SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davidson* [2022] QCA 22
PARTIES:	**R** **v** **DAVIDSON, Miranda Ellen** (appellant)
FILE NO/S:	CA No 288 of 2021 DC No 32 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Emerald – Date of Conviction: 8 October 2021 (Muir DCJ)
DELIVERED ON:	Date of Orders: 11 February 2022 Date of Publication of Reasons: 25 February 2022
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2022
JUDGES:	Fraser and McMurdo and Bond JJA
ORDERS:	**Orders delivered: 11 February 2022** **1. Appeal allowed** **2. New trial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was convicted of a single count of fraud as an employee to the value of $30,000 or more – where the appellant was sentenced to three and a half years imprisonment, suspended after 21 months with an operational period of four years – whether the primary judge failed to direct the jury as to the facts that had to be proved for the mental element of "dishonesty" – whether a miscarriage of justice occurred CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant was convicted of a single count of fraud as an employee to the value of $30,000 or more – where the appellant was sentenced to three and a half years imprisonment, suspended after 21 months with an operational period of four years – whether the primary judge erred in excluding evidence of a

business practice – whether a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was convicted of a single count of fraud as an employee to the value of $30,000 or more – where the appellant was sentenced to three and a half years imprisonment, suspended after 21 months with an operational period of four years – whether the primary judge failed to direct the jury as to the meaning of "forgery" – whether a miscarriage of justice occurred

Criminal Code (Qld), s 408C(1)(b), s 408C(2), s 408C(2)(d)

Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd (2010) 4 ACTLR 114; [2010] ACTSC 20, cited
Connor v Blacktown District Hospital [1971] 1 NSWLR 713, considered
Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7, considered
R v Lyons [2021] QCA 136, considered
R v Quagliata [2019] QCA 45, cited

COUNSEL: A M Hoare and M Heelan for the appellant
N Rees for the respondent

SOLICITORS: RK Law for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with Bond JA.

[2] **McMURDO JA:** For the reasons stated by Bond JA, I joined in the orders which were made at the conclusion of the hearing of this appeal.

[3] **BOND JA:**

Introduction

[4] On 8 October 2021, the appellant was convicted after a three-day jury trial on an indictment which had alleged a single count of fraud as an employee, to the value of $30,000 or more, within the meaning of ss 408C(1)(b), (2)(b) and (2)(d) of the *Criminal Code*. She was sentenced to imprisonment for three and half years, to be suspended after serving 21 months with an operational period of four years.

[5] The appellant appealed against her conviction on the sole ground that the verdict was unreasonable and could not be supported by the evidence.

[6] At the commencement of the hearing of the appeal, the appellant was granted leave to add appeal grounds 2 and 3 as identified and pursued in her written submissions, in the following terms:

> "2. The learned trial judge erred in excluding evidence of business practice and thereby caused a miscarriage of justice.

> 3. The learned trial judge failed to direct the jury as to the meaning of forgery and thereby caused a miscarriage of justice."

[7] During the course of oral argument, and after the Court had intimated that it had concerns as to the directions which had been given to the jury concerning the nature of the appellant's knowledge, belief or intent said to have rendered her conduct dishonest, the appellant sought and was granted further leave to add a fourth appeal ground in the following terms:

> "4. The learned trial judge did not direct the jury as to the facts that had to be proved in the proof of dishonesty and thereby caused a miscarriage of justice."

[8] At the close of oral argument, the Court intimated to the parties that it had formed the view that a miscarriage of justice had been occasioned by the inadequacy of directions to the jury and, but for the need to reserve its decision to consider the first ground of appeal, would be minded to allow the appeal and to require a re-trial. Counsel for the appellant then advised that he had instructions to abandon the first ground of appeal. Accordingly, by consent, the Court struck that ground of appeal from the Notice of Appeal.

[9] The Court then ordered that the appeal be allowed and that a new trial be ordered.[1] These are my reasons for concurring in those orders.

Appeal ground 4

[10] It was not disputed at trial that:

(a) In about June 2016 the appellant was employed by Bluechip Acreage Maintenance Pty Ltd as its general manager reporting directly to the company director, Gregory Marshall, for an annual salary of $128,000.

