SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dale* [2012] QCA 303
PARTIES:	**R** **v** **DALE, Robert Norman** (appellant/applicant)
FILE NO/S:	CA No 352 of 2011 DC No 580 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	6 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2012
JUDGES:	Margaret McMurdo P, Gotterson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant was convicted following a twenty day trial of seven fraud based offences – where appellant argued eight grounds of appeal – whether miscarriage of justice occurred having regard to circumstances in which count 1 was amended during the trial – whether the learned judge erred in failing to direct the jury that it was open on the evidence to conclude that the appellant was exercising an honest claim – whether the verdicts on counts 2, 3, 4, 5, 6 and 8 were unreasonable given the evidence which was adduced – whether a miscarriage of justice occurred when the learned judge dealt with the appellant's attempt to make a submission that there was no case to answer – whether the trial judge erred in failing to warn the jury as to the manner in which evidence relevant to one group of counts could be used when they were considering their verdicts for counts in one of the other groups – whether the trial judge erred in failing to direct the jury as to the use which could be made of circumstantial

evidence and of evidence from the witness Maynes – whether the trial judge erred in failing to direct the jury that, for each count, where more than one particular of dishonesty was given, in order for them to be satisfied of dishonesty, it was necessary that they be unanimous as to the particular, or particulars, of which they were satisfied – whether a miscarriage of justice occurred when the trial judge allowed an email from Rollings to Tobin to be admitted as evidence going to a representation made by the appellant but failed to direct the jury as to the use which could be made of that email

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant sentenced on count 1 to seven and a half years imprisonment and to concurrent sentences of six years on each of the other counts – whether judge below erred in sentencing the appellant on the basis that the loss occasioned by his conduct constituting counts 1 to 6 and 8 was substantially more than the actual loss so occasioned as disclosed by the respondent's accounting evidence

Fermanis v Western Australia (2007) 33 WAR 434; [2007] WASCA 84, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, distinguished
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Fuller [2009] QCA 195, cited
R v Holman [1997] 1 Qd R 373; [1996] QCA 262, cited
R v More (1987) 86 Cr App R 234, cited
R v Sitek [1988] 2 Qd R 284; (1988) 26 A Crim R 421, followed
R v Tapara [2010] QCA 320, distinguished
R v Wedd (2000) 115 A Crim R 205; [2000] WASCA 273, cited
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, distinguished

COUNSEL: P Callaghan SC, with S Robb, for the appellant/applicant
D Kent for the respondent

SOLICITORS: Legal Aid Queensland for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for dismissing the appeal against conviction and refusing leave to appeal against sentence.

[2] **GOTTERSON JA**: On 15 November 2011, after a 20 day trial before a judge and jury in the District Court at Southport, the appellant was convicted of seven fraud based offences. They correspond to counts 1, 2, 3, 4, 5, 6 and 8 in the indictment. He was acquitted on count 7, the learned judge having suggested an acquittal on that count during the course of his summing up to the jury. The appellant represented himself at the trial. He chose not to give or call evidence.

[3] Count 1 charged the appellant with an offence under s 408C(1)(a)(ii) of the *Criminal Code* 1899 (Qld) ("the Code") of dishonest application to the use of another of property in his possession subject to a condition whereas the other counts charged him with several offences under s 408C(1)(d) of the Code of dishonest gaining of a benefit. Count 1 related to the amount of $250,000, count 7 to the amount of $100,000, and the other six counts collectively to the amount of $1,650,000.

[4] The appellant was sentenced on count 1 to seven and a half years imprisonment and to concurrent sentences of six years on each of the other counts on which he was convicted. A parole release recommendation date was fixed at 15 January 2015. He is automatically disqualified from managing a corporation pursuant to s 206B of the *Corporations Act* for a period of five years following his release from custody.

[5] At the commencement of the hearing of the appeal, the appellant sought leave to amend the notice of appeal against conviction which had been filed on 15 December 2011. Leave to amend was granted. The appellant's notice of appeal as amended challenges the convictions on eight grounds which may be summarised as follows:

- **Ground 1:** A miscarriage of justice occurred having regard to the circumstances in which count 1 was amended during the trial;
- **Ground 2:** The learned judge erred in failing to direct the jury that it was open on the evidence to conclude that the appellant was exercising an honest claim of right for the purposes of s 22 of the *Code*;
- **Ground 3:** The verdicts on counts 2, 3, 4, 5, 6 and 8 were unreasonable given the evidence which was adduced and the manner in which the respondent's case was particularised;
- **Ground 4:** A miscarriage of justice occurred when the learned judge dealt with the appellant's attempt to make a submission that there was no case to answer;
- **Ground 5:** That as there were, in effect, three separate groups of counts, namely, 1 and 2; 3, 4 and 5; and 6, 7 and 8, the learned judge erred in failing to warn the jury as to the manner in which evidence relevant to one group of counts could be used when they were considering their verdicts for counts in one of the other groups;
- **Ground 6:** The learned judge erred in failing to direct the jury as to the use which could be made of circumstantial evidence and of evidence from the witness Maynes;

- **Ground 7:** The learned judge erred in failing to direct the jury that, for each count, where more than one particular of dishonesty was given, in order for them to be satisfied of dishonesty, it was necessary that they be unanimous as to the particular, or particulars, of which they were satisfied; and

- **Ground 8:** A miscarriage of justice occurred when the learned judge allowed an email from Rollings to Tobin to be admitted as evidence going to a representation made by the appellant but failed to direct the jury as to the use which could be made of that email.

[6] The appellant also sought leave at that time to amend his application for leave to appeal against sentence in order to advance one ground of appeal only. Leave was granted. The live ground contends that the learned judge erred in sentencing him on the basis that the loss occasioned by his conduct constituting counts 1 to 6 and 8 was substantially more than the actual loss so occasioned as disclosed by the respondent's accounting evidence.

Background to the charges

[7] The following brief outline provides a background for analysis of the grounds of appeal.

[8] The appellant worked at the Gold Coast as a motivational speaker and life coach. He was a director of a number of companies, including Rob Dale Group of Companies Pty Ltd, Rob Dale Property Group Pty Ltd and Water at Wooyung Pty Ltd. During 2004, the appellant was engaged in an attempt to purchase coastal land with an area of about 200 acres at Wooyung in northern New South Wales. His apparent objectives were to develop the land as a tourist resort or to secure a development approval for the same and on-sell the land to a developer at a profit. The land was on two separate title deeds. The registered proprietor on one of the deeds was a company which was associated with two individuals who were registered proprietors on the other.

[9] On 13 January 2004, the appellant caused Rob Dale Group of Companies Pty Ltd (as trustee for a trust) and Rob Dale Property Group Pty Ltd to enter into two contracts for purchase of the land concerned. The combined purchase price was $6,275,000 and the completion date was 1 August 2004. Planning certificates attached to each contract disclosed that under its current zonings, the land could be developed as proposed only with local authority consent.

[10] When the deposit on each contract was not duly paid, the provisions for payment of deposit were varied. The deposits as varied, too, were not paid. By agreement, the deposit provisions were further varied and the completion date was advanced to 31 May 2004. Some moneys, in excess of $100,000, were paid by way of deposit in order to facilitate the variations. The purchasers failed to complete on the due date. Negotiations to extend the completion date subject to payment of a further non-refundable deposit of $100,000.00 foundered when it was not paid. The vendors then terminated the contracts.

[11] At about the same time, the appellant caused Water at Wooyung Pty Ltd to enter into fresh contracts with the same vendors to purchase the land on broadly similar

terms. These contracts were dated 2 July 2004. The contract price made allowance for deposit moneys that had been paid under the superseded contracts.

[12] Later, on 27 July 2004, a third set of contracts was executed with Water at Wooyung Pty Ltd as purchaser. Again, the appellant was instrumental in causing that company to enter into the contracts. These contracts superseded those dated 2 July 2004. The contractual date for completion was 27 September 2004. The allocation of purchase price as between the two lots differed significantly from the allocation in the superseded contracts. This time a substantial deposit of $620,000 was paid. Completion, did not, however, occur on 27 September.

