HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

MICHAEL JOHN MILNE APPELLANT

AND

THE QUEEN RESPONDENT

Milne v The Queen
[2014] HCA 4
14 February 2014
S278/2013 & S279/2013

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 2 March 2012 with respect to count 1 on the indictment and, in their place, order that:*

   (a) *the appeal against conviction with respect to count 1 to that Court be allowed;*

   (b) *the appellant's conviction with respect to count 1 be quashed and the sentence imposed by the Supreme Court of New South Wales on 17 December 2010 with respect to count 1 be set aside; and*

   (c) *a verdict of acquittal be entered with respect to count 1.*

3. *The commencement of the sentence imposed on the appellant by the Supreme Court of New South Wales on 17 December 2010 with respect to count 2 on the indictment be amended to 17 December 2010 with the sentence to expire on 16 June 2014.*

On appeal from the Supreme Court of New South Wales

Representation

H K Dhanji SC with T F Edwards for the appellant (instructed by Michael Bowe)

T A Game SC with D Jordan SC and A P C McGrath for the respondent (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Milne v The Queen

Criminal law – Money laundering – Criminal offence under s 400.3(1) of *Criminal Code* (Cth) to deal with property intending it will become "instrument of crime" – Appellant dealt with shares intending not to declare resulting capital gain – Whether shares "instrument of crime".

Words and phrases – "instrument of crime", "money laundering", "used in the commission", "used to facilitate".

Criminal Code (Cth), ss 134.2, 400.1(1), 400.2(1), 400.3(1).

FRENCH CJ, HAYNE, BELL, GAGELER AND KEANE JJ.

Introduction

1 This appeal concerns the construction and application of a provision of Pt 10.2 of the *Criminal Code* (Cth) ("the Code") which creates one of a number of offences under the general designation "money laundering". That provision, s 400.3(1), makes it an offence for a person to deal with money or other property of a value of or exceeding $1,000,000 if the person intends that the money or property will become an "instrument of crime". Property is an "instrument of crime" if it is used in the commission of, or used to facilitate the commission of, an indictable offence[1].

2 In February 2005 the appellant effected a disposition of shares the beneficial interest in which was held by a company under his control, Barat Advisory Pty Ltd ("Barat Advisory"). The shares were in a publicly listed company, Admerex Ltd ("Admerex"). They were swapped, at the appellant's direction, for shares in a Swiss software development company, Temenos Group AG ("Temenos"). The appellant intended that Barat Advisory would not declare, in its income tax return for 2005, the capital gain derived from that transaction. An intentional failure by Barat Advisory to declare the capital gain would be an offence against the Code[2]. The question in this appeal is whether, in those circumstances, the Admerex shares upon which the capital gain was made could have been intended to be or become "an instrument of crime" within the meaning of s 400.3(1). The answer to that question must be in the negative. Upon the disposal of the shares, which was the relevant dealing for the purposes of s 400.3(1), they were not intended to be "used" in the commission of, or to facilitate the commission of, an indictable offence. The proposition that they were intended to be so used involves giving to the term "use" a meaning which the text of the Code will not bear and which its purpose does not require.

3 The appellant, who was convicted in the Supreme Court of New South Wales of the offence of money laundering and whose appeal against that conviction to the Court of Criminal Appeal of New South Wales was dismissed[3], should not have been convicted of that offence. The appeal to this Court, by

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1 Code, s 400.1(1).

2 Code, s 134.2.

3 *Milne v The Queen* (2012) 259 FLR 42.

special leave granted on 8 November 2013[4], should be allowed and orders made in terms appearing at the end of these reasons.

The conviction and sentence

4 The conviction, the subject of this appeal, was for the offence against s 400.3(1) of the Code set out in count 1 of the indictment, on which the appellant was tried before a judge and jury in the Supreme Court of New South Wales. That count read:

> "Between about 30 April 2004 and about 30 September 2005 at Sydney in the State of New South Wales and elsewhere [the appellant] dealt with property, intending that the property, namely a parcel of shares, would become an instrument of crime, in that it would be used to facilitate the commission of an offence by Barat Advisory Pty Ltd and at the time of the dealing, the value of the property was $1,000,000 or more."

