SUPREME COURT OF QUEENSLAND

CITATION:	*R v Russell* [2018] QCA 96
PARTIES:	**R** **v** **RUSSELL, Brian Benjamin** (appellant)
FILE NO/S:	CA No 46 of 2017 DC No 2035 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 28 February 2017 (Farr SC DCJ)
DELIVERED ON:	25 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2018
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – OTHER FRAUDS AND IMPOSITIONS – FRAUD – GENERALLY – where the appellant was convicted of fraud under s 408C(1)(a)(i) of the *Criminal Code* (Qld) – where the appellant argued the person who "applied" the property was a company, but not the appellant himself – where the appellant argued the evidence led at trial did not pierce the corporate veil – where the appellant was the sole director of the companies concerned – where the respondent argued the appellant caused the transfer of property between the companies concerned – whether there was evidence to support a finding beyond reasonable doubt that the appellant "applied to his own use" the property in question CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – OTHER FRAUDS AND IMPOSITIONS – FRAUD – GENERALLY – where the appellant was convicted of fraud with a circumstance of aggravation under s 408C(1)(a)(i) and s 408C(2)(c) of the *Criminal Code* (Qld) – where the appellant argued the property was in the "possession" of a company, but not the appellant personally – where the appellant argued the evidence led at trial did not pierce the corporate veil – where the appellant was the sole director of the companies concerned – where the respondent argued the appellant had

possession of the property because he had control of it – whether there was evidence to support a finding beyond reasonable doubt that the property came into the appellant's "possession on account of" another

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant was convicted of fraud under s 408C(1)(a)(i) of the *Criminal Code* (Qld) – where the appellant was self-represented at trial – where the directions given on whether the property "belonged to" the complainant company reflected the Crown's case that the company had a claim to the funds – where the appellant argued the directions failed to direct the jury as to what would constitute a legal or equitable claim – whether the learned trial judge failed to adequately direct the jury on the issue of whether the property "belonged to" the complainant company

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant was convicted of fraud with a circumstance of aggravation under s 408C(1)(a)(i) and s 408C(2)(c) of the *Criminal Code* (Qld) – where the appellant was self-represented at trial – where the appellant argued the learned trial judge did not adequately direct the jury as to the meaning of "on account" and the type of relationship in which a duty to account would arise – where a jury note sought clarification on an aspect of this circumstance of aggravation – where the respondent argued the note demonstrated the jury's understanding of the words "on account of" – whether the trial judge failed to adequately direct the jury on the meaning of property held "on account"

Criminal Code (Qld), s 408C

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
R v Allard [1988] 2 Qd R 269, cited
R v Easton [1994] 1 Qd R 531; [1993] QCA 255, applied
R v Lenahan [2009] QCA 187, distinguished

COUNSEL: E Wilson QC, with L Reece, for the appellant
M T Whitbread 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 Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** The appellant, Brian Benjamin Russell, was tried in the District Court at Brisbane on an indictment containing a single count. The trial took place over 10 days in February 2017. The count alleged an offence against s 408C(1)(a)(i) of the *Criminal Code* (Qld) in that on divers dates between 27 April 2011 and 24 May 2011 at Brisbane and elsewhere in Queensland, the appellant dishonestly applied to his own use and the use of BRGOC Group Finance Pty Ltd and others property, namely a sum of money and bank credits belonging to AF (Qld) Pty Ltd and another. The following two circumstances of aggravation were alleged: that the property came into the appellant's possession on account of Aquatic Food Marketing Pty Ltd;[1] and that the property was of a value of more than $30,000.[2]

[3] On 28 February 2017, the appellant was found guilty by majority verdict of the offence. He was sentenced on 1 March 2017 to three years' imprisonment. Pre-sentence custody of one day was declared to be time served under the sentence. A parole release date was set at 28 August 2018.

[4] On 16 March 2017, the appellant filed a notice of appeal against conviction and an application for leave to appeal against sentence.[3] On 6 February 2018, the appellant filed a notice of abandonment of the application for leave to appeal against sentence. At the hearing of the appeal on 6 March 2018, leave was given to amend the grounds of appeal. The appellant had represented himself at the trial. He was represented by counsel at the hearing of the appeal.

Circumstances of the alleged offending

[5] During the period of the alleged offending, the appellant was registered as the sole director of a number of companies. There was B & B Russell No 2 Pty Ltd ("BBR2"), in which Bernadette Davina Russell was the sole shareholder. That company was the sole shareholder in Queensland Sea Scallops Pty Ltd which, in turn, was the sole shareholder in Queensland Sea Scallops Trading Pty Ltd and in Queensland Sea Scallops Holdings Pty Ltd ("Holdings"). Holdings was the sole shareholder in AF (Qld) Pty Ltd ("AFQ") and Queensland Sea Scallops SR Pty Ltd.[4]

[6] During that time, in addition to those companies, the appellant was also registered as the sole director of BRGOC Pty Ltd ("BRGOC"), the shareholders in which were the appellant himself and other members of his family. He was also registered as the sole director of BRGOC Group Finance Pty Ltd ("BRGOC Group Finance") in which BBR2 was the sole shareholder.[5] As the name suggests, BRGOC Group Finance acted as the treasury for the appellant's group of companies.

