
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CRIMINAL

CITATION : ARBUCKLE -v- COMMISSIONER OF TAXATION
[2019] WASC 7

CORAM : KENNETH MARTIN J

HEARD : 22 OCTOBER 2018 AND BY FURTHER WRITTEN
SUBMISSIONS OF 30 OCTOBER AND 6
NOVEMBER 2018

DELIVERED : 17 JANUARY 2019

FILE NO/S : SJA 1043 of 2018

BETWEEN : JOHN PHILLIP ARBUCKLE
Appellant

AND

COMMISSIONER OF TAXATION
Respondent

ON APPEAL FROM:

For File No : SJA 1043 of 2018

Jurisdiction : MAGISTRATES COURT OF WESTERN
AUSTRALIA

Coram : MAGISTRATE R HUSTON

File Number : AM 3918 of 2017

Catchwords:

Taxation - Single judge appeal - Appeal against sentence - Alleged excessiveness - Suitability of suspended imprisonment - Sentencing considerations - No consequential error

Legislation:

Crimes Act 1914 (Cth)
Criminal Appeals Act 2004 (WA)
Taxation Administration Act 1953 (Cth)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Ms S Oliver
Respondent : Mr E Greaves

Solicitors:

Appellant : Fletcher Law
Respondent : Commonwealth Director Of Public Prosecutions

Case(s) referred to in decision(s):

Chan v The Queen (1989) 38 A Crim R 337
Collins v Denton (1986) 85 FLR 139
Commissioner of Taxation v Hagedimitriou (1985) 16 ATR 839
Dinsdale v The Queen [2000] HCA 54; (2000) 202 CLR 321
Goddard v City of Stirling [2009] WASC 28
Kay v Hickey [2002] TASSC 108
Krenn v Klitscher (1986) 43 SASR 199
Petherbridge (1997) 93 A Crim R 235

Sarney v Rizidis (1987) 85 FLR 130

KENNETH MARTIN J:**Introduction and legislative environment**

1 On 10 April 2018 the appellant, Mr Arbuckle, was convicted in the Magistrates Court upon his earlier plea of guilty to 26 offences of failing to comply with a court order, contrary to s 8H of the *Taxation Administration Act 1953* (Cth) (as amended) (the **TA Act**), charges 48930 - 48955/2017. He was sentenced by his Honour, Magistrate Huston, to a suspended term of 6 months' imprisonment, but released forthwith on a recognisance release order - in the sum of \$1,000 on the basis that he be of good behaviour for a period of 24 months.

2 By an appeal notice filed in this court on 8 May 2018, Mr Arbuckle seeks leave to appeal against his sentence.

3 As filed, the appeal notice contained two grounds of appeal. But, as matters have transpired, the second proposed ground which addressed s 17A(2) of the *Crimes Act 1914* (Cth) was not pursued at the hearing of the application for leave and of the appeal.

4 Consequently, Mr Arbuckle's sole ground of appeal in respect of which leave is sought is that the sentencing disposition he received was excessive: see s 8(1)(a)(iii) *Criminal Appeals Act 2004* (WA).

5 Amplifying the excessive disposition ground were four particulars provided to that ground - in the following terms:

- (a) the learned magistrate erred when he found that a sentence of imprisonment was the only appropriate disposition in this case;
- (b) having regard to the nature and circumstances of the offending, and the matters personal to the appellant, the sentence is outside the standards of sentencing customarily imposed for this type of offending;
- (c) the learned magistrate erred by mistaking the facts of the case - specifically, by finding that the appellant had not taken any steps to prepare the outstanding returns before 6 April 2018; and
- (d) the sentence imposed is so unreasonable or unjust, that error must be implied in the learned magistrate's decision.

6 In further amplification of what was at the hearing essentially an appeal against sentence by Mr Arbuckle, the court received his written outline of submissions filed on 1 October 2018. His position was

further addressed by the comprehensive and careful submissions of his counsel, Ms Oliver, at the hearing.

7 To properly appreciate the background underlying the learned magistrate's sentencing disposition against Mr Arbuckle, it is necessary to know that a corporation of which Mr Arbuckle was sole director, namely, Maybach Consulting Pty Ltd (Maybach), had earlier been convicted in 2017 upon a series of charges - contrary to s 8C of the TA Act. The convictions were for failing to provide the Commissioner of Taxation with seven income tax returns for the period spanning 1 July 2008 - 30 June 2015 (the 2009 - 2015 financial years) and for further failures to file 19 GST returns - in successive quarters spanning a period between October 2011 to September 2016.

8 The charges against Mr Arbuckle personally had arisen first out of the conviction of Maybach and second, and more importantly, from Maybach's subsequent failure to comply with the compliance order issued in the Magistrates Court against it pursuant to s 8G of the TA Act on 31 March 2017. That order required Maybach to provide to the Commissioner all Maybach's outstanding income tax and GST returns - within a period of one month from the day Maybach was convicted in the Magistrates Court for its infringements against s 8C.

9 In consequence, Maybach had then, by its subsequent non-compliance with that specific order against it of 31 March 2017 (requiring that Maybach provide the outstanding income tax and GST returns to the Commissioner) committed a further 26 offences - and this time against s 8H of the TA Act.

10 By reason of s 8Y of the TA Act, where a corporation (such as Maybach) commits a taxation offence, then another person (such as Mr Arbuckle) who is concerned in, or takes part in, the management of the corporation is deemed to have committed the (same) taxation offence. That other person becomes punishable on the same basis.

11 So then, in present circumstances, Mr Arbuckle, as sole director of Maybach, via s 8Y of the TA Act, was taken to have committed 26 offences of failing to comply with the orders of the Magistrates Court directed at Maybach, contrary to s 8H of the TA Act. None of that was at all controversial before me at the hearing.

12 That Commonwealth legislative framework as just related above provided the basis upon which Mr Arbuckle himself came to personally

face 26 charges for his failure to comply with a court order, contrary to s 8H of the TA Act.

13 It is necessary to provide some further detail concerning those charges.

Maximum penalty exposure

14 I need to mention that s 8H(1) of the TA Act provides a maximum penalty for the offence of failing to comply with a court order of a fine of 50 penalty units or 12 months' imprisonment. Pursuant to s 4AA of the *Crimes Act* the amount of a penalty unit was specified at \$180.

15 Consequently, as regards his 26 charges, Mr Arbuckle had faced an aggregate maximum fine of $50 \times 26 \times \$180 = \$234,000$. That fine threshold, however, was reduced by reason of the fact that his charges were being dealt with in a court of summary jurisdiction and he was a natural person.

16 By application of s 8ZJ(4) and (9) of the TA Act, a maximum penalty unit fine was \$5,000. Hence, for the 26 offences when aggregated, the maximum summary jurisdiction penalty confronting Mr Arbuckle in April 2018, upon his earlier submitted pleas of guilty to all charges, was \$130,000, not \$234,000. Again, this was not controversial at the hearing in this court.

17 The gravamen of the submissions put to the court on the present application was to the effect that a fine against Mr Arbuckle personally would have been the appropriate sentencing disposition in the circumstances - rather than the eventual disposition of imprisonment, albeit suspended.

