

SUPREME COURT OF QUEENSLAND

CITATION: *R v Saba* [2013] QCA 275

PARTIES: **R**
v
SABA, Daas Ramez
(appellant)

FILE NO/S: CA No 283 of 2012
DC No 1438 of 2012

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: Orders delivered ex tempore 31 May 2013
Reasons delivered 27 September 2013

DELIVERED AT: Brisbane

HEARING DATE: 31 May 2013

JUDGES: Fraser JA and Applegarth and Jackson JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **Delivered ex tempore on 31 May 2013:**

- 1. The appeal is allowed;**
- 2. The appellant's convictions are set aside; and**
- 3. The appellant is discharged.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – OTHER FRAUDS AND IMPOSITIONS – FRAUD – GENERALLY – where the appellant gained the appearance of control by changing the ASIC register to show that he was the sole director and shareholder of two companies – meaning of “benefit” – whether the appearance of control of a company is a benefit

Corporations Act 2001 (Cth), s 120(1), s 128, s 129, s 135, Pt 2D.1, s 198E, s 201A s 201F, s 201G, s 203C, s 205B, s 350, s 351, s 352, s 1274, s 1274A, s 1308
Crimes Act 1900 (NSW), s 192E
Crimes Act 1914 (Cth), s 29A, s 29B
Criminal Code 1995 (Cth), s 135.2
Criminal Code of 1995 (Qld), Act No 37 of 1995
Criminal Code 1899 (Qld), s 1, s 59, s 60, s 87, s 92A, s 98C, s 101, s 118, s 120, s 121, s 122, s 127, s 133, s 391, s 408C, s 408E, s 415, s 427A, s 430 s 442A, s 568, s 583

Criminal Law Amendment Act 1997 (Qld)

Bacon v Salamane (1965) 112 CLR 85; [1965] HCA 22, considered

Bolitho v The State of Western Australia (2007) 34 WAR 215; [2007] WASCA 102, considered

Guillot v Hender (1999) 86 FCR 294; [1999] FCA 322, considered

Hansen v Archdall (1930) 44 CLR 265; [1930] HCA 16, followed

Moylan v The State of Western Australia (2007) 169 A Crim R 302; [2007] WASCA 52, considered

Yates v Wilson (1989) 168 CLR 338; [1989] HCA 68, considered

COUNSEL: S Ryan for the appellant
P J McCarthy for the respondent

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

- [1] **FRASER JA:** I agree with the reasons for judgment of Jackson J.
- [2] **APPLEGARTH J:** I agree with the reasons for judgment of Jackson J.
- [3] **JACKSON J:** On 31 May 2013, this Court allowed this appeal, set aside the appellant’s convictions, and discharged the appellant. These are the reasons for those orders.
- [4] The indictment charged the appellant on two counts of contravention of s 408C(1)(d) of the *Criminal Code* as follows:

“that on a date or dates unknown between the first day of December, 2008 and the thirty first day of August, 2009 at Brisbane in the State of Queensland, DAAS RAMEZ SABA dishonestly gained a benefit, namely the control of DEEVA DEVELOPMENT & CONSTRUCTION PTY LTD, for himself.

that on a date or dates unknown between the first day of December, 2008 and the thirty first day of August, 2009 at Brisbane in the State of Queensland, DAAS RAMEZ SABA dishonestly gained a benefit, namely the control of DAE INSULATION PTY LTD, for himself.”

- [5] The prosecution provided particulars of the allegation that the appellant gained control of each of the companies as follows:
- “1. The defendant changed ASIC records and thereby acquired the public appearance of being legitimately appointed sole director and sole shareholder in each of the companies.
 2. The defendant was a director of each of the companies. This is in the meaning given to ‘director’ in the *Corporations Act* that he did ‘act in the position of a director’.

By having achieved either or both of 1 and 2, the defendant was able to and/or did take actions that were either done or represented to be done in the name of each of the company.”

