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TRANSCRIPT OF PROCEEDINGS

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COUNTY COURT

CRIMINAL JURISDICTION

MELBOURNE

FRIDAY 1 AUGUST 2007

BEFORE HIS HONOUR JUDGE HOWARD

THE QUEEN v. ROGER THOMAS MAY  
JASON ROGER MAY

**R U L I N G - SENTENCE INDICATION**

MR. L. BOLKAS appeared on behalf of the Crown.

MR R. BURNS appeared on behalf of the Accused Jason May.

MR S. GINSBOURG appeared on behalf of the Accused Roger May.

**R U L I N G - SENTENCE INDICATION**

HIS HONOUR: In this matter the accused are charged with dishonest use of their position as an officer of a company pursuant to s.184(2)(a) of the Corporations Act 2001. The matter was listed last Monday for trial. There was an initial delay by reason of the change of counsel on behalf of the first accused, Roger May, and I gave additional time to counsel to further digest voluminous materials in the case. At the same time it was indicated by counsel for the second accused, who is the son of the first accused, that there was a prospect of settling the matter by way of a plea of guilty, subject to further discussions with the Crown.

Yesterday, on the resumption of the matter, both counsel for the accused sought an indication from me as to the appropriate sentencing range in circumstances where each of the accused were to plead guilty to the offence that they face. In short, it was submitted that were the accused to plead guilty it would be an appropriate case in which to impose a term of imprisonment, but that that term of imprisonment should be wholly suspended by way of release on a recognisance under the Commonwealth Crimes Act.

The Crown submits that there are special circumstances in this case which would justify such an approach on sentence, and joins with the accused in seeking such an indication. All parties submit that it is open and appropriate to the court in the circumstances of this case to give such an indication. I will deal with that submission shortly, but first will refer briefly to the factual circumstances.

A statement of agreed facts has been provided to me, drafted as between the parties. It would be specifically agreed by the accused on a plea. Each of the accused were directors of Australon Enterprises Pty Ltd (AEPL). Their company, Advanced Communications Technologies Australia Pty Ltd (ACTA) held 57.5 per cent of the shares in AEPL. The balance of the shares were held by entities New Page Pty Ltd (25%), and  
May

1 Springwell Australia Pty Ltd (17.5%). AEPL held over  
2 213 million shares in Intermoco Ltd, a publicly listed company.  
3 ACTA's shareholding represented about 100 million Intermoco  
4 shares.

5 A shareholders agreement had been entered into by the  
6 shareholders of AEPL on 3 December 2001. There was significant  
7 litigation conducted in the Supreme Court by the shareholders  
8 from that time onwards, the details of which I do not have to  
9 hand. Ultimately, that litigation was settled by the  
10 shareholders entering into a settlement deed on 22 May 2003  
11 (the deed). The deed provided for the cancellation of all the  
12 shares in AEPL held by ACTA and the distribution of those  
13 shares to ACTA. This mechanism was referred to as the Selective  
14 Capital Reduction Resolution and a complex mechanism was  
15 provided for in the deed for the return of the shares, as I  
16 have said, amounting to something like 100 million Intermoco  
17 shares.

18 Under clause 2.1 of the deed the parties agreed that the  
19 Selective Capital Reduction Resolution and would be considered  
20 at a meeting and specifically:

"the AEPL Shareholders will procure the passing  
of the Selective Capital Reduction Resolution at  
that meeting."

21 It is not disputed that from the date of the deed, namely 22  
22 May 2003, for some three or four months significant efforts  
23 were made by the accused to compel the other directors, acting  
24 on behalf of the other shareholders, to implement the Selective  
25 Capital Reduction Resolution. However, there was, I infer, bad  
26 feelings between the shareholders at AEPL and the accused had  
27 been unsuccessful in achieving that result.

28 The directors of AEPL were to hold a meeting on Monday  
29 10 November 2003. On Friday 7 November 2003 the Crown alleges  
30 that the accused produced a signed share transfer form and  
31 facilitated the transfer of 60 million Intermoco shares to  
32 Global Investment Fund Pty Ltd (GIF), of which the first  
33 accused, Roger May, was the sole director. This transfer was  
34 effected by the production of a false document, namely what

1 purported to be a resolution of the shareholders of AEPL in  
2 favour of such a transfer. A figure of \$3.2 million was  
3 nominated as the consideration for the transfer of the shares.  
4 A false seal was used in respect of the alleged resolution.

