

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Armstrong & Ors* [2015] QDC 80

PARTIES: **THE QUEEN**
(respondent)

v

GARY COLLYER ARMSTRONG
(applicant)

and

ANDREW ERIC YOUNG
(applicant)

and

BRADLEY WENDELL YOUNG
(applicant)

FILE NO/S: 1503/14

DIVISION: Criminal

PROCEEDING: Section 590AA application

ORIGINATING COURT: District Court of Queensland

DELIVERED ON: 16.4.15

DELIVERED AT: Brisbane

HEARING DATE: 26 March 2015

JUDGE: Farr SC DCJ

ORDER:

1. **The application of Gary Collyer Armstrong for further and better particulars is dismissed.**
2. **The Crown provide further and better particulars to Andrew Eric Young and Bradley Wendell Young as to what discrepancies are said to exist in the information provided to the auditors and how the true financial circumstances of the companies were withheld when audits and financial diligence reports were conducted, and if necessary, identify the documents in question.**
3. **In all other respects the applications for further and better particulars of Andrew Eric Young and Bradley Wendell Young are dismissed.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE - application for an order that the Crown be directed to file further and better particulars.

COUNSEL: Mr Mac Giolla Ri and Ms Hillard for the applicant
Armstrong

Ms Bain for the applicant Andrew Young

Mr Minnery for the applicant Bradley Young

Mr Kent QC and Mr Woodford for the respondent

SOLICITORS: Russo Lawyers for the applicant Armstrong

Gilshenan and Luton Lawyers for the applicants Andrew
Young and Bradley Young

Commonwealth director of Public Prosecutions for the
respondent

- [2] The applicants Gary Collyer Armstrong, Andrew Eric Young and Bradley Wendell Young each are charged with one count of fraud with a circumstance of aggravation and 18 counts of insolvent trading. Andrew Eric Young also faces an additional charge of fraud with a circumstance of aggravation (Count 20). For ease of reference I will refer to the applicants as “the defendants” and the respondent as “the Crown”.
- [3] The allegations relate to the Kleenmaid group of companies, and transactions around and prior to that business being placed into voluntary administration. The primary fraud allegation (count 1) is that a loan was secured in the amount of \$13,000,000 in a manner that involved dishonesty. Whether there was dishonesty is in dispute. The insolvent trading charges relate to allegations about specific instances of trading that are said to have occurred when the applicants, who were alleged to be directors of the company relevant to each charge, suspected that the company in question was insolvent or would become insolvent.

The applications

- [4] Each of the defendants applies to the court for orders that the Crown be directed to file further and better particulars.

History

- [5] The legal representatives for Armstrong have provided the following chronology to the court which is not the subject of challenge as to its accuracy:
- (a) Prior to the global financial crisis, the Kleenmaid Corporate Group experienced financial difficulty, and ultimately went into administration in 2009;
 - (b) There were a number of subgroups associated with the Kleenmaid Corporate Group including EDIS Service Logistics Pty Ltd (“EDIS”);
 - (c) Bradley Young and Armstrong are said by the Crown to be directors of EDIS;
 - (d) The “Orchard Group” was controlled by Andrew Young and it is alleged by the Crown that he was also associated with the Kleenmaid Corporate Group;

- (e) The Crown case on the Westpac fraud is that the \$13,000,000 was obtained from Westpac and paid to EDIS but was intended for and used for another purpose.
- (f) The Crown case on the insolvency counts is said to involve all three co-accused:
 - (i) two counts of insolvent trading involving Westpac – \$3,500,000 on or about 3 July 2008 (counts 2 and 3);
 - (ii) 12 counts of insolvent trading against CEO Global Logistics Pty Ltd – \$513,072.18 on various dates between 5 November 2008 and 8 April 2009 (counts 4 to 15). CEO Global Logistics provided delivery services for EDIS and arranged customs clearances;
 - (iii) four counts involving Mitchell & Partners –\$289,048.60 on various dates between 31 October 2008 and 31 January 2009 (counts 16 to 19);
 - (iv) Mitchell & Partners provided advertising services to EDIS for their trading under the Kleenmaid name.
- (g) At the committal hearing, the Crown was directed to provide particulars. It is alleged that the particulars provided did not fully amount to particulars although the matter was not further agitated at that stage given the limitations surrounding the provision of particulars at the committal stage.
- (h) The Crown has now provided further particulars titled “Particulars – Westpac fraud” and “Particulars – suspicion of insolvency, dishonesty” under letter dated 15 October 2014.
- (i) In that correspondence the Crown has also stated that it intends to rely on the co-conspirators rule as to the admissibility of the acts of the parties.¹

