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**LPDT v MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR
(M70/2023)**

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 64

Date of judgment: 3 May 2023

Special leave granted: 14 September 2023

LPDT (“the Appellant”) is a Vietnamese national who was granted a spouse visa in 2008. In 2011, he was sentenced to imprisonment for 7 years and 6 months by the County Court of Victoria for offences that included conspiracy to import, and attempted possession of, border-controlled drugs (“the 2011 Proceedings”). In subsequent years the Appellant was twice sentenced to a term of imprisonment for further offences, which included drug trafficking, dealing with suspected proceeds of crime, and making a false statutory declaration.

In May 2019, the Appellant’s visa was mandatorily cancelled by a delegate of the first respondent (“the Minister”) under section 501(3A) of the *Migration Act 1958* (Cth) (“the Act”), and in April 2021 a delegate decided not to revoke that cancellation.

Upon a review of the non-revocation decision, the Administrative Appeals Tribunal (“the Tribunal”) was required to adhere to a detailed direction (“Direction 90”), which had been given by the Minister under s 499 of the Act, concerning the assessment of potential revocation of visa cancellations made under s 501 of the Act. Section 8 of Direction 90 prescribed four “primary considerations”, the two which were relevant in the Appellant’s case being the protection of the Australian community from criminal or other serious conduct (“Primary Consideration 1”), and expectations of the Australian community (“Primary Consideration 4”). In relation to Primary Consideration 1, Direction 90 required decisionmakers to consider “the nature and seriousness of the non-citizen’s conduct to date”, having regard to various factors including:

- In s 8.1.1(1)(a), the types of conduct viewed “very seriously” by the Australian government and community included violent and/or sexual crimes, violent crimes against women or children, and family violence;
- In s 8.1.1(1)(b), types of conduct considered “serious” included crimes against vulnerable persons or government officials, causing a forced marriage, and conduct that would support a finding that the person was not of good character; and
- In s 8.1.1(1)(g), whether the person had re-offended since being made aware, in writing, of the consequences of further offending on the person’s migration status.

On 7 July 2021, the Tribunal affirmed the decision not to revoke the cancellation of the Appellant’s visa, finding that the Appellant did not pass the character test under the Act and that, having reference to the Direction and the totality of the evidence, there was not another reason to revoke the cancellation. The Tribunal found that the nature of the Appellant’s conduct was “very serious”. It found that the two

relevant primary considerations in s 8 of Direction 90 each weighed strongly in favour of non-revocation. Underlying findings of the Tribunal as to Primary Consideration 1 included that both s 8.1.1(1)(a) and s 8.1.1(1)(b) militated in favour of a finding that the Appellant's criminal offending was of a very serious nature. In respect of s 8.1.1(1)(g), the Tribunal concluded that the Appellant would have been formally warned or otherwise been made aware in writing about the consequences of further offending in terms of his migration status. This was in view of: 1) mention in the County Court's 2011 sentencing remarks of investigations as to whether the Appellant would be deported; 2) a reference in a 2012 judgment on an appeal application that the Appellant would experience stress while waiting to learn whether he would be deported after the completion of his sentence; and 3) notes taken by prison officers in 2012-2013 concerning deportation issues.

An application to the Federal Court for judicial review of the Tribunal's decision was dismissed by Snaden J. His Honour held that, although the Tribunal had erred by considering s 8.1.1(1)(a) of Direction 90 to be apt in informing its assessment of the seriousness of the Appellant's offending, it might well have done so only in a form of reasoning by analogy. Snaden J similarly held that analogical reasoning could explain the Tribunal's finding that the Appellant's offending was "very serious" in view of s 8.1.1(1)(b), rather than the Tribunal having misconstrued that provision's prescription of the level of seriousness ascribed to crimes against vulnerable persons or to a non-citizen's being not of good character. In respect of s 8.1.1(1)(g), his Honour held that the evidence, although somewhat weak, was sufficient for the Tribunal to infer that the Appellant had been made aware, in writing, of the consequences on his migration status of any further offending.

