Federal Court of Australia

Anglo American Investments Pty Ltd (Trustee) v Commissioner of Taxation [2021] FCA 974

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| File numbers: | QUD 512 of 2018  QUD 513 of 2018  QUD 399 of 2019 |
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| Judgment of: | **LOGAN J** |
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| Date of judgment: | 5 August 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to reopen proceedings – where respondents seek to recall key witness for cross-examination and to tender further evidence – where part of the further evidence was telephone intercept transcript – where that evidence was tendered in criminal proceedings before the District Court of New South Wales – where that evidence was admissible in civil proceedings from that date onwards – where it was a forensic choice of the respondent not to tender the transcripts during trial – whether that choice was affected by model litigant obligations – whether the tender of transcripts of QUD513/2018 and QUD399/2019 in QUD512/2018 should be allowed – whether the tender of a judgment of the Court of Criminal Appeal of the Supreme Court of New South Wales should be allowed – whether the tender of a certificate of conviction should be allowed – application to re-open allowed only in respect of the proposed tender of certificate of conviction and certificate as to outcome of appeal and cross-examination and re-examination thereon |
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| Legislation: | *Crimes Act 1914* (Cth)  *Evidence Act 1995* (Cth) ss 55, 56, 91, 92. 101A, 102, 103, 128, 178  *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N, 37AF  *Income Tax Assessment Act 1936* (Cth) s 264  *Taxation Administration Act 1953* (Cth) s 353-10  *Telecommunications (Interception and Access) Act 1979* (Cth) s 75A |
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| Cases cited: | *FYD Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097  *Gould v R* [2021] NSWCCA 92  *Melbourne Steamship Company Limited v Moorehead* (1912) 15 CLR 333  *Seller v Federal Commissioner of Taxation* (2013) 308 ALR 376  *Shord v Federal Commissioner of Taxation* (2017) 253 FCR 157  *Smith v New South Wales Bar Association* (1992) 176 CLR 256 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Taxation |
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| Number of paragraphs: | 37 |
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| Date of hearing: | 4 – 5 August 2021 |
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| Counsel for the Applicant: | Mr J Hyde-Page |
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| Solicitor for the Applicant: | Mark J Ord Lawyer & Consultant |
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| Counsel for the Respondent: | Ms C Ensor |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | | QUD 512 of 2018 |
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| BETWEEN: | ANGLO AMERICAN INVESTMENTS PTY LTD ATF THE ANGLO AMERICAN CHARITABLE AND CULTURAL TRUST  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 5 AUGUST 2021 |

THE COURT ORDERS THAT:

1. The proceeding be re-opened.
2. The respondent have leave further to cross-examine Mr Vanda Gould with respect to:
   1. a certificate of order dated 28 September 2020 relating to the conviction of Mr Gould (conviction certificate); and
   2. any certificate by a proper officer of the New South Wales Court of Criminal Appeal in respect of the dismissal by that Court on 10 May 2021 of Mr Gould’s appeal against the conviction (appeal certificate).
3. The further hearing of the taxation appeals as a consequence of the permitted re-opening occur on 25 and, if need be, 26 October 2021, to the end that the further hearing in QUD512/2018 occur first, followed thereafter by QUD513/2018 and QUD399/2019 being heard together.
4. The parties are to consult one with the other to the end of bringing in interlocutory directions adapted to the end of the hearing occurring as ordered.
5. Liberty to apply reserved in respect of seeking such directions as necessary which cannot be the subject of a consent order.
6. The applicants pay 40% of the respondent’s costs of and incidental to the interlocutory application to be fixed by a Registrar if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | QUD 513 of 2018 |
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| BETWEEN: | MELBOURNE CORPORATION OF AUSTRLIA PTY LTD  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 5 AUGUST 2021 |

THE COURT ORDERS THAT:

1. The proceeding be re-opened.
2. The respondent have leave further to cross-examine Mr Vanda Gould with respect to the appeal certificate.
3. The further hearing of the taxation appeals as a consequence of the permitted re-opening occur on 25 and, if need be, 26 October 2021, to the end that the further hearing in QUD512/2018 occur first, followed thereafter by QUD513/2018 and QUD399/2019 being heard together.
4. The parties are to consult one with the other to the end of bringing in interlocutory directions adapted to the end of the hearing occurring as ordered.
5. Liberty to apply reserved in respect of seeking such directions as necessary which cannot be the subject of a consent order.
6. The applicants pay 40% of the respondent’s costs of and incidental to the interlocutory application to be fixed by a Registrar if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | QUD 399 of 2019 |
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| BETWEEN: | PHOTO ADVERTISING (INTERNATIONAL) PTY LTD  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | LOGAN J |
| DATE OF ORDER: | 5 AUGUST 2021 |