5 The second count, upon which the appellant was also convicted, alleged that on or about 13 November 2006 at Sydney, with the intention of dishonestly obtaining a gain from the Commonwealth, he caused to be lodged an income tax return in the name of Barat Advisory for the year ending 30 June 2005 containing false information, namely that the net capital gain from the sale of the shares in Admerex was $4,597, contrary to s 135.1(1) of the Code.

6 On 17 December 2010 the appellant was sentenced by Johnson J on count 1 to a term of seven years imprisonment dating from 17 December 2010 and expiring on 16 December 2017. He was sentenced on the second count to three years and six months imprisonment dating from 17 December 2015 and expiring on 16 June 2019. The sentencing judge set a non-parole period of four years and nine months dating from 17 December 2010 and expiring on 16 September 2015. That non-parole period was later varied, pursuant to s 19AD(2)(e) of the *Crimes Act* 1914 (Cth), by Fullerton J as part of a sentence imposed in respect of another offence[5].

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4 [2013] HCATrans 279.

5 *R v Milne* [2012] NSWSC 1538.

The statutory framework

7 Part 10.2 of the Code is entitled "Money laundering" as is Div 400 of Pt 10.2, which contains s 400.3(1). Part 10.2 was introduced into the Code by Sched 1, item 1 of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act* 2002 (Cth). That Act replaced offences of money laundering created by ss 81 and 82 of the *Proceeds of Crime Act* 1987 (Cth) ("the POC Act") with those set out in Div 400[6]. The POC Act provisions were confined to dealings with money or property that was proceeds of crime or was reasonably suspected of being proceeds of crime. The enactment of Div 400 gave effect, inter alia, to a recommendation by the Australian Law Reform Commission ("the ALRC"), in a report on the POC Act published in 1999, that the scope of the offence of money laundering be broadened[7].

8 The respondent relied upon the ALRC report as supportive of a broad construction of the offence-creating provisions in Div 400. It may be accepted that the purpose of Div 400 was to create offences of broader application than existing money laundering offences. That purpose is reflected in the texts of the offence-creating provisions read according to their ordinary meanings. The questions whether the text of s 400.3(1) gives rise to constructional choices, whether a broad construction is to be preferred, and whether on a proper construction of the text the Admerex shares could be characterised as intended to "become an instrument of crime" are not answered simply by reference to the legislative purpose of broadening the scope of the offence of money laundering.

9 This Court is concerned with the provisions of Div 400 as they stood between April 2004 and September 2005[8]. Section 400.3(1) provided:

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6 Australia, Senate, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, Revised Explanatory Memorandum at 12.

7 Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, (1999), Recommendation 22 at 139.

8 The provisions have been subject to amendment since that time – see especially the *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act* 2006 (Cth), Sched 1, Pt 1, items 21–38 and the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 (Cth), Sched 5, Pt 1.

"A person is guilty of an offence if:

(a) the person deals with money or other property; and

(b) either:

(i) the money or property is, and the person believes it to be, proceeds of crime; or

(ii) the person intends that the money or property will become an instrument of crime; and

(c) at the time of the dealing, the value of the money and other property is $1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both."[9]

The two offences created by s 400.3(1), distinguished by the alternative elements in s 400.3(1)(b)(i) and s 400.3(1)(b)(ii), were temporally distinct. The first offence concerned a case in which a "crime" had already been committed. The second concerned a case in which a "crime" was in prospect[10].

10 Section 400.1(1) defined "instrument of crime":

"money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence)."

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9 Lesser offences were created where a person dealt with money or property where there was a risk that it would become an instrument of crime and where the person was either reckless or negligent that there was that risk – Code, ss 400.3(2) and 400.3(3). Sets of similarly defined offences for money or property of lesser values were created by Code, ss 400.4 – 400.8 inclusive.