18 I now turn to relevant events.

Chronology

19 In the circumstances, it is necessary that I commence with the events concerning tax offences committed by the corporation of which Mr Arbuckle was sole director, namely, Maybach. These events are outlined in the appellant's submissions of 1 October 2018 at pars 5 - 10 in terms:

5. At all relevant times, the appellant was a director of Maybach Consulting Pty Ltd (ACN 115 045 988) ('the Company').

6. On 31 March 2017, the Company was convicted in the Perth Magistrates Court of 26 offences against section 8C(1)(a) of the Act for failing to give the Commissioner of Taxation 7 Income Tax Returns (during the period 1 July 2008 and 30 June 2015) and 19 Activity Statements (during the period 1 October 2011 and 30 September 2016).
7. The Company was convicted and fined \$30,000 (global fine), and was ordered to file the outstanding returns within one month of being served with the Court's orders. Those orders were made in the absence of the Company, the appellant, or any other representative for the Company.
8. The orders were served by post on the Company at the Company's registered office address of 23 Amaroo Place, Duncraig ('**the Duncraig address**') on 18 April 2017.
9. The Company's registered address, being the Duncraig address, is the appellant's home address. The appellant's wife collects the mail received at the home address.
10. As the outstanding returns had not been filed by 29 May 2017, the Commissioner elected to commence a prosecution against the appellant personally (pursuant to section 8Y of the Act) in relation to the Company's failure to comply with the Court's orders. He was therefore charged with 26 offences contrary to section 8H of the Act. (footnotes omitted)

20 The respondent also added at par 1 of its submissions:

1. The respondent agrees with the background as set out in [5] to [11] of the appellant's submissions dated 1 October 2018 (**AS**). The respondent would add:
 - a. To AS [5] that the appellant was the sole director of the Company. As a simple question of fact the Company could act, and ultimately only act, through or with the approval of the appellant.
 - b. To AS [8] that the address to which the orders under s 8C were posted in March / April 2017 was also the appellant's home address. (footnotes omitted)

21 Concerning the charges against Mr Arbuckle personally, the record of court proceedings indicates he was legally unrepresented across the period between 1 September 2017 and 6 April 2018 during which period his 26 charges were returnable in the Magistrates Court on the following occasions.

- **1 September 2017:** The charges were mentioned in the Magistrates Court at Perth and adjourned by Magistrate G Smith. It would appear that Mr Arbuckle did not attend that day.
- **29 September 2017:** Mention only orders made by Magistrate G Cicchini on 27 October 2017 with a notation of there being a summons issued to Mr Arbuckle.
- **27 October 2017:** Mention only orders were again made by Magistrate E Campione. Personal service of a summons was required.
- **17 November 2017:** It would appear Mr Arbuckle now attended court in person before Magistrate G Lawrence for the first time in respect of his 26 charges. He was legally unrepresented. On this day the charges were adjourned to 19 January 2018 with a notation there were 'legal advice orders'. There was a further notation made to the effect that, 'The accused has family issues that appear to have led him not being aware of the first notices of adjournment'.
- **19 January 2018:** A notation indicates that Mr Arbuckle attended court before Magistrate R Bayly. Mention only orders were made and the matters were adjourned.
- **16 March 2018:** There is a file notation that Mr Arbuckle personally attended court, again unrepresented. He was now remanded to the Perth Magistrates Court on 6 April 2018, with a notation of his plea (presently of guilty) and the grant of bail. There is a further notation:

It is queried whether pleas were actually entered on 17/11/17. Acc does not recall entering pleas and prosecution have no notation of it. To enter pleas next appearance.

22 All following appearances by Mr Arbuckle were before Magistrate Huston in the Perth Magistrates Court, first on Friday, 6 April 2018 and ultimately on Tuesday, 10 April 2018.

23 It would appear that on Friday, 6 April 2018 Mr Arbuckle again attended at court unrepresented. The matters were then adjourned to the following Tuesday, 10 April 2018 following the confirmation of Mr Arbuckle's pleas of guilty to all charges and new bail was set. The firm verbal advice of the learned magistrate on Friday, 6 April 2018 to

Mr Arbuckle to obtain legal representation was obviously heeded in the period between Friday, 6 April and the ensuing Tuesday, when Mr Arbuckle now attended at court represented by counsel (Mr P Fletcher).

24 Upon that occasion he received a disposition of 6 months' imprisonment, but suspended upon his \$1,000 recognisance - as a concurrent penalty in respect of all 26 charges, together with costs of \$206.

The events of the Friday, 6 April and Tuesday, 10 April 2018 attendances before Magistrate R Huston

25 Transcripts of Mr Arbuckle's attendances on these days were provided to the court for the purposes of the leave applications. What transpired on Friday, 6 April 2018, when Mr Arbuckle first attended before Magistrate Huston without legal representation, was highly relevant to and bore significantly upon the ultimate penalty disposition - as was subsequently imposed the following Tuesday, 10 April 2018.

26 I turn first to examine the proceedings of Friday, 6 April 2018.

Friday, 6 April 2018

27 On this day, there was some initial confusion over whether pleas of guilty had been entered by Mr Arbuckle at an earlier time, namely, on 17 November 2017. In any event, Mr Arbuckle confirmed his intent to maintain his personal pleas of guilty to all charges.

28 At this time, the learned magistrate enquired of counsel for the prosecutor (Ms H Polinelli) whether an order for imprisonment was being sought. Her response was that disposition was an option.

29 In response to a question as to whether he was prepared for imprisonment, Mr Arbuckle verbally responded that imprisonment would be 'very hard' for him and that he wished to mention his personal mitigating circumstances. Mr Arbuckle referred to the situation of his wife, who he said suffered anxiety and depression and was reliant upon him for care.

30 The learned magistrate enquired of Mr Arbuckle whether the underlying tax and GST returns which had been the subject of the earlier orders had yet been lodged (ts 4). The prosecutor then informed the court they were still outstanding.

31 The circumstances in which Mr Arbuckle had come to learn of the 26 charges brought against him were related. Mr Arbuckle acknowledged he knew of the requirement (presumably for Maybach) to lodge income tax returns with the Australian Taxation Office. His Honour now observed (ts 4):

And you've previously got convictions and the court has made orders and you've not complied with those orders and you're intending to plead guilty. Clearly, with that number of charges and the fact that the returns are still outstanding, there's a chance of you being imprisoned.

32 The learned magistrate enquired again as to what Mr Arbuckle had done towards 'getting these returns in'. Mr Arbuckle's verbal response at the time was (ts 4):

Well, I've spoken to my tax agent and I've got - sort of started the process of - I've managed to find - finally find all the GST returns or the BAS returns and completing those. I've completed - - -

33 The learned magistrate observed (ts 4):

This order was made a year ago nearly ... 29 March 2017.

(Referring, of course, to the compliance order issued against Maybach to file its outstanding income tax and GST returns.) Mr Arbuckle acknowledged this fact but said (ts 4):

I didn't become aware of the notice until - - -

34 His Honour (correctly) observed that what had been issued against Maybach was an order, not a notice (ts 5). Mr Arbuckle replied that he 'wasn't aware of the order until November last year ...' (ts 5).

35 The learned magistrate then explained to Mr Arbuckle that he really did need legal assistance and that his situation was 'very serious' (ts 5).

36 There followed a discussion between his Honour and the prosecutor about a posting of the compliance order to the accused's residential address in Duncraig.

37 His Honour then observed that some of the offences by Maybach in terms of not filing returns dated as far back as 2011. He observed to Mr Arbuckle (ts 5):

It might be that you've had some challenges and the court can be informed about those things, but you need to be better prepared for your

sentencing than it seems to me you are today because what the taxation office is saying is that these returns are still not lodged.