An appeal by the Appellant was unanimously dismissed by the Full Court of the Federal Court (Markovic, Thomas and Button JJ). Their Honours held that Snaden J had gone too far by inferring that the Tribunal might have reasoned by analogy in respect of s 8.1.1(1)(a), as the Tribunal's reasons exposed no chain of reasoning between the evidence to which it referred and the conclusion that it made. The Full Court then proceeded to find however that if the Tribunal had not so erred and had instead concluded that s 8.1.1(1)(a) was irrelevant, the Appellant would still not have achieved the setting aside of the non-revocation decision. This was because even if the Tribunal's conclusion on Primary Consideration 1 had been less severe and the Appellant's conduct had been found "serious" rather than "very serious", a different outcome of the weighing exercise undertaken was not possible, due to the undisturbed conclusion as to Primary Consideration 4 (and other considerations which the Tribunal had assessed under Direction 90). Their Honours similarly held that the Tribunal's lack of reasoning upon the application of s 8.1.1(1)(b) could not be saved by an inference of analogical reasoning, as erroneously held by Snaden J, but that those errors too were immaterial to the ultimate conclusion as to the non-revocation decision. The Full Court then held that s 8.1.1(1)(g) was inapplicable, as there was no evidence that any of the documents relied upon by the Tribunal as constituting a giving in writing were provided to the Appellant. Again, however, their Honours held that there could be no different result, on the basis of lack of materiality to the ultimate conclusion.

The grounds of appeal are:

- The Full Court erred in concluding that each of multiple failures by the Tribunal to comply as required by s 499(2A) of the Act with written directions given under s 499(1) were not material to the Tribunal's decision.

- The Full Court erred in failing to conclude that, cumulatively, the Tribunal's multiple non-compliances with Direction 90 were material.

PRODUCTIVITY PARTNERS PTY LTD (TRADING AS CAPTAIN COOK COLLEGE) ACN 085 570 547 & ANOR v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ANOR (S118/2023);
WILLS v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ORS (S116/2023)

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 54

Date of judgment: 6 April 2023

Special leave granted: 14 September 2023

Productivity Partners Pty Ltd trading as Captain Cook College (“PP”) offered vocational education and training (“VET”) courses, including via online learning, that were approved for the Commonwealth’s VET FEE-HELP (“VFH”) scheme. PP was a subsidiary of Site Group International Ltd (“Site”). Mr Blake Wills was the Chief Operating Officer (“COO”) of Site, and from 20 November 2015 to 20 January 2016 he acted as Chief Executive Officer (“CEO”) of PP. Mr Wills chaired monthly management meetings that were also attended by PP’s senior management and Site’s Chief Financial Officer.

Under the VFH scheme, each student incurred a debt to the Commonwealth in return for the latter’s payment to PP of the student’s course fee, which was incurred if the student remained enrolled in the course once a “census” date had passed. Risks associated with the scheme included: 1) potential misconduct by “course advisors” (“CAs”), who marketed VET providers to potential students in return for a commission for enrolments; and 2) the enrolment of unsuitable students, being those with insufficient language or technology skills and/or those who might enrol without understanding the debt obligation they would incur. Commission was paid to CAs for students who had passed their census dates.

In response to declining competitiveness, due in part to CAs preferring PP’s competitors, PP made two changes to its student enrolment practices (“the Changes”) on 7 September 2015. Prior to that date, PP would call students and speak with them within 48 hours of receiving their enrolment application, discussing their abilities and the VFH liability. PP would also withdraw students from their course prior to the census date if they had not logged into the online learning system and if attempts by PP to contact them had been unsuccessful (“campus driven withdrawals”). One of the Changes was the replacement of PP’s outbound calls to students with inbound calls to PP. Many of the inbound calls were made by CAs, albeit in the presence of enrolling students. Each student would use their CA’s laptop or tablet computer to fill in documents for their enrolment. The other change was the abolition of campus driven withdrawals.

As a result of the Changes, enrolments dramatically increased, as did PP’s revenue and profits. A majority of VFH students however were found to be uncontactable by the College, and only around 20% of students logged into the online learning system. On 18 December 2015 PP stopped accepting new enrolments in its online courses, in response to a VFH funding cap imposed by the Commonwealth for 2016. PP continued to claim VFH funds for prior enrolments, however.

The Australian Competition and Consumer Commission (“ACCC”) commenced proceedings against PP, Site and Mr Wills, claiming that they had engaged in unconscionable conduct, in contravention of section 21 of the *Australian Consumer Law* (“ACL”) (Sch 2 to the *Competition and Consumer Act 2010* (Cth) (“the Act”)).

