District Court
New South Wales

Amendment notes

Medium Neutral Citation:	**R v Colquhoun; R v Colquhoun; R v Colquhoun [2026] NSWDC 148**
Hearing dates:	13 – 14 May 2026
Date of orders:	15 May 2026
Decision date:	15 May 2026
Jurisdiction:	Criminal
Before:	Abadee DCJ
Decision:	See: [105]; [129]
Catchwords:	CRIMINAL LAW – trial by judge alone – whether in the ‘interests of justice’ for there to be trial by judge alone – consideration of relevant factors – apprehension of prejudice – legal and factual complexity EVIDENCE – offence of alleged fraud – alleged dishonest obtaining of property by any deception – first accused was former solicitor – first accused subject of subsisting disciplinary investigation – application to exclude evidence referring to or suggestive of professional misconduct – Crown case posits liability of co-accused on joint enterprise

principles – relevance of conduct of solicitor before the ‘agreement’ was allegedly entered into – relevance of expert opinion evidence to practices and principles of a solicitor when acting for a deceased Estate – objection to impugned evidence on the ground that their probative value was outweighed by the danger of unfair prejudice

Legislation Cited:	*Corporations Act 2001* (Cth) s 9 *Crimes Act 1900* (NSW) ss 192E(1)(a), 4B *Criminal Procedure Act 1986* (NSW) ss 131, 132 *Evidence Act 1995* (NSW) ss 55, 79, 80, 136, 137, 177
Cases Cited:	*Allianz Australia Ltd v Sim* [2012] NSWCA 68 *Bazouni v R* [2021] NSWCCA 256 *Day v R (No 2)* [2023] NSWCCA 312 *Evans v Smith* [2025] NSWCA 102 *Huynh v The Queen* [2013] HCA 6; (2013) 295 ALR 624 *Obeid v The King* [2026] HCA 1; (2026) 426 ALR 708 *Osland v The Queen* (1998) 197 CLR 316 *Patel v The Queen* (2012) 247 CLR 531 *Peters v The Queen* (1998) 192 CLR 493 *R v Batak (No 6)* [2025] NSWSC 658 *R v Dawson* [2022] NSWSC 552 *R v Monteleone* [2026] NSWDC 83 *R v Petroulias* (2005) 62 NSWLR 663 *R v Saliba (No 2) (Judge Alone Application*) [2025] NSWSC 155 *R v Simmons; R v Moore* [2015] NSWSC 259
Texts Cited:	Brendan Edgeworth, *Butt’s Land Law* (7th ed (electronic version), 2017, Thomson Reuters)
Category:	Procedural rulings

Parties:	Rex (Crown) Peter Colquhoun (Accused) Margaret Heather Colquhoun (Accused) Andrew Colquhoun (Accused)
Representation:	Counsel: S Healy (Crown) C Parkin with B Gooch (Accused, Peter Colquhoun) B Neild SC (Accused, Margaret Heather Colquhoun) G Walsh (Accused, Andrew Colquhoun) Solicitors: Solicitor for Public Prosecutions (NSW) (Crown) Greg Walsh & Co (Accused)
File Number(s):	2023/00227389; 2023/00227396; 2023/00223343
Publication restriction:	Nil

JUDGMENT

Introduction

1 Each of the accused, Peter Colquhoun (PC), Margaret Colquhoun (MC) and Andrew Colquhoun (AC), face the common charge on indictment that between 22 February 2010 and 29 July 2023, by deception, they dishonestly obtained property, being real property situated at 61 Boyce Street, Glebe (henceforth ‘the property’), the property of the deceased estate of Ansis Neilands, contrary to s 192E(1)(a) of the *Crimes Act 1900* (NSW). Colloquially put, they are charged with fraud.

2 The property had been owned by Ansis Neilands (the ‘deceased’) prior to his death in 1995. In October 1996, the deceased’s neighbour, Mr Huszti, instructed the law firm of which PC was principal, to apply for letters of administration of the deceased’s estate

and locate his next of kin. No next of kin were located. In May 1997, PC organised for the property to be rented. It remained rented until September 2002 during which time further searches for next of kin were carried out by PC's law firm.

3 In August 2002, Mr Huszti passed away.

4 On 17 July 2003, PC authorised a builder to secure the property. The same day, MC entered an agreement with a real estate agent to manage the property.

5 On 24 November 2013, MC & AC commenced the process of becoming registered proprietors of the property. They had never paid to acquire the property, although they renovated it and AC lived in it for a few years. On 18 January 2014, PC corresponded with Land and Property Information (LPI), a state agency responsible for administering real property titles in New South Wales on behalf of MC and AC. On 18 January 2014, a possessory application was lodged with the Land Titles Office. PC corresponded with Peter Blair, a solicitor of LPI, who it is said, eventually became the effective decision-maker of the application.

6 As part of the process of pursuing the claim for possession, on 20 March 2014, PC wrote to the Office of State Revenue and enclosed a Deed Poll book, with supporting documentation, and on 2 April 2014, the possessory application was withdrawn.

Following further requisitions from LPI, which were answered by either or both PC and/or MC, Mr Blair granted the application, as delegate (of the Registrar General), in or around May 2015.

7 The Crown contends that some of the documents lodged in support of the application for registration contained false statements which deceived Mr Blair into conferring title upon MC and AC. The alleged false statements concerned: (a) the date on which MC took possession of the property; (b) that the property was abandoned on that date; and that (c) the title documents for the property were found on site at that time.

8 A question that emerged throughout the process was whether PC had engaged in professional misconduct, having regard to his firm being retained by Mr Huszti. Mr Blair considered that this question was separate from his determination of the entitlement in MC and AC.

9 In the case of MC and AC, it is said that by the said transfer, they obtained the property. In the case of PC, it is said that he obtained that property for MC and AC. The Crown seeks to establish the guilt of the co-accused by alleging a joint criminal enterprise. The Crown will argue that Peter and Margaret Colquhoun entered into that enterprise in about July 2003, with Andrew Colquhoun joining the enterprise later in November 2013 and the enterprise subsisted until the property was obtained.

10 Each of the accused have pleaded not guilty.

11 The trial is due to commence on 18 May 2026.

12 The accused have brought several applications jointly. Their lawyers indicated that they all had a common, indeed identical, issue in each application. Henceforth, unless there is reason to indicate otherwise, when I refer to the 'accused' I am referring to all three of them.

13 The applications that ultimately ran were for:

(a) a ruling excluding evidence of alleged professional misconduct of PC;

(b) a ruling excluding the report of Mr Courtenay;

(c) a ruling excluding the report of Mr Neal, a solicitor; and

(d) a ruling on an application for trial by judge alone.

14 As argument emerged, it became apparent that there was no neat conceptual distinction between these applications. Simply put, much of the accused's complaint about prejudice may lose much, if not all of its force if the trial was to be by judge alone, but consideration of whether there should be judge by trial alone should not effectively be dictated by the circumstance that the accused complains of prejudice. I took the course of determining that the order in which the applications would be heard would start with applications to exclude evidence, simply to enable me to better understand the matters concerning the application for trial by judge alone.

The issues and how the Crown puts its case on joint enterprise liability

15 By its written submissions on evidentiary issues (MFI 1), the accused identified (at paragraph 20), in a general way, the issues that the trier of fact will need to determine. Mr Crown indicated his assent to that list. The issues were:

(a) was there a joint criminal enterprise *to engage in a fraud to obtain the property by deception*? (emphasis supplied)

(b) did the accused engage in a deception (i.e. making identified representations to the Registrar General that were allegedly false)?

