the CARA

24. When compared with the legislation under consideration in *Mortimer v Brown*, *Rees v Kratzmann* (1965) 114 CLR 63 and even *Hamilton*, the legislative intention to abrogate the privilege against self-incrimination manifested in the *CARA* is plain. Section 13A(1)-(2) of the *CARA* – cast in relevantly similar terms to s 541(12) of the *Companies (New South Wales) Code* under consideration in *Hamilton* – speaks in the clearest terms: see *Hamilton* at 495-496, 508.1, 509.5 and 516.4. Section 13A(3) of the *CARA* states explicitly what the Court in *Hamilton* (at 496.3) was left to infer regarding the absence of any protection in the case of derivative evidence. Most significantly, s 63 of the *CARA* provides that the existence or commencement of criminal proceedings is *not* a ground upon which the Court may stay proceedings under the *CARA*; which must be taken to include the vital tool of examinations within and for the purpose of *CARA* proceedings.

25. As was observed by Dawson J in *Hamilton* (at 508.5), there can be no real basis for discerning a difference in legislative intent according to whether or not criminal proceedings have actually been commenced. The subject matter of the *CARA* means it is highly likely a prospective examinee will at some point in time be called upon to defend criminal charges arising out of the circumstances touched on in an examination, especially when regard is had to offences concerning dealing with the proceeds of crime, such as money laundering. Parliament must be taken to have been aware of this, especially in light of s 63, which expressly contemplates criminal proceedings being concurrent with *CARA* proceedings, and that the latter should not await the outcome of the former. It follows that the use of the fundamental tool provided for *CARA* proceedings, being the examinations of those best placed to explain where seized assets have come from and where other assets might be, should not await the final disposition of criminal proceedings, or any step along the way.

26. This conclusion is reinforced by the objects and purpose of the *CARA*.[2] The lengthy delay of an examination due to the pendency of criminal charges (including any appeals) would be highly likely to frustrate the principal objects of the *CARA* identified in s 3, and elaborated upon in the second reading speech for that Act:[3] see also *Hamilton* at 497.5; *Mortimer v Brown* at 496.3 and 502.9; and *Rees v Kratzmann* at 80. A purpose of examinations under the *CARA* is to locate hitherto unknown assets obtained as a result of criminal activity, in order that they may be brought within existing restraining orders or made the subject of further restraining orders. This accords with one of the principal objects of the *CARA*, being to enable law enforcement authorities effectively to trace the proceeds of serious criminal activity: see s 3(c). Lengthy delays in being able to locate such assets necessarily increase the prospect of dispersal or concealment, potentially defeating this principal object of the *CARA*.

27. Having expressly abrogated the privilege, Parliament has provided compensating protection in the form of s 13A(2) of the *CARA*. Moreover, as was observed in *Hamilton* at 496.6, 498.9 and 510.5, a person required to attend an examination while criminal charges are pending can seek to call in aid an array of protections which, in appropriate circumstances, remove any real risk of interference with the administration of justice which might otherwise be created by the examinations; the full gamut of which are not available in the context of examinations by an officer of the executive of the type contemplated by *Hammond, Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, *ACC v OK, ABC v Sage* (2009) 175 FCR 319, *R v CB; MP v R* [2011] NSWCCA 264 and *R v Sellar* [2013] NSWCCA 42.

28. It is for this reason that Beazley JA observed at [9][4] that the existence of related criminal proceedings will rarely, if ever, be a basis of itself, for the Court to refuse to make an examination order under s31D of the *CARA*. As Basten JA said at [20],[5] on an application for such an order there is a binary outcome possible in that either an

---

[2] Consideration was given by this Court to the objects, statutory scheme and history of the *CARA* in *International Finance Trust Company v New South Wales Crime Commission* at 338-341 [5]-[14], 344-346 [25]-[32] and 361-362 [81]-[83].

[3] Premier's second reading speech on the Bill for the Act (originally entitled the *Drug Trafficking (Civil Proceedings) Act 1990*), New South Wales Legislative Assembly Parliamentary Debates (Hansard), 8 May 1990, pp 2527-2532, especially at pp 2529.1, 2530.2 and 2530.6.

[4] AB115

[5] AB118

examination order is made or it is not; that is, at that stage what is decided is whether an individual should be required, at some future time, to attend the Supreme Court for the purpose of being examined. Such an order does not dictate the content of such an examination, its timing or the protections which might be implemented at the time of the examination to remove the possibility of the examination interfering with the criminal proceedings. All of those matters fall for later determination by the Supreme Court.

