

IN THE SUPREME COURT OF NEW ZEALAND

SC16/2007

BETWEEN

NICOLA BRONWYN HAYES

Appellant

AND

THE QUEEN

Respondent

Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Hearing: 15 August 2007

Counsel P Davey and D Hayes for the Appellant
DB Collins QC and S Edwards for the Respondent

CRIMINAL APPEAL

10.02am

Davey May it please the Court, counsel's name is Davey and I appear on behalf of the appellant with Mr Hayes and he'd just like me to say that he's not actually related to the appellant although the name is the same.

Elias CJ Thank you Mr Davey, Mr Hayes.

Collins And I together with Miss Edwards appear for the Crown if the Court pleases.

Elias CJ Thank you Mr Solicitor, Miss Edwards. Yes Mr Davey.

Davey Thank you Your Honour. Yes may it please the Court, I've set out the grounds of appeal that were approved in this case but essentially in my submission what happened in this case was over-simplification and errors of law by the trial Judge and then on appeal a different approach altogether was taken by the Court of Appeal to the particular facts of this case than what was presented at trial by the Crown and so as a

result my submission is that there has been a miscarriage of justice in this case and that the convictions should be quashed and perhaps if I can just expand on that, the Crown case as summed up by the trial Judge was essentially that Ms Hayes had misled the Corporation about her capacity to work and also about the fact that she was receiving money. Her defence was that she only thought that she had to declare that work, or her capacity to work as it related to her being a teacher which was her previous employment. She was a director and shareholder in a company but she didn't view herself as being employed, rather more initially as assisting her partner in the first company that was set up, running that, and that she effectively carried that on as she went through, when the second company was actually incorporated. Further she didn't view herself as actually earning any income because any drawings that were taken she said went to pay off loans that had been made and that also ACC was actually aware that she was running this business and that she was involved in this business.

McGrath J Loans to who, to her?

Davey To as I understand, to her mother, yes to her mother that she said and also to a Trust, her Family Trust that was set up to

McGrath J But she owed the money? She was using the money she received to pay her debts?

Davey That's right, as opposed to actually viewing it as being the drawings were to repay the loans as opposed to actually income

McGrath J It wasn't the company's debts? She was using the money to pay her debts?

Davey Yes, yes.

Tipping J Was she a guarantor or something like that?

Davey No I don't think that she was a guarantor but she said that money had been lent to the company to enable it to start up and then those funds or drawings that were taken out of the company were used to repay that money which I understood was from her mother.

Blanchard J So had she borrowed money from say her mother and then on-lent it to the company?

Davey Yes, as I recall the evidence, the loan was to the company from her Family Trust and also from her mother and the drawings were to repay her, well that was her evidence that she gave.

Blanchard J But did she owe the money or did the company owe the money?

Anderson J Or did she not make that clear?

Davey I'm not sure if she actually made it clear in her evidence

Elias CJ Does the factual position matter?

Blanchard J It may not.

Tipping J Anyway she's thought presumably that there was no net income if you like, available because all this was committed before it came to her beneficial hands so to speak, that was her belief I gather that's what you're telling us?

Davey Yes, that she thought that any drawings that were taken out of the company were not to her personally as income but were to repay loans. That was what happened.

Tipping J Whatever the precise legal position was, that's what she thought, that's the case is it?

Davey Yes, yes.

Tipping J Well that was her case?

Davey That's right, that's right.

Elias CJ The theory of her case was that she was not employed, she was operating a business, was that it, and

Anderson J And that she thought she only had to declare her position in relation to fitness to teach.

Davey That's right, and perhaps that's really best summarised by the medical certificates that contained a declaration 'I declare this certificate to be an accurate reflection of my fitness for work', and essentially her defence was fitness for work as a teacher, that was how she viewed it, 'and that there is nothing else I need to tell ACC, and I understand that I must notify ACC of any employment', well her defence was well I was a director and shareholder of these businesses having to run them but I didn't see myself as being employed by the company and that I must notify ACC any income that I receive over the time I am receiving compensation, and again her defence on that was that essentially she wasn't receiving income, it was just money from her company to repay loans, that was her position. So that was essentially the defence that was at trial and the Crown case was that she, as was summed up by the trial Judge, was that she actually had the capacity to work; that she wasn't entitled to this compensation; they relied on evidence from various farmers to say that she was out there doing physical work and also evidence from Doctors to say that well if they

had known of this then they wouldn't have supplied the medical certificates.

Elias CJ But they would have the better understanding of the ACC obligations. I'm just thinking about the theory of the case put forward by the defence. That wasn't necessarily fatal, their views.

Davey No, no, that's right because essentially it was her belief that she was entitled to still receive compensation because she couldn't return to work as a teacher essentially

Tipping J Was her defence essentially at the simplest possible level but her mind was not dishonest?

Davey Yes.

Elias CJ Because of the factors that you've mentioned.

Davey Yes.

Tipping J And that the Crown had to show that she had a dishonest mind, putting it in the simplest possible way.

Davey Yes, yes, and really the key issue that I set out at para.96 was whether the Crown approved beyond reasonable doubt that the appellant acted deliberately and with knowledge that she was acting in breach of her legal obligations by submitting the medical certificates was a proof that she didn't believe that she wasn't entitled to submit the medical certificates.

Anderson J Her focus was on intent to defraud that element in the charge.

Davey Yes it was, it was.

Tipping J If she could persuade the jury that her honesty of purpose if you like, if her mind was not dishonest, she'd be well on the way to disproving, forgive the version, intent to defraud. The intent to defraud.

Davey That's right.

Tipping J She might have defrauded them but she didn't have an intent to defraud them if her mind was honest. I mean without pinning you to exact terminology, that was the essence of it as I read the case.

Davey Yes, although my submission went further than that as well that she wasn't actually defrauding ACC, because she continued to receive, even after she was investigated, she continued

Tipping J I'm sorry, on this point with prejudice to whether she was actually defrauding them, she wasn't guilty of intent to defraud?

- Davey That's right, that's right. So
- Elias CJ I'm sorry Mr Davey, so there were two aspects to it in terms of the theory of the case advanced by the defence. One is that she thought she only had to disclose employment as a teacher but secondly that there was a difference in her view between employment and working as she was for the company in which she was shareholder and from which she wasn't in fact drawing wages, is that right?
- Davey Yes, in terms of, perhaps instead of using the word 'employment' I'd use more a capacity to work as a teacher. She only thought she had to declare her ability to work as a teacher, not so
- Tipping J I thought you said there were three points. Fitness to work as a teacher, any employment she did not see herself as being employed and income received, none.
- Davey That's right, that's right, yes, and that effectively ACC were also aware at least from 2001 that she was actually helping run this business, she still continued to received compensation following that. So perhaps, I mean the essence of my submission is that what happened was that the case became over-simplified in terms of what the jury had to consider in terms of her working; of what advantage she obtained from it and without a consideration of the legal position behind the ACC Legislation, and perhaps that just then falls into the various grounds of appeal that have been raised in terms of the first one being the pecuniary advantage
- Elias CJ Sorry, we interrupted you because you were starting to say how things were overtaken in the Court of Appeal. Did you want to say anything further about the Court of Appeal treatment of the case?
- Davey Yes certainly, I mean essentially the Court of Appeal took the approach, in the trial Court according to the summing up, the issue was that she wasn't entitled to accident compensation, whereas then in the Appeal Court the position, and I can expand on this further in my submissions, was more along the lines that that wasn't actually in issue at all, whereas it was actually in issue at the trial, her entitlement to compensation.
- Anderson J The Crown case at trial was that whatever she did which they were impugning led to her getting her next payments. The actual payments were made. Clearly pecuniary advantage in terms of being paid cash; that was the Crown case, and at the Court of Appeal the Judge sort of shunted off into an idea of the pecuniary advantage was characterised by avoiding the risk of stopping payments.
- Davey That's right.

- Anderson J Look at it from the other end of the telescope really.
- Davey Which was, yes, not the way that the charges in the indictment were relayed in terms of what was alleged as being the pecuniary advantage and not the way in which the Crown presented its case at trial. Perhaps as I go through my submissions the specific points, I mean that's just an overview and specific points will become clearer. Now I don't know whether the Court wishes me to actually go through the factual overview at all in any detail, whether that's necessary. It's really just a snapshot of the main matters that happened during the course of events over quite a lengthy period of time – some seven years or so. So then really turning to the first ground of appeal is this meaning of pecuniary advantage. Now I've set out the two sections under s.229A and 228 and then followed those by the trial directions which were simply that pecuniary advantage in this case was the weekly compensation that she received, and then what His Honour then did though, that was in relation to the 229A charges, he said this is what the pecuniary advantage is as weekly compensation, but then when he came to sum-up to the jury on the S.228 charges, the last five counts in the indictment, he said that, this is at p.26, page 6 of my submissions, that's a pecuniary advantage. The word 'advantage' indicates that the accused had obtained some financial benefit to which she was not entitled or she evaded an obligation that she was not entitled to avoid. So there were quite different directions on what pecuniary advantage meant under both sections. And then as I've indicated the Court of Appeal said
- Tipping J Had there been any suggestion at trial that the term differed in meaning 'as between the two sections'?
- Davey I can't comment on it because I wasn't actually the counsel at trial but I could
- Tipping J It doesn't seem so. I mean it would seem inherently improbable but I just would like to know what now founded the Judge's different approach to the term 'as between the two sections'.
- Davey Yes, and no there's nothing clearly that indicates as to why that happened for what are essentially the same terms and the
- Tipping J But in the indictment it was the same wasn't it? There wasn't any difference as to the way the word
- Davey No there wasn't actually a definition of what pecuniary advantage was for the counts under s.228, it just simply
- Tipping J The indictment is at tab 3, or is it
- Davey Tab 4.

Tipping J Tab 4 I'm sorry.

Davey And particularly at page 20. Whereas if you look at count 24 under the old section, s.229A, the pecuniary advantage was namely weekly compensation payments, but counts 25 and onwards under s.228 just simply referred to pecuniary advantage without naming without particularising what it was.

Tipping J Yes.

McGrath J Can I just be clear Mr Davey on whether the issue you take with those two directions, are you concerned that they're confusing together; are you concerned that one or both were gone? What I'd like to know is exactly in what respect you say the Judge was wrong in directing in this way?

Davey Well I'd actually say that the direction in terms of the counts under s.228 was correct based on *Ruka and the Department of Social Welfare*, that the advantage was some financial benefit to which she was not entitled. I'd go as far to say that that was correct.

McGrath J Yes.

Davey But that

Tipping J Well was anyone suggesting she'd invaded an obligation which she was not entitled to avoid? Why did that get in there?

Davey I don't know. Yes there's

Tipping J Okay, it's probably for the abundance of caution perhaps.

Davey Yes, I'm not sure why that was in there.

McGrath J Did you say that aspect went beyond *Ruka* into the territory covered by *Donaldson and Thomas*? Is that what you say the Judge was trying to do? I just want you to as precisely as you can say why it was wrong, if you say it was wrong.

Davey I would say that as far as in terms of saying pecuniary advantage indicates that the accused had obtained some financial benefit to which she was not entitled, up to that point that was correct in terms of *Ruka*, or that she evaded an obligation to which she was not entitled to avoid, I really don't know what His Honour was referring to there and

McGrath J But it doesn't relate to actually receiving the benefit and you say it's stepped outside *Ruka* and it's therefore an incorrect direction.

Davey That's right.

- McGrath J Thank you, yes I understand.
- Davey And that also his direction in terms of counts 1 to 24, that the pecuniary advantage was just weekly compensation payments; that it was directed on the basis that simply receiving weekly compensation payments by themselves whether you're entitled to them or not was a pecuniary advantage. That was what effectively his direction was
- McGrath J so he should have added 'to which she was not entitled'
- Davey That's right.
- McGrath J That's your point, yes.
- Davey Which is effectively what he did in relation to the first part for the charges under s.228 that she attained some final some financial benefit to which she was not entitled.
- Anderson J What about 'which she might not otherwise have received'? Might not. Why can't that be a pecuniary advantage? The person who cranks up the value of assets in a loan application to make sure they get the loan which they have got anyway, isn't that dishonest? Isn't the granting of the loan a pecuniary advantage even if they might had got it, because they might not have?
- Davey Yes, well I mean that's the very issue really in the case as to whether or not an advantage is something to which you're not entitled and the more I looked at this case and at *Donaldson and Thomas*, there seems to be a blurring between what is a pecuniary advantage and what actually is required for an intent to defraud, as to which it falls within, and if you look at the basic proposition in terms of what is required for a fraudulent intent, it's to obtain some advantage for yourself or to cause economic loss to the other person and so really what I'm saying is that if you're entitled to receive it, or you're entitled to get the loan application in any event, that you haven't actually defrauded, there's no intention to actually defraud to cause prejudice to that other
- Tipping J There might be a difference here between discretion and right.
- Elias CJ You're getting more favourable consideration - it's the *Hawkins* type case isn't it?
- Tipping J If you had an absolute right to the relevant money then I don't know that you've got an advantage, but if you might or might not have been given the money and you put in something false with a view to getting it then I would have thought you probably have got an advantage.
- Davey The trouble in my submission with whether it be 'might' or 'might not' is it becomes vague as to what's actually required in terms of the risk of actually whether you would receive that benefit or not.

- Tipping J Isn't the cut off though, if you were going to get it inevitably on the true facts, the fact that you gloss your case does matter. If you may or may not have got it, it does matter. I'm just exploring it with you Mr Davey. I have no firm view of it at all.
- Davey Well for instance like the cases of invoices in *The Queen and Firth*, I mean the Court of Appeal said that the Crown had to prove that the person wasn't entitled to invoice on that, knew they weren't entitled to invoice on that basis, and
- Tipping J An acceleration of a payment can be an advantage that's clear.
- Davey Yes, yes that's right. For instance in the *Gunthorp* decision by changing and receiving more favourable credit terms then there's a clear monetary advantage, or a pecuniary advantage there, but in terms of an advantage being that you might not receive that benefit it just becomes in my submission nebulous and really the Crown should have to prove no, she or he wasn't entitled to receive that payment as a result of what was done, as a result of using that document.
- McGrath J When you cite the *Firth* case though, that can be categorised can't it into Justice Tipping's first category of an absolute right to receive the money? Normally if you invoiced for money, you are presumably asserting you have an absolute right to it. It seems to me that the invoice cases don't really apply where there are contingencies as to your continuing right which is what the scheme of the Accident Compensation is, but that's falling into Justice Tipping's second category.
- Davey In my submission there is actually no distinction because it's submitting medical certificates and effectively by doing that then the compensation is received and it's only if the ACC show that you or are satisfied that you are no longer incapacitated that you stop receiving compensation.
- Anderson J Would she have received payments if she hadn't returned the certificates?
- Davey No, no.
- Anderson J So returning them meant she got paid, therefore she used them for that purpose.
- Davey That's right, yes she did, but in my submission the term 'advantage' or what needs to be proof of fraudulent advantage is receiving something that you weren't otherwise entitled to receive as a result of that.