On 4 August 2021, Stewart J declared that PP had contravened s 21 of the ACL, by making the Changes and by claiming and retaining the consequently increased VFH revenue from the Commonwealth. This was in circumstances where a substantial purpose of the Changes was to increase revenue, and where PP knew of the risks of CA misconduct and of unsuitable enrolments. His Honour also made declarations against both Mr Wills and Site. Stewart J found that Mr Wills was “involved” and “knowingly concerned” (within the meaning of those terms in the ACL) in PP’s unconscionable conduct, as he was aware of the plan to make the Changes and he oversaw its implementation and effects. His Honour attributed Mr Wills’ knowledge and conduct to Site, under s 139B of the Act.

An appeal by PP and Site, and a separate appeal by Mr Wills, were largely dismissed by the Full Court of the Federal Court (Wigney and O’Byrne JJ; Downes J dissenting). The Full Court however set aside the declarations in the form in which they had been made, and remitted the question of declaratory relief to Stewart J.

Wigney and O’Byrne JJ held that Stewart J had correctly concluded that PP’s decision to make the Changes was unconscionable, as it removed two principal safeguards against known risks in circumstances where PP knew or ought to have known the effects, being a large increase in the enrolment of unsuitable students who would incur VFH debts. This was despite PP not having breached any regulatory obligation relating to the VFH scheme, and Stewart J having made no finding of the extent to which the risk of CA misconduct materialised. The majority found that Stewart J had had regard to relevant matters prescribed in s 22(1) of the ACL insofar as the matters had been raised by the parties at trial. Wigney and O’Byrne JJ found that although Mr Wills had been informed of and had supported relevant decisions, he was not aware of all relevant matters as at the date of the Changes. Mr Wills should have been found knowingly concerned in PP’s contravening conduct only as of the date on which he became PP’s acting CEO.

Downes J would have allowed both appeals, on the basis that Stewart J had erred by not addressing all relevant matters prescribed in s 22(1) of the ACL. All such matters must be considered to the extent that they are applicable. Downes J considered that many of the matters were applicable, but that the ACCC had failed to adduce evidence concerning them. Her Honour held that Stewart J had then erred by failing to consider that the absence of such evidence told against a finding of unconscionable conduct within the meaning of s 21. Relevant matters in s 22(1) included the relative strengths of bargaining positions, whether the customer could understand documents, whether there was any undue influence, the circumstances of potential acquisition from a different supplier, the extent of any unreasonable failure to disclose, and the extent to which the supplier and the customer acted in good faith.

In the appeal by the College and Site Group, the grounds of appeal include:

- The Full Court ought to have held that Stewart J erred in holding that the College engaged in unconscionable conduct within the meaning of s 21 of the ACL when the claim was framed, and considered by the trial judge, without reference to the factors prescribed by s 22 of the ACL.

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- The Full Court erred in holding that the College's conduct, in removing two system controls and operating an enrolment system without those controls, in the absence of an intention that the risks ameliorated by those controls eventuate, constituted unconscionable conduct in contravention of s 21 of the ACL.

Mr Wills' grounds of appeal include:

- The majority of the Full Court erred in finding that Mr Wills had the requisite knowledge to be liable as an accessory to a contravention of the prohibition on unconscionable conduct notwithstanding that Mr Wills did not know that conduct involved taking advantage of consumers or was otherwise against conscience.
- The majority of the Full Court erred in finding that Mr Wills satisfied the participation element for accessorial liability by:
 - a) Mr Wills' conduct before he had knowledge of the essential matters which make up the contravention; together with
 - b) Mr Wills' continued holding of positions of authority, but no identified positive acts, after Mr Wills had the requisite knowledge.

In each appeal, a notice of contention filed by the ACCC raises (in essence) the following grounds:

- The majority of the Full Court:
 - a) Erred in finding that, between 7 September 2015 and 20 November 2015 ("the Initial Period"), Mr Wills did not have sufficient knowledge of the essential matters that rendered the College's conduct unconscionable, and holding that, consequently, Mr Wills was not "involved" (within the meaning of s 2 of the ACL) in the College's contraventions of s 21 of the ACL during the Initial Period; and
 - b) Should have found that Mr Wills had sufficient knowledge of the essential matters that rendered the College's conduct unconscionable throughout the Initial Period, in addition to the period from 20 November 2015 to September 2016, and consequently should have held that Mr Wills was "involved" (within the meaning of s 2 of the ACL) in the College's contraventions of s 21 of the ACL throughout the Initial Period, in addition to the period from 20 November 2015 to September 2016.

