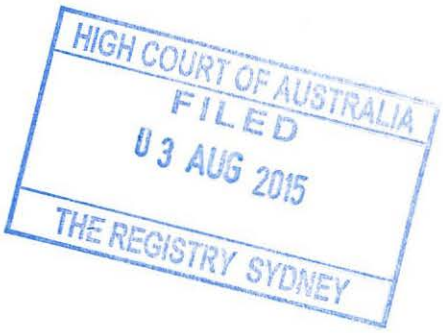
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S94 of 2015**

BETWEEN:

THE QUEEN
Appellant

and

BARBARA BECKETT
Respondent



RESPONDENT'S SUBMISSIONS

Hammond Nguyen Turnbull
Suite 3, Level 6
9 George Street
Parramatta NSW 2150

Telephone: 02 9687 6880
Fax: 02 9687 6860

Ref: Matthew Hammond

PART I: CERTIFICATION

1. This document is in a form suitable for internet publication.

PART II: STATEMENT OF ISSUES

2. First, is it an element of s 319 of the *Crimes Act 1900* (NSW) ("*Crimes Act*") that the course of justice has been embarked upon (or is in being) at the time when the defendant engages in the relevant act or omission?

3. Secondly, if not, were proceedings against Ms Beckett under s 41 or s 42 of the *Taxation Administration Act 1996* (NSW) ("TAA") possible at the time she engaged in the conduct alleged?

PART III: SECTION 78B

4. No s 78B notice is required.

PART IV: FACTUAL BACKGROUND

5. The respondent has three comments in relation to the statement of facts in [5.1]-[5.15] of the appellant's submissions ("AS").

6. First, AS paragraphs [5.2]-[5.8] should be read as the appellant's summary of the "Crown case", not as outlining facts which are correct.

7. Secondly, the respondent does not accept as accurate the summary of the primary judge's reasoning at [5.13]. However, because this is not a matter of fact, no summary of that reasoning is here provided.

8. Thirdly, the "Crown case" set out in AS [5.1]-[5.15] is not an accurate summary of the prosecution case. The Crown case as it appears in AS and the Crown facts sheet ("FS") is as follows:

(a) From 24 February 2003 until at least 11 June 2010, the respondent was approved for "special arrangement[s]" for the lodging of returns and payment of tax under s 37 of the TAA: AS [5.1]; FS [13].

(b) Such approvals under the TAA were subject to conditions under s 39(1) of the TAA.

(c) It was an offence against s 41(2)(b) of the TAA to contravene a condition of an approval; it was also an offence against s 42(2) of the TAA to endorse an instrument otherwise than in accordance with the conditions of an approval: AS [5.2], FS [23], [28].

(d) One condition of the respondent's approval was that, before processing a stamp duty transaction online, she was to have available to her the duty payable: AS [5.2]; FS [12].

(e) On 11 June 2010, the respondent processed a stamp duty transaction online for a property, without having the duty available to her: AS [5.3], FS [23]. The respondent also stamped the transfer: FS [29].

(f) The respondent thereby breached a condition of her approval and therefore committed an offence against both ss 41(2)(b) and 42(2) of the TAA: AS [5.2], [5.3], [6.30]; FS [23], [29].[1]

(g) On or about 17 June 2010, the Office of State Revenue (OSR) became aware of this alleged "breach": RS [5.4]. On 17 September 2010, the OSR informed

[1] It is no part of the Crown case that, before 17 June 2010, the respondent had committed any offence other than offences against ss 41 and 42 of the TAA or that she could reasonably have been considered to have committed any other offence.

the respondent that an audit of her practice was to be undertaken under the TAA and the *Duties Act 1997* (NSW) ("the *Duties Act*") and that, if a breach of those statutes were discovered, the OSR may consider prosecution action: AS [5.4], [6.30].[2]

(h) On 21 September 2010, a representative of the OSR, David Morse, spoke to the respondent on the telephone and requested that the respondent attend an interview on 28 September 2010: AS [5.5], [6.31]. On the same day, the OSR issued notices to the respondent requiring her to attend the interview on 28 September 2010 and requiring her to produce her files in relation to the property transfer: AS [5.6], [6.32].[3]

(i) The respondent attended the interview and produced photocopies of two bank cheques (in response to a notice to produce) and told investigators that the cheques were available to her before she processed the transactions online but had been lost by the bank: AS [5.8], FS [33]-[36]. The cheques were forged and the statements that the cheques had been available to her were false: AS [6.34]-[6.44].