Particulars

- [6] Section 573 of the *Criminal Code* (Qld) states:

“573 Particulars

The court may, in any case, if it thinks fit, direct particulars to be delivered to the accused person of any matter alleged in the indictment, and may adjourn the trial for the purpose of such delivery.”

- [7] MacKenzie J noted in *R v S* [2000] 1 Qd R 445 at 452:

“There are two aspects of the need for particularity. One is the need to eliminate the risk of duplicity. ...

The second purpose of particulars is to give the accused person a sufficient indication of what is alleged against him on the occasion when he is said to have committed the offence. ...”

- [8] In *R v Juraszko* [1967] Qd R 128, Stable J said at 135, “*the object of particulars is to enable the accused to know the nature of the charge which he is called on to meet*”. Another formulation, from Stanley J in *R v Phil Maria* [1957] StRQd 512 at

¹ Correspondence from Crown dated 15 October 2014, p 3.

523, is that the Code aims at continuing the common law practice of the charge being known to the accused, with particulars if needed, giving him every fair opportunity to prepare his defence to what is charged and particularised against him.

- [9] More recently in *R v Logan* [2012] QCA 210 White JA discussed the nature of particulars at [102]-[104] and said, “*The function of particulars is to enable an accused to know the nature of the charge which he is called on to meet...*”.
- [10] As I perceive the argument in this matter duplicity is not alleged by any of the applicants. The argument necessarily proceeds on the basis that the particulars that the Crown has supplied are not a sufficient indication of what is alleged against each applicant.
- [11] Counsel for Bradley Young has also referred the court to *Johnson v Miller* (1937) 59 CLR 467, where Dickson J said at 489:
“... the question is whether the prosecutor should not be required to identify one of a number of sets of facts, each amounting to the commission of the same offence as that on which the charge is based. In my opinion he clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. ...”
- [12] Counsel has also referred to *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 where French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said:
*“The common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge. ... The common law requirement is that an information, or an application containing a statement of offences, ‘must at the least condescend to identifying the essential factual ingredients of the actual offence’. These facts need not be as extensive as those which a defendant might obtain on an application for particulars. In *Johnson v Miller*, Dixon J considered that an information must specify ‘the time, place and manner of the defendant’s acts or omissions’. McTiernan J referred to the requirements of ‘fair information and reasonable particularity as to the nature of the offence charged’.”* (footnotes removed)
- [13] As recently as 2012, the High Court has readily accepted the proposition that an accused person is entitled to particulars of the acts relied upon in proof of the offences.²
- [14] Finally, counsel have referred to *S v The Queen* (1989) 168 CLR 266, where the High Court considered the situation of a person charged with serious sexual offending, where the indictment specified a period of offending in which some or

² *Patel v The Queen* (2012) 247 CLR 531 at [65].

more than one of the acts were alleged to have occurred, and the defendant was forced by the conduct of the trial to effectively guess which acts were said to make out the offences. The High Court found that the indictment was correctly formed but that the defendant was prejudiced in his ability to mount a defence by the unparticularised nature of the allegations.

[15] Counsel have submitted that of further relevance to the present case is the fact that in *S v The Queen*, the unparticularised or unspecified nature of the allegations permitted the Crown, without realistic ability of the accused to object, to lead a significant body of evidence which amounted to propensity evidence, to establish an inappropriate relationship between the accused and the complainant.

[16] Whether in fact that is an issue of relevance to the present matter remains to be seen.