Mr Arbuckle responded:

They're on the verge of being lodged, your Honour.

38 His Honour observed (correctly, of course) that some of the returns would have been outstanding for a period of seven years 'after the income or payment for services was received'. He continued (ts 6):

And if the returns are not lodged and orders have been made a year ago nearly - well, 10 months ago - for something that you already knew about in terms of notices that were forwarded by the tax office, in terms of obligations that you have under the broader income tax legislation in any event it's going to be a difficult sentencing exercise for you.

39 Mr Arbuckle requested an adjournment to obtain legal advice - but the prosecutor then indicated this was the seventh time the matter had been heard and that on the last two occasions it had been adjourned in order to facilitate lodgements. She said further that Mr Arbuckle was a certified accountant who ought to 'know his responsibilities' (ts 6).

40 The learned magistrate then asked Mr Arbuckle whether he was an accountant. The response was in the affirmative, although Mr Arbuckle said, 'I don't really practise as an accountant any more, your Honour' (ts 6).

41 After further discussion, Mr Arbuckle verbally accepted that as a certified practising accountant he understood taxation legislation and that he should not need a notice or an order to be, in effect, informed of such obligations.

42 His Honour then said that he was disposed towards granting Mr Arbuckle further time to obtain legal advice, given the serious charges that he was facing and the potential prospect of imprisonment.

43 At this point (see ts 7) Mr Arbuckle now disclosed that he was 'going on a family holiday next week'. His Honour observed (ts 7):

So you're prioritising your family holiday, but not lodging your tax returns?

Mr Arbuckle responded that that was not what he was submitting. But he advised the court that he was taking a family holiday overseas to the United States of America. He said that he was not prioritising his

overseas travel ahead of lodging his tax returns and added, 'I intend to have everything done before I leave' (ts 7).

44 After a brief adjournment, Mr Arbuckle advised that the planned family holiday to the USA was to commence the following Thursday, extending through to the beginning of May (ts 8).

45 There was then some general discussion about priorities and his Honour made the following observation (ts 8 - 9):

So you can find the money to pay for an overseas trip, but you can't get yourself organised to lodge your income tax returns that were ordered 10 months ago that were previously the subject of a notice from the Australian Taxation Office that were previously the subject of legislation that you're well aware of. It's not a situation that I'm particularly impressed with and in sentencing you because you've confirmed your pleas of guilty from 17 November, I need to make sure that the broader community has confidence in the sentencing process and that when an offender comes before the court for sentencing in respect of such matters that it will maintain their confidence: (a) send the messages to them as well as for the community to say, well, that's what the court should be doing.

46 After correcting his planned departure date to earlier than the date he had originally told the learned magistrate, a final sentencing hearing was then fixed for the following Tuesday morning.

47 His Honour then said this to Mr Arbuckle (ts 10):

I suggest that you consult - well, it's up to you what you do, but your situation is grave in terms of the seriousness of the offending, the omission to comply with the order is ongoing - the 26 orders, the overseas travel that you've prioritised ahead of your obligations to the broader Australian community to pay your taxes, lodge your returns, comply with court orders and it's going to be a challenging exercise for you when it comes to sentencing on Tuesday morning, the 10th at 9 am. You will need to sign a bail undertaking today.

48 As we will see, in the interim period of four (4) days, matters changed considerably. I now turn to the actual sentencing disposition hearing of Tuesday, 10 April 2018.

Tuesday, 10 April 2018

49 According to the transcript of proceedings, Mr Arbuckle, now represented by counsel (Mr P Fletcher), attended before Magistrate

Huston for his sentencing at about 9.15 am on Tuesday, 10 April 2018. Again, Ms Polinelli appeared for the prosecution.

50 There appears to have been a break in proceedings that day before a resumption to the late afternoon at about 4.09 pm, according to the transcript, see page 33 where, after a completion of penalty and mitigation submissions by each counsel, the learned magistrate's sentencing remarks commence (ts 33 - 40).

51 A number of significant things happened in the interval. **First**, and wisely, Mr Arbuckle was now legally represented.

52 **Second**, the prosecutor now informed Magistrate Huston that as of 'today' (ie, Tuesday, 10 April) that all returns as per the 26 charges had been lodged (ts 3).

53 **Third**, Mr Fletcher, for Mr Arbuckle, advised his Honour that the assessed tax payable (by Maybach) arising out of that lodgement of the 26 returns was \$360,000 and, further, that of an amount \$55,000 was paid on Friday and that 'the balance will be paid today' (ts 3).

54 **Fourth**, in response to his Honour's question, the prosecutor confirmed the lodgement of the returns and a payment of \$55,000 had all occurred after the hearing 'on Friday' (ts 3).

55 **Fifth**, his Honour indicated that, in light of Mr Arbuckle's looming overseas travel intentions any payment of the outstanding balance of the tax due upon the returns (ie, \$305,000) would be a (relevant) sentencing consideration for him. His Honour said he would be prepared to adjourn the proceedings until later that day 'when the moneys have been paid, and sentence then' (ts 4).

56 **Sixth**, his Honour now asked (properly) whether fines which had been imposed against Maybach back on 31 March 2017 had been paid. (They had not been). The prosecutor was then unaware. Maybach's fines were in the amount of \$30,000 (ts 5). Asked about the \$30,000 in fines (imposed against Maybach) Mr Fletcher now indicated he would need to take instructions whether that amount could be paid on short notice, given that his client had had to borrow, he said, in order to meet the tax debt. His Honour again indicated he would like to receive information about that issue as well, as it would be, in effect, another sentencing consideration and because the non-payment of that fine 'troubles me' (ts 5). His Honour said that Mr Arbuckle, by reason of a non-compliance with the court's order had, in effect, on the previous

Friday, been in the 'frame for imprisonment' - given the fact that the orders had not been complied with and had been in place 'almost 10 months now' (ts 6). His Honour then added (perfectly correctly) (ts 6):

Clearly under the Commonwealth Crimes Act, I can only impose a term of imprisonment if I'm satisfied that there's no other appropriate outcome. And I mentioned on Friday, before you were engaged, that non-compliance with orders made by the court, particularly these sort of orders ... is not something that was particularly impressive or in Mr Arbuckle's favour. Certainly since Friday there has been a lot of ... activity ... which has swung things considerably back in his favour. But if I was to be informed later today, when we reconvene, that the tax has been paid, and the fine has been paid, then I can deal with this as a discrete sentencing outcome, and there might well be some further matters that you want to take me to that will ...

The sentencing hearing was then adjourned to the afternoon at that point.

57 **Seventh**, once the sentencing hearing was reconvened that Tuesday afternoon, Mr Fletcher advised his Honour that Maybach's fine of \$30,360.74 had been paid, handing up a Justice PMC registry receipt (ts 9).

58 **Eighth**, so also, it would appear, was the balance of the assessed tax of \$305,000 and confirmed by the prosecutor (ts 9).

59 **Ninth**, Mr Fletcher then submitted his client was neither a registered accountant nor a chartered accountant. Nor did he hold a bachelor of commerce (ts 11). He said that Mr Arbuckle had acquired an accounting qualification from a technical college as a young man - but that he had been engaged in the mining industry and had not practised accountancy since the age of 25 (Mr Arbuckle was then 52). Mr Fletcher also corrected an earlier asserted misstatement concerning Mr Arbuckle being a director of 13 mining companies. Whilst Mr Arbuckle had been a director of junior mining corporations in the past, presently he was only a director of the one corporation, namely, Maybach.