10 *Chen v Director of Public Prosecutions (Cth)* (2011) 83 NSWLR 224 at 230 [17] per Basten JA, 244 [87] per Garling J; *R v Ansari* (2007) 70 NSWLR 89 at 94 [15] per Simpson J.

11 It also defined "property":

"***property*** means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property."

12 The term "deals with money or other property" was defined in s 400.2(1):

"For the purposes of this Division, a person ***deals with money or other property*** if:

(a) the person does any of the following:

(i) receives, possesses, conceals or disposes of money or other property;

… and

(b) the money or other property is proceeds of crime, or could become an instrument of crime, in relation to an offence that is a Commonwealth indictable offence or a foreign indictable offence."

13 The offence created by s 400.3(1) of the Code may be resolved into physical and fault elements within the meaning of Divs 4 and 5 of Pt 2.2 of the Code. Section 400.3(1)(a) defines a physical element of the offence, namely dealing with money or other property. As a physical element which is conduct, it attracts a fault element of intention pursuant to s 5.6(1). A second physical element, defined by s 400.3(1)(c), is that the value of the money or other property is $1,000,000 or more (an element of circumstance). As an element of circumstance it attracts, by operation of s 5.6(2), a fault element of recklessness. Section 400.3(1)(b)(ii) defines an element of intention. Whether it can or should be characterised as a fault element or otherwise need not be explored for the purposes of this appeal.

14 It was not in dispute that the Admerex shares the subject of the indictment were "property" and that their transfer, effected by the appellant, was a disposal for the purposes of s 400.2(1)(a)(i). What was in contest, relevant to the physical element in s 400.3(1)(a) and the element of intention in s 400.3(1)(b)(ii), was whether, on the Crown case, the shares could be said to have been intended to become "an instrument of crime" within the meaning of s 400.2(1)(b). The relevant crime attributable to Barat Advisory was that created by s 134.2 of the

Code[11], namely obtaining a financial advantage by deception. Section 134.2 relevantly provided:

> "(1) A person is guilty of an offence if:
>
> (a) the person, by a deception, dishonestly obtains a financial advantage from another person; and
>
> (b) the other person is a Commonwealth entity."

That offence was said to arise out of the deliberate failure by Barat Advisory to declare the net capital gain for the sale of the Admerex shares in its income tax return for the year ending 30 June 2005.

15 The obligations imposed upon Barat Advisory by the capital gains tax ("CGT") provisions of the *Income Tax Assessment Act* 1997 (Cth) ("the ITAA 1997") were not in question. The disposition of the Admerex shares was a CGT event A1 within the meaning of the ITAA 1997[12]. Nor was it in dispute that by reason of the disposition Barat Advisory made a net capital gain for the year ended 30 June 2005[13], and incurred an obligation to declare that gain as part of its assessable income in its income tax return for that year[14]. A deliberate failure to make that declaration would result in Barat Advisory gaining a financial advantage from the Commonwealth.

The factual case at trial

16 The appellant, who did not give or call evidence at trial, made extensive formal written admissions pursuant to s 184 of the *Evidence Act* 1995 (Cth). The important facts of the case, although of some complexity, were largely undisputed.

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11 It is not necessary to show an intention that a particular offence will be committed in relation to money or property – Code, s 400.13(2)(a). In this case no offence other than that said to have been committed by Barat Advisory under s 134.2 was in contemplation.

12 ITAA 1997, ss 100-20(2) and 104-5 to 104-10.

13 ITAA 1997, ss 100-45 to 100-50.

14 ITAA 1997, s 100-55.

17 On the factual case advanced by the Crown, the appellant was the sole director and shareholder of Barat Advisory. On 30 April 2004, 55,911,475 shares in Admerex, which was listed on the Australian Stock Exchange, were allotted to Barat Advisory by way of repayment of a debt owed to Clairmont Holdings and Finance Ltd ("Clairmont") by Admerex and assigned to Barat Advisory. Clairmont was also controlled by the appellant. The shares were allotted at a value of four cents each, representing a total value of $2,236,459.