(b) In February 2017, the appellant handed to the company's payroll officer a letter dated 21 February 2017 addressed to the appellant which purported to be signed by Mr Marshall, and which advised the appellant that her new annual salary would be $250,000 per year, effective as of 13 February 2017.

(c) The payroll officer processed the salary increase on 23 February 2017 and, as a result, the appellant's weekly salary increased from $2,461.53 gross per week to $4,807.69 gross per week.

(d) The appellant was paid at the increased rate until October 2017, obtaining in excess of $50,000 more than she would have received but for the increase.

(e) Mr Marshall had not signed the letter. Rather the appearance of his signature had been achieved by the use of an electronic signature.

[11] The critical issue at the trial was whether the jury was satisfied that the appellant's actions were dishonest. Such satisfaction could only be reached if the Crown proved beyond reasonable doubt that what the appellant did was dishonest by the standards of ordinary honest people.

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[1] A grant of bail to the appellant, essentially on the same grounds as had applied prior to the first trial, was unopposed and the Court so ordered.

[12] In *R v Lyons* [2021] QCA 136, this Court reiterated the importance of the observations made by Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493 at [15]-[18].

[13] McMurdo JA held:[2]

> "Toohey and Gaudron JJ there explained that an objective assessment, by the standard of ordinary honest people, of whether a person's act was dishonest must be made by reference to that person's knowledge or belief as to some fact relevant to the act in question, or the intention with which the act was done.[3] As they observed, in most cases where honesty of the accused is in issue, the real question is whether an act was done with a certain knowledge, belief or intent, rather than whether an act done with that state of mind is properly characterised as dishonest.[4] Nevertheless, **in all cases the issue of dishonesty must be determined by reference to what is proved to have been the accused's state of mind as to some fact relevant to the accused's act in question**. Their honours said:
>
> > 'In a case in which it is necessary for a jury to decide whether an act is dishonest, **the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest**.'[5]"

[14] Mullins JA[6] and Wilson J[7] also referred with approval to the same passage. Mullins JA further observed:[8]

> "In relation to the element of dishonesty, the purpose of the suggested direction in the above passage as to the knowledge, belief or intent with which the accused person did the dishonest act is to assist the jury in applying the test of whether the act was dishonest by the standards of ordinary, honest people. **It ensures the issue of dishonesty is not left at large, but focuses the jury's assessment of the evidence to decide whether the element of dishonesty has been proved beyond reasonable doubt by considering the knowledge, belief or intent with which the relevant act was committed. To enable the trial judge to give such a direction, the prosecution case must articulate clearly the knowledge, belief or intent with which the accused person is alleged to have done the dishonest act which is the subject of the particular charge of fraud**."

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2 *R v Lyons* [2021] QCA 136 at [6], footnotes in original, but emphasis added.
3 *Peters v The Queen* (1998) 192 CLR 493 at 503; [1998] HCA 7 [15].
4 *Peters v The Queen* (1998) 192 CLR 493 at 503; [1998] HCA 7 [16].
5 *Peters v The Queen* (1998) 192 CLR 493 at 504; [1998] HCA 7 [18].
6 *R v Lyons* [2021] QCA 136 at [19].
7 *R v Lyons* [2021] QCA 136 at [136].
8 *R v Lyons* [2021] QCA 136 at [20], emphasis added.

[15] In the present case, the Crown had particularised its case in the following way:

> "**Count 1 Fraud, as an employee, to the value of $30,000 or more**
>
> The defendant produced a document purportedly from her employer approving a salary increase from $128,000 per annum to $250,000. As a result, the defendant's salary was increased to $250,000 per annum.
>
> The defendant was dishonest in that at the relevant time/s the defendant:
>
> - Knew she was not entitled to the salary increase; and/or
> - Forged her employer's signature on the salary increase document; and/or
> - Arranged for the salary increase to be processed without her employer's authority; and/or
> - Received the increased salary payments; and/or
> - Breached the terms of her employment contract."