[7] The appellant became a bankrupt on 4 February 2011. Having become aware of the bankruptcy, the Australian Securities and Investment Commission removed the appellant's registration as a director of those companies of which he was a director on 29 June 2011 with the removal backdated, except in the case of AFQ, to the date

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1 *Criminal Code* (Qld) s 408C(2)(c).
2 Ibid s 408C(2)(d).
3 AB1337-1339.
4 Exhibits 29, 56.
5 Exhibit 56.

of the bankruptcy.[6] AFQ was incorporated on 7 February 2011. For it, the backdating was to the date of its incorporation.[7]

[8] On the Crown case, AFQ had been incorporated by the appellant for the "purported purchase" of an unrelated company, Australian Fisheries Pty Ltd ("Australian Fisheries").[8] It operated a seafood processing factory at Burnett Heads near Bundaberg. In February 2011, the directors of Australian Fisheries were Albert Doriean and Desmond O'Toole. Mr Doriean was the sole shareholder.[9] Neither testified at the trial.

[9] The evidence was inconclusive as to whether the purchase of Australian Fisheries by AFQ was completed. In any event, Australian Fisheries was placed into external administration on 11 April 2011.[10]

[10] Evidence was given by the office manager of Australian Fisheries in 2011. She said that the appellant was "in charge" of the company. "All decision-making was with (the appellant)" and all banking was arranged from his office in Brisbane. He caused a Westpac account to be opened for Australian Fisheries.[11]

[11] The charged offence arose out of a commercial arrangement which the Crown alleged had been entered into in March 2011 between the complainant company, Aquatic Food Marketing Pty Ltd ("Aquatic") and AFQ in order for a shipment of seafood to be sold to a Hong Kong buyer, Mak Louis. The arrangement was negotiated between Denis O'Brien who was then a quality assurance officer and marketing manager employed by Australian Fisheries, and the founding director and shareholder of Aquatic, Marshall Betzel.

[12] Aquatic is based in Cairns. It conducts a number of fishing-related business activities, including buying and selling seafood in its own right.[12] Mr O'Brien and Mr Betzel had known each other for many years and were good friends.

[13] Mr O'Brien testified that the arrangement was entered into at a time by which the appellant had told him that he would be taking over the Australian Fisheries business. An order had come in from a Hong Kong customer for 12 tonnes of a particular variety of Australian prawn. Australian Fisheries had only three tonnes of it available. The remainder had to be sourced from another supplier. Aquatic was a potential source.[13]

[14] Mr Betzel and Mr O'Brien gave evidence with respect to the negotiation of the arrangement.

[15] According to Mr Betzel's evidence, Mr O'Brien telephoned him and told him that Australian Fisheries was looking for Endeavour prawns to fill a container for shipment to Hong Kong. He told Mr O'Brien that Aquatic did not have any of that product available but that he would make enquiries from his Cairns contacts to see if any was available. He found a parcel of Endeavour prawns with Tropic Ocean

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6 Ibid.
7 AB192 Tr4-59 ll15-25.
8 Prosecutor's Opening Transcript 1-2 ll25-30.
9 Exhibit 21.
10 Ibid.
11 AB265 Tr5-42 ll5-41.
12 AB47 Tr2-3 l1 – AB48 Tr2-4 l2.
13 AB127 Tr3-22 l23 – AB 128; Tr3-23 l12.

Prawns Australia ("Tropic Ocean"). He advised Mr O'Brien of their availability, the price, his brokerage fee and the cost of transporting the prawns to Brisbane.[14]

[16] Later, Mr O'Brien contacted him and said that the price was too high. Mr O'Brien asked him to approach Tropic Ocean with a lower counter-offer. They also discussed the brokerage fee. Mr O'Brien requested him to consider an alternative arrangement. Mr Betzel gave the following evidence in chief about this alternative:

> "[W]ould I procure the prawns on their behalf at that price and that we would then do the shipment with the other product they had and the component of the container that I would procure, we would split the net profit that would be made out of that sale."[15]
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> "He also advised me that payment for the product without the profit would be around about seven to 10 days. By the time they packed the container and received the bill of [lading], and that bill of [lading] was to be sent to the client with a commercial invoice, I would be looking at roughly seven to 10 days before I would see funds coming in to pay the product that we procured on their behalf."[16]
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> "This was merely procuring the product at cost, organising – facilitating the product to get to Brisbane and then relying on Denis' integrity insofar as that he advised me that I could be looking little bit better than the 50 cents a kilo as an incentive, and I'm of the opinion that also assisted them because they probably didn't have the – it being a new client, I probably would have asked for that – that money be paid prior to shipment."[17]
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> "Denis and I discussed, in the arrangement, that the transaction would be completed in two stages. As soon as the product had been paid for, or the container shipment had been paid for by the client, [Mak Louis], they would then arrange for the $76,485 for the product to be remitted within the seven to 10 days, so that then I could pass those funds to Tropic Ocean and thereafter – and it was grey. After a period of time, once all the invoices had been received for the cost of the shipment, then a 50-50 split would be calculated and thereafter, I would receive my bit – my share of the profit."[18]