(c) did the accused obtain the property by reason of the deception?

(d) (if the answer to (c) is in the affirmative) did the accused act dishonestly?

(e) was the property 'property of another'?

16 During the course of argument, the accused referred to a summary description of what it took to be the Crown's case, contained in a letter from the accused's solicitor to the ODPP on 5 March 2026. The Court was informed that, subject to an expressed caveat

(regarding the suggested necessity of proving that Mr Blair was actually deceived), the Crown generally agreed with that summary. The summary stipulated the following propositions:

(1) Each of the accused were part of a joint criminal enterprise *to obtain the property for MC and AC dishonestly and by deception*. (emphasis supplied)

(2) The property was obtained for MC and AC upon the granting of the primary application (made to the Registrar General).

(3) The deception operative on the mind of the person deceived (this part not being accepted by the Crown), and the effective cause of MC and AC obtaining the property were false representations made in support of that primary application.

17 In an earlier response to a request for particulars (dated 15 August 2024), prepared in advance of the committal hearing, Mr Crown indicated that the Crown case was that the dishonest intention of PC was formed by the middle of July 2003 (by which point, the firm's file had closed) when he obtained ownership, possession or control of the property for MC and AC. In the case of MC, it was said that she formed a dishonest intention at about the same time. In the case of AC, it was said that he formed a dishonest intention on or about 24 November 2013.

18 I have emphasised the parts of these summary descriptions that concern the Crown case on joint enterprise liability, as this can be a complicating factor in cases of fraud.

19 In argument, in response to my question as to what was the *actus reus* of the crime that the participants to the enterprise agreed to commit, Mr Crown said that it was 'an agreement to obtain the property dishonestly'. Mr Crown said that such agreement was to be inferred by the conduct of the participants from about the middle of July 2003 in the context of the conduct of the participants up to that point. The generic feature of dishonesty was that MC, or such other person (within the Colquhoun family), who at a later point in time would bring the application, was a 'stranger' to the property, but held possession of it adversely to the interests of the Estate. This was in circumstances

where the *de facto* control of the Estate had only subsisted in the Colquhoun family because of PC’s actions as solicitor. Mr Crown said that the Crown’s case was that the agreement was not fixed in time but evolved. Specific acts of dishonest deceptions came later, in MC’s case, from November 2013 onwards, and later still in the case of AC.

20 More than once, the accused criticised the way that the Crown put its case on joint enterprise liability. They emphasised a need in the Crown to allege and prove an agreement to commit all the elements of the offence. This relevantly included dishonestly obtaining property by deception. On the Crown case, as they understood it, the dishonesty was manifested only at the time when the deceptions were perpetrated, from 2013. It was not criminal for PC and MC to agree in the middle of 2003 to take steps to acquire the property.

21 The Crown responded to this by referring to the High Court’s recent decision, that of *Obeid v The King* [2026] HCA 1; (2026) 426 ALR 708 (“*Obeid*”) at [23]-[35]. That was a case of conspiracy, although the Crown argued that it applied analogously to joint enterprise liability. In the decision, the High Court rejected the proposition that in a conspiracy case, it was necessary for the Crown to allege and prove specified acts. It was often the case in conspiracies that the agreement was a generally common design and how the conspirators might act in execution of that design was not yet apparent. On the facts in that case, the common goal (or design) of the conspirators was that the Minister would conduct himself with the improper purpose of advancing the interests of the Obeid family (or associates). It was unnecessary that at the point of the agreement, the Crown could not precisely prove what acts the Minister would engage in. For their

part, Mr Parkin, Counsel for PC (but in this respect arguing on behalf of the accused), said that *Obeid* was distinguishable since the crime of conspiracy was different to joint enterprise liability.

22 The present applications do not raise, and it is wholly inappropriate for the Court to consider, the question whether the way that the Crown puts its case is capable of proving the liability of the accused under joint enterprise liability. In my view, the proper approach to dealing with *all* the applications is to proceed on the assumed basis that it does.

23 I will now identify the arguments the accused relied upon on the evidentiary issues, the Crown's position in respect to them and thereafter the debate concerning the application for trial by judge alone.

24 Before doing so, however, as a procedural matter, having noted that in most instances the accused (and especially AC) raised s 137 of the *Evidence Act 1995* (NSW) as a basis for excluding proposed Crown evidence, I raised with the parties whether they expected the Court to consider the position of each accused differentially when it came to considering the application of that statutory provision. I understood them to indicate that this was not necessary on the understanding that if any limitation (under s 136) was sought by an individual accused as to who particular items of evidence were admissible against, the individual accused could raise it at the trial. I proceed on that basis.

Exclusion of evidence of professional misconduct and PC's 'pre-2000 dealings'

Professional misconduct

25 It is uncontroversial that PC became subject to a complaint of professional misconduct in about February 2015. On 19 August 2015, the Legal Services Commissioner referred the complaint to the Law Society of New South Wales.

26 In March 2018 David Courtenay, a solicitor, was appointed as an investigator. He completed a report on 8 November 2019 and gave it to the Law Society. A copy of that report (or the body of it) was before the Court (VD Exhibit 2).

27 In this proceeding, Mr Courtenay gave a police statement which, the accused say, did little more than reproduce his earlier report. He ventured the opinion, amongst other things, that the evidence may justify the Law Society Council concluding that PC had engaged in unsatisfactory conduct or professional misconduct and that there were grounds for the Society to make further complaints. This was described as his 'Outcome Conclusions'. It appeared Mr Courtenay indicated that he thought members of the public may feel disquiet if they knew that PC's family may have improperly benefited by his conduct. Further, it indicated that there may be 'further complaints' open to the Council. This was described as his 'Other Matters Conclusions'.

28 The accused indicated that it was not just the evidence of Mr Courtenay which caused concern for them. In a statement of Anthony Lean (also part of VD Exhibit 2), the Director of Legal Regulation, Professional Standards of the Law Society, Mr Lean

referred to the Law Society complying with a requirement issued by NSW Police to make available to Police information in the Law Society's possession relevant to the suspected offence.

29 Further, the accused also referred to the content of PC's ERISP. It was submitted that a large feature of the questioning was concerned with, or arose from, the circumstances of the disciplinary investigation of PC.

30 It was not entirely clear whether these sources that I have identified represented the universe of all of the evidentiary items which, they said, directly or indirectly gave rise to the assertion that PC had engaged in professional misconduct.

31 At any rate, the accused complained that this would be irrelevant, contravened the rule against opinion evidence (in the case of the Courtenay report) and, alternatively, was so unfairly prejudicial as to be appropriately excluded under s 137 of the *Evidence Act.*

PC's pre-2000 dealings with the property

32 The accused argues that a large amount of evidence in the case, which gives rise to paragraphs 9-115 of the Crown Case Statement (which appears in VD Exhibit A), concerns PC's dealings with the property. They object to that evidence save to the

extent that the evidence is capable of bearing upon the persons who were in actual possession of the property or the accused's knowledge of persons in actual possession of the property.

33 Their argument was that PC's dealings with the property in his capacity as a solicitor, which went back to 1995, pre-dated the indictment period by decades and did not bear on the issues in the trial. The deceptions allegedly perpetrated comprised false representations in 2013.

34 The accused anticipate that the Crown will eventually submit that PC introduced MC and AC to the property, knowing that it was vacant with such knowledge being acquired through his professional dealings with it.

