IN THE SUPREME COURT OF NEW ZEALAND SC 82/2014

[2015] NZSC Trans 9

JONATHAN DIXON

Appellant

v

THE QUEEN

Respondent

Hearing:	24 March 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	Appellant appears in Person D J Boldt and F G Biggs for the Respondent

---

CRIMINAL APPEAL

ELIAS CJ:

Yes, Mr Dixon, you're appearing for yourself?

MR DIXON:

Yes.

ELIAS CJ:

Thank you.

MR BOLDT:

May it please Your Honours, Boldt and Biggs for the Crown.

ELIAS CJ:

Thank you Mr Boldt and Mr Biggs. Yes, Mr Dixon. We have, of course, the written submissions that have been filed on your behalf, including the reply submissions, and we've read those. So this is the opportunity for you to highlight anything that's in those submissions that you particularly want to highlight. You will have a right of reply after Mr Boldt has addressed us, but only on matters that he develops orally. So nothing apart from that in your reply. So if there is anything you can stand in at the lectern that is probably easiest for you and then it is recorded there.

MR DIXON:

Yes Ma'am.

ELIAS CJ:

Thank you.

MR DIXON:

So I just tell you what happened in regards to the, to what's been submitted to you, the instructions, submissions?

ELIAS CJ:

You really need to, if there's anything that you particularly want to highlight or develop, this is your chance to do that.

MR DIXON:

Okay.

ELIAS CJ:

Thank you.

MR DIXON:

First off, thank you very much for hearing me –

ELIAS CJ:

And I should say Mr Dixon that it is very nice of you to wear a jacket but if you would like to take it off you're very welcome too, all right?

MR DIXON:

Thank you.

ELIAS CJ:

It's a bit hot in here.

MR DIXON:

Yes it is. Why I'm here, Your Honours, is in regards to what I believe is a miscarriage of justice in regards to my Court case which was held on the 15th of April in the District Court of Invercargill. Now in my submissions through my lawyer there were three points of which were placed to you. Point 1 was in regards to the property and is a copy of a copy and so forth. The second one was in regards to a swapping of the charge and could indeed that be done. The third one, the third point which is what I call point 3 is in regards to the trial and what I say was a miscarriage of justice in regards to being found guilty and so forth. So what I want to highlight here is about that particular point and I know my learned friend here Mr Boldt is skipping the reply and submissions, and I've read those, and I don't, there's no disrespect in anything I say here towards him in my reply, but what I want to do is to be able to, just to tell you what happened and then why I believe that I wasn't given a fair trial. Now, obviously I have to prove that to you, and I shall.

Firstly, I am someone that takes a vested interest in regards to my freedom, I suppose everyone does, but in my case what I do is I became heavily involved in the case itself and understanding about the charge and the disclosure and the law in regards to it. Now, when I was charged initially on the 13th of September, obviously I requested disclosure myself and I obtained the case notes along that way. Now it was a period of time until I actually appeared in front of His Honour in the High Court of Invercargill and prior to that I had been assigned through Legal Aid Mr Westgate, who was my trial counsel. Now prior to that Court case Mr Westgate and I had met many, many times and emailed and so forth in regards to it. Now when I say I prepare my case I do, I do that in depth, and I do that by writing questions, obtaining evidence in relation to the charge, and my defence structure and the defensive