- Anderson J Well as you said that's the key point. Is it absolute, wasn't entitled to receive, or is it a question of might not have received, and it's undoubtedly a pecuniary advantage when you receive it.
- Elias CJ Because it does depend how the case was run doesn't it? I mean we're talking theoretically here about ways the case might have run, whereas as you say at least in terms of the s.229 charges, they related to the actual payments received, which is a claim that she wasn't entitled to receive them.
- Anderson J Has someone got a phone that's on silent but vibrating?
- Elias CJ Well we tried to find out about this, whizzing emails around trying to work what the mechanicals were
- Anderson J It sounds like a telephone.
- Elias CJ It sounds as if it's a camera that's moving or something. I don't whether you know one of the, anyway I hope it's not putting you off too much. We will ignore it.
- Tipping J I agree with the Chief Justice, it seems to have been premised at trial on the basis that she was literally not entitled to this money. That's the way I would read the Judge's direction. That's she's got something to which she was not affirmatively not entitled, not that she has got some advantage in the sense of more favourable treatment or something because the Judge simply says that the pecuniary advantage is the weekly compensation. It's a little less precise in the second direction. Well perhaps it's more precise in one sense and less in another because of the alternative to which she was not entitled, that's clear enough. I suppose if you stop there.
- Anderson J I think the ACC evidence was if we knew she was doing the work that all these witnesses have told us about we wouldn't have paid her.
- Davey That's essentially what the Crown case was, that she had no entitlement
- Anderson J And that's why the Crown called so much evidence as to the nature of the work that she was actually doing on the farms.
- Davey That's right, that's right, and when His Honour actually summed up the Crown case it was very much on the basis that the Crown case was that she was not entitled to this compensation but in
- Tipping J Was there any dispute about that at the trial? Did she take her stand on sort of alternative bases - my mind was honest but even if it was dishonest I was entitled to this money.
- Davey I don't know if it was so clearly defined

- Tipping J It would be a funny way of defending yourself but it's seen quite often that these sort of alternative
- Anderson J Well it's the dichotomy as pointed out in Mr Solicitor's submissions that she said all the witnesses have got it wrong as to what I'm able to do but if not then I honestly believe.
- Davey Well I don't know if as was suggested by my learned friend that it was somehow inconsistent the defence being run because in effect as I understood the defence at trial was that she thought she was entitled to the compensation and she honestly believed that and that the degree of capacity to work wasn't as great as what the witnesses suggested.
- Anderson J Yes they're not necessarily exclusive are they? Cumulative defences.
- Davey Yes, yes, and so, I mean this is a point made by learned friend, while the evidence in terms of the farmers and a number of them that were called is strong evidence, and you know it has to be acknowledged given the number witnesses there was strong evidence as to her capacity to undertake physical work. That by itself wasn't sufficient in terms of what the ACC legislation requires because her defence was essentially that they were exaggerating exactly how much I could do, but that also I only thought I had to declare my capacity so far as it became work as a teacher, and so the ability to do the physical work on the farm didn't necessarily mean that she was able to actually return to her job as a teacher which the point seemed to be made quite clearly that she was also suffering from a mental state, head injury, from which there was evidence about her not being able to concentrate properly, falling asleep and matters such as that.
- Tipping Well where were the Judge's instructions to the jury deficient in relation to all of that?
- Davey That really is in terms of a second ground that I've set out at para.59 on page 11 of my submissions. What appears to have happened is that the jury sent a jury trial communication
- Elias CJ Work and employment seems quite a sophisticated question really. Right on the button in terms of the theory of the case that you were putting forward - the second aspect of it.
- Davey That's right, that's right, and so obviously it was a distinction that they had drawn in this case but what the Judge effectively said on this
- Anderson J Where do we find that Mr Davey?
- Davey This is at para.59.
- Elias CJ Was that in the course of the trial that came through?

Davey Yes I spoke to Mr Hayes about that this morning and he tells me that it arrived on about the second day of the trial from the jury and the Judge advised that he would deal with it in his summing up, so that was

Anderson J And there was no specific response at the time it was asked?

Davey No, no, no.

Anderson J I had the impression it was a question the jury asked when they were in retirement but it seems that I had that wrong.

Blanchard J He actually refers to the question at some point in the summing up.

Davey Yes he does and I referred that in para.56, which is the case on appeal, volume 1

Elias CJ Do you know where it is in the summing up?

Davey Volume 1, tab 6, page 37.

Blanchard J Ah that's right.

Davey At line 16 or 17 he says 'I can recall you asking at one point for effectively what a definition of work is'. And then really

Elias CJ Well goodness that's not sort of answering the point which seems to be behind the question which seems to be directed at the return or the obligation to disclose employment.

Tipping J It misses the point.

Elias CJ Yes.

Davey Yes.

Tipping J They wanted the distinction, they didn't want a definition of work, they wanted to be helped with the distinction between work and employment as they were perceiving it.

Blanchard J Was this question in fact directed to the issue, if it was squarely raised of whether she could be seen to be working when she was doing things for the company and as she said not being paid for them. Was that what the jury was getting at?

Davey Yes well one always wonders what but yes what I wondered was in terms of the medical certificates there was the distinction in the medical certificates behind tab 7. 'I declare this certificate to be an accurate reflection of my fitness for work' and then it goes on to say 'I understand that I must notify ACC of any employment part-time'.

- Tipping J They would have had these documents in front of them in the jury room wouldn't they and you can just see them pouring over it to see exactly what she was declaring, and an astute mind would wonder whether there is a difference between fitness for work and any employment?
- Davey That's right. And so
- Elias CJ And if her case was that fitness for work was fitness for work as a teacher; there could be quite a material difference.
- Davey Yes, yes, because when as I go on under this ground of appeal to refer to the legislative provisions. The capacity to work in terms of whether ACC can immediately cease compensation depends on whether the person was able to engage in employment in which that person engaged and the personal injury occurred or work for which the person by reason of experience and training is suited for, so the plain English definition of doing some work in my submission the jury could well have been left with the impression from misdirection that if this woman carried out any work whatsoever, that was sufficient to disentitle her from weekly compensation, whereas the ACC legislation is much more specific than that as to what's actually required before someone is said to have a capacity to work will no longer be incapacitated, and that her argument that 'I thought that work or fitness to work related to my job as a teacher' has some support from the actual ACC legislation in terms of that being the employment for which she was engaged in before the injury, and so without that, with just a plain definition of work without reference to the ACC legislation effectively as I said the jury could have been left in a situation where they thought oh well if she was carrying out any work at all then she was obviously not entitled to ACC and breaching her legal obligations.
- Elias CJ Sorry I have not read the evidence, which I should have done. Was this something that she covered in her evidence, her understanding of what her obligations were under the legislation?
- Davey Yes, well not directly in terms of referring to knowledge of the legislation, but this is at page 422 of the case on appeal, it will be volume 3, the last volume. It's page 422, line 21 'the word that was read out by some of the Crown witnesses 'I declare this certificate to be an accurate reflection of my fitness to work'. Do you remember those words there? What do you understand by those words? 'Every time I went to the Doctors I've always thought it was because I'd been a teacher and a school principal and I couldn't do that job anymore'. It didn't go into the strictly position, but
- Tipping J She was cross-examined about that I presume was she?
- Elias CJ This is cross-examination.

Tipping J This is cross-examination?

Davey No sorry this is evidence in chief. Yes she was. Sorry I'm wrong, that is cross-examination.

Elias CJ And then on page 423 is the reference to employment.

Davey That's right.

Tipping J Well the observation by the cross-examiner right immediately following the answer seems to suggest that it's sort of almost quasi accepted but no doubt it was just a sort of habit of speech

Elias CJ Filler

Tipping J Or something. I mean it's all very odd.

Davey Yes, I wish I could make that submission and you'd accept it

Tipping J No, but it's an odd way of, oh yes I see yes it's a punctuation mark.

Elias CJ It's a filler.

Tipping J Yes.

Davey And the medical certificates themselves do give some support in the sense that they talk about return to work. Behind tab 7 one of the medical certificates "return to work". 'This claimant is expected to be fit to return to work on such an such a date', so

Tipping J What one is that?

Davey Sorry, behind

Tipping J I've got them all, but are they all in that form or which is the one you are referring to?

Davey Page 46

Tipping J 46. I see, well there's also the dichotomy between work and employment in the declaration itself that might I suppose lead a mind to think that one was specific to your normal job and the other was sort of employment generally. I mean I'm not forecasting what was in anyone's mind but it's a possible.

Davey Yes, yes, yes that's right.

Tipping J Fitness for work is sort of more out with your normal work. Any employment part-time blah, blah, blah has a much more general

connotation. How on earth she didn't read the words 'paid or unpaid' I don't know Mr Davey, but

Davey Yes well I mean her evidence was she didn't actually see herself as being employed by the company, that was the position she took in her evidence, and she also gave evidence that really and perhaps given the length of time she had been doing this that she didn't place too much emphasis on the declarations that she actually signed and that was again at page 422 of the case on appeal when she was asked under cross-examination 'there's been a lot of discussions about these forms. Look at the claimant declaration there. Did you on this particular form, did you read it before you signed it? I just, the Doctor just passed it over and I just signed it'. So effectively what she was saying, she didn't really turn her mind to the particular wording, which was again in my submission something for the jury to consider as part of whether they accepted her evidence of that she didn't have an intent to defraud. She wasn't acting dishonestly.

Tipping J Without wanting you to jump to this, the essential point on that, that the state of her mind was the Judge introduced this concept of reasonableness.

Davey Yes.

Tipping J But I'm not asking you to move to it, I just wanted to bear that in mind when assessing the strength of the material here.

Blanchard J Mr Davey what I don't follow about this argument is if she wasn't familiar with the statutory provisions and her familiarity was really based the form of declaration she was having to give, how can she assert that the jury's failure to be told by the Judge about the statutory provisions impacted on its assessment of her honesty?

Davey Essentially because the way the Judge summed up in terms of saying to the jury that work can be just a plain English definition of work, she said I only thought that I had to tell them about my capacity to work as a teacher

Tipping J I thought your argument was not that this wasn't going to honesty or not, it was going as to pecuniary advantage.

Blanchard J Yes. I can see it as relevant to entitlement but I can't see it as relevant to honesty.

Tipping J We haven't got to honesty yet as I understand you. You're still talking here about what is a pecuniary advantage and what is an entitlement, in that sort of dual sense. That is the way I was understanding you. I think my brother's point is absolutely unanswerable when it comes to honesty. She can't claim that she was honest because she had a

knowledge of something she didn't know about. She can't say I was familiar with these provisions and on that basis I thought I was entitled.

Elias CJ She doesn't actually say that either and she couldn't. I mean it wouldn't be acceptable. Page 442 and 445 he returns to cross-examine her on those matters.

Davey In my submission the Crown had to prove that she was acting deliberately in breach of her legal obligations and so an understanding of those legal obligations, or the correct position in terms of what her legal obligations were

Elias CJ Is that right though with the charges that she was facing here? Didn't they simply have to say that she used this document dishonestly with a view to getting a pecuniary advantage?

Davey Under the 229A charges it was with an intent to defraud which in the *Queen and Firth* which really summed up the established law, was that it was acting deliberately and knowingly in breach of her legal obligations, and I've put that at par.91 on page 18 'in order to establish an intent to defraud, the prosecution must prove that the defendant acted deliberately with knowledge that she was acting in breach of her legal obligation'.

Tipping J Surely the jury would have seen this as being a case where she was accused of knowingly getting money to which she wasn't entitled by this means. Getting money to which she knew she wasn't entitled by means of this false declaration. Short of all the trimmings that surely is the heart of this case.

Davey Yes, and so then really my submission is that the Crown had to prove that she wasn't entitled to the compensation and to do that that had to be against the background of the ACC legislation as opposed to just a general definition of what amounted to work.

Blanchard J So it's not related to her honesty, it's related to another ingredient in the proof, which is what Justice Tipping was putting to you earlier.

Davey Yes, well intent to defraud necessarily implies acting dishonestly. Perhaps if I just say really in my submission the Crown case was presented on the basis she wasn't entitled to the compensation. In order for the jury to consider that they had to be told what the ACC legislation was about her entitlement, not just simply that given the impression that if she carried out any sort of work then she wouldn't be entitled to it.

Tipping J There are two ingredients then that you emphasise. One the fact one, the fact of not being entitled, and two, the appreciation in her mind that she wasn't entitled

Davey That's right.

Tipping J Both are necessary before this count can stick.

Davey Yes.

Tipping J That's the fact of the submission isn't it?

Davey Yes, which really mirrors what was set out in *Firth* in terms of the same section and in terms of the Crown had to prove that in that case the accused was entitled to invoice on that basis, and he knew he wasn't entitled to invoice, so

Elias CJ It seems, maybe I'm looking at it much too simplistically, but I would have thought here she knows she has an obligation to tell them if she's employed or if she's able to work, she knows that because it's there on the form. She says she complied with that. That her answer to that was honest in terms of what she understood. Why is it necessary to go beyond that?

Davey Because it then comes down to what is meant by those terms of having that fitness for work and that employment

Elias CJ Yes, so you explore what her understanding and knowledge were in an attempt to shake the view that she honestly believed her answers to be complying?

Davey Yes.

Tipping J I think what you're saying Mr Davey is she's entitled to have both elements proved against her on a proper direction.

Elias CJ Yes.

Davey Yes.

Tipping J And you're a sort of belt and braces – that the belt is the fact, the braces are the mind.

Davey That's right, yes, yes, Your Honour has put it very well, that's essentially the position, and what happened was because the trial Judge gave a plain English definition to the jury of what was work and told them that was all they needed to know for the purposes of this case, that they were actually looking at what the wrong fact was in terms of assessing her.

Tipping J The question wasn't whether she was working, it was whether she remained entitled, or was entitled.

Davey That's right.

Tipping J Strictly.

Davey Yes.

Anderson J The certificate really required direction as to employment. If one looks at the certificate, first she sees the certificate as an accurate reflection of my fitness to work, and if you look at the terms of the certificate it's purely factual. It talks about traumatic Fibromyalgia of the cervical and shoulder, and so there's nothing in that, but then she says 'also declares there is nothing else I need to tell ACC about my circumstances', so that 's the assertion of fact in it. And then she acknowledges that she must tell them about employment, even unpaid employment. So what she's representing in effect allowing the certificate to go forward is that there is nothing about employment, even unpaid employment that I need to tell the ACC, and it's on that representation that the payments continue to be made. So the issue is in terms of direction was there an adequate direction about that part of the certificate, particularly employment?

Davey Yes and I'd also say in terms of fitness for work.

Anderson J Well she doesn't represent that does she? I mean there's nothing really much in the medical certificate, which she says is an accurate reflection, because all it says is really the details of the impairment.

Davey Yes although in terms of return to work it says the claimant is expected to be fit to return to work on, and it's left blank, and so

Anderson J By implication I suppose it's suggesting she's not fit for work.

Tipping J What the certificate is effectively doing is saying I warrant that my Doctor is right when he says I'm not fit to work.

Elias CJ Well it's to catch the cases where the Doctor is relying on patient identification of problems to come to the conclusion that they're not fit for work, the sort of person who's seen lifting heavy sacks but tells the Doctor he can't.

Davey Yes.

Tipping J If that was part of the clinical impairment management details, it might have some force here, but there's simply here a diagnosis.

Anderson J The Doctors said they wouldn't have issued the certificates if they had been aware of the information that the Crown brought forward about the farmers saying 'oh she were a good lass, she can anything on farm'.

Davey Yes although that's not entirely correct either because one of the Doctors, Doctor Hayworth actually, now if I can just find his evidence.

Dr Hayworth visit, page 343, which will be part of volume 2 of the case on appeal, and he becomes involved after the appellant goes to Alpha Consultants and one way or another ACC finds out that she's actually helping out with her husband's business and he actually went and received a letter from ACC about whether or not she should be put down for selective duties or not following that information and then he nevertheless determined that no, she was still fully unfit for work and he seems to think that he contacted ACC and said let's wait off until she's had a psychiatric assessment done before deciding whether or not she's fit to actually return to work. So despite receiving that information he still issued some medical certificates saying that she was fully unfit for work. So it wasn't completely the case that it is. My learned friend suggested that all the Doctors said that if they had known that that they wouldn't have, and to a certain extent as well in my submission I mean the Doctors might have been wrong in terms of what the legal test was for her being incapacitated or not, and so she may well have been entitled to review the fact that they weren't issuing certificates because the capacity to work is quite specific under the 1998 Act which I've set out at para.69 of my submissions. 'The capacity to work in relation to an insured means the insured's capacity, having regard to the consequences of his or her personal injury, to engage in employment for which he or she is suited by reason of experience and training or a combination of those things and for 30 hours or more a week'. So to no longer be incapacitated is not simply a case of lifting the odd pipe on the farm. Although there were a number of farmers called as witnesses, it also needs to be remembered that it was over a lengthy period of time that this was related to, so it's not a situation where it was easy to say that look she was a teacher, she went and got another job as a teacher, clearly she had a capacity to engage back in that employment for 30 hours or more a week while still receiving ACC. It was a much difficult issue before she would not be entitled to compensation.

