SUPREME COURT OF QUEENSLAND

CITATION:	*R v Campbell* [2019] QCA 127
PARTIES:	**R** **v** **CAMPBELL, Catherine Faye** **(appellant)**
FILE NO/S:	CA No 73 of 2018 DC No 224 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton – Date of Conviction: 28 February 2018 (Burnett DCJ)
DELIVERED ON:	25 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2019
JUDGES:	Holmes CJ and Fraser and McMurdo JJA
ORDERS:	**1. On counts 4 and 6 of the indictment:** **(a) the appeal is allowed;** **(b) the convictions are set aside;** **(c) a new trial is ordered.** **2. The appeal is dismissed in relation to counts 2, 3, 5 and 7 of the indictment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the appellant alleged that the trial judge's failure to direct on the use of hearsay evidence, combined with the trial judge's refusal to admit evidence of an intention to marry, rendered the appellant's conviction on the count of aggravated fraud unreasonable – where the appellant further alleged that the Crown had led "incomplete evidence" in failing to undertake further investigations of telephone accounts for some phone numbers that the appellant had provided at an earlier civil trial, rendering the convictions on the remaining counts unreasonable – whether the matters raised were capable of rendering the verdicts unreasonable – whether it was reasonably open to the jury to be satisfied

beyond reasonable doubt of the appellant's guilt on the evidence before it

CRIMINAL LAW – APPEAL AND NEW TRIAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASES – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the trial judge admitted a document into evidence as a business record pursuant to s 93(1) of the *Evidence Act* 1977 – whether the maker of a record from information told to him by another meets the description "the person who supplied the information" for the purposes of s 93(1)(b) of the *Evidence Act* 1977, on its proper construction – whether the document was wrongly admitted – whether a miscarriage of justice resulted – whether the proviso in s 668E(1A) of the *Criminal Code* should be applied on the basis that no miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASES – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the trial judge ruled that evidence of the appellant's conversation with a witness was admissible as an admission against interest – where the appellant alleges the evidence was irrelevant and hearsay – whether the evidence was relevant to establishing the appellant's intent to defraud – whether the evidence was properly admitted on that basis

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the aggravated fraud alleged was the procuring of a property transfer from a man now deceased – where the appellant alleged that a miscarriage of justice occurred due to the trial judge's non-direction as to the use of hearsay evidence in the form of statements made by the deceased to others about his intentions to transfer part of his property – whether the evidence was hearsay or evidence of conduct giving rise to an inference – whether, in any event, any miscarriage of justice could have resulted from the trial judge's failure to give a direction

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE

– MISDIRECTION OR NON-DIRECTION – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the appellant alleged that the trial judge failed to properly summarise the defence case in failing to instruct the jury to have regard to testimony of a witness given at a previous trial – where the witness acknowledged giving his previous evidence but was not asked whether it was true – whether the trial judge could have instructed the jury to have regard to the content of the evidence when the witness had not adopted it

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the aggravated fraud alleged was the procuring of a property transfer from a man now deceased – where the trial judge refused to permit the appellant to cross-examine witnesses about alleged statements made to them by the deceased of his intention to marry the appellant – whether those statements, if proved, were admissible as evidence of a fact relevant to an issue – whether the trial judge should have permitted the applicant to cross-examine the witnesses in order to elicit the evidence – whether a miscarriage of justice resulted from the trial judge's refusal to permit cross-examination of the witnesses – whether the proviso in s 668E(1A) of the *Criminal Code* should be applied on the basis that no miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – where the appellant was convicted at trial of one count of fraud with a circumstance of aggravation, three counts of making a false declaration, and two counts of perjury – where the appellant contended that the Crown had led "incomplete evidence" at trial by failing to undertake further investigations of telephone accounts for some phone numbers that the appellant provided at a previous civil trial – where no reference was made to these telephone numbers during the criminal trial and there was no evidence before the court as to whether there had been any investigation of the numbers to which the appellant referred or what any of the telephone accounts could have disclosed – whether a miscarriage of justice could be found to have resulted from the Crown's failure to investigate the telephone numbers and obtain the relevant records

Criminal Code (Qld), s 668E(1A)

Evidence Act 1977 (Qld), s 59(2), s 93(1), s 93C, s 96(1)
Recording of Evidence Act 1962 (Qld), s 10
Succession Act 1981 (Qld), s 5AA

Baker v The Queen (2012) 245 CLR 632; [2012] HCA 27, cited
Bannon v The Queen (1995) 185 CLR 1; [1995] HCA 27, cited
Collins v The Queen (2018) 92 ALJR 517; (2018) 355 ALR 203; [2018] HCA 18, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Burns (2001) 123 A Crim R 226; [2001] SASC 263, cited
R v Leroy [1984] 2 NSWLR 441, cited
R v Mazzone (1985) 43 SASR 330; [1985] SASC 8793, cited
R v Murdoch [2017] QCA 239, cited
R v Ross [2010] QCA 63, cited
R v TJW [1989] 1 Qd R 108, cited
Walton v The Queen (1989) 166 CLR 283; [1989] HCA 9, considered
Ward v H S Pitt & Co [1913] 2 KB 130, cited

COUNSEL: M W C Harrison for the appellant
C N Marco for the respondent

SOLICITORS: Hannay Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The appellant appeals her convictions by a jury of one count of fraud with a circumstance of aggravation, three counts of making a false declaration and two counts of perjury. She does not seek to appeal a further conviction at the same trial, of fraud simpliciter. The appeal grounds are: that the convictions were "unsafe"; that evidence, in the form of a financial synopsis submitted in connection with an insurance claim and a conversation with a witness named Heremia, was wrongly admitted; that the trial judge failed to direct about the use of hearsay evidence; that his Honour failed properly to summarise the defence arguments; that his Honour wrongly refused to allow the appellant to adduce evidence that the man against whom she was alleged to have committed fraud had expressed an intention to marry her; and that the Crown, having improperly failed to undertake further investigations of telephone accounts for some phone numbers which the appellant had provided at an earlier civil trial, had led "incomplete evidence".

The Crown case

[2] The Crown case was that the appellant had in various dishonest ways sought to obtain benefits from the estate of Christopher Butler, who died on 18 September 2011. She had registered his motor vehicle in her own name and sold it (count 1, fraud, which is not the subject of appeal) and had fraudulently transferred his house to a trust, the beneficiaries of which were herself and her two sons (count 2, fraud with a circumstance of aggravation). The appellant had brought a claim for family provision from Mr Butler's estate on the false basis that she had been in a de facto relationship with him for more than two years.[1] For the purpose of that claim, it

[1] The claimed duration of the relationship was significant because s 5AA of the *Succession Act* 1981 requires that in order to be the "spouse" of a deceased person, and thus entitled to apply for provision

was alleged, she had falsely sworn in affidavits and in evidence to matters concerning her respective relationships with Mr Butler and another man, Jeremy Johnson, giving rise to the remaining counts on the indictment.

The applicant's statements in the family provision claim

[3] The two affidavits which were the subject of the false declaration charges were tendered in evidence. In the first, sworn on 6 January 2012, the appellant said that her first contact with Mr Butler occurred in February 2009, when he rang her home phone number. He explained that her number had appeared on his telephone bill and he was trying to establish to whom it belonged. After some discussion, they established that the father of her two sons had boarded with him in late 2008 and the boys had visited their father at Christmas that year. The appellant went on to say in the affidavit that thereafter, she regularly spoke by telephone with Mr Butler. Around 24 February 2009, she drove with her sons to Mackay to meet him, staying for two days. She met him again at Bribie Island in March 2009 and once more visited him in Mackay for two days in April 2009, becoming intimate with him on this visit. These statements about travel to Mackay were the subject of the alleged falsity in count 3.