nature of how I'm going to put that forward, and how I'm going to instruct the lawyer to be able to do that. So that's what I did. I set upon a path of being able to create the only defence of which I had for the charge of 249(1)(a) which is accessing a computer system for dishonest purpose. Now I put all of that together and I put in, I obtained my witnesses and my witnesses' statements and then I obtained from disclosure the Crown side, and I created questions and I obtained the evidence in relation to what it was that I had done previously for Discovery Lodge Basepackers, ACB Holdings which was the people who own the system in which I was to have accessed it or was convicted of accessing it. Now I thought everything was understood and everything was okay when it came to the time it was to go to Court. And as I said in the past there were lots of meetings and I had given over my evidence, I had given over volumes of projects and work and everything else that was related to my defensive side, my defence strategy because as I said before, the only defence that I had was the claim of right. I had to prove that, not just that I had a belief that I could access the computer system, that I held an honest belief and to be able to prove that honest belief I had to show that I had accessed, not just only accessed the system before but I had obviously undertaken projects in the past for the company in regards to research, marketing, competitive and comparative analysis of competitive businesses and so forth and so on. Now this doesn't sound like a bouncer or this doesn't sound like someone as it was that was throughout the case, as the Crown made out, a rogue bouncer that accessed the system. My claim of right defence was solely put together for my lawyer to be able to proffer my defence properly as it was set down for him to the jury. Now I say I was robbed of that. I say that what happened in that case with that lawyer in the Invercargill Court was that that miscarriage happened because my lawyer changed the defensive structure, the nature of what my defence was. Now –

ELIAS CJ:

Mr Dixon I think we do understand that that is a complaint you've had throughout and it was the subject of the submissions you put in after the hearing in the Court of Appeal –

MR DIXON:

Yes Ma'am –

ELIAS CJ:

The problem we have is that is not greatly developed in the written submissions that we have and really we're confined at this hearing to the submissions that the parties have put forward and that the respondent, the Crown, has had an opportunity to respond to. So I'm not sure that we can get very far in going back to the beginning.

MR DIXON:

I understand Ma'am, it was the submissions on point 3 and is in regards to the – one of the points was the trial lawyer failed to follow instructions –

ELIAS CJ:

Yes.

MR DIXON:

– from what I understand and that was, it was what –

ELIAS CJ:

You say that the trial lawyer didn't put forward the evidence that you say substantiated the case that he had accessed the video recordings before, for purposes which were congruent with those of your employer?

MR DIXON:

Yes.

ELIAS CJ:

Yes.

MR DIXON:

Yes and what I'm saying Ma'am, with all due respect, is that within that point 3, that was the only point was what I was bringing forward. In the Appeal Court with my Appeal Court lawyer, when I – after I was sentenced for the charge I filled out form 3 myself and I submitted it and I wrote out what it was, which was, which happened in the Court which I believed was a miscarriage of justice and I filled that and sent that away and then I was assigned a lawyer –

ELIAS CJ:

Sorry when you're talking about point 3 by the way, perhaps we should be on the same page –

MR DIXON:

Sorry four.

ELIAS CJ:

– what are you referring to?

MR DIXON:

Under the last, the last section of the submissions.

O'REGAN J:

They're on page 13.

ELIAS CJ:

Yes, thank you.

O'REGAN J:

But that's about the Judge's summing up isn't it, it's not about what your lawyer did?

MR DIXON:

That was, well part of it was about the Judge's summing up. But the Judge's summing up was in relation to that when he summed up he summed up the case of which, of which the lawyer, the defensive lawyer put through. Now part of that – I understand that that probably should have been done within the Appeal Court and that the right of reply for those lawyers, and I absolutely agree that the waivering of my rights so therefore confidentiality so I understand the Courts can speak to those people and get affidavits and so forth to be able to have a right of reply for it. But the problem there was, is that I thought my lawyer was doing that. I had, I do not know the process in regards to that. I only found out afterwards that those are the specifics of what were meant to happen at the time inside the Appeal Court and what I have, what I have is letters of acceptance from my lawyer saying that he will add the property point to the main point which was the miscarriage of justice in regards to the lawyer's instructions. But nine days out before the appeal case was to be heard my lawyer sent me a letter saying, and I have the letter here, saying that he was not