- [6] The case as it was submitted to the jury was further narrowed. It did not encompass particular 2 because the case was put to the jury on the “basis that the paragraph number 2 is deleted” and the last paragraph of the particulars read “By having achieved this the defendant was able to...”.¹ That was reflected in the following directions of the learned trial judge:

“... the prosecution contend that the defendant gained a benefit for himself in terms of the control of each of the companies, not because he actually had that control in the sense that I have just described it, but by acquiring the public appearance of being the legitimately appointed sole director and sole shareholder in each company ... That contention, in this case, ... is premised on the provisions in the laws relating to companies to the effect that unless a person at the time of any dealing that the person has with the company, knows or suspects that such an assumption is incorrect, the person dealing with the company may assume that anyone who appears from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company, has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company. And can also assume that the officers of the company properly perform their duties to the company ...”.²

- [7] The learned trial judge continued (a little later in the summing up) as follows:

“[T]he prosecution is based on the premises that you will be satisfied beyond reasonable doubt of these things:

- That the benefit for which the defendant gained for himself was the control of each company by acquiring that public appearance of being the legitimately appointed sole director and sole shareholder in each of the companies;
- That he did that by effecting, in the sense that it was done by him or for him, by effecting (sic) the changing of the ASIC records in respect of each of the companies by utilising access to the corporate key which allowed for that to be done;
- Thirdly, that this was a benefit or advantage to him because he acquired this control as it’s particularised, with the intention of using that control of the company for personal advantage or gain, and;
- Fourthly, that his dishonesty in gaining this benefit is to be found in his knowledge of his lack of entitlement to so acquire that control of each company with the intention of achieving personal advantage or gain.”³

¹ AB 2/720.60-721.

² AB 2/794-795.

³ AB 2/795-796.

- [8] The fundamental question raised by the way in which the case was submitted to the jury is whether the appearance of being a company director or shareholder, created by the public register of documents lodged with ASIC, is a benefit for the purposes of the commission of an offence under s 408C, when in truth the person is neither director nor shareholder.
- [9] An important point is that, as it was put before the jury, the case was that the offence on each was complete when the relevant forms were lodged or submitted or the “records” at ASIC were “changed”. At that point, on the Crown’s case, the appellant had committed an offence of fraud which rendered him liable to conviction and imprisonment for a period of five years.
- [10] On count 1, relating to DEEVA Development & Construction Pty Ltd, the prosecution’s case was that there was no transaction of transfer of the shares and no appointment of the appellant as a director in fact.
- [11] The “change” of membership from the existing shareholder to the appellant was notified by a form submitted to ASIC on 24 March 2009, the appointment of the appellant as director was notified by a form submitted to ASIC on 1 May 2009 and the cessation of the other director was notified by a form submitted to ASIC on 12 May 2009.
- [12] On count 2, relating to DAE Insulation Pty Ltd, the prosecution case was that there was no transaction of transfer of the shares and no appointment of the appellant as a director in fact.
- [13] The “change” of membership from the existing shareholders to the appellant was notified by a form submitted to ASIC on 24 March 2009, the appointment of the appellant as director was notified by a form submitted to ASIC on 12 May 2009 and the cessation of the other director was notified by a form submitted to ASIC on 22 May 2009.
- [14] There was no evidence that tended to prove any particular purpose of the appellant in making any of the changes, in the sense that no evidence identified any use the appellant may have intended to make of the state of the ASIC registers and nothing of that kind was identified in the case as it was placed before the jury.
- [15] Section 408C provides:

“408C Fraud

- (1) A person who dishonestly -
- (a) applies to his or her own use or to the use of any person –
 - (i) property belonging to another; or
 - (ii) property belonging to the person, or which is in the person’s possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
 - (b) obtains property from any person; or
 - (c) induces any person to deliver property to any person; or
 - (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
 - (e) causes a detriment, pecuniary or otherwise, to any person; or

- (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
- (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
- (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

commits the crime of fraud.