Tipping J Although she doesn't claim to have been relying on this definition of capacity for work in the two acts, is it possible to say that they do give some support to focus on her teaching?

Davey That's right, yes.

Elias CJ The Doctor says something similar too doesn't he, that he thought it was all about the original occupation fitness to work?

Davey Yes.

Tipping J Just help me here Mr Davey, I don't recall, but it's not a firm recollection at all or lack of it the Judge making any real point of this business about fitness appropo the teacher and fitness generally. Did he draw the jury's attention to this point either from the point of view of the reality of the entitlement or from the point of view of what was in her mind? Other than in the narrative I think it may have been

mentioned in the narrative part of the summing-up as to what the competing cases were, but I don't recall the Judge himself having made any specific direction or attention to the point, but I'm very much open to correction.

Davey No, what he did, and I've highlighted this at para.60, page 12 of my submissions, he added that the Crown case was that the appellant had deliberately withheld her obligations to disclose circumstances about her capacity to work, about receiving money, about her circumstances and that important capacity to work, so really in my submission the capacity to work is a legally defined term under the ACC legislation. He talks about this being an important matter for the jury to determine and yet there's no reference to the ACC legislation, what it actually means to have a capacity or a fitness to work.

Tipping J But you would say it has a dual relevance, (1) to the actual fact of lack of entitlement and (2) to the state of her mind?

Davey Yes.

Tipping J Obviously she can't claim reliance on something in the legislation she wasn't familiar with but her primary case as you've emphasised many times was that she thought it was reference to teaching?

Davey Yes.

McGrath J Mr Davey on this question of failure to disclose circumstances about her capacity to work and the certificate's reference to 'nothing else I need to tell', her answer to that at various places, including page 422 was 'I always thought they knew'. Now I gather this is really a reference to a dialogue that was going on between her and the Commission at the time, but I'm wondering what evidence there is apart from her reply – 'I've always thought they knew' that supports that.

Davey Yes, it's probably actually best highlighted in the documentary exhibits that are attached at the back behind tab 12 of volume 3 which certainly it seems from December 2001 anyway that she was referred to a Vocational Rehabilitation Consultant by ACC and this is a report from them the ACC Officer, Mr Perdia, and it sets out how some of the roles that she's performing, running her husband's or Mr Mailman's business, and then there's ACC actually behind tab 13 writing a letter to Dr Hayworth which is what I referred to, 'I note that her medical certificates certify her fully unfit for work. As Nicola is looking after Garth and running her fertiliser business full time could I ask that you certify her fit for selected duties?' and then sets out what he understood her role to be. And then behind tab 14 there was a further Vocational Assessment report

Tipping J How much longer after this did she keep getting paid the full rate?

Davey Right up until, well up until trial, I mean effectively even after investigation she still continued to receive ACC payments and there was actually

Tipping J Running his fertiliser businesses full time?

McGrath J Am I right in saying that in something else I read that this particular track that ACC was pursuing in fact led to a hearing, or led to a determination adverse to her which she succeeded in having overturned on review?

Davey That's right.

McGrath J So this was a separate track that at this stage ACC was pursuing in relation to demonstrating fitness for selective duties?

Davey Yes that was at a later stage in 2003 and I think the witness Stearn, the ACC Manager, talked about writing letters, and basically what happened is ACC requested company information about this fertiliser business which she didn't disclose and ACC elected to terminate her weekly compensation, she reviewed that decision and there was a decision issued at the beginning of January 2005 upholding her review and requiring ACC to continue paying her weekly compensation, and this was after she was investigated by, well this was after she'd attended two interviews with ACC investigators in 2003 and also in the middle of 2004. So she was reinstated compensation back in January 2005 after all this happened, and that's something of the irony in the case is that she still continued to receive ACC compensation despite being investigated and interviewed on the matter, and yet the Crown case at trial was she wasn't entitled to compensation but she still continued to receive it.

McGrath J Are those all the references we need to be aware of in terms of elaboration of her comment 'I always thought they knew'?

Davey Yes, I don't know if there's any other further positive evidence independent from what she says in her evidence 'that I always thought they knew', but apart from that dialogue in 2001, yes, that's really the key.

McGrath J Thank you.

Elias CJ We don't have do we the sentencing notes in this case do we?

Davey No.

Elias CJ Was she sentenced on the basis of having had the pecuniary advantage in the amount in the *Cara* case?

Davey Essentially I'm working from memory now, but my understanding is she was sentenced on the basis that she'd obtained pecuniary advantage of the of \$160-odd thousand dollars from compensation that she received to which it was claimed she had no entitlement. I'm wondering if I might just

Anderson J Mr Davey is she on parole at present? She should be shouldn't she?

Davey No, no, she's not, no she's still in custody.

Tipping J What was her sentence, I've just forgotten?

Davey There was two and a half years imprisonment so effectively since September last year she's served now 11 months.

Anderson J She'd be entitled to parole normally after 10.

Elias CJ Mr Hayes has tried to get your attention.

Davey Oh sorry. I'm sorry that's my mistake, no, she has received parole

Anderson J Just recently though, it would be in the last month.

Davey Yes, yes, yes.

Anderson J Then that is relevant to the submission in your written submissions that in the event that the conviction be quashed there should not be an order for retrial.

Davey Yes.

Elias CJ I'm sorry we've sort of taken you all around the place in terms of your submissions. Where do you want to go now Mr Davey?

Davey Well I've gone around and about, I think I've really covered most of the key points that I put in my written submissions. Perhaps the only one that I haven't really addressed is in terms of the Judge's direction on reasonableness.

Tipping J Well I'd certainly like to hear you on that because frankly I regard that as one of the most significant issues in the case, both the jurisprudence and whether it can reasonably be said that it was a slip or it didn't really matter how this direction was framed.

Anderson J And reading the summing-up as a whole.

Tipping J And reading the summing-up, yes.

Davey Yes, yes, and perhaps it's better rather than looking at my submissions to look at the actual summing-up

- Tipping J Because the Solicitor-General asks us to perhaps take a slightly different line from what it might be perceived to have been a conditional line in New Zealand in New Zealand on this, so I think this is probably the most important point of general law in the case.
- Davey Yes, perhaps there's two responses to that. In terms of intention to fraud, I mean that wording doesn't actually form part of s.228 anymore, it's only under s.229A and I mean there's an issue as to whether or not it's something that needs to be changed by this Court, given that that section of that wording is now no longer
- Tipping J Well this direction on honest belief I'll be quite blunt about it, really in isolation, looks to me to be very problematical, quoting an honest belief with a reasonable belief or a belief on reasonable grounds or whatever the Judge was trying to signify.
- Davey Yes.
- Tipping J So if there is to be any infraction, I mean this point wasn't addressed in the Court of Appeal was I?
- Davey No it wasn't.
- Tipping J No, dissolved to say the very least.
- Anderson J Well Mr Barnsdale had put the case to the jury quite emphatically and repeatedly that her belief was reasonable.
- Davey Yes, well I mean certainly the way the Judge summed up the defence case he refers to him saying that her belief was reasonable, but His Honour has also introduced that concept in terms of his direction on what is required to be proved, and I don't have any issue with his first part of the direction, but it's when His Honour says
- Tipping J You mean the first two lines but for the words "and you"? The passage that you've cited in para.93 of your submission, are you saying you've got no problem with it up until the end of the second line stopping short of the words 'and you'?
- Davey Well I think in fairness when one looks at the summing-up, even on the previous page, on page 31 of the case on appeal, he says effectively what is 'I don't have any issue of the direction if you act in breach of a legal obligation..
- Tipping J Oh that one, yes. But then he defines on this belief, or appears to, and, well it's open to that possible construction. An honest belief, he's told them you're alright if you have got an honest belief, but then he says what an honest belief is.

Davey Yes, yes, yes,

Tipping J Well I'm just reading from your submission. I haven't got the summing up

Blanchard J He says something even more odd a line or two above that. There's a sentence in which he says 'that you act dishonestly if you act in breach of legal obligations'. I don't know what he thought he was saying at that point. But then he goes on to the bit that Justice Tipping was referring to.

McGrath J I thought that Mr Davey was referring to the passage on the previous page.

Blanchard J I noticed that too.

Davey Yes, at page 31 on the case on appeal or what's headed up 414 of the Court of Appeal's case.

Blanchard J But you said you were happy with that.

Davey Yes, so

Blanchard J So it's the piece on page 32 you're unhappy with?

Davey That's right, that's right.

Blanchard J And I'm just pointing out it's prefaced by this very odd sentence.

Tipping J Well there's nothing wrong with the saying 'if you act with an honest belief you've got a defence', there's nothing wrong with that, it's how he explained on this belief that potentially is the problem. I say potentially because I'm not at all sure whether it actually matters in the context of the whole case in the summing up and as a whole, etc. That's something quite different, but on the face of it it looks very wrong.

Davey Yes, yes, it is, well it is and it's, I mean yes it is in my submission and that really

Tipping J That's why Parliament went to the trouble of requiring the belief to be on reasonable grounds in the sexual violation context, because otherwise there is a problem if you simply had an honest belief. Therefore they had to reinforce it by having to show reasonable grounds for the belief, but that's not the law generally

Anderson J Reaction to the Thompson case in England, but the

Davey And it's also further emphasised in terms of the way that he's also summed up the defence case as well. I mean he emphasises it as being

importantly, as being important an honest belief being reasonable and then he further sums up the defence case as being, page 40, line 14, 'that you should determine her belief was reasonable

Anderson J What I think he must have meant to say is that if you consider there was a reasonable possibility that she had such honest belief, you must acquit, that's the idea that he was trying to articulate, but he gets it utterly wrong.

Davey Yes.

Anderson J That's how he should have directed it.

Davey Yes, that's right. So when looking at the summing-up as a whole that passage is not just an isolation, it permeates also the way the defence case was summed up.

Blanchard J Well they were more or less parroting what Mr Barnsdale had actually said.

McGrath J But Barnsdale perhaps was exercising reasonable belief as a basis for finding honesty.

Davey Yes, it could well be, it could well be.

Tipping J Well that's the only way it counts traditionally.

Davey Yes.

Tipping J The more reasonable, the more likely it's held. This honest belief is a difficult phrase. The question is whether you have a belief. Whether you have it can be guided by how reasonable it is. If it's thoroughly unreasonable it's pretty unlikely you had it.

Davie Yes.

Tipping J There's all sorts of baggage around this expression 'honest belief' which I think an opportunity might be had to

Anderson J Genuine belief

Tipping J Genuine or sincerely held or

Blanchard J Well a belief is a belief.

Tipping J Exactly. Well Lord Diplock had something to say about this, and admittedly in a defamation case about malice, but it resonates down the decades with problems of this expression.

Davey Yes, perhaps whether you genuinely believed that you're entitled to do what you did in terms

Tipping J Well you either believe it or you don't as my brother says. I mean honest is simply to reinforce that the belief is actually held.

Anderson J Not wishful thinking.

Davey Yes, yes.

Tipping J But it's certainly not a reasonable belief.

Davey No.

Tipping J In traditional thinking. Mr Solicitor will have something to say about that.

Anderson J From my experience there's a lot of wishful goes on when people are trying to get more than they're entitled to.

Blanchard J Or explain why they thought that at the time.

Tipping J Well I fully have your point here Mr Davey. The only thing that I find remarkable is that it wasn't taken in the Court of Appeal, but you can't comment on that.

Davey No, no.

Tipping J Or spotted by the Court of Appeal.

Davey My friend acknowledges that there is an issue there and so seeks to rely on the proviso and I mean I've already covered ground in terms of what her belief was in terms of her that it related to her capacity to work as a teacher in matters like that, so I don't think I need to repeat those, but essentially that's a credibility issue ultimately for the jury to determine on correct directions on the law and this wasn't a case in my submission when one looks at what she was explaining her belief that the proviso can apply in a sense that it could be said that a jury would have inevitably convicted her even if they'd been given the right direction on this, that I take issue with my learned friend's argument that it was so fanciful, certainly in my submission based on the ACC legislation based on the wording of the certificate, there was the possibility of a belief that capacity to work related to her position as a teacher and that it couldn't be said that if the jury, given the correct direction, that they would have inevitably convicted her in any event if they didn't need to consider about the reasonableness of that belief, and that's ultimately a jury issue to determine and I mean it's emphasised obviously recently in terms of *Bain* and a decision like that, that ultimately it would be an assessment for the jury on a credibility issue like this that in terms of the farmers' evidence that that, although strong

in terms of her ability to carry out physical capacity, that only related to her ability to do physical work, it didn't necessarily relate to ability to return to work as a teacher.

- Anderson Or her mental attitude.
- Elias CJ Tasking and ordering and things like that. The sort of things that her Doctor refers to.
- Davey Yes. So really, I mean perhaps in terms of the reference to adopting *Ghosh*, I mean it's been said more in this country since *Coombridge* that intentative fraud involves a subjective intent. The Court of Appeal in *Williams* specifically considered *Ghosh* and rejected it. It was further considered in *Firth* and rejected then and as I've said the issue of intentative fraud is now no longer relevant under s.228, there's now a test for dishonestly, or a definition of dishonesty, which is simply defined as acting without authority effectively. So in my submission there's no need, well the established law shouldn't be changed and that now introducing a concept of reasonableness wouldn't apply because we've got actually the statutory definition of dishonesty and set out
- Tipping J Is that in your submission Mr Davey, the statutory definition?
- Davey No, but it's set out in my learned friend's submission.
- Tipping J Oh Right, thank you.
- Davey I must say I was little bit surprised by the point that was in terms of I didn't understand it to be covered by the grounds of appeal in terms of whether the direction on intentative fraud should actually be where there was an issue of law as opposed to whether or not the Judge directed on established law and so that is why I didn't cover it in my submissions, but at para.73 of my learned friend's submissions
- Elias CJ You saw an opportunity?
- Davey That's right. I didn't think I'd opened the gate but obviously my learned friend did and
- Tipping J Well it's an important point. I mean dishonesty is such an endemic concept in the criminal law, features of it, but it's got to be nailed down one way or the other, and firmly as to what we mean.
- Davey Yes.
- Tipping J And this so-called honest belief in states of fact that would constitute a defence if they existed. All that is very important.
- Davey Yes it is, but we now have a statutory definition of dishonesty which is that in respect of a charge under s.228 in relation to act or admission,

means done or omitted without a belief that there was an express or implied consent to or authority for the act or remission of a person entitled to give such consent or authority, so there's no notion of reasonableness in the statutory definition now under s.228, it's just a belief that there was no authority expressed or implied to do that act, and so really on the face of it there's no room in that definition of my submission to introduce some objective element into it and I think the point is made by *Smith and Hogan* is that a reasonable assessment of honesty is, I mean in a society now what is considered to be honest, can you really say that there's a standard of honesty that applies across all various cultures as to what is considered to a standard of honesty, and that's the difficulty that's been criticised with the *Ghosh* test is that you can't find that standard in such a diverse society nowadays as to what is considered to be honest or not, and so introducing a concept of reasonableness or a concept of what is objectively honest doesn't actually solve the issue.

Blanchard J I suspect that jurors probably factor it in anyway, because that's the way people's minds work, but

Davey Yes, I agree, I'm sure they do in terms of what they consider is honest behaviour or not.

Tipping J As long as they aren't given the wrong message.