[13] On 18 October 2004, the same parties entered into a fourth set of similar contracts to supersede the third set. These contracts made allowance in the contract price for the $620,000.00 and, at the purchaser's request, made provision for vendor finance in the amount of $4,905,000.00. The appellant was instrumental in causing the purchaser company to negotiate for the finance and execute the contracts.

[14] The purchase was finally settled on 22 October 2004. Water at Wooyung Pty Ltd failed to make payments required of it under the terms of the vendor finance facility. In consequence, the vendor-mortgagees obtained a judgment for possession of the land and re-sold by auction in 2005. The Water at Wooyung "project" failed. In June 2005 a provisional liquidator was appointed to Water at Wooyung Pty Ltd and on 1 August that year it was placed into liquidation.

[15] During 2004, the appellant invited clients of his motivational speaking and life coaching service to invest in the "Water at Wooyung" project. Those clients included a Mr and Mrs Loughnan with whose moneys counts 1 and 2 are concerned; a Mr Marsh with whose moneys counts 3, 4 and 5 are concerned; and a Mr Tobin with whose moneys counts 6, 7 and 8 are concerned.

[16] The Crown case was that the Water at Wooyung "project" was:

> "… much more than a failed business venture … [the appellant] dishonestly persuaded these people to invest. Dishonestly dealt with their money, told them untruths about it and in all the circumstances, his conduct was criminally fraudulent."

The Crown case relied upon false assertions by the appellant made during the period prior to completion of the contracts that he "owned" the land free of encumbrance, and representations by him that investors' money was to be applied to the project.

[17] The Crown case maintained that investors' moneys were not applied to the Water at Wooyung project and that they were dishonestly used by the appellant for private purposes or to repay other investors who wished to withdraw from the project. The Crown case also referred to false statements made to investors after they had invested, including statements that the invested moneys were sitting in an account unspent, whereas, in fact, significant portions of them had been used for private purposes for repaying other investors who had wished to withdraw.

[18] Factually, count 1 is in a separate category from the other counts. The investor, Mr Loughnan, wrote and signed a cheque payable to Water at Wooyung Pty Ltd for $250,000.00. It was drawn on a bank account which he controlled. The cheque was given to the appellant on 13 July 2004 as part of the Loughnan's investment in the

project. The appellant immediately endorsed the cheque to make it payable to Antrim Corporation Pty Ltd, a company controlled by the appellant's wife, Ms Rollings, without the consent of Mr Loughnan. Mr Loughnan testified that he thought that the money was going to the Water at Wooyung Trust. He said that he knew nothing of the Antrim company and that had he known that the money was going to be used for it instead of Water at Wooyung Pty Ltd, he probably would not have written or signed the cheque and given it to the appellant.

[19] For the other counts, the investor wrote and signed a cheque payable to Water at Wooyung Pty Ltd and gave it to the appellant. He caused it to be deposited to that company's bank account.

Ground 1 - amending count 1

[20] The appellant contends that the trial judge improperly "entered the arena as a consultant to the Crown" by "advising" the Crown that count 1 needed to be amended and how to amend it, by permitting the amendment, and by preventing the appellant from being heard in opposition to that course.

[21] Count 1 on the indictment had already been amended, without opposition, on 12 August 2011, some two months prior to the commencement of the trial and at a time when the appellant was represented by counsel. The count in its amended form was:

> "On or about the thirteenth day of July 2004 at Southport in the State of Queensland ROBERT NORMAN DALE did dishonestly apply to the use of another, namely Antrim Corporation Pty Ltd, property, namely the sum of two hundred and fifty thousand dollars, which was in his possession subject to a direction or condition
>
> AND
>
> The property was to the value of $5,000 or more, namely $250,000.
>
> Particulars of Benefit: a cheque payable to Water at Wooyung Pty Ltd in the sum of $250,000 signed by Jeffrey Loughnan, on the account of Cornwall Grazing and Investments."

[22] Early on the second day of the trial, and in absence of the jury, the learned judge was dealing with questions from the appellant which related to evidentiary issues and cross-examination of the Crown witnesses. As he was making enquiries of the Crown prosecutor regarding the evidence, the learned judge turned to "another topic entirely".[1] He expressed a concern that count 1 might be bad for duplicity in so far as it alleged that the moneys were held subject to a "direction or condition". His Honour said, "… the section lists a number of matters, shouldn't the Crown elect which to go on …"[2] At that point, the Crown prosecutor indicated that he would elect for a condition.[3] The indictment was not amended at that point.

[23] Early on the third day of the trial, the Crown prosecutor confirmed that the Crown would elect to proceed with the word "condition".[4] His Honour then asked of the

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1 AB 76 T2-7 L50.
2 AB 76; T2-7 L57-AB 77 T2-8 L1.
3 AB 77 T2-8 L8.
4 AB 173 T3-9 L3.

Crown prosecutor whether the count should include a description of the condition. He agreed that it should[5] and then sought the return of the indictment in order to make the amendment. At that point the following exchange occurred:

> "HIS HONOUR: Would you hand the document to the Prosecutor, please? Mr Dale, Mr Kent has very properly conceded that count 1 on the indictment should be amended by including reference to the condition which the Crown alleges was not complied with when you applied the $250,000, and that's going to be included in the count.
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> DEFENDANT: Your Honour, may I ask a question? How do you - considering I have no legal experience - how do I - how do you - how do you challenge that? How do you-----
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> HIS HONOUR: There's no need to challenge it. Mr Kent's conceded that the indictment should be amended in the way I've just indicated. When that's been done and you've had a look at it-----
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> DEFENDANT: Yes, your Honour.
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> HIS HONOUR: -----I think it might be advisable to ask my Associate to re-arraign you on that count. That is, to ask how you plead to that particular count."[6]

[24] The Crown prosecutor amended count 1 on the indictment by adding after the word "condition" a comma and then the words "namely that it be paid to Water at Wooyung Pty Ltd". He showed the amendment which he had initialled to Mr Dale.[7] The appellant was then re-arraigned on count 1 to which he pleaded not guilty.[8]

[25] The appellant's submissions on this ground includes the following significant acknowledgement:

> "… a review of the transcript suggests that his Honour did, with respect, appear to strain every nerve in order to ensure that the appellant had a fair trial, even to the point of being solicitous about the appellant's health. And his Honour's approach appears, with respect, to have been adopted also by the learned Crown prosecutor. A review of the transcript suggests that he, too, appears to have made every effort to ensure that the trial was a fair one …"

[26] The learned judge was obliged to ensure that the trial was conducted fairly according to law. If he perceived that one of the counts was potentially duplicitous, then, consistently with that obligation, he was bound to raise that concern with the Crown prosecutor. So also, if he was concerned that, in order to secure a fair trial, the count should describe what the direction or condition was, then he was bound to raise that concern. The Crown prosecutor was under a reciprocal obligation to have regard to concerns expressed by the learned judge and to act as he considered appropriate to address them.

[27] In my view, the expression of both concerns by the learned judge is a reflection of the careful approach taken by him to ensure a fair trial. He raised concerns. He did not proffer solutions. He offered no advice as to how to obviate any possibility of

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5 AB 174 T3-10 LL10-20.
6 AB 174 T3-10 L43-AB 174 T3-11 L4.
7 AB 176 T3-12 LL5-10.
8 AB 176 T3-12 LL12-30.

duplicity or how to describe the condition. In no way can the steps taken by him to which I have referred be properly categorised as acting as a consultant to the Crown.

[28] Section 572(1) of the Code would permit the court to order an amendment of an indictment on trial in the manner that count 1 was amended here "if it considers that the (amendment) is not material to the merits of the case, and that the accused person will not be prejudiced thereby in the person's defence on the merits".