In cross-examination, he further described the alternative as follows:[19]

> "I procured the product for them at a given price in Australian dollars, given that it was an Australian transaction and thereafter, the recoup of that – those funds back to my company so that I could pay Tropic Ocean, was always going to be in Australian dollars, it was never a question foreign currency."

[17] In view of their friendship, Mr Betzel decided to assist Mr O'Brien and was prepared to go ahead with this alternative.[20] It required all invoices for outgoings associated with the shipment to be consolidated so that net profit could be

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14 AB49 Tr2-5 ll4-31.
15 AB49 Tr2-5 ll41-44.
16 AB50 Tr2-6 ll13-18.
17 Ibid ll31-36.
18 AB54 Tr2-10 ll20-27.
19 AB78 Tr2-34 ll14-18.
20 AB50 Tr2-6 ll3-8.

calculated at a later stage. Within that context, it was agreed that Australian Fisheries would arrange, and pay for, the transportation of the prawns by road from Cairns to Brisbane.[21]

[18] Mr Betzel testified that on 1 April 2011, Mr O'Brien asked him whether he could arrange for some form of instrument so that when funds were received from the Hong Kong customer, Australian Fisheries could pay "whoever it was" for the prawns sourced by Aquatic.[22] Until then, Mr Betzel had not given any real thought to how his supplier was to be paid.[23] There were no currency discussions. In cross-examination he said that the prawns were procured for Australian Fisheries at "a given price in Australian dollars" and that "the recoup of that – those funds back to my company so that I could pay Tropic Ocean, was always going to be in Australian dollars, it was never a question [of] foreign currency".[24]

[19] Before the prawns were delivered to Australian Fisheries, Mr Betzel took up the matter with Tropic Ocean. He did so on 4 April 2011. Tropic Ocean had never had dealings with Australian Fisheries. It raised an invoice dated 4 April 2011 for $76,485 for the prawns. The invoice was addressed to "North Queensland Trawler Supplies", a trading name used by Aquatic. It was for prawns dispatched to Australian Fisheries on 4 April 2011.[25] On the same day, Aquatic, using the same trading name, raised an invoice to Australian Fisheries for the same dispatch of prawns and in the same amount.[26] According to Mr Betzel, this invoice was raised to facilitate "the funds going into [Aquatic's] account so that [he] could then put them into [Tropic Ocean's] account."[27]

[20] Mr O'Brien gave the following evidence concerning the arrangement:

> "Now in terms of the details of the transaction, what were the details of the transaction? --- Well, there was nine tonne of prawn in Cairns that we were looking at to make part of this container. I – we didn't have the money at the time to buy these prawns so we [set up] an arrangement with Mr Betzel that he supply the prawns to us at a price that we knew that we could exchange overseas. We had the balance of the product in-store at Bundaberg. And then between the two of us, we'd export this product and all the costs were then to be [brought] in place. And what profit was there was to be split between Australian Fisheries and North Queensland Trawler Supplies"[28]
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> "And in terms of payment, do you know what the arrangements for payment were? --- Well, the company we were dealing with in Hong Kong at the time was to pay the amount into a bank account nominated by ourselves. And then the haul costs were to be divvied up, and what profit was in there was to be split between Australian Fisheries and North Queensland Trawlers[29]"
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> "Now in terms of the payment, did you talk to Mr Betzel about when payment would be made? --- I gave him a rough idea. I said it would

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21 AB52 Tr2-8 ll31-37.
22 AB51 Tr2-7 ll3-10.
23 Ibid.
24 AB78 Tr2-34 ll15-18.
25 Ibid ll0-22. The invoice is Exhibit 2: AB511.
26 Exhibit 3: AB512.
27 AB80 Tr2-36 ll1-8.
28 AB128 Tr3-23 l41 – AB129 Tr3-24 l2.
29 AB130 Tr3-25 ll4-8.

