HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Moses Edward Obeid
Appellant

and

The King
Respondent

APPELLANT'S REPLY

Part I: Certification

1. The submissions are in a form suitable for publication on the internet.

Part II: Reply to Respondent's Argument

2. The Crown alleged a conspiracy to commit an offence and, in particular, a high level conspiracy formed and entered into by all parties by a particular date. The central contention made by the respondent is that it is not necessary that the Crown identify and prove the conduct or transaction that was agreed upon by the parties which would make out the relevant offence if carried out. It is sufficient that the Crown allege an object *"in a qualitative way"* by setting out certain *"cumulative conditions"* that identify a *"general class of acts"* within which a potential conduct or transaction might fall: RS [26], [29], [31], [39], [45]. The respondent says that a conspiracy at an even higher (and indeed much higher) level of generality than here could be properly put: RS [27]. There is no support in principle or authority for the respondent's contentions.

3. ***First***, the authorities at RS [10]-[16] concern challenges to the form of an indictment, either on a demurrer or an application for certiorari. An indictment founds jurisdiction for trial and, historically, a broad statement of a charge was desirable to prevent a conviction being set aside on technical pleading grounds as opposed to matters of substance in circumstances where particulars could be provided.[1] The question on this appeal is not merely the indictment but the Crown case as put and particularised.

4. ***Second***, whatever the permissible bounds of an indictment (*cf* RS [10]-[11]), a

[1] See e.g. *R v Kenrick* (1843) 5 QB 49 at 54 and 62; 114 ER 1166 at 1168 and 1171.

conspiracy must be properly particularised at trial. The fact that the prosecution must identify the conduct or transaction comprising an offence is a well-established and elementary principle.[2] It does not propose a *"new criterion of validity"*: *cf* RS [37]. The principles apply equally to conspiracy.[3] An accused is entitled *"to have identified with precision the transaction upon which the Crown relies"*, *"to be apprised not only of the overt acts alleged but also the legal nature of the charge against him and the particular act, matter or thing alleged as the foundation of the charge"*.[4] That includes the co-conspirators and *"the specific scope of the conspiracy alleged"*.[5]

5. ***Third***, the statements of principle extracted by the respondent must be seen in light of the cases particularised at trial. Particulars limit the generality of a charge.[6] Thus in *Weaver*, the allegation was not conspiracy to defraud *simpliciter*: *cf* RS [12]. The *"essence of the matter [was] the agreement of the accused by means of false and fraudulent statements, conduct and devices to induce a person to buy land at more than is worth and thus cheat and defraud them"*.[7] Indeed, in each of the cases cited at RS [12]-[20] where the facts are known, the Crown went much further than presenting a general indictment when particularising the conspiracy alleged at trial.

6. The respondent cites *Lacey* to say a conspiracy can be alleged in *"fairly general terms"* and cites the indictment as showing that generality: RS [17]-[18]. But the Crown went beyond the indictment. The Crown did not allege a high level conspiracy to extort or to commit a qualitative 'class of acts'. The Crown alleged an agreed transaction: Lacey (a police officer) agreed with Barlow and Christodolous to demand and recover money from illegal bookmakers in exchange for immunity from prosecution and protection from other police.[8] The *"common purpose"* was defined.[9] Other *"substantially different"* conspiracies were not put (e.g. an agreement that only one bookmaker would be extorted, or an agreement where the persons paying the money were party to the conspiracy).[10] King CJ's statement that the criminal agreement need not be *"in precise terms"* concerned matters such as the date the conspiracy was entered into, the full