[4] The second of the relevant affidavits was sworn on 28 June 2012, apparently in response to material filed by the respondents to the family provision application. In it, the appellant made the statement,

> "I had a brief rebound liaison with a person called Jeremy Neil Johnson from the end of July 2008 to the 23rd of January 2009".

That statement is the subject of count 4; on the Crown case, Mr Johnson was the appellant's de facto partner during part of the two year period for which she claimed to be in a relationship with Mr Butler. In the same affidavit, the appellant swore that, having met Mr Butler by telephone in February 2009, she met him:

> "… in person on a number of Occasions (sic) to August 2009 at which time we established a mutual commitment to each other".

It was the assertion that they had met on a number of occasions between February and August 2009 which was the subject of the falsity alleged in count 5.

[5] The trial of the family provision application took place in November 2012. An audio tape and transcript of the appellant's cross-examination by counsel for the respondents were tendered in evidence at her criminal trial, pursuant to s 10 of the *Recording of Evidence Act* 1962. In that cross-examination, she was asked about Jeremy Johnson's assertion that he had been in a de facto relationship with her from October 2008 to June 2010, and responded that it was a "load of rubbish". (She went on to say that she had never been in a de facto relationship with him.) The denial of a relationship from October 2008 to June 2010 gave rise to the charge of perjury which was count 6.

[6] As to count 7, the appellant was asked the question and gave the answer which follow:

> "And it's your case that after that initial telephone contact in February of 2009 that the two of you remained in regular contact and

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from the estate, the claimant must have lived with him or her on a genuine domestic basis for a continuous period of at least two years before the death.

> saw each other essentially on a monthly basis from that point onwards?—If – if – if not more frequently, yes."

She went on to say that Mr Butler had visited her at Coomera and that she had visited him in Mackay in April 2009. Again, on the Crown case, the claim that the appellant and Mr Butler saw each other at least monthly was false and constituted perjury.

The relationship with Mr Johnson

[7] Jeremy Johnson gave evidence that he had been in a relationship with the appellant from May 2008 to June 2010. From October 2008, he said, he was living with her and her sons at an address at Upper Coomera. He gave little detail of their domestic arrangements, apart from saying that he and the appellant shared responsibility for taking the two children to and from childcare. In October 2009, he and the appellant had travelled to Thailand together for twelve days, staying in the same hotel room and having sexual intercourse. Both had dental and cosmetic treatment while they were there. He could not remember whether he had reimbursed the appellant, who had paid for the trip. At Christmas 2009, the appellant's stepmother and father had joined them at Coomera for Christmas and in March 2010, he, the appellant and her children travelled for two weeks to New Zealand where they stayed with the appellant's relatives; he and the appellant shared a room.

[8] Nineteen photographs of Mr Johnson and the appellant were tendered, 18 of them from the Thailand holiday. Most of them showed Mr Johnson and the appellant in close physical contact, certainly looking the part of a couple. They included a shot of Mr Johnson with his tongue in the appellant's ear and another of the pair with tongues touching.

[9] Mr Johnson denied propositions put to him by the appellant, who was unrepresented at the trial, that he had joined her on the Thailand holiday as a friend and had stayed in a separate room. He similarly denied that when they travelled to New Zealand they had only stayed together for one night. He agreed, however, that he never became a lessee of the Coomera property or took responsibility for insurance or utility bills. He also agreed that he had a sexual relationship with another woman, lasting, he said, only two days, during the period he was living at the appellant's house. A witness named Garrett gave evidence, however, that she had continued a physical relationship with Mr Johnson through most of 2009, although they did not live together. The appellant put to Mr Johnson that although he had lived with her from October 2008 and shared her bed in that time, after he had slept with Ms Garrett in January 2009 she had not had sex with him again. Mr Johnson maintained that after the two-day liaison with Ms Garrett he had in fact gone back to live with the appellant and they had continued to have sexual intercourse.

[10] The appellant's biological mother, Ms Smith, gave evidence that she visited her daughter at Upper Coomera in July or August 2010. Jeremy Johnson was staying at the property at that time.

[11] In support of its case that Mr Johnson had been the appellant's de facto spouse, the Crown tendered an undated document headed "Financial Synopsis". It was produced at the trial by an employee of NRMA Insurance who had no personal knowledge of it, but, led by the prosecutor, agreed that it was the product of a meeting between a representative of NRMA and the appellant on 25 August 2010. The synopsis appears to be a record of the appellant's assets and liabilities,

completed by a claims investigator, and to be signed by the appellant. The significant portion reads:

> "Spouse/Partner: JEREMY JOHNSON. (DOES NOT RESIDE WITH INSURED)".

Another entry, "NO JOINT FINANCES", also relates to Mr Johnson. The second page contains the notation "Jeremy contributes to rent (variable amount)". That page was apparently signed by the appellant as acknowledging that the two pages of the synopsis accurately described her current financial position. In his closing address, the prosecutor invited the jury to compare the signature on the document with that of the appellant on the affidavits in evidence. The admission of that document was the subject of an appeal ground.

[12] A police officer, Detective Shields, produced calendars for the years 2009 through to 2011 inclusive, compiled from bank records for the accounts of the appellant and Mr Butler for the years 2009 through to 2011, and their telephone records for the 2010 year. (The records themselves were also tendered in evidence.) The calendar (and records) showed bank transfers from Mr Johnson to the appellant on eight occasions. The first was in March 2009 and contained a reference to his son. Others in July and November 2009 contained affectionate notations: "luv U baby X" and "Mwah. XX". There were five more transfers of funds between February and May 2010, although without fond messages; one more prosaic notation read "window/power/food". In addition, there were text messages or telephone calls from the appellant to Johnson on an almost daily basis from the commencement of the telephone records on 1 January 2010 until the end of August that year, with less frequent text messaging in September and October.

The commencement of the relationship with Mr Butler

[13] A friend of Mr Butler's, Mr Davies, said that he had lived with Mr Butler for about two months from 15 April 2009 and had also spent Christmas 2009 at his home; in neither period had he seen the appellant on the premises. Mr Davies had stayed with Mr Butler on 30 December 2010; again, the appellant was not there. In April 2011, he and his daughter stayed overnight at Mr Butler's house. The appellant was there on that occasion. Mr Butler slept in the lounge room with Mr Davies while the latter's daughter slept in Mr Butler's bedroom. Mr Davies' daughter confirmed his evidence and also said that she saw no signs of any female presence in Mr Butler's bedroom. Both Mr Davies and his daughter said that they did not see any signs of affection between the appellant and Mr Butler.

[14] Another of Mr Butler's friends, Mr Munro, who had worked with him in the mining industry and also lived at or near Mackay, said that he had regularly visited Mr Butler over a seven year period prior to his death in 2011. He had first encountered the appellant at Mr Butler's house in March or April in 2011, when she arrived with her children and stayed for 10 or 20 minutes. Like Mr and Ms Davies, he saw no manifestation of affection between her and Mr Butler. Mr Munro's former partner, Ms Sanderson, said that she had first met the appellant in February 2011. The appellant told her that she and her children were staying with Mr Butler until they got another house and that she and Mr Butler were "not together"; they were friends and slept in separate rooms.