> – possibly would – within two weeks of the paperwork leaving the country.
>
> Okay. [Alright]. Now, in terms of the timing or the – sorry, I'll rephrase this. In terms of that two weeks, was the amount to be paid to Mr Betzel to be done in a certain way in – how did you know where to pay the money and how it was going to be paid? --- It was just a fifty-fifty share of profits.
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> What about the cost of the prawns? --- Well, that was invoiced to Australian Fisheries for a set amount. Now, I believe that was in the vicinity of $76,000."[30]
>
> "The proceeds of the sale that was involving Mr Betzel? --- Where was that supposed to go?
>
> Yes? --- It was supposed to go with – proportionately, back to Mr Betzel.
>
> Okay? --- And to ourselves."[31]

[21] Mr O'Brien also gave evidence that at the time he "ran (the transaction) by" the appellant.[32] Evidence to similar effect was given by Sidney McKeown, the then operations manager of Australian Fisheries.[33]

[22] On 8 April 2011, Australian Fisheries issued an invoice to Mak Louis in Hong Kong for the prawn shipment in an amount of USD122,319.[34] Mr O'Brien gave evidence that the appellant nominated a Westpac account in Bundaberg operated by AFQ as the account to which funds in payment of the invoice were to be "T/T"'d once shipping documents had been received.[35] The invoice was endorsed accordingly. In fact, the appellant arranged for AFQ to open a Westpac USD account on 27 April 2011 and the amount of USD122,289 was remitted to it by Mak Louis on 28 April 2011.[36]

[23] Almost all of these funds were then withdrawn (USD40,000 on 28 April 2011 and USD82,000 on 3 May 2011), converted to AUD ($36,529.68 and $73,853.91 respectively) and deposited by transfer to a Westpac business account operated by AFQ.[37] There were then further transfers from that account to a Westpac business account operated by BRGOC Group Finance.[38] The Crown alleged that the funds so transferred were thereafter used to make disbursements from this account to pay wages, group companies or their creditors, and the appellant himself.

[24] As for the invoice raised by Tropic Ocean, Aquatic paid it on the 31 May 2011.[39] However, the invoice issued by Aquatic to Australian Fisheries was never paid. Nor was a re-issued invoice directed to AFQ.[40] No accounting for a net profit share was ever made by Australian Fisheries to Aquatic.

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30 AB131 Tr3-26 ll26-38.
31 AB137 Tr4-4 ll28-33.
32 AB128 Tr3-23 ll1-5, 35-39.
33 AB167 Tr4-34 ll27-36, AB215 Tr4-82 ll1-10.
34 Exhibit 18: AB800.
35 AB130 Tr3-25 ll31-36.
36 AB716.
37 AB724.
38 AB693–694.
39 Exhibit 7: AB516.
40 Exhibit 11: AB520.

The appellant's account

[25] The appellant did not testify at trial. He had been interviewed by police on 3 April 2014. The interview was video-recorded. It was adduced in evidence during the testimony of Detective Sergeant Anthony Vlismas, the interviewing officer, and played to the jury.[41] During the interview, the appellant told police that the arrangement bought to him by Mr O'Brien was a "joint venture deal".[42] The appellant said that it "[s]imply was a share profit or loss and cover cost with products being owned by parties with no payment until full payment –, full funds were received."[43]

[26] According to the appellant, the transaction "went wrong".[44] He said that "incorrect money came in" but that the consultants would not go back to the buyer to address that.[45] Aquatic would not agree to a reduction in what it was to receive. The appellant was insistent that the loss be shared and was ready to pay Aquatic a reduced amount.[46] Civil litigation ensued.[47]

Particularisation of the charge

[27] A document containing particulars of certain elements of the charge was tendered by the Crown.[48] How the money and bank credits (the USD122,289 credited to AFQ's USD account) belonged to AFQ was particularised in it (Particular 1). In the course of the trial, the prosecutor identified the "another" referred to in the charge as being Aquatic and explained how the money and bank credits also belonged to it by reference to the exposition of how property may belong to a person for the purposes of s 408C(1)(a)(i) contained in s 408C(3)(d).[49] As is elaborated further in these reasons, that was because Aquatic had a legal or equitable interest or claim in that property. The jury was so instructed.[50]

[28] I note that the learned trial judge struck out one of seven particulars of how the application of the money and bank credits was dishonest (Particular 3(a)).[51] His Honour considered that this particular was inappropriate for an offence alleged against s 408C(1)(a)(i), in contrast to s 408C(1)(a)(ii).[52] Nothing turns on the strike out of the particular for this appeal.

The grounds of appeal

[29] The appellant relies on the following grounds of appeal:

1. There was no evidence to support a finding beyond reasonable doubt that the appellant "applied to his own use" the property in question.

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41 AB101, 102. A transcript of the interview is Exhibit MFI "E": AB1138-1326.
42 AB1167.
43 AB1167.
44 AB1227.
45 AB1203.
46 AB1227-1228.
47 Ultimately, judgment was entered in the Magistrates Court at Cairns for Aquatic against AFQ in the sum of $90,767.52 which included the $76,485.
48 Exhibit MFI "B": AB1134-1136.
49 AB374-376.
50 AB425 ll13-31.
51 AB395 Tr7-30 l44.
52 AB395 Tr7-30 ll20-45.

2. There was no evidence to support a finding beyond reasonable doubt that the appellant held the property "on account of" another.