(j) The respondent contemplated the possibility of being prosecuted for breaches of the TAA and, when taking the steps referred to in paragraph (i), acted with an intention to prevent such a prosecution: FS [46]; AS [6.33].

(k) In order for there to be an offence contrary to s 319, it is "necessary" for the Crown to establish a "link" between the accused's conduct and "imminent or possible judicial proceedings": AS [6.47]. The respondent's conduct had that necessary "link" because, at the time of her conduct, a prosecution for breaching ss 41 and 42 was possible.

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2 Again, it is no part of the Crown case that the respondent contravened the *Duties Act* or could reasonably be considered to have done so.

3 It is an offence to fail to comply with such notices: TAA s 72(8).

PART V: APPLICABLE LEGISLATIVE PROVISIONS

9. To the provisions identified in AS the respondent adds ss 37, 39, 41 and 42 of the *Taxation Administration Act* (as at 11 June 2010). These provisions are annexed to these submissions.

PART VI: SUBMISSIONS ON THE APPEAL

10. The primary issue on this appeal is the construction of s 319 of the *Crimes Act 1900* (NSW) which provides as follows:

> "A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years."

11. The CCA construed the words "pervert the course of justice" as relating to a course of justice which existed (or had commenced) at the time of the relevant act or omission: [105], [100], [98], [80], [72], [73]; see also AB 367.45.

12. The primary judge also construed s 319 in the same manner: AB 164.48, 165.21, 165.31; CCA at [73].

13. The essential difference between the CCA and the primary judge was that the primary judge found that there was a course of justice in being when Ms Beckett was interviewed (AB 164.48, 165.22) whereas the CCA at [80], [98], [100], [111] held that the course of justice does not commence until proceedings are instituted—that is, when the jurisdiction of the Court is invoked.

14. This reasoning of the CCA is supported by a number of matters.

15. The first and most important matter is that as at 1990 (when s 319 and the other provisions of Pt 7 were inserted into the *Crimes Act*) it was clear from High Court authority that perverting the "course of justice" meant perverting a course of justice

which was in being. That is clear from the judgment of the Court in *R v Murphy* (1985) 158 CLR 596 at 610 ("*Murphy*"). There, the Court adopted observations made by Watkins LJ in *R v Selvage* [1982] 1 QB 372 at 381 that "one of the vital tests or principles which helps to determine whether or not a charge of perverting the course of justice is properly laid" is "that a course of justice must have been embarked upon", that is, must be in being or extant. The Court added that it did not need to determine "the limits of the offence" (that is, the scope of an existing course of justice) because "'the course of justice' would include the conduct of committal proceedings". At that point, proceedings had been instituted: *R v Rogerson* (1992) 174 CLR 268 at 303 ("*Rogerson*"). Thus, in 1990, at common law, the notion of intending to pervert "the course of justice" involved an intention to pervert an *existing* course of justice.[4] And, in *Murphy*, the Court determined the scope of a statutory offence which (like s 319) referred to the "course of justice" by reference to what the course of justice "would include" (at 610).

16. Secondly, in *Rogerson*, it was held (at 276, 283) that the "course of justice" does not commence until proceedings are instituted. In the earlier case of *Murphy*, the Court (at 610) had expressly refrained from delineating the scope of the words "course of justice" and, in particular, did not determine whether the "course of justice" would include future proceedings which might be brought. That issue was unnecessary for the determination of the issues, was left for subsequent determination and was determined later in *Rogerson*.

