Neutral Citation Number: **[2024] EWHC 245 (KB)**

Case No: AC-2022-LON-003368

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE JAY

- -

Between

RYAN STAGE — **Appellant**

- and –

THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA — **Respondent**

- -
- -

Ben Keith and **David Williams** (instructed by **Alsters Kelley Solicitors Ltd**) for the **Appellant**
Rosemary Davidson (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 31 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE JAY:

INTRODUCTION

1. On 20 September 2021 the Government of the Commonwealth of Australia ("the Respondent") made a request for the extradition of Mr Ryan Stage ("the Appellant"), a British citizen. In outline, the request stated that the Appellant was accused in Australia of having been party to a conspiracy to import a commercial quantity of cocaine into the country.

2. On 3 November 2021 the Secretary of State certified the extradition request under section 70 of the Extradition Act 2003, Australia being a Part 2 Territory. On 21 December 2021 the Appellant was arrested and he has remained in custody since then. His appeal was dismissed by District Judge (Magistrates' Court) Sarah-Jane Griffiths ("the District Judge") on 4 October 2022, and he now appeals to this Court with the leave of Julian Knowles J.

3. The sole ground of appeal is that the District Judge was wrong to find that extradition would not be an abuse of process as a result of a change in prosecutorial position.

THE FACTS

4. The Extradition Request alleged that between approximately 25 August and 5 October 2016 the Appellant and his partner, Ms Dorothy Whitney, imported four consignments of cocaine into Australia using international mail. The first two consignments were imported into Perth, Western Australia, and the third into Sydney, New South Wales. The fourth was found at the address where the Appellant and Ms Whitney were living in Sydney. The total weight of the four consignments measured with reference to their pure weight was 7,185.6 grams (pure weight).

5. Considered individually, the pure weight of the first consignment, intercepted on 25 August 2016, was 1,407.2 grams; the pure weight of the second consignment, intercepted on 26 August 2016, was 1,396.6 grams; and the pure weight of the third consignment, intercepted on 4 October, was 1,488.6 grams. These totalled 4,265.4 grams, pure weight.

6. On 5 October 2016 the Appellant and Ms Whitney were arrested, and located at the address where they were temporarily staying was found a further quantity of cocaine in two separate receptacles (2,920.2 grams measured with reference to its pure weight) and AUD 85,250. The total quantity of cocaine was, therefore, 7,185.6 grams (pure weight).

7. Under Australian law an importation or possession of drugs with intent to supply is treated as "commercial" if the pure weight is 2 kgs or more; otherwise it is treated as "marketable" if more than 2 grams.

8. On the same day, 5 October 2016, the Appellant and Ms Whitney were charged jointly with four offences under the Criminal Code, viz.:

(1) Two counts of possession of a commercial quantity of cocaine, reasonably suspected of having been unlawfully imported into Australia, contrary to section 307.5(1).

(2) One count of possession of a marketable quantity of cocaine reasonably suspected of having been unlawfully imported into Australia, contrary to section 307.6(1); and

(3) One count of dealing with the suspected proceeds of crime, being money less than AUD 100,000, contrary to section 400.9(1A).

9. These counts have been described as "the initial charges". It is not entirely clear how these counts married with the four quantities we have mentioned, although it is a reasonably strong inference that the prosecutor aggregated the first two importations for the purpose of the first count under section 307.5(1) and the second count under this provision related to what was seized on 5 October. The count under section 307.6(1) related to the third importation which was less than 2 kgs in pure weight. If that interpretation were correct, then (1) the initial charges covered the entirety of the cocaine involved (i.e. 7,185.6 grams, pure weight) and (2) the prosecutor was treating the quantities seized on 5 October in the same way as the earlier importations (i.e. they were all charged as offences of possession of drugs that had been imported).

10. Following successful plea negotiations between the Commonwealth Director of Public Prosecutions ("the CDPP") and those representing the two accused, on 19 July 2017 at the Central Local Court in New South Wales the CDPP filed a fifth charge against the Appellant and Ms Whitney alleging their joint commission of an importation of a commercial quantity of cocaine, contrary to sections 307.1(1) and 11.2A(1) of the Criminal Code ("the negotiated charge"). A copy of the negotiated charge is not available, and it not clear if it specified a particular quantity of cocaine, whether that be 7,185.6 grams or 4,265.4 grams.