[29] It is not apparent to me how the amendment here was material to the merits of the case or that the appellant would have been prejudiced in his defence on the merits by it. The deletion of the words "direction or" and the description of the condition would have both simplified and clarified for the appellant, the case he had to defend, without prejudicing his defence of it. The appellant has not advanced any basis for prejudice of that kind in submissions.

[30] The circumstances here are similar to, but less serious than, those in *R v Tapara*[9] where the indictment omitted the word "unlawfully". The trial judge raised the matter and the prosecutor sought leave to amend without opposition. A challenge to this procedure on appeal was unsuccessful, the Court observing at [19]:

> "… The amendment to cure the omission was not material to the merits of the case and could not have prejudiced the appellant's trial …"

[31] Lastly, a reading of the transcript, including that part of it specifically referred to by the appellant,[10] reveals that there is no basis for the submission that he was cut off from being heard in opposition to the amendment. Evidently, he did not then have a proposed basis for opposing it which he wished to raise, but was prevented from raising, before the learned judge. Nor has any viable ground of opposition which might have availed him then, been suggested in submissions.

[32] In summary, no miscarriage of justice occurred as is alleged in this ground and it must fail.

Ground 2 - direction as to honest claim of right

[33] As amended, this ground applies to all convictions under appeal. To adopt the appellant's written submission:

> "In essence the defence case, as put, was that the appellant's company structure was such that he believed that he could move things around as he liked. As such, when the appellant applied the money as he did, it was open to conclude that he was exercising an honest claim of right."

It is further submitted by the appellant that, for that reason, the jury ought to have been given a direction that reflected s 22 of the Code. No such direction was sought or given at trial.

[34] Relevantly, s 22(2) provides:

> "(2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by

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9 [2010] QCA 320.

10 Namely, AB 174; T3-10 LL50-56.

> the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

For this section to absolve a person from criminal responsibility for an act or omission that might otherwise constitute a property offence, the same must occur both in the exercise of an honest claim of right and without intention to defraud.

[35] It is not readily apparent how the defence case as outlined in the appellant's written submissions would have availed for any of the s 408C(1)(d) counts. They concerned the dishonest gaining of a benefit for Water at Wooyung Pty Ltd to which the respective cheques were payable. That company did not gain the benefit of the proceeds of the cheques by the appellant "moving around" funds within the corporate group. Perhaps that is why this ground in its unamended form related only to count 1 which concerned a cheque payable to Water at Wooyung Pty Ltd which the appellant endorsed for payment to Antrim Corporation Pty Ltd.

[36] Be that as it may, the offences of which the appellant was convicted are all fraud based. Central to each of these offences is the element that the person acted dishonestly. At the trial, the defence was conducted on the basis that there was no dishonesty or intention to defraud. The learned judge directed the jury thoroughly as to the element of dishonesty in respect of all counts.[11] No complaint is made about that.

[37] The appellant's submission that a direction reflecting s 22(2) ought to have been given faces a substantial logical hurdle. The Crown case required it to prove beyond reasonable doubt that the appellant was dishonest. If that was proved, then there was no scope for the operation of s 22(2). The jury could not have found that the appellant acted dishonestly yet exercised an honest claim of right in respect of any of the counts. On the other hand, if dishonesty was not proved, the jury would have no need to consider whether an honest claim of right was exercised. Given those circumstances, a direction concerning honest claim of right was unnecessary.

[38] In *R v Sitek*,[12] the Full Court was pressed with an argument that the trial judge had erred in not leaving to the jury the defence of honest and reasonable mistake of fact under s 24 of the Code in a s 408C prosecution. As to that, de Jersey J, as his honour then was, (with whom Connolly and Carter JJ agreed) said:[13]

> "If the jury took the view that the appellant was dishonest in the manner alleged by the Crown, they could hardly in the circumstances of this case consider that he was nevertheless acting under an honest mistake. The two positions would be contradictory. It was on this basis that the learned trial judge did not allow s 24 to go to the jury, and he was clearly correct in taking that course."

The argument pressed here is analogous to that pressed in *Sitek*. That decision provides confirmation that it was correct for the learned judge here not to have directed the jury in terms of an honest claim of right under s 22(2).

[39] It remains to note, that in oral submissions, the appellant referred to the decision of the High Court in *Stevens v The Queen*.[14] The accused was convicted of murder in

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11 AB 1420; T19-22 L28-AB 1423; T19-25 L1.
12 [1988] 2 Qd R 284.
13 At p 293.
14 (2005) 227 CLR 319.

a circumstantial case. The trial judge instructed the jury on a number of bases on which they should acquit the accused if they believed his version of events. However, the judge refused to instruct the jury on the defence of accident under s 23(1)(b) of the Code. By majority, the High Court held that such an instruction should have been given. In their view, the evidence adduced at trial was such that a reasonable jury could properly have concluded that the death of the deceased was one that occurred by accident even if they did not accept the accused's account of extraordinary emergency.

[40] The decision in *Stevens* does not establish a principle which would have required that the direction suggested by the appellant here ought to have been given. Given the basis upon which the defence was conducted, there was no material difference between proof beyond reasonable doubt that the appellant was dishonest and disproof to that standard that he was exercising an honest claim of right without intention to defraud.

[41] A direction as to honest claim of right was not required. Consequently, this ground cannot succeed.

Ground 3 - unreasonable verdicts on counts 2, 3, 4, 5, 6 and 8

[42] This ground invokes s 668E(1) of the Code which requires the court to allow an appeal against conviction if it is of the opinion that the verdict should be set aside on the ground that it is unreasonable. In *SKA v The Queen*,[15] all members of the court reaffirmed[16] that the function to be performed by an intermediate court of appeal is as stated in *M v The Queen*,[17] by Mason CJ, Deane, Dawson and Toohey JJ:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[43] This test has been accepted as applicable to statutory formula which refers to the impugned verdict as "unreasonable".[18] In *M*, the joint judgment went on to say:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred." [19]

In applying this test, the court is required to make an independent assessment of the evidence, both as to its sufficiency and quality.[20]

[44] Each of these counts concerned the s 408C(1)(d) offence of dishonest gaining of a benefit. In each case, the benefit gained was a sum of money paid by an investor or

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15 (2011) 243 CLR 400; [2011] HCA 13.
16 French CJ, Gummow and Kiefel JJ at [11]; Crennan J at [77]; Heydon J at [45].
17 (1994) 181 CLR 487 at 493.
18 *SKA* at [12]; *MFA v The Queen* (2002) 213 CLR 606 at [58].
19 At 494.
20 *SKA* at 406 [14].

investors to Water at Wooyung Pty Ltd. That company gained the benefit when the payment was made to it. Each count alleged that the benefit was gained for the company by the dishonesty of the appellant.

[45] During the opening, the Crown prosecutor outlined the appellant's dishonest conduct in terms of false assertions knowingly made by him separately to the Loughnans,[21] to Mr Marsh[22] and to Mr Tobin[23] prior to the making of the respective payments by them. As noted earlier in these reasons, some of the alleged assertions related to existing fact – ownership of the land at Wooyung; and others to future conduct – where the investors' money would be applied, or to prediction of future fact – the value of the investors' investment over a five year period.

[46] I propose to consider first the evidence before the jury of assertions as to ownership that the appellant was alleged to have made. It is not in dispute that he did not own the land directly or via any of his companies including Water at Wooyung Pty Ltd, at any time when the assertions in question were alleged to have been made. Any assertion that it was so owned was false and the appellant would have known that they were false when he made it. Thus, if the evidence was sufficient to have satisfied the jury beyond reasonable doubt that the assertions were made before the investors made their payment or payments, then that evidence would have been sufficient for the jury to have been satisfied that the appellant acted dishonestly in order to gain the benefit of the payment or payments for that company.