THE COURT ORDERS THAT:

1. The proceeding be re-opened.
2. The respondent have leave further to cross-examine Mr Vanda Gould with respect to the appeal certificate.
3. The further hearing of the taxation appeals as a consequence of the permitted re-opening occur on 25 and, if need be, 26 October 2021, to the end that the further hearing in QUD512/2018 occur first, followed thereafter by QUD513/2018 and QUD399/2019 being heard together.
4. The parties are to consult one with the other to the end of bringing in interlocutory directions adapted to the end of the hearing occurring as ordered.
5. Liberty to apply reserved in respect of seeking such directions as necessary which cannot be the subject of a consent order.
6. The applicants pay 40% of the respondent’s costs of and incidental to the interlocutory application to be fixed by a Registrar if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. The Commissioner has sought leave to reopen proceedings so as to recall Mr Vanda Gould (Mr Gould) for further cross-examination and, in the course of cross-examination, to tender further evidence. Mr Gould was the principal witness for each of the taxpayer companies, which were applicants in the taxation appeals. The further evidence sought to be adduced in the course of Mr Gould’s cross-examination, in the event that reopening is permitted, is as follows:
   1. In proceeding QUD512/2018:
      1. A certificate of order dated 28 September 2020 relating to the conviction of Mr Gould in respect of an offence against the *Crimes Act 1914* (Cth) (conviction certificate); and
      2. Pages 513 to 515 of the transcript of the hearing of taxation appeals QUD513/2018 and QUD399/2019 of 2 October 2020, being an extract of evidence given on that day in cross-examination by Mr Gould (cross-examination extract).
   2. In each taxation appeal proceeding:
      1. A judgment of the New South Wales Court of Criminal Appeal of 10 May 2021 in *Gould v R* [2021] NSWCCA 92; and
      2. Transcripts of audio recordings of intercepts of telephone calls that were admitted as an exhibit in the course of criminal proceedings instituted by the Crown and right of the Commonwealth against Mr Gould, which resulted ultimately in the conviction, which was the subject of the appeal against conviction to the New South Wales Court of Criminal Appeal (telephone intercept transcripts).
2. The present position in relation to the taxation appeals is as follows. Judgment was reserved in QUD512/2018 on 16 October 2019. At that time, and at the express request of each of the parties, judgment was reserved on the basis that judgment would not be delivered until the hearing and determination of taxation appeals QUD513/2018 and QUD399/2019. The reason for that was that it was recognised by each of the parties that credibility findings in respect of Mr Gould would be necessary and that to do other than have the proceedings simultaneously determined would necessitate that the later taxation appeals, ie QUD513/2018 and QUD399/2019, would necessarily have to be heard and determined by a different judge in the original jurisdiction.
3. Pragmatic reasons associated with the number of judges assigned to the taxation national practice area doubtless informed the parties in relation to that course, as it certainly did my acquiescence in it. Judgment in respect of taxation appeals QUD513/2018 and QUD399/2019 was reserved on 8 October 2020. Thereafter, I was requested by the parties to defer delivery of judgment in respect of the three taxation appeals, at least until a special leave application pending in the High Court of Australia, which was thought might result in an exercise of appellate jurisdiction by that court on the subject of the exercise of judicial power in a taxation appeal where a question of the Commissioner’s satisfaction was at large, was determined. That particular special leave application was determined in February this year. As it transpired, the case concerned did attract a ground of special leave to appeal but the bases upon which special leave was granted did not extend to an issue touching upon the exercise of judicial power in relation to a taxation provision an element of which was the Commissioner’s satisfaction.
4. In terms of principle, in relation to the present application the root authority is *Smith v New South Wales Bar Association* (1992) 176 CLR 256, at 266 – 267, where, in their joint judgment, Brennan, Dawson, Toohey and Gaudron JJ stated:

It is again necessary to distinguish between the considerations which may bear on a decision to re-open and the processes involved in reconsideration once a case has been re-opened. If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete , or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side. In the latter situation the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised. But those considerations bearing on re-opening are not decisive of the question whether, a matter having been reopened by reason of error, further evidence can be called.