going to represent me on that point anymore and that's, that left me in the lurch to be able to present my side, to be able to – because in that form 3 I'd said that I would speak orally and I would give evidence in regards to it. But when my lawyer pulled out I was left without a lawyer so I submitted a letter immediately to the Court of Appeal asking for leave and that I wished to speak and on the subjects of what I put forward for my submissions in regards to the trial Court lawyer and counsel's misconduct in Court and I had a reply back from His Honourable Harrison J stating that I have a lawyer and that my lawyer's meant to take care of this. So as you can see Ma'am I was left in a position of somewhat limbo because my lawyer says that he wasn't going to go forward on it and I needed – so what was then developed was that I would do my part, do my submissions to the Court of Appeal and my Court of Appeal lawyer would take the submissions forward and present them to the Court of Appeal and he didn't. When he submitted my submissions he just wrote "no comment" on it, and that is why, that is what left me to be here in front of you now. Like I know what I say, like by saying the trial Court lawyer, trial counsel failed to follow instructions and that those instructions weren't, those questions weren't asked, those answers weren't introduced, so forth and so on, there was a miscarriage. And then, now I'm saying that the Appeal Court lawyer, when I went to him, he said, "Yes," and then everything was going fine and then he pulls out and leaves me in the lurch and I submit I know that sounds crazy but I can show you, I can show the letter, I can –

ELIAS CJ:

I think there was a minute of the Court of Appeal saying that you were appearing by counsel and therefore that they would not hear you –

MR DIXON:

Yes.

ELIAS CJ:

– so that the arrangement that you and your lawyer may have come together that you would put forward some submissions and he would put forward some submissions was not one that the Court accepted, as they were perfectly entitled to since you were being represented.

MR DIXON:

Yes Ma'am and if you see, with all due respect Ma'am, how that would have, how that left me because I was only nine days out from the hearing and I, as with the ability to waiver the right to have that confidentiality with counsel so therefore they could – I don't know I'm sure what happens but ask counsel questions or grab affidavits and so forth, it was all taken from me and there is –

ELIAS CJ:

But the problem you face is that we don't have any Court of Appeal determination on the matters that you say you would like to have argued in the Court of Appeal but weren't argued in the Court of Appeal, so the Court of Appeal had no argument on them. We don't have a decision by the Court of Appeal and in this Court appeals come to us only with leave of the Court and only if there's a substantial matter of public interest effectively. So this Court doesn't operate as a general first Court of Appeal. So the points you want to run haven't been run and are not really likely to have been matters that we would have given leave on to come here.

MR DIXON:

Ma'am in the judgment from the Court of Appeal they said at the very end that my submissions were outside the scope but then they also said that they have read the submissions and that there wasn't any part or a whole that would have caused a miscarriage and then –

ELIAS CJ:

Yes.

MR DIXON:

– I, we put forward that that shouldn't have been allowed because I should have had the ability to have an appeal as everyone's right – sorry Ma'am as you know that. That everyone –

ELIAS CJ:

Yes.

MR DIXON:

– has the right to appeal on their conviction to a higher Court, to the appellant Court which I did but they didn't hear it because my lawyer didn't take it forward as he was

instructed to but in that little piece at the end, my Supreme Court lawyer argued that it should've been heard, that those points in that memorandum should have been heard and that –

ELIAS CJ:

Well you were given, you were given leave to put these matters forward but the written submissions we have deal only with the – with an alleged error the Judge made in summing up to the jury. So that matter is still open for you to argue but none of these others matters have been raised in the written submissions we have before us.

MR DIXON:

Sorry Ma'am but I have an email here from my lawyer in regards to the submissions that were made and the first submission is the trial lawyer failed to follow instructions which has always been my original submissions. So –

O'REGAN J:

We just can't deal with that now. We don't know what your trial lawyer – we would have to hear from your trial lawyer to know what –

MR DIXON:

Yes, I –

O'REGAN J:

It hasn't been put forward and isn't now before us, so we can't deal with it.

ELIAS CJ:

The argument that we've got, we've got a third ground of appeal, miscarriage of justice.

MR DIXON:

Yes.

ELIAS CJ:

Have you got the submissions that have been put in on your behalf? The submissions on behalf of appellant.