60 There then appeared to be some confusion as between ASIC searches as were relied upon by the prosecutor, as against Mr Arbuckle's contention that his position with the other corporations was only secretarial, or that form 412 ASIC lodgements had not been kept up to date, thereby reflecting an inaccurate position concerning his former directorships.

61 Attention then turned to the swiftness with which the (26) taxation returns had been able to be completed between the previous Friday and Tuesday, 10 April. His Honour put this to Mr Fletcher (ts 17):

And he indicated to me that he hadn't been able to get to the completion of the returns. It just wasn't something that had occupied his attention. Four days later all the returns are prepared. When were the returns prepared?

Mr Fletcher responded for Mr Arbuckle (ts 17):

Well, your Honour, my understanding is that, in fact, what Mr Arbuckle - and unfortunately we're jumping - there are many things that I need to tell you, your Honour, that will affect - - -

...

HIS HONOUR: Were the returns prepared and lodged - were the returns prepared on Friday and just not lodged?

FLETCHER, MR: Your Honour, my understanding is that the returns have been in preparation. That is to say the work required to be done in order that the returns can be finalised and lodged has been ongoing since Mr Arbuckle became aware in November of the need to get on with that.

62 The learned magistrate then posed another question (ts 17 - 18):

Well, now could he then make submissions to me that he didn't believe that there was a requirement to lodge the returns if he's in the process of preparing them?

FLETCHER, MR: Because my understanding, your Honour, is that what has happened is that either he's misunderstood your question, or you may, with respect, have misunderstood his answer, because it's apparent from my instructions that the reality is that Mr Arbuckle was not aware - critically was not aware of the order that these returns be lodged. He had no knowledge of the order made in March 2017 until shortly after the police knocked on his door in - some time in November 2017. How that has come about I will be explaining to your Honour in - at the appropriate time.

63 Some discussion then followed about there being no attendance by Maybach at its sentencing disposition at March 2017, and then that there had been, as regard the personal charges against Mr Arbuckle, a lack of knowledge on his part and consequent non-attendances until the police had personally attended at his residence in November 2017 to serve him with that summons over those charges. The problem, as eventually was explained by Mr Fletcher, concerned the registered

office of Maybach Consulting being the Duncraig residence of Mr and Mrs Arbuckle coupled to an asserted medical condition suffered by Mr Arbuckle's wife leading to her practice of discarding or destroying of official correspondence posted to the Duncraig residence, resulting in Mr Arbuckle (and Maybach) not receiving, thus, having no knowledge of posted information either timeously, or at all.

64 His Honour returned to an issue which was obviously troubling him concerning what he had been verbally told by Mr Arbuckle in person the previous Friday (ts 18):

Well, how is it that he would tell me on Friday that he hadn't made any headway in the preparation of these returns yet they were all lodged by Tuesday morning? When they were lodged, yesterday or today?

The prosecutor then advised his Honour that the tax returns had been lodged the previous day - ie, on Monday, 9 April 2018. Mr Fletcher responded (ts 19):

Well, it seems clear enough that he must have been gathering, as he has told me, all of the necessary documents. Your Honour, we're talking about nine income tax returns and some 19 GST returns.

Mr Fletcher subsequently corrected the position to seven (not nine) income tax returns. He continued (ts 19):

He then was obviously galvanised into action and got it done by an accountant who was prepared to work obviously hard enough to achieve that outcome by yesterday [Monday]. He then went about raising the funds, which he has done, from a family friend, fortunate a - not only a very good friend but a wealthy friend who has been able to advance a very substantial amount of money, in addition to helping - - -

65 Mr Fletcher then (at ts 19 - 20) related a number of personal matters concerning Mr Arbuckle's age, self-employment, his provision of consulting services to junior mining companies, working largely out of their offices, and the number of certain personal difficulties experienced by one of his two children, aged 16, who was said to suffer from ADHD and ODD (oppositional defiance disorder), as well as anxiety and depression. In addition, it was submitted Mr Arbuckle's wife suffered severe anxiety and depression and was on medication, and had been since the birth of their 16-year-old son, and that she had been hospitalised for a period in 2004 due to that adverse medical condition.

66 Mr Fletcher also related that Mr Arbuckle had discovered in November 2017, after the police attended his residence in Duncraig, that his wife's depressive condition had (it was said) resulted in her using stress avoidance techniques - which had extended to throwing away or hiding every piece of mail that she considered threatening - thus including the prosecution notice for the company Maybach and all of the other (tax) notices posted to the Duncraig residence. It was only a police in person attendance at the residence that had caused Mr Arbuckle to finally become aware of the problem of a long-term non-receipt of correspondence attributable to his wife's stress avoidance techniques.

67 Mr Fletcher pointed out that Mr Arbuckle had no previous convictions and was a person of otherwise 'impeccable integrity' (ts 21). Reference was made to Mr Arbuckle's extensive community contributions by way of coaching juniors in AFL, basketball and hockey, and his raising of significant amounts of money for charity.

68 It was also put on behalf of Mr Arbuckle that he was extremely remorseful and embarrassed about his situation which, essentially, arose out of the related very significant difficulties experienced in his home life.

69 Mr Fletcher explained further that Mr Arbuckle had also suffered problems in scrambling to obtain discarded financial documentation due to his wife's condition and that, furthermore, Mr Arbuckle had been hospitalised with pneumonia in September 2017, from which it took him some months to recover.

70 Mr Arbuckle was also said to be a chronic insomniac. This had caused him difficulties in terms of a loss of concentration and focus. A medical report was provided in support of that submission (ts 22). Mr Fletcher then submitted that his client had (ts 22):

... not only complied fully with the requirement, albeit belatedly, for the lodgement of all of the company's returns. He has also given instructions to his accountant to get on with the preparation now, now that those returns are out of the way, his personal income tax returns for some years past are also outstanding. They are now going to be attended to with the appropriate degree of urgency ...

71 It was explained that personal (income) tax returns were outstanding for Mr Arbuckle from 2007 to 2017 (ts 22). Some adverse financial circumstances suffered post 2007 causing financial difficulties for Mr Arbuckle were also mentioned by Mr Fletcher, particularly the

decline in the market value of shares held in mining companies - which had diminished very significantly over time post the GFC of 2008.

72 Finally, Mr Fletcher indicated his client was extremely remorseful (ts 23) and that:

This is never going to happen again in his lifetime. He will make certain that this sort of situation, no matter what happens within his family life, or his professional life, will not recur ...

73 The prosecution had submitted that an offence against s 8H of the TA Act (non-compliance) was more serious than the original underlying s 8C TA offence. Reference was made to a 31 year old decision, *Collins v Denton* (1986) 85 FLR 139, supporting that proposition. It was also submitted that the penalties imposed needed to reflect the obvious policy of the legislature as regards a hierarchy of offences and that second tier offences such as against s 8H, were more serious. Consequently, a fine of greater than the original (Maybach) fine penalty of \$30,000 was in prospect (ts 24) according to the prosecutor's submission. Considerations of general and specific deterrence were also stressed as being of an 'absolute necessity' in Mr Arbuckle's case (ts 24).