Particulars provided

[17] The particulars which have been provided to the applicants are:

Re: Count 1

1. “WHAT BENEFIT WAS GAINED

Business Finance Facilities totally \$13M from Westpac for EDIS service logistics Pty Ltd:

- To fund the business known to be known (sic) as the EDIS appliance division(\$7M)
- to assist with importing of appliance stock(\$1.5M)
- working capital(\$1.5M)”

2. “HOW THE BENEFIT WAS DISHONESTLY GAINED

The benefit was dishonestly gained because all three directors know that given the precarious financial position of the KM group, the only way the business could continue was to obtain a cash injection from a financial institution, and the only way they could obtain such finance, was to seek to obtain funding through an applicant entity which was not encumbered by the substantial debts of the group. Consequently, with the knowledge of all three defendant, funding was sought from Westpac via EDIS. All three defendants at that time:

- (a) were complicit in concealing from the bank
 - (i) the true nature of the relationship between EDIS and the Orchard group companies, in that the companies did not, as the defendants represented, trade at an arms length basis but rather were interdependent with substantial uncollectable intercompany loan accounts;
 - (ii) the serious debt position of the Orchard group, in particular Orchard KM Pty Ltd;
 - (iii) the transaction which occurred in October 2007 where the Armstrongs transferred their shares in EDIS to Kleenmaid Holdings Pty Ltd for \$12, to be onsold to Kleenmaid Corporate Pty Ltd for \$9.88m, creating a debt

from the Corporate group to the Holdings group of that amount with a resulting negative impact on the financial position of the Corporate group including EDIS;

- (b) knew that it was intended that the borrowed moneys not be used for the stated purpose, but rather to retire the debts of the Orchard group.”

3. **“WHO OBTAINED THE BENEFIT AND WHEN**

Funds were provided to EDIS for the purpose outlined in the Business Finance Agreement signed by the GA, BY and AY on 13.11.07.”

- [18] In relation to particulars 1 and 3, the Crown has supplied to the defendants a schedule detailing the witnesses from whom the particularised evidence is to be led and the paragraph numbers in their witness statements where the proposed evidence is to be found.
- [19] Similarly, after particular 2, the Crown has again supplied the names of the witnesses who are expected to give evidence of material facts relevant to certain identified issues and have identified the paragraph numbers in the statements of those witnesses where such information is to be found. In relation to particular 2, the material facts in support of the allegation that the benefit was dishonestly gained, as detailed by the Crown, are identified as follows:
1. “Application made to the bank by EDIS via GA for \$13M finance which was subsequently approved by Westpac;
 2. The Directors were all aware of the precarious financial state of the KM group, including the inability to pay debts when they became due, non-adherence to payment plans, credit holds, etc;
 3. The Directors had trouble in securing finance previously (see efforts with – NAB, Suncorp, Oaktower Partnership), in the period 2003-2005 and knew by 2007 they could not obtain finance if they disclosed the true state of the Orchard side of the Group;
 4. The main and likely only true purpose of the restructure was to provide a company with a clean balance sheet in order to obtain finance from Westpac, for the following reasons:
 - to quarantine the Orchard debt
 - to create an impression that EDIS and Orchard were separate businesses
 - there was no impact on the day to day operations of the KM business;
 5. Although the \$13M loan was obtained in the name of EDIS (of which GA and BY were directors were involved the process of obtaining finance from Westpac as GA kept AY and BY aware of the application to Westpac. The projections which were provided to the bank were prepared by on (sic) GA’s instructions and sent to AY and BY;
 6. Westpac was led to believe that Orchard and EDIS were separate and distinct businesses and that all transactions between the two

- were conducted on a commercial arms length basis, when in fact it was one operation;
7. Westpac was always led to believe that Orchard could pay its debt to EDIS;
 8. Despite assertions that EDIS/Orchard were separate businesses, they operated their cashflow from the one NAB account controlled by AY, and funds obtained by EDIS were intended and in fact were largely use to pay the creditors of Orchard;
 9. Refusal to provide Orchard financials when requested
 - refused on the basis that Orchard was a separate company and AY refused to provide financials, however to compensate for the lack of financials provided Orchard offered \$2M vendor finance instead
 - Westpac told by GA that he had conducted his own due diligence on Orchard and was satisfied with what he saw;
 10. Westpac was told the funds were required for specific purposes for EDIS (namely the acquisition of Orchard inventory and purchase of display stock), but in fact they were intended for another, namely the retirement of Orchard debt and the named purposes were not fulfilled;
 11. Financials/figures provided to Westpac were false/misleading;
 12. Withholding the true financial circumstances of the companies when audits and financial diligence reports were conducted;
 13. Representations regarding share transfers, retained profits, legal advice, terms of trade, agreement re transition of stores and security providing to Westpac were false/misleading; and
 14. Representation that AY was intending to spend time away from the business, when in fact this was not the case.”