- (2) An offender guilty of the crime of fraud is liable to imprisonment for 5 years save in any of the following cases when the offender is liable to imprisonment for 12 years, that is to say -
 - (a) if the offender is a director or member of the governing body of a corporation, and the victim is the corporation;
 - (b) if the offender is an employee of another person, and the victim is the other person;
 - (c) if any property in relation to which the offence is committed came into the possession or control of the offender subject to a trust, direction or condition that it should be applied to any purpose or be paid to any person specified in the terms of trust, direction or condition or came into the offender's possession on account of any other person;
 - (d) if the property, or the yield to the offender from the dishonesty, or the detriment caused, is of a value of \$30000 or more.
- (3) For the purposes of this section -
 - (a) **property**, without limiting the definition of property in section 1, includes credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations; and
 - (b) a person's act or omission in relation to property may be dishonest even though -
 - (i) he or she is willing to pay for the property; or
 - (ii) he or she intends to afterwards restore the property or to make restitution for the property or to afterwards fulfil his or her obligations or to make good any detriment; or
 - (iii) an owner or other person consents to doing any act or to making any omission; or
 - (iv) a mistake is made by another person; and
 - (c) a person's act or omission in relation to property is not taken to be dishonest, if when the person does the act or makes the omission, he or she does not know to whom the property belongs and believes on reasonable grounds that the owner can not be discovered by taking reasonable steps, unless the property came into his or her possession or control as trustee or personal representative; and

- (d) persons to whom property belongs include the owner, any joint or part owner or owner in common, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, had control of it; and
- (e) **obtain** includes to get, gain, receive or acquire in any way; and
- (f) if a person obtains property from any person or induces any person to deliver property to any person it is immaterial in either case whether the owner passes or intends to pass ownership in the property or whether he or she intends to pass ownership in the property to any person.”

[16] The specific parts of s 408C most relevant to this appeal are picked up in the following words of the text:

“A person who dishonestly ... gains a benefit or advantage, pecuniary or otherwise, for any person ... commits the crime of fraud.”

[17] The part of that text taken from par (1)(d) appears in the context of the other paragraphs of sub (1). Each of those paragraphs requires action by a defendant. Under par (1)(d), the action is that of gaining a benefit or advantage for any person. The section is engaged where that action is done dishonestly.

[18] It can readily be seen that the relevant text uses wide language and that the scope of the section under par (1)(d) is, therefore, potentially very wide. It also appears that the various paragraphs of s 408C(1) can operate in a way that overlaps one with another, according to the ordinary meaning of the text. Thus, a person who dishonestly obtains property from another person is also a person who gains a benefit or advantage for themselves. That observation, based on the ordinary meaning of the text, is confirmed by the extended meaning given to the word “property” in s 408C by reason of s 408C(3)(a) – “property” includes “benefit or advantage”.

[19] The word “benefit” is defined in s 1 of the *Code* as follows:

“**benefit** includes property, advantage, service, entertainment, the use of all access to property or facilities, and anything of benefit to a person whether or not it has any inherent or tangible value, purpose or attribute.”

[20] In casting the net so widely, the drafter of s 408C did not provide much assistance in the text or context as to the potential limits to the operation of the section, including those limits under par (1)(d).

[21] It will have been observed that, to an extent, the definitions operate circularly. Thus “property” includes “benefit”, in s 408C, and “benefit” includes “property”, in general, in the *Criminal Code*, unless the context otherwise requires. As well “benefit” is defined to include “advantage”, in general, yet in the specific part of the relevant text of s 408C(1)(d) the phrase is “benefit or advantage”. “Benefit” is a term deployed in over 15 sections of the *Criminal Code*,⁴ in connection with

⁴ Sections 59, 60, 87, 92A, 98C, 101, 118, 120, 121, 122, 127, 133, 391, 408E, 415, 427A and 568.

offences including those dealing with bribery, corruption, fraud, extortion, compounding and dishonest recovery of property. “Advantage” is used in only a few sections.⁵

- [22] Given the potentially wide meaning of “benefit” in many contexts, it is not surprising that courts have previously struggled with the scope of a provision creating an offence of which an element is that the defendant obtained a benefit. Thus, in *Hansen v Archdall*⁶ the relevant section made it an offence to “impose ... by any false or fraudulent representation ... with a view to obtain money or some other benefit or advantage ...”. Isaacs CJ and Gavan Duffy J (in the majority) said:

“...it is only when a person sets out to cheat ... in order to obtain ... as the direct or proximate result of the representation money or some other benefit or advantage, that the provision is contravened ... Nor does it extend to the case of a person by misrepresentation by inducing an institution or individual to make a contract with him under which he obtains money or other property. In such a case the property is not obtained by means of the misrepresentation immediately, but by force of the contract. The misrepresentation is the cause of procuring the contract, and there its mission ends. The contract is the true source of the transfer of the property. And a contract may not always be a profitable one: that depends on circumstances. The statute contemplates the representation as the direct actuating cause of the offender obtaining the money or other benefit or advantage.”⁷