**CESSNOCK CITY COUNCIL ABN 60 919 148 928 v 123 259 932
PTY LTD ACN 123 259 932 (S115/2023)**

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2023] NSWCA 21

Date of judgment: 20 February 2023

Special leave granted: 15 September 2023

This case concerns the principles of awarding reliance damages and the circumstances in which the presumption of recoupment applies where there is a breach of a commercial contract. The usual principle is that damages for breach of contract are awarded to place the injured party in the position in which it would have been had the contract been performed. However, a party who is unable to demonstrate whether, or to what extent, the performance of a contract would have resulted in a profit may seek “wasted expenditure” instead of “loss of profits” under the contract. Specifically, this case concerns:

1. Whether the presumption of recoupment referred to in the decision of *Commonwealth v Amann Aviation* (1991) 174 CLR 64 arose;
2. Whether that presumption was successfully rebutted; and
3. Was the recovery precluded by the rule in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145.

The parties’ dispute arises in the context of a proposal to develop Cessnock Airport as a cross purpose area for aviation and non-aviation use to promote the area as a gateway to the Hunter Valley. The Appellant (“the Council”) owns the land on which Cessnock Airport is located. By an Agreement for Lease (“the AFL”), the Council promised to grant a 30-year lease of part of the Cessnock Airport to the Respondent, on which it intended to operate various business ventures. As part of the AFL, the Council agreed to take all reasonable steps to register a plan of subdivision to subdivide the Cessnock Airport into 25 lots by 30 September 2011 (“the Sunset Date”). The commencement date of the lease was tied to the date of the registration of the plan of subdivision. In the meantime, the Council granted a licence to the Respondent for the subject land. In reliance on the AFL, the Respondent constructed an aircraft hangar at a cost in excess of \$3 million and commenced operating three business – an adventure flight business, an aviation museum and a corporate venue hire business, all of which were unsuccessful. The Sunset Date passed without the Council registering the plan of subdivision and the development of Cessnock Airport did not go ahead as planned.

After the Sunset Date, the Respondent stopped paying licence fees and vacated the hangar. In September 2015, the Respondent was deregistered by the Australian Securities and Investments Commission (“ASIC”) with its property vesting in ASIC. The Council subsequently terminated the AFL and paid \$1 to ASIC for the acquisition of the hangar in reliance on a provision of the proposed lease to the Respondent. The Council later granted a 5-year lease to a new tenant. In June 2017, the Respondent was reinstated and commenced proceedings against the Council seeking reliance damages on account of wasted expenditure alleged to

have been suffered as a consequence of the Council's breach of contract and unconscionable conduct.

The primary judge (Adamson J) held that the Council breached the AFL by failing to take all reasonable steps to obtain registration of the plan of subdivision by the Sunset Date in accordance with its contractual obligations. However, the primary judge was not satisfied that any presumption of recoupment arose, and if it did, the Council had discharged the onus of rebutting it by showing that the cost of the hangar would not have been recouped over the term of the 30-year lease. The primary judge also determined that the Respondent's claim did not fall within either of the two limbs in *Hadley v Baxendale*, and consequently the Respondent was only entitled to nominal damages of \$1.

On appeal, the Court of Appeal (Macfarlan, Brereton and Mitchelmore JJA) determined that the Respondent had proved that it had incurred expenditure in reliance on the Council's performance of its obligations to take all reasonable steps to procure registration of the plan of subdivision, and therefore the presumption of recoupment arose. The Court also considered that the Council did not show that the Respondent would not, over a 30-year lease, have recouped its expenditure and therefore found that the presumption had not been rebutted. In addition, the Court determined that the loss incurred by the Respondent in constructing the hangar was reasonably incurred and within the contemplation of both parties at the time the AFL was entered into, thereby falling within the second limb of *Hadley v Baxendale*. Accordingly, the Court of Appeal allowed the Respondent's appeal.

On appeal to this Court, the Council submits that the principles in *Amann Aviation* are not inconsistent with the Council's position, but that factually this case can be distinguished. The Council's position is that the compensatory rule is fundamental to the assessment of contract damages and should guide the approach taken in this appeal in circumstances where the Court in *Amann Aviation* published six separate sets of reasons. The Council submits that by applying the proper approach in this case, the recoupment presumption was not engaged and the Respondent's claim for reliance damages should fail for four reasons – i) the Council's breach of contract did not itself make it impossible to assess damages by comparing the value of what was promised and what was delivered; ii) the AFL was a risky contract for the Respondent under which the Respondent and not the Council was to bear the risk of the future development of Cessnock Airport occurring; iii) at the point of the Council's breach, the risks inherent in the AFL were not working in the Respondent's favour and the evidence clearly indicates that the Council's breach saved the Respondent from incurring further losses and liability to pay rent; and iv) the only obligation for the Respondent under the AFL was to occupy the site and pay licence fees, not incur the very considerable expense of constructing a hangar in the manner it did.