[47] **Count 2: assertions as to ownership:** This count concerned an amount of $750,000 paid to Water at Wooyung Pty Ltd by Mr and Mrs Loughnan on 23 July 2004. The payment was made by way of bank transfer from the bank account of Cornwall Grazing Investments, an entity owned by Mr and Mrs Loughnan, to the company's Bank account. Mr Loughnan had requested their bank to make the transfer.[24]

[48] In his evidence-in-chief, Mr Loughnan said that in meetings with the appellant held before the $750,000 was transferred, the appellant mentioned that he "owned" a block of land in New South Wales and that he was planning on getting a group of "select investors" together to develop it into residential and resort type accommodation units.[25] A little later, the following was said still in evidence-in-chief:

> "MR KENT: What was your - what was your understanding about who owned the land?-- That Mr Dale gave us the impression he owned the land and that - that-----
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> HIS HONOUR: Well, could - could you tell us what he actually said to you rather than using the word "gave the impression"?-- Um.
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> I know it's a long time ago?-- It is a very long time ago-----
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> Yes?-- -----Sir, but basically, yeah, "I've got this land in northern New South Wales. I'm putting that up into the – the company" - or the trust or whatever – "to - and then your investors will pool

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21 AB 41 T1-28 LL22-38.
22 AB 46 T1-33 LL41-47.
23 AB 47 T1-34 LL40-47.
24 AB 396 T6-13 LL55-57.
25 AB 185 T3-21 LL20-40.

> everything and - and do the development." Which, yeah - yeah, I – I took away from that that Mr Dale owned this land and he was putting it forward as the land we were going to develop in the Water at Wooyung trust.
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> HIS HONOUR: So he said, "I've got this land" which you interpreted as meaning "I own this land"?-- His exact wording, I'm not sure of. I - I, yeah, I definitely was left in no doubt that he had this property-----
>
> Yes?-- -----that he was prepared to put up as his part of the - the whole deal. Yeah.
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> MR KENT: When you were investing the money what did you think was going to happen to the money?-- That it was going to go in to the Water at Wooyung to be used to develop and - and bring it through to a - to its completion, yeah.
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> And was it - do you recall what made you think that?—That was the general - yeah, any conversations with Mr Dale was that that was what was going to happen. That we were going to invest the money into this business or this venture to – and use that money to develop into its - into what we see on the - what we were told was going to happen with it, to have an investment similar to the Salt and Casuarina which were already under way and completed down there."[26]

[49] The appellant points particularly to evidence given by Mr Loughnan in the course of cross-examination by the appellant, where the following exchange occurred:

> "DEFENDANT: It was disclosed to you of the trust deed's powers, you had already confirmed that Rob had said to you he control (sic) the land and the trust would eventually own it?-- Yes.
>
> I confirmed that for you.
>
> HIS HONOUR: Do you accept that, Mr Loughnan?-- I do accept that statement.
>
> DEFENDANT: Thank you?-- That-----
>
> I controlled the land and the trust would eventually own it. …"[27]

The questioner did not clarify when the disclosure confirmation of which was sought of Mr Loughnan was made; whether it occurred before or after the funds in question were transferred.

[50] In my view, the totality of the evidence to which I have referred was sufficient for the jury to be satisfied beyond reasonable doubt that the appellant falsely stated to Mr Loughnan before the funds were transferred that he owned the land. By it, the appellant meant Mr Loughnan to understand that he, the appellant, was in a position to put the land forward as his contribution to the "Water at Wooyung" project. There is no material difference between what he first said on the topic and what he said a little later in evidence-in-chief. In context, the word "got" was used by the

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26 AB 197 T3-33 L28-AB 198 T3-34 L9.

27 AB 372 T5-51 LL21-32.

witness synonymously with the word "owned" to describe the interest the appellant said that he had in the land.

[51] Whilst there is uncertainty as to whether the evidence in cross-examination related to any time before the funds were transferred, that evidence does not amount to a significant departure from the evidence-in-chief. Control of property is compatible with ownership of it in the sense that a person may both own and control property. They are not antonyms such that control of property is incompatible with ownership of it. The jury were entitled to regard anything the appellant may have said about controlling the land as not inconsistent with statements by him that he owned it.

[52] Given Mr Loughnan's evidence that it was he who had requested the bank to transfer the $750,000, what he said he was told by the appellant has a greater relevance why the transfer was requested than what Mrs Loughnan said she was told by the appellant. In evidence-in-chief, Mrs Loughnan's account was similar to that of Mr Loughnan. She was asked and answered as follows:

> "MR KENT: All right. Now, did you ever hear of something called Water at Wooyung?-- That - yes, he started talking - Mr Dale started talking about Water at Wooyung. I have a clearer memory for January '04 about he talked a lot about - we were introduced to the Water at Wooyung idea then, his ideas for the land that he said he owned at Wooyung which is between Kingscliff and Byron Bay. He said it was the last 200 – last plot of land that was able to be developed in that stretch of coastline.
>
> MR KENT: All right. Do you recall at that stage Mr Dale saying anything else about that proposed development?-- He said he owned the land, the 200 acres. He took us down there on an occasion to show us. He said that - he said that he could develop the land himself, that Suncorp would give him the money to develop the land himself, but because he had clients that he was coaching and most of our goals were to be financially independent that he would offer - that he had a group - an idea for a group that he called The Inner Sanctum that he would hand-pick 30 people to become part of the inner Sanctum to specifically go into this development called Water at Wooyung and we would, you know, become financially secure through this investment, that it was a great opportunity."[28]

[53] Mrs Loughnan was cross-examined on a signed statement she had made for ASIC in which one of the investments they had made was described as "an investment into the acquisition and development of" land at Wooyung.[29] She was asked whether she remembered saying those words. She said that she did not distinctly recall. It was put to her that the word "acquisition" was her word. She said that she was not entirely sure whether it was hers or not.[30] It was suggested to Mrs Loughnan that if she was shown that all of the money they had put into the project had gone towards acquisition of the land, she would not have had a problem with that. She replied: "Not the acquisition of the property. You told us you owned the property".[31]

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28 AB 752 T10-4 LL32-55.
29 AB 816 T10-68 LL8-12.
30 AB 816 T10-68 LL12-18.
31 AB 816 T10-68 LL41-45.

Overall, this evidence did not amount to a significant departure from her evidence-in-chief that the appellant told her as early as January 2004 that he owned the land.

[54] This evidence of false statements as to ownership of the land made by the appellant was sufficient for the jury to have been satisfied beyond reasonable doubt that he dishonestly gained a benefit for Water at Wooyung Pty Ltd, namely, the payment the subject of count 2.

[55] **Counts 3, 4 and 5: assertions as to ownership:** These counts concerned respectively an amount of $200,000 paid on 2 September 2004 by Denage Pty Ltd to Water at Wooyung Pty Ltd; an amount of $100,000 paid on 27 September 2004 by Denage Pty Ltd to that company; and a further amount of $200,000 also paid on that date to that company by Mr Marsh himself. In each case, the payment by Denage Pty Ltd was made at Mr Marsh's direction.

[56] Mr Marsh gave evidence that in June 2004, the appellant had tried to interest him in becoming a member of The Inner Sanctum, a small group of investors organised by the appellant, for the purpose of providing funds for the Water at Wooyung project. An investor was required to contribute $1 million to join The Inner Sanctum. For some time, a launch event for that group at Hayman Island had been planned. Mr Marsh said that in June 2004, and well before the event, the appellant had said to him that he wanted Inner Sanctum members to invest their $1 million "so he could announce at the event that the property at Wooyung was unencumbered; that he had had enough money from all the investors to own the property outright to allow the development to proceed."[32]

[57] At that point, the following was said in his examination-in-chief:

> "MR KENT: In relation to this project at Wooyung that you've told us about, were you aware of any company being involved with that?-- I know the name Water at Wooyung was mentioned. I'm not too sure when that came about.
>
> All right. Well, I'm still dealing at the moment with this occasion around June 2004?-- Okay.
>
> When you filled out the form, okay? So we'll just take it through one step at a time. At that time, as far as you were aware, who owned the land?-- I believe Mr Dale, or one of his companies owned the land.
>
> And why did you think that?-- He'd advised me that he owned the land.
>
> Okay.
>
> HIS HONOUR: When did you receive that advice?-- I suppose generally during discussions and he had mentioned why he needed the money was to re-finance the property, and he'd also mentioned at the time when our son was in - down at a session with Mr Dale - that we could go down and use the property on the weekend to camp because we're keen campers, and he said other Inner Sanctum members had been down there camping and we were able to as well."[33]

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32 AB 600 T8-12 LL7-10.