18 In May 2003, Clairmont had acquired, for the sum of $1, a debt of approximately $11,000,000 (later assessed to be closer to $8,000,000) owed by Admerex to its holding company, Global Technology Ltd[15]. Barat Advisory agreed to pay $1,500,000 to Clairmont for the assignment of the Admerex debt. That money was never paid. Barat Advisory thus acquired an asset with a value of at least $2,200,000 in circumstances in which Clairmont had acquired the original asset (the debt) at a cost of $1. As the Court of Criminal Appeal put it in its judgment[16]:

> "It was the Crown case that the appellant was, by this fortunate situation, now confronted with the problem of determining how to realise the profit from those transactions without having the proceeds substantially diminished by an obligation to pay tax, particularly CGT."

19 The appellant sought legal advice ostensibly with a view to placing the Admerex shares in a structure which would facilitate their sale to off-shore investors and defer liability to tax. Five off-shore companies were incorporated on 3 June 2004[17] and five entities known under Dutch law as "Stichtings"[18] were established on 11 June 2004. The appellant was identified in documentation as the beneficial owner of assets in accounts opened in a Swiss bank, known as EFG Private Bank SA ("EFG Bank"), on or around 15 June 2004 in the name of each

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15 In May 2003 Admerex was known as Global Technology Australasia Ltd. It changed its name to Admerex Ltd on 10 July 2003.

16 *Milne v The Queen* (2012) 259 FLR 42 at 49 [26].

17 Challinor Equities Ltd, Schlossman Partners Ltd, Thouvanel Investments (Asia Pacific) Ltd, Metevier Securities International Ltd and Vaillendourf Europe Ltd.

18 A Stichting is defined in Art 2:285 of the *Burgerlijk Wetboek (Dutch Civil Code)* as a legal person created by a legal act to realise a purpose by the use of capital or property brought in for that purpose. A Stichting must have at least one director.

of the off-shore companies. Urs Meisterhans, a partner in a Swiss financial services company, who was a director of each of the companies, opened the EFG Bank accounts. He was their sole signatory.

20 On 11 June 2004 the appellant effected the transfer by Barat Advisory of 55,911,475 Admerex shares in five parcels at five cents per share, one parcel going to each of the five off-shore companies[19]. The total stated consideration for the transfer was $2,795,573.75. On the appellant's instructions each parcel was placed by the company secretary of Admerex with ANZ Nominees, to be held on behalf of each the off-shore companies, in an ANZ Nominees account operated by EFG Bank. It was not in dispute on this appeal that Barat Advisory retained beneficial ownership of the shares[20].

21 In January 2005, the appellant made an agreement with Mr Kim Goodall whereby Barat Advisory would acquire from him 1,000,000 shares in Temenos. Consideration for that acquisition was at least 48,000,000 of the Admerex shares. It was that transaction, as the Court of Criminal Appeal put it, that precipitated a CGT event[21].

22 On 3 February 2005 the Temenos shares were transferred to an account in the name of one of the off-shore companies, Challinor Equities Ltd. The value of the Temenos shares on the Swiss Stock Exchange was between A$8,400,000 and A$8,800,000 at that date. The value of the Admerex shares on the Australian Stock Exchange was then between A$8,400,000 and A$9,120,000. The appellant arranged for the 48,000,000 Admerex shares to be held on behalf of Mr Goodall in accounts in the names of the other four off-shore companies. The appellant accepted that the jury, by its verdict on count 1, was satisfied beyond reasonable doubt that on 3 February 2005 he intended that Barat Advisory would not declare the disposal of the Admerex shares as a CGT event. In September 2005, on

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19 The parcels were 12,000,000 shares to Challinor Equities Ltd for $600,000, 11,900,000 shares to Schlossman Partners Ltd for $595,000, 11,500,000 shares to Thouvanel Investments (Asia Pacific) Ltd for $575,000, 9,411,475 shares to Metevier Securities International Ltd for $470,573.75 and 11,100,000 shares to Vaillendourf Europe Ltd for $555,000.