[16] There were a number of flaws in those particulars:

(a) First, each of the dot points was joined by "and/or" - the oft-criticised bastard conjunction.[9] The use of this conjunction conveyed the intention that reliance was placed on any one or more of the propositions so conjoined. This form of drafting should usually be avoided on the grounds of vagueness and ambiguity, and, possibly, depending on the number of logical alternatives created by the drafting, on the grounds of oppression.[10]

(b) Second, in this case, the use of the conjunction went beyond vagueness and ambiguity and became positively inaccurate. The vice was that the use of the "and/or" conjunction suggested that, amongst other possible combinations of the conjoined propositions, reliance was placed on any one of the dot points standing alone as an identification of the requisite nature of the appellant's knowledge, belief or intent. While the first dot point (standing alone) did convey a proposition concerning the appellant's knowledge, the third, fourth and fifth dot points (each standing alone) did not.

(c) Third, a similar vice was inherent in the use of the verb "forged" in the second dot point. In ordinary English usage, the verb "forge" might be interpreted as carrying with it something concerning the alleged forger's knowledge, belief or intent,[11] but the question would be, what? Nor would

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9 See per Viscount Simon LC (at 82) in *Bonitto v Fuerst Bros & Co Limited* [1944] AC 75 and other references collected by Refshauge J in Ca*nberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* (2010) 4 ACTLR 114 at [85].

10 See *R v Quagliata* [2019] QCA 45 at [15] per Bond J, with whom Sofronoff P and Henry J agreed, where the use of the conjunction led to more than 512 possible combinations of relevant propositions.

11 The Macquarie Dictionary relevantly defines the verb as "to imitate (a signature, etc.) fraudulently; fabricate by false imitation."

clarity be achieved if one assumed that the Crown intended the meaning attributed to the verb "forge" in s 1 of the *Criminal Code*.[12]

[17] Perhaps these flaws could have been remedied if sufficient clarification had been provided by the way in which the trial was run. However, that did not occur. I make the following observations:

(a) First, the prosecution commenced her opening of the case by ignoring any question concerning the appellant's state of mind and identifying, as the critical issue, Mr Marshall's state of mind, rather than that of the appellant. Proof that he had not actually authorised the appellant's salary increase was certainly relevant. But to prove the appellant's dishonesty, the critical consideration was not his state of mind, but hers. Yet in the following passage the prosecution framed Mr Marshall's state of mind as the critical question:[13]

> "… on – in February 2017, the defendant produced this document. As you can see, the letter is dated the 21st of February 2017 and it states that the defendant's salary would be increased to $250,000, effective 13 February 2017. So that's almost double the defendant's initial salary. The defendant subsequently arranged for that salary increase to be processed. She handed that letter to the company's payroll officer, Natasha Wilson, who processed that salary increase. Now, at the time, Ms Wilson didn't question the defendant, because she was – the defendant was her boss. As a result of that increase, the defendant's weekly wage increased from $2461.53 gross, per week, to [$4807.69] gross per week. **And ladies and gentlemen, that's pretty much what this trial is about. The Crown case is that the defendant's employer, Gregory Marshall, had no knowledge of that letter. He had no knowledge of the salary increase. He didn't authorise it. He didn't sign that letter. He didn't authorise the use of his electronic signature. He essentially knew nothing about it. And that's really what the issue is in this trial – whether or not the defendant acted dishonestly, by producing that document and arranging for the processing of that salary, or whether the defendant's employer, Mr Marshall, knew about it.**"

(b) Second, later in the opening, counsel for the prosecution did turn to the state of mind of the appellant, but did so only by what was a reiteration of the particulars, emphasising that the Crown sought to establish that the defendant "acted with a certain state of mind, and acted dishonestly" by "one or

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12 Section 1 states "**forge** a document, means make, alter or deal with the document so that the whole of it or a material part of it— (a) purports to be what, or of an effect that, in fact it is not; or (b) purports to be made, altered or dealt with by a person who did not make, alter or deal with it or by or for some person who does not, in fact exist; or (c) purports to be made, altered or dealt with by authority of a person who did not give that authority; or (d) otherwise purports to be made, altered or dealt with in circumstances in which it was not made, altered or dealt with."

13 Appeal Book (AB) at 11.15-32, emphasis added.

a combination of the factors" identified in the particulars.[14] The flaws in those particulars became part of the case advanced to the jury.