11. According to the Respondent's evidence before the judge, the agreed terms of the negotiated charge were that both co-accused would plead guilty to it on condition that they would admit being party to an ongoing agreement with themselves and others to import cocaine, that the commercial quantity of cocaine imported comprised the aggregate of the separate quantities of cocaine which grounded the initial charges, that once the guilty pleas were entered in relation to the negotiated charge the CDPP would withdraw all the initial charges, and that an agreed statement of facts prepared for the sentencing hearing would still include reference to the money that had been seized, on the basis that it had been derived from their course of conduct of importing the cocaine. The Agreed Statement of Facts that was drawn up in due course addressed the facts of the first three importations (aggregate pure weight, 4,625.4 grams) under the headings 'Import 1', 'Import 2' and 'Import 3' and the two quantities of cocaine seized at the address at which the Appellant was staying (the 2,920.2 grams, pure weight) under the heading 'Possession 1'. In relation to that quantity the Agreed Statement of Facts also recorded the communications which the Appellant and Ms Whitney had had about it with the supplier responsible for the first three importations which suggested that it was part of a similar pattern of importation. The Agreed Statement of Facts also referred to the cash that was found at the premises.

12. One possible inference from the Agreed Statement of Facts is that the negotiated charge related to the three importations alone and not to the quantities seized on 5 October

2016, notwithstanding that all the details of that 'possession' were included in what was being tendered as a basis of plea to an importation charge. The much stronger inference, however, is that the negotiated charge related to the overall amount, described in slightly different ways, of 7,185.6 grams. The Prosecutor's evidence that the negotiated charge was an acceptance of the importation of the quantities referred to in the initial charges was not challenged; and it seems to me highly improbable that the Australian Federal Police, when charging the Appellant and Ms Whitney on 5 October 2016 immediately after they had seized almost 3 kgs pure weight of cocaine from their address, would not have laid any charge in relation to this quantity.

13. On 9 August 2017 the two co-accused appeared at the Central Local Court on video-link from custody. They each entered pleas of guilty to the negotiated charge and the initial charges were withdrawn and then dismissed. They were each committed to the Sydney District Court for sentence, and remanded in custody.

14. Owing to an administrative error, the New South Wales Justice Department's electronic case database incorrectly showed that all five charges against the Appellant (but not his co-accused, Ms Whitney) had been withdrawn at the Central Local Court on 9th August 2017. In consequence, the Appellant was released from custody. The Australian Border force was informed that the Appellant was unlawfully in the country, and following his interview by the Department of Immigration and Border Protection he was granted a visa to facilitate his removal to the United Kingdom. On the following day the British Consulate in Sydney issued him with an emergency travel document (it appears that he untruthfully stated that he had lost his passport – it had been seized pursuant to the search warrant executed on 5 October 2016), and he returned to the United Kingdom on 12 August 2017.

15. In the meantime, Ms Whitney was sentenced on the basis of the negotiated charge. Her sentence was six years' imprisonment.

16. The Appellant's extradition is not being sought on the negotiated charge. Under Australian law, although he had pleaded guilty to it, he had not been convicted. The evidence was that at the sentencing hearing the Appellant would have had the opportunity to withdraw the plea; and that conviction would only take place at the point of passing sentence.

17. Instead, his extradition is being sought for the prosecution of the following offences ("the extradition offences"):

> "a. Jointly commit an offence with Dorothy Whitney ("Whitney"), in that they did import a substance, the substance being a border-controlled drug, namely cocaine, and the quantity imported being a commercial quantity between 25 August 2016 and 5 October 2016, contrary to ss. 307.1(1) and 11.2A91) with 311.4 of the Criminal Code, alleged to have been committed both in Perth, Western Australia ("WA") and in Sydney, NSW ("the principal offence"); or
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> b. in the alternative:

> (i) Jointly commit an offence with another person, namely Whitney, in the course of carrying out an agreement to import a substance being a border controlled drug, namely cocaine, and the quantity imported being a marketable quantity on or about 15 August 2016 contrary to ss. 307.2(1) and 11.2A(1) of the Criminal Code ("Charge 2" – relevantly, alleged to have been committed in Perth, WA); and/or
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> (ii) Jointly commit an offence with another person, namely Whitney, in the course of carrying out an agreement to import a substance being a border controlled drug, namely cocaine, and the quantity imported being a marketable quantity on or about 26 August 2016 contrary to ss. 307.2(1) and 11.2A(1) of the Criminal Code ("Charge 3" – relevantly, alleged to have been committed in Perth, WA); and/or
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> (iii) Jointly commit an offence with another person, namely Whitney, in the course of carrying out an agreement to import a substance being a border controlled drug, namely cocaine, and the quantity imported being a marketable quantity on or about 2 October 2016 contrary to ss. 307.2(1) and 11.2A(1) of the Criminal Code ("Charge 4" – relevantly, alleged to have been committed in Sydney, NSW); and/or
>
> (iv) Jointly commit an offence with another person, namely Whitney, in the course of carrying out an agreement to possess a commercial quantity of a substance, that substance having been unlawfully imported and that substance being a border controlled drug, namely cocaine, on or about 5 October 2016 contrary to ss. 307.5(1) and 11.2A of the Criminal Code ("Charge 5" – relevantly, alleged to have been committed in Sydney, NSW); and
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> c. Jointly commit an offence with another person, namely Whitney, in the course of carrying out an agreement to deal with property reasonably suspected of being proceeds of crime (being less than AUD 100,000), on or about 5 October 2016 contrary of ss. 400.9(1A) and 11.2A(1) of the Criminal Code ("Charge 6" – relevantly, alleged to have been committed in Sydney, NSW)."

18. Given the dates of the principal offence, it is clear that the importation conspiracy is intended to cover the overall amount of 7,185.6 grams. Counts 2-5 are alternatives to Count 1 and relate to the four individual consignments or seizures, although Count 5, pertaining as it does to 5 October 2016, is pleaded on this basis as an agreement to possession cocaine with intent to supply rather than as an agreement to import it.

THE EVIDENCE BEFORE THE DISTRICT JUDGE

19. The District Judge received a mass of evidence from the Respondent seeking to explain why it was not seeking the extradition of the Appellant on the negotiated charge but instead on the six charges specified above. In particular, Mr Karthigeyan

Kanagasabapathy, a Senior Federal Prosecutor, swore a detailed affidavit on 28 June 2021. In short, the Australian Director of Public Prosecutions decided that the negotiated charge contained a procedural defect in that it omitted to plead section 311.4 of the Criminal Code. That provision is said to aid the proof of the CDPP's case that the Appellant was engaged in an organised commercial activity that involved repeated importation of cocaine and, therefore, a commercial quantity in the overall charge period across both jurisdictions of WA and NSW. Charges 2-5 are all alternative charges to the principal charge, but which in particular may be relied on, if at all, will depend on which State in Australia the Appellant is tried.

20. The significance of section 311.4 of the Criminal Code to this case does not emerge with conspicuous clarity from the Prosecutor's evidence. However, read in conjunction with the expert report of Mr Simon Healy, barrister at Samuel Griffith Chambers, Sydney and dated 10 August 2022, the position overall becomes clearer. We propose to summarise the available evidence in the following way.

21. First, in the plea agreement the Appellant had admitted to the importation of 4,265.4 grams of cocaine, aggregated across the first three importations, and to the possession/importation of a further 2,920.2 grams of cocaine made up of two smaller quantities. All the individual quantities were therefore only 'marketable' not 'commercial', or at least potentially arguably so.

22. Secondly, if the Appellant were extradited on the negotiated charge, it would technically be open to him to apply to withdraw his guilty plea. Accordingly, the position must be examined on that hypothetical footing.

23. Thirdly, the individual quantities were arguably all below the threshold of 2 kgs (in pure weight) to establish a commercial quantity. If aggregated, however, the relevant threshold would easily be surpassed. The Prosecutor seeks to rely on section 311.4 of the Criminal Code in order to defeat a possible argument that the individual quantities should be disaggregated and, therefore treated as non-commercial.