20 An argument that Barat Advisory had relinquished beneficial ownership was advanced in the Court of Criminal Appeal and rejected: *Milne v The Queen* (2012) 259 FLR 42 at 90 [225].

21 *Milne v The Queen* (2012) 259 FLR 42 at 52 [51].

Mr Goodall's instructions, the 48,000,000 Admerex shares were transferred and held on behalf of a third party.

23 Between 3 February 2005 and mid June 2005, the 1,000,000 Temenos shares were disposed of and the proceeds deposited in an account, in the name of Challinor Equities Ltd, with a Swiss bank named Swissfirst Bank AG. A total of about $5,600,000 was transferred between March 2005 and January 2006 from that account to the Barat Advisory account with the Commonwealth Bank of Australia. Amounts from the transferred funds were expended for the personal benefit of the appellant over a period of time. The capital gain derived from the disposition of the Admerex shares was not declared by Barat Advisory in any of its income tax returns for the relevant years. They were prepared on the basis of information provided by the appellant.

The Crown case at trial

24 A written statement of the Crown case at trial, in relation to the first count on the indictment, included the following contentions:

> "[167] The Admerex shares remained under the beneficial ownership and effective control of Barat Advisory through the accused, after they were purportedly transferred into the Stichting Group companies on or around 11 June 2004. At the time of that purported transfer, and subsequently, [the appellant] intended to use the Stichting groups to conceal the disposal of the Admerex shares, and the proceeds of such disposal, in order to avoid the payment by Barat Advisory of Capital Gains Tax.
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> [168] When the 48 million Admerex shares were disposed of on 3 February 2005, by exchanging them for 1 million Temenos shares, [the appellant] intended to avoid the payment by Barat Advisory of tax on the capital gain which was derived as a result of that disposal. For that purpose, [the appellant] used the Stichting groups to conceal the disposal of the 48 million Admerex shares and the proceeds of that disposal.
>
> [169] As such, [the appellant] intended that the 48 million Admerex shares would be used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as a Commonwealth indictable offence, namely the obtaining by Barat Advisory of a financial advantage by deception, contrary to section 134.2 of the Criminal Code.
>
> [170] On this basis [the appellant] intended that the 48 million Admerex shares would become an instrument of crime."

25 In closing address to the jury, the prosecutor submitted that the exchange of the Admerex shares for the Temenos shares constituted a dealing with the Admerex shares which put the appellant in the position of being able to obtain a financial advantage for Barat Advisory:

> "So that the final act that the Crown points to was the swapping of the shares for the Temenos shares which meant that [the appellant] could then move ahead and cash in the Temenos shares, derive the benefit or proceeds from what had been the Admerex shares and bring them back into the country, again with a much reduced prospect of detection.
>
> It is in that way that the Crown says the accused was using the shares to facilitate the commission of the crime of obtaining the advantage by deception because he had this ongoing benefit of having converted the Admerex shares into Temenos shares and thus the capacity to sell those shares and obtain the benefits without the prospect of detection."

The ruling and directions of the trial judge

26 The trial judge rejected an application by senior counsel for the appellant for a directed verdict of acquittal on the first count. His Honour accepted that on the Crown case there was some evidence in support of each element of the offence created by s 400.3(1).