- [23] The court took the view that the text that the defendant must “obtain money or some other benefit or advantage” required a direct causal connection between the relevant fraudulent misrepresentation and the benefit and that a contract was not necessarily a benefit, because it may not be profitable.
- [24] Notwithstanding this view, in *Bacon v Salamane*⁸ a different approach was taken in relation to an offence under s 29B of the *Crimes Act 1914* (Cth) by a person who “imposes or endeavours to impose upon the Commonwealth ... by any untrue representation ... with a view to obtain money or any other benefit or advantage ...”. The majority in that case declined to apply the reasoning of Isaacs CJ and Gavan Duffy J in *Hansen* because the section in *Bacon* appeared in the context of other sections, which had been interpreted in another way.
- [25] Simplifying, the view was taken that where the charge was one of “endeavours to impose”, as opposed to one of “imposes”, the actions of the defendant in inducing the contract “with a view” to obtain a relevant benefit or advantage were enough to constitute a contravention.⁹ However, that basis of distinction does not assist in the present context.
- [26] The point which was made in *Bacon* was that the remuneration of the defendant obtained under his contract of employment was a benefit notwithstanding that it was the contract that was obtained by means of the false representation. The operation

⁵ Sections 408C, 427A and 442A.

⁶ (1930) 44 CLR 265; [1930] HCA 16.

⁷ At 272-273. See also at 279, per Starke J.

⁸ (1965) 112 CLR 85; [1965] HCA 22.

⁹ At 96, per Owen J, and at 90, per Windeyer J.

of the section was not confined by the interposition of the contract between the representation and the benefit of the remuneration. That explanation may be seen in the reasons of Owen J as follows:

“... it must be remembered that s 29B was enacted along with s 29A. If the suggested limited meaning is to be given to the former provision it must equally be applied to the latter, yet it has long been held that it is no answer to a charge of false pretences that the property the subject of the charge was obtained by means of a contract if the fact is that the prosecutor was induced to make the contract by false pretence ... For these reasons, the various considerations which induced this Court ... to place a limited construction upon the relevant provision of the Queensland and Victorian Acts to which I have referred do not appear to me to be applicable to s 29B.”¹⁰

- [27] What other guidance is there as to the extent of the operation of the word “benefit” used in the context like this? One example is *Yates v Wilson*.¹¹ That case concerned s 29A of the *Crimes Act* 1914 (Cth), referred to in the passage set out immediately above. Under s 29A(2) “any person who, with intent to defraud, by any false pretence causes or procures any ... benefit to be delivered or given by ... any public authority ... to any person” is guilty of an offence. It was held that where the defendant by false pretence caused a company, of which he was a director, to be relieved or excused from the obligation to pay sales tax on importation of goods for a period there was a “benefit” to the company.”
- [28] Similarly, in *Guillot & Ors v Hender*¹² it was held that s 29B of the *Crimes Act* was engaged where the defendant made an untrue representation as to the amount of fish unloaded and consigned from his vessel. The benefit was the ability to continue fishing for the undeclared amount. The court held that, consistently with *Bacon*, “contravening conduct with a view” to obtaining a benefit was enough whether or not the benefit was actually obtained. As in *Bacon*, where the employment was something capable of being a benefit or advantage in view, so was not being constrained to limit the amount of the catch capable of being a benefit or advantage in view.
- [29] In *Moylan v The State of Western Australia*,¹³ the Court of Appeal of the Supreme Court of Western Australia considered the operation of s 409 of the *Criminal Code* (WA), which is in very similar terms to s 408C. The benefit which was allegedly gained in that case was the opportunity to apply for a position of employment. The defendant had gained the alleged benefit by deceit or fraudulent means. They were that the defendant had deceived a co-employee into believing that the employer intended to terminate the co-employee’s contract of service so that he accepted and negotiated a separation arranged by the defendant. In fact that was not the intention of the employer. The aim of the defendant and the consequence of the co-employee leaving was that the defendant was able to apply for his job. In that context, the benefit was characterised as the opportunity to apply for that employment.

¹⁰ At 97.

¹¹ (1989) 168 CLR 338; [1989] HCA 68.

¹² (1999) 86 FCR 294; [1999] FCA 322.