Davey Yes, yes. Perhaps I can reply to any issues that get raised by my learned friend in reply, but that's generally my comment on it.

Elias CJ Thank you, and does that conclude your submission Mr Davey?

Davey Yes it does thank you. Well we'll take the morning adjournment now thank you.

11.36am Court Adjourned

11.53am Court Resumed

Elias CJ Thank you. Yes Mr Solicitor.

Collins Thank you very much Your Honours. At trial the appellant raised four distinct defences. One of those defences related to the actus reus and focused on whether or not she had obtained a pecuniary advantage. The other three defences related to the mens rea element of the charges and focused on whether or not she had a dishonest belief. The actus reus defence was this, and I'm paraphrasing the language which the appellant would have used. 'I was not working as a matter of fact therefore I was entitled to continue to receive weekly compensation'. The mens rea defences were these. 'I did not think I was working alternatively. I thought my legal obligation was simply to disclose if I

returned to teaching. Alternatively I thought ACC knew everything about what my work circumstances were'. Now I just want to very briefly traverse the evidence as it related to each of those defences. The appellant's assertion that she was not as a matter of fact working is set out in her own evidence in chief. 'I wasn't working', and that evidence was in complete contrast with a parade of witnesses who were able to describe sometimes in quite blunt and colourful terms, not only the physical activities that the appellant was engaged in, but also the managerial skills that she was displaying when managing two successive companies. Even her own witnesses refuted her claims that she was not working. So that element of her defence was simply a question of credibility which the jury were well-positioned to resolve and clearly they did not accept the appellant's explanation. Dealing very briefly with the mens rea elements as I've just explained them. The appellant's statement 'I did not think I was working'. She was cross-examined on that. She was questioned about the statements that she'd previously made to the ACC investigators. The inconsistencies between her evidence at trial and her statements to the investigators were brought out. It was a question for the jury to resolve. Did the appellant honestly think she had not been working and clearly the jury rejected that element of her case.

- Elias CJ Mr Solicitor are you going to give us references to the material?
- Collins I'm quite happy on any point that I'm raising, I'm very very happy to do so. I have done so in the written submissions and
- Elias CJ You're not adding to those?
- Collins No I'm not adding to those. I'm really just re-casting them in light of the way in which has been put this morning.
- Elias CJ Yes, thank you.
- Collins But if at any point you need me to take you to the evidence I'm very very happy to do so Your Honour.
- Elias CJ I haven't read the evidence and I'm sorry about that, but just looking at it in Court it did not seem to me that the cross-examination was very extensive on these points. Is that wrong?
- Collins With the greatest of respect the cross-examination was quite a
- Elias CJ Oh well then I must only have been looking at part of it, thank you.
- Collins The cross-examination was actually quite a lot longer than the evidence in chief
- Elias CJ Right.

Collins And covered all of the points which I'm traversing now. The second mens rea defence, 'I thought my legal obligation was simply to disclose if I had returned to teaching' was the subject of quite penetrating cross-examination from just reading the transcript. It was pointed out to the appellant that the declaration made no reference to being confined to returning to the occupation that she had previously had. It was pointed out to her that she had qualifications in remedial reading and that by reading the declaration it was obvious that what she had to do was to tell ACC if she returned to work or if she was engaged in any form of employment, whether paid or unpaid. And that ultimately resulted in the jury having to make a decision - did that explanation ring true? Did the appellant honestly believe that her only obligation was to tell ACC if she returned to her pre-injury occupation, and clearly the jury were well positioned to assess her credibility on that point and rejected her explanation. And her third mens rea defence was 'that I thought ACC knew everything'. Well, as I've said in my written submissions, there was at least the beginnings of a nucleus to that defence, particularly in relation to events from December 2001 onwards. But again there were questions of fact. What was it that ACC was actually told and what was it that the appellant said she was doing, and the explanation was that ACC accepted that she was engaged in some activities, had no idea of the extent of her work activities and every effort that was made to have her vocationally assessed was frustrated because of the appellant's failure to comply with the vocational assessment programmes that she was obliged to undertake. So that's how the case was presented at trial by the defence. Three crucial of credibility and one crucial question of fact, and clearly the jury ideally positioned, rejected the appellant's explanations and defences on all four points. Now can I just deal with the ingredients of the offences? Dealing firstly with the actus reus, the pecuniary advantage. I unhesitatingly accept that at trial the s.229A charges were presented on the basis that the appellant had obtained an advantage to which she was not entitled. That's how it was put. And the factual basis for that was as follows. The Doctors who had examined the appellant and had certified on the ARC18 forms that she was unfit for work would not have so certified had they actually known what the appellant was really up to in terms of the work activities. Those ARC18 forms, and in particular the medical components of them, were an essential pre-condition to the appellant continuing to get weekly compensation. No certificate, no weekly compensation. The appellant was questioned on that when she gave her evidence and she accepted, she understood that, with the certificates there would be no weekly compensation. Secondly a succession of ACC employees explained to the jury had ACC known the appellant was working, she wouldn't have got compensation, and I can take you to the

Tipping J When you say was working, you mean knew what she was actually doing?

Collins Really up to, yes.

- Tipping J Yes, yes.
- Collins Yes, yes, yes, and I can take you to that part of the evidence if you like, but there were at least three ACC witnesses who explained that in very very firm terms. Now the evidence of the Doctors and the evidence of the ACC witnesses on these points were not challenged. The appellant accepted without any hesitation that what she had done was used the document, the ARC18 form, to obtain the pecuniary advantage, and in his summing-up His Honour the trial Judge pointed out to the jury that they probably wouldn't have any difficulty in accepting this aspect of the case and that it appeared that no issue was taken with it. I also accept that in the Court of Appeal a different test for pecuniary advantage was seized upon by the Court. Either test would suffice. There was a compelling evidential foundation for the proposition that under the first test the appellant obtained a pecuniary advantage which she simply could not have obtained had she been honest. Had she told her Doctors the truth and if she had submitted forms which accurately portrayed her circumstances. The Doctors said that and ACC said that, so the first test for pecuniary advantage was clearly satisfied. Now in the Court of Appeal a different tact was raised by the appellant and what the appellant endeavoured to do in the Court of Appeal was to try and shoe-horn the circumstances of this case into *Donaldson* where the Court of Appeal had previously said in relation to a case which is quite distinct and different from this case, that where there is an issue about entitlement, before there can be a conviction the jury have to have the factual foundation for understanding whether or not there is or is not an entitlement and therefore the terms upon which entitlement is granted need to be explained to the jury. Well that's completely different from what happened in this particular case. If I can just elaborate a little further in relation to *Donaldson*. *Donaldson* was a case which involved a mixed question of fact and law.
- Tipping J Sorry, before you do Mr Solicitor, are you reflectively saying that in this case as presented to the jury there was no issue about entitlement in the sense of had there not been these documents presented there would have been no money?
- Collins Correct.
- Tipping J Yes.
- Collins Yes. So lest I'm adding to the confusion, let me just give an overview of this point of my submission. There are two ways in which a pecuniary advantage can be obtained. One is to receive a benefit to which one is not entitled, and the second, which I might call the *Thomas* test, is to mislead the payer of the benefit into not making the inquiries that the payer would make and if made might deprive the recipient of the payments received.

- Anderson J Might being operative.
- Collins Might being operative. *Donaldson*, even though it was an ACC case, fell into that first category because in *Donaldson*, which as I said was a delicate case involving a mixture of fact and law, the appellant had declared that he was working; said that he was working 20 hours a week and the issue was – there were two issues – as a matter of fact was he working more than the 20 hours that he said and if so did that make a material difference to the entitlements that he actually received, and before the jury could convict they needed to know the nature of the entitlements before deciding whether or not it would have made a material difference to the entitlements received. So a gray case but not on all fours by any manner of means with the present circumstances where it was either all in or all out. Now in my submissions I have drawn attention to the *Thomas* case, which of course the Court of Appeal relied upon and in reality *Thomas* is indistinguishable from the present case. *Thomas* as I said a few moments ago stands for the proposition that if A receives a benefit from B in circumstances where A has a duty to explain the contingencies upon which B might make that payment, then A must make that explanation to B because if B might not make the payment, if the full facts are known.
- Elias CJ Well Mr Solicitor can I ask you under the ACC legislation is it a distinct offence in terms of not supplying accurate information?
- Collins Yes, there is a summary offence I think it's s.305 or thereabouts of the Injury Prevention Rehabilitation Compensation Act of 2001. 308 I'm told.
- Elias CJ 308, and do you know what that says?
- Collins Yes, it's actually set out in my friend's submissions Your Honour at page 10 of my friend's submissions Your Honour.
- Anderson J What was the equivalent section in the previous Act, whatever that might have been called?
- Collins We can look that up very quickly – could you look up s.308 and see what the reference is to the earlier section? It appears to be s.375 of the 1998 Act Your Honour.
- Anderson J Thank you.
- Collins So just finishing off the actus reus submissions as to what constitutes the obtaining of a pecuniary advantage, *Thomas* was entirely correct. Where a person obtains a benefit in circumstances where the payment of that benefit is contingent on certain events and there is a failure to notify, in this case ACC, of the circumstances which might influence whether or not that payment is made, then the failure to give ACC the

opportunity to make that inquiry, constitutes the obtaining of a pecuniary advantage.

Tipping J So the concept here is of circumstances material to the entitlement or presumably the amount thereof?

Collins Material to the entitlement is as far as I think we need to go Your Honour.

Tipping J Here, yes.

Collins Yes.

McGrath J But the case wasn't run on the basis of *Thomas* at trial was it?

Collins It was not Your Honour, no, it was run on the first limb that I have referred to.

Tipping J Yes, the all in or all out limb as you aptly described it.

Collins Yes.

Tipping J She said she wasn't working

Collins Yes.

Tipping J So it was all in.

Collins Yes.

Tipping J However she was working, it was all out.

McGrath J So what basis do you support the proposition that we can join the Court of Appeal in substituting a *Thomas* justification?

Collins Because it would make no difference at the end of the day Your Honour, under either limb, in this case pecuniary advantages were obtained every time the appellant submitted these ARC18 forms to ACC. It doesn't matter which way you look at it, the same result emerges. They are not alternative, they are either, and, or elements. I'm sorry, ingredients

Tipping J Well she's got an advantage down both routes.

Collins She has and it doesn't matter which way you look at it, she's obtained a pecuniary advantage and so the Court of Appeal were well within their right to analyse the way in which this appellant had obtained pecuniary advantages along the *Thomas* line; that it was quite open for them to have followed the path that had been taken at trial and say well the evidence, and the accepted evidence

- McGrath J How could we be certain that the jury would have accepted the *Thomas* line?
- Collins Because it was a question of fact – did she or did she not make a disclosure to ACC that might have resulted in ACC investigating and reaching the conclusion she wasn't entitled.
- McGrath J You're saying that the issue wasn't substantiated before the jury, the *Thomas* issue wasn't substantiated before the jury albeit under the non-*Thomas* scenario.
- Collins Yes.
- McGrath J Yes I can understand that submission.
- Tipping J What we're talking here is solely about actus reus aren't we?
- Collins We are.
- Tipping J Yes.
- Collins We haven't started on mens rea.
- Blanchard J I'm wondering whether it can really be said that you get a pecuniary advantage when the advantage you get is that a decision is made with insufficient information when if there were sufficient information the decision might have gone in your favour. Can pecuniary advantage really cover a contingent possibility of a pecuniary advantage?
- Collins The answer to that is yes, and the element that clinches it is the dishonesty. If a person starts telling lies in order to get a payment, as occurred in this case, it is that act of dishonesty of lying and deceiving, knowing full well that if you tell the truth your payments might be at risk, but you get a pecuniary advantage, and the pecuniary advantage you get isn't simply the money that you get in the pocket each week from ACC, it's the fact that you're not assessed and your position isn't determined in accordance with the law.
- McGrath J In other words it improves your chances by reducing the risks of an impediment to your payment.
- Tipping J I suppose there's an element of policy in here that you're going to allow people who must have thought there was some good reason for this honestly, to deny that.
- Collins Well I eluded to that in my submissions Your Honour by saying that the ACC scheme, and I'm not suggesting that this Court needs to devise a scheme that's suited to ACC, but ACC is clearly a scheme that

is highly dependent on the honesty of all citizens who get the benefits of ACC, and that

Blanchard J I wonder whether the answer to my question is possibly in the language of 229A in that the charge is related to using a document capable of being used for the purpose of obtaining

Collins Yes, yes I think Your Honour is right. The word 'capable' and for the 'purposes of obtaining' which of course introduce the mens rea element which I haven't started to focus on yet, but the word 'capable' is

Blanchard J Because that does perhaps shed some on *Ruka* and *Firth*. I don't think this point was argued in *Ruka* and possibly the reason why the passage that's referred to appears in my judgment is a disinclination to say on the one hand that in fact *Ms Ruka* wasn't living in a relationship in the nature of marriage, and on the other that she'd be committing a crime.

Collins Yes, well

Anderson J I wonder whether the words 'for the purpose' really indicate both the nature of conduct and the mental accompaniment to it rather than whether it succeeds

Collins Yes.

Anderson J Which is the way it has sometimes been interpreted, perhaps wrongly, but you're using it in the particular way and you intend to.

Collins Yes, with an objective in mind mainly you were going to get your weekly payment.

Tipping J If your purpose is to obtain money, it doesn't matter that you could have attained the same money by other means, i.e. by being honest.

Collins Correct, correct, and the English authority certainly support that proposition which at first blush may seem a little harsh, but they focus on the fact that as a matter of policy here we are dealing with dishonest behaviour and that's what society is aiming to punish.

Anderson J Now on that approach you couldn't be guilty of an attempt because the very crime itself is in the nature of an attempt?

Tipping J Yes.

Collins Yes, yes, and if I can come back to *Ruka* I don't think Your Honour should be too hard on yourself in relation to *Ruka*.

Blanchard J I know I'm apologetic about it

Tipping J I was just looking forward to

Tipping J Yes.

Collins Well I am reliably informed, I mean the Police asked *Miss Ruka* if she wanted to bring charges, she declined because she was still in the relationship. *Ruka* of course is authority for one very very basic proposition that you can't unlawfully obtain a pecuniary advantage if you have an entitlement as a matter of law to that advantage.

Blanchard J But she can still have the purpose of doing so.

Collins She may well have but I think we can confine *Ruka* to the proposition that I've just outlined Your Honour that if you have a legal entitlement and it's established you had that legal entitlement then that's the end of the matter. You can't obtain an advantage.

Tipping J But your purpose may be so but you can't be sensibly seen to have an intent to defraud.

Collins No, not if you have a legal advantage, that legal entitlement, yes. And the crucial word in *Ruka* is 'advantage'. No advantage in that case.

Elias CJ We're into impossible attempts

Blanchard J I suppose we don't need to resolve this dilemma because the charges under the current legislation are framed as with intent to obtain a pecuniary advantage, dishonesty, and without claim of right.

Collins Yes.

Blanchard J So maybe that's actually written *Ruka* into the law, because whether or not she knew it she did have a claim of right.

Collins Correct, though her intent was something different, so I'm not completely certain if *Ruka* has been written into law and I don't think we need to go down that path.

Elias CJ In any event in this case the Crown case was that she did obtain pecuniary advantage and it was critical to culpability.

Collins Yes, yes indeed.

Elias CJ So we don't need to deal with the hypothetical question of whether this section is capable of catching people who are attempting

Collins No we do not.

Elias CJ No.

Tipping J A hand in the empty pocket.

Collins Yes, and if it's of any consolation the English authorities make it very very clear that it's their dishonest behaviour in obtaining payment, even though one might actually be entitled to it, that constitutes the offence and I brought your attention to that English Court of Appeal case where the parents of the young person who was facing trial overseas helped themselves to the trust monies by putting in false claims and were convicted even though they actually had an entitlement to the monies that had been paid into that trust account for their daughter.