[15] Friends of the appellant who had conversations with her about Mr Butler gave similar evidence about her denial of any relationship. Ms Dally said that in December 2010, the appellant had told her that she was going to Mackay with her mother and children at Christmas. At some later time she had telephoned Ms Dally from Mackay and told her that her sons had recognised Mr Butler's house from their stay there with their father. She had described Mr Butler as a "really nice guy", but had said that they were not in a relationship.

[16] Ms Heremia gave evidence that she had been a childhood friend of the appellant's, but that they had lost contact until mid-2010, when they began communicating via Facebook. At the stage, Ms Heremia was living near Mackay. The appellant had told her she was on the Gold Coast and that she was single. Just after Christmas 2010, the appellant let Ms Heremia know that she was bringing her sons to Mackay to camp over the New Year period, and they met on 30 December. The appellant told her then that she had that day met Mr Butler for the first time; Ms Heremia herself met Mr Butler in the following days. The appellant told her she planned to return to the Gold Coast and move to the Sunshine Coast to live with her biological mother and stepfather.

[17] Around the end of January, Ms Heremia and her husband stayed for a few days at Mr Butler's house. The appellant was there; she slept on a couch while Ms Heremia and her husband slept in her bedroom with the appellant's children. Mr Butler slept in his own bedroom. Ms Heremia and her husband visited again in June of that year. On this occasion, Mr Butler was not there. The appellant slept in her own bedroom with her sons, while Ms Heremia and her husband slept in Mr Butler's room.

[18] Four neighbours of Mr Butler, Mr and Mrs Watson, Ms Sturgeon and her partner Mr Gordon Johnson gave evidence, the general effect of which was that the appellant had not been seen at his Mackay house before, at the earliest, late December 2010. Each of them acknowledged, though, that they had given different accounts previously in evidence at the civil trial of the appellant's claim for family provision. Mr and Mrs Watson said they had simply been mistaken in giving their evidence at that trial. Mrs Watson said that she had not checked the dates before saying there that the appellant arrived in late 2009. However, she agreed with evidence she had given at the civil trial that Mr Butler appeared happier once the appellant moved in with him and that there were some shows of affection between them. Mr Watson had said at the civil trial that he first saw the appellant in mid-2009, but he said now that he had confused her with another woman. He accepted that once the appellant and her children had moved in with Mr Butler, the latter seemed happier, and that he had said at the civil trial that the relationship appeared a loving one.

[19] A third neighbour, Ms Sturgeon, said that she had, wrongly, given evidence that she had seen the appellant before April 2010 because the appellant asked her to. In fact she first saw her at Mr Butler's property in about January 2011 and was first introduced to her in June or July of 2011. That witness had also made a statutory declaration (which was admitted into evidence) in November 2011 saying that she had known the appellant and her sons for approximately 12 months and had observed that there was a loving relationship between the appellant and Mr Butler and that he enjoyed his involvement with the two boys.

[20] Ms Sturgeon's partner, Gordon Johnson (who had no connection with Jeremy Johnson), said that he recalled first seeing the appellant in the 2010 Christmas period camped in a tent outside Mr Butler's house. He subsequently saw her on a number of occasions in Mr Butler's company, but he did not see signs of affection between them. In cross-examination, it was put to him that at the civil trial he had said that he first saw the appellant at Mr Butler's property in April 2010; he now conceded that he had a vague memory of someone being there at the time. He also conceded that he had at the civil trial said that the appellant and Mr Butler had been camping together, and he thought it might have been at Christmas 2010, but was not sure. In that trial he had also said that on more than one occasion he had seen the appellant and Mr Butler holding hands.

[21] The Crown objected to the tendering of a statutory declaration which Mr Johnson had made in November 2011, in which he said that the appellant and Mr Butler had a "loving relationship" and that Mr Butler had discussed his "intending marriage" to the appellant, on the basis that it was hearsay and was not admissible as a prior inconsistent statement. It was submitted that it did not fall within the exception to the hearsay rule applicable to statements made against interest by deceased persons. The trial judge accepted those submissions and excluded the document. For the same reason, objection was taken to Mr Johnson's being cross-examined about evidence he had given at the civil trial to the effect that Mr Butler had said that he intended to ask the appellant to marry him. The refusal to allow the appellant to adduce the evidence from Mr Johnson was the subject of a ground of appeal.

[22] A former girlfriend of Mr Butler, Ms Vickery, gave evidence that she lived with him for a period of several years before he went away to work in mining. However, Ms Vickery continued to live in his caravan at Nerang and he contributed to the cost of the caravan park site until December 2010. He visited her there and stayed in phone contact with her. The Crown put into evidence, without objection, what appeared to be an employee record, prepared on 11 August 2009, of the mining company for which Mr Butler had worked. Under "Personal Details", it gave, as Mr Butler's next of kin, Ms Vickery's name and her relationship to him as "De Facto". (That information had not appeared on the equivalent form for the previous year, so it was not merely a repetition of existing information.) In August 2010, Ms Vickery said, Mr Butler had come to stay with her at Nerang for a week, and they had spent a weekend at a Broadbeach resort, where they had shared a bed.

[23] The appellant's biological mother, Ms Smith, said that she and her then husband, Mr Rainbow, had moved to Australia in November 2010 and had rented a house at Sippy Downs in the Sunshine Coast area, contemplating that her daughter and children would move in with them. Before Christmas that year, she and the appellant had gone to a Sippy Downs school that the latter's two sons might attend in the following year. Ms Smith met Mr Butler in February 2011 when she and Mr Rainbow visited him and the appellant in Mackay; they seemed to be in a relationship. In April of that year she and Mr Rainbow moved to the Mackay area, and stayed for a few weeks at Mr Butler's house, where her daughter was living with her children. They returned in late August or the beginning of September 2011, and were there when Mr Butler died.

[24] The appellant's former step-father, Mr Rainbow, said that he had visited Mr Butler's residence for a week in the middle of 2011. He did not know where the appellant slept. He saw her kiss Mr Butler once. He was there again at the time of

Mr Butler's death. Under cross-examination, he accepted that he had given evidence at the civil trial and said that the appellant and Mr Butler seemed very happy, like any normal couple, and he had seen them go out together. The appellant's attempt to ask him about whether Mr Butler had raised marital plans with him was the subject of immediate objection, upheld by the trial judge. That ruling, too, was relied on as part of the basis for the appeal ground concerning the refusal to permit the appellant to adduce evidence of an intent to marry.

[25] From about February or March 2011, the appellant worked for a real estate agency in Mackay. One of her employers recalled that the appellant referred to Mr Butler as her uncle; the other said that she had heard the appellant's children give him that title. Another witness, a Mr Waterson, who had bought a property near Mr Butler's residence through the agency said that after the purchase in late July 2011, the appellant introduced Mr Butler to him as her uncle. Between the end of July and Mr Butler's death in mid-September he had seen the appellant and Mr Butler on a number of occasions and had never seen any physical contact between them or demonstrations of affection.

[26] A witness from Telstra produced telephone records for a mobile phone account and a landline account belonging to Mr Butler, two mobile phone accounts in the name of the appellant and a landline account also in her name. Under cross-examination, he confirmed that searches were undertaken by reference to telephone numbers rather than by names, although it was possible to do a name search. He conceded that if the appellant had other telephone numbers than the mobile numbers searched, records relating to them would not have been produced.