29. The terms of s 13A of the *CARA*, together with the availability of orders under s 7 of the *Court Suppression and Non-publication Orders Act* 2010, s 71 of the *Civil Procedure Act* 2005 and the Court's inherent jurisdiction[6] will – in almost all cases – be sufficient to overcome any risk – and certainly any *real* risk – of interference with the administration of justice which might arise during the course of the examination. Those protections control such things as who may be present at an examination, what suppression or non-publication orders should be made, and what limits should be placed on particular questions to be asked: see *Hamilton* at 498.8, 502.2, 510.5 and 515.3. Those are matters for the exercise of discretion of the Court at the time the examination takes place; unfettered by the making of the original order for examination under s31D *CARA*.

30. There is every reason to assume that, if answers given in the course of an examination would be likely to prejudice a future criminal trial, an order would be made under s 7 of the *Court Suppression and Non-publication Orders Act* 2010 (NSW), supplemented as needed by other powers available to the Court, both statutory and inherent: per Basten JA at [53]-[54][7], [62][8] & [81],[9] and per Meagher JA at [100]-[101].[10]

31. Non-publication orders made under s 7 of the *Court Suppression and Non-publication Orders Act* offer greater protection than that considered adequate in *ACC v OK*. Such an order is a decision of a superior court, not a mere administrative direction of the type contemplated by the *ACC Act*, even if that direction is supported by sanctions

---

[6] As to which see *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 per French CJ at [46] and the cases cited therein.
[7] AB132-3
[8] AB135
[9] AB141
[10] AB148

under the relevant statute.[11] Section 7 of the *Court Suppression and Non-publication Orders Act* enables the Supreme Court to ensure that the separation between proceedings under the *CARA* and any criminal proceedings is not just legal and evidentiary, but practical as well. In the event of a breach of such an order, the remedies available are more potent and flexible, including injunctive relief and contempt of court with potentially unlimited penalties.

32. Section 71 of the *Civil Procedure Act* permits the Supreme Court to close the court while an examination is conducted to overcome an apparent central concern of this Court in *Hammond*, namely the presence of investigating police at an examination (the other concern about transcript being passed on to prosecuting authorities being met, if required, by an order under s 7 of the *Court Suppression and Non-publication Orders Act*).

No error by the Court of Appeal

33. The legislative scheme of the *CARA* and its objects reveal that Parliament contemplated examinations *should* proceed despite the existence of related criminal proceedings and the risk of self-incrimination. In exercising the s31D discretion, the Supreme Court must give effect to this legislative intention.

34. In the present case, the Court of Appeal held that neither the existence of the related criminal proceedings nor the *possibility* of adverse consequences for those proceedings arising from the abrogation of the privilege against self-incrimination were alone sufficient grounds to refuse to make an examination order under s31D of the *CARA* where the circumstances of a case otherwise favor making such an order: see the reasons of Beazley JA at [9]-[10],[12] Basten JA at [47],[13] [49],[14] [55], [56][15] and [81][16] and Meagher JA at [100]-[101].[17] The Court of Appeal did not hold that actual interference or a real risk of interference with a criminal trial and fair trial considerations are entirely irrelevant to the exercise of the discretionary power in s31D as is suggested at AS[32], [36], [43], & [46].

---

[11] Section 25A(14)(b) makes it an offence, punishable by a fine not exceeding 20 penalty units ($2,200) and/or imprisonment for up to 12 months, to make a publication in contravention of direction. That sanction is a summary offence: s 4H, *Crimes Act 1914* (Cth).
[12] AB115
[13] AB130
[14] AB131
[15] AB133
[16] AB141
[17] AB148

35. The approach to s31D of the *CARA* advanced by the appellants both before the Court of Appeal and in this Court mandates that an examination order can *never* be made under s31D of the *CARA* where there are related criminal proceedings and any possibility that the examination would touch on the same subject matter as the criminal trial and the prospective examinee would be required to give evidence which might be self-incriminating; that is, the plain legislative intention *must* be ignored in exercising the s31D discretion. As the Court of Appeal held, this construction fails to pay adequate – or any – regard to the text of the *CARA* and operates to defeat its objects: per Basten JA at [34][18] and [49][19] and Meagher JA at [101].[20]

36. The Court of Appeal correctly held at [55] and [56][21] that – in refusing to make examination orders against the appellants – the primary Judge fell into error in adopting the approach advanced by the appellants at AS[35] to [40]. The primary Judge focussed on the possible risk of self-incrimination posed by the examinations and did not go on to consider whether the legislature intended that examinations be ordered and thereafter conducted despite this possibility; in particular through the enactment of ss 13A and 63 of the *CARA*, together with s 62 of the *CARA* (now replaced by s 7 of the *Court Suppression and Non-publication Orders Act 2010*).