Elias CJ One of the things that occurs to me in looking at the indictment here is how inadequate it is and one would have thought that the defence would have sought further particulars on some of these things, particularly on the s.228 charges.

Collins Yes, I think the Crown would have been in some difficulties if it had tried to resist such an application.

Elias CJ Yes.

Collins But none of course was made.

Anderson J It would just add the extra that's in the other one,

Collins Exactly.

Anderson J Namely compensation payments or whatever

Collins Or the *Thomas* as the trial Judge summed up in relation to s.228. That was all I was proposing to say about the actus reus, about the pecuniary advantage and unless I can assist Your Honours on any other point in relation to that, but in summary two ways in which a pecuniary advantage can be obtained by obtaining a payment to which you're not entitled or by obtaining a payment in circumstances where the payment is contingent and you don't give the information which the payer needs, which if it had been given, might have resulted in the payment not being made.

Elias CJ Just looking at this, the framing of the indictment, the counts which all rely on this ACC ARC18

Collins Yes.

Elias CJ It's this document only that is said to have been used and therefore to have been dishonest

Collins Correct.

Elias CJ It's not a subsequent failure to act on the undertaking given here to supply information?

Collins That undertaking is given in each of these documents.

Elias CJ Yes, so for the past period it may bite but it's got to be dishonest on its face

Collins Yes.

Elias CJ You know, its entire, the dishonesty is entirely contained in this document.

Collins And it is. What happens is that I think it's approximately every 90 days or thereabouts the appellant goes to a Doctor and in this case the Crown's case is she told her Doctors that all she was doing was light housework and driving her partner and not doing anything else and she was incapable of doing anything else. The Doctors continued to certify her medical condition and then she also certified in the case of most of the forms the words that are set out in the declaration 'I am not working and I'm not engaged in any form of employment paid or otherwise and there's nothing else that I need to tell ACC'. So I agree Your Honour that relates to the past 90 days

Elias CJ Yes.

Anderson J It's not an undertaking, it's an acknowledgement as to the sort of information she has to supply and it links to the comment 'there's nothing else I need to tell them'.

Collins Yes, yes.

Anderson J That's the purpose of it.

Collins Yes, I accept that Sir.

Anderson J So she's saying in effect this information about employment and all the rest of it, there's nothing relevant to tell you.

Collins Yes.

Anderson J I declare that.

Collins Yes.

Elias CJ Well it also indicates if it's read like that and perhaps we shouldn't examine this as if it were a statute, but it would mean that employment is indicated to be relevant to fitness for work rather than being a separate obligation that it's tied back into fitness to work which would also make the fitness to work distinct from employment.

Collins Yes, I agree Your Honour that trying to interpret this document as if it were a statute, there's certainly confusion on my part I can assure you.

Elias CJ On the other hand it is the whole basis of the charge against it so it has to be looked at with care.

Collins Yes, yes, with one minor qualification Your Honour and that is that when the appellant went on ACC she was given a letter which also set out her obligations were and that's in the evidence and is referred to in my submissions.

Tipping J Would that tend when read together with the ARC18, tend to elucidate some of the mysteries of the ARC18 Mr Solicitor?

Collins I wouldn't go so far as to say that but the letter says if in the future there is a change in the degree of your incapacity or your capacity to earn, you must inform, and the words in the letter are 'this office'. The letter I'm referring to Your Honours is in volume 3, under tab 13 and there is a box which is headed weekly compensation information

Tipping J Volume 3?

Collins Volume 3, I'm sorry, under tab 11.

Anderson J I must say they can draft their forms a bit better than the certificates in this case. They bring a lot of the problems on themselves.

Collins I thought of contesting them but I think it's probably entirely due to a lack of leadership in ACC at the time and probably the fault of the Chairman Your Honour.

Anderson J I think they precede that by a long way Mr Collins.

Collins The paragraph that I was referring to is in that box, weekly compensation information, and it's the third paragraph. I think it commences 'if in the future there is a change in the degree of incapacity, or your capacity to earn, you must inform this office. This is so that you're entitlement to compensation can be reassessed'.

Anderson J Tab 13?

Collins I'm sorry Your Honour, under tab 11.

Anderson J 11, sorry.

Collins At page 486.

Elias CJ But it's probably irrelevant an just bold curiosity on my part but the fact that her position was reassessed and went on review

Collins There was a misunderstanding there Your Honour. We do have the review authority decision. It's not part of the record, but the reinstatement was only because ACC hadn't justified the reasons for the information which it had sought. The process followed was ACC sought information. That information wasn't forthcoming. ACC cancelled the weekly payments. There was a review decision and the decision was ACC having justified asking the questions that its asked, therefore we're reinstating, well therefore the appeal

Elias CJ So it was a procedural decision rather than a decision on the merits?

Collins Precisely.

Elias CJ Yes.

Collins Yes. That said I wouldn't want this Court to be left under any impression that ACC acted efficiently in 2001 in this case. Far from it. From December 2001 onwards they clearly had some information that the appellant was engaged in some work and although they made efforts to have her vocationally assessed under the Act, and she frustrated those efforts, it is surprising that it took as long as it did before the payments were stopped.

Elias CJ But when you say she frustrated them, we've got correspondence there from an assessor

Collins Yes, yes there is evidence from ACC, I think it's Mr Perdia? Mr Perdia who explained how the efforts to get Ms Hayes to the vocational assessment programme didn't succeed and I think he actually offered some possibly inadmissible evidence about her rationale and her reasons for that.

Tipping J What would you be able to say Mr Solicitor about that letter I think from the self-same Mr Perdia?

Collins Yes.

Tipping J Which recorded the ACC's understanding that she was working full-time in this other gentleman's business. That's a bit worrying isn't it?

Collins I agree, it is worrying, but the evidence at trial was that they didn't know the extent of her work

Tipping J Full-time.

Collins They didn't know she was out there doing all this physical labour that the farmers gave the evidence about. They were under the impression as I understand the evidence that she was simply doing bookkeeping and running the telephones and doing the administrative stuff.

Elias CJ Does it matter?

Collins Well I'm not offering it as an excuse, it just helps explain ACC's thinking at the time.

Blanchard J Well in fact the next paragraph of that letter does indicate what working full-time meant, and there's no mention of physical work.

Elias CJ So what, where is that? So my question remains, does it matter?

Collins I think as a matter of law no it doesn't. It simply does not matter.

Elias CJ Also Mr Collins there's reference in that correspondence to psychiatric assessment.

Collins Yes.

Elias CJ Was there evidence from a Psychiatrist?

Collins Not from a psychiatrist but from a Neuro Psychologist I think

Elias CJ Yes but not from a Psychiatrist?

Collins No, am I correct on that? It wasn't a Psychiatrist was it, it was a Neuro-psychologist or physiologist? Not psychiatric evidence but nevertheless

Elias CJ I see, but it was directed to that

Collins Her cognitive skills Your Honour.

Elias CJ Yes.

Tipping J What is that letter that I referred to and then my brother Justice Blanchard referred to. I would be just grateful

Collins I just closed the folder Your Honour.

Blanchard J It's in para.13 in volume 3 and I was looking at the penultimate paragraph.

Collins Yes. Now if I can just deal with this point before it escapes me. The relevance of this is it provides was I described earlier as the nucleus of her defence 'I thought ACC knew everything? That was a question of for a jury to assess. Her defence is 'one of the reasons why I had an honest belief is because I thought ACC knew everything' and clearly the jury didn't accept that. And that was a quintessential jury issue.

Tipping J Provided they were correctly directed.

Collins Yes.

Elias CJ Still to come. Can you just tell me where I find later, you don't need to take me to it, the Neuro Psychologist's evidence?

Collins Yes, we'll get that for you.

Elias CJ Thank you.

Collins Volume 2, pages 364 to 373. There was an assessment done on the 28th October 2004.

Blanchard J Sorry, what were those page numbers again?

Collins Volume 2, pages 364 to 373. This is the evidence of Debra Stearns I think is it? No, no, Ms Mitcheson, sorry, and described as a Neuro Psychologist I'm sorry it's 367, not 364. Now if I could just continue on the mens rea elements, if that were of assistance, is an analysis of the defence case reveals the first of the mens rea defences is, and I'm para-phrasing here, the appellant saying 'I did not think I was working'. This was ultimately a question for the jury. It followed on from her absolute denial that she had been working and that those who had thought that she had been were all wrong, and doesn't involve an intricate knowledge of company employment law relations, the appellant must have known when she went out onto the farms each day that she went out and was seen working on these farms; engaging in the physical work; telephoning the farmers; getting the contracts; telephoning the dairy company; getting the contracts for the work; attending to the dairy company work; arranging for the loans, and which she amongst other things at one point described the assets of the company as being over \$400,000; arranging for credit card facilities and petrol cards for the four vehicles that the company had at this stage. It's impossible for a jury to have thought that what she was doing was anything other than work or that she must have realised that what she was doing was working. Now there is some confusion in the evidence about the profitability of the companies and the extent, if any, of any drawings which went to her directly. There is no issue however that the company was paying for her car - she acknowledged that. The credit cards for petrol in the company's name were being used by her, and as I understood the evidence, the loan arrangements involved a loan to her from the family trust which she then provided to the company, and that was done in relation to the first company and in relation to the second company. And there is evidence that an offer of some \$160,000 was made for this company at one point but that was declined. Whether she received drawings or not is utterly irrelevant. If it were relevant fraud would be able to be perpetuated by somebody simply becoming a director and shareholder and not taking any drawings and using the company to provide day-to-day living

arrangements for the company director or shareholder and not taking any declared drawings.

Tipping J It is probably irrelevant to actus reus, but is it wholly irrelevant to mens rea?

Collins It is utterly irrelevant to mens rea because how could anyone sensibly look at what this person was doing and describe it as anything other than work.

Tipping J I agree that it's extremely unpersuasive or one might be motivated to say that but can one say that the fact that the thing was set out this way is totally irrelevant to mens rea, in other words should not be considered by the jury at all. It's just the absolute of that Mr Solicitor

Collins Well perhaps I have over-stated it slightly there Your Honour, I accept that

Tipping J I mean it would probably be dismissed by a jury.

Collins Yes.

Tipping J But you see this is where I get into this question of honesty and reasonableness.

Collins Yes.

Tipping J A reasonable mind would dismiss it immediately.

Collins Yes.

Anderson J Unless it was someone who was familiar with Lee and Lee's Air Farming Limited.

Collins I don't think she was cross-examined on that one.

Tipping J Well maybe it's *Salomon and Salomon*?

Collins Although there was one sentence in her cross-examination which did remind me of *Salomon and Salomon* when she was asked 'and you went out and drained the effluent ponds one day, and she said oh no, I didn't do it, the company did it'.

Elias CJ She was very impaired Mr Solicitor. I'm just having a look at that Neuro Psychologist. She's assessed at 4% and the average percentile is between 25 and 75.

Collins Yes, yes.

Tipping J 4 percent.

Elias CJ 4 percent.

Collins On that scale she is impaired.

Elias CJ Yes.

Anderson J Borderline cognitive functioning.

Elias CJ Yes, borderline is what they say.

Collins She did also accept in cross-examination that it's possible and she knew it was possible to fake those results.

Elias CJ Yes, in re-examination that question was put to her.

Collins Re-examination, yes.

Elias CJ Yes.

Tipping J Well all good jury stuff provided they're properly directed.

Collins And I'm not putting off coming to this question of reasonableness Justice Tipping, but I just wanted to finish off by saying and the first limb to this mens rea was 'I thought ACC knew everything' and I think I have covered that probably sufficiently. So what was it that the trial Judge did say in relation to mens rea that might be of concern, and the submission that I make is this. Aside from that passing reference to reasonableness which I will focus on, the direction was unremarkable in terms of its analysis of the contents of honest belief. Now when looked in context it is quite apparent that the defence submissions to the jury the previous day had focused on the appellant having an honest belief, and to illustrate that point or to underscore it, what the defence was saying was that her beliefs were reasonable, therefore in her mind honestly held. And as I've said in my submissions it wasn't necessary for the trial Judge to be drawn into that, but when he did get drawn into it, his two references to reasonableness in his directions on the law were a reiteration of what the defence theory had been, namely her beliefs were reasonable and therefore honest. What is very important to stress is that although it wasn't necessary for His Honour to go into that territory, he did not give the jury any direction that would be consistent with a classical objective direction on reasonableness. He did not for example tell the jury as juries in the United Kingdom are required to be told, or now in Australia as the result of *Peters*, you must assess honest belief by first applying the standards of ordinary citizens in assessing whether or not this belief was reasonable. He didn't qualify the word 'reasonableness' by applying the classical objective test. He simply slipped that word 'reasonable' in, no doubt still reflecting on the final words of the defence lawyer about the reasonableness of the appellant's belief.

Tipping J Mr Solicitor can I just explore this with you?

Collins Yes.

Tipping J If one looks at the summing up, page 415 at line 12, the bottom of that first paragraph 'in addition and as I pointed out to you, without an honest belief etc' and then he says 'an honest belief is a belief', so he's defining on his belief, 'is a belief that if you considered was held by the accused'. Now it's actually held, 'it's also got to be reasonable or the Crown have got to prove that it was not reasonable'. I have real difficulty with a submission that says that that wasn't a material misdirection.

Collins Well I'm sorry Sir but I wouldn't describe it as a material misdirection, I would certainly acknowledge that it was an unfortunate trespassing to an area that needed to go.

Tipping J But he's described it first of all you've got to hold it, which is fine, and then it's got to be reasonable.

Collins Yes.

Tipping J And then importantly, it's very disjointed this, but giving it the best instruction one can, he's emphasising that the Crown has got to prove that it was not reasonable.

Collins Yes.

Tipping J Now if that's not an ingredient of the defence as opposed to a reflection on the way the case was argued, that for me is your essential difficulty if I may respectfully put it to you that way.

Collins I accept that without hesitation Sir, and that's why I've said that the use of that word 'reasonable' on two occasions in that paragraph, needs to be viewed in context what was it that the Judge was really saying.

Tipping J But he then comes on when discussing the defence case. I marked it.

Collins Yes, yes.

Tipping J That she did have a reasonable belief.

Collins That's right, that was the defence case?

Tipping J Yes, as though that's what got to be shown. He had a duty as counsel wasn't up to the mark.

Collins Yes.

Tipping J With great respect appears possible. He had a duty to put it to them on the correct basis, rather than just parroting counsel.

Collins I have no hesitation in saying there is always an obligation on the trial Judge to get the law right, I have no hesitation in accepting that Your Honour. What I am trying to do is to put this error into context and the context is a defence counsel running a submission that the belief held by the appellant was reasonable and therefore honest. And that in itself, while she is legally not correct, is totally understandable. It would be a very brave trial lawyer who said this was unreasonable but nevertheless honest.

Blanchard J Well bear in mind that if there was a basis for saying to the jury that this woman's mind wasn't working completely normally because of the injury, it was the kind of case in which a defence lawyer, having thought it through, might have put it on that basis.

Collins It doesn't appear to have been put on that basis Your Honour.

Blanchard J No I know it hasn't. But we have to look at whether there is a miscarriage of justice.

Collins I accept that Sir.

Tipping J The Judge with great respect should have put it to them that her mental functioning was relevant to the honesty of her belief. If counsel can't get there, I mean it was crying out wasn't it for a direction on this specific individual rather than the more abstract directions that we see time and time again. This is not a summing up which is focused enough in my view provisionally, subject to what you're going to say, on this case, rather than just going through the motions?

Collins Yes. Can I just pause for one second please Your Honour?

Tipping J Yes.

Collins I just wanted to make sure that there was actually no reference at all in the trial Judge's summing up to the Psycho Analyst's report. I couldn't recall there being any.

Tipping J I don't, and this must have been a significant feature of the defence to anyone with any nous.

