

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA105/2010  
[2010] NZCA 501**

BETWEEN SHANE CHARLES WENZEL  
Appellant

AND THE QUEEN  
Respondent

Hearing: 2 November 2010

Court: Randerson, Potter and Heath JJ

Counsel: M B Meyrick and A E Lankovsky for Appellant  
D J Boldt for Respondent

Judgment: 3 November 2010

Reasons: 17 November 2010

Recalled and Reissued: 19 November 2010

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**JUDGMENT OF THE COURT**

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- A The appeal against conviction is allowed.**
- B The convictions on all 36 counts in the indictment are quashed.**
- C A new trial is ordered on all counts.**
- D If the appellant seeks bail, he must apply to the District Court.**
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# REASONS OF THE COURT

(Given by Randerson J)

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### Introduction

[1] After a District Court trial before Judge Epati spanning a period of some 16 weeks, the appellant Mr Wenzel was convicted of 35 counts of fraud under the Crimes Act 1961 and one count of failing to produce documents contrary to s 45 of the Serious Fraud Office Act 1990. The Judge sat without a jury and announced his verdict with brief reasons on 23 December 2009. He gave detailed reasons on 10 February 2010 and sentenced Mr Wenzel the same day to five years imprisonment.<sup>1</sup>

[2] On 3 November 2010, we allowed Mr Wenzel’s appeal against conviction on all 36 counts. The convictions were quashed and a retrial ordered with reasons to follow. These are our reasons.

### Background

[3] The charges against Mr Wenzel arose from a series of transactions involving the sale and purchase of properties in South Auckland. The Crown alleged that

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<sup>1</sup> *R v Wenzel* DC Manukau CRI-2006-092-014382, 10 February 2010.

Mr Wenzel was in de facto control of a series of companies together known as the SCI group. It was alleged he devised and supervised a scheme by which mortgage lenders were defrauded. The Crown alleged the banks were deceived into lending 100 per cent of the purchase price of a property in circumstances where they would not have done so had they been aware of the true position.

[4] The Crown alleged that the deception involved four key elements although not all were present in every case. These were:

- (a) Misleading the lender by producing a sale and purchase agreement which stated that the purchase price was significantly higher than it really was.
- (b) Falsely inflating the income of the purchasers.
- (c) Falsely asserting that a real estate agent had been involved in the transactions.
- (d) Misleading the lender into believing that a substantial deposit had been paid when it had not.

[5] At material times Mr Wenzel was an undischarged bankrupt and was not permitted to have any formal role within any of the companies involved in the transaction. A woman named Robyn Case was the owner and director of the companies. She was involved in a number of business enterprises including a training company called Case Boreham Associates. By 2004, her business enterprises included a series of property companies forming the SCI group.

[6] The Crown case was that, despite not having any formal role in the companies, the SCI group was effectively controlled and run by the appellant.

[7] Most of the transactions which gave rise to the fraud charges involved properties being purchased by SCI companies and then on-sold to a purchaser. SCI arranged for the purchasers to be introduced to a solicitor, D. Initially, D was jointly charged with Mr Wenzel in respect of 16 of the 35 fraud counts. However, part way through the trial, the Judge granted D's application for a stay of proceedings.

Confusingly, the transcript records the Judge as granting the stay but the Judge then said D was discharged on all counts. The Judge said he would give reasons later but none were given. In his reasons for verdict, the Judge said D was discharged under s 347 of the Crimes Act. The application was made on the grounds of D's ill-health and delay. Only passing reference was made to the strength of the Crown's case.

[8] For the first five weeks of hearing, Mr Wenzel was unrepresented. His counsel, Mr Bioletti, was granted leave to withdraw at the commencement of the trial because he was not willing, as an officer of the court, to advance certain applications which Mr Wenzel wished to put forward. The precise nature of these applications is not before us but it is likely they related to Mr Wenzel's contention that the courts did not have jurisdiction over him. He advanced similar submissions before us which we refer to below.<sup>2</sup>

[9] Mr Wenzel sought an adjournment of the trial to enable alternative counsel to be arranged. The Judge granted Mr Wenzel an adjournment from Friday 14 August 2009 until the following Wednesday, 19 August 2009, but he was unable to arrange alternative counsel within that time. The trial commenced with Mr Wenzel cross-examining the Crown witnesses called. After five weeks, Mr Meyrick was retained and represented Mr Wenzel for the remainder of the trial.

[10] The Crown called a large number of witnesses and produced voluminous documents to support its case. The witnesses included a number of the purchasers who, Mr Wenzel accepted, had been recruited by him mainly through seminars which he ran. A number of the purchasers became employees of the SCI group and gave evidence as to the group's methods of operation and Mr Wenzel's role in the companies.