[27] Detective Shields, as already mentioned, produced calendars compiled from bank records for the years 2009 through to 2011 and the telephone records for the 2010 year. She had not obtained 2009 telephone records, because, as far as she had been able to establish, the first telephone contact between the defendant and Mr Butler took place on 30 December 2010, when there was a text message from the appellant to Mr Butler. She had (apparently contrary to the Telstra witness' evidence) conducted name searches, as well as number searches in relation to four telephone numbers. The only telephone numbers that she had been able to locate for Mr Butler were for a landline at his Mackay residence and a single mobile phone.

[28] The appellant tendered Telstra records[2] for Mr Butler's landline account for January and February 2009. They showed a two second call between Mr Butler's landline and the appellant's landline number on 24 January 2009, and on 1 February 2009, a couple of brief one and two second calls between the same numbers and then a more substantial call of about 23 minutes. On 23 February 2009, a telephone call took place from the appellant's landline to Mr Butler, with the call lasting a little over two minutes.

[29] There were no phone calls between the appellant and Mr Butler in the 2010 records, before a text message from the appellant on 30 December 2010. There were a

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[2] It used to be the convention that when an unrepresented defendant sought to put an uncontentious document into evidence, the prosecutor would tender it so that the defendant did not lose the right of last address, should he or she elect not to give evidence. That courtesy appears to have lapsed; at any rate, it was not observed in this case. The appellant, having tendered some documents, was required to address first, although she did not herself give evidence or call any witnesses.

number of telephone calls and text messages from Mr Butler to Ms Vickery over the 2010 year.

[30] Under cross-examination, Detective Shields explained that she had not listed every banking transaction which could be seen on the tendered bank records, but had confined the entries to those where it was evident where the transaction was undertaken. The bank records for 2009 showed that Mr Butler was regularly conducting transactions in Mackay. There were, however, two transactions at Bribie Island over a three day period in March 2009 and on another occasion, in June 2009, he conducted a transaction at the Sunshine Coast. As well, an AMEX statement for Mr Butler, tendered by the appellant, showed that Mr Butler had used his card at the Hamilton Airport Motel in Brisbane on 12 April 2009. Most of his 2010 financial transactions took place at Mackay, Hay Point or the Burton Coal Mine. The exceptions were a transaction at Newmarket in May and some others at Nerang and Mermaid Beach in August, which coincided with telephone calls from Mr Butler to Ms Vickery.

[31] Through 2009 and 2010, the appellant was conducting transactions almost exclusively in south east Queensland, although for a period in 2009 she appears to have been in Sydney. On 24 February 2009 and on each of the two days following, when, on her version of events, she visited Mr Butler with her sons for two days, EFTPOS transactions in Coomera were recorded. Detective Shields agreed that there were no transactions shown for the appellant between 1 and 14 April 2009; the appellant suggested that this might have been an occasion when she travelled to Mackay. The first record, in the form of a bank transaction, of the appellant's being in Mackay appears on 29 December 2010. The appellant's credit card statements showed her address until December 2010 at Upper Coomera; thereafter, the statements were sent to a Post Office Box at Maroochydore, until March 2010, when they were sent to a Post Office box at Mackay.

The transfer of the property

[32] In relation to count 2, concerning the house transfer, a Justice of the Peace, Mr Clark, gave evidence that on 20 July 2011, he witnessed the signatures of the appellant and Mr Butler on a transfer document by which Mr Butler transferred his interest in fee simple in his property at Mackay to the appellant. The transfer showed the consideration for it as "Gift". The document as ultimately lodged showed three typed names where the names of transferees were to be inserted: that of the appellant, followed by those of her two sons, with a notation in parentheses, "Mother To Sign". Each was described as "Joint Tenant". There had been alterations by hand, however. The three names and the joint tenant reference in each case were crossed out and there was a handwritten entry showing the transferees as "The Campbell Family Trust" and the appellant "As Trustee", with the amendment accompanied by what appears to be the appellant's signature. There was no initialling or signature by Mr Butler evident in the altered portion of the document.

[33] The jury may have found the handwritten changes explained by a requisition notice from the Titles Registry, issued on 22 July 2011, which was in evidence. Addressed to the appellant, it required the removal of the words "Mother To Sign" and said that if the transferees were underage the document should be executed on their behalf pursuant to a registered power of attorney, with new execution dates added. The notice advised that the transfer was liable to be rejected if the requisition were

not met by 16 September 2011. The document, altered as earlier described, appears from Land Registry markings to have been resubmitted on 12 September 2011, six days before Mr Butler's death, and registered on 21 September 2011.

[34] At the civil trial, the appellant said that she and Mr Butler had established that she could not obtain a power of attorney in respect of her sons because they were minors, so she opted instead to use an existing family trust of which she and her children were the beneficiaries. Under cross-examination, she accepted that the trust deed showed its date of execution as 27 July 2011. Her intention (she said), shared by Mr Butler, was that the property would be transferred in equal shares to her children, with her taking responsibility for the mortgage debt, to pay out which she would borrow $240,000, so that Mr Butler could retire. The consideration for the transfer was shown as "Gift" to avoid stamp duty.

[35] Giving evidence at the current trial, Mr Clark said that he maintained a log book. Referring to it, he could confirm that he had checked the identification of Mr Butler and the appellant by looking at the driver's licence of each and noting the date of birth shown. He was able to say from his note of his conversation with Mr Butler and the appellant that their intention (as told to him) was that Mr Butler would transfer a share in the property to the appellant so that it was held, as he put it, on a "50-50" basis. There were only two people involved in the transfer; he could not recall the other names being on the transfer document when he saw it. He did not recall approving the changes to the document in the form of crossings out and substitution of the handwritten notations; his normal practice in such a circumstance was to require that the document be re-done. He might have taken a different view of alterations of a minor nature, but he would have initialled any such change.

[36] Under cross-examination, Mr Clark accepted that in June 2012, he had sent an email, which was tendered, to the appellant, in which he had set out brief details of his notes, including the words "transfer from Christopher to Catherine". The appellant having cross-examined on an affidavit of Mr Clark filed for the purposes of the family provision proceeding, she was required to tender it. It referred to his log book as indicating a transfer of land from Mr Butler to her, and his recollection that Mr Butler said

> "… words to the effect that they weren't selling it, but were sharing it"

which caused him to add the "50/50" notation. He also said that he would have remembered any handwritten alterations and would have initialled them.

[37] Ms Heremia said that in the weeks leading up to Mr Butler's death, the appellant told her she was buying a half share of his house for $240,000 and that she had a mortgage loan approved for that purpose. Later, but before Mr Butler's death, the appellant asked her whether a Justice of the Peace whom she knew would be prepared to witness documents which were not signed in front of her. Ms Heremia answered, emphatically, in the negative. In response, the appellant

> "… indicated there was some elderly gentleman in the Hay Point area, and that quite possibly, she would be – it would not be surprising if the properties ended up in her name in the coming years".

At a time before that, the appellant had shown her transfer papers which showed her name and the names of her sons, with Mr Butler as transferor. Ms Heremia noticed that there was no reference to 50 per cent and said that it ought to be sorted out.

The appellant told her that this was a genuine oversight and would be rectified. In cross-examination, the appellant did not put to Ms Heremia that that particular conversation was an invention, but instead put a more general proposition that there had been no conversations which took place between the two of them alone.

[38] Other neighbours and friends recalled Mr Butler telling them of his intentions in relation to the property. Mr Munro said that about three to four weeks before his death, Mr Butler came to his house near Mackay and told him that the appellant was to borrow $240,000.00 in order to buy a half share in his property. Mr Watson, one of the neighbours, said that three to five weeks prior to Mr Butler's death, the latter had told him that he was going to meet the cost of renovations and pay down some debt by selling half of the house to the appellant. Ms Sturgeon said that on the occasion in June or July 2011 when she first met the appellant, in the latter's presence, Mr Butler said that he had signed half of his house over to the appellant and expected to be debt-free and able to retire.