Anderson J What he should have said is if you consider it's reasonably possible that she in fact believed that, that would have been the correct direction. It looks as though he's got himself miscued somehow.

Tipping J Yes he might have, yes that's a though, but I don't think that's what he was trying to say actually. I think he got it into his mind, helped no doubt by counsel, that the belief had to be reason.

Collins You don't have the sentencing notes do you?

Blanchard J No.

Collins Can I just confer with my friend? Do you have objection to the Court getting the sentencing notes? This might take a minute Your Honours.

Elias CJ Do you want to come back to it after the adjournment?

Collins Subject to what my friend has to say, I would like the Court to have the benefit of the sentencing report because it deals with the question of cognitive inability; why it wasn't raised at trial; and observations of that nature.

Blanchard J For my part given that this is a new ground which has come in only at this level, it would seem to me that we should have the benefit of that.

Davey If I could just a moment to be able to read it. I'm just not quite sure what it says Your Honours, but I imagine

Elias CJ Yes that's fine. Mr Davey I think we will receive it because it's public record, it may answer some queries we have.

Davey Certainly, well perhaps if

Elias CJ Leave it till after the adjournment if you want to consider whether there is any reason for not putting it before us.

Davey Yes that would be much appreciated, thank you.

Collins I don't think I should go further on that point until my friend's had an opportunity to consider that and Your Honours have had an opportunity to read the sentencing report.

Elias CJ Well would it be convenient to take the adjournment now or do you want to carry on until 1 on something else?

Collins Well I've quite happy to carry on on something else if it's convenient to the Court.

Elias CJ Yes, that's convenient thank you.

Collins Ringfencing then the question as to whether or not there needed to be a direction relating to this appellant's personal circumstances that might have had an influence on whether or not her belief was reasonable, I'm sorry, honest,

Elias CJ Yes.

- Collins And I didn't do that deliberately. Was honestly held, I have in my submissions raised the issue as to whether or not the time may have come for New Zealand to reconsider whether or not a more objective test to honesty is now required, particularly in light of s.228 of the Crimes Act, and I'm acutely aware of course of the New Zealand jurisprudence on this issue dating back to *Coombridge*, but what is striking is how New Zealand is now at least superficially quite out of step with the Courts of England and Wales
- Blanchard J And yet s.217's been brought in when the drafters must have known that we were out of step.
- Collins Yes, and my submission is that 217 and the word 'belief' can be read objectively or with an objective element, just as
- Blanchard J Why didn't they put it in?
- Collins Well they didn't put it in in the United Kingdom either and that's the way the Courts of the United Kingdom have gone.
- Tipping J Could you just encapsulate for my benefit what you described is at least superficially, I'm not sure whether that's the precise word you used Mr Solicitor
- Collins Well it was, it was
- Tipping J There's difference. I'm not entirely sure that I have got a firm enough grip of this difference that you're seeking to have a shift in favour of.
- Collins Yes. I think the starting point has to be an observation which His Honour Justice Blanchard made earlier this morning when he made the observation that juries probably do think in terms of reasonableness anyway, whether or not they're directed to do so. We'd like to think that juries behave in rational, reasonable way and that it is instinctive for people to make judgements based upon a standard of reasonableness. Now my suggestion to this Court is that, that the Courts of England and Wales, right through to the House of Lords, appear to be content with an objective requirement to assessing whether or not a belief is honestly held and they've done so in relation to a statute which is strikingly similar to the definition of dishonesty, now found in s.217 of the New Zealand Crimes Act.
- Tipping J When you say an objective requirement, this is more than evidentiary, this is substantive is it that it must be reasonable before it could be said to be honest?
- Collins Correct, yes. Objectively reasonable, and then the second limb to the test has this defendant knowingly breached the standard of the reasonable person.

Anderson J So you want us to read into the interpretation section without a belief, read in, held on reasonable grounds, or reasonably held, or

Collins I'm not inviting the introduction of any language, I'm just inviting the interpretation of the word 'belief' to be the same as the United Kingdom.

Tipping J So on that premise the Judge would not have misdirected?

Collins Correct. If what he was saying was a direction to apply an objective test, and there perhaps with the greatest of respect you and I might never quite agree Your Honour.

Tipping J Well I don't know Mr Solicitor.

Anderson J That was a pioneering summing up.

Collins I'm sure you'll take all the credit for it

Tipping J It's like getting it right but for all the wrong reasons.

Blanchard J We've all done that.

Tipping J Yes, we've all been there. Well it's interesting, but the traditional view is this isn't it, that whether conduct is dishonest, in fact is judged by the view of ordinary reasonable people as to what constitutes dishonesty.

Collins Yes.

Tipping J But whether the mind of the accused was dishonest, is whether he appreciated that his conduct would be regarded as dishonest by ordinary reasonable people.

Collins That is the traditional position, but it is not the way the rule has been applied in New Zealand in relation to fraudulent intent for example in s.229A since *Coombridge*.

Tipping J Well if we're going to re-consider the whole shebang, it's capable of going in more than one direction.

Collins Yes.

Tipping J Is it dishonest to do such an such? Yes says the jury, or no, and if it's no that's the end of it. If it's yes, must the accused have realised that by ordinary standards what he was doing was dishonest?

Collins Yes.

Tipping J No, I've always thought that's a simple, neat, tidy, separation of mens rea and actus rea if such be necessary.

- Collins Well I'm entirely with you Your Honour but that's not what the New Zealand law has been since *Coombridge*.
- Tipping J Well I can't claim to be sufficiently au fait with *Coombridge* to
- Collins Well *Coombridge* in the cases would follow say dishonestly is assessed purely subjectively, regardless of whether or not anyone else would have possibly have believed what the accused said that they believed, the jury must make an assessment was this person
- Elias CJ Well what's wrong with that as a matter of policy? I mean that is after all the foundation of criminal responsibility.
- Collins The policy objection to it is this Your Honour that where crimes involve acts of objective dishonesty, they ought to be able to be established upon the basis of objective assessment rather than on the basis of what one person thinks they can get away with, because they go to Court and say I believed this.
- Anderson J Assume we took the view that you are suggesting for belief, then it's negated, it takes it back to square one with claim of right, without claim of right which immediately follows the s.228. It throws it back
- Collins But that really reinforces it that the belief must be an objectively held belief.
- Anderson J Yes I know but the effect of belief and without claim of right admits to the subjective belief.
- Collins Without claim of right?
- Anderson J Yes, and relation to any Act means the belief that the Act is lawful although the belief may be based on ignorance or mistake of fact or any matter of law other than the enactment against which the offence has alleged to have been committed. So the combination of objective belief plus without claim of right takes you back to square one. There's a formula. The Crown must exclude the subjective belief in order to exclude claim of right.
- Collins With respect I would have put that completely the other way around with the greatest of respect Sir. I would have thought that the introduction of claim of right merely reinforces the objective nature of what the belief must have been.
- Anderson J No, well
- Tipping J It's not a reasonable claim of right, it's an honestly held claim

Collins A belief. But it must be assessed objectively, that's what my position would be.

Elias CJ Honesty's never been assessed objectively unless it, well it's never been assessed objectively.

Collins Well with the greatest of respect the Courts of England and Wales have found it possible to do so and now the High Court of Australia is doing the same as a result of

Tipping J Yes, *Peters*.

Collins Yes.

Blanchard J But they didn't actually like *Ghosh*.

Collins They may not have but they ended up with a test

Elias CJ It's a very strange case the High Court of Australia case if you count up where everyone went.

Collins Yes.

Elias CJ Now I don't know that it's much of an authority.

Collins Well.

Tipping J I thought you were going to say it's a very strange Court.

Elias CJ No, no it's a Court I have a lot of admiration for.

Collins And I confess I did have to have a flow chart going when I was going through the judgments, but the end result appears to be *Ghosh*.

Blanchard J They seems to have accepted in that subsequent case that you

Collins *McKay*.

Elias CJ Is it convenient to take the adjournment.

Collins It's certainly convenient for me Your Honours.

Elias CJ Right, we'll do so, thank you.

1.02pm Court Adjourned
2.17pm Court Resumed

Elias CJ Thank you.

Collins Thank you very much Your Honours. I wasn't proposing to be too much longer on this point of whether or not a more objective test should be introduced into determining whether or not an accused has acted dishonestly, but perhaps I could just summarise with the following propositions. The definition of dishonestly, now found in s.217, undoubtedly reduces the scope of the defences available under s.228. Notwithstanding that reduction in the scope of defences available under s.228, it is respectfully submitted that a more objective analysis in determining whether or not a person has acted dishonestly is appropriate so as to bring New Zealand's jurisprudence more into line with that found in the United Kingdom and Wales in relation to an almost identical statutory provision

Elias CJ Is it

Collins Yes it's in my submissions Your Honour. It's the definition of dishonestly obtaining by appropriation in the Theft Act, para.76.

Elias CJ 76, thank you.

Collins Dishonest appropriation. But there is a mistake, it's Hinks, not Hicks, the reference to the House of Lords judgment which is in the bundle of authorities made available. The formulation advanced by His Honour Justice Tipping is one with respect with which I would accept

Elias CJ Sorry, so the decision there was that the belief in the right to deprive another of the property has to be reasonable?

Collins In the first instance. Assessed against the two-step test; the first step being as judged by the standards of the ordinary person, yes

Elias CJ Yes.

Collins And then the second test is does this person know that they have failed to adhere to that standard, so that's the subjective element to it.

Elias CJ Dishonestly is judged objectively according to ordinary people's standards.

Collins Dishonest conduct is undoubtedly but now in England and Wales and in Australia, dishonesty, the mens rea of dishonesty, is judged on the two-step analysis first articulated in *Ghosh*.

Elias CJ Yes, thank you.

Collins And if I could just finish off by getting back to the issue of policy which Your Honour the Chief Justice raised where you clearly found it unpalatable to accept the proposition that I was putting forward. Justice Kirby found it equally unpalatable and even referred to the New

Zealand authorities to support the proposition which he thought was more principled, but ultimately accepted that in order to have clarity in the law the *Ghosh* test if I can refer it to as that was the way in which he would have to cast his vote.

Tipping J It's quite simply put isn't it? In one case, I've forgotten which it is, in England by an author that you've got to do a dishonest act with a dishonest mind. The dishonest act was judged according to the standards of ordinary people whether your mind was dishonest is judged by whether you realised that that was so. That's just the same dichotomy isn't it?

Collins No with respect it's not because what you've just said is both the actus reus and the mens rea and it's the mens rea that is assessed firstly objectively and then subjectively so that's the dichotomy.

Tipping J Well we may be at slight cross-purposes then if you said you were comfortable with the formulation that I made Mr Solicitor because I saw the actus reus if that had to be a dishonest conduct.

Collins There's never been any doubt about that.

Tipping J Right, but then you have a double filter do you for mens rea?

Collins Correct.

Tipping J A double for mens rea?

Collins Indeed.

Tipping J Right, I see.

Elias CJ It sounds like provocation to me.

Tipping J It depends on according to whom.

Elias CJ I think everyone has objective subjective. Some of would have had just subjective.

Tipping J But what's wrong whether in policy terms by saying the conduct is dishonest if ordinary people would regard it as such and all the accused has to know, or all the Crown has to prove is that he knew that that was so.

Collins Well again we might be dancing on the head of a pin but that's entirely consistent with the proposition that I've been putting forward.

Tipping J Well I suspect we aren't necessarily

Elias CJ Is there a statement of principle in terms of the law that you particularly rely on? Does somebody express it exactly as you would have us determine it?

Collins *Ghosh*, para.62 of my submissions. I'm sorry Your Honour I haven't quoted a paragraph in the judgment, I've simply analysed, I've simply it.

Elias CJ Yes can you take us to

Collins It's tab 7 of the respondent's authorities.

Elias CJ It doesn't look so bad like this.

Collins Sorry.

Elias CJ It doesn't look so bad at page 1064.

Collins Yes at line D and a half.

Elias CJ C to D. 'I did not now that anybody would regard what I was doing as dishonest'. That's fine. That seems to me to be subjective.

Tipping J It's not a Robin Hood defence. You're not setting your own standard of honesty. You simply say I didn't realise that this would be regarded as dishonest.

Collins Well as I understood the case, and the way it's been reported and relied upon ever since it was reported, the true ratio is to be found in the paragraph commencing 'in determining whether the prosecution has proved' through to 'dishonest', line G.

Anderson J What page is it?

Elias CJ Well that's fair enough.

Collins I'm sorry, this is at page 1064.

Anderson J Where Robin Hood was actually mentioned.

Collins Yes.

Elias CJ But the key is that if it's dishonest by the standards of reasonable people, what you're describing is the actus reus, well I'm not sure that it is.

Collins No, no, that's part of the mens rea.

Elias CJ Well, but the key part is then the jury must consider whether the defendant himself must have realised that what he was doing by those standards dishonest.

Collins Precisely, so there is an objective and a subjective

Elias CJ Well I would have thought this was wholly subjective.

Collins This description?

Elias CJ Yes, it's just that you can't invent your own standard of morality.

Collins Yes, well

Elias CJ The Robin Hood thing.

Collins Yes. Well what I think this case has been cited as authority for since 1982, is that a jury used to be instructed in assessing an accused dishonesty by asking two questions – has the accused acted dishonestly accordingly to the standards of the ordinary people; if so does he know that he has failed to adhere to those standards? So there is an objective followed by a subjective consideration.

Elias CJ Well I don't know why you bother with the first part, I mean it's not going to be a crime if it's not dishonest by their standards.

Tipping J The question is he must have an appreciation that he's reaching the external standard.

Collins Exactly.

Elias CJ Yes, yes, well I don't have a problem with that. That's a subject of test.

Collins Well that's not been the law of New Zealand.

Anderson J Since *Coombridge*.

Collins Since *Coombridge*. New Zealand's gone the other way and said you make up your own standard.

Tipping J Well not quite.

Collins Well up until this law change that's been basically it. The Robin Hood defence works.

Elias CJ But the examples are the vivisectors and things like that. That's applying their own standards of morality, well that can't be the law here.

Collins Well it was following *Coombridge*.

Elias CJ Well I misunderstood that I must say.

Anderson J I've always problems with *Coombridge*.

Collins So I understand have a lot of prosecutors.

Tipping J I think one of the important features of *Ghosh*, or Gosh or whatever is the correct pronunciation, one has to read what follows on 1064 by reference to what's said on the previous page at letter F where they're clearly dissecting actus reus in the conventional sense with mens rea in this double filter sense. That is the essential underpinning if you like of what follows.

Collins Yes indeed.

Tipping J Yes.

Elias CJ But they make the point there that dishonestly turns on the knowledge and belief of the accused. It's just the standard that's applied to that knowledge and belief.

Tipping J But if it wouldn't be dishonest by external standards that's the end of the matter.

Elias CJ Yes.

Collins That's right.

Tipping J If it would be then you go on to what you might call the classic mens rea part of it which is did he realise that was so.

Anderson J That he thought he was cheating but in fact he wasn't.

Tipping J Yes.

Collins Yes.

Anderson J It doesn't matter.

Collins But you see *Coombridge* really does permit the Robin Hood defence. What I did was what I thought was honest regardless of how outrageous that may

Elias CJ But nobody's putting that forward here. That's not being suggested.

Collins Well that's been the position up until now.

Elias CJ No but it's not being suggested in this case. She didn't say I thought I was entitled to ACC because for whatever reason.

Collins No, no.

Elias CJ She said what I was doing was not cheating and by their standards, or by the standards of ordinary people, and I believed I wasn't.

Collins I think she was actually cutting out that standards of reasonable people. She was saying I thought that what I was doing was honest and her defence counsel was saying and that belief was reasonably held by her, and the trial Judge made the error of repeating that.

Elias CJ Yes.