35 The accused say that the tender or inadvertent disclosure of the circumstance that PC was the subject of a disciplinary investigation, even thought that had been stayed, was not only irrelevant but highly prejudicial. It was tantamount to credibility or bad character evidence as against PC. The trier of fact at worst, might consider that there must have been a reasonable basis for the investigation.

36 The accused argue that the evidence could not be admissible as against AC or MC, given that it concerned conduct prior to the indictment period. AC and MC both complain particularly about the prejudice that would be caused to them.

37 Mr Walsh, solicitor for all of the accused and solicitor advocate for AC, emphasised in oral argument the particularly narrow case against AC, this being that in 2014 he swore a statutory declaration containing the false statement that what was contained in MC's declaration was correct. His involvement, it was said, really began in 2010, so PC's conduct prior to the 2000s was even more remote in his case.

The Crown's position

38 As something of a preliminary point, the Crown noted that the start of the indictment period reflected the commencement date of the offence for which the accused were charged (s 192E falls within Part 4AA of the *Crimes Act 1900* (NSW)), which part commenced operation on 22 February 2010). That did not mean that conduct or events before 22 February 2010 were or could be excluded as inadmissible against any of the accused.

39 At the hearing, Mr Crown made it very clear that the Crown would not be suggesting to the trier of fact that PC *had* engaged in professional misconduct (nor, I infer, unsatisfactory conduct). Mr Crown said that the intended use of Mr Courtenay's evidence was to show that Mr Courtenay had in fact been appointed as investigator and had in fact prepared a report. What the Crown really sought to adduce from Mr Courtenay were the 'Ex RC' documents, in addition to Mr Courtenay's explanation of some things he did not investigate.

40 Mr Crown indicated that these documents aided proof of the existence of the joint enterprise which the Crown says emerged between PC and MC in 2003. (The Crown case is that AC joined it in November 2013). The circumstances that led to the creation of that agreement started in the mid-1990s, including the death of the deceased, PC's filing of documents when Mr Huszti was a client of the firm as a creditor of the deceased estate, and the Firm's payments in connection with the property, including to itself.

The Neal report

41 Mr Neal is an Accredited Specialist in Wills and Estates Law and a Registered Trust and Estate Practitioner. He was admitted as a solicitor in 1973 and has practised as a solicitor for 52 years.

42 I understood that the accused's concerns regarding this report were similarly linked to general concerns about evidence of improper conduct, to use a generic description, prior to 2000, but the accused advanced particular arguments against the admissibility of this report, which justifies it being addressed separately in these reasons.

43 Mr Neal's report (which was in VD Exhibit A) was substantial, occupying 73 paragraphs. He was asked four questions.

44 These were as follows:

(1) Please provide an overview of how wills, estates, probates and succession law (by whatever name; called "wills and estates" subsequently for convenience) applied in 1995 (and following years) in relation to the death of Ansis Neilands - specifically:

(a) an overview of the usual steps that would be taken where a person without obvious and immediate next of kin, but with an estate of some value, passes away; and

(b) what is expected of a solicitor hired by a client to do wills and estates work arising from the death of Ansis Neilands, in the circumstances where Colquhoun and Colquhoun Solicitors were apparently retained by Mr Neiland's neighbour Alexander Huszti in 1996. (**the Wills and Estates Question**)

(2) Where money is received by a firm of solicitors such as Colquhoun and Colquhoun Solicitors on account of rent for a real property such as 61 Boyce Street Glebe, what are (at the relevant period of time) the requirements imposed upon a firm of solicitors in relation to the handling, accounting for and disposition

of those funds? In particular, if the money received for rent for real property is intended to be paid out to the firm of solicitors itself, for its professional costs and disbursements, what steps are (at the relevant period of time) required to be taken? (**the Money Question**)

(3) Against the background of actions taken by Colquhoun and Colquhoun Solicitors in relation to its wills and estates work arising from the death of Ansis Neilands, from 1996 until 2003 when Colquhoun and Colquhoun Solicitors' file may have been closed: what steps would a competent ethical solicitor have taken when confronted with the circumstance that had by 2003 arisen? In answering that question, your attention is drawn specifically to the filing of the Summons on behalf of Alexander Huszti, allegedly by the solicitor Peter Colquhoun, in the Supreme Court of NSW on 16 December 1996; the Supreme Court of NSW raising requisitions on 24 December 1996 in the matter for which there does not appear to be record of a response; and the apparent fact that inquiries undertaken by (or on behalf of) Colquhoun and Colquhoun Solicitors to find other beneficiaries, executors or next of kin for Ansis Neilands' estate had over some years come to naught. (**the Ethics Question**)

(4) As at the relevant time (in the present matter, about 2013-2015), what were the procedures and rules surrounding applications to obtain real property by adverse possession (by whatever name such an application might be known) in New South Wales? (**the Adverse Possession Question**)

45 For all but Question 4, the accused contended that these were irrelevant. Further, the opinions went to questions of law, and finally, the opinions should be excluded under s 136 of the *Evidence Act*.

46 As to its relevance objection, the accused say that Questions 1-3 do not bear on the actual allegations. Mr Neal's evidence in answer to those questions appeared no more than to call into question PC's conduct a decade or more before the alleged offending. Mr Neild SC, on behalf of all the accused, elaborated the relevance ground of objection

to Questions 1-3 by reprising his point that given the way that the Crown had particularised its case on the element of deceptions (making false representations), Mr Neal's evidence could not assist in explaining how the joint enterprise arose in 2003. Senior Counsel argued that any criminality could only have developed in 2013 when documents came into existence. There was no criminality in MC and AC bringing the application when they did, or forming the intention to acquire the property, in 2003. Anything the expert said about PC's conduct in the 1990s was irrelevant to proving the falsity of documents created over a decade later. The dishonest deception occurred in 2013.That meant that all that Mr Neal had to say in answering Questions 1-3 was no more than suggestive of a case that the Crown disclaimed, that is, that he had acted in a way that amounted to professional misconduct or impropriety.

47 As to its second objection, the accused say that, to the extent that Mr Neal's evidence related to the practices of solicitors, or applicable procedures that would be undertaken by a solicitor in 1995 when placed in PC's circumstances, or to what was expected of a firm in 1996, including what requirements were imposed upon solicitors in relation to the accounting of funds received from rental derived on the property; and what a competent ethical solicitor would do in the period from 1996 to 2003 (when the file was closed), these were effectively legal principles which were not amenable to expert opinion evidence.

48 Thirdly, it was argued that Mr Neal's opinions were not admissible under s 79 of the *Evidence Act* or, alternatively, should be excluded under s 137. They say Mr Neal's evidence has no probative value or at least is so significantly lacking in probative value relative to the prejudicial effect of an opinion which, in substance, involves one solicitor's criticism of another. Again, AC and MC argue that the opinions are especially prejudicial to them.

49 As a separate but related point, Mr Walsh drew the Court's attention to litigation in *Patel v The Queen* (2012) 247 CLR 531 ("*Patel*") to point to the danger of evidence being adduced about a professional's incompetence when that was not an essential element

of a criminal charge against the professional.

50 Mr Crown submitted as to the relevance of Questions 1-3 (incl). In relation to both Question 1 and Question 3, it was explained that the legal principles at work in 1995 (and from the period 1996 to 2003 in the case of Question 3) in relation to the deceased's Estate, were likely to fall outside the life experience of the jurors, given the unique circumstances of the case. It was argued that what PC did in performance of his retainer was fundamental to explaining the existence, or creation, of the agreement between himself and MC in 2003. The trier of fact would be aided by Mr Neal's description of those principles in understanding why PC acted as he did, including the filing of documents in Court and the steps or inquiries made to locate next of kin.