[39] The appellant's cross-examination of Ms Sturgeon on this topic proceeded as follows:

> "… Did you know Christopher – well, you said during the examination you talked about he was going to be happy he was going to be out of debt and he was going to be able to retire, but during the civil court trial I had asked you did you know about like specifically Christopher's plans to retire.
>
> Was it in the short-term or - - -?---I really can't remember. When Chris said ou – out at the fence that day that he was ha – happy to retire and looking forward to retiring, he meant within a couple of years of that because he had signed the house and that's all I know.
>
> Yeah, okay, sure. And you also said under examination, [Ms Sturgeon], that the first time you heard about the transfer of the house, that was the first day that you'd met me in June 2011; is that right?---Correct."

The cross-examination then turned to the issue of when Ms Sturgeon had first encountered the appellant. Ms Sturgeon, having been excused, was later in the trial recalled to allow further questioning by the appellant, who said that she had not previously understood how to cross-examine the witness on the transcript from the civil trial. On this occasion the appellant cross-examined solely on Ms Sturgeon's previous evidence about when she had first met the appellant and whether Mr Butler had shown the appellant affection.

[40] Ms Sturgeon's partner, Mr Johnson, recalled an occasion when Mr Butler had told him that the appellant was going to buy a half share in his house and that he was about to retire. No one else was present for that conversation. Under cross-examination, he accepted that at the civil trial he had also said that Mr Butler had told him that the appellant

> "… had brought (sic) the house - a half share in the house and that he had put the house into her and the children's name".

[41] Mr Waterson said that about three weeks before Mr Butler's death, the appellant had told him and his wife that she was going to purchase Mr Butler's property,

although he was "not clear" whether she had said how much of the property she was going to purchase.

The "unsafe verdict" ground

[42] The "unsafe verdict" ground seems to be misconceived. In relation to count 2, it was put on the basis that while hearsay evidence of Mr Butler's state of mind about the intended transfer was admissible, there was a lack of direction about how it could be used, which, combined with the judge's refusal to allow evidence of an intention to marry, rendered the conviction unreasonable. In similar vein, it was said that the Crown's alleged failure to investigate and tender evidence of telephone accounts said to have been maintained by the appellant rendered the verdicts in relation to counts 3 to 7 unreasonable.

[43] But that is not so. Those particular arguments might, if made out, warrant setting the verdicts aside if a miscarriage of justice resulted. That does not mean, however, that it was not reasonably open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of those counts on the evidence before it. In relation to counts 3, 5 and 7, there was extremely compelling evidence on which the jury could conclude that the appellant was not in truth in a de facto relationship with Mr Butler before, at the earliest, 2011. Indeed, it is very difficult to see how they could have concluded otherwise. There was evidence from her mother and friends that by the end of 2010 she was still living in southeast Queensland and intending to stay there; there was the evidence of Mr Butler's friends and neighbours that she was not to be seen on his premises before 2011; the telephone records showed a complete lack of contact between the two until the very end of 2010, consistent with the appellant's account to Ms Dally and Ms Heremia of her first encountering him on her visit to Mackay at the end of that year; and there were her denials of any relationship existing around that time. The regularity of telephone contact in 2010 between the appellant and Jeremy Johnson and between Mr Butler and Ms Vickery stood in sharp contrast to the absence of contact between the appellant and Mr Butler.

[44] As to counts 4 and 6, the jury were entitled to accept Jeremy Johnson's account of having maintained a de facto relationship with the appellant over approximately two years between 2008 and mid-2010; there was some support for it in other evidence such as the photographs and the 2010 telephone records showing constant contact between the two.

[45] In relation to count 2, there was nothing which should have deterred the jury from accepting Mr Clark's evidence that the children were not named on the transfer form when he saw it. If the jury were satisfied of that, the conclusion would be that the appellant alone was originally shown as transferee, "as Joint Tenant", consistent with an intended transfer of a half share of the property, Mr Butler being the other joint tenant, and that the entries in relation to the children were added later so that they became the remaining joint tenants. Even if the jury concluded that the children's names were on the transfer document when Mr Butler signed it, there was ample evidence that, whomever the transferees, Mr Butler only intended to transfer a half interest.

[46] Ms Heremia's evidence about the conversation in which the appellant acknowledged that there was a mistake in the transfer form was only challenged in the most general way, and nothing was identified as to why it should not be accepted as accurate. If the jury did accept that evidence, it was reasonably open to

them to conclude that the appellant had taken advantage of Mr Butler to procure a transfer of his entire property, rather than the agreed half share, to the family trust of which she and her children were beneficiaries. Ms Sturgeon's evidence was that the appellant had made no demur when Mr Butler said (using the past tense) that he had signed half of his house over to the appellant. The lack of challenge to her account of the conversation is not explicable by oversight on the part of an unrepresented defendant. The appellant's cross-examination on the conversation indicates that she was prepared to question about matters peripheral to it, but did not dispute its essential content.

[47] On the whole of the evidence, it was unquestionably open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of all the counts on the indictment.[3] The "unsafe verdict" ground has no merit.

The admission of the financial synopsis

[48] The trial judge held a pre-trial hearing to resolve questions about admissibility of evidence. The contentious items of evidence included the financial synopsis, which formed part of an NRMA Insurance file. The appellant objected to it on the basis that the information on the document had been written by a representative of NRMA Insurance who was not being called as a witness. The trial judge informed her that it would be admissible as a business record and could be proved as that by someone from NRMA Insurance. It was relevant as containing an admission by her. The appellant appears to have been content for it to be admitted, provided the NRMA investigator who had completed it was called. When it became plain in the course of the trial that the prosecution did not propose to call the investigator, she renewed her objection. She acknowledged that she thought the signature on the document was hers, but made the point that she could not say that all the information on it was there when she signed it. The trial judge reiterated that it was a business record maintained by NRMA Insurance and was therefore prima facie admissible.

[49] In the trial, an employee of NRMA Insurance produced the synopsis in his capacity as an employee of the company who had access to documents stored on NRMA business computers. He was led by the prosecutor as to its having been brought into being by a representative of NRMA through a meeting with the appellant on 25 August 2010. The witness said that he did not recognise the handwriting on the document. When the appellant sought to cross-examine the NRMA employee about the contents of the synopsis, the trial judge intervened, pointing out that the witness had no knowledge of the manner in which the record came into being, but was merely there to produce it. The appellant desisted from further questioning.

[50] In this court, counsel for the respondent Crown contended that the trial judge had correctly admitted the financial synopsis under s 93(1) of the *Evidence Act* 1977, which is as follows:

> "93 Admissibility of documentary evidence as to facts in issue in criminal proceedings
>
> (1) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document

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3 *M v The Queen* (1994) 18 CLR 487 at 493.

and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—

(a) the document is or forms part of a record relating to any trade or business and made in the course of that trade or business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and

(b) the person who supplied the information recorded in the statement in question—

(i) is dead, or unfit by reason of the person's bodily or mental condition to attend as a witness; or

(ii) is out of the State and it is not reasonably practicable to secure the person's attendance; or

(iii) can not with reasonable diligence be found or identified; or

(iv) can not reasonably be supposed (having regard to the time which has lapsed since the person supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information the person supplied.