33 AB 600 T8-12 L40-AB 601 T8-13 L8.

[58] Later, Mr Marsh gave the following answer to a question:

> "At the time when you were investing in this - your original investment firstly, Mr Marsh - what were you aware of in relation to Water at Wooyung's purchase of the land?--I believe the land had already been acquired, either by the Water at Wooyung trust, or some other entity of Mr Dale's."[34]

[59] Mr Marsh was not cross-examined on his evidence that the appellant had advised him that he owned the land. Indeed, the tenor of the cross-examination was consistent with the appellant or one of his entities having become the owner of the land by June 2004. For example, the appellant put to Mr Marsh that the reason he required investors to contribute a minimum level of funds prior to the Hayman Island event was because, as he put it, Water at Wooyung Pty Ltd had purchased the land but had intended to re-finance the loan based on the investors' contributions such that there would be no external debt on the project.[35] The learned judge sought clarification from Mr Marsh as follows:

> "Look, Mr Marsh, is it the case that you were told by Mr Dale at some stage prior to your investing in the project, that Mr Dale wanted to refinance the property such that there was no debt on it, no external debt on it? Is that what you were told?-- Yes, your Honour.
>
> And when were you told that?-- That was around about the time of signing up for the Hayman Island experience.
>
> So, that's before you - is that before you put any moneys into the investment?-- Yes, your Honour.
>
> And that the refinancing was to be achieved through funds raised from investors?-- That is correct, your Honour."[36]

In these exchanges between the learned judge, the witness and the appellant, the notion of refinancing of debt is consistent only with there having been an existing debt owed to an external creditor which was secured against the appellant's (or one of his entities') ownership of the land. It is not at all consistent with external ownership of the land.

[60] The evidence to which I have referred was sufficient for the jury to have been satisfied beyond reasonable doubt that the appellant falsely asserted to Mr Marsh that he or an entity of his owned the land at Wooyung and that, on that account, he dishonestly gained the benefit of the payments made by Denage Pty Ltd and Mr Marsh to Water at Wooyung Pty Ltd.

[61] In the appeal, the appellant raised two issues which require mention. The first was that Mr Marsh was cross-examined about a signed statement he had made which contains a statement that the appellant indicated that the original investors would contribute $7 million to purchase the property at Wooyung. Mr Marsh maintained that he did not mean that and that the statement was a mistake.[37] It was a matter for the jury whether they accepted his explanation.

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34 AB 620 T8-32 LL38-42.
35 AB 695 T9-12 LL28-35.
36 AB 696 T9-13 LL20-34.
37 AB 694 T9-11 LL30-35.

[62] Secondly, in evidence-in-chief, Mr Marsh was asked by the Crown prosecutor whether, had he known that the land was not owned by the appellant or an entity of his, would he have invested in the project. He replied that he could not say no to that and that other factors would have been taken into account as well.[38] This evidence does not detract from the dishonesty of the appellant's conduct in making the false assertions as to ownership, or in their role in the gaining of the benefits. That the payments may have been made even if Mr Marsh knew that the land was not so owned, would not justify an inference that the making of the false assertions had no significant role to play in the gaining of the benefit of the payments.

[63] In summary, with respect to the false statements, there was sufficient evidence for the jury to have been satisfied beyond reasonable doubt that the appellant dishonestly gained benefits for Water at Wooyung Pty Ltd, namely, the payments the subject of counts 3, 4 and 5.

[64] **Counts 6 and 8: assertions as to ownership:** These counts concern the respective amounts of $300,000 transferred by internet banking by Mr Tobin to Water at Wooyung Pty Ltd on 2 September 2004 and $100,000 also so transferred to that company on 5 November 2004.

[65] Mr Tobin gave evidence that during a two hour meeting on 12 August 2004, his potential participation in the Water at Wooyung project via The Inner Sanctum was discussed between himself and the appellant.[39] At that point, the following exchange occurred:

> "HIS HONOUR: Was anything said, Mr Tobin, as to who owned this 200 acres?-- There was a lot of discussion and detail and I kept written records of - of the discussion, but part of the discussion or the information that I needed was to ascertain exactly the nature of the investment. And, part of the discussion was Mr Dale saying that he was vending in the – the block of land that on which the - the project was based.
>
> He was vending in. Can you - is that a term he used or is that a term you've used-----?-- At the time a term I would use. It's the - the structure of the Water at Wooyung unit trust was to be 30 million units issued, of which Mr Dale was going to retain 15 million and one unit and he would - he was seeking to raise funds for the other 14 million 999 thousand. So, I asked what Mr Dale was doing to earn his 15 million units, because he would have a 50 per cent interest and with that extra one share he would have, you know, voting control. And, Mr Dale told me that he was contributing or putting in the land and all the concepts, ideas and motivation to deliver the project."[40]

[66] Mr Tobin made a contemporaneous note of the discussion setting out figures, including the value of the appellant's share.[41] The significant amount of $15,000,001 attributed to the appellant is consistent with the contribution of the land to the project of which Mr Tobin was advised.

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38 AB 620 T8-32 LL43-46.
39 AB 430 T6-47 LL5-42.
40 AB 431 T6-48 LL9-29.
41 Exhibit B 00255733 AB 1744.

[67] I note at this point that on 26 August 2004 and in response to an enquiry[42] he had made of Suzanna Rollings, the appellant's partner and sales director for the project, seeking confirmation that Water at Wooyung Pty Ltd owned "100%" of the land, a representation was made by Ms Rollings by email to Mr Tobin that "Water at Wooyung Pty Ltd owns the land ATF (sic) the water at wooyung trust. It is unencumbered."[43] That this email was admissible as a representation made by the appellant is affirmed in the disposition of ground 8.

[68] In any event, Mr Tobin caused his own solicitors to conduct title searches of the land. He was advised that that company was not the registered owner of the land. He raised this with the appellant at the latter's office at Southport on 2 September 2004. According to Mr Tobin, the appellant's response was that "the land was to be settled within a week; within a few days".[44] Mr Tobin asked to see the contract. The appellant told him that it was not at the office because the contract was due to settle within a couple of days.[45] Based on these assurances, Mr Tobin instructed his accountant in Perth to effect the electronic transfer of the $300,000, the subject of count 6, that day.[46]

[69] There was ample in the evidence to which I have referred for the jury to have been satisfied beyond reasonable doubt that the appellant gained the benefit of the payment of the amount of $300,000 dishonestly. There was the evidence that the appellant had said that he was contributing or putting up the land for the project which implied that he was in a position to contribute it directly or cause it to be contributed to the project. That was not so and the appellant must have known that it was not so. More graphic and direct was the representation in the email that Water at Wooyung Pty Ltd owned the land unencumbered as trustee for the Water at Wooyung Trust which, it was open for the jury to infer, was sent with the appellant's knowledge. That representation was false. The appellant could not but have known that it was false. No less graphic and direct was the assurance made by the appellant on 2 September 2004 when confronted by Mr Tobin over ownership of the land. It also was false as the appellant must have known. The contract was not to be settled within a week of that date – the contractual completion date was 27 September 2004. No arrangements to settle earlier had been made and, moreover, Water at Wooyung Pty Ltd was not then in a financial position to settle earlier or, for that matter, on the contractual date. The fall back to vendor finance was not negotiated until October.

[70] The payment the subject of count 8, was made after completion of the purchase on vendor-financed terms had been completed. Water at Wooyung Pty Ltd did not become owner of the land "100%"; it never owned the land unencumbered. The appellant did not advise Mr Tobin of this. Mr Tobin testified further that at a meeting of members of The Inner Sanctum held at the Sheraton Hotel Broadbeach on 6 October 2004, the appellant said that all the money that had been put into the Water at Wooyung Trust was untouched and remained in the trust. He said that he had been paying expenses for the project out of his own pocket and members would be informed when money was paid out of the trust.[47] Mr Tobin was not challenged on this testimony.