51 In relation to Question 2, Mr Crown said it was impossible for the trier of fact to assess (or perhaps evaluate) the significance of MC's actions from about the middle of 2003 without an understanding of what PC had done from late 1996 to May 2003. This included the collection of, and payment out of, the rental income received. Those events occurred (and what should have occurred) in the context of the responsibilities of a firm in the position of PC's firm. The Crown argued that the withdrawals from the Firm's trust account in 2003 were relevant to whether PC entered the joint enterprise, by which he preferred the interests of others (MC and AC).

52 As a discrete point in relation to Question 3, Mr Crown referred to what Mr Neal said at paragraph 62 of his report, concerning the consequence of a reasonable solicitor's inquiries that there was no next of kin, which was to the effect that the property belonged to the State and that the client should seek an ex gratia payment; and further, that the estate would have been administered if referred to the Public Trustee. This, Mr Crown submitted, reinforcing the point, was relevant to the entry into the joint enterprise.

53 Generally, Mr Crown submitted that Mr Neal's evidence was also relevant for illuminating the legal context in which Mr Blair made his decision. Although Mr Blair was eminently qualified to explain the principles himself, as the decision-maker, he could not

‘wear two hats’. In reply to this submission, the accused said that it was already clear that Mr Blair had distinguished his attitude towards PC’s conduct and the application brought by MC and AC. He had given some evidence at the committal hearing by which the trier of fact would obtain an adequate understanding of what was done, why it was done or should have been done.

54 Mr Crown submitted that any prejudice could be alleviated by a direction to the trier of fact that it was not essential to the Crown case to prove that PC had been negligent.

55 Mr Crown addressed two other grounds of objection. As to the suggestion that an expert witness could not give evidence of legal principles in domestic law, the Crown referred the Court to the decision in *R v Petroulias* (2005) 62 NSWLR 663 (“*Petroulias*”) where it was evident (in the context of a federal offence) from what was said at [28]-[29] that expert opinion evidence could be admissible on the interpretation of a statutory provision. This decision was relied upon by analogy.

56 As to the criticism of Mr Neal’s lack of expertise to opine on the questions he addressed, this was misconceived. Clearly, he was very experienced in the area. The expert’s pinpointing of only one particular instance where he personally had experience in the circumstances betokened only the rarity in which applications for adverse possession had been brought.

Other applications

Ms Yang's evidence

57 Xiaran Yang is a forensic accountant attached to the Financial Crimes Squad. Police relied upon an expert certificate she had given pursuant to s 177 of the *Evidence Act*. Though it was not referred to in the Amended Notice of Motion, in the accused's written submissions objection is taken to that evidence and Mr Crown took no point that the Crown could not deal with it.

58 Mr Crown indicated the Crown's intention to rely upon the whole or parts of tables in that expert's certificate. Mr Crown identified parts of the Crown Case Statement to which the content of those tables was directed. The accused suggested in argument that the dispute about the admissibility of this evidence be deferred.

Documents produced by the Law Society

59 This was the subject of another application. Mr Walsh, speaking for all the accused on this point, also suggested that this dispute be deferred until the first day of the trial.

Trial by Judge Alone

60 All of the accused jointly apply for a trial by judge order.

61 It is common ground that the applications were brought more than 28 days prior to trial. Each of the accused have sought and received legal advice on the effect of a trial by judge alone order. Signed elections were placed before the Court (VD Exhibit 4).

62 The Crown opposes the application. The accused persons jointly prepared written submissions (MFI 2). The Crown prepared written submissions in response (MFI 3), both sets of submissions being supplemented in oral argument.

Provisions and principles

63 In *R v Monteleone* [2026] NSWDC 83 ("*Monteleone*"), I referred to the provisions and principles as follows:

> "**Statutory provision and principles**
>
> Section 131 of the [*Criminal Procedure Act 1986* (NSW)] provides that criminal proceedings, relevantly, in the District Court are to be tried by a jury except as otherwise provided by this Part. Applications under s 132(1) are to be considered in the light of the circumstance that trial by jury is the 'conventional approach': *DPP (NSW) v Farrugia* [2017] NSWCCA 197 ("*Farrugia*") per Basten JA (Button J agreeing) at [9].
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> Section 132 of the CPA provides:
>
> 132 Orders for trial by Judge alone
>
> (1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a "trial by judge order").
>
> (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.
>
> (3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.
>
> (4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.
>
> (5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.
>
> (6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.
>
> (7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:
>
> (a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and
>
> (b) the risk of those acts occurring may not reasonably be mitigated by other means.
>
> *"Interests of justice"*

I note the broad discretion in s 132(4), subject to s 132(6). But the Court's consideration is confined to the evidence placed before it; in addition to matters of which the Court can take judicial notice: *R v Belghar* [2012] NSWCCA 86 at [90].

Counsel referred me to the statement of guiding principles of Yehia J in in *R v White* [2024] NSWSC 1369 which statement was reprised by her Honour in *R v Batak (No 6)* [2025] NSWSC 658 ("*Batak*"). Her Honour prefaced that statement of principles by noting the accused's general constitutional right to trial by jury and explained why the subjective preference of an accused, and/or his belief that a jury trial may not be fair, is a relevant mandatory, and indeed weighty, consideration for applications under s 132(1), given that the accused has made a considered decision to forego the protections that come with a jury trial.

Then at [31]-[39] (the paragraph numbering being taken from *Batak)*, her Honour observed (omitting citations):

> '31. Firstly, there is no presumption that a trial should be conducted with a jury.
>
> 32. Secondly, an accused is not entitled to a trial by judge alone simply because he or she has made an election to be tried by a judge alone. However, the fact that an accused has decided, on legal advice, to relinquish his or her right to a jury trial is a matter to be weighed in determining where the interests of justice lie…It should be noted that a mere unstated apprehension without supporting evidence will not be sufficient.
>
> 33. Thirdly, the interests of an accused are not necessarily the interests of justice. The community receives important collateral benefits from a trial by jury in the involvement of the public in the administration of justice and in keeping the law in touch with community standards.
>
> 34. Acknowledging that the interests of justice are not limited to the interests of an accused does not detract from the emphasis that should be placed upon the fundamental importance of an accused receiving a fair trial. Underpinning that principle is the presumption of innocence and the substantial consequences that flow to an individual upon a finding of guilt. Furthermore, the interest of the community is not in ensuring that an accused is convicted but in ensuring that an individual accused of a crime receives a fair trial according to law.
>
> 35. Fourthly, s 131 of the CPA does not cast a burden of proof on an accused person. Although an accused carries an evidentiary onus, the Court does not determine where the interests of justice lie by requiring the evidence to rise to a level by which "a presumption" of trial by jury is displaced.
>
> 36. Fifthly, Parliament has made it clear that it may be preferable "in the interests of justice" that there should be a trial by jury where an alleged offence involves objective community standards. Section 132(5) sets out a non-exhaustive list of issues requiring the application of objective community standards, including, but not limited to, an issue of reasonableness, negligence, indecency, obscenity or dangerousness. That does not mean that it necessarily follows, in a case involving the application of objective community standards,

that there should be a jury trial. However, whether or not the issues involve the application of community standards is a relevant consideration. Each case will depend upon its own facts and circumstances.

37. …

38. Sixthly, efficiencies in the conduct of the trial without a jury is a relevant factor as part of the mix of issues which must be considered.