MR DIXON:

Yes and was that the one dated the 5th of December 2014?

ELIAS CJ:

Yes that's right, yes. The point that's being raised with you really is that this third ground of appeal which is on miscarriage of justice –

MR DIXON:

Yes.

ELIAS CJ:

– is all about the Judge's summing up. There's no indication in – there's no submission that's been put to us about trial counsel error.

MR DIXON:

I apologise Ma'am, I was to the understand that submissions were to contain the trial lawyer failed to follow instructions. The last letter that was sent to the Supreme Court in regards to allowing me to speak on point three, that the points that were raised here in this letter that was sent were the ones that I could argue in front of – well not argue but talk to you about in this Court appearance here today with my lawyer and the response was obviously that we can't speak at the same time, so one of us had to speak.

ELIAS CJ:

But my point is really a slightly earlier point than that which is that the whole point of getting written submissions is so that everybody, the Court and the Crown know what's going to be argued.

MR DIXON:

It would be fair.

ELIAS CJ:

And there's nothing in the submissions as developed about Crown counsel error. It's about the Judge's summing up. There's a general proposition put at paragraph 68 which refers to the submissions which the Court of Appeal were outside the scope of the leave granted but then at 69 it returns to the misdirection to the jury. It doesn't

develop any submissions except for the misdirection point. So we can hear you on the misdirection point if you want to expand on that.

MR DIXON:
Yes.

ELIAS CJ:
But otherwise we've got nothing really before us.

MR DIXON:
I see, which leaves me in a bit of a pickle I suppose. Would it be okay just to have one minute just to look at –

ELIAS CJ:
Would you like to hear the Crown submissions first Mr Dixon and then respond to them, would that help you? I mean you're very welcome to carry on developing yours if you want to but it may help you to hear the Crown first.

MR DIXON:
Yes, okay Mr Boldt –

ELIAS CJ:
Well would you like a few minutes to think about it, think about what I've just said to you.

MR DIXON:
Yes Ma'am.

ELIAS CJ:
And have a look to see if there's anything that you want to develop in the submissions, the written submissions we have, including the reply submissions your counsel has filed.

MR DIXON:
Yes.

ELIAS CJ:

So we'll take a short adjournment of 10 minutes and then after that you may want to expand on those submissions or you might want to hear first from the Crown but we'll take a 10 minute adjournment now.

MR DIXON:

Okay.

ELIAS CJ:

Thank you Mr Dixon.

COURT ADJOURNS: 10.26 AM
COURT RESUMES: 10.42 AM

ELIAS CJ:

Yes Mr Dixon, did you want to speak to us further at this stage?

MR DIXON:

It would be all right if Mr Boldt had a go.

ELIAS CJ:

Thank you. Yes Mr Boldt.

MR BOLDT:

May it please Your Honours, from the Crown's point of view the critical issue that arises on this appeal is a very discrete and important point of law and that is whether a digital file is an item of personal property. That issue arises in this case because the Court of Appeal, in a holding it acknowledged was counterintuitive, held that the video footage in issue in this case, the footage, there's no dispute, the appellant obtained from his employer's computer, was not in fact a piece of property. The Court drew an analogy with a line of cases which have held that so-called pure information is not property and the Court reasoned by analogy that those cases also governed the present situation and it's our submission, with respect, that the Court of Appeal was wrong in that regard and that a digital file is every bit as an item of personal property as the physical items we can see and hold and touch and are immediately familiar with.

ELIAS CJ:

So do you say that for all purposes Mr Boldt, or just for the purposes of these provisions?

MR BOLDT:

It is necessarily for all purposes Your Honour and the reason I say that is because the definition of property in the Crimes Act 1961 is a deliberately all embracing one. The definition, the way property is described in the Crimes Act and I can read the definition to Your Honours is, "It includes real and personal property and any estate or interest in any real or personal property, money, electricity and any debt and anything in action and any other right or interest." So it's an inclusive definition, it's not an exhaustive definition and it is a deliberately circular definition. So the Crimes Act says basically property means everything that can possibly be described as property and we then need to look to the wider law of property to determine whether something qualifies. So the answer Your Honour is if a digital file is property for the purposes of the general law, then it is also property for the purposes of the Crimes Act.