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[2] E.g. *Johnson v Miller* (1937) 59 CLR 467 at 489, 495, 501-501.
[3] *R v Partridge* [1930] 30 SR 410 at 412; *R v Weaver* (1931) 45 CLR 321 (***Weaver***) at 333 and 337; *Mok* (1987) 27 A Crim R 438 (***Mok***) at 441-442; *Saffron* (1988) 17 NSWLR 395 (***Saffron***) at 447-448; *R v Maria* [1957] St R Qd 512 at 516 and 517. See also *R v Lacey* (1982) 29 SASR 525 (***Lacey***) at 532-535.
[4] *Mok* at 441-442.
[5] *Mok* at 441.
[6] E.g. *Saffron* at 418.
[7] *Weaver* at 336. See also at 337.
[8] *Lacey* at 527, 530, 531 and 532. Indeed, the parties solicited payments of $50 a week: *Lacey* at 526.
[9] *Lacey* at 526.
[10] *Lacey* at 533. *Cf* AS fn 51.

extent of the bookmakers involved and the amounts of money collected.[11]

7. The respondent cites *Saffron* to say that a conspiracy may comprise an agreement to *"defraud company creditors as and when the opportunity arose"* or to engage in terrorist acts of murder *"as opportunity allowed"*: RS [44]. Yet the Crown case there was not put *"merely"* as a conspiracy to defraud the Commonwealth of tax; the object of the conspiracy was to defraud the Commonwealth by understating for tax purpose income derived from enterprises which the co-conspirators were concerned.[12] While applied to businesses opened after the commencement of the conspiracy (i.e. 'as the opportunity allowed'), it comprised the same scheme, same kind of businesses and income, same bookkeeper or bookkeepers and a substantial intermixing of tax evasion activities in the businesses.[13] The fact that certain conduct can be engaged in *"as the opportunity allowed"* is not to say that the conduct itself does not need to be identified.

8. ***Fourth***, the authorities cited by the respondent all concern different offences. Most concern conspiracies to defraud rather than a conspiracy to commit an offence: e.g. RS [36]. They say no more than was said in *Aston*.[14] In the conspiracy to defraud charges there, the conduct or transaction was to *"defraud"* a certain identified victim(s), being doing something to dishonesty induce the victim(s) to financially prejudice themselves,[15] and the references to *"means"* or *"method"* concerned only the *"performance"* or *"implementation"* of the conduct or transaction agreed.[16]

9. The charge in *Elomar* concerned a very different substantive offence (*cf* (RS [20], [38]), namely, doing acts in preparation for a terrorist attack contrary to s 101.6(1) of the *Criminal Code* (Cth). The narrow submission made on appeal that the Crown case failed because it was unable to *"identify any particular act of terrorism"* the subject of the agreement misconceived the nature of the offence.[17] That offence was part of a *"special"* and *"unique"* legislative regime concerning terrorism.[18] The provisions criminalised *"[p]reparatory acts… not often made into criminal offences"* in a situation *"where an offender has not decided precisely what he or she intends to do",*

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[11] *Lacey* at 535.
[12] *Saffron* at 426.
[13] *Ibid*.
[14] *Aston* (1987) 26 A Crim R 128 at 132.
[15] *Weaver* at 334; *Peters v R* (1997) 192 CLR 493 at [74].
[16] *DPP v Doot* [1973] AC 807 at 827 (A conspiracy *"as an agreement… has three stages, namely: (1) making or formation (2) performance or implantation (3) discharge or termination"*), cited in *Saffron* at 421.
[17] *Elomar v R* (2014) 316 ALR 206 (***Elomar***) at [26]. The same offence provision is considered in *B v R* (2008) 76 NSWLR 533: *cf* RS [48].
[18] *R v Lodhi* [2006] NSWCCA 121; (2006) 199 FLR 303 at [65]-[66].

reflecting a *"policy judgment… that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct e.g. well before an agreement has been reached for a conspiracy charge"*.[19] That particular offence did not require there be a particular act of terrorism in mind.[20] The Crown case concerned conduct at a much earlier point in time, being to take steps to acquire the capacity or capability to prepare for a terrorist act.[21]