39. Seventhly, it is in the interests of justice to conduct a trial in the most efficient and flexible way possible, so as to minimise the prospect that any trial would not be able to be completed.'

At [68]-[80], her Honour explained why in her view, the circumstance that a trial is likely or necessarily to involve an assessment of the credibility of witnesses is a neutral consideration when considering what the interests of justice requires.

Earlier, in *R v Dawson* [2022] NSWSC 552 ("*Dawson*"), Beech-Jones J made the following observations about the phrase:

"10. Generally, the phrase 'interests of justice' envisages a broad assessment of a variety of matters, some concerning the interests of the parties to the litigation, but also 'interests wider than those of either party' (*BHP Billiton Limited v Schultz* (2004) 221 CLR 400; [2004] HCA 61 at [15], and at [169] and [172]). In the context of s 132, in *R v Belghar* [2012] NSWCCA 86; (2012) 217 A Crim R 1 ("Belghar"), McClellan CJ at CL held that s 131 does not create a presumption that the trial should be with a jury which an accused person must discharge. Instead, as each form of trial has its own characteristics, and depending on the particular case, the court may conclude that the interests of justice are best served by a trial before a judge alone rather than a trial by a jury. Further, the subjective views of an accused, and his or her belief that a jury trial may not be fair, are relevant factors to consider however they are far from determinative. What is more significant is the reason for that preference, whether those reasons are rationally justified, and whether they bear upon the question of a fair trial. The mere apprehension of prejudice in prospective jurors, not based on evidence or a matter of which the court may take judicial notice, is not sufficient to make such an order as it is contrary to the assumption which the common law makes that jurors will understand and obey the instructions of trial judges to bring an impartial mind to bear on their verdict.

11. In *Simmons (No 4)*, Hamill J identified several considerations which may inform the assessment of whether the interests of justice warrant the making of an order for trial by judge alone. These include the potential to save court time and expense from having a matter proceed without a jury although the weight to be attached to this factor will vary from case to case. One advantage of a trial by a judge alone is the enhanced community confidence in the verdict that may be derived from the provision of reasons by a judge especially if it concerns complex engineering, scientific or medical issues. On the other hand, there is a 'public interest in the administration of justice [being] carried out in public and in serious cases by the representatives of the public sitting as jurors'. Many authorities point to juries as the preferred body to make

> assessments of the credibility of witnesses. However, in *Simmons (No 4)* Hamill J regarded this factor as neutral given that judges have the 'training and experience of making difficult decisions on credibility, putting aside matters of emotion, on an almost daily basis'."

In *Farrugia* Basten JA (Button J agreeing) said (at [11]):

> "Without seeking to be restrictive of the circumstances in which such orders are appropriate, it is helpful to note that the decided cases reveal [J]udge alone trials may be preferable in relation to lengthy complex trials involving significant disputes between experts and in cases where the judge is not satisfied that a fair trial can be achieved with a jury, perhaps because a particularly horrendous crime has inflamed public sentiment in a small community. On the other hand, it is clear that an order is not to be made because the judge has a preference for trials without a jury because, for example, a reasoned judgment is more transparent than a jury verdict, the trial is likely to be shorter and less expensive to run, or a 'correct' result is more likely."

64 I do not consider that what I stated in that decision is inconsistent with, or derogates from, the principles the parties identified in argument. I propose to apply them, whilst noting that there were some authorities in respect to which other relevant propositions were drawn to my attention. I have noted and considered them below.

Submissions

65 Shortly stated, the accused jointly submitted that a trial by judge alone is in the interests of justice because of serial factors, taken in combination:

(a) each have indicated a desire to waive their right to trial by jury;

(b) questions of objective community standards do not loom large;

(c) the nature of the Crown case creates an irremediable risk of unfair prejudice;

(d) the case raises complex issues of fact and law better suited to a judge;

(e) there is a risk that the jury will substitute its own view for that of the decision-maker, Peter Blair;

(f) overlapping professional disciplinary proceedings generate a risk of unfair prejudice;

(g) the length of trial will be significantly shortened; and

(h) the circumstance that there has been significant delay in prosecution is a matter best considered and addressed by a judge.

66 I will address these points seriatim and note the Crown's responses to each of them.

67 As to (a), the desire to waive the right to trial by jury was a weighty matter, involving as it does a considered decision to forego the protections afforded by trial by one's peers.

68 The Crown argues that what is material is not the fact of a waiver of right, but the reasons for that preference and whether they are rational. It also says that the weight to be given to this particular consideration is not amplified simply because it is made by each accused.

69 As to (b), it is common ground that the mental state for that offence, regarding dishonesty, is the dual notion of dishonesty according to the standards of ordinary people and known by the defendant to be dishonest according to those standards (*Crimes Act*, s 4B). However, that circumstance does not inexorably lead to the conclusion that the application for trial by judge alone should fail. Whether or not issues involve the application of community standards is a relevant consideration but each case depends upon its own facts and circumstances (*R v Batak (No 6)* [2025] NSWSC 658 at [36]); and other matters may outweigh this particular consideration (*R v Saliba (No 2) (Judge Alone Application*) [2025] NSWSC 155 at [8]). Here the notion of community standards did not loom large since, in the way that the Crown has particularised its case, the element of dishonesty was synonymous with the making of allegedly false statements in a statutory declaration. That is, the same facts to sustain the element of the perpetration of a deception are relied upon to prove dishonesty.

70 Further, when the trier of fact considers whether the conduct is dishonest, according to the first limb, it will need to resort to legal principles governing the doctrine of adverse possession. A jury will be in no better position to do so than a judge. Indeed, the

opposite may be true. As to the second limb, whether the accused knew that their conduct was dishonest in accordance with community standards does not strictly turn upon community standards since it is a subjective matter, so as to make that limb of the test of dishonesty akin to an element of specific intent. In the circumstances, the consideration about community standards is neutral.

71 The Crown submits that the question of what the standards of honesty of ordinary people are, is quintessentially a matter upon which objective community standards bear. Although the second limb of the test of dishonesty concerns the state of mind of the accused, what the Crown has to prove is that the accused knew that their conduct was dishonest in accordance with community standards. The collective experience and wisdom of the jury, as the conventional repository of community standards, is appropriately applied to both limbs of the element of dishonesty.

72 Although it is true that the issue of dishonesty needs to be considered in a particular legal context, that is not unusual. Indeed it is not uncommon in cases of fraud where rights to property are sourced in statute (as seen in prosecutions of offences under the *Corporations Act 2001* (Cth)) or where the contextual setting for fraud concerns professional responsibilities, contractual or equitable principles in the general law (as illustrated in *Day v R (No 2)* [2023] NSWCCA 312 ("*Day*")). Whether false statements were made in the statutory declarations are factual questions in context. Although part of that context is shaped by legal principles, they remain factual questions.

73 As to (c), the accused submit that the ordinary layperson will not be acquainted, or familiar with the doctrine or concept of 'adverse possession'. The accused are concerned that a jury may take a prejudicial view against them that MC and AC

acquired title in a manner that was not ‘fair, appropriate, or lawful’. So, it is said, the nature of the subject matter for the Crown case is likely to have a powerful and improper prejudicial impact in the jurors’ minds.

74 The Crown argues that juries are assumed to abide by their oaths or affirmations in deciding the case based on the evidence and guided by judicial directions. Although it may be a matter of common knowledge that housing in Sydney is not cheap, it is speculative to suppose that the jury would take a prejudicial view to the acquiring of property by adverse possession; particularly where it will be no part of the Crown case to suggest that this means of acquisition of property is illegitimate. At any rate, juries are customarily told that they are not to be prejudiced against accused persons and they can be directed that they should not allow their personal views about the propriety of the law and the entitlements it confers upon persons to acquire property to influence their decision but instead, they should set those views aside.