24. Fourthly, a comparison between the extradition offences and the negotiated charge reveals that it is exactly the same in terms of its *actus reus* (importation) and the specific criminal provision violated (section 307.1(1)). The only possible difference concerns the amount of pure cocaine involved. The principal charge clearly alleges the importation of 7,185.6 grams whereas it is arguable the negotiated charge refers to 4,265.4 grams.

25. Mr Kanagasabapathy's affidavit is silent on the issue of whether there is any difference in quantities when comparing the negotiated charge with the extradition offences. Although this may be a point which is capable of cutting both ways, the stronger inference from her silence is that there is not, because the Prosecution have been assiduous in seeking to give an explanation for the new charges, both in Mr Kanagasabapathy's affidavit, and in a subsequent further information letter, and the explanation given is by reference to section 311.4, not by reference to any change in quantities.

26. Mr Healy's evidence is that section 311.4 of the Criminal Code, which is in the nature of a procedural rather than a substantive provision, is unnecessary in the present case inasmuch as "rolled up" charges could always be preferred without it. He may or may

not be right about that, but either way the Prosecutor's decision to seek to rely on the section on a belts and braces approach could scarcely form the basis of an abuse argument. Mr Keith did not suggest otherwise. The main thrust of his argument on abuse was that here was a change in the quantity of imported drug being made, and that accordingly Mr Stage faced a potentially higher sentence on the extradition charges than he would have faced on the negotiated charge.

27. The basis of this argument is what Mr Healy said in his report as follows:

> "… on the information with which I am briefed, it appears likely that the 2.920 kgs total of pure cocaine in 2 parcels allegedly [found at the address] was included in the Agreed Statement of Facts tendered at Central Local Court in accordance with above principles. If that is so, [the Appellant] could only be sentenced on the basis that he imported 4.265 kgs of cocaine into Australia (jointly with DW). The other 2.920 kgs of cocaine could only affect the Court's assessment of the relative seriousness of the specific charge for sentence – for example, by depriving [the Appellant] of any argument that the 3 importations that summed into 4.265 kgs were isolated instances of him dealing with cocaine. The other 2.920 kgs of cocaine did not form part of any charge (once any charge of possessing it as an illegally imported border controlled drug had been withdrawn following charge agreement), and so [the Appellant] was not liable to be convicted for it and was not to be sentenced for it."

28. I have closely examined this section of Mr Healy's report. I have to say that the distinction he seeks to draw is a somewhat fine one. If "the other 2.920 kgs could only affect the Court's assessment of the relative seriousness of the specific charge for sentence", it would indeed be taken into account for the purposes of the sentencing exercise and the adverb "only" is misplaced. That is indeed the effect of the "above principles" set out in the preceding paragraphs, to which this paragraph makes reference. Further and in any event, whether the final sentence from the above citation from Mr Healy's report is correct may depend amongst other things upon an examination of Basten JA's dictum at para 146 of his judgment in *Einfeld v R* [2010] 200 A Crim R 1; [2010] NSWCCA 87. It is notable that Mr Healy does **not** suggest that if the 2.920 grams had been taken into account in sentencing in the negotiated charge, in accordance with these principles, it would or might have resulted in a lower sentence than that to which he is exposed on the extradition charges when the full 7,185.6 grams is explicitly included in the importation charge.

29. Mr Healy's overall conclusion is that the Appellant would have reasonable prospects of success on an application before the NSW Courts of staying the principal charge, and Charges 4-6, as an abuse of process. When cross-examined before the District Judge Mr Healy said that it was a question of fact and degree as to whether the unfairness argument would succeed, and "that the judge would need to weigh up the facts in relation to this particular case to decide upon the extent of the unfairness to this [Appellant]".

30. Further, and as recorded by the District Judge

> "Mr Healy agreed with the Prosecution that [the Appellant], should he be extradited, would be able to raise all these matters in Court in Australia and that he would be able to make an application before the Court. Mr Healy added that in his opinion, not only could this be done, that this is what would happen in this case.
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> Mr Healy explained that should the Defendant be successful in an abuse of process application in Australia, the result would be that the Prosecution would be held to proceeding on the negotiated charge. Mr Healy conceded that the Prosecution have stated that the Defendant would face no charges in Australia if the abuse of process application was successful. Mr Healy stated that the highest he could therefore put this, was that there was a possibility that [the Appellant's] case would not be stayed in its entirety but stayed insofar as the Prosecution sought to rely upon larger quantities of drugs or wider facts, which were more adverse to [the Appellant], that those which were negotiated by him at the time."