5 The transfer took place at about 10 a.m. on the morning  
6 of 10 November. The meeting thereupon proceeded without the  
7 other directors being informed that the accused had facilitated  
8 the transfer of the share parcel. Indeed, there was discussion  
9 at the meeting as to the ACTA share entitlement being used as  
10 security so as to obtain a loan provided to ACTA in accordance  
11 with clause 2.5 of the deed. There was in principle agreement  
12 by the other directors for this proposal. Of course by this  
13 time the share parcel of the substantial number of shares had  
14 already been transferred to another company by the accused.

15 The Crown accepts that the second accused, Jason May,  
16 played a lesser role in the transaction involving the transfer  
17 of the shares. Nevertheless, it is submitted that both accused  
18 acted dishonestly in transferring the shares and hence  
19 committed the offence charged.

20 It is significant in this case that all parties concede  
21 that the transfer of the shares was a transfer of an asset to  
22 which ACTA was entitled and had been entitled at least since  
23 May of 2003 when the deed was agreed. Hence, in summary, the  
24 accused have used illegal means to obtain an asset to which  
25 they or their related entities were entitled. For that reason  
26 the Crown says that the offence is one of lesser gravity than  
27 might otherwise have been the case where directors such as the  
28 accused were acting dishonestly in relation to company matters.

29 Neither party seeks that I should give an indication of a  
30 specific sentence that I might impose in these circumstances.  
31 Indeed, it would be difficult, if not impossible, for me to do  
32 so because I am yet to hear any pleas to be made on behalf of  
33 either accused, or to hear any evidence which might be produced  
34 by them in relation to their personal circumstances generally.

35 In *R v. Marshall* [1981] V.R. 725 the Full Court of the  
36 Supreme Court comprising Young CJ and McInerney and McGarvie JJ  
37 dealt with circumstances where a trial judge in my position had

1 been requested by counsel for the accused to provide guidance,  
2 in fact a sentence indication, in circumstances where the  
3 applicant had already been sentenced to lengthy terms of  
4 imprisonment in respect of a large number of convictions for  
5 rape.

6           There was one final matter to be resolved and, according  
7 to the report, counsel was anxious to see whether or not there  
8 might be some "light at the end of the tunnel" for his client.  
9 The judge indicated that if the Crown's advisers were prepared  
10 to accept a plea of guilty to rape with mitigating  
11 circumstances, he would not do anything to deter them from that  
12 course. There was then an exchange between the judge and  
13 counsel as to what the additional sentence might be. The  
14 learned trial judge indicated that there would be an extra 18  
15 months to two years actual time to be served.

16           A short adjournment followed and the accused then  
17 immediately pleaded guilty to rape with mitigating  
18 circumstances. In the result, the applicant was sentenced to  
19 an effective increase in the sentence that he was already  
20 serving of one year and nine months which the Full Court  
21 observed might be said to be sufficiently close to the  
22 18 months mentioned by His Honour before arraignment, see:  
23 pp.725-727. All of this process took place in open court.

24           Ultimately the applicant appealed against the sentence  
25 imposed. The court dealt at length with the process and the  
26 propriety of a judge in my position giving a sentence  
27 indication of the kind that had occurred. The court referred  
28 to the case of *Bruce* in which special leave to appeal to the  
29 High Court had been sought in May 1976. In that case there had  
30 been a sentence indication given by a judge in chambers and not  
31 in open court. The High Court dismissed the application in  
32 *Bruce*, but emphasised the necessity to avoid the offering of  
33 inducements [by the Court] to an accused to plead guilty.