75 As to (d), some of the factual matters that will arise concerning the asserted falsity of the representations, whether MC and AC were in possession ‘adverse’ to the estate of the deceased and whether PC was ever actually acting on behalf of the estate at the time he was instructed by a creditor to the estate, are more suitably dealt with by a legally trained judge.

76 The Crown says that just because there are factual and legal matters of some complexity does not mean that the circumstance weighs in favour of trial by judge alone. If that was so, fraud cases would be something of an island, or beyond the reach of the purview of determination by ordinary people. The same point arises where an alleged fraudster is a solicitor and part of the background to the fraud involves a consideration of what the solicitor did in the light of legal principles or professional standards.

77 As to (e), the accused cite that an important question will be causation: whether the property was obtained by deception. That, it is argued, will involve inquiry into the thought processes of Mr Blair and the way he applied legal requirements. Observing

that the Crown wishes to rely upon expert opinion of legal principles relating to claims of adverse possession and the circumstance that the evidence of what was actually put before Mr Blair will also be before the trier of fact, it is said that there is a risk that a jury may be tempted to substitute its view for Mr Blair's reasoning. 'Possession', it is said, for the purposes of the doctrine of adverse possession, may be at variance from a lay person's understanding of the concept.

78 The accused make the more general point, relevant to some of the more specific points already raised, that it is more desirable that the issues of factual and legal complexity are identified transparently, so that if they are decided erroneously, there is a potential for correction. In oral argument, Counsel noted that the Crown's reliance upon multiple alleged misrepresentations. They give rise to many possible permutations as to what conclusions the trier of fact might reach about what representations were actually the subject of findings, and whether those misrepresentations were deceptive. That gave rise to the prospect of a need for an extended unanimity direction. How the jury may deal with these matters is inscrutable.

79 The Crown says that on the element of causation, it is not the law that the Crown has to prove that Mr Blair actually was deceived, and there is no requirement for the trier of fact to consider whether Mr Blair made the correct decision. That being so, it is speculative to say that there is a risk that the jury may be influenced to ignore the directions about the elements that are given to them and be tempted to engage in the reasoning the accused refer to.

80 As to (f), although the Crown has indicated that it does not propose to rely upon opinions about the disciplinary investigation against PC, there is a real risk that much of the evidence compiled by the Law Society through the investigation may seep through. More fundamentally, once the jurors get it in their mind that PC was the subject of a complaint, which had made its way to the NCAT, that would be prejudicial and especially so for MC and AC. In oral argument, it was suggested that the Crown case

was redolent of professional misconduct or impropriety and thus redolent of bad character. Counsel expressed the concern that reference to disciplinary investigation may give rise to a risk the jury may engage in tendency reasoning.

81 As Mr Crown submitted in writing and in oral argument, it is not part of the Crown case to contend that PC committed professional misconduct or engaged in unsatisfactory conduct. The Crown has not seen the initiating process in NCAT or the particulars to the complaint against PC. As noted earlier in these reasons, the Crown says that the fact that an investigation occurred and the fact that a significant number of documents the Crown relies upon were obtained through the course of the investigation will be apparent. Mr Crown submits that the jury would understand that there is a significant distinction between the making of a complaint about a professional (a known fact) and the outcome of that complaint (which is unknown). It was no different to the jury being aware that police had investigated the accused. Again, should there be any real risk of prejudice, an appropriate judicial direction can be crafted.

82 Further, to the extent that some witnesses need to have their memories refreshed, they will not generally be doing so by reference to the documents produced through the Law Society's investigation. Even if there is some inadvertent reference by a witness to the investigation, the risk is sufficiently dealt by direction.

83 As to (g), in its oral argument, Counsel for PC somewhat, with respect, walked back the notion of 'significant' reduction in time if the case proceeded by judge alone. He did not, for example, give an estimate in the days in Court that would be saved. Much of the Crown's case was documentary and it was argued that it would be more efficient if a Judge was led through the evidence, much of which could be the subject of a court book which substantially could be by agreement (subject to objections) in a bulk tender, rather than individual tender. To the extent that its case is not documentary, where

matters are uncontroversial, the Crown may be incentivised to lead the evidence through witnesses. That process might be more streamlined if the trial is by judge alone.

84 The Crown emphasises that its case is largely documentary. The prospect that the case can be streamlined by such expedients as a tender by agreement or agreed statement of facts subsists in either case.

85 As to (h), the Crown case, as it is constituted, spans nearly 30 years. Memories fade and documents may have been lost. The accused will rely upon a direction of significant forensic disadvantage. Whilst it is not uncommon for juries to receive such directions, it is unknown how the jury will take that into account.

86 The Crown does not dispute that there are cases where it is advantageous that judges deliver reasons, although against that, there is an advantage to having a jury assessing credibility and reliability of witnesses. But there is no basis, in authority or in principle, for thinking that a judge is in any superior position to weigh the circumstance of delay. It is not a situation where is it suggested that any large volume of documents, or even a single document, has been lost or destroyed.

Consideration of application for trial by judge order

87 I reiterate that my decisions on the applications are predicated upon acceptance, for present purposes, of the Crown case at its highest, as it is put.

88 As the authorities indicate, this is not a case where there is any presumption in favour of trial by jury. Nor, in my view, is there any hierarchy in the considerations. As to this, on its face, s 132(5) of the *Criminal Procedure Act 1986* (NSW) does not *elevate* the significance of the circumstance that a trial will feature factual issues requiring the application of objective community standards. It strikes me that the provision serves to operate, in effect, as a discretionary reason disqualifying a particular category case as

being amenable to trial by judge alone. It is a negative criterion. The Crown did not suggest that the circumstance that objective community standards are relevant in this trial was reason of itself to refuse the application.

89 In my opinion, the cumulative weight of the accused's arguments, most of which I accept, is that it is in the interests of justice to make a trial by judge order.

90 There is substance as to the accused's concern about the prejudicial effect, or at least flavour, of much of the evidence that the Crown relies upon, as indicated by the current applications. The circumstance to be disclosed that PC was the subject of a current but unresolved disciplinary investigation, about or in relation to events that the Crown relies upon to establish the joint enterprise, is inherently prejudicial. So too is expert opinion evidence that might lead the trier of fact to conclude that he acted contrary to legal or professional standards, or even in conformity with his common law obligation to exercise reasonable care. Although they did not bring applications for separate trial, there is a real risk of AC and, to a lesser extent, MC, being tarred with the same brush. It is true that juries can be assumed to be capable of, and do, comply with directions requiring them to disregard prejudicial evidence in the course of the trial. Moreover, it is to be expected that the Crown will do its utmost to excise or limit the jury's exposure to documents that directly or indirectly point to those matters. But such attempts can only go so far to be effective particularly where, in the situation here that the factual substratum relating to the disciplinary investigation is interconnected to the police investigation and charging.