[20] The particulars of Counts 2-18 as provided are:

Re: Counts 2-18

“SUSPICION OF INSOLVENCY

The directors suspected that EDIS was insolvent at the alleged dates, as set out in the indictment because they were aware at all material times of the following circumstances:

- the financial position of the various members Kleenmaid Group of Companies, which were inextricably linked
- losses being sustained by the Kleenmaid Group of Companies
- the significant difficulties with cashflow
- suppliers withholding stock because of unpaid invoices/debts and/or payment plans not being adhered to
- creditors were placing them on credit hold and creditors insurers were refusing to service them
- creditors were filing statutory demands or taking legal action due to non-payment of debts owed to them
- there were substantial arrears of tax with the ATO and failing to adhere to negotiated payment plan with the ATO

- franchisees rents and utilities were unpaid, often resulting in threatened or actual lockouts or disconnection of services
- inability to pay staff wages on time or in full
- compulsory staff superannuation payments were not being made
- franchisees payments were at times unpaid, part paid or overdue
- service agents were not being paid
- a major creditor took action to place Orchard into receivership in late 2008
- they could not continue trading without further capital injection
- they were acting dishonestly in their dealings with suppliers”

- [21] Following those particulars, the Crown has identified the material facts upon which it intends to rely in support of the conclusion of suspicion, the details of which I will not repeat in the course of these reasons. The Crown has also identified each witness that is anticipated to give evidence of relevance to one or more of the material facts, as well as the relevant paragraph numbers in their witness statements.
- [22] I do not need to detail the particulars provided in relation to count 20 as there is no request for further and better particulars in relation to that charge.
- [23] The Crown has also submitted that the anticipated evidence will demonstrate that pre-concert existed between the defendants and, once that condition is satisfied, it will be argued that the acts and statements of each co-conspirator can be led for the purpose of proving the substantive offence against each alleged participant.

Applicants’ complaints

- [24] Counsel for Armstrong has submitted that the particulars provided are inadequate in the following ways:
1. The Crown has not identified the acts or statements that will be relied upon to prove pre-concert;
 2. The use of the company names lacks clarity and creates uncertainty as to which entity is being referred to:
 - (a) the terms “Kleenmaid Group”, “Kleenmaid”, “KM”, “KM group”, “Corporate group”, “Orchard group” and “Orchard” are used interchangeably as are;
 - (b) the terms “EDIS Service Logistics Pty Ltd” and “EDIS Appliance Division” are referred to interchangeable with “EDIS”; and
 - (c) clarification is required;
 3. Under the heading “What benefit was gained”:
 - (a) The amounts listed are assumed to be conjunctive – clarification is required.
 4. Under the heading “How the benefit was dishonestly gained”:
 - (a) The matters listed are assumed to be conjunctive – clarification is required.