3. The learned trial judge failed to adequately direct the jury on the issue of whether the property "belonged to" the complainant company.

4. The learned trial judge failed to adequately direct the jury on the meaning of property held "on account".

Although some of these grounds are interrelated, it is convenient to consider each of them separately.

Ground 1

[30] **Appellant's submissions:** The appellant submitted that, on the evidence adduced, the person who "applied" the property was AFQ and not the appellant personally. The money credits were in AFQ's USD account. Hence, it alone could have applied them. The appellant relied on the decision of this Court in *R v Lenahan*.[53]

[31] In his written Outline of Submissions, the appellant submitted that the evidence led by the Crown did not "pierce the corporate veil" to establish that it was the appellant who applied the credits to his own use or the use of another.[54] The distinction between the appellant and his company, AFQ, had been overlooked at trial and was not addressed by the learned trial judge in his standard direction to the jury on the element of "applied to his own use or to the use of any person".[55]

[32] **Respondent's submissions:** The respondent distinguished the decision in *Lenahan* as one concerned with the s 408C(1)(b) offence of dishonestly obtaining property from any person. It submitted that the observations of Macrossan CJ in *R v Easton*[56] with respect to the meaning of "applied" in s 408C(1)(a)(i) are to point.

[33] The respondent further submitted that, consistently with those observations, the appellant had applied the money credits in the USD account when, as sole director of the companies concerned, he caused those funds to be transferred first to the AFQ business account and then to the BRGOC Group Finance business account for payment to others and thereby deflected them from payment to Aquatic.

[34] **Discussion:** Unlike the word "obtain" which is defined for s 408C(1)(b) to mean "to get, gain, receive or acquire in any way",[57] the word "applies", as an element of the s 408C(1) offences, is not defined.

[35] In *Lenahan*, on which the appellant relies, the accused was the sole director and shareholder of a company which engaged in buying cattle. He was tried and convicted of 20 offences against s 408C(1)(b) in that he had "dishonestly obtained" property from each of the individual complainants. The charges arose out of contracts for the sale of cattle. In some instances, it was the accused who personally had contracted with a complainant; in other cases, it was his company.

[36] The arguments on appeal focused on the charges where the company had been the contractor. The issue was whether when property in cattle was transferred to the company under a contract of sale, the accused himself "obtained" the property in

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53 [2009] QCA 187.
54 At [37].
55 At [36].
56 [1994] 1 Qd R 531; [1993] QCA 255.
57 *Criminal Code* (Qld) s 408C(3)(e).

question. Fraser JA (with whom McMurdo P and Jones J agreed) said of the defined term "obtained":

> "The breadth of the inclusive definition of "obtain" does not advance the respondent's case. None of the examples of "obtain" ("get, gain, receive or acquire") suggest that it includes the delivery of property to someone other than the fraudster. The definition undoubtedly ensures an extensive reach for the concept of "obtaining" in s 408C(1)(b), but it does not touch the requirement, unequivocally flowing from the language of the section, that the person who obtains the property must be the person who is dishonest. In that respect paragraph (b) may be contrasted with paragraphs (c) and (d), which comprehend cases in which an individual who is dishonest is (in terms of (c)) not the recipient of property and (in terms of (d)) does not personally gain from his or her dishonesty.[58]

[37] His Honour cited with approval a decision of this Court in *R v Ehlert*[59] which considered the meaning of the word "obtains" in s 427(1) of the *Criminal Code* (Qld), a predecessor to s 408C. His Honour added[60] that "the language of s 408C(1)(b) is not apt to create a statutory exception to the legal distinction between a company and the company's sole director and shareholder which was authoritatively confirmed more than a century ago in *Salomon v A Salomon & Co Ltd*.[61]"

[38] It is undoubtedly correct that when, under a contract for sale of goods, property in the goods is transferred to a company, it is not concurrently transferred to a person who is the sole director of a company. That is so even if that person has been instrumental in entering into the contract. If property in the goods is not transferred to such a person, it cannot be said that the person gets, gains, receives or acquires the goods in any way.

[39] By contrast, the word "applies" in s 408C(1)(a) is not constrained by comparable considerations. In order to offend against that provision, it is unnecessary that the alleged offender first have obtained the property in question. Thus, no inquiry into the legal identity of the entity which, in legal concepts, obtained the property, is required on that account.

[40] Nor is a comparable inquiry required where property is alleged to have been dishonestly applied by a person within the meaning of s 408C(1)(a). It is neither a requirement of that provision nor an aspect of the natural meaning of the word "apply", that in order for a person to apply property, the person must be the owner of the property. To the contrary, the provision is posited upon a person dishonestly applying property that belongs to another.

[41] The ordinary meaning of the word "applies" in this context was considered by Macrossan CJ in *Easton*. His Honour said:

> "The phrase "applies to his own use" may not always have the same meaning as, say, "uses for his own purposes" because under the

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58 At [50].
59 [1996] QCA 555 at [28]-[29].
60 At [53].
61 [1897] AC 22.