91 Moreover, in my opinion, there is also force in the common concern of the accused that a jury, or some jurors, might regard the notion of possessory title or adverse possession as involving some level of moral opprobrium or illegitimacy. In the latest edition of *Butt's Land Law* the learned author noted that some judicial decisions have commented upon the apparent harshness to the land holder who is dispossessed (without compensation), including muted concern about a mode of property acquisition which involves a suggested contravention of that person's human rights in European law. [1] Of

course, the trier of fact will not be asked to make findings of that kind, but the circumstance that eminent judges and commentators have commented upon the doctrine in this way might serve to illuminate what could be concerns amongst many in the population at large. This is not to discount the possibility that some persons may recognise works done by a person in possession over a period and have no difficulty acknowledging the entitlement of persons to pursue what they perceive as their rights to acquire real property. The point which I understand the accused to raise is that this is a subject matter which of itself may generate strong views.

92 Secondly, there are multiple levels, or layers of legal and factual complexity in this case. In *R v Simmons; R v Moore* [2015] NSWSC 259 Hamill J (at [71]) observed that cases involving complex evidence that can be difficult for a jury to understand may lend themselves to orders for trial by judge alone. I respectfully agree. It may not be quite accurate to say that the Crown case involves overtly technical issues, or that they are on par with the 'complex engineering, scientific or medical issues' referred to by Beech-Jones J in *R v Dawson* [2022] NSWSC 552, but still, the legal context concerns the application of a relatively rare doctrine of land law – so rare that the Crown's expert witness had only encountered it on a single occasion. The Crown's reference to *Petroulias* is unpersuasive in the circumstance that a jury was mandatory (because the case concerned a federal offence) as the trier of fact. The decision in *Day* that Mr Crown referred to did, it is true, also involve or relate to an agent's legal obligations. As the Judge who presided over the re-trial in that matter, I can recall first hand that it was apparent that laypersons had some difficulty in understanding the nuances of contract law as to the formation and terms of agreements that arose in that litigation. There is force in the accused's submission that the concept of 'possession' for the purposes of this doctrine of land law in issue, with its requirement that exclusive physical control be

tailored to all the circumstances, including the nature of the land, the manner it is commonly used or enjoyed, calls for a very rounded evaluative assessment and is not likely to be something that laypersons instinctively are likely to easily grapple with.

93 The Crown's reliance upon joint enterprise liability is itself far from straightforward. This is not a case of multiple accused persons being involved in an agreement to commit a bank robbery, where all the participants are present at the time of the robbery. In this case as Mr Crown articulated it, the agreement to commit a crime was identified as commencing in 2003, but evolved to the extent, at least, that AC was added at a later point and where the different acts of each of the participants said to evince their participation in the enterprise occurred at different points in time.

94 Beyond that, there are a range of potential permutations as to how any guilt in the accused might be established. This is apparent from the multiple and alternative array of representations that the Crown relies upon.

95 There is also some force in the contention that it would be uncertain if the jury, despite direction, could weigh the significance of delay in the prosecution as a factor bearing upon proof of the Crown case, although that is a relatively more minor concern.

96 Further, on the element of dishonesty, that is also complex. The statutory concept in s 4B of the *Crimes Act* has been described as involving a *subjective* state of mind of knowledge, on the part of the accused, about an *objective* norm that sits outside his or her own assessment, and is reposed in ordinary members of the community: *Bazouni v R* [2021] NSWCCA 256 per Button J (Bell P – as his Honour then was – agreeing) at [78]. That can be a difficult concept to apply and arguably perceptions of the difficulty

with the *Ghosh* test have contributed to its rejection, at least for Commonwealth offences under general law (*Peters v The Queen* (1998) 192 CLR 493) and as expressly indicated in some federal statutes (*Corporations Act 2001* (Cth), s 9).

97 These last matters fairly engage the point the accused makes that there are cases where the transparency afforded by reasons of a trial judge are most likely to secure the community's interest, not to mention the accused's interest, in them receiving a fair trial. This case is, from what little I know of it at this point, the type which, if tried by a judge, could generate legal or factual error which could be corrected, if necessary. To take one example, I note in this regard the successful appeal on factual findings from a claim for adverse possession in *Evans v Smith* [2025] NSWCA 102.

98 All of what I have reasoned so far satisfies me that the arguments for the accused's apprehension of a trial by jury are more than reasonably based. I do place some weight upon their informed decision to trade the benefit of unanimity for reasons.

99 I acknowledge, as I must, that objective community standards will be brought to bear especially on, but not limited to, the first limb of the test for dishonesty. I recognise and reiterate that juries are the authentic repository about factual questions on that subject matter. I further acknowledge not only the civic virtue of members of the community

engaging in determination of an accused's alleged criminal liability and also the benefit to the administration of justice generally in the law being applied in a way that accords with the expectations of citizens. These are all weighty matters.

100 However, it is also the case that trial judges who sit in common law matters (such as claims for damages for negligence or in defamation) are trained to regularly decide factual questions that turn upon the application of objective standards.

101 In my view, the considerations that the Crown refers to are outweighed by the importance of the accused receiving transparent reasoning in all the circumstances.

102 I expect that there would likely be greater efficiencies and therefore time saved if the case was conducted by judge alone than by jury; although on the evidence this appears marginal.

103 The matter was not really touched upon in written submissions, but in argument, reference was made to the circumstance that the trier of fact may be called upon to form credibility or reliability assessments of witnesses. Mr Crown indicated that the preponderant part of its case was documentary; though there was going to be viva voce evidence. He gave an example of one such case where testimonial evidence would likely be given (for example, evidence from the tenant as to the state of the property at a certain point).

104 In *Monteleone* at [42], I indicated a general preference for findings of credibility or reliability of witnesses to be determined by a jury, notwithstanding contrary views of eminent judges. Having regard, however, to the way in which the Crown will seek to prove its case and also the effluxion of time since the events related to or giving rise to the charges, I think it is fair to expect that it will the evidence that emerges from the

documents, viewed in context and in accordance with the probabilities (and shaped also by consideration of the onus of proof) that will have a decisive bearing. In this way, in the circumstances, what I have described as my general preference has lesser force.

105 Pursuant to s 132 of the *Criminal Procedure Act*, the accused are to be tried by judge alone.

Consideration of the applications to exclude evidence

106 The evidentiary applications commonly concern the relevance of PC's conduct prior to 2003.

107 I have noted the criticisms that the accused make of the Crown's case theory.

108 For the purposes of s 55 of the *Evidence Act*, however, the test of relevance is whether the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of *a fact in issue* in the proceeding.

Pre-2000s dealings

109 A fact in issue in the proceeding is whether there was a joint enterprise. Integral to that is whether there was an agreement, arrangement or understanding to commit the foundational crime. At least as at the middle of July 2003, one of the participants to that agreement was PC. My impression (putting the matter no more highly than that) is that the Crown will allege that PC was the mastermind of the alleged enterprise and the Court, I expect, will be invited to infer, firstly that an agreement or understanding had been reached by all of PC, MC and AC, from and following July 2003, to acquire the property and that the actions of the accused from 2003, and particularly from 2013 and 2014, reflected such understanding or arrangement to commit the crime (*Osland v The Queen* (1998) 197 CLR 316 per McHugh J at [73] approved in *Huynh v The Queen* [2013] HCA 6; (2013) 295 ALR 624 at [24]), and that the actions of MC from 2003, and

later AC, were consistent with the design of PC and MC from 2003 to acquire the property. The respective acts of PC, MC and AC that are attributed to one another are those which are done in execution of agreement.