74 The ongoing failures by Mr Arbuckle to lodge his own personal income tax returns in the decade between 2007 and 2017 was also submitted as a relevant consideration under s 16A of the *Crimes Act* towards his character. The present offences could be characterised, it was put, in effect, as the same type of offending (ts 25). The prosecutor concluded (ts 26):

... typically a fine is imposed in these matters, however, the \$30,000 fine that was previously imposed under s 8C has not acted as a deterrent, as the accused has still not lodged - has not acted as a deterrent as the accused took - failed to comply with the order before lodging the outstanding returns.

75 The prosecutor's ultimate submission was that, given the overall seriousness of the offending and the fact that fines had not worked as a deterrent, 'the prosecution invites your Honour to consider other sentencing options available' (ts 26).

76 Part of the prosecution's submission had also been that Mr Arbuckle had led no actual evidence (ie, beyond bare assertion) about his wife's condition and that of his son.

77 Mr Fletcher was given a further opportunity to respond by his Honour for Mr Arbuckle and he now submitted that (ts 26):

Mr Arbuckle's in a catch-22 situation. He can't get such evidence without getting the permission of his wife and his son, which would cause an exacerbation of their existing conditions if he was to approach them for that permission. That's the problem he faced there, your Honour.

78 The learned magistrate then observed (again, properly, in my view) that Mr Arbuckle had selected his home residential address as the registered office of Maybach Consulting, knowing of the challenges and complexities of his home life as regards his wife and son's issues (ts 26):

... knowing full well that if the tax office or ASIC or any instrumentality, mining company or business associate needs to contact him that's the address that they would be advised to use ...

Mr Fletcher, in response, re-emphasised that Mr Arbuckle had had 'no idea that his wife's avoidance techniques had extended to the extraordinary step of throwing away mail'.

79 The non-compliance with the order of the court maintained in the period after police had visited Mr Arbuckle's residence in Duncraig in November 2017 to serve him personally then fell into focus: see ts 30. His Honour posed the question (ts 30):

So what's the reason for the non-compliance from the period 17 November to 9 April?

FLETCHER, MR: Yes, your Honour. The explanation for that is that he was having to gather all of the financial information that spanned those years, a substantial body of information, obviously, had to be gathered. Some of it had gone astray as a consequence of [his wife's] conduct, but he is gathering it and attempting to put it in order so that the returns could be lodged. But, yes, it is accepted that there is a delay in complying with the order once he was aware of it. That is the explanation, and there is no other explanation other than his mental - not his mental condition, but his chronic fatigue and the pressures at home ...

His Honour observed (ts 30):

And you're asking me to accept that he's otherwise of good character, although you concede and don't take issue with the submission that he personally hasn't lodged his income tax returns for over 10 years?

80 Further submissions were made concerning personal problems experienced by Mr Arbuckle at home and in his financial affairs. It was re-emphasised by Mr Fletcher that Mr Arbuckle was 'totally remorseful' and that the position which had occurred would never occur again (ts 31).

81 His Honour now came to observe (ts 31):

I've made the point a number of times today that it's a particularly impressive feature of today as compared to Friday that the returns are now lodged and all the tax has been paid, but when I spoke to him on Friday about that likelihood the position was that there was no horizon on which the returns would be lodged or prepared or when the tax would be paid. There was great uncertainty about that, and that's what concerned me about his impending decision to leave for overseas.

82 Mr Fletcher concluded his reply mitigation submission by submitting that his client's penalty ought to be quite a significant monetary penalty, taking all relevant factors into account.

The 10 April 2018 sentencing disposition

83 The transcript records that his Honour's sentencing remarks began at about 4.09 pm that afternoon after the completion of the respective verbal submissions by counsel as just canvassed above.

84 His Honour noted that, as regards the personal charges against Mr Arbuckle, that he may have become aware of the proceedings later in the process than had initially emerged at the review of the court hearings undertaken by his Honour the previous Friday (ts 33).

85 His Honour observed that although there had been seven prior hearings in relation to the personal charges against Mr Arbuckle, that he had not attended in person until November 2017 and that, to his credit, pleas of guilty were then entered, according to the record, at that time, albeit there appeared to have been one slight 'glitch' in relation to an entry made by another magistrate about that earlier plea of guilty. But that position, in any event, had been confirmed again on the preceding Friday, by Mr Arbuckle in person.

86 The tenor of his Honour's remarks indicates that Mr Arbuckle's early plea of guilty and his reconfirmation of that position the preceding Friday were positive factors for which he should be given full credit. Clearly, that was correct and no error was made as regards that issue.

87 His Honour then noted that the tax offences themselves were serious, being described by the prosecutor as second tier offences. This meant, in effect, that there had already been one layer of proceedings by the Australian Tax Office in respect of the (27) overdue returns by Maybach. But the relevant offence now concerned the unmet court order against Maybach in 2017 - the unmet court order requiring Maybach to comply and lodge its 26 returns as regards income tax and GST.

88 His Honour contextually also noted then, a possible third tier tax offence had the non-compliance persisted, observing (again, correctly) (ts 51):

... obviously, a third tier offence would be more serious and very often results in terms of imprisonment.

89 His Honour then directed his attention to the nature of Commonwealth sentencing considerations by reference to a start point at s 16A(1) of the *Crimes Act* - requiring a court to determine a sentence for a federal offence of a severity that was appropriate in all the circumstances to the particular offending (ts 34).

90 His Honour (appropriately) directed his attention to factors identified under s 16A(2) of the *Crimes Act*. He properly noted s 17A(1) of the *Crimes Act* as regards the sentence of imprisonment, in effect, being a sentencing disposition of last resort only in effect, after the court had considered all other available sentences and being satisfied that 'no other sentence is appropriate' (ts 25).

91 His Honour then proceeded to recount much of what had earlier been put to him on Mr Arbuckle's part by Mr Fletcher through the course of the day. He then said (ts 35):

It has to be said that the prosecutor has a point that some of the submissions made today are not supported by documents in the form of independent verification of some of the assertions made, and Mr Fletcher asserts that - or submits, sorry, that obtaining that documentation in itself might lead to further challenges, and that in itself is a catch-22. But for the court I need to be fully informed of what the exact facts and circumstances are.

92 By my own assessment, it was perfectly open and proper for his Honour to render that observation concerning all of what had been put to him that day about the related difficulties experienced with unreceived (by Mr Arbuckle) mail sent to Mr Arbuckle's home

residential address going astray by reason of his wife's depressive illnesses, which were asserted, but were otherwise unverified. To some extent, these were in the nature of a 'dog ate my homework' excuses, as to which, absent some better basis of verification, were in the present long running default circumstances concerning both Mr Arbuckle and the corporation Maybach (of which he was sole director) convenient excuses about which a healthy degree of cynicism born out of the life experience of human nature was not out of place.

93 His Honour made some further observations concerning the somewhat shifting nature of underlying facts, between what he had been verbally told personally by Mr Arbuckle on the previous Friday and the submissions made by counsel that day. Again, as regards a shift in position concerning Mr Arbuckle not being a certified practising accountant and not being a director of multiple mining companies - the comment was not out of place.