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42 Exhibit B 00255903 AB 1747-8.
43 Exhibit B 00255904 AB 1749.
44 AB 464 T6-81 LL47-56.
45 AB 464 T6-81 LL58-AB 465 T6-82 L5.
46 AB 472 T6-89 LL42-52.
47 AB 488 T7-7 LL51-55.

[71] The evidence of Mr Maynes, the admissibility of which is affirmed in the disposition of ground 6(b), demonstrated that the statement that all money that had been put into the trust remained there, was false. For example, according to Mr Maynes, by 10 September 2004, of the $300,000 paid in by Mr Tobin eight days earlier on 2 September 2004, approximately $221,000 had been paid out to participants who had wished to exit the project.[48] The demonstrable falsity of the appellant's statement provided a compelling foundation for an inference by the jury of dishonesty on the appellant's part which he had deployed to garner Mr Tobin's continued participation in the project and the payment of the further $100,000.

[72] **Ground 3 summary:** For the foregoing reasons, this ground of appeal must fail in respect of each count to which it is addressed.

[73] It remains to note that there was also a large amount of evidence adduced which was relevant to other assertions alleged to have been made by the appellant, including assertions as to future conduct and predictions as to future fact. It is unnecessary to refer to this evidence in any detail. It is sufficient for present purposes to note that none of that evidence detracted from the evidence to which I have referred as sufficient to have satisfied the jury to the requisite standard of proof of the appellant's guilt on counts 2, 3, 4, 5, 6 and 8.

Ground 4 - "no case to answer" submission

[74] No oral submissions were made on behalf of the appellant on this ground of appeal. In all likelihood this was because the ground is, in substance, superfluous. A failure of ground 3 would preclude an argument that the appellant had a significant "no case to answer" submission available to him for counts 2, 3, 4, 5, 6 and 8; it is not suggested that such a submission had been available to him in respect of count 1; and in respect of count 7 for which a "no case to answer" submission was available, he was acquitted in accordance with the learned judge's suggestion to the jury. In these circumstances, had ground 3 succeeded, it would have been unnecessary to consider ground 4.

[75] This ground cannot afford an independent basis for success for the appellant in his appeal. It is not necessary to deal further with it. In passing over the ground, I do not mean to imply that there is any validity in the appellant's complaint that he was "cut off" by the learned judge in an unacceptable way from making a "no case to answer" submission.

Ground 5 - failure to give a "propensity reasoning" direction

[76] The eight counts of which the appellant was tried fall to be grouped according to the complainant by whom payment of moneys was made or directed. Each complainant gave evidence with respect to the counts grouped to them. The essence of this ground of appeal is that the learned judge failed to warn the jury as to the manner in which evidence relevant to one group of counts could be used when considering their verdict for a count in one of the other groups. In the appellant's oral submission, the necessity for such a direction arose from "a clear and present danger of propensity reasoning"[49] from a finding of guilt on one count to a conclusion that the appellant was guilty of "discreditable conduct" and hence guilty on the other counts.

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48 Exhibit B00570032 Schedule 6.3 AB 1783.

49 Appeal Transcript 1-17 LL15-16.

[77] The appellant's adoption of the expression "discreditable conduct" draws upon the decision of the High Court in *HML v The Queen*.[50] It ought be said at once that the evidential issue in that case has no counterpart in the evidential circumstances of the present appeal. In *HML*, uncharged acts were left to the jury as evidence of the conduct in which the complainant's evidence of the charged acts was to be evaluated. That did not occur here.

[78] In written submissions, the appellant argued that the jury verdicts here bespeak "propensity reasoning in action" so as to demonstrate the "practical necessity" of the direction proposed. It is said that the jury was willing to convict "in circumstances where the requisite particulars were not established" and that that "suggested that their deliberations were short circuited." Had the appellant succeeded on ground 3, then this submission would have had considerable force.

[79] Whether there was a need for a direction of the kind proposed by the appellant falls to be considered against the directions that were given to the jury in the summing up. As the respondent has summarised in written submissions, the learned judge directed the jury that:

(a) the eight counts were separate;
(b) they were to consider each count separately, evaluating the evidence relating to that particular count in order to decide whether they were satisfied beyond reasonable doubt that the prosecution had proved its essential elements;
(c) they would return separate verdicts in respect of each of the eight counts;
(d) the evidence in relation to the separate counts were different and so their verdicts did not need to be the same for each count;
(e) finding the accused guilty of a particular count did not mean that they must find him guilty of all other counts, and, conversely, for a finding of not guilty; and
(f) the elements of count 1 were different and, again, their verdicts did not need to be the same.[51]

His Honour also identified the three separate groups of counts and related each to the respective complainant witnesses. He gave a *Markuleski* direction in respect of each group of complainants.[52]

No criticism is made by the appellant of any of the directions that were given.

[80] At no point in the trial was it suggested that the evidence given in respect of the separate groups of counts was cross-admissible. Nor was it suggested to the jury that they could rely on a finding of guilt on one count to find the appellant guilty of any other count. Having regard to the directions that were given and the absence of either of the suggestions to which I have referred, I am of the view that there was no need for a direction of the kind proposed by the appellant on appeal in order to afford him a fair trial. Indeed, to have given a direction of that kind could have risked sewing seeds in the minds of the jurors with respect to impermissible lines of reasoning.

[81] For these reasons, this ground of appeal ought not succeed.

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50 (2008) 235 CLR 334 at [113]; [2008] HCA 16.
51 AB 1408 T19-10 L8-AB 1410 T19-12 L2.
52 *Ibid* T19-11 L19-T19-12 L2.

Ground 6(a) - failure to give an "only reasonable inference" direction

[82] The appellant's dishonesty which formed an element of each offence for which he was charged was a matter to be determined by the jury by inference. In his summing up, the learned judge directed the jury with respect to inferences, explaining to them the process of drawing an inference as a reasonable conclusion from a fact or facts which they found to be established by the evidence.[53] He explained the burden of proof[54] and gave directions as to dishonesty referable to the standards of ordinary honest people.[55] Significantly, too, his Honour identified dishonesty as an element of each offence charged and stressed that it had to be proved to the requisite standard for each offence.[56]

[83] The appellant submits that the directions fell short of what was required for a fair trial by failing to include a direction that the conclusion about dishonesty must be the only reasonable inference available in the circumstances. The appellant did not propose that, as a matter of legal principle or invariable practice, such a direction need be given in every case involving circumstantial evidence. Such a proposition was repudiated in this Court in *R v Fuller*[57] in which Fraser JA observed:

> "[72] As to the other two directions the appellant argued should have been given (that guilt should be the only rational inference that could be drawn from the circumstances, and that if there is any reasonable hypothesis consistent with innocence the jury's duty is to acquit), whilst it would have been prudent for the trial judge to give those directions there is no 'invariable rule of practice' that they must be given in every case involving circumstantial evidence.[58] The purpose of those directions is to explain and emphasize the requirement of proof beyond reasonable doubt.[59] The trial judge's directions made it very clear to the jury that a verdict of guilty might be given only if the jury was satisfied that the prosecution had proved the elements of the charged offences beyond reasonable doubt. His Honour gave and repeated the conventional directions to that effect. For example, the trial judge directed the jury that the prosecution must prove the essential elements of each charge, failing which the duty of the jury was to acquit. There was no complaint at trial or in this appeal about the trial judge's descriptions of the elements of each offence or about the terms in which his Honour directed the jury as to the burden and standard of proof."