Not every case involving error will invite further evidence: it will depend entirely on the issue that is opened up. If the issue is one that invites further evidence, then, prima facie and subject to the ordinary rules of evidence, that evidence should be allowed. We say prima facie because there may be situations in which the particular evidence involved would cause embarrassment or prejudice such that, in the circumstances, it would be unfair to allow it.

[footnote references omitted]

1. Encapsulated in the statement just quoted, as to considerations which bear upon whether or not to reopen, is where the interests of justice lie in the circumstances of a particular case. Latterly and, with respect, surely aptly, given the statutory exultations to which his Honour referred, White J in *FYD Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 considered that regard should be had generally to the overarching purposes stated in s 37M and s 37N of the *Federal Court of Australia Act 1976* (Cth) (Federal Court of Australia Act).
2. So approaching the present application, the first question is whether there was a deliberate decision not to call any of the evidence identified in the application?
3. As to the certificate of conviction and the outcome of the resultant appeal against conviction, (I have put the latter that way so as deliberately to distinguish the appellant outcome from the related reasons for judgment and the cross-examination extract in the later heard taxation appeals), there obviously could never have been a deliberate decision not to tender them, because they came into existence later.
4. This does not apply to the telephone intercept evidence. The telephone intercept evidence comprises 160 pages of transcripts of intercepted telecommunications, lawfully intercepted by officers of the Australian Federal Police pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act). The evidence led for the Commissioner on the present application establishes that officers within the Australian Taxation Office assigned to a major revenue law compliance and recovery operation known as Project Wickenby became aware in a general way of the existence of the telephone intercept evidence in October 2013, shortly after Mr Gould’s arrest.
5. There was reference in a general way to such material in an Australia Federal Police brief used for the purposes of the initial criminal court proceedings. This same body of evidence also discloses that, shortly after Mr Gould’s arrest, there were understandable and appropriate dealings between officers of the Australian Taxation Office, the Australian Federal Police and the Commonwealth Director of Public Prosecutions Sydney Office. A sequel to these was that the Commissioner used a power once found in s 264 of the *Income Tax Assessment Act 1936* (Cth) relocated, for reasons thought good by Parliament, but hardly, with respect, helpful in terms of finding them in their current source, to s 353-10 in the dense thicket of Sch 1 to the *Taxation Administration Act 1953* (Cth) to obtain from the Australian Federal Police copies of various documents seized under search warrants and other document gathered in the course of the Australian Federal Police investigation of Mr Gould. The Commissioner did not then use this power to obtain the telephone intercept transcripts. There was good reason why he did not seek to do this.
6. The TI Act contains, in Pt 2-6, very explicit provision as to the disclosure of intercepted information prior to any tender of that information in a criminal court proceeding. There was no suggestion on the hearing of the present application that access under s 353-10 might, in the face of this explicit provision, nonetheless have been lawful. It is neither necessary nor desirable to explore that subject. What is clear is that whatever access inhibitions there were earlier, these disappeared once the telephone intercept evidence was tendered by the Crown in the course of Mr Gould’s first criminal trial in the New South Wales District Court in July and August 2018.
7. Section 75A of the TI Act provides:

**75A Evidence that has been given in exempt proceeding**

If information is given in evidence (whether before or after the commencement of this section) in an exempt proceeding under section 74 or 75, that information, or any part of that information, may later be given in evidence in any proceeding.

Note: This section was inserted as a response to the decision of the Court of Appeal of New South Wales in *Wood v Beves* (1997) 92 A Crim R 209.

1. The tendering of the telephone intercept evidence in the course of that first criminal trial engaged s 75A of the TI Act.
2. Mr Gould gave evidence in taxation appeal QUD512/2018 in June 2019. A verdict not having been reached in the first trial as at that stage, there was a fresh criminal trial pending in the New South Wales District Court. The taxpayer company in that taxation appeal did not seek an adjournment of the taxation appeal pending the resolution of the criminal proceeding against Mr Gould. That same course was adopted in relation to the later taxation appeals. Instead, in each instance Mr Gould sought and obtained from this court a certificate under s 128 of the *Evidence Act 1995* (Cth) (Evidence Act) in respect of his evidence.
3. The evidence led for the Commissioner on the present application establishes that a deliberate decision was made by the Commissioner not to seek, much less to use for any purpose associated with the hearing of any of the taxation appeals, particularly cross-examination as to credit, the telephone intercept transcript.
4. The attested reason for that, the veracity of which I do not doubt, was a policy one. From this it emerges that the Commissioner and relevant subordinate officers considered that, as a model litigant, he ought not to embark upon a course which might occasion embarrassment to the criminal justice process as it related to Mr Gould. The Commissioner considered that then to use the telephone transcript evidence might do that. These same policy considerations informed the later heard taxation appeal. I do not doubt that the policy position attested to was one reached in good faith.
5. As to a model litigant obligation, in *Melbourne Steamship Company Limited v Moorehead* (1912) 15 CLR 333, a case to which a subordinate of the Commonwealth Chief Revenue Officer of an earlier era, the Comptroller-General of Customs, was a party, Griffith CJ felt obliged to state, at 342:

I am sometimes inclined to think that in some parts – not all – of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not know or thought out of date. I should be glad to think that I am mistaken.