GLAZEBROOK J:

Well do you have to argue that or can't you argue that property, because it's looking specifically at accessing computers in these sections, does actually have a meaning that then can be coloured by the context in which it's used and doesn't necessarily have to be a wider definition of property?

MR BOLDT:

Well Ma'am yes that is another way of approaching it and if that's as far as we need to go and then to leave the broader question for another day then that – then obviously that's a matter for the Court and I do take Your Honour's point, because when you're talking about a provision that deals with accessing a computer with a dishonest intent and obtaining something, well there's only a limited range of things you can actually obtain when doing that and if a digital file isn't property, the question is well what sorts of things are we talking about there and it's particularly incongruous given the range of other options that are available in section 249(1)(a) including a valuable consideration and a benefit.

ELIAS CJ:

Well it may be, of course, consequential, the section may be concerned with accessing a computer and extracting money from a bank account.

MR BOLDT:

Well that is a possibility, although that would also be well and truly covered by the other provisions within the section. I've approached the case, as Your Honours will have seen, on a broader footing and that is in part because the Court of Appeal also approached this on a very broad footing. The Court's ruling in this regard has implications that go well beyond the Crimes Act. What the Court has held is quite simply that a digital file is not property and that will apply whether we're dealing with section 249 or if we're dealing with an action for conversion, if we're dealing indeed with –

ELIAS CJ:

An action for conversion under the Act?

MR BOLDT:

No an action for conversion at common law Ma'am.

ELIAS CJ:

Yes but why would the definition in the Crimes Act apply there?

MR BOLDT:

Well Your Honour the ruling in the Court of Appeal is quite general in its application. The Court did not purport to confine this narrower definition of property section 249 and nor could it, given the way the Crimes Act takes it colour from the broader law of property. The definition of property in the Crimes Act is not and never has been meant to be exclusively for the purposes of the Crimes Act. The reason it is circular and all embracing is to ensure that anything that qualifies as property –

ELIAS CJ:

Sorry, I just don't quite understand that submission. The definition in the Crimes Act is not meant to be just for the purposes of the Crimes Act.

MR BOLDT:

No Ma'am and if the Crimes Act definition had said, "For the purposes of this Act "Property" means X" we would be within a narrower compass but of course –

ELIAS CJ:

I haven't got the whole of the Crimes Act here. How is it introduced? Is this in section –

MR BOLDT:

Yes it's in – I should introduce the materials that are before you. There are two bundles of authorities the Crown filed, along with our submissions. There's a third supplementary bundle Your Honours that I handed up to the Court this morning, just a slim volume with five things in it but if we look at volume 1 behind tab 1.

GLAZEBROOK J:

But a definition in a Act is always only for the purposes of that Act. If it was for the purposes of something else –

ARNOLD J:

Well it starts off saying that, "In this Act."

MR BOLDT:

Of course but and I guess this is –

GLAZEBROOK J:

Don't you mean it the other way round that that was meant to encompass the wider view of property, is that what you mean?

MR BOLDT:

Indeed.

ELIAS CJ:

Sorry, now I don't understand –

MR BOLDT:

In other words if something is property for the purposes of the general law then it will, by definition, be property for the purposes of the Crimes Act and –

GLAZEBROOK J:
Because it's an inclusive definition or for any other reason?

MR BOLDT:
Because it's an inclusive definition and also though Your Honour because –

GLAZEBROOK J:
Property has its ordinary meaning but for the avoidance of doubt it also has the specifically defined meaning, or the specifically defined meaning was supposed to encompass the more general broad view of property?

MR BOLDT:
I think it's the latter, Your Honour. The point is, it is a circular definition.

GLAZEBROOK J:
I've now lost it sorry.