[11] A key Crown witness was a Mr Richard Justice who worked in the SCI group for between six and twelve months during the relevant period to improve its administration and information management systems. He was highly qualified holding the degrees of Bachelor of Commerce and Master of Business Administration from Auckland University. He was also a chartered accountant. In

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<sup>2</sup> At [77].

addition, the Crown called representatives of the lending institutions involved and representatives of real estate firms who gave evidence of the unauthorised use of sale and purchase agreement forms bearing their names. It was alleged that the use of these forms gave lenders confidence in the transaction they would not otherwise have had.

[12] For the defence, both Mr Wenzel and Ms Case gave evidence along with three other witnesses. Mr Wenzel maintained that his role in the SCI group was as a business “coach”. He accepted he had sourced the properties involved in the transactions at issue but denied having any element of control of the companies. Specifically, he denied directing and orchestrating the relevant transactions and denied any fraud on his part. He did not believe the transactions were unlawful in any respect and had confidence in the professionalism of D and Mr Justice. He believed they would not have become involved in the transactions if they contained any element of unlawfulness.

[13] In that respect, Mr Justice accepted in cross-examination that the loan applications and all supporting documentation had been checked by him and he had been personally involved, for example, in sending letters to D instructing him not to bank the deposit cheques. Mr Justice accepted that, at least initially, he did not see anything improper in these arrangements. However, he said he later remonstrated with Mr Wenzel on certain issues but was told it was none of his business. As for D, it is not in dispute that he wrote the letters which the Crown said were misleading as to payment of the deposits.

[14] For present purposes, it is significant that Mr Wenzel denied any intention to defraud and maintained that, by reason of the involvement of professionals in the transaction, he was entitled to believe there was no dishonest or unlawful element in the transactions.

### **The indictment**

[15] The crimes alleged in the indictment can be divided into four categories:

- (a) Two counts under s 229A of the Crimes Act of using a document with intent to defraud.
- (b) Seventeen counts under s 228(b) of the Crimes Act of using a document with intent to obtain any property or pecuniary advantage dishonestly and without claim of right.
- (c) Sixteen counts under s 240 of the Crimes Act of causing the relevant lender to execute documents by deception and without claim of right. (These counts were those laid jointly with D.)
- (d) One count under s 45 of the Serious Fraud Office Act of failing to produce documents without lawful justification and excuse.

[16] The 16 counts under s 240 of the Crimes Act can be subdivided into two groups. Three counts alleged a deception through D advising the lender that deposits had been paid under the relevant agreements for sale and purchase when they had not been paid. The remaining 13 counts alleged a deception through D confirming to the purchasers' solicitors that he held a cheque for the deposit when he had instructions not to bank the cheque.

### **The grounds of appeal**

[17] Mr Meyrick for Mr Wenzel submitted that the Judge erred in:

- (a) Failing to make findings of fact on the essential elements of the crimes alleged.
- (b) Finding that Mr Wenzel could be guilty as a party to the jointly laid counts under s 240 of the Crimes Act.
- (c) Failing to give reasons for the stay of proceedings against D.
- (d) Permitting the trial to proceed when Mr Wenzel did not have legal representation for a substantial part of the trial.
- (e) Admitting evidence from certain legal practitioners which was said to be privileged.

[18] We found the first of these grounds to be decisive in reaching our decision. We therefore focus principally on that ground.

### **The Judge's reasons for his verdict**

[19] In his written reasons on 10 February 2010, the Judge recorded the grounds for his oral decision convicting Mr Wenzel on 23 December 2009 in the following terms:<sup>3</sup>

In my Oral Decision of 23 December 2009, I stated the grounds for finding that Wenzel was responsible for the fraud as follows:

- (a) All the Crown witnesses were consistent in their accounts of what happened to them and what Wenzel said and did to them.
- (b) They also agreed that it was Wenzel who 'directed' the acquisition of the properties, the finance applications and on-sale.
- (c) It was Wenzel who directed and decided the information that is to be entered into the documentation.
- (d) In particular, Mr Mohammed of the Bank gave evidence that Wenzel 'recruited' him and that whenever there are queries regarding information in the loan applications and other supporting documents, he always referred to Wenzel.
- (e) The witnesses related their experiences of Wenzel's control during the process regarding choice of properties, filing of documents and the connection to SCI, a company which was once Wenzel's Family Trust.
- (f) The unique position and over-view of witness Richard Justice and his observations of Wenzel's central position and control in all the proceedings.
- (g) There is no evidence, or even a suggestion, of collusion amongst the witnesses, yet their evidence was remarkably similar as to Wenzel's influence and control over the actions taken, which constituted the charges of fraud, and
- (h) I have witnessed the genuine emotions displayed by the witnesses in the stand, as they each recall their experiences with Wenzel at the time. I am satisfied the emotions were genuine – especially those of the witness who was a nun and who had just left to try and make a life outside the nunnery.