- (b) In relation to the phrases “precarious financial position of the KM Group” (prelude to the paragraph) and the “serious debt position of the Orchard Group” (para (a)(ii)):
 - (i) what is meant by each phrase;
 - (ii) what is the position actually alleged by each phrase i.e. what debt, whose debt and how much, what financial position, etc;
 - (iii) what time the position is said to have existed; and
 - (iv) how the parties are said to have known the positions that are alleged.
 - (c) In relation to the phrase “complicit in concealing” matters from the bank (para (a)):
 - (i) what is meant by the phrase; and
 - (ii) how are the parties alleged to have been complicit with one another i.e. what acts, omissions or statements are relied on.
 - (d) In relation to the phrase “uncollectable intercompany loan accounts” (para (a)(i)):
 - (i) what is meant by the phrase;
 - (ii) what amount is alleged as being uncollectable; and
 - (iii) between whom is it alleged the loans existed.
 - (e) In relation to the phrase “negative impact on the financial position” concerning the shares (para (a)(iii)):
 - (i) what is meant by the phrase.
 - (f) In relation to the phrase “the borrowed moneys not be used for the stated purpose” (para (b)):
 - (i) how are the parties said to know the above; and
 - (ii) what is the intended purpose that is alleged.
5. Under the heading “Material facts in support of the allegation that the benefit was dishonestly obtained”:
- (a) The matters listed are assumed to be conjunctive – clarification is required;
 - (b) The insolvency particulars are relied on in bulk at page 2 box 2. It remains unclear:
 - (i) what is meant by the “precarious financial state”; and
 - (ii) what financial state is alleged.
 - (c) Within the insolvency particulars, it does not state:
 - (i) whether the suspicions relied on are conjunctive;
 - (ii) what date the insolvency is alleged to have arisen;
 - (iii) how and when the directors are alleged to have been aware of the insolvency; and
 - (iv) the timeframe of when each of the material facts are alleged to have arisen.
 - (d) Page 7, box 1 – refers to “financials/figures provided to Westpac were false/misleading”. There is a difference between a document that is misleading and one that is said to be false. In this regard:
 - (i) what is alleged as being the true financial position; and
 - (ii) which financials, documents, records or information are relied on as being false.

[25] In relation to the request for further and better particulars regarding the insolvency offences, the defendant relied upon the request as detailed in paragraph [24]5(c) above.

[26] Andrew Young and Bradley Young have submitted that the particulars provided are inadequate in the following areas and/or for the following reasons:

Re: Count 1

1. The Crown had not identified what was dishonest regarding the application, including what was dishonest, false and/or misleading about the communication with the bank. Specifically, clarification is sought as to whether the dishonesty was constituted by one or more of the following (or for any other reason):
 - (a) the way the financial information was presented to the Westpac Bank; and/or
 - (b) the fact that Orchard Group finances were not presented to the Westpac Bank; and/or
 - (c) the fact that the Orchard Group was presented as a separate entity where it allegedly wasn't; and/or
 - (d) any other reason.
2. What discrepancy is said to exist in the information provided to the auditors?
3. If the Crown allegation includes dishonesty in the provision of information to the Westpac Bank, what was the dishonesty and how was it dishonest?
4. How was the dissipation of funds dishonest and what proportion of the money was spent dishonestly and in what way are the descriptions provided to the Westpac Bank as to the proposed destination of the funds different to the actual spending?

[27] I will deal with each of these issues individually.

Re particulars sought by Armstrong

[28] Insofar as the submission made by the applicant Armstrong that the use of company names in the particulars lacks clarity and creates uncertainty, I note that that issue appears to now be resolved given the submission by the Crown at paragraphs 18 and 19 in its outline of submissions.³ No further resolution in relation to this issue appears necessary.

[29] Furthermore, I note that the request for further and better particulars on behalf of Armstrong detailed in his Outline of Submissions in paragraphs 32(a), 33(a), 34(a), 34(c)(i) and 35 (insofar as it relates to the issue raised in paragraph 34(a)) (and repeated in paragraphs [24]3(a), [24]4(a), [24]5(a), [24]5(c)(i) and [25] above) has been satisfied by the Crown in the body of its outline of submissions,⁴ and in my view require no ruling by this court.

[30] In response to the defendants' submission that the Crown has not identified the acts or statements that will be relied upon to prove pre-concert, the Crown has responded that the particulars of dishonesty concerning the Westpac fraud provided to the defendants on 15 October 2014, are the matters relied upon by the Crown as going to the fact that the applicants were bound together in the pursuit of the unlawful object of defrauding the Westpac Bank and also as reasonable evidence of the individual participation of each defendant in that combination. The Crown has submitted that its case is that the acts and omissions of each of the defendants identified in those particulars were done or made in furtherance of the unlawful

³ Exhibit 4.

⁴ Paragraphs [20], [21], [27] and [29] of Crown's outline of submissions.

object. The Crown has submitted that the particulars supplied therefore give the defendants sufficient indication of the Crown's case in this regard. On my reading of the material I agree with that submission.