> former phrase some relevant use may not yet have commenced while under the latter the use will have been at least initiated. However, even to "apply" involves some utilisation of the thing in question. The composite phrase which s. 408C adopts contains words which, if possible, should all be given their natural meaning. It can be accepted that the section envisages some interaction between the person and the thing and this will not be met merely by the formation of an intention to act or the devising of a plan in respect of the thing. The section nevertheless stops short of requiring that there should be some consumption, expenditure or dissipation of the thing, alteration of its form or utilisation of it to secure some collateral material benefit, although these may be involved. I consider that the requirement of this part of the section is met when there has been a utilisation by the person involved for his own purposes."[62]

[42] After giving an example, Macrossan CJ observed:

> "Under s. 408C, before an item of property will be "applied", there has to be a mental element, an intention held in relation to the thing, and also there has to be some implementation of that intention, i.e. some act or acts which constitute some dealing with the thing: in simple terms something has to be done to or with the thing. Usually there will be, I think, some influence exerted upon the thing affecting its form, location or its attributes. The "application" will involve some deflection from the purposes of the person to whom the property belongs."[63]

[43] From these observations, one may draw that for the purposes of s 408C(1)(a), to apply property involves a dealing with it, usually by exerting some influence upon it affecting its form, location or attributes. A dishonest application of property will involve deflecting it from the purposes of the person to whom the property belongs.

[44] In my view, if such a dealing is undertaken by an individual with respect to property, it is that individual who applies the property. If the individual undertakes the dealing as a director of a company, it may be that the company also applies the property. But it does not at all follow that it is the company, and not the individual, who has applied the property.

[45] The application by the appellant of the funds credited to the USD account was particularised as causing them to be transferred first to AFQ's business account and then to BRGOC Group Finance's business account, and thereafter to be disbursed from that account to pay wages, group companies or their creditors and the appellant.[64] There was ample evidence that it was the appellant, as sole director of AFQ and BRGOC Group Finance, who caused the transfers and disbursements to be made. Hence, there was ample evidence that he **applied** the funds within the meaning of s 408C(1)(a). This ground of appeal cannot succeed.

Ground 2

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62 At 534.
63 At 535.
64 Particular 2.

[46] The first circumstance of aggravation charged was that the property came into the appellant's possession on account of Aquatic. At the relevant time, the second limb to s 408C(2)(c) provided for an increase of the maximum penalty from five years' to 12 years' imprisonment if "any property in relation to which the offence is committed … came into the offender's possession on account of any other person."

[47] **Appellant's submissions:** The appellant submitted that, at no time, were the funds which were credited to the USD account and thereafter transferred and disbursed, in the possession of the appellant. Initially, they were possessed by AFQ and then by BRGOC Group Finance; but they were never possessed by the appellant. As with Ground 1, the appellant further submitted that the evidence in the Crown case did not "pierce the corporate veil" and thereby attribute possession of the funds to the appellant. Hence, this circumstance of aggravation was not proved.

[48] **Respondent's submissions:** The respondent noted that the word "possession" is defined in s 1 of the *Criminal Code* to include:

> "having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question."

The respondent submitted that, on the evidence, the appellant has caused the USD account to be opened. He was the sole signatory to it. Further, the remittance from Mak Louis was deposited to that account at his request or direction. Relying on the definition of "possession", this evidence and the fact that the appellant was the sole director of both AFQ and BRGOC Group Finance, the respondent submitted that the appellant had control over the funds at all material times and therefore they were in his possession at all such times.

[49] **Discussion:** The word "possession" in the second limb to s 408C(2)(c) has the meaning given to it by the definition in s 1. That meaning includes control of property whether or not the property is within the actual possession or custody of a person. It is a definition that is not confined to possession according to property law concepts. Provided that a person has control of the property, the person has possession of it for the purposes of s 408C(2)(c). Here, too, if the person having control of property is the sole director of the company, it may be that the company also has possession, but not exclusive possession, of the property for the purposes of this provision.

[50] The evidence which the respondent has identified established that the appellant directed the flow of the funds into and out of the USD account and ultimately the disbursements of them. Thus there was a sufficient evidential basis for the jury to have been satisfied beyond reasonable doubt that the appellant controlled, and therefore was in possession of, the funds at all material times. This ground of appeal also cannot succeed.

Ground 3

[51] For the purposes of s 408C, 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".[65]

[52] In his summing up, the learned trial judge explained to the jury that the Crown must prove that the appellant applied "to his own use and/or the use of BRGOC Group Finance and others, property belonging to AFQ and Aquatic".[66] His Honour referred the jury to s 408C(3)(d) and read it to them.[67] He continued:[68]

> "So as you can see, it is quite a wide-ranging definition. The Prosecution case here is that the property the subject of the charge belonged to Aquatic Food Marketing – at least, in part – Proprietary Limited because Aquatic Food Marketing had a claim on the property. Given the circumstances of this case, I direct you as a matter of law that before you could convict the defendant, you would have to be satisfied beyond reasonable doubt that the property the subject of the charge belonged to AF Queensland Proprietary Limited and Aquatic Food Marketing Proprietary Limited. As would be apparent from that definition that I have just read out to you, property can belong to more than one person and a Proprietary Limited company is a person at law."