17. Thirdly, the words "pervert the course of justice" are open to be interpreted as referring to an existing course of justice and the provision is naturally read to refer to a circumstance which is in existence and which the accused must intend to pervert.

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4 On the special leave application (*R v Beckett* [2015] HCATrans 113 at 15-17), counsel for the appellant stated that "[o]f course, the offence of pervert the course of justice, actual, can only be committed if there are curial proceedings on foot because there actually has to be a perversion of the course of justice". Cf *R v Edelsten* (1990) 21 NSWLR 542 (CCA) at 562-3: on a charge of perverting the course of justice the "Crown case ... is one of alleged actual perversion of the course of justice."

18. Fourthly, even if the Crown can establish that an alternative construction is open, the Crown will further need to demonstrate that s 319 is not ambiguous or uncertain. This will be difficult for the Crown to do given that a construction different from the Crown's construction was adopted by the four judges below. The Crown will need to show that s 319 is not ambiguous because, if it is, this Court will generally apply the principle that s 319 "must be strictly construed" in the accused's favour: *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 254. That principle has already been applied in the context of s 319 by the CCA in *R v Einfeld* (2008) 71 NSWLR 31 at [92]ff per Bell JA, Hulme and Latham JJ ("*Einfeld*"). See also *Monis v The Queen* (2013) 249 CLR 92 at [20], [59] per French CJ, *R v Adams* (1935) 53 CLR 563 at 567-8 per Rich, Dixon, Evatt and McTiernan JJ.

19. What are the arguments deployed by the Crown in its written submissions in order to demonstrate that the four judges below were wrong in interpreting the "course of justice" in s 319 to refer to an existing course of justice and that the CCA was wrong to hold that the course of justice does not commence until proceedings are instituted?[5]

20. The principal matters relied upon by the Crown appear to be the following.

21. At AS [6.6], it is asserted that to interpret the words "course of justice" as referring to an existing course of justice is "contrary to the decisions of this Court in *Murphy* and *Rogerson*".

22. The difficulty with that submission is that *Murphy* and *Rogerson* are quite consistent with the reasoning of the CCA in relation to the meaning of the "course of justice". *Murphy* (at 610) approved the statement that the "course of justice" must be an

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5 One portion of the CCA's reasoning does not appear to be in dispute on this appeal. At AS [6.16] it is noted that the CCA (Bell JA, Hulme and Latham JJ) held in *Einfeld* at [97]-[99] that the definition of "pervert the course of justice" in s 312 "differs little, if at all, from the expression 'the course of justice' as explained in *R v Rogerson*": [99]. Like the Crown, the respondent does not dispute the correctness of this holding which was adopted by the CCA: at [92], the CCA noted that in *Einfeld* the CCA "accepted that the expression [in s 312] bore the same meaning as was given to the phrase 'course of justice' in *Rogerson*".

existing course of justice and held that the scope of the offence was determined by reference to what "the 'course of justice' would include". And *Rogerson* held (at 276, 283) that the course of justice does not commence until proceedings are instituted.[6] The two cases (so far as they are relevant to the interpretation of the words "course of justice" in s 319) thus support the reasoning of the CCA.

23. At AS [6.1] and [6.29], there is much emphasis on the assertion that *Rogerson* and *Murphy* establish that an attempt to pervert the course of justice may (in limited circumstances) occur even when no curial proceedings of any kind have been instituted. It is then said that the CCA decision is contrary to those two decisions because the "basis of the [CCA's] stay [reasoning] was that the s 319 offence cannot apply to conduct committed before judicial proceedings have commenced" (AS [6.28]).