31. Insofar as the Respondent's position is not already apparent from the foregoing, there are two further points to be made. First, according to the Prosecutor's affidavit the parity principle would mean that the Appellant should not receive a more severe sentence than his co-defendant, particularly where, as here, his role was said to be lower than Ms Whitney's. Secondly, the effect of the specialty provisions in section 42 of the Extradition Act 1988 is that the Appellant could only be prosecuted for the conduct described in the extradition request or for some similar or lesser offence based on the same facts.

THE DISTRICT JUDGE'S CONCLUSIONS ON THE ABUSE OF PROCESS ISSUE

32. The District Judge's essential reasoning was that the abuse of process argument should be litigated before the relevant Australian Court and not in these extradition proceedings. She did not see how she was in a position to rule on the issue. The highest that Mr Healy could advance the argument was that it had reasonable prospects of success. The issue turned on matters of fact and degree. Further:

> "I find that I cannot make an assessment as to whether this amounts to an abuse of process in Australian law. It is simply not a matter for me to do so.
>
> In terms of whether it is an abuse of process in relation to the extradition proceedings, I do not accept that this is capable of amounting to an abuse of process. It follows that these issues fall outside of the extradition court's abuse jurisdiction. I find that the Australian Government cannot be said to be acting in bad faith or that they are manipulating the court process. The Government (or prosecution) has not acted in such a way as to "usurp" the statutory regime nor has its integrity been impugned."

THE APPELLANT'S CASE IN THIS COURT

33. The Appellant's case advanced by Mr Keith and Mr Williams is that the District Judge was wrong to find that extradition would not be an abuse of process as a result of the change in prosecutorial position. The Appellant, it is said, now faces the possibility of a higher sentence than his co-accused on a more serious charge, that is to say a charge based on the importation of 7,185.6 grams of pure cocaine rather than 4,265.4 grams.

34. The essence of the abuse argument is that the Respondent has reneged on the plea agreement made with the Appellant without sufficient explanation or justification, and that the severity of the charges has been increased. It is submitted that the District Judge approached her task in the wrong manner. Applying the criteria set out in the *Tollman* case (see below), the District Judge should have asked herself whether the conduct complained of could amount to an abuse, whether the conduct has occurred, and whether the reverse burden at *Tollman* stage 4 has been discharged. Had the correct questions been asked, and answered, it is contended that the District Judge would inevitably have concluded that an abuse of the extradition process had taken place. This is because any domestic abuse that is compounded by extradition proceedings is an abuse of both Courts' processes. Furthermore, Mr Keith and Mr Williams submit that if extradition were ordered on these charges "the decision of the UK court that he can be extradited on those charges potentially expunges any abuse of process argument in Australia and legitimises the abuse of the extradition process".

THE RESPONDENT'S CASE IN THIS COURT

35. Ms Rosemary Davidson accepted that it had been not contended on behalf of the Respondent in the Court below that there had been no elevation in the quantities of cocaine involved, on a comparison between the negotiated charge and the extradition offences. She emphasised instead that the evidence fell way short of demonstrating that the Respondent had perpetrated an arguable abuse of the process of extradition: in particular, there was no evidence of bad faith or of acting for a collateral purpose, and Mr Healy had not alleged as much. The gravamen of his evidence was that the Respondent had undertaken an incorrect analysis of the law.

36. Ms Davidson drew a distinction between three possible species of abuse, viz. (1) abuse of process in Australia; (2) abuse of the extradition jurisdiction; and (3) abuse of process for the purposes of the criminal law of England and Wales. She contended that Item (3) was irrelevant for our purposes, not least because reasons of comity and mutual trust rule out of consideration altogether how a criminal court here might determine the question at issue. In any event, this Court is not exercising that species of jurisdiction. Her headline submission was that unless the Appellant can raise a reasonably arguable case of extradition abuse properly so called, then the present dispute can only be resolved under the banner of Item 1, namely abuse of process in Australia; that is a matter for the Australian Court.