(c) Third, counsel for the Crown emphasised by repetition the vice of focusing on Mr Marshall's state of mind rather than that of the appellant and of equating a finding that Mr Marshall had neither known of the increase nor authorised it, with a conclusion that the appellant must have been dishonest. Counsel concluded the opening address in these terms:[15]

> "So this should be a relatively short trial, ladies and gentlemen. The issue is quite narrow. As I said, there's no dispute that the defendant obtained the money. It went from the complainant's [bank] account into her bank account. **The issue is whether she obtained that dishonestly. So essentially, whether Mr Marshall knew about the pay increase, and he authorised that. That's really the issue.** So when Mr Marshall gives his evidence shortly, pay attention to his evidence. His honesty, credibility, and reliability will be an issue in this trial. And it's really your – your verdict at the end of the trial will really depend on whether or not you believe what he's saying to you or not. Whether you actually accept that he knew nothing about the pay increase. The Crown case is that he knew nothing, he didn't authorise the salary, and the defendant did in fact act dishonestly."

(d) Fourth, counsel for the defence also gave an opening address, but it accepted without demur the Crown's characterisation that the critical issue was whether Mr Marshall knew about the pay rise.[16]

(e) Fifth, in her closing address, counsel for the prosecution framed the issue in a way which continued the vice of focusing on Mr Marshall's state of mind, in these terms:

> "The issue here is with dishonesty and whether Greg Marshall knew about it, the salary increase, and whether he authorised it. Now, her Honour, I mentioned this in my opening, but I just briefly want to say it again. The Crown has to prove beyond reasonable doubt that the defendant acted dishonestly and that is determined objectively, not by the standards of the defendant, by what you ladies and gentlemen think is dishonest.
>
> If you think she acted dishonestly, it's you that would find her guilty. And as I said, the Crown says that she knew she wasn't entitled to the salary increase, she knew Mr Marshall had not authorised the salary increase. She used the electronic signature to forge that document. She arranged with Natasha Wilson the salary increase without her employer, Mr Marshall's, authority. She received the increased salary

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14 AB at 12.3-11.
15 AB at 13.20-32, emphasis added.
16 AB at 14.6-10.

> payments dishonestly and then breached the terms of her contract."

[18] I acknowledge that, despite framing "the" issue in the way she did, by the second paragraph in the above quote, counsel for the prosecution might be thought to have narrowed the Crown case to a cumulation of all the factors she mentioned and thereby to have gone some way to addressing the problem created by the use of the "and/or" conjunction in the particulars and the "one or a combination of the factors" language used in the opening. However, as we will now see, the problem was reintroduced by the terms of the instructions given to the jury and no re-direction was sought.

[19] Instructions were given to the jury by reference to a "Charges, particulars and elements" sheet.[17] The second page of that document recorded the way in which the Crown had particularised its case as recorded above. When the primary judge took the jury to that page, her Honour merely read out those particulars without clarification. The third page of the document recorded the trial judge's analysis of the elements of the offence charged. As to this:

(a) The document provided:

> "**Count 1 - Fraud, as an employee, to the value of $30,000 or more**
>
> In relation to Count 1 the prosecution must prove beyond reasonable doubt that:
>
> 1. The defendant obtained property from the complainant.
> 2. The defendant was an employee of Bluechip Acreage Maintenance Pty Ltd.
> 3. The defendant acted dishonestly.
>
> - The crown must prove beyond a reasonable doubt that the defendant acted dishonestly.
> - That is to be determined objectively - not by the defendant's standards, but by the standards of ordinary, honest people.
> - To prove that the defendant acted dishonestly the prosecution must satisfy you, beyond a reasonable doubt, that what the defendant did was dishonest by the standards of ordinary honest people.
> - In this case, the prosecution says that there are one or a combination of factors that establish that the defendant acted with a certain state of mind. These are that she:
>
> ○ Knew she was not entitled to the salary increase; and/or

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17 See AB at 48.24 et seq. and MFI A recorded at AB at 275-277.

- Forged her employer's signature on the salary increase; and/or
- Arranged for the salary increase to be processed without her employer's authority; and/or
- Received the increased salary payments; and/or
- Breached the terms of her employment contract.

- You are to consider whether the crown has satisfied you beyond a reasonable doubt that the defendant did act with a particular state of mind and whether, by acting with that state of mind, the defendant was acting dishonestly by the standards of ordinary, honest people.

The prosecution does not have to prove that the defendant must have realised that what she was doing was dishonest by those standards.