MR BOLDT:
It's behind tab 1 and it starts, "Property includes real and personal property." So you need to look outside the Act to determine what real and personal property might mean before you can say that something is property for the purposes of this Act.

ELIAS CJ:
Although it doesn't follow that if we decide that this is property for the purposes of this provision, it will be property for all purposes of law, and I think we'd need to be very careful there because one of the things that bothers me about this case is that there are a lot of specific provisions now dealing with use of files stored on computers and they might all be redundant if this provision can, has a very wide meaning.

MR BOLDT:
Yes Ma'am, and that's something I do propose to address. That was a concern realised on behalf of the appellant in this Court and there is a risk in a case of this kind that the complications that arise regarding intellectual property in digital files overshadow the first question which is whether they are, whether a digital file is a piece of personal property in the first place. What I've said in my submissions, and I'll develop it in due course as these submissions go along, is that a digital file is

actually a piece of personal property. It is a thing that exists in the real world which can be owned, bought, sold, alienated, and very often, in fact in most cases, there will be parallel intellectual property rights that go along with that and of course the story in this area of the last 15, 20 or more years, has been how copyright holders have been trying to ensure they can preserve their rights over these new pieces of property and sometimes they do that with very extensive licensing restrictions. Sometimes they try and do that with physical copy protections so that people can't copy. But those are all overlays that may or may not be present depending on how the particular rights holder seeks to enforce their intellectual property rights over the file in question. There may, on the other hand, by no property restrictions at all and an awful lot of the things you can download are –

GLAZEBROOK J:
But intellectual property restrictions did you mean to say?

MR BOLDT:
I'm sorry, what did I, oh yes –

GLAZEBROOK J:
You said property restrictions.

MR BOLDT:
Yes, there may be no intellectual property restrictions at all and an awful lot of what you can download off the Internet is completely open source and you can do with it whatever you like. This is not, however, an intellectual property case, unless it absolutely needs to be, and as Your Honours will see I have addressed the copyright issue in the course of my submissions, but it's certainly our case that we don't need to go that far. We don't need to look at the intellectual property implications over this file because what happened here was much simpler. The appellant obtained a file from the computer, belonging to his employer Base Limited. That file belonged to Base, it was its property. The appellant, by means of inserting a USB stick obtained a copy of that file and therefore he obtained an item of property, which he then, as if to underline the fact it was a piece of property, he then sought to sell. So it's my submission that we are in the territory of a "chose in possession", we're in the territory of a thing with a physical existence in the real world, albeit one that is microscopically small and which with our naked eyes we can't see or feel or weigh. But it exists nonetheless. So – and I certainly take Your Honour's point about the

breadth of the submission and the fact this case may have significant implications for the law of property as a whole. That is, as I say, an inevitable consequence of the breadth of the Court of Appeal's decision which has held, not just for the purposes of this provision but more broadly, that a digital file does not qualify within that very all embracing definition of property which is found in the Crimes Act.

ELIAS CJ:

You see for some purposes copying is really quite problematic but I suppose under this provision the, it's because it's the accessing and thereby obtaining the property, it's not – is that –

MR BOLDT:

Well that's right Your Honour and we don't get into some of the trickier questions that might in other cases arise about, say, theft –

ELIAS CJ:

Yes.

MR BOLDT:

– because of course theft requires corresponding loss on the part of the person whose property it is in the first place. Now this wasn't a theft because the original file remained with Base, the employer but of course this section doesn't talk about depriving anyone of property, it simply talks about obtaining property and so property of this kind can easily be obtained without there needing to be a corresponding depravation.

So, and the proposition which the Crown does challenge –

ELIAS CJ:

And your position on dishonestly or by deception is simply knowing that it, the access is not authorised?

MR BOLDT:

Yes. And without – yes and here in this case the two questions, that is dishonesty and claim of right, really that go hand in hand because the defence, as Mr Dixon himself has outlined to Your Honours this morning, was that he said he was doing

this on behalf of his employer and with his employer's interests in mind at all times and with an honest belief it was okay for him to act the way he did.