DISCUSSION AND CONCLUSIONS

37. As the District Judge correctly recognised, there is a line of authority supporting the existence of a residual abuse jurisdiction where the Court is satisfied that it is the extradition process itself that is being abused.

38. In *R (Bermingham and others) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin); [2007] QB 727, this Court held that it possessed an implied power within the scheme of the Extradition Act 2003 to ensure that the integrity of that regime is not usurped. Laws LJ held, at para 100, that it might be usurped if the prosecutor failed to act in good faith, acted for some collateral motive (by, for example, tailoring the choice of documents accompanying the extradition request) or deliberately delayed the extradition process to seek an advantage. Laws LJ no doubt did not intend this list to be exhaustive. Ouseley J agreed with Laws LJ.

39. This Court returned to this issue in *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin); [2007 1 WLR 1157 ("*Tollman*"). Lord Phillips of Worth Matravers CJ, giving the judgment of the Court, endorsed Laws LJ's conclusion that a judge conducting extradition proceedings has jurisdiction to consider an allegation of abuse of process (para 82). Indeed, a duty to do so arose if the extradition court:

> "… has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused."

40. If the extradition judge has reason to believe that an abuse has taken place, then:

> "Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred." (para 84)

These are the steps that the Appellant calls *Tollman* 1-4 in his skeleton argument.

41. In *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin); [2009] 1 WLR 2384, the Court was constituted as it had been in *Bermingham* although on this occasion Ouseley J gave the judgment of the Court. At paras 33-34 he said this:

> "33. … The focus of this implied jurisdiction is the abuse of the requested state's duty to extradite those who are properly requested, and who are unable to raise any of the statutory bars to extradition. The residual abuse jurisdiction identified in *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727 and the *Tollman* case [2007] 1 WLR 1157 concerns abuse of the extradition process by the prosecuting authority. We emphasise those latter two words. That is the language of those cases. It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted

> intent and purpose which constitutes the abuse. If the authorities of the requesting state seek the extradition of someone for a collateral purpose, or when they know that the trial cannot succeed, they abuse the extradition processes of the requested state.
>
> 34 The abuse jurisdiction of the requested state does not extend to considering misconduct or bad faith by the police of the requesting state in the investigation of the case or the preparation of evidence for trial."

42. Ouseley J further explained that an issue bearing on the admissibility of evidence, for example, cannot properly be determined within the ambit of this residual jurisdiction. Such an issue is for the trial court to determine in line with its own procedures. Moreover, such an issue cannot be determined by the extradition court on partial and incomplete evidence (para 36). We would add that the extradition court simply is not equipped to determine questions of local law and procedure, even if – as in the instant case – the requesting state has a legal system which is broadly similar to ours. Tempting though it may be for us to second-guess how the Appellant's abuse of process argument would be determined in New South Wales, we lack the requisite knowledge and judicial experience to set out a definitive conclusion.

43. I have spent some time analysing the material evidence in order to ascertain whether there is any difference in the quantities in cocaine comparing the negotiated charge with the principal offence listed in the extradition offences; or whether, in any event, the putative introduction of the additional 2,920.2 grams might make any difference to the Appellant's sentence in Australia. Overall, I very much doubt whether the Appellant would be in any worse position were the principal offence to be proved than he would have been under the negotiated charge. However, the District Judge did not decide the case on that basis, and Ms Davidson did not contend that we should do so. We therefore proceed on the premise that the negotiated charge pleaded a lower quantity of cocaine and that the relevant Court's sentencing powers might conceivably be greater.

44. In my judgement, there is no evidence that the Respondent has abused the extradition process in any way. Indeed, the Respondent set out the position very fully as part of the extradition request, and has acted in good faith throughout. It has sought to explain and justify its thinking at some considerable length and with great care. The Respondent takes the view that were the Appellant sought to be extradited on the negotiated charge there is a risk that the full extent of his criminality may not be reflected in his sentence because the individual quantities might be treated as separate. Whether the Respondent has correctly assessed the position under Australian law is not for us to say, but what is clear is that the Respondent is not obviously incorrect. Accordingly, the Respondent has sought to obviate that risk by proceeding on a different principal charge which is explicitly based on what we would call a conspiracy to import the full quantity of the cocaine seized and, should the need arise, places reliance on the provisions of section 311.4 of the Criminal Code which enable the three importations to be aggregated for the purpose of ascertaining whether a commercial quantity is involved.

