HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27E – Appellant's reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Edward Moses Obeid**
Appellant

and

The King
Respondent

APPELLANT'S REPLY

Part I: Certification

1. These submissions are suitable for publication on the internet.

Part II: Reply

Agreement vs methodology

2. By its reply the Respondent seeks to draw an unnuanced delineation between an agreement articulated "in fairly general terms" on the one hand, and the means by which that agreement is effected on the other. The articulation of those means within the indictment is said to be unnecessary to render a charge of conspiracy valid: **RS [9]-[20], [29], [37]**. In this way, the Respondent fails to meet the Appellants' case.[1] The Respondent elides the necessity to identify the "unlawful act" or "common design" contemplated by the co-conspirators with sufficient specificity such that the *agreement itself* is ascertainable – not merely the *method* by which the agreement is brought into effect.

3. There is a distinction to be drawn between "particulars which define the agreement which the Crown will seek to prove" and "those which set out overt acts from which the Crown invite" the inference of the agreement's existence.[2] "Whether the

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1 Including as adopted by Edward Moses Obeid: **AS [7]**.
2 *Archbold's Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2003), § 33-44.

particulars are elevated to the status of ingredients [of the conspiracy] depends on the charge involved…[t]here may be cases where the particulars related not to the implementation, but to the form of the agreement itself".[3]

4. This reality arises from the nature of a conspiracy – an agreement to "do an unlawful act, or to do a lawful act by unlawful means",[4] whose "identity is to be found in what the conspirators commonly agree to or accept".[5] The mens rea is the "intention to do the unlawful act" and the "fact of the agreement is the actus reus",[6] and so "there can be no conspiratorial agreement unless [the conspirators] also intend that the common design should be carried out".[7] It follows that without knowing the content of the "common design" that has been agreed, one cannot intend to bring it into effect: cf **RS [31]**. There is nothing "new" about such a proposition: cf **RS [37]**.

5. An indictment for a conspiracy therefore needs to "identify the agreement alleged with the specificity necessary in the circumstances of each case" and "if the agreement alleged is complex, then details of that may be needed and those details will … form part of what must be proved".[8] In all cases, there must be "sufficient certainty for there to be an agreement" between the alleged co-conspirators.[9] It is "fundamental" that "the precise nature of the conspiracy" is analysed before such a charge is laid.[10]

6. An example of where articulation and proof of the contemplated acts is required is a conspiracy to defraud which is effected through multiple stages or consecutive transactions. There, those dishonest means through which the agreement is effected "form[ ] part of the conspiratorial agreement itself" and it is "incumbent on the prosecution to prove that the conspirators agreed to the dishonest means as part of their burden to prove the existence of the alleged conspiratorial agreement."[11] By way of contrast, in a conspiracy to defraud a known victim through making false

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3 Ormerod, D 'Conspiracy to Defraud', *Criminal Law Review* (Sweet & Maxwell, 2005) at 298-301.
4 *Mulcahy v The Queen* (1868) LR 3 HL 306; *R v LK* [2010] HCA 17; 241 CLR 177 at [62] (French CJ
5 *Gerakiteys v The Queen* [194] HCA 8; 153 CLR 317 at 327 (Brennan J).
6 *R v LK* [2010] HCA 17; 241 CLR 177 at [64] (French CJ).
7 *Peters v The Queen* [1998] HCA 7; 192 CLR 493 at [55] (McHugh J).
8 *R v K, G & M* [2004] EWCA Crim 2685 at [36] (Thomas LJ).
9 *R v K, G & M* [2004] EWCA Crim 2685 at [28] (Thomas LJ). See also the Amended Appellant's Submissions of Moses Edward Obeid dated 31 July 2025 at [27]-[28].
10 *Gerakiteys v The Queen* [194] HCA 8; 153 CLR 317 at 333 (Deane J).
11 *HKSAR v Chen* [2019] HKCFA 32 at [62] (Ribeiro and Cheung PJJ, with whom Ma CJ, Fok PJ and Gummow NPJ agreed). See also *R v Bennett* (Unreported, Court of Appeal (England and Wales, Criminal Division), 6 May 1999); *HKSAR v Chen Chee Tock Theodore (No 2)* (2016) 19 HKCFAR 86 at § 13-14.

representations, where each representation is individually sufficient to constitute the unlawful act, that agreement is certain and "the agreement to make any particular representation is not regarded as an essential element of the crime".[12] As illustrated by the eight sequential acts of misconduct relied upon by the Respondent,[13] the conspiracy alleged against the Appellants is akin to the former category, not the latter.

7. Having regard to the above principles, the authorities relied upon by the Respondent between **RS [12]-[19]** concerning agreements to "cheat" or "extort" an identified victim are not analogous to the case against the Appellants.[14] In those cases, what is agreed is an unlawful act of sufficient certainty without the need for further articulation of the contemplated conduct. By contrast, in the Appellants' case, the indictment contemplated Mr Macdonald doing "acts in connection with granting of an exploration licence", and "concerning the interests" of Edward and Moses Obeid "and/or their family member and/or associates".