34           The Full Court in *Marshall* strongly deprecated the  
35 practice of any sentencing indication being provided by a judge  
36 in chambers, that is in private - a process not subject to the  
37 obviously transparent nature of events occurring in an open

1 court subject to public scrutiny. The court went on to note  
2 that in *Marshall's* case nothing had taken place in private.  
3 The court said if negotiations in private became common it  
4 would, to borrow a phrase used by Barwick CJ in the course of  
5 argument in *Bruce*, seem to be "clearing the lists at too great  
6 a price". The court continued -

7 "But the objections to negotiations concerning the likely  
8 sentence are not confined to negotiations which take  
9 place in private. They include objections that are  
10 available in the present case" (p.733).

11 The court went on to give a number of reasons as to why  
12 it considered it was inappropriate for the trial judge to have  
13 acted in the way that he did. All parties in this matter  
14 submit that there are a number of distinguishing features in  
15 *Marshall's* case from the present matter. These have been  
16 summarised in the written submissions which I received this  
17 morning from both accused. Before turning to them, it is  
18 important to note the Full Court's observations in *Marshall*  
19 that:

"The integrity of the court is of the greatest  
importance to public confidence in the  
administration of justice. In the end, the  
successful administration of justice depends to  
a considerable extent upon public confidence in  
it and it is thus vital that that confidence be  
maintained" (p.734).

20 It is, of course, essential that no accused be induced to  
21 plead guilty to any offence if the accused does not truly wish  
22 to do that. As the court observed in *Marshall*:

"It is the task and responsibility of an  
accused's legal advisers to advise him as to the  
likely sentence. That responsibility cannot be  
transferred to the court and it is not  
legitimate to attempt to do so" (p.735)

Furthermore, as the court observed:

"... the judgment of a court is delivered only after the court has heard at a hearing at which members of the public are present or entitled to be present all that both parties before it wish to place before it. To allow this principle to yield to an expedient for clearing the lists is to clear the lists at too great a price" (p.734).

1 It is submitted by all parties that the decision in  
2 *Marshall* does not bind this court against providing the  
3 indication sought. Specifically, it is noted that the Full  
4 Court said:

"In view of the infinitely various circumstances that may exist or occur in relation to a criminal trial it is both unwise and undesirable to lay down as a proposition of universal application that a trial judge must never give any indication before he pronounces sentence of the sentence he is likely to pass." (p.736)

5 One of the reasons provided in *Marshall* for the  
6 undesirability of the course adopted was that set out at p.733:

"If a judge is asked to give an indication of the sentence which is likely to be imposed following a plea of guilty he is likely to feel inhibited from subsequently passing a more severe sentence."

7 The accused submit that, whilst that concern is  
8 applicable to the present case, its force is somewhat  
9 diminished by the limited nature of the indication sought,  
10 namely that the court would not impose an immediate custodial  
11 sentence. By contrast, in *Marshall* what was being sought, and  
12 what was provided, was an indication as to the specific  
13 sentence - initially, 18 months to two years, and later the  
14 judge said, at 726, "something like 18 months".

15 A second reason advanced by the court in *Marshall* as to  
16 why sentencing indications were often undesirable was because:

"The procedure adopted in the present case would, if it became common, rapidly lead to a belief and perhaps more than a belief that an accused pleading guilty will receive a lesser sentence than one who defends himself by pleading not guilty. We have already pointed out that this is a fundamental error" (pp.733-734)

1        Although that may well have been the position 25 years  
2 ago when *Marshall* was decided, it is the case today that a plea  
3 discount has, as counsel submit, become entrenched law. As  
4 counsel puts it:

"Indeed, to the extent that a sentence indication would publicly highlight the plea discount, the administration of justice would benefit."

5        Two further reasons were given by the court in *Marshall*  
6 for discouraging sentencing indications. First, that a  
7 misunderstanding may arise on the part of the accused as to the  
8 indication given. It would appear that that is what happened  
9 in *Marshall*, although, as I have already noted, the judge made  
10 it clear at the outset that the additional sentence being  
11 discussed was actual time to be served. In this case, it is  
12 submitted that no such misunderstanding might arise, given the  
13 limited nature of the indication sought. Second, that the trial  
14 might proceed in what the court described in *Marshall* as "in an  
15 incorrect atmosphere". Again, counsel submit that in the  
16 present circumstances this is an unlikely event to occur were  
17 the trial to proceed. In short, that there is in these  
18 circumstances no likelihood at all of any misunderstanding  
19 occurring as between either of the accused in respect of any  
20 indication sought.