45. Although – on the hypothesis that there is a change in the quantity of imported drug in the extradition charges - the Respondent has failed to deal expressly with the issue of quantities, we cannot conclude that it is somehow seeking to suppress the true facts or

mislead this Court. As I have said, the Respondent has been assiduous in seeking to explain the reason for the new charges and the highest that the point might be put is that the Respondent has simply failed to grasp everything that is in issue in these proceedings. There is no arguable case of bad faith or abuse of the extradition process. Mr Keith suggested that the appropriate relief was to seek further information from the Respondent as to the amount of drugs included in the negotiated charge. However, this is the hypothesis on which I am addressing the argument, and on that hypothesis, there is no arguable case of bad faith or abuse of the extradition process.

46. The Appellant's essential contention – that the possibility that this is an abuse directly engages the four *Tollman* steps – entirely misses the point. This is because the issue which must be addressed is whether the District Judge had, or ought to have had, reasonable grounds to suspect that the extradition jurisdiction was being abused. The Appellant's evidence goes no further than to suggest the possibility that the Respondent's actions might create the springboard for an abuse argument being mounted before an Australian Court. There is nothing to indicate that this Court's processes are being manipulated, usurped or perverted in any way, or that the Respondent is acting in bad faith in the exercise of its executive powers. It is common ground that any abuse argument would be heard and determined by the Australian Court, and we have complete confidence that the Appellant would receive a fair hearing.

47. Mr Keith submitted more than once that *Tollman* step 1 was fulfilled because an arguable case of abuse had been made out on the platform of Mr Healy's evidence. However, all that Mr Healy can speak to was the possibility that an Australian Court would find an abuse of process according to the common law of that country, or of the relevant State within this federal system. Mr Healy is not qualified to address whether there is evidence of an extradition abuse. The essential problem with Mr Keith's argument is that he treated the existence of a *prima facie* case of local abuse (Item (1) above) as establishing, without more, an equivalent case of extradition abuse (Item (3)). These concepts may overlap to some extent but they are conceptually distinct and must be kept apart.

48. Mr Keith sought to make much of the fact that Ms Whitney was sentenced on the basis of the negotiated charge. However, the irresistible inference must be that she did not apply to vacate her plea and take a point on disaggregation.

49. Ms Davidson conceded that if Mr Healy had stated, and the District Judge had accepted, that there was an unanswerable case of abuse of process according to the common law of Australia that would be highly relevant to the issue of abuse of the extradition process. We think that Ms Davidson was right to make that concession, not least because on that hypothesis the Respondent would know that the prosecution in Australia on the extradition offences was bound to fail.

50. The Appellant has also failed to grapple with the consequences of the doctrine of specialty. Rather than pre-empt any determination of the abuse argument in Australia, as the Appellant would have it, the doctrine of speciality works against the interests of the Respondent in this important respect. Were the Respondent to lose the abuse of process argument before the Australian Court, it would be precluded by specialty, as enshrined in section 42 of the Extradition Act 1988, from proceeding any further against the Appellant on the principal extradition charge. That would not preclude the

Respondent from proceeding on the four alternative charges, or on different charges that alleged offences of similar or lesser gravity arising out of the same facts.

51. Charge 6 alleges being in possession of the proceeds of crime. This is not said to be an alternative to Charge 1, and so does represent a change from the negotiated charge position in which the proceeds of crime charge was dropped as part of the plea negotiation. This is not, however, of any significance in the present context because the unchallenged evidence of the prosecutor is that it was agreed as part of the plea negotiation that, for sentencing purposes, the Agreed Statement of Facts would include reference to the money on the basis that it had been derived from the course of conduct in importing the cocaine. To be fair, Mr Keith did not put this aspect in the forefront of his argument.

DISPOSAL

52. There is no merit in this appeal and I would dismiss it.

LORD JUSICE POPPLEWELL :

53. I agree.