[51] The construction of s 93(1) for which the Crown contended was that the expression "the person who supplied the information recorded in the statement" was a reference to the person who had actually created the document; in this case, the missing NRMA investigator. Once the information was conveyed to the person who recorded it, it became that person's personal knowledge, and they were the supplier of it when they recorded it on the document. The appellant's counsel supported that construction; his complaint was that there had been no evidence of any enquiry made as to that witness' availability. Counsel for the Crown countered that complaint by relying on s 93(1)(b)(iv), arguing that the NRMA investigator who made the record could not reasonably be supposed to have any recollection of the matters dealt with. She pointed to s 96(1), which permits a court to draw any reasonable inference available from the form or contents of the document containing the relevant statement in determining whether it is admissible, and submitted that the inference could be drawn that the NRMA employee would be in the position referred to in s 93(1)(b)(iv).

[52] I do not think that counsel's construction of the section is plausible.[4] The proposition that a person who merely records information conveyed by another thereby obtains personal knowledge of it, is not, in my view, tenable. And on counsel's construction, the mere fact that the recorder of information was unavailable in any of the senses in paragraph 93(1)(b) would provide a basis to dispense with the giving of oral evidence, even though the individual who was the

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[4] Nor does it seem consistent with approaches previously taken to the provision's application: see, for example, *R v TJW* [1989] 1 Qd R 108 at 109-112; *R v Ross* [2010] QCA 63 at [13]-[22]; *R v Murdoch* [2017] QCA 239 at [57]-[76].

source of the information was on hand and had a full recollection of it. To make the availability or memory of the mere recorder the premise for the section's application could not advance any sensible purpose.

[53] Section 93(1) offers an alternative to the giving of oral evidence of a fact. It enables evidence which might have been given by a witness in court to be admitted where it has instead been recorded in documentary form, if the conditions in s 93(1)(a) and at least one of the conditions in s 93(1)(b) are met. That alternative is permitted for a reason: that the person who would give the oral evidence is unavailable or can no longer have a memory of it. The purpose of the section is to provide for the reception of evidence of a witness who is no longer in a position to give it orally.

[54] What s 93(1)(a) clearly contemplates is that a record may be made by one person from information supplied by another, the second having personal knowledge of the subject matter of the information. Alternatively, the maker and the supplier of information may be identical, but that can only be so where the record is made in the course of the trade or business in question by someone who has personal knowledge of the information. In either circumstance, the focus of s 93(1)(b) is on the availability or recollection of the supplier of the information. In the present case, although one might infer from the face of the synopsis that it was made from information supplied by the appellant, who had personal knowledge of the matters dealt with, none of the conditions in s 93(b) is met in relation to her. The document was not admissible pursuant to s 93, and the judge erred in ruling it admissible as a business record pursuant to that section.

[55] Counsel for the Crown submitted that, if that conclusion were reached, the proviso in s 668E(1A) of the *Criminal Code* should be applied; the appeal in this regard should be dismissed on the basis that no miscarriage of justice had occurred, because of the strength of the remaining evidence as to the appellant's having being in a relationship with Jeremy Johnson at the relevant time. In any event, the synopsis was not a significant piece of evidence because its effect was undermined by the entry, "DOES NOT RESIDE WITH INSURED". I will return to that submission later in this judgment.

The Heremia conversation

[56] The appellant submitted that Ms Heremia's evidence of one of their conversations should not have been admitted. That conversation had two components: the first was the enquiry as to whether Ms Heremia's friend, who was a Justice of the Peace, would sign documents effectively representing that she had witnessed signatures when she had not. The second component of the conversation was the appellant's statement about "an elderly gentleman in the Hay Point area" and the possibility of properties coming into her name. The appellant at the outset of the trial indicated that she did not maintain any objection to Ms Heremia's evidence, but was content to cross-examine her on it. However, she later objected to the evidence about whether Ms Heremia's friend would sign documents as it was being given, as irrelevant and hearsay. The trial judge ruled that it was admissible as an admission against interest.

[57] The appellant's contention here was that the two statements attributed to her went only to show a propensity for dishonesty. Certainly, the prosecutor in his closing address framed the second component of the conversation in that light. He said this to the jury:

> "You'd also have regard to what Ms Heremia said about Ms Campbell and her remark about acquiring properties from other older men in town. Is that sort of a statement, if you accept it was made, more consistent with a genuine error or more consistent with somebody taking full and dishonest advantages that there might be other older chaps that might find themselves relieved of their property? You appreciate those aren't the exact words she used, but the meaning is the same."

[58] Later, though, the prosecutor suggested that the trial judge should direct the jury on the basis that both parts of the conversation were to be regarded as lies going to credit. His Honour gave this direction:

> "Can I just give you, however, one remark by way of instruction in relation to dealing with the evidence of Helen Meare [Heremia]. You will recall that she gave evidence of a number of matters relevant to the transfer document. In particular, she gave evidence of a conversation concerning finding a JP who might – which is to be inferred might witness a document without seeing the parties execute the document in her presence, and also gave evidence of perhaps others falling off the perch in relation to property that might be transferred to other parties. If you accept that evidence as truthful and you accept her as a witness of truth in relation to those matters, then you can use that evidence only to assess the credibility of the defendant's account. You can't use it for any other purpose.
>
> You certainly cannot reason that if she said those things to – that is, if the defendant said those things to Helen Meare [Heremia] then that makes her guilty of any – any of the – any of the accounts [counts] which are before you now."

[59] I confess to being completely at a loss as to how any part of the relevant conversation could be characterised as a lie, or how the evidence could properly have been led if it went only to credit. However, if anything, the direction seems to have been to the disadvantage of the Crown, because the alternative was to view the conversation as directly relevant to an intent to defraud. More to the point, the appellant's complaint here was not of the judge's direction but of the admission of the evidence in the first instance.

[60] In my view, the conversation was admissible, although not on the bases suggested in the address or the summing up. Rather, it was open to the jury to conclude that the question about the readiness of the Justice of the Peace to sign documents improperly was asked, given its timing, in connection with a concern on the appellant's part about how she could alter the transfer document, as the requisition required, and register it without Mr Butler's signature. The allusion to transfer of properties by older men is explicable as an attempt, on the strong reaction of Ms Heremia to the suggestion of false witnessing, at diverting her attention, with a fictional prospect, from relating it to the transfer of Mr Butler's property. (By that time, Ms Heremia was already aware, on her account, of the fact that the transfer document required rectification to reflect the intended 50 per cent transfer.) The evidence was relevant to establishing the appellant's intent and was properly admitted in the first instance as going to the issue of fraud (although it would have been better described as part of the res gestae than as an admission against interest).

The failure to direct as to the use of hearsay evidence

[61] The appellant contended that there was a miscarriage of justice because the trial judge had failed to give a direction as to the use which could be made of hearsay evidence in the form of what Mr Butler had said to others about his intentions in relation to the transfer of his property. Counsel submitted that the evidence was properly admitted, but should have been subject to a warning similar to that provided for in s 93C of the *Evidence Act*. That section is limited in its application to evidence admitted pursuant to s 93B, which does not apply to the offences in question here. Nonetheless, counsel said, it gave guidance as to the form of an appropriate warning: the trial judge should have told the jury that the evidence might be unreliable, informed them of matters which might cause it to be unreliable, and warned of the need for caution in deciding whether to accept it and the weight to be given to it.