ELIAS CJ:

Well he's saying that it was authorised and he'd done it many times. Your position is a bit more, goes a bit further than that because it's the use he intended to make of it that makes it unauthorised, that's the Crown position isn't it?

MR BOLDT:

That always was, yes Ma'am.

ELIAS CJ:

Yes. So accessing it simply for a giggle had happened a number of times. Accessing it for the purposes of his work presumably had happened a number of times.

MR BOLDT:

Yes.

ELIAS CJ:

And so he had a colour of right defence there. The difference here is that he intended to benefit from it?

MR BOLDT:

Indeed and I think there would have been no argument at all had it simply been accessed for a giggle and he certainly could have, he could have said well there was an implicit authority to do something like that which is relatively harmless but of course here it was something entirely different, it was obtained with a view to – seeking, first of all to market it to international media and secondly and hopefully to sell it to international media for a very large sum of money and I think that the figure mentioned in evidence was £1.37 million, that was the appellant's estimate of what this footage was likely to be worth if he had been able to sell it. And then of course things fell apart. The attempted sales were unsuccessful and the appellant instead uploaded the footage onto YouTube where it still is. But the reason this case does have a very broad implication is because the Court of Appeal has held in a ruling that will have far wider –

ELIAS CJ:

As he was simply downloading it to upload onto YouTube, I suppose we don't need to go there but it's not so very far from downloading it for enjoyment.

MR BOLDT:

No and the issue that would've been a change in the facts, the issue would've been was could there have been any suggestion of implicit authority on the part of the employer to do that. I suspect the answer would still have been no because certainly the evidence –

ELIAS CJ:

It bothers me a little bit that the case proceeded and indeed the question trail proceeds on the basis that was there authority but the way all of this was being operated one would've thought that the real question was, was it prohibited? Why do you say that the question is was there authority to do it? Because it's property, is it?

MR BOLDT:

Well it's because it wasn't his computer. I think that's the starting point, so –

ELIAS CJ:

But there was authority to access.

MR BOLDT:

For work-related purposes, yes and that was the basis on which the receptionist said she understood he was obtaining it. What had happened was, and I'm sure Your Honours are familiar with the evidence on this, the appellant had asked a receptionist at the company to isolate the footage involving Mr Tindall on the night in question and she did that and she took it from the computer that housed the security footage and put it onto a computer at reception at Base. The appellant accessed it, he went into that computer, he transferred the files from the computer onto a USB stick and then deleted from the computer at reception, although of course they remained on the original computer that had recorded the video footage originally and when asked what she thought the appellant wanted it for, she said, "Well I assumed he needed it for work-related purposes." And that's not – you can imagine that not being at all an uncommon situation because people have their employer's authority to access work computers for work-related reasons. There is sometimes a margin of tolerance in terms of being able to have limited and responsible access for personal use as well

but every employer is different and every situation is different and certainly accessing to publish it to the wider world, it seems – it was something well beyond on the scope of what any implicit authority could have permitted.

The question that arises and the really important legal question on this issue of property is the Court of Appeal's conclusion that a digital file represents pure information. The Court has concluded that that is all a digital file is. It is pure information. Reasoning out from analogy with the English decision of *Oxford v Moss* (1979) 68 Cr App R 183 and I'm sure Your Honours are all familiar with that case. That was a case where a student obtained access to an exam paper in a subject he was taking and he was shortly to sit the exam, he obtained the exam paper, he read it and he put it back and he was charged with theft. He was acquitted on the basis that he had obtained nothing but knowledge or information, he hadn't taken the paper, he hadn't –

ARNOLD J:
So if he'd photocopied it, the position would've been what?

MR BOLDT:
The position would've been that he'd obtained an item of property Sir and what I'm going to come –

WILLIAM YOUNG J:
Say it was on his piece of paper. Say it was on his piece of paper.