27 The trial judge gave the jury written directions in addition to his oral summing up. His Honour directed the jury that in order to establish that the appellant had intended that the 48,000,000 Admerex shares would become an instrument of crime, the Crown must prove beyond reasonable doubt, inter alia, that at the time of their disposal by Barat Advisory on or around 3 February 2005, the appellant intended that they would facilitate the commission of an offence. He referred to the Crown allegation that the appellant intended that the shares would be used to facilitate the commission of an offence which involved the appellant at some time in the future dishonestly obtaining a financial gain by causing Barat Advisory to lodge an income tax return that contained false information because it did not include information about the capital gain that Barat Advisory was alleged to have made when it swapped the Admerex shares for the Temenos shares on 3 February 2005. His Honour continued:

> "The Crown must prove beyond reasonable doubt that, on or around 3 February 2005, the Accused intended that the 48 million Admerex shares would facilitate (that is, make easier) that type of offence to be committed."

The written directions did not differ materially in this respect from the oral directions to the jury.

28 In the event, the outcome of this appeal turns on whether the relevant provisions of the Code apply to the conduct alleged in the Crown case. The critical physical element of the offence, the alleged dealing with the Admerex shares, was their disposal to Mr Goodall. The element defined by s 400.3(1)(b)(ii) required proof of an intention relating to the use of those shares after their disposal.

The decision of the Court of Criminal Appeal

29 The Court of Criminal Appeal gave a wide interpretation to the term "used to facilitate the commission of, an offence" in the definition of "instrument of crime". Their Honours adopted, as had the trial judge in his direction to the jury, the ordinary English meaning of "facilitate" as "make easier"[22]. The shares, which were "instrumental in the commission of an offence" as opposed to "incidental in its commission", could be said to have facilitated the commission of the offence[23]. They were "plainly capable of being used" and, on the Crown case, were intended to be used after their disposition to facilitate the commission of a s 134.2 offence[24]. The Court's reasoning appears to have rested in part upon a proposition that the continuing existence of the shares "hidden behind the additional curtain of the Temenos shares" after the disposal by the appellant meant that they "remained capable of use for the future commission of an offence."[25] That proposition should be rejected as untenable given the factual case presented by the Crown.

30 The Court rejected an argument that the Crown case involved an erroneous proposition that the share swap itself facilitated the commission of the subject offence. The Crown's contentions on the swap went to the appellant's intention. The swap created the CGT event which provided the basis for the commission of the future crime. It also provided "a further cloak or curtain behind which the act of ultimate deception (the lodgement of a [false] return)

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22 *Milne v The Queen* (2012) 259 FLR 42 at 71 [145].

23 *Milne v The Queen* (2012) 259 FLR 42 at 71 [145].

24 *Milne v The Queen* (2012) 259 FLR 42 at 71 [146].

25 *Milne v The Queen* (2012) 259 FLR 42 at 70 [140].

would be more likely to succeed."[26] The disposition of the shares also provided "a further facilitating measure for the offence itself."[27]

31 The Court held that the trial judge did not err in refusing to direct the jury to acquit the appellant on the first count[28].

Ground of appeal

32 The single ground of appeal is that:

> "The Court of Criminal Appeal erred in its interpretation of the definition 'instrument of crime' in s 400.1 of the *Criminal Code*, *Criminal Code Act* 1995 (Cth) and as a result erred in finding that the property referred to in count 1 of the indictment was capable of falling within that definition in the circumstances alleged against the appellant at trial."

Instrument of crime – the constructional question

33 For property to become an instrument of crime within the meaning of s 400.3(1) it must be "used". An ordinary meaning of the verb "use" is "[t]o make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose."[29] That is the relevant ordinary meaning for the definition of "become an instrument of crime" which involves the "use" of property to serve a purpose, namely the "commission of an offence" or "to facilitate the commission of an offence". The relevant ordinary meaning of "facilitate" in this case is "[t]o render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process)."[30]

34 The appellant submitted that the word "use" in the definition of "instrument of crime" required an "actual dealing" or "actual deployment" by the

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26 *Milne v The Queen* (2012) 259 FLR 42 at 72 [150].

27 *Milne v The Queen* (2012) 259 FLR 42 at 72 [150].

28 *Milne v The Queen* (2012) 259 FLR 42 at 72 [151].