8. An agreement framed at such a degree of generality, and by reference only to "qualities or descriptors" (**RS [39]**), is deprived of the certainty of content about which its parties could be said to be ad idem. Its wording was "so vague and imprecise" it was capable of referring to "any one of a number of different alleged or conceivable conspiracies".[15] Indeed, on a literal reading of the broad terms of the indictment, the condition that Mr Mcdonald's acts "concern[ ] the interests" of Edward and Moses Obeid (and/or their families and/or their associates), was such the conduct need not even *advance* those interests.

9. Contrary to **RS [28]**, the Respondent's reliance on particulars provided outside of the indictment, and not said to be part of the agreement, does not cure an indictment which does not advert to a sufficiently certain agreement which the conspirators can be said to have joined.

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12 *R v Walsh* [2002] VSCA 98; 131 A Crim R 299 at [57] (Phillips and Buchanan JJA, with whom Ormiston JA agreed). See also *R v Brown* (1984) 79 Cr App R 115 at 119 (Eveleigh LJ).

13 See CCA [15]; **AABFM 2 672-673**.

14 In this respect, the Respondent's reliance on *Elomar v R* [2014] NSWCCA 303; 316 ALR 206 (**RS [20], [38]**) is an inapposite foundation for a statement of general principle because the offence under consideration there specifically *excluded* the requirement to identify any specific terrorist act to which planning or preparation was directed: *Criminal Code* (Cth), s 101.6(2)(b).

15 *Gerakiteys v The Queen* [194] HCA 8; 153 CLR 317 at 335 (Deane J).

10. The effect of the above is not to suggest that a prosecutor needs to frame an indictment more narrowly than what is required to identify an ascertainable unlawful act or common design. That is, in *Rubasha,*[16] which the Respondent highlights at **RS [41]**, the indictment could have been readily crafted to be a conspiracy to rob someone without specifying the precise location of that person, whilst also maintaining a sufficient degree of certainty as to what unlawful conduct was agreed.

11. The Respondent's characterisation of what had been "agreed", that "Mr Macdonald would engage in acts that satisfy the cumulative conditions in the indictment" (**[RS [35]**), that is a "class of acts, qualitatively described" (**RS [29]**), merely begs the question rather than provides an answer. The breadth of possible conduct encompassed by the indictment is such that there could not have been "sufficient certainty" as to what was agreed between the Appellants or a shared intention that a "common design should be carried out" – let alone the assessment of the gravity of the misconduct required by the predicate offence: **AS [34]-[37]**.

12. The case the Appellants were required to meet at trial was left at large to a considerable and intolerable degree, with the Respondent able to rely on "every act fitting within the cumulative conditions of the indictment" as evidencing the agreement: **RS [33]**. Conceptualising an agreement the subject of a conspiracy at such a high level of generality, which may make conviction more achievable, ought not be encouraged.[17] In any event, it here failed to establish an agreement of sufficient certainty to make good the charge.

The fifth element

13. The Respondent further submits that there is no relevance in the distinction between a class of acts and specifically defined acts for the purposes of the tribunal of fact characterising the conduct as serious and meriting criminal punishment for the purposes of the "fifth element" of the offence. It is submitted that "at most" the approach renders the prosecutor's onus to be more burdensome: **RS [50]-[52]**. It is not clear that that is so.

14. Had the Respondent articulated defined acts constituting the common design of the agreement, whether or not those acts were "serious and meriting criminal

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16 [2021] NSWCCA 319.

17 See *R v Patel and others* (Unreported, Court of Appeal (England and Wales, Criminal Division), 7 August 1991).

punishment" could be readily assessed by a tribunal of fact having regard to "the responsibilities of the office and the officeholder, the importance of the public object which they serve and the nature and extent of the departure from those objects".[18]

15. Instead, through a global reference to "such misconduct" in the chaussette of the indictment, the Respondent invited the trier of fact to make a characterisation of the impugned conduct *as a whole*. Indeed, this appears to be the approach the trial judge undertook, noting "I do not propose to focus on the multiple ways in which Mr Macdonald executed the agreement" but rather the "gravity of the agreement" and its "open-ended nature…and the breadth of its scope".[19]

16. As such, rather than making proof more difficult for the prosecutor, the framing of the indictment tended to have the opposite effect. Rather than testing a series of specified acts constituting the agreement as against the criteria set out in the fifth element, the trier of fact was invited to make a broad assessment of the conduct as a whole, divorced from specificity. The reduced scrutiny that necessarily follows from such an approach tended to prejudice the Appellants, not the Respondent: cf **RS [52]**.

17. The Respondent's submission that the characterisation required by the fifth element operates "in the same way" between a class of acts and specifically defined acts (**RS [50]**) should therefore be rejected.

Dated: 1 October 2025

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18 *R v Quach* [2010] VSCA 106; 27 VR 310 at [46] (Redlich JA, with whom Ashley JA and Hansen AJA agreed.

19 TJ [2034]-[2039]; **AABFM 1 457-458**.