10. ***Fifth***, the respondent does not show how the statements of principle, seen in their context, support the startling deployment of conspiracy in the present case or the 'qualitative' or 'class of acts' proposition advanced. There was no conduct or transaction agreed on in this case that would attract the characterisation of misconduct in public office. The essential facts constituting the target offence were not known.[22]

11. The respondent's conceptualisation of the Crown case is unclear, as is how it sits with the case put at first instance. The respondent accepts that the case was not an agreement that Macdonald *"remain favourably disposed"* as in *Hui* (RS [42]-[43], AS [31]), yet, says *Hui* assists *"[b]y analogy"* without saying why: RS [44]. The respondent does not accept the primary judge's understanding of the Crown case as a *"do what he could"* conspiracy (see AS [33], RS [44]), instead saying the agreement was to commit a *"class of acts"* which should then *per se* be understood as being an agreement to any act within that class that happened to be performed (RS [45]). Such acts are said to be agreed because they are acts which *"could fall within the class which must have been in contemplation, albeit at a higher level of generality"* even though they might not be performed: RS [46]. The 'but for' test and the fifth element can, the respondent says, be considered by evaluating the *"acts taken as a class"* regardless of whether such acts were to be performed or known about by the conspirators: RS [48], [52].

12. The contentions are not persuasive. One does not *"perform"* or *"implement"* a *"general class of acts"* because an act within the class is performed. Nor would performance of an act within a class be the *"means"* or *"method"* to implement an abstract 'class of acts'. There can be no *"common agreement"* on conduct, nor clarity on whether an agreed conduct attracts the characterisation of the offence, until it is translated from the abstract class into the conduct comprising the offence: *cf* RS [33],

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[19] *Ibid*.
[20] *Elomar* at [608].
[21] *Elomar* at [707] and *R(Cth) v Baladjam (No 4)* [2008] NSWSC 726; (2008) 270 ALR 106 at [69].
[22] *Cf Georgianni* (1985) 156 CLR 473 at 481, 487-488, 494, 500, 503, 504-505, 508.

[53]. Here, the so-called 'class' captures multiple potential acts that could be criminalised rather than one act with one or more forbidden characteristics: *cf* RS [48]. Indeed, the true limits on the 'class' are not even clear. The 'qualitative' descriptors describe the class in an inherently circular way by reference to elements of the offence rather than conduct (e.g. breaches of partiality and/or confidentiality): *cf* RS [45]. The agreement to carry out concrete conduct within the class might found a conspiracy. But that is, deliberately, not what was alleged here. Any conduct Macdonald chose to engage in was not agreed. That any conduct ultimately engaged in might fall within the abstract class does not mean there was an agreement to engage in that conduct.

13. The respondent does not engage with the unusual temporal and abstract nature of the conspiracy. A conspiratorial agreement is often inferred from the conduct attempting or achieving the crime the subject of the agreement.[23] Typically, the overt acts particularised inform the agreement itself and are not merely its execution.[24] The present conspiracy was different. The overt acts performed were not subsumed in the agreement itself. It was not a high-level conspiracy which incorporated as part of the agreement the specific acts that came to be committed. The *"class of acts"* never became specific conduct the subject of a common agreement. It was a high level conspiracy formed prior to 9 May 2008 and remained a high level conspiracy.

14. The appellant maintains that the proper understanding of misconduct in public office is within the grant of leave: *cf* RS [22], [48], [49]. Whether the Crown alleged an agreement to commit an offence requires attention be given to the offence. For instance, the respondent alleges that the 'but for' test and fifth element both apply to the *"class of acts":* e.g. RS [52]. The Crown at trial relied upon the acts in fact performed but which were not agreed: see e.g. **AABFM1 7** (para 4) and **14** (para (c)).

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[23] *Lacey* at 535. See also *R v Ongley* (1940) 57 WN (NSW) 116 at 117.
[24] See Gillies, 'The Indictment of Criminal Conspiracy' (1978) 10 *Ottawa Law Review* 273 at 283.