A person's act or omission in relation to property may be dishonest even though

- he or she is willing to pay for the property; or
- 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
- an owner or other person consents to doing any act or to making any omission; or
- a mistake is made by another person

4. The property obtained was to a value of more than $30,000."

(b) It may be observed that the third numbered paragraph dealt with dishonesty. The fifth bold print dot point was unremarkable, but begged the question what was the "particular state of mind" which had to be proved beyond reasonable doubt and then assessed by reference to the standards of ordinary, honest people. The only assistance given to the jury was that set out in the fourth bold print dot point. The requisite state of mind was not actually identified at all. Rather the dot point contained all the flaws previously discussed concerning the particulars. The Crown case about the appellant's state of mind was to be found somewhere in "one or a combination" of five factors, only one of which did clearly state anything about the appellant's state of mind.

(c) A further confusion was introduced by the inclusion at the end of the third numbered paragraph of the words "A person's act or omission in relation to property may be dishonest even though … an owner or other person consents to doing any act or to making any omission". Although that language derives from s 408C(3)(b)(iii) of the *Criminal Code*, its inclusion in the instructions was misleading, especially as one important consideration in the jury's mind should have been whether or not Mr Marshall had either actually or apparently consented to the application of the electronic signature or the increase to the appellant's salary. This direction suggested that such a consideration could be ignored.

(d) Although the trial judge did address orally that which she had given the jury in writing, her address did not change the applicability of the observations I have just made. Indeed, when her Honour commenced that part of her instructions which sought to summarise the relevant cases, she seemed to accept without demur the Crown's flawed suggestion that a finding that Mr Marshall had neither known of the increase nor authorised it could by itself justify a finding of the appellant's dishonesty. Her Honour observed:[18]

> "This then brings me to a summary of the rival contentions. You heard the address from the Crown Prosecutor yesterday afternoon and the Crown identified that the issue is whether the defendant acted dishonestly and that the question was whether Mr Greg Marshall knew or authorised the salary increase of $250,000 to the defendant. The Crown submitted that you would be satisfied beyond reasonable doubt that the answer to the question is no and therefore you would find the defendant guilty of the one charge."

[20] Insistence on precision in relation to these matters was all the more important because there was evidence in this case which the jury should have been invited to view through the lens of its relevance to the question of whether the Crown had proved beyond reasonable doubt a particular and clearly identified aspect of the appellant's knowledge, belief or intent, rather than merely through the lens of its relevance to whether Mr Marshall had actually authorised the appellant's pay increase. I observe:

(a) The appellant was employed as the general manager reporting to Mr Marshall.[19] He said that he gave her full control of the office. He said that "Basically I give her full control of everything, overseeing the bank accounts, everything, the lot." That included responsibility for employing people and paying them.[20]

(b) There was no written evidence as to the limits of the appellant's authority concerning employment matters, let alone her own employment matters. Mr Marshall gave arguably inadmissible opinion evidence that he thought he would have to authorise any pay rise which the defendant wanted.[21] But even that evidence did not shed direct light on what must have been the appellant's state of mind as to the limits of her own authority.

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18 AB at 49.27-33.
19 AB at 92.8.
20 AB at 74.18-23.
21 AB at 75.4-26.

(c) Mr Marshall accepted was that there was some discussion between him and the appellant that she would accept the contracted salary until such time as the company was "kicking goals".[22]

(d) Mr Marshall accepted that prior to February 2017, the appellant had been instrumental in securing a contract which had brought in a potential $12 million to $20 million income to the company.[23] He denied that that could be regarded as "kicking goals".[24]

(e) Mr Marshall denied ever authorising the increase to the appellant's salary but there was evidence from him and from another witness that:

(i) the appellant had sent Mr Marshall a text message letting him know that he had signed off on the appellant's pay rise;

(ii) he had responded with a prayer emoji; and

(iii) she had replied with some emojis.[25]

(f) The prosecution had opened the case on the basis that the texts were sent and received in February 2017.[26] In this regard, the letter purporting to authorise the pay increase was dated 21 February 2017 and the appellant provided the letter to the payroll officer on 23 February 2017. In chief, Mr Marshall said he could not remember when the texts were sent, but there was some suggestion in his cross-examination that he accepted that they were sent on the 22 February 2017.[27]

(g) Mr Marshall said he treated the texts as a joke and never followed them up with the appellant.[28] However it was a jury question whether, from the appellant's point of view, the prayer emoji might have been interpreted as "thank you" and relevant to the question of whether the Crown had proved beyond reasonable doubt whatever its case actually was in relation to the appellant's knowledge, belief or intent.