1. Like Sir Samuel Griffith, I learned that standard of play also a very long time ago. In *Shord v Federal Commissioner of Taxation* (2017) 253 FCR 157, at [167] – [168], having referred to this statement by Griffiths CJ, I stated:

167 … The “standard of fair play to be observed by the Crown in dealing with subjects” to which Griffith CJ referred was not, in 1912, a new subject. Part of the constitutional history of the United Kingdom and, thus, derivatively, our own, was oppressive, unlawful behaviour by the Crown in the 17th century in the imposition, collection and recovery of taxes and a resultant and vicious civil war leading to regicide and not a republican ideal but military dictatorship. The later restoration of the monarchy was on terms that evolved into the constitutional separation of powers, legislative, judicial and executive and what we have come to know as the Westminster system of responsible government, each feature of which is to be found in the Australian Constitution. The standard of fair play expected of the Crown and its officers in litigation is a standard in keeping both with the avoidance of behaviours that, in an extreme form, led to the civil war and with the later constitutional settlement. Once this heritage is understood, the requirement for its observance is, or should be, as Griffith CJ stated, “elementary”.

168 The standard expected of the Crown is not one diminished by the passage of time since the Restoration, much less since 1912, as this Court and others have, in the circumstances of particular later cases, felt obliged to highlight. Then, as now, there is a vital public interest in the maintenance of confidence in administrative government. This point was well made by Finn J in *Kelson v Forward* (1995) 60 FCR 39 at 66:

A shared concern both of courts and of public administrators within their particular spheres is with securing “good administration”. While the respective emphases in, and understandings of, this may differ on occasion, the concern itself is a manifestly desirable and proper one. In the law, securing good administration can properly be said to be an organising idea for a group of principles which, in exacting procedural fairness, are designed to maintain public confidence in the integrity of administrative government: see e.g. *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Consolidated Press Holding Ltd v Commissioner of Taxation* (1995) 57 FCR 348 at 357-358.

In Commonwealth administration the concern has had a somewhat different focus. The reforms of the last decade and more — see generally The Australian Public Service Reformed (December 1992, AGPS) — have seen an accentuated emphasis on service delivery, performance and results. This emphasis has its own, acknowledged risks. As was said in Accountability in the Commonwealth Public Sector (June 1993, AGPS, p 15):

In moving the public servant’s attention to focusing more on results, care has been taken to balance this against the traditional concerns for probity and due process. Due process, fair dealing and the clear requirement to work within the law continue to be mandatory, but are not sufficient in themselves as a focal point for public servants.

For all these reasons, the importance of absolute integrity on the part of the Commissioner and those representing him in the collection and recovery of tax cannot be over-emphasised.