The Respondent submits that the Court of Appeal was correct in its analysis of the various judgments in *Amann Aviation*. The AFL was not a "risky" or purely aleatory contract, and the commercial development of Cessnock Airport was the ultimate purpose of the proposed subdivision. Had the Council not deliberately breached the AFL, it would have led to secure tenure over the land on which the Respondent erected the hangar with 30 years to recoup expenditure in an environment where there was a real prospect of development. The lack of viability of the Respondent's business ventures does not result in the recoupment presumption failing to engage. For the presumption to arise, all the Respondent had to show was that it incurred

expenditure in reliance on the Council's promise to take reasonable steps to register the plan of subdivision and that such expenditure was wasted, and that the Council failed to rebut the presumption. The Respondent further submits that by the Council's deliberate breach, the wasted expenditure has in fact become a free commensurate benefit to the Council.

The grounds of appeal are:

- The Court of Appeal erred by concluding that a presumption arose that the respondent would at least have recouped its wasted expenditure if the contract between the appellant and the respondent had been performed.
- The Court of Appeal erred by concluding that the presumption was not rebutted in the circumstances of this case.

**MILLER v MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS & ANOR (S120/2023)**

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 183

Date of judgment: 15 November 2022

Special leave granted: 15 September 2023

This appeal concerns the construction of section 29(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“the Act”). The appellant sought review in the Administrative Appeals Tribunal (“the Tribunal”) of a decision of the first respondent (“the Minister”) under s 501CA(4) of the *Migration Act 1958* (Cth) not to revoke a cancellation of the appellant’s visa. The visa had been revoked because the Minister was of the view that the appellant was not of good character, following his conviction and imprisonment for domestic violence related offences. The application for review had to be made within nine days of the day on which the appellant was notified of the Minister’s decision, and there was no power on the part of the Tribunal to entertain an application to extend the time in which to make an application for review: s 500(6B) of the *Migration Act*.

Section 29 of the Act sets out the requirements governing the manner of making an application to the Tribunal. Section 29(1)(c) provided that the application must contain a statement of reasons for the application. Before the Tribunal, it was not disputed at the time the appellant’s application was lodged, the application did not contain a statement of the reasons for the application. The application was one which had to be brought in the Tribunal’s General Division, not the Tribunal’s Migration and Refugee Division. The appellant’s agent had used a form for use in the Migration and Refugee Division (not a form for use in the General Division), and this form did not contain a space in which to state the reasons for the application. A statement of reasons for the application was later provided, but only after the nine-day time prescribed for the lodging of the application. The Tribunal held that the application was valid, notwithstanding the absence of a statement of reasons for the application having been made within the time prescribed. On the basis that the application to it was valid, the Tribunal proceeded to affirm the decision under review.

The appellant applied for judicial review of the Tribunal’s decision in the Federal Court. The Minister accepted that, if the Tribunal had jurisdiction to engage in the review, then the Tribunal’s decision was affected by jurisdictional error and would have to be remitted. However, the Minister contended that the Tribunal did not have jurisdiction because the application made to it was invalid for non-compliance with s 29(1)(c) of the Act. As had been the position before the Tribunal, there was no issue that the application did not contain a statement of reasons for the application to the Tribunal as required by s 29(1)(c). The primary judge held that the application was invalid by reason of non-compliance with s 29(1)(c). The primary judge held that the use of the imperatives “must” and “shall” naturally indicate that the requirements to which they relate are necessarily constituent elements of an application.

His Honour noted that an application which did not contain a statement of reasons could be “perfected”, provided that was done within the relevant prescribed time for lodging the application. However, this was not the case here.

On appeal, the Full Federal Court agreed with the primary judge's reasoning that the use of the word "must" in s29(1)(c) pointed strongly to the conclusion that an application would be invalid if that section were not complied with.

The ground of appeal is:

- The Full Court erred in concluding that the second respondent (the Tribunal) did not have jurisdiction to determine the appellant's application to the Tribunal filed on 24 March 2021.