[53] His Honour's direction reflected the Crown case, as put to the jury, that the funds belonged to AFQ because they were deposited to its USD account, and that they also belonged to Aquatic because it had a claim to the funds. Having, by arrangement with Australian Fisheries, contributed prawns to the container for shipment to Hong Kong, Aquatic had a claim on the funds remitted by Mak Louis in payment for the prawns.[69]

[54] **Appellant's submissions:** The appellant submitted that the directions given on the issue of whether the property "belonged to the complainant companies", were inadequate. It failed to direct the jury as to what would constitute a legal or equitable claim to the funds credited to the USD account.[70] The jury should have been informed, the appellant maintained, by an exposition of what the concept of AFQ and Aquatic each having a legal or equitable claim to the monies or bank credits might actually mean in the circumstances of the case.[71] Without content as to that, the direction that was given was meaningless.[72]

[55] Relying on observations of McHugh J in *Fingleton v The Queen*[73] which approved those of McMurdo P and Thomas JA in *R v Mogg*,[74] the appellant submitted that, in this respect, the learned trial judge did not discharge his duty of identifying the real issues in the case and explaining how the law applied to them. As a consequence, the jury could not properly consider the issue and the appellant may have been denied an opportunity of an acquittal.[75]

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65 *Criminal Code* (Qld) s 408C(3)(d).
66 AB425 ll1-4.
67 Ibid ll13-20.
68 Ibid ll22-31.
69 Closing Addresses Transcript ("CAT") p 9 ll9-14.
70 Appellant's Outline of Submissions ("AOS") at [46].
71 Ibid at [48].
72 Ibid at [47].
73 (2005) 227 CLR 166; [2005] HCA 34 at [80].
74 [2000] QCA 244; (2000) 112 A Crim R 417 at [54] and [73] respectively.
75 AOS at [50].

[56] **Respondent's submissions:** The respondent referred to the appellant's case on this issue, and on which he had addressed the jury, namely, that there was evidence of an agreement between Aquatic and Australian Fisheries that had not been reduced to writing and that there were no terms setting out the way that the money was to be held and accounted for between the parties. On the appellant's case, the funds credited to the USD account belonged to AFQ only.[76] The only relationship between Aquatic and Australian Fisheries was a "debtor/creditor relationship".[77]

[57] The respondent submitted that, to the contrary, in the testimony of Mr Betzel and Mr O'Brien, there was no evidence of a sale of the prawns by Aquatic to Australian Fisheries as might have given rise to a debtor/creditor relationship. Thus, it was unnecessary for his Honour to have summed up as if there was some evidence to that effect.

[58] The respondent submitted that the evidence on the issue was "relatively straightforward". It was to the effect that Aquatic had a claim on the funds remitted by Mak Louis. Thus, the direction was appropriately straightforward. It accorded with Bench Book Direction 138.1.[78] To have expounded upon other legal concepts beyond a claim would have been confusing to the jury and unnecessary.[79]

[59] **Discussion:** I accept that the learned trial judge did not instruct the jury as to the criteria for the existence of a legal claim or an equitable claim to property. The direction given rather assumed that there was a sufficiency in the evidence for the jury to be satisfied that there was a basis for a finding of such a claim by Aquatic to the funds in question.

[60] It is clear that such an assumption was warranted having regard to the evidence of the two witnesses who negotiated the arrangement. Aquatic was to source prawns to make up the container for shipment by Australian Fisheries to Mak Louis. The price at which they had been sourced by Aquatic, $76,485, was to be paid to it from the funds remitted by Mak Louis to Australian Fisheries in payment for the prawns within seven to 10 days of receipt. Aquatic would then pay that amount to its source supplier, Tropic Ocean.

[61] Those facts, if accepted, would undoubtedly give rise to an equitable charge in favour of Aquatic on the remitted funds once received by, or on behalf of, Australian Fisheries. The charge would be one to secure payment from the funds of the amount of $76,485. Such a charge would be an equitable interest in, or claim to, the funds for the purposes of the definition in s 408C(3)(d). Arguably, it would also give rise to an equitable charge on the funds in favour of Aquatic for a further undetermined amount, the 50 per cent profit share to be calculated.

[62] In any event, the evidence of Mr Betzel and Mr O'Brien did not support a finding of a debtor/creditor relationship. It was not part of the arrangement, as described by them, that the prawns were to be sold by Aquatic to Australian Fisheries. The raising of the invoice by Aquatic was explained to be a device to facilitate payment.