[6] I also stated in that Decision that I do not believe the defence evidence on this aspect because:

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<sup>3</sup> At [5].

- (a) Wenzel contradicted himself on this between his sworn evidence and his interview with the SFO, and
- (b) None of the other defence witnesses called effectively contradicted the Crown evidence on this aspect.

[20] We observe that the brief reasons given by the Judge at that stage assumed there was a fraud and focused entirely on whether Mr Wenzel was the person responsible for it.

[21] The next portion of the written reasons proceeds under the heading “Crown’s Summary of Prosecution Case”. Mr Boldt for the Crown sought to persuade us that parts of this section of the Judge’s reasons were findings made by him. Given the heading of this section, we cannot safely assume that the Judge was making findings of fact rather than simply recording the Crown’s submissions. Even if they were findings of fact they were general findings about some aspects of the scheme such as the false inflation of purchase prices and misleading representations made by D as to the payment of deposits. They did not amount to findings of dishonesty against Mr Wenzel. Paragraph [12] may be an exception:

[12] In order to support the application for mortgages, CBA, a company which, on the exterior, was legally “owned” by Robyn Case but, in reality, as the Crown established through direct evidence, was controlled and directed by the accused, provided letters of employment containing false statements as to income for the borrower(s). The accused’s name appearing on one such letter.

[22] The next section of the Judge’s reasons purports to be a summary of the evidence which the Crown submitted was sufficient to prove the guilt of the accused beyond reasonable doubt. However, for the most part, it is a recitation of the evidence tending to establish that the SCI group of companies was controlled by Mr Wenzel. This led to the Judge’s conclusion:<sup>4</sup>

[35] The evidence tendered by 11 Crown witnesses clearly places the accused as the man running the show. The accused has sought to dispute this but has, apart from his denials, not adduced any credible evidence to the contrary. Mr Ranapai was the only purchaser who came to court to give evidence supporting the accused’s defence that he had nothing to do with the applications and was merely a coach. Mr Ranapai was a released prisoner on home detention. Mr Ranapai was a perfect target that the accused

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<sup>4</sup> At [35].

ensnared to progress his criminal scheme. As I have observed, Mr Ranapai's testimony was opened to some scrutiny revealing alarming inconsistencies.

[23] In this passage, the Judge refers to the accused's "criminal scheme" and in an earlier passage<sup>5</sup> the Judge referred to the accused using "bullying tactics to force and hoodwink persons into becoming embroiled in his illegal scheme". And he refers to two Crown witnesses (a Ms Gwilliam and a Ms Cullen) being "duped by the actions of the accused".<sup>6</sup> The Judge also noted that:<sup>7</sup>

It stretches the imagination, as the accused has sought to do, that these two witnesses were compiling false applications, writing false letters regarding salary, off their own bats.

[24] These references may be taken to be findings in a general sense that there was a fraudulent or criminal scheme and that the accused had duped two of the SCI staff to write false letters but they fall well short of dealing with the specific allegations made in relation to each of the counts. Nor do they deal with the specific elements the Crown was required to prove in each case.

[25] The last part of this section of the Judge's reasons summarises the Crown submissions with regard to the four types of deception we have summarised at [4] above but without making any findings of fact in that respect.

[26] The final sections of the judgment<sup>8</sup> deal with the submissions made on each side as to whether Mr Wenzel was charged as a principal or secondary party. The Judge recorded<sup>9</sup> the Crown's reliance on s 66(1) of the Crimes Act and the contention that Mr Wenzel had either actually committed the offences himself or procured innocent agents and/or persons unknown to commit the offences. The Judge referred to s 66(1) and the circumstances in which an accused might be found to be a party through aiding, abetting, inciting, counselling or procuring a person to commit a crime. The Judge also referred to *R v Paterson*<sup>10</sup> for the proposition that

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<sup>5</sup> At [23].

<sup>6</sup> At [25].

<sup>7</sup> At [24].

<sup>8</sup> At [38] – [72].

<sup>9</sup> At [38].

<sup>10</sup> *R v Paterson* [1976] 2 NZLR 394 (CA).

s 66(1)(a) would cover situations where the accused had the necessary mens rea but used an innocent person as an instrument to commit the offence.

[27] The Judge referred to submissions made on behalf of Mr Wenzel, in relation to the joint counts involving D to the effect that Mr Wenzel could not be liable as a secondary party unless D had committed a crime.

[28] The Judge recited numerous authorities on these points without reaching any conclusion as to the basis upon which Mr Wenzel might be found responsible. He concluded this part of the reasons with the following:

[72] Overall, the Crown submits that the offending was perpetrated against the bank; Mr Wenzel was the principal and protagonist in the fraud by orchestrating it and using “pawns of various kinds to achieve that end”. Alternatively, if the Court does not accept this submission and take a narrower view as submitted by the defence that the fraud was committed by the applicants who made the applications then Mr Wenzel is a party to that offending albeit that the applicants are not charged or convicted.