24. However, *Murphy*—which was decided before the enactment of s 319—does not establish as part of its ratio that the offence of attempting to pervert may be committed before proceedings are instituted. It is clear from page 610 of the judgment that the Court adopted the proposition that the course of justice must have been embarked upon, that is, that there must be an existing course of justice and that the scope of the offence is determined by reference to what the course of justice "would include". However the Court (at 610) did not determine whether the course of justice "would include" any particular point prior to the institution of proceedings. That was because, as the Court observed (at 610), there could be no doubt that at common law and under statute "'the course of justice' would include the conduct of committal proceedings" (at which time proceedings have been instituted). Any discussion in *Murphy* of the position prior to the institution of proceedings is clearly obiter and, in any event, cannot be linked to the construction of the text of s 319.

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6 *Rogerson* was decided in 1992, after the enactment of s 319 in 1990.

25. So far as *Rogerson* is concerned, that case (as noted in paragraph 22) is relevant to the meaning of the words in s 319 because it holds that the "course of justice" does not commence until proceedings are instituted (a holding which harms the Crown's construction). The broader holding that the *common law offence* may in some limited circumstances be committed before proceedings are instituted does not impact on the construction of the text of s 319 and has not been shown by the Crown to do so.

26. At AS [6.6], it is asserted that the CCA's reasoning that there must be an existing course of justice is "not reflected in the terms of the section itself".

27. If this submission is directed to the absence of the word "existing" in s 319, it is trite and open to the riposte that the section likewise does not refer to a "possible" or "future" course of justice or to a "necessary link" (cf AS [6.47]). If it is directed more generally to the construction of s 319 it needs to rise above assertion, deal with the matters referred to in paragraphs 15 to 18 above and articulate reasons why the words "course of justice" in s 319 should not be construed as referring to an existing course of justice, particularly when the High Court in *Murphy* had adopted that view about five years before s 319 was enacted.

28. At AS [6.17]-[6.27] there is discussion of whether s 319 requires that the relevant act have an objective tendency to pervert the course of justice.

29. However, it is not clear whether the Crown asserts that s 319 contains such a requirement and, if so, how such a requirement would advance the Crown's position on the appeal.

30. Finally, at AS [6.33] and [6.47], by reference to the law on the common law offence of attempting to pervert, the Crown asserts that s 319 covers the situation where there are "possible judicial proceedings" at the time when the accused's conduct occurred and that this will provide the "necessary link". The Crown then asserts that those

"possible proceedings" against Ms Beckett were "prosecution[s] for breaches of the Duties Act and TAA": AS [6.33] and [6.47].

31. This submission involves difficulties. The first is that the Crown has not demonstrated how the text of s 319 incorporates the notion of "possible proceedings" and "necessary link": common law principles only assist in the interpretation of a statute so far as they assist in fixing the meaning of a given statutory text, but the Crown's submission does not address the text of s 319. The second is that in *Rogerson* this court held that the words "course of justice" do not include the situation before proceedings are instituted. The third is that (for reasons advanced in paragraphs 32 to 41 below) no prosecution under the *Duties Act* or ss 41 or 42 of the TAA was possible.

32. The possibility of prosecution under the *Duties Act* can be put to one side because the Crown has never identified how this is possible and counsel for the respondent are therefore unable to address it.

33. It is, however, part of the Crown case that prosecution of the respondent under ss 41(2) and 42(2) of the TAA was possible (AS [5.2], [5.3], [6.30]) and that that possibility constituted the "necessary link" between the respondent's conduct and a future course of justice (AS [6.47]). The respondent submits that the Crown case, depending as it does on those propositions, is foredoomed to fail. Why is that so?

34. At the relevant time, it was a common element of offences against ss 41 and 42 that the accused be approved for special tax return arrangements under s 37 of TAA.[7] The respondent was so approved: AB 179. At the relevant time, it was also a common element of both offences that the accused contravene a "condition" of that approval. That is because s 41(2) proscribed a person from contravening conditions of an approval when acting on behalf of a taxpayer and s 42(2) proscribed a person from

7 The text of ss 37, 39, 41 and 42 is set out in Annexure A.

endorsing an instrument otherwise than under and in accordance with an approval, that is, endorsing an instrument in contravention of a condition of the approval.