[21] In my view, the knowledge, belief or intent with which the appellant was alleged to have done the dishonest act was neither articulated clearly in the Crown case, nor identified in the trial judge's instructions to the jury. Further, the trial judge did not instruct the jury in terms which would have required the jury to decide whether Crown had proved beyond reasonable doubt that the appellant had a particular identified knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. The failure so to do occasioned a miscarriage of justice.

Appeal grounds 2 and 3

[22] In light of the foregoing analysis, I can express my view in relation to appeal grounds 2 and 3 in a summary way.

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22 AB at 99.18-24.
23 AB at 93.6-23.
24 AB at 99.28-29.
25 AB at 85.4-26, 121.39-47; 155.40-44 and 165.1-30.
26 AB at 12.39-44.
27 AB at 85.34 and 120.29-31.
28 AB at 85.20-26.

[23] As to appeal ground 2:

(a) In *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713 at 721E Asprey JA (with whom Mason JA agreed) observed:

> "In my opinion, evidence of a relevant practice may be given by a person who, on a sufficient number of occasions and over a sufficient period, has regularly and uniformly performed acts, or has observed the regular and uniform performance of acts by others, under the same circumstances and upon the same occasions, so as to make it appear probable in the minds of reasonable men that, given the same circumstances and occasions, the like acts will again be performed. Such evidence, if accepted by the tribunal of fact, will enable it to draw the inference that such acts were performed by that person or those others, as the case may be, where the same occasion and circumstances for their performance have subsequently recurred at a point of time connected sufficiently closely with the continuity of acts related in the evidence."

(b) It was common ground that if there had been evidence of business practice in relation to the use in the company's business of Mr Marshall's electronic signature, that would have been admissible.

(c) The relevant ruling is to be found in an exchange which took place during the cross-examination by the appellant's counsel of Ms Latchford, an employee who started as a secretary and eventually moved to an accounts role:

> "MR MOON: All right. Thank you. Now, do you have any knowledge of Greg Marshall – an electronic signature of Greg Marshall being - - -?---Yep.
>
> You do. All right?---Yep.
>
> Well, what knowledge do you have about an electronic signature for Greg Marshall?---The knowledge that I have of the signature is that the previous secretary before me had created one because Greg was never in the office. And he had said I – I don't know how many times, but he said, "If I'm not in the office just put that signature on your documents".
>
> I see. All right. Thank you. And did that information come from Greg Marshall?---I heard it through the secretary. I didn't directly hear it from Greg himself, but I do remember a phone call once where I had to ask him as he was away - - -
>
> MS WILSON: Objection, your Honour, it's - - -
>
> HER HONOUR: Yes. I will just have to stop you.
>
> MR MOON: Yes
>
> HER HONOUR: Ladies and gentlemen, this is hearsay. You will have to ignore this evidence."

(d) In my view these questions could not be characterised as an attempt to elicit testimony which could be characterised in the way which the appellant now

seeks to characterise it. They do not seek to elicit evidence of actual performance by the witness of any practice concerning the application of electronic signatures. Nor do they seek to elicit evidence of any observation by her of anyone else engaging in such a practice. The evidence concerning the witness's knowledge was founded on out of court statements to her made by a secretary and could not be admissible to prove the truth of any fact stated to her. The question concerning a phone call from Mr Marshall apparently concerned only one call from him to her and could hardly have provided the foundation for admissible evidence of a business practice, in the manner explained in *Connor v Blacktown District Hospital*.

(e) This ground of appeal fails.

[24] As to appeal ground 3:

(a) The use of the verb "forged" in the particulars and the instructions to the jury obfuscated what was meant particularly insofar as it was intended to shed light on the appellant's knowledge, belief or intent.

(b) The trial judge should have insisted on clarity as to what was intended by the particular so that she could then have instructed the jury on the meaning of the term.

(c) I would regard this ground as dealt with by my reasoning in relation to appeal ground 4.

Conclusion

[25] The success of appeal ground 4 justified the orders which the Court made.