[29] Without further elaboration, the Judge then concluded:

[73] On the above analysis of the evidence and the law I was satisfied that the Crown has proved guilt beyond reasonable doubt on Counts 1 to 35 and I convicted Mr Wenzel accordingly on 23 December 2009.

[30] As to count 36, the Judge set out the relevant portions of s 45 and then cited defence counsel’s summary of the elements the Crown needed to prove.<sup>11</sup> In summary, these were said to be that the accused had the documents in his possession or control; the relevant notice under s 9 of the Act requiring the documents to be produced was properly served; the accused failed to produce the documents; and this failure was intentional.

[31] We note that this summary is not entirely accurate since the Crown must also prove that the accused did not have any lawful justification or excuse for refusing or failing to produce the documents as required by the notice.

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<sup>11</sup> At [74] – [75].

[32] The Judge then embarked on a discussion of authorities as to the meaning of possession and control in other statutory contexts.<sup>12</sup> He summarised the opposing submissions on this point.<sup>13</sup> In that respect, defence counsel had accepted that Mr Wenzel had possession of the relevant documents at one point but then delivered them to Ms Case. Thereafter, it was submitted they were no longer in his possession or control. Defence counsel also submitted that the documents did not belong to Mr Wenzel and that the s 9 notice should have been directed to Ms Case. The Crown submission was that if Mr Wenzel was the person in control of the companies, then the issue of legal ownership of the documents was not relevant.

[33] Having recited the submissions but without reaching any conclusions about them, the Judge then said:

[82] On the overall analysis of the evidence and the law I was satisfied that the Crown has proved guilt beyond reasonable doubt on Count 36 and I convicted Mr Wenzel accordingly on 23 December 2009.

**Counsel's submissions on the first ground of appeal – failure to make findings of fact on the essential elements of the crimes alleged**

[34] Mr Meyrick submitted that the Judge had failed in his duty to make findings of fact which were essential to support his verdict. In particular, Mr Meyrick submitted that the Judge had failed to make findings on the following matters:

- (a) Whether any fraud had been committed and, if so, by whom.
- (b) Whether Mr Wenzel was found guilty as a principal or as a party to fraud committed by others.
- (c) Whether other persons such as D, Mr Justice, Ms Gwilliam and Ms Weir were so under Mr Wenzel's control or influence that he was responsible for their actions.

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<sup>12</sup> At [76] – [77].

<sup>13</sup> At [78] – [81].

- (d) Whether Mr Wenzel had a claim of right (including his contention that he believed the transactions were lawful due to the involvement of professionals such as D and Mr Justice).
- (e) Whether in relation to the charge brought under s 45 of the Serious Fraud Office Act Mr Wenzel had possession or control of the documents.

[35] For the Crown, Mr Boldt acknowledged there were shortcomings in the reasons given by the Judge for the verdict, but he submitted that the Judge had made findings on the key issues which were:

- (a) Whether there was a fraudulent scheme.
- (b) Whether Mr Wenzel was a party to it.

[36] Mr Boldt submitted that the Judge proceeded from the starting point that there was a fraudulent scheme. Counsel characterised this as an inevitable conclusion given the strength of the Crown case. He noted that the Judge had rejected the evidence of Mr Wenzel and Ms Case on the critical issues. It was implicit in the rejection of their evidence that the Judge was not persuaded there was any basis for Mr Wenzel to believe his actions were justified.

[37] Further, the acceptance by the Judge of the evidence of Mr Justice and the rejection of the evidence by Mr Wenzel meant that the Judge accepted Mr Wenzel was responsible for orchestrating each aspect of the fraudulent conduct relied upon and was not merely an unwitting bystander to the actions of others. Mr Boldt submitted, in relation to the agency issue, that it was unnecessary for the Judge to reach a conclusion as to whether Mr Wenzel was a principal or agent. Nor was it necessary for the Judge to reach any conclusion about D's guilt or otherwise.

[38] Finally, Mr Boldt submitted that the factual findings referred to by the Judge at sentencing could be taken into account as part of his reasons for verdict.