94 It should be observed, however, that in adjourning the whole sentencing exercise first on 6 April 2018 by four days, his Honour had allowed Mr Arbuckle an opportunity to engage legal representation to put his best possible mitigating position to the court. It also afforded a further opportunity to Maybach and Mr Arbuckle to attend at long last to a filing of 26 outstanding tax returns, which were the underlying subject matter of the original charges against that corporation. Second, his Honour had even further adjourned the proceedings across the course of Tuesday, 10 April to allow Mr Arbuckle the extended opportunity to attend to causing Maybach to meet payment of the balance of its outstanding tax debt (\$305,000) and to pay the penalty fine of \$30,000 which had been imposed but had not to that point been paid by Maybach.

95 These hiatuses allowed Mr Arbuckle to take the compliance steps to further mitigate his overall personal exposures - which four days previous saw him facing a prospect of a term of imprisonment in respect of unduly long-standing failures to meet taxation obligations, or to cause the corporation of which he was sole director to meet those obligations - and which themselves were of a not insubstantial magnitude in terms of unpaid tax (ie, \$360,000) due to the Commonwealth over a long period.

96 His Honour properly noted Mr Arbuckle's personal circumstances as regards his ill health and that of his wife. He said that he would accept that to be the case, although he did not have documentary

evidence of it and, as well, of the health challenges said to have been experienced by his son from birth and which his Honour again said he would accept.

97 His Honour then noted that Mr Arbuckle otherwise had a clean record with no prior convictions at the age of 52 and an exemplary business record.

98 His Honour noted the fact that Mr Arbuckle was prominent in the business world and was, in effect, a person who was educated and (commercially) sophisticated (ts 36). He now said (again appropriately, in my view) (ts 36):

The obligation to fulfil a taxpayer's legal requirement to lodge income tax returns and business activity statements should be a priority, as much as it is to achieve the other things that a company or individual is obliged to do.

His Honour continued (ts 36 - 37):

On Friday, none of the returns had been prepared or lodged. On Friday, when I asked Mr Arbuckle where completion of these returns was at there was no indication that there was any expectation of these returns being in a position to be lodged any time soon. It's accepted that Mr Arbuckle has not lodged personal income tax returns for the period 2007 to 2017. That means income tax returns for the last 11 years haven't been lodged by Mr Arbuckle at a time when he's earning moneys.

99 His Honour next returned (properly) to the sentencing factors set down under s 16A(2) of the *Crimes Act* - relevantly here concerning Mr Arbuckle's character, antecedents, age, means and his physical and mental condition.

100 In the end, his Honour observed that Mr Arbuckle, as was clearly the case, had (ts 37):

... prioritised his business interests ahead of what his obligations are, both in respect of his individual tax obligations, as well as for the company Maybach Consulting Proprietary Limited.

101 His Honour accepted Mr Arbuckle was remorseful, albeit that that feature appeared to have emerged since the previous Friday (ts 37).

102 His Honour noted that in his sentencing disposition there was a need for 'general deterrence', as well as personal deterrence or specific deterrence and said (ts 37):

I need to send a message very clearly to Mr Arbuckle that he needs to be discouraged from engaging in this form of unlawful behaviour ever again. It seems as though the message is through to Mr Arbuckle.

103 As regards general deterrence, his Honour added (again, in terms which, on my assessment, here were perfectly appropriate) (ts 37):

But I also need to send a message to the broader community that the expectations in the legislation for lodging income tax returns and business activity statements is not something to fit in when life is convenient. They have to be prioritised because it's a legislative requirement to do those things. And whilst it might surprise some, the court operates in the real world where the court is frequently encountering offenders who have struggles for one reason or another: health, business, a combination of health and business, family issues.

104 His Honour stated that the court understood the challenges of everyday life experienced by many people, but adding (ts 37):

But to have not lodged income tax returns and business activity statements for the company that Mr Arbuckle is sole director of for the period of time that he has omitted to do that is startling. It's astonishing that those omissions could have continued for so long, even with those health issues he has had personally and the family has had.

His Honour emphasised a lack of prioritisation by Mr Arbuckle in terms of taxation obligations (as, indeed, was obvious). He noted that the compliance as regards the filing of returns the subject of the court's order against Maybach of March 2017 was only on the previous day, ie, Monday, 9 April 2018. He noted again the significant change of position between the previous Friday and what had occurred in the interim as regards the lodgements and payments, observing (ts 38):

It's astonishing that that degree of effort wasn't applied back in November 2017.

105 His Honour also noted that for so-called second tier offences a term of imprisonment of 12 months was open, if the court were satisfied that no other sentencing disposition would be appropriate. He said further (ts 38):

I accept that the decision of *Collins v Denton* has emphasised that [a s 8H] offence, as it's described, is more serious than [a s 8C] offence, the notice offence, and that the outcome today should reflect it. It is the case, as the prosecutor has alerted me to, that the \$360,000 in tax that was paid yesterday [sic] -

\$55,000 was paid, with \$305,000 then paid that very day during the interval between the morning and afternoon sittings of the court -

has been deprived of the Australian community for the period that it was not assessed and not paid.

106 His Honour now indicated by reference to s 16A of the *Crimes Act* and by reference to the submissions made to him that day, that (ts 39):

... I am satisfied that the seriousness of the offending means that a term of imprisonment is the only appropriate sentencing outcome and that in respect of the 26 offences the term of imprisonment would be six months in respect of all of those offences to be served concurrently.

He added (ts 39):

However, considering all such circumstances again and being very conscious of the need for general deterrence but noting the availability of the Commonwealth sentencing jurisdiction pursuant to section 20(1)(b) of the *Crimes Act*, I am satisfied that the sentence can be wholly suspended, that is, the term of imprisonment need not be served in its entirety. It is available to the court to wholly or partly suspend, but I'm satisfied that the term of imprisonment, six months in respect of each of the offences to be served concurrently, can be wholly suspended, provided that and it is a requirement that the accused prior to release from court is to enter into a recognisance undertaking to be of good behaviour, that is, not offend for a period of two years and in the amount of \$1000 in respect of each of the offences.

107 In further concluding remarks his Honour said that for the 26 offences in a court of summary jurisdiction a maximum fine of \$130,000 was open. Nevertheless, he imposed a recognisance undertaking of only \$1,000 in respect of the 26 offences, noting (ts 39):

It need not be paid, provided that there's no further offending for the period of two years. It means that, Mr Arbuckle, you won't be required to serve a term of imprisonment of six months or any part of that term provided there's no further offending.

108 Noting again the changes occurring between the previous Friday and Monday as regards lodgement and payment of the tax and penalties, his Honour concluded (ts 39):

Specific deterrence looms, that is, to make sure that you understand that these legal requirements you have must be prioritised.

His Honour finally reiterated in this federal tax obligation context the significance of general deterrence to the Australian community as a whole, noting (ts 39 - 40):

General deterrence is a very significant feature of the sentencing outcome today to ensure that the community has confidence in the sentencing process and for the offending that you accept and to discourage anyone else from engaging in similar behaviour.

109 Costs were also imposed in an amount of \$206 against
Mr Arbuckle.

110 As seen, the only ground of appeal pursued against his Honour's
sentencing disposition is raised pursuant to s 8(1)(a)(iii) of the *Criminal
Appeal Act*, namely, that the sentence imposed was 'excessive'.

111 By s 9 of the same Act leave is required in respect of each ground
of appeal and must not be granted by the Supreme Court 'unless it is
satisfied the ground has a reasonable prospect of succeeding': see
s 9(2).

112 I turn to deal with the arguments advanced on Mr Arbuckle's
behalf concerning the sole ground as to an excessive sentence.