110 Putting the matter very generally, the subject matter of the agreement was rights to potentially acquire ownership of real property about which, through his peculiar professional capacity as a solicitor in acting for the Estate, PC had certain knowledge. More specifically, acting in the capacity as a solicitor for the Estate, certain events had occurred, which were facilitated or contributed to by his conduct, or over which he had some control or influence, created an opportunity in him, and/or members of his family, to make the application to the Registrar General that was later made in November 2013. The Crown has to some extent explained how it will argue that the facts, including inferences from the facts, prove that in all the circumstances, as at and from the middle of July 2003, there was a design to acquire the property which properly could be characterised as dishonest. MC was, it is alleged, a party to that design, at least from 2003 and, as I understand the Crown's case, AC allegedly became party to it later. The alleged conduct of MC and AC in making false statements in or from 2013, and PC's involvement in facilitating the application were all referable to a design that emerged from 2003.

111 It is sufficient to meet the threshold in s 55 that evidence of those dealings could rationally affect assessment of the existence and terms of the agreement, arrangement or understanding that emerged from the middle of July 2003. Further, as articulated by the Crown, the allegedly deceptive statements of MC and AC in 2013 and 2014, and PC's own general conduct, cannot fairly be understood without reference to the background or context which led to the agreement, arrangement or understanding from the middle of July 2003.

112 I will return to the discretionary grounds for exclusion after considering the other impugned evidence.

Professional misconduct

113 The Crown has disclaimed any intention to rely upon opinions about PC's conduct in Mr Courtenay's report. Plainly it would be irrelevant to proof of the charge that PC's conduct has been or even could satisfy the legislative definitions of professional misconduct or unsatisfactory professional conduct.

114 What the Crown proposed in terms of Mr Courtenay's evidence, which was really to rely upon the source documents obtained through the investigation, with some relatively formal explanation as to who Mr Courtenay was and how he obtained the documents, is relevant for the same reasons as I have determined in relation to the documents concerning events in the pre-2000s.

Mr Neal's opinions

115 There was, it struck me, some tension between the accused's submission that principles associated with the doctrine of adverse possession in property law were so complex as to justify trial by judge alone and their submission that the Crown was not entitled to rely upon opinions as to the procedures of solicitors and applicable principles surrounding applications for adverse possession.

116 It should be apparent from what I have stated that I reject the accused's submission as to the lack of relevance as to Mr Neal's opinions in answer to Questions 1-3, to the extent it concerns opinions about events prior to 2003. There was no serious contention that what he said in answer to Question 4 was not relevant. I accept what Mr Crown says about the relevance of Mr Neal's opinions in answer to those questions.

117 There is another aspect, arising from a submission orally advanced by Mr Walsh.

118 The High Court's decision in *Patel* is not in point. There, the problem emerged in a criminal trial against a surgeon for manslaughter and unlawfully causing grievous bodily harm. The Crown case, in a trial before a jury, had significantly narrowed during the trial and evidence that the surgeon had been incompetent was no longer relevant to a

reformulated case that the criminal liability had arisen from the decision to undertake the surgery in the first place. But as partly indicated by paragraph 22 of his report, Mr Neal did not purport to express opinions about the competence of PC's conduct, and/or whether he had complied with his obligations (under his retainer or contract) to exercise reasonable care.

119 It is true that Mr Neal characterised PC as an intermeddler and opined that PC had made himself an executor de son tort, but to a trained judge, these are not necessarily pejorative terms (although they could be regarded in that way by a jury) and, at any rate, they were descriptions given steps along the way to identifying what his obligations as a solicitor were, when his firm received rent on a property, as it uncontroversially did. Contrary to the accused's submission, it was not simply a case of one solicitor being critical of another. In my view, it is (provisionally) arguable that the standards of ordinary people include an expectation that solicitors will comply with their obligations. To the extent that Mr Neal elucidates those obligations, that evidence is admissible to proof of dishonesty by PC.

120 As to the challenge under s 79 of the *Evidence Act*, I agree with the Crown that the circumstance that Mr Neal himself may have had only a singular experience of acting for a client in this area does not mean that he does not have specialised knowledge (derived from his training, study or experience) to opine. I have noted his credentials.

121 Further, although this point was not strongly advanced in oral argument, having read Mr Neal's reasoning, I am also satisfied that his opinions are substantially based upon his specialised knowledge. I respectfully adopt what was said by Allsop P (Meagher JA agreeing) in *Allianz Australia Ltd v Sim* [2012] NSWCA 68 at [9]:

> "The recognition of the requirement to explain how the opinion is drawn from the available facts and how it is based on the specialised knowledge of the witness should be understood as the enunciation of a procedural rule for the admission of evidence as available to be considered by the tribunal of fact. As such it should (unless the statutory words demand to the contrary) be understood and applied as a facultative rule to promote the just and efficient resolution of disputes. This is achieved by not permitting, through loose application of the requirements of the statute, voluminous or unsourced opinions unfairly to vex tribunals and other parties in litigation. It is also achieved by

> recognising that the two requirements of the section and the explanation that is ordinarily required as to how the opinion applies to the facts should not be elevated into something more than they are: procedural rules to limit evidence to that which is rational and coherent and properly arising from expertise and directed to areas in respect of which the court needs assistance…”

122 Further, I reject the accused’s submission that it is impermissible for an expert solicitor to give expert opinion evidence about domestic principles of law. The submission is contrary to s 80 of the *Evidence Act*. I agree also with the Crown that, whatever other limits arise from the circumstance that the case dealt with a Commonwealth offence, the authority of *Petroulias* demonstrates that lawyers can give expert opinion evidence as to the types of matters the subject of Mr Neal’s opinion.

Prejudice

123 It appeared from the accused’s written submissions that their submissions about the danger of unfair prejudice, if the various items of disputed evidence were admitted, was premised upon the contingency that the trial would be by jury (see for example, MFI 1, paragraphs 36, 60, 69).

124 For reasons adverted to, that premise has been falsified.

125 All the parties were invited during argument to make submissions about the danger of unfair prejudice upon the contingency of the trial being by judge alone. I think it is fair to say that the accused’s lawyers did not specifically make submissions as to how s 137 was engaged in respect to any impugned items of evidence in the event, which has now materialised, that the trial would be by judge alone. They did not express any apprehension that I might misuse the evidence in the requisite sense understood in s 137 and plainly their advocates will have the opportunity to submit what warnings or directions I should give myself. This is no guarantor that the evidence will not be

misused in a way that is indicative of legal and/or factual error, but the accused' rights will be protected by the circumstance that my reasoning will be transparent and therefore available for review and, if appropriate, correction.

126 During argument, Mr Crown was at pains to explain that there were certain things that the Crown did not set out to assert or prove. It does not intend to assert or prove that PC engaged in professional misconduct. It does not rely upon the investigator's opinion that PC has a case to answer from a disciplinary complaint. Although it relies upon an opinion that PC made himself an executor de son tort, the Crown does not intend to assert or prove that PC was negligent. It does not assert or intend to prove that PC is of bad character or has a tendency to act in some improper way.

127 As I stated earlier in these reasons, should any individual accused wish to argue that a limitation under s 136 should apply in their case as to the evidence, they are not constrained from anything said in these reasons from applying for such limitation.

128 The generic complaints of unfair prejudice raised do not afford a basis for excluding the impugned items of evidence.

129 In the various ways that the Crown has stated its purposes in adducing the impugned evidence and having regard to the indications of what it does not intend to rely upon, the evidence of Mr Courtenay (incorporating documentary evidence of the so-called 'pre-2000s dealings' of PC) and Mr Neal is admissible.

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Endnote

1. Brendan Edgeworth, Butt's Land Law (7th ed (electronic version), 2017, Thomson Reuters) at 16.10.

Amendments

29 May 2026 - Minor amendment to coversheet

Decision last updated: 29 May 2026