## Discussion

[39] The obligation of a Judge hearing a criminal trial without a jury is not in dispute. The verdict of a Judge sitting alone in indictable cases is to be treated as the equivalent of the verdict of a jury. The grounds of appeal are limited by s 385(1) of the Crimes Act in the same way as if the accused had been tried before a Judge with a jury. As this Court held in *R v Connell*,<sup>14</sup> careful consideration is an elementary need but long exposition is not required. Although recognising that the extent of reasoning required will vary according to the circumstances of the case, this Court said:<sup>15</sup>

... in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

[40] More recently, the principles stated in *Connell* were confirmed by this Court in *Eide v R*<sup>16</sup> with the following additional observations in respect of fraud prosecutions:

[21] The problems with short-form judgments are particularly acute in fraud prosecutions. The parties (ie the prosecutor and accused) are obviously entitled to know the key elements of the Judge's reasoning. In a case of any complexity, this will not be possible unless the Judge provides an adequate survey of the facts. As well, in this context a Judge is addressing an audience which is wider than the prosecutor and accused. If the verdict is guilty, the Judge should explain clearly the features of the particular scheme which he or she finds to be dishonest. There is a legitimate public interest in having the details of such a scheme laid out in comprehensible form. Similar considerations apply if the verdict is not guilty. Further, some regard should be had to how the case will be addressed on appeal. A judgment which is so concise that some of the key facts in the case are required to be reconstructed by this Court on appeal is too concise.

[41] We would add that where there are multiple counts in an indictment, the critical factual and legal elements of each count in the indictment must be separately

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<sup>14</sup> *R v Connell* [1985] 2 NZLR 233 at 237.

<sup>15</sup> At 238.

<sup>16</sup> *Eide v R* [2004] NZCA 215.

considered and conclusions reached. This does not mean that counts having common factual and legal elements may not be grouped for convenience, but separate consideration is reached where factual or legal elements are different.

[42] As this Court held in *R v Meyrick*,<sup>17</sup> the appeal must be determined on the basis of the Judge's findings of fact made at the time he delivered his verdict and findings made by the Judge at sentencing must be put to one side.

[43] The legal elements of the fraud charges under the Crimes Act involved in this case may briefly be summarised as follows:

- Section 229A
- (a) The accused used a document:
  - (b) That was capable of being used to obtain a pecuniary advantage;
  - (c) For the purpose of obtaining a pecuniary advantage for himself or for another person; and
  - (d) With intent to defraud.
- Section 228(b)
- (a) The accused used a document:
  - (b) With intent to obtain pecuniary advantage;
  - (c) Dishonestly; and
  - (d) Without claim of right.
- Section 240
- (a) The accused by deception (in one or more of the ways defined in s 240(2));
  - (b) Without claim of right;
  - (c) Caused or induced the lender to execute a document capable of being used to derive a pecuniary advantage.

[44] Section 229 of the Crimes Act was repealed and replaced with effect from 1 October 2003 as part of a substantial revision of Part 10 of the Crimes Act. The Supreme Court has recently considered the elements of dishonesty required in

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<sup>17</sup> *R v Meyrick* [2005] NZCA 150 at [36].

respect of these provisions in *R v Hayes*,<sup>18</sup> observing in respect of s 229A that the key mental ingredient of intent to defraud was conventionally equated with dishonesty.<sup>19</sup> If the appellant Ms Hayes had believed that what she was doing was in accordance with her legal rights and obligations she would have had a defence.

[45] In relation to s 228, the term “dishonestly” is defined by s 217:

**dishonestly**, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.

[46] And “claim of right” has replaced the former expression “colour of right” and is defined by s 2 as follows:

**claim of right**, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed.

[47] As the Supreme Court held in *Hayes*, a qualifying belief for the purposes of each of the expressions “dishonestly” and “claim of right” does not have to be reasonable or based on reasonable grounds.<sup>20</sup> In *Hayes*, the Supreme Court emphasised the importance of distinguishing between two concepts relevant to the issue of dishonesty. The first was whether conduct of the kind in question should be characterised as dishonest and the second was whether the mind of the particular accused was dishonest. It is the latter concept which is generally at issue at trial.<sup>21</sup> The Supreme Court went on to say:<sup>22</sup>

The objective facts of a particular case may be such that the jury can properly infer that the accused had a dishonest mind unless he or she can raise a reasonable doubt on the basis of a relevant but mistaken belief. In this respect the international jurisprudence is consistent with New Zealand’s view that, provided the accused’s belief is actually held, it does not have to be reasonable. This approach recognises the common law principle that mens rea is, in most cases, a subjective concept. Hence a mistaken belief in facts or circumstances that would, if correct, exculpate the accused does not have to be reasonable or based on reasonable grounds.

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<sup>18</sup> *R v Hayes* [2008] 2 NZLR 321.

<sup>19</sup> At [32] referring to *R v Coombridge* [1976] 2 NZLR 381 (CA) at 386-387.

<sup>20</sup> At [34], [35], [42], [43] and [58].

<sup>21</sup> At [42].

<sup>22</sup> At [43].

[48] This Court summarised the position in *Ede v R*.<sup>23</sup>

... It is essential that the jury form a view as to whether the defendant's conduct was, in all the circumstances, dishonest. The jury makes that assessment based on the objective facts as they find them, which facts will almost inevitably include findings as to the accused's knowledge of relevant facts. But that is just the first step. The jury must then determine whether the defendant knew or believed his or her conduct was dishonest.