35. The procedure for prescribing conditions was set out in s 39 of the Act. The *only* conditions to which an approval was subject were "conditions specified by the Chief Commissioner [of State Revenue] in the notice of approval or by subsequent written notice": TAA s 39(1).

36. The Crown's case is that the respondent contravened ss 41(2) and 42(2) because she failed to comply with the Office of State Revenue "Settlement Policy" and compliance with that policy was a condition of her approval. That case cannot succeed, and is misconceived.

37. The only document in which that "Settlement Policy" was set out—and the only means by which the Crown could conceivably establish that compliance with that policy was a condition of the respondent's approval—was the "Office of State Revenue Directions for Using Electronic Duties Returns" ("EDR Directions") at AB 251. The Settlement Policy read:

> An approved person must have the duty payable available to them prior to processing transactions online. This is the case for all EDR transactions except those where the duty payable will be collected at settlement.

38. The question of whether the respondent complied with that policy can be put to one side. The critical and clear defect in the Crown's case is that compliance with the policy was not a "condition" of the respondent's approval. As indicated above, the only two means by which compliance with the Settlement Policy could have become a condition of the respondent's approval were if (1) it was a condition specified by the Chief Commissioner in the respondent's notice of approval or (2) it was a condition specified by the Chief Commissioner by subsequent written notice.

39. As to (1): the respondent's notice of approval appears at AB 179 and does not specify that compliance with the Settlement Policy, or anything akin to the Settlement Policy, is a condition of the respondent's approval. The Crown must therefore rely on the second possibility ie a condition specified by the Chief Commissioner by subsequent written notice.

40. As to (2): the Crown has to date furnished no reason why compliance with the "Settlement Policy" was a condition specified by subsequent written notice. However, the Crown's case must be that the articulation of the "Settlement Policy" in the EDR Directions (AB 251) constitutes specification by the Chief Commissioner that compliance with that policy is a condition of the respondent's approval. That case cannot succeed:

(a) The EDR Directions explicitly and directly identify the only matters which are "conditions" of approvals. They do so by incorporating a section entitled "Conditions of Approval" and then listing 19 conditions (AB 241-243). The "Settlement Policy" is not one of the conditions so stated.

(b) The "Settlement Policy" is, in its own terms, only a "policy", not something *specified*[8] as a *condition* of approval by written *notice*.

(c) The "Settlement Policy" is not "specified" as a condition because it is not stated with the precision that should attend the specification of a condition contravention of which constitutes a criminal offence. The policy does not define what it means for duty to be "available". Nor does the policy articulate with precision when the

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8 A condition is not "specified" unless it is "state[d] in explicit terms" and "give[n] not by inference but by direct statement": *Jolly v Yorketown District Council* (1968) 119 CLR 347 at 351 per Barwick CJ and Owen J, 351 per McTiernan J, 352 per Kitto J, 352 per Menzies J.

exception to the policy—namely, circumstances where "the duty payable will be collected at settlement"—will be triggered.[9]

41. It follows that the "Settlement Policy" was not a "conditio[n] specified ... by subsequent written notice". It also follows that the Crown case that it is a "requirement of the Electronic Duties Returns scheme (EDR) ... that the approved person must have received the duty payable in respect of a transfer before processing the transfer"[10] and that it "was an offence under ss 41 and 42 of the ... TAA to stamp a transfer in breach of this requirement" is manifestly flawed: cf AS [5.2].[11]

42. To conclude, even on the Crown's construction and taking the Crown evidence at its highest the prosecution will "necessarily fail" and is "futile": *Ridgeway v R* (1995) 184 CLR 19 at 40-41, 52. It is "foredoomed to fail" and will "inevitably and manifestly fail" (*Walton v Gardiner* (1993) 177 CLR 378, at 392-393, 411) because there was no possibility of a successful prosecution under s 41 or s 42 of the TAA.