- [31] The Crown has also submitted that it will be a matter for the trial judge, after having heard all of the evidence at trial, to finally determine the question as to whether there is reasonable evidence of each of the defendants' individual involvement in the 'conspiracy' such that the trial judge can then rule as to whether the jury is directed that the acts and omissions of each of the defendants alone is admissible against the others as an exception to the hearsay rule. That approach is hardly controversial and in fact counsel for the defendants all agree that that would be the usual approach of the courts when determining such an issue. Defence counsel have submitted however that due to the size of this matter it would be beneficial for such a process to take place prior to the commencement of the trial. In my view given the nature of this case it would be a foolhardy judge who attempted to make such a ruling without having heard the evidence. The evidence of combination and participation has been adequately identified and the defendant has been properly informed as to the case he has to meet. Whether the co-conspirator rule has application will be a matter for the trial judge to determine.

Re paragraphs [24] 4(b) and [24] 5(b) above

- [32] The Crown has submitted that the terms "precarious financial position of the KM Group" and "serious debt position of the Orchard group" are the subject of detailed analysis in the liquidators reports and are set out in the evidence referred to in the in the insolvency particulars in Attachment 4 to the Crown outline. It is further submitted that how the parties are said to have known that the positions existed, is set out in pages 2-8 of Attachment 2 as well as in the insolvency particulars in Attachment 4. Having now had the opportunity of perusing the material, I am of the view that the particulars provided are adequate for the intended purpose, and that further and better particulars are unnecessary.

Re paragraph [24] 4(c) above

- [33] The Crown has identified that the various acts, omissions and statements relied upon as supporting the phrase "complicit and concealing" are those set out in pages 2-8 of the Particulars document (Exhibit 4). Again, in my view, upon perusal of that information, no uncertainty should exist as to the nature of the allegation and the evidence which is said to support it. The anticipated evidence, by its very nature as detailed in the nominated paragraphs of the witnesses' statements, provides a clear meaning of the phrase and, accordingly, no further elucidation is necessary.

Re paragraph [24] 4(d) above

- [34] The Crown having identified that the nature and recoverability of the intercompany loans as being those set out in the liquidator's reports, having also identified the reports in question, have in my opinion, sufficiently particularised that issue for the defendants' information.

Re paragraph [24] 4(f) above

- [35] Once again the Crown has identified where the evidence can be found as to the purpose of the loan and therefore what the stated purpose was, the actual use of the

loan money was put to and the basis of the applicant's knowledge. That information would appear to answer the applicant's request.

Re paragraphs [24] 5(c)(ii) and [25] above

- [36] In response to the question as to when the insolvency is alleged to have arisen the Crown has submitted that the date of insolvency is a conclusion to be drawn from the financial and non-financial indicators of insolvency, as set out in the liquidator's reports.
- [37] In my view any further particularisation is unnecessary to inform the defendant as to the case he has to meet.
- [38] I also note, that the Crown anticipates that a further report relevant to the issue is to be supplied to the defendants.

Re paragraphs [24] 5(c)(iii) and [25] above

- [39] In response to the question as to how and when the directors are alleged to have been aware of the insolvency, the Crown has submitted that the evidence, which has been identified in the particulars documents, reveals that the applicants must have had a growing suspicion of insolvency and that by the date averred in the charges, suspicion can be proved beyond reasonable doubt.
- [40] Once again, the provision of the particulars and the identification of the evidence relevant to the material facts, particularly when considered in light of the Crown's response to the request regarding this issue in my view adequately identifies the case (or that part of it) that the defendant has to meet.

Re paragraphs [24] 5(c)(iv) and [25] above

- [41] In response to a request for the timeframes of when each material fact is alleged to have arisen, the Crown has submitted that such timings are described in the evidence that has been identified and that simply repeating that which is in evidence is unnecessary and not the function of particulars.
- [42] The defendants' request in that regard, I must say lacks any precision as to which material facts are being referred to and why the evidence is inadequate in identifying the date that is sought. In the absence of such precision it is not the function of the court to trawl through all of the potential evidence relating to the material facts to determine whether the sought after information is available. Accordingly, I provisionally accept the Crown's submission to that effect, whilst noting that a further request can be made by the defendant if the timing of a particular material fact is not in fact disclosed by the evidence.