[49] In *Ede*, this Court set aside a jury verdict because the Judge had failed to put the appellant's defence to the jury. That defence was that he did not realise he was doing anything wrong because a solicitor had told him it was in order to sign the relevant documents. It was held that if the appellant could satisfy the jury there was a reasonable possibility that he believed he was acting within the law, he would have had a defence.<sup>24</sup>

[50] The elements of the new crime of deception under s 240 of the Crimes Act were discussed by this Court in *R v Morley*.<sup>25</sup> The crimes alleged in *Morley* were under s 240(1)(d) which deals with causing loss by deception but the element of deception is also essential to the crime alleged in the present case brought under s 240(1)(a).

[51] The term "deception" is relevantly defined in s 240(2):

**240 Obtaining by deception or causing loss by deception**

...

(2) In this section, **deception** means—

(a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

(i) knows that it is false in a material particular; or

(ii) is reckless as to whether it is false in a material particular; or

(b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

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<sup>23</sup> *Ede v R* [2010] 3 NZLR 557 at [35].

<sup>24</sup> At [51].

<sup>25</sup> *R v Morley* [2010] 2 NZLR 608.

(c) a fraudulent device, trick, or stratagem used with intent to deceive any person

[52] It follows from this discussion that it was essential for the Judge to make clear findings on the mental elements of each of the different categories of fraud alleged. In particular, the Judge had to find in relation to the counts under s 229A of the Crimes Act that Mr Wenzel acted with intent to defraud and that he acted dishonestly and without claim of right in relation to s 228(b). In respect of the counts under s 240, it was essential for him to find that Mr Wenzel acted with intent to deceive and without claim of right.

[53] We are satisfied there was a fundamental failure by the Judge to discharge his obligations in terms of the principles established in *Connell*. The starting point was for the Judge to identify the legal elements the Crown was required to prove in the case of each of the categories of fraud alleged. He did not do so. Had he commenced with this basic step, it would have provided a template for him to have made the necessary findings on each element. An analogy might usefully be drawn with the question trail now commonly used in jury trials. These set out the essential issues for the jury to determine before reaching its verdict.

[54] We accept that the Judge made some important general findings of fact. For example, he found that Mr Wenzel was “running the show”; that he had duped Ms Gwilliam and Ms Weir; and that he directed the information which was to be supplied in support of finance applications. But these findings did not go nearly far enough. It was essential for the Judge to make separate findings on the facts and legal elements relating to each charge. Regrettably, the Judge did not do so despite the Crown’s careful closing submissions which clearly identified the witnesses and documents the Crown relied upon in each case. The Crown’s submissions also clearly stated the false or deceptive representations it relied upon in each case.

[55] To take an example. In respect of the property transaction which was the subject of counts 1, 2 and 3, the Crown’s closing submission summarised the nature of the transaction and the evidence relied upon. The Crown identified the fraudulent aspect of the transaction as being false representations as to the salary of Ms Weir who was to be a shareholder in the company purchasing the property. In order to link Mr Wenzel to the salary letter, there was evidence from a document examiner

that the signature on the letter was his. The Crown alleged that Mr Wenzel arranged the solicitors for the purchaser.

[56] For these charges, the Judge needed to:

- (a) Identify the document or documents relied upon by the Crown.
- (b) Find that the documents were capable of being used to obtain a pecuniary advantage.
- (c) Find that Mr Wenzel used the document for the purpose of obtaining a pecuniary advantage.
- (d) State how and through whom that was done.
- (e) Find that Mr Wenzel acted with intent to defraud or, in the case of s 229A, that he acted dishonestly and without claim of right.

[57] The Judge made no findings on any of those **essential elements**. His obligation was systematically to make the essential findings on the factual and **legal elements** relevant to each count following the pattern we have identified. We accept that there were commonalities in the deceptive conduct alleged. An example is the 16 counts which relied on false representations as to the payment of the deposit. But this particular representation was not common to all the counts and, in any event, the circumstances differed in relation to each transaction. The terms of the representations as to the deposits took two different forms and needed separate consideration and findings as to their effect.

[58] Given that this was a fraud case, the most striking deficiency in the Judge's reasons for verdict is his failure to make any specific finding that Mr Wenzel was dishonest and that he acted without claim of right. The general references by the Judge to fraud and illegal schemes do not satisfy the obligations incumbent on the Judge in this respect. It is no answer to say that there was ample evidence to support the necessary findings if the Judge had made them. It is for the Judge to make the

findings. It is no part of the functions of an appellate court in the context of criminal proceedings to make the findings itself.