[62] The trial prosecutor, in arguing for the admission of the evidence, relied on the common law exception to the hearsay rule for declarations made by a person, since deceased, against his or her pecuniary interest.[5] The trial judge accepted that argument. I am unconvinced, however, that the various statements said to have been made by Mr Butler, in the absence of the appellant, about the plan for her to buy a share in his property were admissible on that basis. It is difficult to see why Mr Butler's description of the transaction by which the appellant would pay for a half share in his house, on one account enabling him to meet the cost of renovations and pay down debt, should be regarded as a statement against his interest.[6] Moreover, for the exception to apply, the declarant must be aware, at the time the statement is made, that the fact declared is against his interest.[7] There was no indication here that Mr Butler, when describing the proposed transaction, thought that it would be other than to his advantage.

[63] However, evidence of an out-of-court statement is admissible to prove its maker's state of mind, where that state of mind is an issue, or is evidence of a fact relevant to an issue. In the view of the majority in *Walton v The Queen*,[8] the evidence is properly characterised as conduct

> "… from which an inference can be drawn rather than as an assertion put forward to prove the truth of the facts asserted".[9]

Mr Butler's state of mind when the statements were made was relevant: in issue on the question of fraud were, whether his intent was to give the whole of the property to the appellant and whether or not there was any intended transferee other than her. The statements were evidence, not of their truth – they were not evidence that he had the agreement that he described with the appellant – but as conduct from which his state of mind could be inferred.[10] Statements for which the appellant was present were admissible on another basis; her failure to indicate any disagreement with them was capable of being regarded as an admission by conduct on her part.

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5 *Bannon v The Queen* (1995) 185 CLR 1 at 23; *Baker v The Queen* (2012) 245 CLR 632 at 644 and 657.

6 The authors of *Cross on Evidence* refer, at [33050], to a rule that a reference by a party to a still executory contract does not amount to a statement against interest.

7 *Ward v H S Pitt & Co* [1913] 2 KB 130 at 137 – 138.

8 (1989) 166 CLR 283.

9 *Walton v The Queen* (1989) 166 CLR 283.

10 *Walton v The Queen* per Wilson, Dawson and Toohey JJ at 304.

[64] In any case, the appellant did not on this appeal take any issue with the admission of the evidence, confining the appeal ground to the question of whether a hearsay direction should have been given. Because none was sought, the trial judge made no decision as to which error can be alleged, so the question would be whether any miscarriage of justice had resulted from the failure to give such a direction.

[65] In the first instance, I doubt that such a direction was appropriate. On the rationale explained by the majority in *Walton v The Queen* for admission of such statements, the hearsay element was incidental; the statements were to be treated as conduct giving rise to an inference, not as true.[11] (Mason CJ in that case took the view that the out-of-court statements as to intent were not hearsay at all, but were properly admitted as original evidence.[12]) Even if the evidence is characterised as hearsay, so that a direction might have been given, cautioning the jury to approach Mr Butler's reported statements about the plans for the property with circumspection, no miscarriage of justice resulted from the failure to give it. There was other, unchallenged evidence to the same effect in the form of admissions by the appellant. Ms Heremia said that the appellant had told her she was buying a half share of the house for $240,000; Ms Sturgeon said that Mr Butler referred, in the appellant's presence and without correction, to having signed "half of his house over"; consistently with Mr Clark's recollection of the conversation with both the appellant and Mr Butler about an equal share in the property being transferred.

[66] At the worst for the appellant, a direction to be cautious about the use of hearsay evidence on this topic carried the risk of highlighting the fact that, in contrast, there were statements made by her or in her presence which did not require the same caution. At the best for her, the proposed direction was most unlikely to have made any difference to the jury's findings. The failure to give it did not produce any miscarriage of justice.

The failure to summarise the defence arguments

[67] The complaint of a failure to summarise the defence arguments, while expressed in the plural, turned out to be singular. It was that, when summarising the evidence of the various neighbours and friends as to what Mr Butler had said about the property transfer, the trial judge had failed to point out to the jury Gordon Johnson's acceptance of something he had said at the family provision trial. That was, that Mr Butler had told him that, the appellant having bought a half share in his house, he had put it into her and her children's names. Clearly, that statement was not admissible as going to Mr Butler's intent at any relevant time, post-dating as it did the transfer, but it was arguably admissible as a statement by him against his proprietary interest.

[68] Unfortunately, however, Mr Johnson was not asked by the appellant whether what he had said at the previous trial was true. Had he adopted his prior statement, it would have been evidence of his conversation with Mr Butler.[13] But because he did not, there was no evidence that it was correct, as opposed to having been made by him, and thus no evidence that Mr Butler had actually made the statement in question. The trial judge could not, accordingly, have instructed the jury to have regard to Mr Johnson's previous testimony as evidence of the fact that Mr Butler had made such a statement.

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11 *Walton v The Queen* at 302.
12 *Walton v The Queen* at 289.
13 *Collins v The Queen* (2018) 355 ALR 203 at 210.

The refusal to permit the appellant to adduce evidence as to Mr Butler's expressed intention to marry her

[69] The appellant sought to cross-examine Gordon Johnson on the content of a statutory declaration he had made in November 2011. It contained this statement:

> "Chris [Mr Butler] had discussed with me his intending marriage to Catherine …"

The prosecutor took objection on the basis that the statement attributed to Mr Butler as to his marital intentions did not fall within any recognised exception to the hearsay rule. The trial judge accepted the submission, and upheld the objection.

[70] Later, the appellant sought to cross-examine Mr Johnson on his evidence given at the family provision trial. Unfortunately, only an edited version of the transcript was marked for identification and it does not contain the relevant passage, but it appears that at some point Mr Johnson had in that evidence said that Mr Butler was going to propose to the appellant. Again, the trial judge ruled that the evidence was inadmissible hearsay. When the appellant suggested that it might go to the interest in the property, his Honour responded

> "It doesn't go to the interest. What has a proposal got to do with an interest?"

[71] Subsequently, when the appellant's stepfather, Mr Rainbow, gave evidence, the appellant sought to ask him about what he had said at a conference with the prosecutor, a file note of which was provided to her. In the conference, it appears, Mr Rainbow was being asked about an occasion on which he had been fishing with Mr Butler. According to Mr Rainbow, Mr Butler had said words to the effect that he was thinking of asking the appellant to marry him, and enquired as to what Mr Rainbow thought. The trial judge referred to his ruling in relation to Mr Johnson's evidence on the same issue in refusing to permit the appellant to ask questions about the conversation.

[72] In this court, counsel for the Crown submitted that the conversation with Mr Rainbow was not a statement of an intention to marry the appellant, but rather a mere indication that Mr Butler was contemplating the possibility. Mr Johnson's evidence was, it was submitted, irrelevant because, firstly, there was no evidence to indicate when the intention to marry was expressed. Secondly, it had no relevance to the question of whether Mr Butler was likely to have transferred his entire interest in the property to the trust in favour of the appellant and her children, as opposed to transferring a half interest to the appellant. Finally, it had no bearing at all on those counts which concerned the appellant's claim as to when the relationship commenced (counts 3 to 7).

[73] The trial judge's ruling, in my view, was made in error. One does not know whether Mr Johnson and Mr Rainbow would have adopted what they had previously said as correct, but that was because of the refusal to permit cross-examination for that purpose. The statement to Mr Johnson, if proved, was of an intention to marry; that to Mr Rainbow, while put more tentatively, also was capable of indicating such an intention. Both statements, if the appellant succeeded in proving them, were capable of being admissible as evidence of a fact relevant to an issue, that being Mr Butler's state of mind in relation to the property transfer. Depending on when the statements were made relative to the property transfer, they

were potentially relevant because, if the jury accepted that Mr Butler did indeed propose to marry the appellant and thus make her children his stepsons, it made it more probable that he would be prepared to enter a property transaction in their favour which might not be commercially rational. The appellant should have been permitted to cross-examine in order to elicit the evidence.