**Appeal submissions on behalf of Mr Arbuckle as regards his sentence of
6 months suspended imprisonment being excessive**

113 As now seen, the charges against Mr Arbuckle were for infringing
s 8H of the TA Act applicable to a 'person who refuses or fails to
comply with an order under subsection 8G(1)'. The offence is noted to
be one of strict liability: see s 8H(2).

114 As also seen, the March 2017 orders of the Magistrates Court as
regards compliance with the filing of income tax and GST returns had
been directed to the corporation Maybach Consulting Pty Ltd
(Maybach) of which Mr Arbuckle was sole director. By s 8Y of the TA
Act:

- (1) Where a person does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.

115 So it is that here, when Maybach failed within the one month
allowed under the orders of the Magistrates Court to file its 26 income
tax and GST returns as had been ordered pursuant to s 8G, that
Maybach committed a taxation offence of strict liability contrary to
s 8H(1) of the TA Act, which provides:

- (1) A person who refuses or fails to comply with an order under subsection 8G(1) commits an offence punishable on conviction by a fine not exceeding 50 penalty units or imprisonment for a period not exceeding 12 months, or both.

116 Then, by reason of s 8Y, Maybach's director, Mr Arbuckle, who
was, in effect, sole person managing that corporation, was 'deemed to
have committed the taxation offence and is punishable accordingly'.

117 The issue then is whether the penalty as imposed by the learned
sentencing magistrate was excessive.

118 As seen, particulars for this ground identify four sub-aspects to
this submission. Two of them may be immediately put to one side - as
clearly meritless. Contentions under particulars (a) and (b) that a
sentence of imprisonment was not the only appropriate disposition in
the case, or that the sentence was outside the standards of sentencing
customarily imposed for this type of offending, are wholly
unsustainable.

119 It was accepted in Mr Arbuckle's outline of written submissions
that there was little in the way of recent appellate authority for offences
against s 8H of the TA Act. The only cases referred to bearing directly
upon a s 8H disposition for failure to comply with a court order were
Kay v Hickey, a decision of the Tasmanian Supreme Court of 2002 (see
Kay v Hickey [2002] TASSC 108) and *Petherbridge* (1997) 93 A Crim
R 235. That was a decision of Nyland J, dealing with two prosecution
appeals against sentences, on the basis that they were manifestly
inadequate with the court, as regards convictions for five offences
against s 8H, increasing a global fine of \$300 up to a fine of \$1,500 (see
observations of Nyland J at 240 - 241) and discussing in those passages
decisions by Olsson J in *Krenn v Klitscher* (1986) 43 SASR 199, by
von Doussa J in *Collins v Denton* by von Doussa J again in *Sarney v
Rizidis* (1987) 85 FLR 130 and *Commissioner of Taxation v
Hagidimitriou* (1985) 16 ATR 839, a decision of Zelling J concerning
s 8C of the TA Act.

120 A submission made on behalf of Mr Arbuckle in written submissions filed on his behalf on 1 October 2018 by reference to that line of authority (which, with respect, was of some significant antiquity as at October 2018), was in terms (par 35):

Having regard to the limited appellate authority of sentences under s 8H of the Act, it is submitted that the usual sentence for these types of offences is a fine, and that it would be unusual for persons convicted of offences against s 8H of the Act to receive terms of imprisonment. In our submission, in order to attract a term of imprisonment, the offending must involve some level of aggravation, such as that seen in *Kay v Hickey*. The present case is not a case where the offender was aware of the proceedings and chose to flaunt the court's orders. There are no particularly aggravating factors in the present case.

121 However, I cannot accept the submission that it was necessary to point to an 'aggravating factor' in order to impose a term of imprisonment, if that disposition was otherwise called for.

122 As seen, and as was reiterated on a number of occasions by his Honour, the applicable sentencing principle was only that imprisonment (including thereby any suspended period of imprisonment) was a sentencing option of last resort. As seen earlier, that constraint was fully recognised and weighed here in all the circumstances by the learned sentencing magistrate who, by his remarks, was cognisant of and took all relevant considerations into account.

123 Even allowing for Mr Arbuckle not becoming aware of the court order made against Maybach until November 2017, it still took him far too long to reach a position of causing the income tax and GST returns to be filed and for what was a substantial amount of underlying tax due to the Commonwealth to be paid in full. That compliance was not, as seen, effected until the day before the final sentencing disposition on Tuesday, 10 April 2018.

124 There was also an issue of Mr Arbuckle's personal failures to lodge his own income tax returns for over a decade which was raised by Mr Fletcher regarding Mr Arbuckle's suggested good character and his remorse, which was relevant and undisputed. Even though the \$30,000 fine had been imposed against Maybach in March 2017 (along with the compliance order made under s 8G), that fine had not been paid until 10 April 2018. Even after November 2017, by which time Mr Arbuckle accepted he became personally aware of the fine and compliance orders made against Maybach, still nothing had happened.

125 The \$30,000 fine imposed against Maybach was not paid until after the morning's adjournment of the sentencing hearing on Tuesday, 10 April 2018. A 'lack of teeth' as exhibited following the imposition of a fine penalty against Maybach was demonstrable - in the underlying circumstances all to be weighed by his Honour on a bespoke basis concerning Mr Arbuckle on 10 April 2018.

126 On my assessment, his Honour did not err by forming a view that here, given what had unfolded, a sentence of imprisonment was the only viable sentencing option for Mr Arbuckle in all the circumstances. As seen, however, he then tempered the force of that penalty by suspending the six-month period - predicated upon a good behaviour recognisance extending over a two-year period. There was no arguable error in that respect. On some occasions, regrettably, some taxpayers are only motivated to meet their obligations when confronted with an imminent loss of their liberty. So be it where that tool of compliance is seen as warranted as a tool of last resort.

127 Likewise, that sentence of suspended imprisonment was not outside the standards of sentencing customarily imposed for this 'type of offending'. Such sparse case authority as there was at an appellate level in April 2018 was aged and limited. There is less tolerance in the community these days for perennial tax compliance defaulters, whose defaults push a greater tax burden on to the rest of the community to 'pick up the slack'.

128 Working at the daily community coal face in the Magistrates Court, his Honour was more than well placed to form a view about the standards of sentence customarily imposed for this particular type of tax offending. The underlying amount of tax at issue was, at the amount of \$360,000 due by Maybach, not an insignificant amount. The period of non-compliance as regards the failures to lodge GST returns over 17 successive quarters, was sustained. A failure to adhere to the s 8G order made by the magistrate who imposed a penalty against Maybach in March 2017, was to disregard an order of the court.

129 The institution of justice is brought into disrepute if orders of a court are just ignored. Even allowing for the making of the order to come to Mr Arbuckle's attention in the unique circumstances which he put forward concerning his wife's destruction or hiding of formal correspondence, the authority of the court needed to be vindicated in the face of non-compliance with that order - after Mr Arbuckle became aware of it from November 2017 and onwards. These were unique and

serious circumstances. They fully supported, in circumstances where a maximum penalty (beyond a fine) was 12 months' imprisonment, the eventual sanction imposed.

130 I can now turn to the two further sub-aspects of the excessive sentence challenge under the particulars to this excessive sentence ground.

131 By particular (c), it is contended the learned magistrate erred in mistaking the facts of the case, by a finding that Mr Arbuckle had not taken any steps to prepare the outstanding returns (of Maybach) before Friday, 6 April 2018. Representing himself in person that day, after being asked about when they would be lodged by his Honour, Mr Arbuckle had only said (ts 5):

They're on the verge of being lodged, your Honour.