[59] We are unable to accept the proposition urged on us by the Crown that we should infer a finding of dishonesty on the part of Mr Wenzel from the Judge's rejection of the evidence of Mr Wenzel and Ms Case and his acceptance of the evidence of the Crown witnesses including, for example, the evidence of Mr Justice. The evidence called by the Crown was to establish the facts. It was for the Judge to draw the appropriate conclusions from the facts including, critically, whether Mr Wenzel had acted dishonestly along with the associated issue of whether there was a reasonable possibility that he acted in the belief his actions were lawful. The rejection of Mr Wenzel's evidence meant he had to examine the Crown evidence on this point and make his findings. Did Mr Wenzel know that false representations were being made and did he intend to defraud the lenders? These were basic questions which went unanswered.

[60] Another critical area in which the Judge failed to make detailed findings was on the mechanism by which the frauds were perpetrated and through whom. There were very few instances where the Crown was able to show that Mr Wenzel was directly involved in the frauds alleged in the sense that he personally made false representations. Rather, the Crown case was that Mr Wenzel was a person who devised the scheme and directed others to implement it.

[61] To that extent, the Crown contended that it was not necessary to demonstrate that those who carried out the scheme were themselves guilty of criminal activity. If they were, then Mr Wenzel could be liable as a party to that offending under s 66(1) but, alternatively, he could be liable as principal acting through innocent agents. Although the Crown had alleged that D was guilty of fraud in relation to the 16 charges laid jointly against him with Mr Wenzel, it was not essential that the Crown prove that D was in fact guilty since it could rely on the alternative basis that Mr Wenzel was the principal who acted through D in relation to the alleged misleading representations about the payment of deposits.

[62] While the Judge made generalised findings about Mr Wenzel's role in the company and in the transactions, he did not identify whether he found Mr Wenzel guilty as a party to offending by others, or as a principal acting through innocent agents. Nor did he identify the persons through whom Mr Wenzel was alleged to have acted in each case.

[63] There are also difficulties in the Judge's reasons for his verdict on the charge under s 45 of the Serious Fraud Office Act. Although he identified most of the elements, he did not identify the need for the Crown to prove the absence of lawful justification and excuse for failing to produce the documents. Nor did he make any findings on the elements he did identify. Instead he simply stated his conclusion.

[64] Even on the critical issue of whether Mr Wenzel had control of the documents, it was not sufficient to rely on his general finding that Mr Wenzel was "in charge of the show". The evidence in that respect was directed to Mr Wenzel's role in the alleged fraudulent scheme. It could not safely be assumed that Mr Wenzel had control of the documents after the Serious Fraud Office began its investigations. The documents belonged to the SCI group and, on Mr Wenzel's evidence, he had given them back to Ms Case. The critical question was whether Mr Wenzel had control of the documents at the time the demand was made.

[65] It may be arguable that the relevant count in the indictment is invalid since it specified two separate dates upon which demand was made for the documents but we make no firm finding on this.<sup>26</sup>

**[66] In summary, the Judge did not adequately discharge his responsibilities in that:**

- (a) He failed to identify and make findings on each of the essential legal and factual elements required to be proved in relation to each count.
- (b) He made no findings on the critical issue of Mr Wenzel's alleged dishonesty and the associated issue of claim of right.

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<sup>26</sup> See *Mason v R* [2010] NZSC 129 at [11] and [12].

- (c) He failed to make specific factual findings as to the false representations and/or deception relied upon by the Crown in relation to each count.
- (d) He failed to make specific findings as to the factual and legal basis on which Mr Wenzel was held responsible for what took place in relation to each count.
- (e) He failed to identify whether he found Mr Wenzel guilty as a principal or as a secondary party.
- (f) He failed to correctly identify all the elements of the charge under s 45 of the Serious Fraud Office Act and failed to make the necessary factual findings on that charge.

[67] In consequence, we were obliged to find there had been a miscarriage of justice. Because the Judge did not make the necessary findings of fact on the elements of each charge, we could not be confident that the Judge directed himself correctly. Just as importantly, Mr Wenzel was entitled to know what the Judge's reasons and findings were in order to determine whether he had any basis to challenge the verdicts.

### **Mr Wenzel's liability as a party to the jointly laid counts**

[68] In oral argument, Mr Meyrick accepted that Mr Wenzel could have been found guilty on either of the legal bases identified by the Crown. However, so that the issue is clear for the purpose of Mr Wenzel's re-trial, it is appropriate that we record our acceptance of Mr Boldt's submission on this point and the authorities he drew to our attention.

[69] Mr Boldt accepted it was only rarely that Mr Wenzel was shown to have made a fraudulent representation personally. As noted, the Crown's allegation was that Mr Wenzel dictated and directed the actions of others. For example, the Crown case was that Mr Wenzel created a template letter which was sent to D in each case instructing him that deposit cheques provided by an entity known as the ICU Trust

were not to be banked. Mr Boldt said the Crown did not know the exact dynamics within the SCI group or the extent to which those who wrote the misleading letters or filled out false sale and purchase agreements fully appreciated the dishonesty involved in doing so. Those who gave evidence insisted that they were not aware that they were acting dishonestly and stated that they were simply doing as they were told by Mr Wenzel.