Collins Of course we only ever get into this debate, this jurisprudential debate, which I accept is a very important principle of law if this Court rejects my submission that the trial Judge's reference to reasonable was not an invitation for the jury to apply a mandatory objective test.

Elias CJ Well I mean I just don't see how the direction that was given in this case squares with what is being said in *Ghosh*. Were you trying to suggest that?

Collins No, because it's not the same as *Ghosh*, but what I am saying is if the Judge was introducing an objective element and I say personally he wasn't, but if he was then this Court ought to seize this opportunity to make the law of New Zealand clear and to follow the *Ghosh* standard and introduce an objective, a mandatory objective element into the equation.

Tipping J But I don't think that actually saves this summing up.

Elias CJ No.

Collins Well the converse of that Your Honour is that if there was no objective element in this summing up then the Judge perhaps quite inadvertently is adhering to the traditional law of New Zealand since *Coombridge*. He was leaving it as entirely a subjective analysis.

Tipping J Well it would require quite a lot of thought if we get to this point.

Elias CJ Well I don't think that the Court in *Ghosh* is addressing this point as to whether you have to reasonably believe that you're acting honestly by the standards of ordinary people.

Collins No, now what the Court in *Ghosh* was saying was that the first step in the mens rea analysis is what is the standard of honesty of ordinary reasonable people; second step, did this accused know that he was planning to object to that standard?

Elias CJ Yes but in this case you didn't need to go into the first because it was quite clear that everyone was talking about the same standard. They weren't talking about a different system of morality. In fact they used the word 'morality' in here, so you're really only focusing on the second one and surely it's a misdirection to say 'you must not only believe that you were acting according to those standards of morality, objectively held standards, but that you held that belief reasonably.

Collins I would agree with Your Honour's analysis if there is also agreement that what His Honour was doing was actually not introducing an objective element at all.

Elias CJ I don't understand the solution.

Collins Well okay.

Elias CJ Sorry.

Collins I'm sorry if I haven't made that clear. We're only having this debate if you get beyond the first point which I make and that is that although he used the word 'reasonable' he wasn't introducing an objective element into the equation.

Blanchard J It's hard to read him that way.

Collins Well not when it's looked in context and particularly the way in which the defence was being run.

Elias CJ Well we don't have what the defence said and it would be totally conventional to say of course it was entirely reasonable for her to believe that. She believed it, that's the question for you but it was entirely reasonable for her to believe it because of this and that.

Collins Yes, and that's the way in which the defence case appears to have been summarised by His Honour.

Elias CJ No but he's directed them.

Collins Oh yes I accept that there is this direction.

Elias CJ Yes.

Collins And he's also summarised the defence case and my submission is that his direction is in accord with the summary as portrayed in his summing up by defence counsel.

Elias CJ But he's not entitled to do that. He has to direct in accordance of law.

Collins I accept that he must direct in accordance with law. I have no hesitation accepting that, but what I'm trying to persuade Your Honours is that although he made an error, he didn't go so far as to introduce an objective consideration. The word 'reasonable' by itself wasn't necessarily an objective consideration and then viewed in context it doesn't make much difference.

Elias CJ I understand the argument.

Tipping J But if that fails you want the law to fit the summing up?

Collins Yes, and it's not a very good summing up to try and fit the law into, I accept. I have no hesitation in making that acknowledgement.

Anderson J Mr Solicitor the *Coombridge* case that you mentioned is at tab 5 and is it the law summarised in the first paragraph on page 387 of the report that you had to.

Collins Page 378 was it Sir?

Anderson J First paragraph on page 387.

Collins Yes.

Anderson J That's what *Coombridge* has taken to have established?

Collins Yes.

Anderson J Although it's confined to a s.222 case.

Collins Yes, it has been applied more widely.

Anderson J It has and in *Mr Coombridge's* case there's a question 'well yes I was instructed to place the money in this account but I believe I was entitled to offset it against what he owed me', that type of

Tipping J This direction is not wrong, it just doesn't go far enough. Shall we say this passage is not wrong in terms, it is just that it doesn't explain what's meant by 'shown to have acted dishonestly'. That I think is the possible vice in it, according to your submission Mr Solicitor that we should bring it back into line because it is opened to the view that it's Robin Hood authorising. It may not have been meant to say that, but it's opened to that construction.

Collins Yes and has certainly been construed in that fashion.

Blanchard J Yes, in *Williams* they added the jury must then imply a subjective test.

Collins Yes.

- Tipping J Is that *Williams 1982*?
- Blanchard J It's the next case.
- Tipping J The next case.
- Blanchard J If you look at the first paragraph.
- Tipping J Yes I was involved in that case. He was known as '*Pork Pie Williams*'.
- Collins Well I don't know if I can assist the Court any further on that particular point. Now what I made available to Your Honours during the lunch break is the sentencing notes of the trial Judge. I know my friend will have submissions to make about the weight that you place on those, but I do invite you to consider those very very carefully. I might if I can briefly summarise what the issue was that caused concern. Throughout the trial it would appear there had been intimations given that a psychiatrist was going to be called by the defence to give evidence that might have been able to lay a foundation of her having cognitive disabilities, and the Crown had sought information on that and had two reports from Medical Practitioners ready to counteract that move if it was called, if that psychiatrist was called. Both reports were obtained soon after the accident in 1998 and had concluded that the appellant was not suffering from a disability and was able to return to work. The trial Judge makes it clear that it was the accused who elected not to call the psychiatrist and not to give the evidential foundation to the defence which may have been available. I don't put it any higher than 'may have been available'. Now it's extraordinarily difficult for any of us in this room who were not present to work out what was really happening but what does appear to be clear from the trial Judge's sentencing notes is that a conscious decision was made by the appellant not to call as evidence and it was obviously a matter that troubled the trial Judge and he went on to make some remarks about the appellant's cognitive ability and her behaviour in the courtroom and the way in which she behaved in the presence of the jury and how that behaviour changed when the jury were not present, and even went on to suggest that she was feigning some disabilities.
- Tipping J Was there no suggestion at sentencing that an issue should be resolved by proper evidence on this? I haven't read this. I'm not saying that in any critical sense, but clearly it would at least have been significant for sentencing purposes as to whether this was a genuine disability or a put-up job.
- Collins Well His Honour says that he's given as much weight as he thinks he can to the suggestion of a cognitive disability, and that's as far as he's taken it.

Tipping J Well with great respect I remember using similar terminology when I wasn't really wanting to get into the facts but I was just sort of trying to guard myself.

Collins Yes.

Tipping J I mean that doesn't really pass muster.

Collins Yes, well

Tipping J If there's a discrete issue of fact as to whether or not this was a put-up job.

Collins There was no evidential inquiry to the purposes of sentencing

Tipping J No, well we can't get into that but

Elias CJ So the upshot of this is that there was a psychiatric report

Collins Yes.

Elias CJ Before the Court at sentencing?

Collins Correct, and there were two counter-reports from 1998.

Elias CJ Yes.

Tipping J But at the trial there was no evidence, certainly no medical evidence or quasi-medical evidence supporting cognitive dysfunction.

Elias CJ Apart from the Neuro what's it

Collins Psychologist, yes.

Elias CJ Who was called by the Crown?

Collins Who was called by the Crown, yes.

Tipping J But that's the 4% person is it?

Collins Yes, and who was cross-examined and re-examined on how the so-called learning, sorry reasoning retardness if I can use that work as neutrally as I possibly can, had dramatically changed in the space of two years and how one might influence the results that you get from doing one of these tests that were performed by this person.

Anderson J By performing them deliberately slowly?

Collins Yes.

Blanchard J I notice at para.8 the Judge says ‘the evidence to my mind was overwhelming in showing that you were well capable of work both physical and mental’, and then at para.18, ‘lapsing to some extent into a feigned brain injury approach, and that to my mind as I have viewed the jury when you were giving your evidence, was very much the way the members of the jury saw it. That was often in complete contrast then to what was observed once the jury had left the courtroom’.

Collins Yes.

Blanchard J It’s somewhat difficult for us to go behind that.

Tipping J I don’t think it touches on what for me is the main point in the case that’s the reasonableness direction.

Blanchard J Oh yes I was looking at it really in relation perhaps to the first part of Mr Solicitor’s argument.

Tipping J Yes, yes.

Collins I can’t go any further because I don’t know what was going on.

Elias CJ No.

Collins I wasn’t present.

Tipping J It’s a pity perhaps Mr Solicitor.

Collins Things may have been even more confusing today if I had.

Anderson J The technical difficulty for the defence is that if they’d called in evidence the Crown might have been able to call the other evidence in rebuttal.

Collins Yes, and from what I can ascertain that was made abundantly clear

Anderson J Yes, that comes through.

Collins Yes. Now the final point, and it give me no pleasure to actually have to finish on this, and that is whether or not we need to go into the proviso, if there was an error, in this particular case the error was one of law in the way in which the summing up was conducted by the reference to the word ‘reasonable’ in two places in the directions. That brings into play s.385(1)B of the Crimes Act, and I accept that the distinction between B and C in s.385(1) is sometimes blurred, but where there is a misdirection on law, 385(1)B should be the first port of call. I emphasise that because I am very aware that there is a strong view that if 385(1)C is engaged then it becomes extremely difficult to apply the proviso. So my first submission would be that this is a 385(1)B case and that those who have difficulty in engaging the

proviso where 385(1)C is raised don't have that difficulty where there is an error of law. In other words there could be an error of law but not a substantial miscarriage of justice and no inherent conflict in that

- Elias CJ But a misdirection on the critical point of the trial must surely give rise to a miscarriage of justice. It's not just a technical incidental point of law.
- Collins Well I said this was my first point and I'm not shying away from what will have to be the second point and that is an error that gives rise to a miscarriage of justice may nevertheless not amount to a substantial miscarriage of justice.
- Elias CJ How do you measure it, in you know if
- Collins It's a matter of judgment for the Court and I emphasise for the Court because 385 emphasises in two places that it is for the Court to exercise its judgement and in this case an opportunity for Your Honours to exercise your judgement.
- Anderson J You're right, it's easier to take that view in relation to an error of law rather than the broader ground and where it has been applied as I recall is whether as it seems to be a mistake in the summing up but not of a material nature or ..
- Collins Well I would have thought that an error of law that gives rise to a ground for an appeal would have to on its face be a significant matter. I mean the Court's not going to deal with inadvertent or
- Elias CJ Or he might just to tidy it up.
- Tipping J Would not the word 'substantial' in this context á la *Sungsuwan* necessarily be linked with the degree of effect it might have had on the verdict?
- Collins Yes, yes, I would accept that. I have to say that we were rather hoping not to get into this in this particular and that we will signal that in another case coming up in the year. We do wish to have a very very careful analysis of the interaction between 385(1)C and the proviso and the submission that will be made then is that the proviso shouldn't be read down even in a case where there is prima facie of finding under 385(1)C that the proviso has survived since 1893 in New Zealand, and between 1907 and 1995 in the United Kingdom, and since about 1908 or 9 in both States of Australia to the present day without difficulty and that it shouldn't be diminished in its effect. That the purpose of the proviso was to negate the old Exchequer rule, first developed in 1835, whereby any error, particularly inadmissible evidence at trial automatically gave right to a re-trial or the allowance of an appeal, and that was abolished in 1873 in civil cases and in New Zealand in 1893 with the adoption of Stevens Code in our Criminal Code Act, and in

England in 1907, and in India in 1893, and in Australia in the early part of the last century.

Tipping J Would you like us to allow the upcoming appeal on the spot Mr Solicitor?

Collins Just giving you a poor taste – small appetiser.

Anderson J Well indicating to us I think that there will be a later case where there will be much more extensive argument on a difficult issue.

Collins Yes indeed, indeed.

Tipping J What is that later case just as a matter of – are you able to say?

Collins Owens, and it's scheduled for November.

Blanchard J That's primarily on para.A isn't it?

Collins Well it really does call into issue all of 385(1), including the proviso. But anyway just at this point we would simply say that it would be unfortunate if the proviso was read out of existence where there is a miscarriage of justice and that the purpose of the proviso was to negate the Exchequer rule. The remnants of the Exchequer rule are found in s.385(1) and the four paragraphs that are lettered A through to D and the proviso is the provision that gives the Court its overriding discretion when it weighs up all of the evidence; looks at everything in the round and says right there was a mistake; it may have been a miscarriage of justice, but at the end of the day exercising our discretion, we believe there was no substantial miscarriage of justice.

Blanchard J Just a small one.

Collins Yes, it makes no difference in the overall scheme of things.

Tipping J And if all that fails do you want a retrial?

Collins I had to say that if a retrial were ordered in all likelihood I would not proceed with it. If the Court didn't do so I would enter a stay.

Anderson J But there is value in the convention of the Court that makes the order and the Solicitor-General makes the decision.

Collins Yes, but I just wanted you to be aware of what the likely is going to be if we get to that point, and I think it's only fair to the appellant to know that as well.

Anderson J It's not a case where there would be any purpose in it.

- Collins And we'd be struggling to see now that the prison term has been served. Unless I can assist you those are the only submissions I wish to make.
- Elias CJ Thank you Mr Solicitor.
- Collins Thank you.
- Elias CJ Yes Mr Davey.
- Davey Your Honours could I be heard in reply just on these matters?
- Elias CJ Yes Mr Davey.
- Davey In my submission my learned friend has incorrectly summarised the defence case as being 'I did not think I was working' is the way that it's been presented to the Court as a summary, whereas it's quite different in my submission the way the defence was that it especially in relation to the capacity to work that 'I did not think I had to advise them of my capacity to continue work as a teacher' so there's quite a difference because on any analysis, I mean she was no doubt carrying out some work for the company, there's no doubt about that, but what her defence was is 'I only thought I had to advise them of my capacity to return to work as a teacher to my old employment', and so I take issue with the way that the defence case has been summarised on that because it flows on in terms of the need to direct on ACC legislation and the definition that was given to the jury on direction of what amounted to work. My learned friend also seemed to accept in his submissions that if in terms of the term 'pecuniary advantage' what I recall him as saying is that if there is a legal entitlement to whatever was received then you can't obtain an advantage, which is effectively what my submission has been that a pecuniary advantage is a benefit to which there is no entitlement and my learned friend seemed to accept that if there is a legal entitlement to it then there's no advantage.
- Tipping J He accepted that to the point that only if it was an absolute entitlement, not an entitlement that might emerge later after discretionary assessment. That was the fundamental premise of his distinction between 1 and 2, I think.
- Davey Yes Sir, yet what my learned friend relied on in terms of supporting his position was the decision of *Thomas* and in that decision which is behind
- Tipping J No he relied on *Thomas* for his second proposition. I'm just looking at my notes Mr Davey. I have *Thomas* clearly alongside Mr Solicitor's second proposition. Misleading payer into not making inquiries which might lead to non-payment, is my summary of it, but that was what *Thomas* was cited in support of.