21        In conclusion, it is made clear by the accused that they  
22 do not suggest sentence indications are appropriate in all  
23 cases. However, it may be that developments in the law since  
24 the decision in *Marshall* - in particular the entrenchment in  
25 sentencing law of the plea discount - have increased the

1 proportion of cases in which sentence indications are  
2 appropriate. It is submitted, in short, that the limited  
3 nature of the indication sought in this case overcomes many of  
4 the concerns raised in *Marshall*.

5 Ultimately, whether any indication is appropriate is to  
6 be assessed on a case-by-case basis. It is submitted that  
7 nothing said by the court in *Marshall* binds this court to any  
8 different view.

9 Significantly, these submissions have been supported by  
10 counsel for the Crown.

11 Another distinguishing feature in *Marshall*, it seems to  
12 me, is that in 1980, when *Marshall* was heard, the Crown played  
13 a significantly lesser role as to submission on sentence than  
14 it does today. There was a time when the Crown did not submit  
15 on sentence at all. That situation no longer prevails and the  
16 Crown plays an active role in making submissions as to the  
17 appropriate sentence, and would do so in this case, were there  
18 to be any pleas. Indeed, it has already made significant  
19 submissions as I have outlined.

20 It also cannot be ignored that since the mid-1990s the  
21 Magistrates' Court has engaged in implementing a protocol for  
22 the provision of sentence indications. Such schemes have also  
23 been instituted in New South Wales in recent times (and then  
24 abandoned), and I understand in other jurisdictions.  
25 Presently, the Sentencing Advisory Council has published a  
26 discussion paper as to the question of sentence indication in  
27 the County and Supreme Courts. It is yet to publish its final  
28 report in respect of the matter. I note in passing that at  
29 p.47 of its discussion paper the Council incorrectly notes that  
30 the indicative sentence provided in *Marshall* had been provided  
31 in chambers. In fact, as I have already noted, the indication  
32 was given in open court.

33 I also note that inquiries of some judges in this court  
34 which I have undertaken indicate that some judges do give  
35 informal sentence indications in open court.

36 I am satisfied that the submissions made by the parties  
37 as to *Marshall's* case should be upheld. Without making any

1 finding as to the appropriateness of sentence indications being  
2 provided generally, I do consider that there are distinguishing  
3 features in this case from *Marshall's* case, which would justify  
4 me responding to the request of counsel to provide a response  
5 to the indication sought.

6 Particularly, I am being asked to respond to the question  
7 as to an appropriate range rather than to a specific sentence,  
8 or something near to a specific sentence. I consider that an  
9 important distinguishing feature from *Marshall's* case.

10 I accept that the gravity of the offence allegedly  
11 committed by each of the accused, on the facts as they have  
12 been provided to me is less than might ordinarily be the case  
13 where directors act dishonestly. In these circumstances, as all  
14 parties agree, the accused or the entities with which they were  
15 connected were entitled to the asset which was transferred  
16 prior to the meeting on 10 November 2003. In essence, the Crown  
17 accepts that an illegal means was used to obtain something to  
18 which the accused or their entities were entitled, and that  
19 such conduct took place in the context of a continuing dispute  
20 between the directors of AEPL, which had been going on for some  
21 three or four months in essence. The Crown accepts that the  
22 other directors were unwilling to implement the mechanism under  
23 clause 2.1 of the deed, which was designed to enable ACTA to  
24 recover its share parcel, or at least the 60 million shares in  
25 question, about which there is no dispute that ACTA was  
26 entitled.

27 There is no doubt that the commission of the offence in  
28 question is a serious one. It is conceded by each of the  
29 accused that, notwithstanding the ameliorating circumstances  
30 which I have noted, it would be an appropriate case in which to  
31 impose terms of imprisonment. Ordinarily, directors of a  
32 company acting in a way in which the accused allegedly acted  
33 might expect such dishonesty would lead to the imposition of  
34 terms of imprisonment to be immediately served.

35 I am prepared to indicate in the special circumstances of  
36 this case that it would be within the range of sentence for the  
37 court not to impose an immediate term of custody in this case