[70] But Mr Boldt submitted that Mr Wenzel's liability did not turn on the Crown's ability to prove the charges against D or anyone else involved in the transactions. If D was acting with fraudulent intent when he agreed to write the letters, then both he and Mr Wenzel could be liable under s 66(1) either as the principal offender or as a party. On the other hand, if D was not shown to be guilty then Mr Wenzel could be found guilty upon the principle known as innocent agency. The same could apply to other persons through whom Mr Wenzel acted.

[71] Mr Boldt cited two authorities for these propositions. The first was *R v Paterson*<sup>27</sup> where this Court said in relation to s 66(1) of the Crimes Act:

In the present case the question which we have to decide is whether or not the words "Actually commits the offence" are in their ordinary meaning apt to describe a person who, with the necessary criminal intent, uses another but innocent person as an instrument to perform the physical act necessary to commit the particular crime. In our view the words in question are perfectly appropriate to cover such a case. Indeed, we believe that the ordinary man in the street would have no hesitation in saying that a dishonest employee who made use of an innocent carrier to bring about the physical taking of goods from his employer's premises would be a person who "actually committed" the crime of theft.

[72] The second is the more recent decision of this Court in *R v Huata*:<sup>28</sup>

We agree that the expression "innocent agent" is often used where the actus reus of a crime has been performed by a third party on the instructions of the accused, see for instance *R v Paterson* [1976] 2 NZLR 394 (CA) and *R v Fowlds* CA222/00 13 December 2000. But there is no credible basis upon which criminal liability of the primary offender (ie the person who commissioned the offence) can depend on the innocence of the agent. If the agent is innocent, the primary offender is guilty as a principal offender. If the agent is not innocent, then the primary offender will likewise be guilty, at least as a party.

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<sup>27</sup> *R v Paterson* [1976] 2 NZLR 394 at 396.

<sup>28</sup> *R v Huata* CA411/05, 20 October 2006 at [58].

[73] We are satisfied that there is a proper legal foundation for the Crown to proceed on the alternative bases Mr Boldt has outlined.

### **The remaining issues**

[74] It is unnecessary for us to deal in detail with the remaining issues raised by Mr Meyrick. Given the grounds upon which the application by D for stay/discharge was made, we are not persuaded that Mr Wenzel was prejudiced by the unfortunate failure of the Judge to give reasons for his decision on this application. The position might have been different if the application had been made on the grounds of lack of evidence.

[75] Mr Wenzel was potentially prejudiced through his lack of legal representation for the first five weeks of his trial during which several important Crown witnesses were called. In that respect a report from a psychologist was placed before us without opposition from the Crown. The report indicated that Mr Wenzel suffers from dyslexia which reduces his ability to process information quickly. However, we make no finding as to whether Mr Wenzel was prejudiced in these respects or whether Mr Wenzel, by his conduct, effectively waived his right to representation.<sup>29</sup>

[76] We also record Mr Meyrick's acceptance during the course of oral argument on the appeal that the ground for objection to the introduction of evidence from the legal practitioners who acted for the purchasers involved in the transactions was not sustainable. It was not open to Mr Wenzel to object on the grounds that their evidence was the subject of legal professional privilege unless he was the client involved. As we pointed out, such an assertion would have been inimical to his defence.

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<sup>29</sup> See *R v Hill* [2004] 2 NZLR 145 (CA).

## **Mr Wenzel's personal submission**

[77] We record that Mr Wenzel provided us with two large volumes of material which are, with respect to him, completely incomprehensible. We do not propose to make any comment about this material.

[78] We also record that Mr Meyrick addressed us briefly on one aspect of Mr Wenzel's personal submission. This related to an argument based on s 71 of the New Zealand Constitution Act 1852 (UK). As we understand this argument, it proceeds on the basis that Māori have authority in native districts to be established under that legislation to govern in accordance with their customs and usages. We understand that, in consequence, it is suggested the courts do not have jurisdiction over Māori. This argument has been rejected at least twice by this Court. The native districts contemplated by the legislation were never established. The relevant legislation has long since been repealed and the authority of the courts confirmed by later legislation.<sup>30</sup>

## **Conclusion**

[79] It was for these reasons that we allowed the appeal and made the orders recorded at the commencement of this judgment.

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<sup>30</sup> *R v Knowles* CA146/98, 12 October 1998; *R v Waetford* CA406/99, 2 December 1999. See also *Barrett v Police* HC Hamilton CRI 2003-419-64, 14 June 2004 at [15] – [22].