- Davey Yes well I understood it was more broadly than that but I mean I could be wrong but perhaps if I can just in terms of *Thomas*, in terms of that second part that my learned friend relied on, what was decided in that case at para.32 was that the Court of Appeal actually determined that, or referred to the fact that the learned Judge was satisfied that the defendant in that case was able to and did work on a day-to-day periodic basis to an extent that proved his incapacity had ended at all times. So on the facts of that case the Court actually said we are satisfied that it was proved that he had a capacity to work. He was no longer incapacitated and therefore he was rightly convicted, so the Court, well it said that in terms of whether or not the second limb where they said that, the second limb that my learned friend relies on, they said it wasn't necessary for them to decide the question in that case. They said that it was just merely arguable, so they
- Tipping J Well please take issue with my premise if you think I'm wrong. I was just saying how I understood Mr Solicitor, but I may well have that wrong. Are you saying that in any event *Thomas* doesn't support Mr Solicitor's second proposition, other than by a side wind?
- Davey That's right, I mean it was raised as an issue as a possibility but what the Court actually decided in that case was that ACC approved that the defendant in that case was no longer incapacitated and so as a result decided that he was rightly convicted in that case and really and so in my submission it actually in some ways supports the argument that I'm seeking the Court will adopt and that is that ACC really needs to prove that in this case she was no longer incapacitated because while it could be said that there may be an advantage to her from a lack of investigation, the word 'advantage' needs to be read with the term 'pecuniary advantage', and a pecuniary advantage based on my submission is an advantage in money terms, along those lines, so there must be not just an advantage of avoiding the risk of investigation, but actually a monetary advantage to the appellant.
- Anderson J Do you think there might be an advantage in actually having paid something to which you have only a contingent entitlement?
- Davey Well I would argue that it's not a contingent entitlement; that you're actually entitled to it until ACC determines that you are no longer incapacitated, because that's how the legislation
- Tipping J But if you fraudulently put them off the scent in that respect, I have to say that if Mr Solicitor's proposition is supported, it seems to me to be pretty sensible policy, otherwise there's going to be quite a major gap in this.
- Davey Well I would say there's not a major gap in it as a matter of policy because in my submissions which I've set out the relevant ACC Offence Provision at page 10 of my submissions

Tipping J You mean the alternative charge would cover it even if this one doesn't?

Davey That's right, which specifically provides that you commit an offence if you mislead ACC, whether or not you are entitled to receive the payment or not.

Anderson J And the remedy is what to sue the money it hadn't received.

Davey No, no, no, it's a summary offence with either a penalty of three months or a fine not exceeding \$5,000.

Anderson J But the fraudulent person who paradoxically commits no crime of fraud as long as they succeed in it is that they're liable on summary conviction and amenable to a civil suit, that's the result. If you have trouble with proposition but as long as you succeed you can't be prosecuted.

Davey Well I'm just not quite sure in terms of succeed because if you're legally entitled to the money

Anderson J But your proposition was that as long as they're paying it you're entitled to it. That's what I understood you to submit. As long as they keep paying it you're entitled to it until they decide that you're not entitled to it, or did I misunderstand you.

Davey Perhaps I didn't make myself quite clear. What I was trying to say was that it's not so much a contingent right to receive compensation. You're entitled to it until you are no longer incapacitated. Now whether ACC are aware of that or not is another thing, but you are actually entitled to that compensation until you actually are no longer incapacitated.

Anderson J And whether you are in many cases will be a matter of judgment.

Davey That's right, it will, it will, but then at the same time a person's potentially at risk of losing their liberty for a very serious offence and so on that basis in my submission it needs to be actually proved that they weren't actually entitled to it.

Anderson J I can understand your point now, but whether you get paid might be a matter of discretion, but whether you're entitled is a matter of fact.

Davey Yes.

Anderson J And if in fact you are entitled, a wrong decision is a matter of discretion by the Department, doesn't mean you're not entitled, it just means you're not getting your entitlement.

Davey Yes, yes.

Anderson J So on your approach then there wouldn't be a pecuniary advantage in getting something that you're actually entitled to and if the allegation was that you weren't entitled and this requires an examination of your physical and mental condition, then the Crown has to prove those pre-conditions to disentitlement.

Davey That's correct.

Blanchard J Well that comes back to the point I was making before lunch that it may be the focus here is on the purpose or in the new language at 228, the intent. And even if you had an entitlement you may still have had the dishonest intent.

Davey Yes, and that's a difficult issue.

Blanchard J Well it is difficult and as I said it raises the question with *Ruka*.

Elias CJ That's not the way though the case was run.

Blanchard J No, I know it's not.

Elias CJ And it's not

Blanchard J But I'm looking at trying to make sense of the section.

Elias CJ Yes I think that's a powerful argument that way, but in this case they equate it what she got, and culpability was assessed on that basis so I don't think the issue really presents itself here.

Tipping J If you deliberately lie, you must at least according to your own view think that it's to your advantage to do so, and that advantage sounds in money. I'm not trying to be cute Mr Davey.

Blanchard J Well it mightn't.

Tipping J It mightn't, but here it must sound in money, in that you're going to continue to get the money that you know you might not get if you told the truth. I mean otherwise why are you going to lie? Assuming we've reached this point that you know that there was a fraud and so on established.

Davey Yes, yes, that's right, that really comes down to my submission of intent to defraud and that aspect of the mental intent as opposed to

Tipping J No it's the purpose for which as I agree with my brother, it's the purpose for which you're using the document. It is to get money, and the reason you're being fraudulent is that you obviously don't think you're going to get it, or you may not get it if you are honest. You're

buying off the risk if you like that honesty will cost you money. Now I would have thought that was a pecuniary advantage.

Blanchard J Well it's an advantage, I'm just not sure that it's a pecuniary advantage.

Tipping J Well no doubt that's

Blanchard J These are difficult sections.

McGrath J It's certainly an advantage in terms of your economic interests. This was what *Thomas* was prepared to find, but hesitant to go further because of *Ruka*. It just sort of foreshadowed the argument after.

Davey The section itself refers to pecuniary advantage and also valuable consideration for the purpose of obtaining any privilege benefit, pecuniary advantage or valuable consideration, and it's now been amended under s.228 to delete references to 'privilege' and 'benefit' and confine itself and based on a decision in the *Queen and Cara*, the word 'service' as well that I think has been introduced in there it is has been submitted that really that was to clarify that as the Select Committee report stated, that the offence relates to financial benefits and I set out that background at paras.31 and 32 of my submissions, so the section's been narrowed rather than broadened in terms of what amounts to a benefit or an advantage and in my submission the pecuniary advantage therefore should be some definite financial advantage such as for instance in *Gunthorp* by getting more favourable terms, or something that could be identifiable in money terms really, rather than just simply the risk of avoidance of an investigation which becomes nebulous and also uncertain as to what degree of risk can become a pecuniary advantage. There is a very small risk that you might, I mean it just becomes so difficult to work with that sort of concept in my submission in terms of directing

Tipping J So you're really asking to reject the Solicitor-General's second route I suspect?

Davey Yes.

Tipping J As an available route howsoever framed or as framed in his terms or anything equivalent to it. Anything with contingencies in is a 'no-no, because it introduces the possible uncertainty into the whole field.

Davey Yes.

Tipping J And you're saying it's not supported by *Thomas* and it would be an unsound thing to introduce?

Davey Yes, and that the ACC is not left without remedy because there's the s.308 that

Tipping J The jury in this case must have thought that your client wasn't entitled the way the case was presented, so I'm not sure whether we really have to get into that.

Davey No although it depends presumably how the Court wish to answer the ground of appeal that whether or not it includes the risk of whether a pecuniary advantage includes the avoidance of risk of losing compensation.

Tipping J But Mr Solicitor made quite a point about the fact that your client never really went into to bat on the basis that she actually was entitled, as I understood the point, the case was fought on the basis of 'if I wasn't working or I thought it was only work as a teacher' etc etc. Did she go into the bat on the basis that she actually was entitled?

Elias CJ Well if she wasn't working she was entitled, is that

Davey Yes.

Tipping J Well I'm just inviting this because I think the Solicitor-General touched on this in his introductory comments as I recall.

Davey Yes well on the evidence her defence was that she was entitled to receive compensation and in fact this is what she was doing and beyond the investigation she still continued to receive compensation and so it certainly wasn't accepted in my submission on the evidence that she was no longer disentitled to receive compensation.

Tipping J I suppose it's a bit more subtle than I've put it. She said she was entitled because she was not working.

Elias CJ Yes.

Blanchard J As a teacher.

Tipping J With that over

Elias CJ Well I'm not sure that it's actually with respect to the Solicitor-General, I'm not sure that it's as helpful to put it in that sense. We should really be concentrating on the use of the document and whether that was dishonestly done.

Tipping J And whether for the relevant purpose.

Elias CJ Yes, yes.

Tipping J That's

Elias CJ Yes, I know that that's what we

Anderson J She was saying my declaration is not false because I wasn't working as a teacher and I thought that's what they were interested in.

Elias CJ Yes.

Davey Yes.

Tipping J And it wasn't in employment as I understood the term.

Elias CJ Yes.

Davey That's right, and perhaps just on that point can I draw the Court's attention just to – there was talk about earnings that she received in terms of the company, but I just draw the Court's attention to my submissions at page 15, para.75. There's specific sections in the Act that actually cover earnings as a shareholder employee and so effectively it needs to be earnings that need to be disclosed to the Corporation for the purposes of abating compensation are earnings that are either source deduction payments in terms of well I guess, source deduction payments under the Income Tax Act, or otherwise deemed to be income derived, or otherwise the Corporation can actually determine what is reasonable for a person in that position to actually have been reasonable remuneration, so it's not simply a situation that any money that you receive as a shareholder employee necessarily disentitles you to a weekly compensation, and this is my submission again, that it's not just a simple case of whether she was working and earning money, there's quite specific legislative provisions that govern what entitlement and entitlement to receive earnings. The other matter my learned friend raised was in terms of the sentencing decision of His Honour. In my submission the sentencing refers to conflicting psychiatric, oh not psychiatric, well one was a psychiatric report proposed by Dr Newburn, a Neuro Psychiatrist, but there were conflicting reports by the Crown from a Dr Hardie, who was an Orthopedic Surgeon back in 1997, and also to a later report in 1998. Now obviously those reports or that evidence wasn't called at trial and in fact one would have thought if the Crown could have called this evidence presumably as part of its case rather than simply as a matter of rebuttal, and

Elias CJ Well the called the Neuro Psychologist.

Davey That's right.

Elias CJ So, yes.

Davey And the Neuro Psychologist actually in my submission gave evidence that was favourable to the appellant in terms of her cognitive functioning and so the fact that Dr Newburn wasn't necessarily called, I mean who knows what discussions were had in terms of tactical

advantages by calling that Doctor or not. I mean there could have been a decision made that well we've got the evidence out from the Neuro Psychologist, why do we need to go any further and raise a can of worms and so really the point that I wish to make is that on the evidence there was evidence that she had impaired cognitive ability.

Elias CJ Was that mentioned at all in the summing up? I didn't think it had been. I mean it's just that the Judge himself in his first paragraph says the verdict must be taken to have both rejected your denial and equally rejected any suggestion of Ms Hayes, your abilities to function cognitively.

Davey Yes, it doesn't seem to have actually been covered in the summing up at all. Now perhaps the only other matter I would like to just make some submissions on is in terms of this test of reasonableness and in terms of dishonesty. What the High Court of Australia seemed to accept in the *Peters* case was that direction on what amounts to dishonesty depends on the particular legislative provision, and we now have s.217 under s.288, which is quite clear in terms of what dishonesty is that it's acting without belief that you're authorised to do that and so in my submission there is in effect actually I mean it's been acknowledged in the commentary that it's taken away a limb of the *Coombridge* argument that you were acting, even though you knew you were acting in breach of your legal obligations, you thought you could nevertheless do that in a particular circumstance of the case because that would no longer be able to be left effectively to a jury as a defence because it's simply dishonestly now, so it's actually narrowed *Coombridge* down in that regard and *Coombridge* actually, I mean the test set out for fraudulently or what was accepted later to be an intent to defraud is that the accused acted deliberately and with knowledge that he's acting in breach of his legal obligation. Now in my submission that rules out the Robin Hood type defence because even if the person says well I knew it was wrong to do this but I nevertheless thought that I was justified in doing it, you'd still be acting deliberately in breach of your legal obligation, and so there's no need in my submission to go down the what seems to have motivated the Court in *Ghosh* about having this reasonable element in it, which seemed to be more concerned with trying to rule out the Robin Hood type of defence.

Tipping J That means if you deliberately breach your contract you're dishonest. I think you have to have a bit more than just deliberately breach your legal obligation.

Anderson J Well it's claim of right brings *Coombridge* back in again.

Tipping J I think it's a wee bit more subtle than just saying you've got to be deliberate and you've got to be aware that you're breaching a legal obligation.

Davey Yes, but I think His Honour Justice Sampson said there's nevertheless the colour of right or claim of right type of defence that can be set up anyway in terms of that you believe that you're entitled to act in that way, that you believe that as is now defined as a claim of right a belief that the act is lawful although that belief may be based on ignorance or mistake of fact or any matter of law other than the enactment against which the offence is alleged to have been committed. And that makes no reference to it being a reasonable belief and

Tipping J Once you return to reasonableness I am more comfortable. This is your essential point isn't it, without wanting to dissuade you from engaging more widely, but your essential point in this case is that it was a misdirection to introduce reasonableness in the way it was and it can't be saved by the proviso?

Davey Yes, it is, yes.

Tipping J And that's really all you need, unless we're going to change the law to make this direction okay.

Davey Yes, that's

Tipping J And you invite us strongly not to do so.

Davey Yes, that's right, that's right, and essentially because *Coombridge* in this approach, and *Ghosh* has been considered by this Court, or by the Court of Appeal rather in *Williams* and further in the *Queen and Firth* and that approach was rejected and in my submission the law in New Zealand is more than adequate in terms of relying on subjective belief, but a jury no doubt looking at the reasonableness of the belief to decide whether or not it was genuinely held.

Tipping J Do you make the point that even if we do change the law as suggested by the Solicitor-General, that's not actually going to save this summing up?

Davey Yes, yes.

Tipping J I wondered when you were going to say that.

Davey Yes, no, that's right in terms of the way that this, yes, yes I do.

Tipping J That's really your point isn't it on this question? You don't really need to engage on whether we change the law as the Solicitor-General invites us because your ultimate position is that even if we do it's not going to effect the outcome?

Davey Yes, yes, that's right, that's right, but perhaps I felt duty bound to also address the fact that in my submission that the law shouldn't actually be changed on this particular area.

- Tipping J Well I don't want to prolong it but I haven't got a firm grasp of why you're saying that.
- Anderson J One might make the proviso more apt.
- Davey In terms of why the law shouldn't be changed
- Tipping J In the way the Solicitor-General said. Are you able to encapsulate that in two or three short sharp sentences, because I would be helped by that, but it's just at the moment I haven't really got a grasp of what you're saying in that respect?
- Elias CJ Well the suggestion of change may be based on the mis-reading of the authorities anyway.
- Davey Perhaps, I mean the key point now is that under s.228 dishonesty is defined as the absence of a belief in authority and there's no reference to it being a reasonable belief or a belief on reasonable grounds, and the cases that my learned friend refers are on
- Tipping J I understand the statutory point completely. I was just interested in whether there was anything of a wider, more policy-based argument that you were advancing.
- Davey Well essentially the criminal law is traditionally, in terms of someone's liability for an offence is based on a subjective intent, is a traditional approach and there's nothing on the wording of the section in my submission to adopt a different approach, so really that's the matter of policy that I'll be relying on. Perhaps finally, in terms of the summing up there's also the passage that can I just draw your attention to page 41 of the summing up. In fact it's really the last direction to the jury before they retired is that he says 'what I understand Mr Barnsdale has asked is acquittal on all charges asking you to accept here that the accused in these circumstances had a claim of right, had a reasonable belief in the way that I've explained in terms of the elements of the offence and the defence to that'. So when one looks at the summing up overall, that was the last thing that was left with the jury is that it was a reasonable belief.
- Anderson J I can imagine counsel putting it to the jury on that basis, if there was a risk that the jury might think she didn't actually believe it, but it would be reasonable to do so.
- Davey I think it would have to be that she didn't believe that and it was reasonable when you look at all the evidence for her to have that belief.
- Elias CJ The best basis for an inference that she did believe that it was reasonable to do so.

Davey Yes. In terms of the proviso my learned friend refers to, I mean I

Elias CJ We're not bothered by the proviso Mr Davey.

Davey Alright, thank you, I won't go into that. Unless there is any questions or anything really those are my submissions.

Elias CJ Thank you Mr Davey. Thank you counsel. We will reserve our decision but that you for your careful argument and interesting argument.

3.30pm Court Adjourned