¹³ [2007] WASCA 52.

- [30] It was held that “the opportunity given to an appellant to apply for the position” was “quite capable of constituting the gaining of a benefit” because the defendant “was arguably placed in ‘a superior position’ by reason of [the co-employee’s] resignation. He thus gained the benefit. A benefit can, in my opinion, also embrace an advantage ... I consider that, as a matter of law, the gaining of the opportunity to apply for the position ... was the gaining of a benefit. It does not matter that the opportunity was qualified, because others might also apply for the position. Nor does it matter that applications for the position involved consideration of the merits of the applicant. It was the opportunity which the appellant had by reason of his alleged deceitful conduct in bringing about [the co-employee’s] resignation that constituted the gaining of a benefit ...”.¹⁴
- [31] In *Moylan* no consideration was given to either *Hansen* or *Bacon*.
- [32] Section 409 of the *Criminal Code* (WA) was further considered in *Bolitho v The State of Western Australia*.¹⁵ That case concerned the element of the Western Australian section which required that the defendant act with “intent to defraud, by deceit or any fraudulent means”. However, a relevant discussion of the provenance of s 409 appears in the reasons of McLure JA as follows:
- “Section 409 was inserted in the *Criminal Code* by the *Criminal Law Amendment Act* 1990 (WA) (No 101 of 1990) ... It replaced the former offences in s 409 (obtaining property or credit by false pretences), s 410 (obtaining the execution of a security by false pretences), s 411 (cheating) and s 413 (frauds on the sale or mortgage of property). All these former offences related to property in one form or another.
- The amendments were based on recommendations made by Mr M Murray (as he then was) and his report ‘The Criminal Code: A General Review’ (1983). The report recommended that ss 409-411 and 413 be repealed and re-enacted as s 409 as a general fraud offence based on the *Theft Act 1968* (UK), but wider. Sections 15 and 16 of the UK *Theft Act* established the offences of obtaining property by deception and obtaining a pecuniary advantage by deception in which the concept of dishonesty replaced the requirement of an intent to defraud and focus was placed on what the person committing the fraud obtained (property or a pecuniary advantage) rather than the effect on the victim...”¹⁶
- [33] The legislative history of s 408C is worth brief mention. The *Criminal Code* of 1995¹⁷ did not commence before it was repealed. However, s 184 of that Act proposed the amalgamation and replacement of sections 426, 427, 427A, 428, 429 of the then existing *Criminal Code*. Section 184 was modelled on s 409 of the *Criminal Code* (WA).
- [34] Notwithstanding the repeal of the *Criminal Code* of 1995, the *Criminal Law Amendment Act* 1997 (Qld) introduced s 408C. The amendments were the product of an advisory working group consisting of Mr Peter Connolly QC, a former judge

¹⁴ At [64], [68] and [69].

¹⁵ (2007) 34 WAR 215; [2007] WASCA 102.

¹⁶ At [128]-[129].

¹⁷ Act No 37 of 1995.

of this Court, and two barristers in practice at the private bar whose proposals were released for public consultation until mid September 1996. The explanatory notes to the Bill for the Act included the following:

“*Clause 66* amends section 408C (Misappropriation) by creating a new offence called ‘Fraud’. This section effectively modernises the criminal law in relation to dishonesty offences by replacing (see Schedule 1, ‘Provisions of Criminal Code repealed’) section 427 ‘Obtaining goods or credit by false pretence or wilfully false promise, section 428 ‘Obtaining execution of valuable security by false pretence or wilfully false promise’ and section 429 (Cheating). In addition to the dishonest application of property in the present section, the offence of ‘Fraud’ will include the person who dishonestly obtains property from any person, or induces any person to deliver property to any person or gains a benefit or advantage, pecuniary or otherwise, for any person, or causes a detriment, pecuniary or otherwise, to any person ...”