132 As matters transpired, all the 26 returns for Maybach were lodged on Monday, 9 April 2018, resulting in the assessment of tax being payable to the extent of \$360,000, of which \$55,000 had been paid on that Friday.

133 A point of challenge under the written submissions filed on behalf of Mr Arbuckle on 1 October 2018 was in terms (par 48):

The above exchanges suggest the learned magistrate remained of the, incorrect, view that nothing had been done in relation to the preparation of the outstanding returns before 6 April 2018. However as noted already, the transcript of 6 April 2018 shows that the appellant in fact told the court the returns were close to completion.

134 But what Mr Arbuckle had personally told his Honour on Friday, 6 April is mentioned earlier in these reasons. Initially, when asked, Mr Arbuckle said that he had spoken to his tax agent and had:

... sort of started the process of - I've managed to find - finally find all the GST returns or the BAS returns and completing those. I've completed - - -

That statement was made at ts 4, prior to the subsequent assertion by Mr Arbuckle at ts 5 that they were on the 'verge of being lodged'.

135 His Honour's remark on 10 April 2018 concerning none of the returns being prepared or lodged (ts 36 - 37) and that there was no 'indication that there was any expectation of these returns being in a

position to be lodged any time soon' needs to be viewed in that overall context.

136 The relevant point, however, is that the income tax and GST returns of Maybach were not lodged with the Commissioner until Monday, 9 April. Upon the issue of how much work had been done on them prior to their lodgement, nothing evidence wise was really put before the court of an empirical nature in order to form any reliable assessment one way or the other about how much work actually had been done in terms of an incomplete or partially incomplete GST or income tax return for Maybach, as at 6 April 2018. That position was wholly unverifiable. Mr Arbuckle's statement that they were on the 'verge' of being lodged was both imprecise from a temporal perspective and not at all verified.

137 In all events, as at Tuesday, 10 April 2018 the learned magistrate, on my reading of his remarks, had acknowledged in Mr Arbuckle's favour the positive changes in compliance and payments events which had transpired across the brief intervening period between 6 and 10 April 2018, as regards lodgement compliance and payment. They were key, relevant sentencing positives in Mr Arbuckle's favour which had essentially emerged over that brief four-day interval. Whilst being appropriately curious about why these defaults which had been subsisting for so long up to Friday, 6 April 2018 were so swiftly capable of being redressed across a three or four-day period, in the end, Mr Arbuckle did not receive, by my assessment of his Honour's remarks, a more severe or condign punishment as regards the issue of the state of preparation of what were then undoubtedly the still unlodged GST and income tax returns of Maybach at Friday, 6 April 2018.

138 Lodgement compliances which followed and the tax payments made in respect of assessed tax by Maybach and its penalties, in the end, had worked in Mr Arbuckle's favour penalty-wise.

139 It was also perfectly appropriate for the learned sentencing magistrate to observe, in effect, that with a 'Sword of Damocles' poised above Mr Arbuckle as regards his potential imprisonment between 6 and 10 April 2018, he had been motivated and able to cause all these long-standing defaults as regards Maybach to be redressed swiftly in that short period of days. The observation was not out of place. It was factually accurate. It also spoke towards the utility and appropriateness here, of a sanction 'with teeth' being used, rather than the fine

disposition which, as was demonstrable, had not produced any tangible lodgement or payment tax compliance results over a long period.

Implied error

140 The last of Mr Arbuckle's particulars contends the sentence imposed was so 'unreasonable or unjust' that error must be implied. As regards implied error contended in an appellate court, I would first make mention of observations of the High Court in *Dinsdale v The Queen* [2000] HCA 54; (2000) 202 CLR 321, 324 - 325. Then, in *Goddard v City of Stirling* [2009] WASC 28 [12] EM Heenan J had observed in this court, that:

It is well-established that if there is such a manifest disproportion between a penalty imposed and any penalty which might reasonably be regarded as being imposed in the circumstances, then that disproportion of itself constitutes error and may also connote some undisclosed or unmentioned error in the course of reasoning ...

141 In *Chan v The Queen* (1989) 38 A Crim R 337, 342 Malcolm CJ, in assessing whether a sentence was excessive, observed that it was necessary to review a sentencing disposition having regard to factors including:

- (a) the maximum penalty prescribed for the offence;
- (b) the standards of sentencing customarily observed in relation to the offence;
- (c) the place which the criminal conduct occupies on the scale of seriousness for offences of the kind in question; and
- (d) the personal circumstances and antecedents of the offender.

By my assessment, none of those considerations were overlooked by the learned sentencing magistrate for present circumstances - as my earlier review of his remarks both in dialogue with Mr Arbuckle, then with his counsel, and finally under his ultimate sentencing remarks would demonstrate.

142 Nor, in my view, were the present circumstances a presenting situation within which there was some well established sentencing tariff or range clearly established, or well settled at the appellate level. In large measure, the sentencing position required the discretion and evaluation by the particular judicial officer implementing the sentencing disposition. To that end what was required was a weighing

of all relevant considerations, bearing in mind that the ultimate sentence imposed would need to 'fit the crime' and that imprisonment, including suspended imprisonment, was always an option of absolute last resort. Obviously, there was no express error in that regard. But, nevertheless, was there an implicit error by reason of the end disposition itself?

143 As EM Heenan J observed in *Goddard* in the passage I mentioned above, for a contention of implied error there needs to be a '**manifest disproportion**' as between the penalty imposed and that which might have been imposed. For present circumstances there had been a long-standing failure to lodge income tax and GST returns by Maybach, and a sustained failure to comply with an order of the Magistrates Court made under s 8G of the TA Act requiring compliance, extended non-compliance by Maybach and by its sole director in terms of causing it to comply after November 2017. There was a significant amount of tax unpaid over that period. Mr Arbuckle was a well educated and commercially sophisticated person who plainly understood taxation compliance obligations. There is no error here. An appellate court ought not to be asked to perform a de novo sentencing exercise from scratch under the cloak of an implied error in the result submission. A manifest error that is needed to make good such a contention ought to be just that, ie, manifest. The impugned penalty result should be clearly seen as an outlier sentencing disposition essentially, on its face, when looked at. There is nothing obvious of that outlier type result here. Hence, there was no implicit sentencing error demonstrated within present circumstances.

144 Consequently, although I would grant leave, the appeal against sentence in present circumstances, in the end, must be dismissed. That conclusion relieves me of any need to consider further submissions provided in writing by the parties as regards a contention that I should take account of some subsequent events concerning even further revenue law transgressions by Mr Arbuckle. These were defaults upon Mr Arbuckle's own personal income tax obligations which, as seen, were discussed before the learned sentencing magistrate within the overall framework of considerations towards Mr Arbuckle's good character at the sentencing hearing.

145 I indicate, however, that had I been minded to uphold the present appeal ground and then had needed to resentence Mr Arbuckle, I would have been minded, given what was said about his intentions by way of good character mitigation in that respect by his counsel, to weigh Mr Arbuckle's personal defaults in terms of not filing his income tax

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returns, to take that conduct into account in any resentencing process - had I been required to embark upon that exercise.

146 So, whilst I would grant leave to appeal in respect of the excessive sentence ground, in the end, I dismiss that appeal. Costs should follow that event.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

DW
Associate

16 JANUARY 2019