[84] As in the appeal in *Fuller*, here, there is no complaint about the learned judge's descriptions of the elements of each offence including dishonesty, about the burden and standard of proof or of reasoning by inference. They were, with respect, full,

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53 AB 1404 T19-6LL9-21; AB 1405 T19-7 LL1-10.
54 AB 1405 T19-7 LL15-41; 55-56.
55 AB 1419 T19-21 LL43-53; AB 1420 T19-22 LL51-56; AB 1421 T19-23 LL1-10; AB 1422 T19-24 LL49-56.
56 AB 1420 T19-22 LL47-49; AB 1422 T19-24 LL49-51.
57 [2009] QCA 195.
58 (Citing *Shepherd v The Queen* (1990) 170 CLR 573 at 578.)
59 (Citing *R v Holman* [1997] 1 Qd R 373 at 380.)

accurate and fair. To have given the direction now sought by the appellant would have been consistent with the practice adopted in some circumstantial cases. As was observed to have been so for *Fuller*, it may have perhaps been prudent to have given it at the appellant's trial. However, having regard to the directions that were given, the appellant has not succeeded in making a persuasive case that a miscarriage of justice occurred in consequence of the direction sought not having been given. This ground of appeal, too, ought not succeed.

Ground 6(b) – failure to direct the jury how to use Maynes' evidence

[85] Mr O J Maynes, a forensic accountant, was engaged to trace the moneys that had been invested by the complainants. He gave expert evidence of his findings which were set out in a substantial report. It was tendered.

[86] On the hearing of the appeal, counsel for the appellant explained that it was not contended that Mr Maynes' evidence "was necessarily inadmissible". The burden of the complaint, as summarised in the appellant's written submissions, is this:

> "53. In truth, this evidence, if admissible at all, has limited relevance as a circumstance in a circumstantial case. The jury should have been told as much, and, in the circumstances of this case, also warned that bad business sense does not necessarily equal fraudulent behaviour."

[87] There are two aspects to this ground, namely, that the jury should have been told that this evidence was "of limited relevance", and that they should have also been told that one inference available from it was that the appellant was "guilty of having a bad business sense" but was not necessarily dishonest.

[88] The appellant was right in not pressing an argument on appeal that Mr Maynes' evidence was inadmissible. It clearly was admissible. In circumstances where the case of dishonesty against the appellant included the repeated application of invested funds in ways which did not accord with statements made by him to investors as to how their money would be applied, evidence of how those moneys had in fact been applied was plainly relevant. Accordingly, I do not accept that this evidence was of limited relevance. Its cogency is apparent.

[89] Nor do I accept the appellant's submission that a reasonable inference available from the evidence overall was that the appellant merely had poor business judgment. In light of Mr Maynes' evidence and the evidence about the statements that the appellant had made to which I have referred, so benign an inference is, with respect, far-fetched.

[90] This ground of appeal is without merit.

Ground 7 – error in direction as to dishonesty

[91] The appellant points out that following upon a direction given by the learned judge on the jury's third question, the Crown prosecutor requested that the jury be directed that "if any one of the particulars are made out that is sufficient. In other words, they don't have to be satisfied of all the particulars."[60]

[92] His Honour then gave the following directions:

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60 AB 1494 T20-18 LL17-21.

> "The Crown must prove beyond reasonable doubt, firstly that the defendant did gain the benefit alleged, that's been conceded, but the Crown must go on and prove beyond reasonable doubt that the action of the defendant in respect of each of those counts was done dishonestly. And to prove that the defendant acted dishonestly, the prosecution must prove beyond reasonable doubt that what the defendant did was dishonest by the standards of ordinary honest people, and that the defendant realised that what he did was dishonest by those standards.
>
> Now, in considering whether the Crown has established dishonesty, or dishonesty on the part of the defendant in that regard, you have regard to the particulars of dishonesty which we've been through together. But it is not necessary for you to accept each of the particulars. It is sufficient if you are satisfied with regard to one of them. And you may recall that what I suggested your exercise should be in this regard was firstly, to determine what was said by the defendant to each of the investors. Secondly, to consider whether that induced the invested to part with his money. And thirdly, to determine whether the action of the defendant in making whatever statement you find was made, thereby acted dishonestly by adopting the standards of ordinary honest people, and then asking yourselves did the defendant realise that what he did was dishonest by those standards.
>
> So you're not required to find that each alleged particular of dishonesty has been established. It is sufficient should you be satisfied that one of those particulars has been established.
>
> I suggested that you decide firstly what was said by the defendant to each of the investors. Then, once you've determined that, you should ask yourselves whether the investor was induced to pay the moneys because of what the defendant said to him or her, and finally to assess whether the prosecution has proved that what the defendant did was dishonest, and you do that by applying the standards of ordinary, honest people. Finally, you determine whether the defendant realised that what he did was dishonest by those standards, and I reminded you that you set the standards for the community; no-one else in this room. You determine whether what the defendant said to the investors, what he did with their moneys after they were invested - you determine whether that was dishonest by the standards of ordinary, honest people. And finally, you determine whether the defendant realised that what he did was indeed dishonest by those standards."[61]

[93] The appellant submits that the learned judge erred in giving this direction because having directed the jurors that it was sufficient to be satisfied of any one of the particulars of dishonesty, he failed to instruct them that they were required to be unanimous as to which one of those particulars they were satisfied.

[94] To my mind, the detailed directions given by the learned judge substantially directed the jury that unanimity in this respect was required. Whilst he did not say

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61 AB 1503 T20-27 L12-AB 1504 T20-28 L46.

so in terms, the requirement for unanimity underpinned the directions he did give them as to how they were to go about their task. A fair reading of the directions indicates that when he addressed the jury members as to what "you" should do, he was referring to them acting collectively. For example, his suggestion that "you decide firstly what was said by the defendant to each of the investors" would have been clearly understood by the jury to mean that they were to make that decision collectively as a jury decision. It is inconceivable that the jury would have understood the learned judge to be referring to decisions made individually by each jury member without discussion with the others.

[95] In these directions, the learned judge twice told the jurors that in order to find dishonesty, it was sufficient for them to be satisfied that one of the particulars of it had been established. His meaning was clear: that they together needed to be satisfied that one particular had been established to the requisite standard. The process that he outlined for them of considering factual issues and making decisions about them progressively would have obviated the kind of risk to which the English Court of Appeal in *R v More*[62] alluded for a case involving obtaining property by deception by a number of misrepresentations, namely, that the jury might convict yet have failed to be unanimous as to the making, falsity and efficacy of at least one of the representations.

[96] For these reasons, I would not uphold this ground of appeal. It remains to note briefly that in written and oral submissions, the appellant referred to the decision of the Court of Appeal of Western Australia in *Fermanis v Western Australia*[63] where two separate accused were tried together on six counts of gaining a benefit fraudulently. The State's case was based on a number of allegations in the alternative such that the jury could convict each appellant by different routes.[64] The appeal succeeded on the basis that the trial judge had failed to direct the jury that in each case each of the jurors had to base his or her decision to convict on the same route or routes. A direction of that kind would have been unnecessary and inappropriate in the present case because of the highly significant differences arising from the number of accused and the nature of the allegations as alternatives in *Fermanis*.

Ground 8 – the Rollings' email

[97] I have mentioned the circumstances in which this email was sent to Mr Tobin and its contents in discussion of ground 3. The appellant contends that the learned judge erred in allowing the email to be admitted as evidence going to a representation made by the appellant and in failing to direct the jury as to the use that could be made of the email.

[98] The email was admitted in the course of Mr Tobin's evidence and after he had twice testified that at the meeting on 12 August 2004, the appellant had instructed him "to send all correspondence and address all questions through Miss Rollings".[65] That evidence was not challenged in cross-examination.

[99] Prior to the formal admission of the email but after Mr Tobin had for the first time given the evidence to which I have just referred, the Crown prosecutor raised with

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62 (1987) 86 Cr App R 234 at 244;

63 (2007) 33 WAR 434; [2007] WASCA 84.