1. At the heart of model litigant behaviour is fairness and not abusing the imbalance of power and resources, which will almost inevitably attend litigation to which the Crown and its officers and emanations thereof are parties. While this means that the Commissioner must conduct litigation fairly, that does not mean that he must conduct it with one arm tied behind his back.
2. Each taxpayer company chose to have the tax appeals heard at a time when either a criminal charge was unresolved or there existed a prospect that a conviction might be quashed and, perhaps, a new trial ordered. They also chose to call Mr Gould and he chose, for good reason, to take advantage of s 128 of the Evidence Act. With such forensic choices came both benefit and burden. There is no inflexible rule that civil litigation must always be deferred pending the resolution of criminal proceedings, but the existence of the latter as it affects a party or a particular witness is always a relevant consideration in the context of any application for an adjournment, especially given the importance of the privilege against self-incrimination.
3. Had an adjournment application been made, considerations notably summarised by Robertson J in *Seller v Federal Commissioner of Taxation* (2013) 308 ALR 376, in the context of an extension of time for the filing of taxpayer affidavits in a taxation appeal pending the resolution of related criminal proceedings, would have arisen. Had the Commissioner sought to tender in either taxation appeal proceeding in the course of Mr Gould’s cross-examination the telephone intercept evidence it may very well have been necessary to consider whether to make very particular orders under s 37AF of the Federal Court of Australia Act in relation to the publication and use, including any derivative use, of Mr Gould’s evidence to supplement the s 128 provision and even to consider whether part of the taxation appeal proceedings ought not to be held in public.
4. As it is, I consider that a deliberate forensic choice in good faith, as I have mentioned, was made by the Commissioner not to use or tender the telephone intercept evidence. On any view, as at the time when Mr Gould first gave evidence in June 2019 in QUD512/2018, 10 months had passed after any inhibition resulting from the TI Act had disappeared. Well over two years had passed from that disappearance by the time Mr Gould next gave evidence. In my view and with respect, in the circumstances which transpired in relation to these taxation appeals, where the taxpayer companies had deliberately chosen to bring on the tax appeals whilst there existed the pendency or the possibility of the pendency of criminal proceedings against Mr Gould, it was a mistaken view of model litigant behaviour to consider that it inhibited the Commissioner from using the telephone intercept evidence.
5. Given the deliberate forensic choice, in my view, the application to reopen insofar as it seeks to rely upon that evidence for the purpose of cross-examination must fail. Different considerations attend the other material. As with the telephone transcript evidence, all of this other material would go only as to credit, but that does not render such material inadmissible: see s 55(2)A of the Evidence Act. Relevant evidence is admissible: s 56 of the Evidence Act. Both the telephone intercept evidence and the other evidence the subject of the application would constitute credibility evidence in terms of s 101A of the Evidence Act. Generally, the effect of the credibility rule found in s 102 of that Act is that credibility evidence is not admissible, but this is subject to the exception found on s 103 of that Act, which provides:

**103 Exception: cross-examination as to credibility**

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

1. These taxation appeals being civil proceedings, the further consideration found in s 104 of the Evidence Act in relation to the use of credibility evidence with respect to an accused is not applicable.
2. In circumstances where no objection was taken to the tender of the certificate of conviction in respect of QUD513/2018 and QUD399/2019 it is difficult to see how any s 135 of the Evidence Act prejudice might arise in relation to a like tender in QUD512/2018. Mr Gould’s credibility in relation to underlying transactions and events is a major issue in relation to each of the taxation appeals.
3. In my view, different considerations attend the use of the cross-examination extract to the criminal justice system outcome evidence. By consent, arising both from reasons of cost and convenience, the transcript of evidence is QUD512/2018 formed part of the evidence in the later heard taxation appeals, but there never was an order that evidence in the later might be used in the earlier, nor was that ever contemplated at the time when the earlier taxation appeal, QUD512/2018, was heard. In my view, to “cherry pick” passages from cross-examination in the later heard taxation appeals is to open up a field for re-examination in particular, the contextual meets and bounds of which are of uncertain extent. To impose on the applicant taxpayer company in QUD512/2018 a burden of considering what those meets and bounds might be would, in itself, be prejudicial and embarrassing.
4. The criminal justice system outcomes are not sought to be tendered so as to prove any fact in issue in the taxation appeals by reference to a determination of such a fact in the criminal proceedings. The apprehension by the taxpayer companies that this was the use, a use forbidden by s 91 of the Evidence Act unless materially an exception found in s 92 was applicable, is, with respect, misplaced. The tender proposed by the Commissioner is for the more limited, albeit important, purpose of an assessment of credibility based on the fact that Mr Gould has been convicted, not just an offence carrying with it an element of dishonesty, but also one associated with an intentional interference with an exercise of Commonwealth judicial power. Rationally, such a conviction could affect an assessment of his credibility.
5. Part of the proposed tender, at least as the interlocutory application and related submissions for the Commissioner have been formulated, goes beyond was s 178 of the Evidence Act would admit. The facts which would be admitted are as set out in s 178(1). Such facts are approved, as that section indicates, by the tender of a certificate under the hand of a proper officer of the court concerned, in this case in respect of conviction or, as the case may be, the outcome of the subsequent appeal against conviction, but not of the reasons for judgment given in respect of the appeal. Something was sought to be made by the Commissioner in submissions of the particular reasons for judgment given by the New South Wales Court of Criminal Appeal in relation to the disposition of the appeal against conviction as if that would bolster the weight to give any certificate evidence as to the appellant outcome in terms of credibility, but those reasons are irrelevant to such an assessment in these taxation appeal proceedings.
6. In the ordinary course of events in relation to QUD512/2018 particularly, I should have delivered judgment by now. However, as already indicated, there were particular reasons why that has not occurred. In the interval which has transpired since that particular taxation appeal was heard events have occurred in the criminal justice system. Both the hearing of that taxation appeal as well as the later heard taxation appeals were conducted against the background of a contingency that events might evolve in the way in which they have proved to have evolved. That evolution of events was taken up in relation to the later heard taxation appeals by the tender by the Commissioner, without objection, of the certificate of conviction. It has not been taken up as yet, but now it is sought to be in relation to the hearing of taxation appeal QUD512/2018.
7. The issue opened up is one of credibility, but that issue, as I have mentioned, is an important one. Recalling Mr Gould for the purposes of cross-examination is not a straightforward matter in these current times. That does not arise just from his present incarceration. A production order directed to the Director-General of Corrective Services for New South Wales or the officer in charge of the prison where Mr Gould is presently incarcerated to produce him would address a difficulty arising from his present incarceration. Rather, the complication introduced, as it was last year in relation to the hearing of the taxation appeals, is one of incarceration in conjunction with prevailing public health restrictions, at the moment, prevailing in both New South Wales and in Queensland materially, as well as the technological and logistic challenges presented by Mr Gould’s location in prison and the separate locations of the court and counsel and solicitors in what is a documentary evidence-rich case.
8. These difficulties, while they are not to be diminished, are not, in my view, insurmountable. I do not, therefore, see any particular prejudice which will tell against the allowing of reopening arising from such considerations.
9. There is also prejudice to be taken into account in relation to the certificate evidence in terms of visiting costs on the taxpayer companies associated with a reopening, which are not confined just to the costs of another appearance. However, in relation to the certificate evidence such costs appear inherently likely to me to be associated with the consequence of the forensic choice that the taxation appeals be heard pending the currency of criminal proceedings. I do not, therefore, as was put on behalf of the taxpayer companies, propose to make any special order for costs in relation to a reopening.
10. I should add that it seems to me that much greater costs and related prejudice would be visited upon the taxpayer companies in relation to the telephone intercept evidence particularly, but also the cross-examination excerpt evidence. I have taken the prospect of such costs into account in deciding not to permit reopening so as to allow cross-examination on and in relation to the telephone intercept and cross-examination transcript excerpt evidence and any related tender thereof.
11. Yet another consideration to take into account is that to reopen at all will inevitably delay further delivery of reasons for judgment in the taxation appeals. The interests of justice certainly include timely resolution of controversies consigned to the judicial branch, but I do not consider that any delay so introduced will be undue and the interests of justice are, in my view, served by granting leave to reopen so as to cross-examine upon and to seek to tender the certificate of conviction and a certificate in respect of the outcome of the appeal against conviction.
12. As to costs, my initial inclination, given that neither party had enjoyed complete forensic success in respect of either making or, as the case may be, opposing the interlocutory application was just to leave costs as costs in the proceedings. That, though, was not a position to which the taxpayer companies subscribed.
13. Given that the subject of costs is controversial, the case is certainly one where it is best to make a decision now in respect of costs. The issues on the application were quite discrete. In terms of legal issues, the preponderance of time spent at yesterday’s hearing was in respect of issues upon which the taxpayer companies misapprehended, in my view, the basis of the tender of the certificate evidence. At an evidentiary level, however, the facts in relation to the interlocutory application were overwhelmingly facts associated with the telephone intercept evidence.
14. These days, when, subject to questions of reasonableness, this Court countenances in ways in which it would have been thought odd in earlier eras, time costing in relation to even the fixing of costs – time is a relevant consideration in relation to apportionment. My very strong impression, having just heard and determined this case, is that the preponderance of time associated with the hearing – in other words, the costs incidental to the hearing – was taken up in the preparation of explanatory affidavit material in respect of an issue upon which the Commissioner failed. The lesser time, which is not to diminish the appreciation of its outcome in submissions was, in my view, related to forensic issues.
15. The application has succeeded in part. It was opposed entirely. In my view, a very substantial discount indeed is necessary if I am to make an order that costs follow the event. The very substantial discount is, for the reasons which I have mentioned in relation to evidentiary preparation costs. That being the case, in my view the order which ought to be made, and which I do make, in respect of costs is that the applicants pay 40% of respondent’s costs of, and incidental to, the interlocutory application, to be fixed by a registrar if not agreed.

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| I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 17 August 2021