37. In supporting the approach adopted by the primary Judge, the appellants rely upon decisions which have considered or applied *Hammond*: AS[37]. At the outset, there is a fundamental point of distinction to be drawn between most of the authorities cited at AS[37] – including *Hammond* – and the present case. With the exception of *Chapman v DPP (WA)* (2009) 194 A Crim R 323, those authorities contemplated an administrative examination conducted by an officer of the executive, whereas an examination under s31D *CARA* is a curial process. This distinction is important as it means the Supreme Court retains the ability to take such steps as might be deemed necessary at the time of the examination to prevent any aspect of it from interfering with the administration of justice; a power which is absent (at least in a practical sense) where an examination is being conducted by an officer of the executive. The significance of this distinction is

---

[18] AB124
[19] AB131
[20] AB148
[21] AB133

apparent even in *Hammond* when the reasons of Murphy J at 201.6 and Deane J at 206.6 are considered.

38. *Chapman v DPP* does relate to what would have been a curial examination under s 58(1) of the *Criminal Property Confiscation Act* 2000 (WA). However, it must be approached with some caution; the case relates to an application for a stay of examination orders pending an appeal. Like *Hammond*, in *Chapman v DPP* the application was made urgently and a decision had to be made after only brief consideration of the issues: *Chapman v DPP* per Pullen J at [1]; *Hammond* per Gibbs CJ at 198.1-5 and Brennan J at 202.9 and the observations of Dawson J in *Hamilton* at 509.4. The outcome of the ultimate appeal – if heard and determined – is unknown.

39. In any event, on either approach to the s31D discretion the particular circumstances of this case point overwhelmingly to the Court of Appeal having correctly made orders under s31D of the *CARA* against the appellants.

40. The primary Judge was satisfied that the appellants are capable of giving evidence on the topics referred to in the orders sought by the Crime Commission and that, but for the risk of self-incrimination, it was appropriate that that such orders be made: see the decision of Hulme J at [11].[22] This conclusion is not challenged.

41. Re-exercising the discretion, the Court of Appeal did not accept that – in the context of the present case – an examination order under s31D had the capacity to create a real risk of prejudice to the appellants. As was observed by Basten JA at [81],[23] the possibility that an examination held at this stage could interfere with the trial of the first appellant and the possible retrial of both the first and second appellants was no more than '*speculative*'; there was not found to be any '*real*' risk. The appellants have cast no doubt on the correctness of this conclusion.

42. In these circumstances, the appeal against the orders made by the Court of Appeal should be dismissed.

---

[22] AB66
[23] AB141

Part VII: NOTICE OF CONTENTION OR CROSS APPEAL

43. No notice of cross appeal or notice of contention has been filed by the respondent.

Part VIII: ESTIMATE OF LENGTH OF ORAL ARGUMENT

44. The respondent estimates that its oral argument will be presented within two hours.

10

I.D Temby
Telephone: (02) 9231 3172
Facsimile: (02) 9223 9699
Email: temby@3sjh.com.au

E.C. Muston

Dated: 12 April 2013

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S29 of 2013

BETWEEN:

JASON (A.K.A DO YOUNG) LEE
First Appellant

SEONG LEE
Second Appellant

10

and

NEW SOUTH WALES CRIME COMMISSION
Respondent

ANNEXURE "A" LEGISLATION

1	*Civil Procedure Act* 2005 (NSW), No. 28 (Historical Version for 07.01.2011 to 03.03.2011)	As at 28 .02. 2011. Still in force as at 12.04.13.	Section 71

20

(Legislation sourced from: www.legislation.nsw.gov.au)

Dated 12 April 2013

Filed by the respondent:

New South Wales Crime Commission
453-463 Kent Street
Sydney NSW 2000
PO Box Q566
QVB Post Office Sydney 1230
DX 13018 Market Street Sydney

Ref: Ms Alexandra Bishop
ABishop@crimecommission.nsw.gov.au
Tel: 02 9269 3819 (direct)
02 9269 3888 (switch)
Fax: 02 9269 9733

Civil Procedure Act 2005 No 28

71 Business in the absence of the public

(cf Act No 52 1970, section 80)

Subject to any Act, the business of a court in relation to any proceedings may be conducted in the absence of the public in any of the following circumstances:

(a) on the hearing of an interlocutory application, except while a witness is giving oral evidence,

(b) if the presence of the public would defeat the ends of justice,

(c) if the business concerns the guardianship, custody or maintenance of a minor,

(d) if the proceedings are not before a jury and are formal or non-contentious,

(e) if the business does not involve the appearance before the court of any person,

(f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,

(g) if the uniform rules so provide.

Top of page