64 At [72].

65 AB 442 T6-59 LL25-32; AB 455 T6-72 LL47-50.

the learned judge the admissibility of the email against the appellant. The appellant expressed strenuous objection to it on the basis that the representation in it was not made by himself.[66] The learned judge informed the appellant that it was a matter for the jury whether they were prepared to infer that he knew that the email was being sent.[67] His Honour ruled at that point that the email was admissible.[68]

[100] In the course of summing up, the learned judge directed the jury on the issue as follows:

> "There is also at least one other example where the Crown seeks you to draw, or seeks to have you draw an inference from facts which you find established. You may recall the evidence of Mr Tobin, that he having raised the question of the ownership of the land, and whether it was encumbered or not, received an email from Ms Rollings stating that the land was owned and unencumbered.
>
> Now, the Crown seeks to have you draw the inference that Mr Dale knew of that email before it was sent to Mr Tobin. The Crown asks you to draw facts from Mr Tobin's evidence that he was told by Mr Dale to direct any questions he had through Ms Rollings. And the Crown also in this regard asks you to consider in general terms the role played by Ms Rollings during the events which we are concerned with."[69]

[101] His Honour continued, explaining the permissible process of reasoning by inference as follows:

> "Now, you may only draw reasonable inferences, and your inferences must be based on facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. But what you must not do is to indulge in guessing or intuition."[70]

The learned judge then instructed the jury that the burden of proof rested at all times with the prosecution, that the standard of proof was beyond reasonable doubt, and that in order to convict, they needed to be satisfied beyond reasonable doubt on every element that went to make up the offence charged.[71]

[102] In my view, these directions were sufficiently clear for the jury to have understood that in order for them to have inferred that the appellant knew what Mr Tobin was being informed by email, they needed to have been satisfied beyond reasonable doubt of that. It would have been open for the learned judge to have illustrated the point by reference to competing inferences in the manner in which they were described in *Wedd v R.*[72] However, the learned judge did not direct the jury defectively because an illustration of that kind was not given.

[103] I do not accept the appellant's submission that the email was inadmissible for the evidentiary purpose for which it was adduced. In the context of the unchallenged

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66 AB 447 T6-64 LL14-18.
67 AB 448 T6-65 LL3-12.
68 AB 448 T6-65 L54.
69 AB 1404 T19-6 LL29-57.
70 AB 1405 T19-7 LL1-10.
71 AB 1405 T19-7 LL15-40.
72 (2000) 115 A Crim R 205 at 14; [2000] WASCA 273.

evidence about the appellant's direction with respect to communications with Ms Rollings, it was clearly open to them to infer that the email was sent to Mr Tobin with his knowledge. Nor do I accept the submission that the learned judge failed to direct the jury as to the use that might be made of the email. He directed the jury, correctly in my view, that if they drew the inference sought by the Crown, they could regard the email as one sent with the appellant's knowledge.

[104] This ground of appeal cannot succeed.

Disposition – appeal against conviction

[105] For the foregoing reasons, the appeal against conviction fails.

Application for leave to appeal against sentence

[106] The proposed ground for which leave to appeal against sentence is sought is as follows:

> "The learned sentencing judge erred in sentencing the applicant on the basis that the quantum of the loss occasioned by the applicant on counts 1 to 6, and 8 was $1.9 million, when the evidence of the Crown's accountant Onus Maynes was that approximately $1.3 million of the total funds invested by the complainants was applied by the defendant to the Water at Wooyung project."

[107] The learned judge made the following sentencing remarks pertaining to investor loss and misapplication of investor funds:

> "So Mr Dale is to be sentenced in respect of six counts of dishonestly gaining a benefit and one count of dishonestly applying monies to the use of another. The amount involved in the dishonesty is $1.9 million. None of that money has been recovered and there is no money available to compensate any of the complainants. The maximum penalty with respect to each of the seven counts upon which Mr Dale was convicted is 10 years.
>
> …
>
> The Crown case largely involved the making of dishonest statements to prospective investors in a development known as the Water at Wooyung Project. Undoubtedly, the subject site did and does exist. Undoubtedly, the subject site was and is capable of being developed. The most significant of the false statements made to the prospective investors relates to the claim that Mr Dale, or an entity associated with him, owned the land and that the land was unencumbered. That was important in particular to Mr Loughnan and to Mr Tobin. Those false claims lie at the heart of the loss subsequently incurred by the investors. Other false statements were relied upon by the Crown during the trial, but it seems to me that it is the claim of ownership by Mr Dale and that the site itself was unencumbered that is the most significant.
>
> What happened after the investors placed their funds into the Water at Wooyung Project in terms of counts 2, 3, 4, 5, 6 and 8 does not show that Mr Dale simply used the funds for his own personal

> benefit. A significant amount of the funds deposited by the investors was put to the purpose for which the funds had been advanced. I do not accept that there was a total and dishonest use of all the investors' funds. Some of those funds undoubtedly went to the personal use of Mr Dale and his now wife, but Mr Maynes' evidence does reveal that substantial parts of those funds were used to further the Water at Wooyung Project."[73]

[108] It can be seen from these remarks that the learned judge quantified the investor loss occasioned by the conduct constituting counts 1, 2, 3, 4, 5, 6 and 8 as $1.9 million. Dealing separately with misapplication of the investors' funds, his Honour acknowledged that Mr Maynes' evidence revealed that substantial parts of those funds were used by the appellant to further the project. He did not put a figure on the funds that were so used.

[109] It must be said at once that the actual loss sustained by the three investors attributable to the counts on which the appellant was convicted, was $1.9 million in total. That was the loss sustained by them in consequence of the dishonest application of the property ($250,000) and the dishonest gaining of benefits ($1,650,000 in total) for which the appellant was convicted. His dishonesty caused the investors together to lose $1.9 million. There was no error on the part of the learned judge in sentencing on that factual basis.

[110] Upon analysis of it, I consider that the appellant's proposed ground of appeal is deficient in three respects. Firstly, it overlooks the relevance and factual accuracy of the actual investor loss adopted by the learned judge. Secondly, it seeks to accord primacy to how the funds were ultimately disbursed by the appellant. Of the counts on which he was convicted, only one, count 1, concerned the dishonest application of property. For that count, the dishonest application lay in endorsing the cheque as payable to Antrim Corporation Pty Ltd rather than in causing that company to disburse the funds in any particular manner. For the other counts, the heart of the offence charged was the dishonest gaining of a benefit by means of the payment made by the investor. The primacy sought to be placed by the appellant is, in my view, misplaced.

[111] Thirdly, the proposed ground asserts that Mr Maynes' evidence was that of the total funds invested by the complainants ($2 million), approximately $1.3 million was applied by the appellant to the project. The assertion is referenced to the following exchange in the course of cross-examination of Mr Maynes:

> "DEFENDANT: So, your opinion and admittance to the Court in this report that we – that's been tabled, you admit that $1.3 million approximately was rightfully used for the purposes of Water at Wooyung or business related purposes. Can you confirm that please?-- Well, yeah, I - on the basis of the information I've set out in the schedules-----
>
> Yes, which is your opinion?-- Yeah, yeah, I said 47 per cent business transactions directly related to purchase of Water at Wooyung; payments to staff. Now, those payments to staff included the ones identified to Mr Collis who I believe was a - employed in the - at - on the Water at Wooyung project. There were other staff that were

[73] AB 1530 Sentence T2 L24-AB 1531 Sentence T3 L50.

> obviously employed in other entities. There's promotional and entertainment expenditure related to the purchase of the property."[74]

[112] Mr Maynes did not concede that the figure of approximately $1.3 million "was rightfully used" on the project. His evidence was that 47 per cent was directly related to it. That percentage equates to approximately $950,000 of the investors' funds, not $1.3 million.

[113] In light of these deficiencies, the proposed ground of appeal must be viewed as having no reasonable prospects of success.

Disposition – application for leave to appeal against sentence

[114] For these reasons, leave to appeal against sentence should be refused.

Orders

[115] I would propose the following orders:-

1. Appeal against conviction dismissed.
2. Leave to appeal against sentence refused.

[116] **MULLINS J:** I agree with Gotterson JA.

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[74] AB 1077 T14-43 LL35-49.