- [35] In contrast to the text of s 408C, the comparable sections of the *Criminal Code* (Cth)¹⁸ and the *Crimes Act* 1900 (NSW)¹⁹ are each directed to obtaining a “financial advantage”.
- [36] With that examination of the context of s 408C, the question is whether, without more, the appearance of control of a corporation, to the extent that it is created by the lodging of forms in the office of ASIC that a person has been appointed as a director or is a member of a corporation, constitutes a benefit or advantage, pecuniary or otherwise, within the meaning of par (1)(d). Specifically, the case presented against the appellant was that the relevant “benefit”²⁰ was “control” of each of the two companies comprising “the appearance of control” which was gained “by effecting the changing of the ASIC records”.
- [37] The appellant submitted that appointment as a director, of itself, is not a benefit. It is not necessary to answer that question. The appointment of a director undoubtedly creates obligations which, as the appellant submitted, are more readily characterised as a burden rather than a benefit. By way of example, the duties of a director set out in Pt 2D.1 of the *Corporations Act* 2001 (Cth) (“CA”) are fairly described as obligations rather than benefits. However, part 2D.1, in Div 4, also makes provision for the powers of a director. In the case of a director of a proprietary company who is the only director and only shareholder, s 198E(1) provides that the director “may exercise all the powers of the company except any powers that this Act or the company’s constitution (if any) requires the company to exercise in general meeting. The business of the company is to be managed by or under the direction of the director.”
- [38] But it is unnecessary to consider whether the powers of a director under s 198E or the many other powers conferred upon a director either under the CA or a company’s constitution can constitute a benefit or advantage within the meaning of s 408C. That is because the benefit alleged against the appellant was not that, in truth, he gained any such powers. It was that he gained “control” in the limited

¹⁸ Section 135.2(1). As to actions short of obtaining a financial advantage, see s 135.1(1).

¹⁹ Section 192E(1)(b).

²⁰ The particulars did not expressly rely on the reference to “advantage” in s 408C(1)(d): AB 2/1107.

sense that he had the appearance of being the sole director “by effecting the changing of the ASIC records”.

- [39] Similarly, this case is not concerned with whether becoming a sole shareholder of a corporation is gaining a benefit or advantage within the meaning of s 408C. The question of shareholding, as such, is only relevant to the extent that it was alleged against the appellant that he had “control” being the appearance of control, by showing him as a sole shareholder, “by effecting the changing of the ASIC records”. It is not suggested that the appellant gained, in truth, any of the powers or rights of a member of either of the companies under the CA.
- [40] It also assists, in my view, to pay close attention to the requirements relating to and the function of the public register kept by ASIC of particulars of the directors of a company. On incorporation of a company, a person specified in the application for registration with their consent “becomes a director”: s 120(1) of the CA. Thereafter, a proprietary company must have at least one director: s 201A of the CA. The director of a proprietary company who is its only director and its only shareholder may appoint another director by recording the appointment and signing the record: s 201F(1) CA. Otherwise, the company may appoint a person as a director by resolution passed in general meeting - s 201G of the CA - unless that section is displaced or modified by the company’s constitution: s 135(2) of the CA.
- [41] Unless they are displaced or modified by a company’s constitution (s 135(2) of the CA), a number of sections apply to resignation or removal of directors. Under s 203A of the CA, a director may resign by giving written notice to the company at its registered office. Under s 203C of the CA, a proprietary company may by resolution remove a director and by resolution appoint another person instead.
- [42] Such appointments, resignations and removals generate obligations to notify ASIC. Under s 205B of the CA, it is provided that:
- “(1) A company must lodge with ASIC a notice of the personal details of a director or secretary within 28 days after they are appointed. The notice must be in the prescribed form...
- (5) If a person stops being a director, alternate director or secretary of the company, the company must lodge with ASIC notice of the fact within 28 days. The notice must be in the prescribed form...”
- [43] Under s 350 of the CA, if the Act requires that a document be lodged with ASIC in a prescribed form and a form for the document is not prescribed in the Corporations Regulations then it must be in the form approved by ASIC. Form 484, “Change to company details”, is the relevant approved form. It may be electronically downloaded as a blank form, electronically completed, printed and then signed by a current officeholder. That requires use of “the corporate key” as a mandatory field on the form. The corporate key is an eight-digit number uniquely associated with a company’s ACN. The corporate key appears on the front page of a company’s annual statement from ASIC. The place for signature appears under the certification that: “I certify that the information in this cover sheet and the attached sections of this form are true and complete.” See also s 351 of the CA. Once signed, the form may be lodged physically with ASIC.