PART VIII: ORAL ARGUMENT

43. The respondent estimates that she will require 1-2 hours to present her argument.

Dated: 3 August 2015

G O'L Reynolds
Telephone: (02) 9232 5016
Fax: (02) 9233 3902
Email: guyreynolds@sixthfloor.com.au

David Hume
Telephone: (02) 8915 2694
Fax: (02) 9233 3902
Email: dhume@sixthfloor.com.au

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9 It does not constitute non-compliance with the Settlement Policy to fail to have duty payable at settlement in circumstances where it "will be collected at settlement". The Crown errs when it states a contrary proposition at AS [5.2].

10 A proposition which is incorrect since the duty need not be available if it will be collected at settlement.

11 The Crown errs so far it contends that any such proposition was held by the CCA.

ANNEXURE A

Division 2 Approval of special tax return arrangements

37 Approval of special tax return arrangements

(1) Despite the provisions of another taxation law, the Chief Commissioner may, by written notice, give approval for a special arrangement for the lodging of returns and payment of tax under the taxation law to:

(a) a specified taxpayer, or

(b) a specified agent or other person on behalf of a specified taxpayer or taxpayers of a specified class.

(2) An approval, among other things:

(a) may provide an exemption for the taxpayer or taxpayers from specified provisions of the taxation law to which it applies, and

(b) may authorise the lodging of returns and payments of tax by electronic means.

(3) An approval may be given on the initiative of the Chief Commissioner or on application.

(4) The calculation of tax by a person other than the Chief Commissioner in accordance with a special arrangement approved under this section is not an assessment.

39 Conditions of approval

(1) An approval under this Division is subject to conditions specified by the Chief Commissioner in the notice of approval or by subsequent written notice.

(2) The conditions of an approval may include:

(a) conditions limiting the approval to tax liabilities of a specified class, and

(b) conditions limiting the approval to transactions effected by instruments of a specified class, and

(c) conditions requiring the lodging of returns at specified times and conditions as to the contents of the returns, and

(d) conditions requiring payments of tax at specified times, and

(e) conditions as to the means by which returns are to be lodged or payments of tax are to be made, and

(f) if the approval provides an exemption from a requirement for the stamping of instruments, conditions as to the endorsement of the instruments, and

(g) conditions requiring the taxpayer or agent to whom the approval was given to keep specified records.

41 Effect of approval

(1) If an approval is given under this Division to a specified taxpayer, the conditions of the approval are binding on the taxpayer and the taxpayer is guilty of an offence if any of the conditions is contravened.

Maximum penalty: 100 penalty units.

(2) If:

(a) an approval is given under this Division to a specified agent on behalf of a specified taxpayer or taxpayers of a specified class, and

(b) the agent acts on behalf of that taxpayer or a taxpayer of that class in relation to a tax liability to which the approval applies,

the conditions of the approval are binding on the agent and the taxpayer and the agent and the taxpayer are each guilty of an offence if any of the conditions is contravened in relation to that tax liability.

Maximum penalty: 100 penalty units.

(3) However, if the provisions of a taxation law from which a taxpayer is exempted by an approval under this Division are complied with in relation to a tax liability, subsections (1) and (2) do not apply to the taxpayer or an agent of the taxpayer in relation to that tax liability.

42 Stamping of instruments

(1) If:

(a) an approval under this Division provides for an exemption from a requirement for the stamping of an instrument, and

(b) the instrument is endorsed in accordance with the conditions of the approval,

the instrument is taken to be duly stamped but without affecting liability for the payment of tax in relation to the instrument under the relevant taxation law.

(2) A person who endorses an instrument otherwise than under and in accordance with an approval under this Division so as to suggest or imply that the instrument is properly so endorsed and as a result is taken to be duly stamped is guilty of an offence.

Maximum penalty: 100 penalty units.

(3) Despite subsection (1), the endorsing of an instrument as referred to in subsection (1) (b) is not evidence of an assessment of the duty payable under the *Duties Act 1997* in respect of the instrument.