29 *The Oxford English Dictionary*, 2nd ed (1989), vol 19 at 353.

30 *The Oxford English Dictionary*, 2nd ed (1989), vol 5 at 649.

accused and that these things could not occur when the property in question had already been disposed of. The respondent contended for a broad construction involving an "extended meaning" of the term "use". It adopted what it described as the "purposive interpretation" adopted by the Court of Criminal Appeal. The respondent sought to draw an analogy from another statutory context. It referred to the decision of the Court of Appeal of Western Australia concerning provisions of the *Criminal Property Confiscation Act* 2000 (WA) in *Director of Public Prosecutions (WA) v White*[31] and the decision of this Court on appeal from the Court of Appeal[32]. *White* was a case involving a different statute and very different facts. Beyond analogy and the call for a broad construction, the respondent's written submissions did not, with respect, spell out with any clarity how it would construe "instrument of crime" and the term "use", which is an essential integer of that definition.

35 In oral submissions to this Court, senior counsel for the respondent accepted that the intended "use" of the Admerex shares for which he contended was the taking advantage by the appellant of circumstances created by their disposal, namely the substitution of the Temenos shares as a way of realising the capital gain derived from the Admerex shares in a way that would facilitate its concealment. To take advantage of the circumstances arising after and as a result of the disposal, that Barat Advisory had become the owner of Temenos shares in lieu of Admerex shares, does not involve a post-disposal use of the Admerex shares within the meaning of the definition of "instrument of crime".

36 Senior counsel for the respondent also relied upon a post-disposal transfer of 4,088,525 Admerex shares from Challinor Equities Ltd to Metevier Securities International Ltd, the purpose of which was, according to the prosecutor in closing address, to ensure that the four off-shore companies had a total of 48,000,000 shares in order to give effect to the swap for the Temenos shares. Senior counsel for the respondent submitted to this Court that on the case thus put at trial there was a continuing use of the Admerex shares after their disposal on 3 February 2005. That submission should be rejected. The purpose of the transfer appears to have been to give effect to the disposal of the shares.

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31 (2010) 41 WAR 249 at 259 [39].

32 *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 487–488 [21]; [2011] HCA 20.

37 The definition of "instrument of crime" and the deployment of that term in s 400.3(1)(b)(ii) require a temporal separation between the requisite dealing and the intended use of the property. They also require an instrumental connection between the intended use of property and the commission or facilitation of the commission of an offence. Conduct involving property which is no more than a necessary condition of the commission of a subsequent offence does not on that account amount to the use of the property in or to facilitate the commission of that offence. Nor is the instrumental connection demonstrated merely by an intention to take advantage of circumstances arising after and as a result of the requisite dealing. A fortiori, that is the case where that property has been put beyond the reach of the accused by sale to a third party.

38 Section 400.3(1) creates a serious offence. It is punishable by a term of imprisonment of up to 25 years. In the end the "broad construction" proffered by the respondent seemed to involve little more than the proposition that, however construed, it fits the facts of this case. As a matter of textual analysis, it does not. Purposive construction does not justify expanding the scope of a criminal offence beyond its textual limits[33]. In this case, those limits are not narrowly defined. The language of s 400.3(1)(b)(ii), and its associated definitions, is capable of application to a range of circumstances which fall within their ordinary meanings. Its construction according to the ordinary meaning of its words is sufficient to provide a broad coverage consistent with its purpose and without resort to "extended" meanings of those words.

39 The preceding approach to construction is consistent with the Revised Explanatory Memorandum for the amending legislation which introduced Div 400 into the Code[34]. The term "instrument of crime" in s 400.1(1) was said in the Memorandum to introduce a new concept for the purposes of the money laundering offences, which were previously only concerned with proceeds of crime. The Memorandum stated[35]:

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33 *Krakouer v The Queen* (1998) 194 CLR 202 at 223 [62]–[63] per McHugh J; [1998] HCA 43; *Allan v Quinlan; Ex parte Allan* [1987] 1 Qd R 213 at 215 per Connolly J, quoting *Wallace v Major* [1946] KB 473 at 477 per Lord Goddard CJ.