Re paragraphs [24] 4(e) and [24] 5(d) above

- [43] In my view the Crown's response to these requests, when considered together with the information provided in the particulars document (including the identification of the evidence that is said to be relevant to the issues) provides adequate particularity and allows the defendant to know and understand the case he has to meet.

Other matters raised by Armstrong

- [44] In addition to these specific complaints, the defendant has also submitted (after belatedly understanding the nature of the Particular and Material Facts document (Exhibit 4))⁵ that the identification of evidence that the Crown intends to rely upon in support of or as proof of a particular fact that is said to be material, by reference to the paragraph number of the witness statement, is inadequate as some paragraphs appear to be irrelevant to the stated issue.
- [45] Relevance of evidence however is not an issue that arises on an application for further and better particulars and I am not asked, at this stage, to rule on relevance. I note that a second pre-trial hearing date has been set to allow other issues to be determined. In that regard I stress the importance that the Court places on legal representatives making all reasonable attempts to resolve any pre-trial issues before seeking judicial resolution.

Re particulars sought by Bradley Young and Andrew Young

- [46] The defendants have sought clarification as to what actions or statements constitutes the alleged dishonesty. However, in the particulars provided on 15 October 2014, the Crown has particularised this issue as detailed in paragraph [20]2 above.
- [47] The Crown, in those particulars, has precisely identified that which is said to constitute the dishonesty and has adequately informed the defendants as to the case they have to meet.
- [48] In such circumstances there is no necessity for further and better particulars.
- [49] The defendants have also sought further and better particulars as to what discrepancies were said to exist in the information provided to the auditors. The defendants submit, that the witnesses that the Crown anticipates will give evidence relevant to that issue, do not provide an answer to the issue in the paragraphs of the statements that the Crown has identified as being of relevance.
- [50] I must say I have some difficulty in understanding how this issue is said to relate to “Particulars”. I note that the alleged withholding of the true financial circumstances is said by the Crown to be a material fact in support of this particular. If there is no evidence in support of that alleged material fact, the admissibility of the evidence of those witnesses (Ms Dimmock and Mr Harris) becomes an issue in itself.
- [51] However, as I read the paragraphs of the witness statements that the Crown has identified as being of relevance, it seems clear that the allegation of the “withholding of the true financial circumstances” arises from the evidence that some financial documents were never supplied.
- [52] Notwithstanding that in my view this is probably not a matter that falls within the parameters of a request for further and better particulars, I will nevertheless err on the side of caution and order that the Crown provide further and better particulars as to what discrepancies are said to exist in the information provided to the auditors and, if necessary, identify any relevant documents.

⁵ See Transcript page 1-18 Line 4 – Page 1-20 Line 22.

- [53] The third request of the defendants (as I discern it given that the Outline of Submissions and the Supplementary Outline of Submissions are rather vague, imprecise and somewhat difficult to follow) is in two parts:
- (a) does the Crown allege dishonesty in the provision of information to the Westpac Bank?; and if so
 - (b) what was the dishonesty and how was it dishonest?
- [54] Both of these issues, as I have already concluded when dealing with the co-offenders' application have been adequately particularised and in my view, the defendants will have no difficulty in understanding the case they have to meet.
- [55] The defendants have also sought further and better particulars as to how and what proportion of the money obtained from Westpac was spent dishonestly and in what way the descriptions provided to the bank as to the proposed destinations of the funds differed to the actual spending. In my view, this request evidences a misunderstanding of the role of particulars. The particulars provided by the Crown unambiguously assert that:
- “The defendants knew that it was intended that the borrowed monies not be used for the stated purpose, but rather to retire the debts of the Orchid Group.”
- [56] What the money was actually spent on is a matter of evidence, not a particular of the alleged offence. So too is the description provided to the bank of the proposed destination of the funds. This part of the application is, for that reason, without merit.

Orders

1. The application of Gary Collyer Armstrong for further and better particulars is dismissed.
2. The Crown provide further and better particulars to Andrew Eric Young and Bradley Wendell Young as to what discrepancies are said to exist in the information provided to the auditors and how the true financial circumstances of the companies were withheld when audits and financial diligence reports were conducted, and if necessary, identify the documents in question.
3. In all other respects the applications for further and better particulars of Andrew Eric Young and Bradley Wendell Young are dismissed.