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v KOLA (A21/2023)

Court appealed from: Supreme Court of South Australia Court of Appeal
[2023] SASCA 50

Date of judgment: 19 May 2023

Special leave granted: 17 November 2023

The Respondent, Mr Kola, was charged in the District Court of South Australia with conspiracy to import a commercial quantity of a border-controlled drug, namely cocaine, in contravention of sections 11.5(1) and 307.1(1) of the *Criminal Code Act 1995* (Cth) (“the Code”). Following a trial by jury, the Respondent was found guilty of the charged offence and sentenced to 13 years imprisonment, with a non-parole period of 7 years. The Respondent’s co-accused, Ibrahim Yavuz and Juan Londono-Gomez, were convicted of the offence on their pleas of guilty.

The prosecution case was that Mr Kola and Mr Yavuz recruited an acquaintance of Mr Yavuz, James (a pseudonym), to travel to Panama to accompany a shipment of cocaine back to Australia on a boat. Mr Londono-Gomez’s involvement was to make arrangements to source the cocaine and to secure a crewed boat to sail to Australia. There was no direct evidence of the quantity of cocaine they had allegedly agreed to import, however, the prosecution case was that the amount of cocaine to be imported pursuant to the alleged agreement was 2kg or more (a commercial quantity).

The Respondent appealed his conviction to the Court of Appeal of the Supreme Court of South Australia, relying on five grounds of appeal. Relevantly, the Respondent’s first ground of appeal was that the trial Judge erred in failing to direct the jury that it was an element of the offence of conspiracy that Mr Kola had agreed with others to import a shipment of cocaine which, if the agreement were executed, would have been a commercial quantity (Ground 1).

Chief Justice Kourakis concluded that the trial Judge failed to properly direct the jury in relation to the elements of the offence. In coming to this conclusion, his Honour examined the reasons of the High Court in *R v LK* (2010) 241 CLR 177, and compared the directions accepted by the Court of Appeal of New South Wales in *Standen v The Queen* (2015) 198 FLR 35 and the directions approved by the Court of Appeal of Victoria in *Le v The Queen* (2016) 308 FLR 486, regarding the elements of different drug importation conspiracy offences against the holding in *R v LK*. His Honour concluded the direction in *Le* more closely conformed with the relevant holding in *R v LK* – that it is s 11.5(1) of the Code which enacts the statutory offence of conspiracy by reference to the common law offence, and that s 11.5(2) of the Code, by way of epexegetis, provides both that the person must have entered into an agreement with other conspirators (with the attendant fault element of an intention to do so) and that, together with at least one other person, must have intended that an offence would be committed pursuant to the agreement – exposing the difficulty in the directions approved in *Standen* and given by the trial Judge in Mr Kola’s case.

Kourakis CJ held (Nicholson and Stein AJJA agreeing) that an element of the offence of conspiracy to import a commercial quantity of cocaine is that the conspirators agreed to engage in conduct which, if executed, would have resulted

in the importation of a commercial quantity of cocaine, whether the conspirators knew, or intended, the execution of their agreement would result in product of that weight being imported. However, the directions given by the trial Judge to the jury allowed for the conviction of Mr Kola if the jury was satisfied that the acts in which James and others had engaged in Central America would have resulted in the importation of a commercial quantity of cocaine, even if that were not the agreement entered into by the conspirators. Accordingly, the Court of Appeal allowed the appeal on Ground 1, set aside Mr Kola's conviction, and remitted the matter for re-trial. The remaining grounds of appeal were dismissed.

The grounds of appeal are:

- The Court of Appeal erred in concluding that:
 - (a) The trial judge failed to direct that an element of the offence of conspiracy to import a commercial quantity of a border controlled drug was that the accused had agreed with others to engage in conduct which, if executed, would have resulted in the importation of a commercial quantity of cocaine;
 - (b) The trial judge's directions permitted the respondent to be convicted if the jury was satisfied that acts engaged in by the conspirators would have resulted in the importation of a commercial quantity of cocaine, even if that were not the agreement entered into by them.
- The Court of Appeal erred in holding that the jury should have been directed that whether the conspiratorial agreement concerned a commercial quantity of cocaine was to be determined having regard only to the circumstances known, or believed, by the conspirators to exist such that evidence of what in fact occurred was irrelevant to the existence of the alleged agreement.