[63] Had the learned trial judge instructed the jury as the appellant suggests, it would have been appropriate for his Honour to have amplified the instruction with directions, first, that the evidence of the two individuals who negotiated the

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76 CAT p 2.
77 CAT p 3.
78 Respondent's Outline of Submissions ("ROS") at [28].
79 Ibid at [29].

arrangement provided them with a sufficient basis for finding that the funds credited to the USD account belonged to Aquatic; and, secondly, that there was an absence of evidence of a mere debtor/creditor relationship between Aquatic, on the one hand, and Australian Fisheries or AFQ, on the other.

[64] For these reasons, I am unpersuaded that the direction given was, in the circumstances, inadequate. The form in which it was given did not, by omission, occasion a miscarriage of justice. This ground of appeal has not been established.

Ground 4

[65] In the course of summing up, the learned trial judge gave the following direction with respect to the first circumstance of aggravation:[80]

> "Now, possession means under his effective control; that is, that he intentionally exercised some control over the thing in question. The concept of possession, relevantly for this matter, denotes the physical control of a thing, plus knowledge that it is in one's control.
>
> The term "on account of" in this context can perhaps best be explained this way: if a person comes into possession of money in respect of which he has to account to another, he possesses that money on account of that other person. So if you receive moneys in respect of which you have to – you have got to account to another person, you receive those moneys on account of that other person."

[66] Within a short time after retiring to consider their verdict, the jury provided the following note to the learned trial judge:[81]

> "Clarification required on first aggravation. We understand property came into his possession on account of multiple parties – Australian Fisheries Pty Ltd via Aquatic Food Marketing Pty Ltd. Why does the charge not read, and another, or similar. Is this a minor point of law or a subtlety that is not relevant?"

[67] His Honour then directed the jury in response to the note informing them that so long as they were satisfied that the funds came into the appellant's possession on account of Aquatic, it did not matter that they concluded that funds were possessed on account of another party as well. The direction continued:[82]

> "And just to remind you of the term – what the term "on account of" means, I'll just give you the same direction that I gave you a little earlier today. If a person comes into possession of money in respect of which he has to account to another, he possesses that money on account of that other person. So if you receive moneys in respect of which you have got to account to another person, you receive those moneys on account of that other person. So does that answer the question that you've asked? Yes? All right, then. Well, I'll ask you to return to the jury room to continue your deliberations."

[68] **Appellant's submissions:** The appellant submitted that the direction provided no meaningful guidance as to how the jury might determine whether the appellant

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80 AB426 ll26-35.
81 AB471 ll7-10: Exhibit MFI "K".
82 AB473 l45 – AB474 l5.

himself "possessed" the funds in question; whether he had a duty to account to Aquatic as a result of the arrangement between that company and Australian Fisheries; and whether he thereby held the funds on account of Aquatic.[83]

[69] It was further submitted that his Honour did not adequately direct the jury as to the meaning of "on account" and the type of relationship in which a duty to account would arise.[84] Reference was made to the examples of "on account of" given to the jury in *R v Allard*.[85] In the result, the jury could not properly consider the issue and the appellant may have been denied an opportunity of acquittal of this circumstance of aggravation.[86]

[70] **Respondent's submissions:** The respondent submitted that the directions given on the meaning of the words "on account of" were clear and adequate. That the jury understood the concept and the facts relevant to it is evident from their question. It was their understanding that the property came into the appellant's possession on account of both Australian Fisheries and Aquatic.[87]

[71] **Discussion:** The appellant's submission with respect to possession by the appellant of the funds appears to overlook the definition of "possession' in s 1 of the *Criminal Code*. The direction given, which I have cited, adequately explained "possession" in terms of that definition. As discussed in relation to Ground 2, there was sufficient evidence for the jury to have been satisfied that the appellant controlled, and therefore was in possession of, the funds at all material times.

[72] The essence of the direction given with respect to "on account of" was in terms of an obligation to account to another or others from the funds that had come into the person's possession. The jury's question reveals that they understood that the funds in AFQ's USD account were in the appellant's possession. They also understood that there was an obligation to account to Aquatic and to Australian Fisheries from those funds. This understanding was correct. It was well supported by the evidence. Plainly, the funds were not the property of AFQ to the exclusion of claims of others, it having neither owned nor supplied any of the prawns delivered to Mak Louis.

[73] There is therefore no substance to the appellant's submission that directions on the meaning of property possessed "on account" of another person were inadequate. The directions did not, by omission, occasion a miscarriage of justice. This ground of appeal also has not been established.

Disposition

[74] Since none of the grounds of appeal has succeeded, this appeal must be dismissed.

Order

[75] I would propose the following order:

1. Appeal dismissed.

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83 AOS at [52].
84 Ibid at [54].
85 [1988] 2 Qd R 269 at 282.
86 Ibid at [53], [54].
87 ROS at [32], [33].

[76] **MORRISON JA:** I agree with the reasons of Gotterson JA and the order his Honour proposes.