[74] Counsel for the Crown submitted that if the ruling were wrongly made, the proviso should be applied, on the basis that there was no substantial miscarriage of justice, because the jury would inevitably have convicted the appellant of count 2. I will return to that question shortly.

The failure to investigate telephone numbers and the leading of "incomplete evidence"

[75] In the civil proceedings, the appellant volunteered some telephone numbers in relation to accounts allegedly held by her. Questioned at that trial, she agreed that she had been put on notice by the respondent's solicitors in that proceeding to produce details of telephone accounts prior to trial and had failed to do so. No reference at all was made to these telephone numbers during the criminal trial; Detective Shields was not asked about them. However, on this appeal, it was contended that the failure to investigate those numbers and to obtain any relevant records might have rendered the calendars produced by Detective Shields misleading and might have led to an injustice.

[76] To succeed on this ground, the appellant needed to show that there was some evidence which could have been led and which might have made a difference. That did not occur. The first premise of the argument was not established: it was unknown as to whether there had in fact been any investigation of the numbers to which the appellant referred. More critically, there was no evidence at all as to whether the telephone numbers were genuine, let alone what any relevant accounts might have disclosed. In consequence, it is simply impossible for the court to reach a conclusion that there was any miscarriage of justice in this regard.

Application of the proviso – the admission of the financial synopsis

[77] The erroneous ruling that the financial synopsis was admissible as a business record was directly relevant to counts 4 and 6 (concerning the denial of a de facto relationship with Jeremy Johnson) and less directly to counts 3, 5 and 7 (which concerned when the relationship with Mr Butler began). The document might have been admitted as a document executed by the appellant, on the basis of the similarity of the signatures it bore to others on documents not in dispute,[14] with an appropriate warning as to the care to be taken in drawing conclusions.[15] But that was not the course taken in this case, although the prosecutor invited the jury to make that comparison. There were other issues: the synopsis was undated, which made its relevance questionable, and the evidence as to when it was produced was led from a witness who was most unlikely to have had any actual knowledge of the fact, in circumstances where that evidence might have been objected to had the trial judge not ruled the document admissible as a business record. Secondly, the appellant did wish to take issue with its content, but was not permitted to do so, again on the basis that it was produced by the witness as a business record.

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14 *Evidence Act* s 59(2).

15 *R v Burns* (2001) 123 A Crim R 226 at [59]; *R v Leroy* [1984] 2 NSWLR 441 at 446; *R v Mazzone* (1985) 43 SASR 330 at 340-342.

[78] I do not consider that one can conclude that the admission of the document made no difference to the appellant's prospects of conviction on those counts (4 and 6) which concerned her denial of a de facto relationship with Jeremy Johnson. Mr Johnson's veracity, at least in relation to whether he had in 2009 been in another sexual relationship, was in question: his evidence was clearly contradicted by Ms Garrett. And although the jury might readily have accepted that he and the appellant were on intimate terms during the Thailand trip and that they were in some form of relationship for most of 2010, given the level of telephone contact, it did not inevitably follow they would conclude that the relationship between the two rose to the level of their being de facto spouses. There was an absence of evidence of any consistent financial contribution, shared assets or financial arrangements, or indeed any joint domestic or recreational activities (apart from sex and two overseas trips) which might generally be considered as indicia of such a relationship. Ms Smith's evidence did not greatly assist, because she described Mr Johnson staying at her daughter's property at a time after the relationship ended, on the Crown case.

[79] Given that state of the evidence, the jury might well have regarded the appellant's apparent preparedness to characterise Mr Johnson as her "spouse/partner" as significant support for his undetailed and largely uncorroborated evidence as to the nature of their relationship. (The entry "DOES NOT RESIDE WITH INSURED" did not really detract from the document's effect, because it was consistent with Mr Johnson's evidence that he had ceased to reside with the appellant after June 2010.) I would not be prepared to conclude that the erroneous admission of the financial synopsis did not affect the jury's preparedness to accept Mr Johnson's evidence and hence its verdict on counts 4 and 6. I would not, accordingly, accept that no miscarriage of justice occurred in relation to those counts and would not apply the proviso in respect of them.

[80] I do not, on the other hand, consider that the admission of the document could have had any bearing on the appellant's prospects of acquittal on the remaining counts. Even if the jury in the absence of the financial synopsis would have rejected the Crown case that the appellant was in a de facto relationship with Mr Johnson, that could not, in my view, have prevented them from concluding, beyond reasonable doubt that the appellant's claims as to when any relationship with Mr Butler commenced were untrue. For the reasons I have given in relation to the "unsafe verdict" ground, I do not consider they could have reached any other view. In summary, the evidence that the appellant had no real contact with Mr Butler before the end of 2010 was overwhelming. Witnesses who knew her confirmed that she had said as much; Mr Butler's neighbours and friends said that they had not encountered her before then at his Mackay home, and her own mother and friends said that she intended at that time to keep living in the south of the State; and the objective evidence, in the form of telephone and bank records showed that she was not in Mackay and she was not in contact with him.

[81] Conviction on counts 3, 5 and 7 was, in my view, inevitable, regardless of whether the financial synopsis was admitted. The document had no conceivable bearing on the jury's conclusion as to whether the house transfer was fraudulent. The proviso should be applied so far as counts 2, 3, 5 and 7 are concerned.

The application of the proviso – the ruling against cross-examination as to marital intent

[82] The refusal to permit the appellant to adduce evidence that in 2011, Mr Butler had made statements about an intention to marry her was relevant only to count 2, concerning

the transfer of his house property. The submission of counsel for the respondent was that it had produced no substantial miscarriage of justice because the appellant's conviction on this count was inevitable. That submission should be accepted.

[83] The theory advanced by the appellant at the civil trial, and reiterated in her address to the jury, that Mr Butler parted with the entire property in order that she would assume responsibility for the mortgage debt, thus enabling him to retire, was not convincing. But an intention on Mr Butler's part to marry the appellant was capable, in the abstract, of bearing on the likelihood of his being prepared to part with his house in favour of her and her children. However, proof of a marital intention could not, in my view, have countered the sheer weight of the evidence that Mr Butler was not, in fact, intending to part with the entirety of his own interest. All the evidence as to his state of mind before and during the transaction (outlined in my consideration of the "unsafe verdict" ground) was that he meant to transfer a half share in the property. The evidence was that the appellant acknowledged that intention before, during and after the transaction. And most significantly, there was a marked lack of challenge on the appellant's part to Ms Sturgeon's evidence that when Mr Butler expressed his belief that a transfer of a half share had occurred, the appellant raised no dispute. I do not consider that the jury could have had any reasonable doubt as to the fraud committed on Mr Butler, regardless of whether an intent to marry was proved.

[84] I would apply the proviso on the basis that the error by the trial judge did not produce any substantial miscarriage of justice.

Orders

[85] I would allow the appeal in relation to the convictions on counts 4 and 6 of the indictment, set aside those convictions and order a new trial in relation to those counts. I would dismiss the appeal in relations to counts 2, 3, 5 and 7 of the indictment.

[86] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes CJ. I agree with those reasons and with the orders proposed by her Honour.

[87] **McMURDO JA:** I agree with Holmes CJ.