- [44] Alternatively, s 352 of the CA provides that a document may be lodged electronically if ASIC has approved, in writing, the electronic lodgement of documents of that kind.²¹ ASIC has approved lodgement of a Form 484, “Change to Company Details”, electronically by a company via the ASIC website at www.asic.gov.au. That requires the company officeholder first to register online for access. Once registered, the user has access to screen displays that make provision, inter alia, to electronically complete and submit an “Officeholders – new office holder Form 484” or an “Officeholders – cease officeholder Form 484”. Submission of either form requires the user first to click “Yes” to the ASIC Electronic Lodgement Protocol Declaration and then to click the “Submit” button.
- [45] Under s 1274(1) of the CA, ASIC must keep such registers as it considers necessary and under s 1274(2) a person may inspect any document lodged with ASIC, subject to presently irrelevant exceptions. Under s 1274A of the CA, ASIC may permit a person to search a prescribed register by using a data processor. Searches of ASIC’s registers including the details of the officeholders who are directors of a company, are permitted.
- [46] In the way in which the case was put before the jury, any appearance of being a shareholder need not be considered further. The Crown relied on and the learned trial judge directed the jury that the appearance of control potentially followed because “[a] person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company has been duly appointed and has authority to exercise the powers to perform the duties customarily exercised or performed by a director or company secretary of a similar company”: s 129(2) of the CA.
- [47] Reduced to its core, the case submitted to the jury as to the “benefit or advantage” was that by submitting or causing the relevant forms to be electronically submitted (“by effecting the change of the ASIC records in respect of each of the companies by utilising access to the corporate key which allowed for that to be done”), the appellant gained the benefit or advantage comprising the opportunity that people might make the assumption in relation to dealings with each company that he had been duly appointed and had authority to exercise the powers and perform the duties customarily exercised or performed by a director.
- [48] But it was not contended that at the time when the appellant so acted there was any particular transaction in view which the change would directly affect, or any person in view who might make the assumption. No benefit or advantage of that kind was relied upon.
- [49] In my view, the potential that some person might make the assumption in the future is not a benefit or advantage for the purpose of s 408C(1)(d). The purpose of s 128(1) and s 129(2) of the CA is not to empower the putative director. On the contrary, it is to bind the company where the putative director acts as a director but does not in fact or law otherwise have a director’s authority. It would invert the purpose of those provisions to erect them into a form of appearance of authority amounting to “control” so as to confer a per se “benefit or advantage” on the putative director.

²¹ ASIC has made an approval process described as the Electronic Lodgement Protocol.

- [50] The scope of s 408C, and the potential for liability to criminal responsibility which it engages, where a person dishonestly gains a benefit or advantage pecuniary or otherwise, are undoubtedly wide. But they should not be extended by the tortured process of analysis advanced by the prosecution in this case. The submission of each electronic Form 484 may have formed part of some scheme whereby the appellant planned to defraud each company. But it was not itself a benefit under s 408C. It did not confer an advantage on the appellant by itself. It was at most a step along the way towards gaining some unidentified advantage.
- [51] This distinction between that which is gaining a benefit or advantage and that which, in a course of conduct, is anterior to gaining a benefit or advantage within the meaning of the text, is not to be viewed as purely a technical distinction. Where the distinction is elided, in some factual circumstances, successive offences will appear to have been created in relation to an intermediate “benefit or advantage” along the path of one course of conduct calculated to derive the actual benefit or advantage. This point is not answered in circumstances like the present case by the provision that one charge of fraud is permitted under s 568(3) of the *Criminal Code*, for “specific frauds of the same type” or where the “frauds have extended over any space of time.”
- [52] For the reasons stated above, in my view the case as it was put before the jury did not disclose an offence known to law because the benefit relied upon was not a benefit within the meaning of s 408C(1)(d).²²
- [53] It was for those reasons that I joined in the orders that, the appeal was allowed and the appellant’s convictions were set aside. Accordingly, it became unnecessary to deal with any of the other grounds of appeal.

²²

I note that the appellant was not charged with contravention of s 1308(2) of the CA (by s 1311 and item 335 of Schedule 3 to the CA, an offender is liable to 200 penalty units or imprisonment for five years or both), or contravention of s 430 of the *Criminal Code*, and that the offence of an attempt to commit an offence under s 408C was not left to the jury under s 583(1) of the *Criminal Code*.