34 Australia, Senate, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, Revised Explanatory Memorandum.

35 Australia, Senate, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, Revised Explanatory Memorandum at 13.

> "Consistent with recommendation 22 of the ALRC report, the definition extends the coverage to money or property used in the commission of, or to facilitate the commission of, an indictable offence."

The Memorandum went on to point out that the concept was not new, being similar to that of "tainted property" in the POC Act[36]. "Tainted property", in relation to an offence, was defined in s 4(1) of the POC Act to include "property used in, or in connection with, the commission of the offence" and was liable to forfeiture by court order under s 19 of the POC Act. The ALRC had commented in its report that its proposed new formulation of money laundering would have the same effect as the *Crimes (Confiscation) Act* 1989 (Q) in that all tainted property, which could include property intended to be used in criminal activity, could be the subject of a money laundering charge[37].

40 Properly construed, s 400.3(1) of the Code could not apply to the conduct of the appellant said to constitute an offence against that provision according to the Crown case at trial. The disposal of the Admerex shares, which was the relevant dealing, did not involve their intended "use" within the meaning of that term in the definition of "instrument of crime".

Conclusion

41 The appeal should be allowed. The decision of the Court of Criminal Appeal of New South Wales dismissing the appellant's appeal with respect to count 1 on the indictment should be set aside and in lieu thereof the conviction quashed and a verdict of acquittal entered.

42 The appellant submitted that if he were successful on the appeal, the Court should adjust the commencement date of the sentence imposed upon him in respect of count 2 on the indictment. In the ordinary case this Court would remit the matter to the Court of Criminal Appeal to deal with any consequences of the orders quashing the conviction and directing entry of a verdict of acquittal, for the sentence imposed upon the appellant in respect of the second count on the indictment. However, the parties were agreed that if the appeal were allowed the Court should adjust the commencement date for the sentence imposed on the

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36 Australia, Senate, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, Revised Explanatory Memorandum at 13.

37 Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987,* Report No 87, (1999) at 128.

second count. The Court is satisfied that it has power to make the order sought[38]. Any consequential adjustment to the non-parole period as varied by Fullerton J pursuant to s 19AD(2)(e) of the *Crimes Act* 1914 (Cth) will be a matter for the Supreme Court of New South Wales.

43 The orders of the Court will be[39]:

1. Appeal allowed.

2. Set aside orders 1 and 3 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 2 March 2012 with respect to count 1 on the indictment and, in their place, order that:

   (a) the appeal against conviction with respect to count 1 to that Court be allowed;

   (b) the appellant's conviction with respect to count 1 be quashed and the sentence imposed by the Supreme Court of New South Wales on 17 December 2010 with respect to count 1 be set aside; and

   (c) a verdict of acquittal be entered with respect to count 1.

3. The commencement of the sentence imposed on the appellant by the Supreme Court of New South Wales on 17 December 2010 with respect to count 2 on the indictment be amended to 17 December 2010 with the sentence to expire on 16 June 2014.

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38 Pursuant to s 37 of the *Judiciary Act* 1903 (Cth) and s 59(1) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) as picked up by s 68(1) of the *Judiciary Act*, and s 16E(1) of the *Crimes Act* 1914 (Cth), the Court may vary the commencement of a sentence imposed on a person on the quashing of another sentence imposed on that person. See also *Putland v The Queen* (2004) 218 CLR 174 at 178-179 [4] and 179-180 [7] per Gleeson CJ, 189 [41] and 193-194 [54] per Gummow and Heydon JJ (Callinan J agreeing at 215 [121]); [2004] HCA 8.

39 Two file numbers were allocated to this matter at trial and in the Court of Criminal Appeal. Two notices of appeal were filed in this Court. The notices are identical and the orders made are as for a single appeal.