MR BOLDT:
He still has obtained an item of property and that was the immediate criticism of *Oxford v Moss* as Your Honours will have seen from Professor J C Smith who said that it just makes absolutely no sense to talk about an exam paper as though it's only a bit of paper and Professor Smith goes on to say any more than it makes any sense to say a Rembrandt is only a piece of canvass or a bank note is only a piece of paper but here the appropriate analogy with *Oxford v Moss* as I've said in my submissions, is if the appellant had actually seen the incident himself and offered to tell people about it. Now that would've been pure information. What *Oxford v Moss* was about was something that went from a piece of paper and lodged in the accused person's brain. It wasn't taking something away that he didn't have before.

So there are a lot of helpful common law definitions of property that are out there but one which I'll open with, if I may Your Honours, comes from a relatively recent decision of the House of Lords in a case called *OBG Limited v Allan* [2007] UKHL 21. It's a case which can be found in the appellant's reply bundle and there are two bundle of authorities from the appellant as well as two from the respondent. This one is in the reply bundle and it's behind tab number 11. Now *OBG v Allan*, well in fact it was an amalgam of cases. If I can take Your Honours to page 88 of the report which is page 466 of the bundle and one of the key issues that arose in *OBG v Allan* was whether it was possible to convert a show's inaction and here that was rights under a contract and the House of Lords divided on this three to two. Baroness Hale was in the minority but Her Ladyship's definition of property is a very good one in my respectful submission and we can find it just under letter B there on page 88. "The essential feature of property is that it has in existence independent of a particular person: it can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner" and we can see immediately there the difference between the pure information situation we found in *Oxford v Moss* and the sort of case we have here because of course in *Oxford v Moss* nothing the student acquired could be described as being independent of him. He couldn't buy or sell it or at least certainly not in the form in which he'd acquired it.

GLAZEBROOK J:

He could pretty well sell it though as very valuable information one would've thought.

MR BOLDT:

Well he could but the distinction is he would not be selling the very thing he had acquired, it would, as with everything we read and see and remember would've been subject to whatever personal filter his mind and his memory supplied to it and he would have to certainly supply it in a very different form to the one in which he'd acquired it and that, in the end and I will take Your Honours through some of these cases that deal with property status of information, is really in the end why the law retreated from saying that information could be property. For a long time the common law said – had no difficulty at all with the concept of pure information being property.

ELIAS CJ:

Some of the commentators of course say that in *Moss* the value to the university was diminished.

MR BOLDT:

Yes.

ELIAS CJ:

So that there was – I mean I don't know whether that answers the property issue and there is some sense in hanging onto some concept of physicality I suppose but –

MR BOLDT:

Yes.

ELIAS CJ:

– the university did lose.

MR BOLDT:

Yes and certainly that was what Professor Smith said too but he had said that would have engaged a different limb of the crime of theft and he used the analogy of if I convert someone's season ticket to the football and hand it back at the end of the season, well I've given the same thing back but it's not very much use anymore. Similarly if I take someone's battery and give it back when it's flat, those were the examples he used. Now that on a different limb of the crime of theft qualifies and Professor Smith said, well, you know, an exam paper which has been read by one of the students who's going to sit the exam is a very different thing from an exam paper that no one has seen. So he said, look, there was another way in doing it which maybe the Court should have considered but that didn't – but he certainly was critical of the focus the Court placed on the physical medium and as we can see that is a focus that a lot of Courts have continued to adopt where digital files are concerned. I know Your Honours will have seen, I reproduced a couple of English cases, which came to the uneasy conclusion that digital material or software could qualify as property if it was, for example, purchased on a disc, but not if it was purchased directly over the Internet, say. I've provided Your Honours with a case from Scotland and another from England which came to that conclusion, noting the incongruity of that, and indeed the absurdity of it, but that was because people continued, at least at that stage of our understanding of these things, to be obsessed with what we could

see and feel and touch and thought you needed something that fell into that category before we could assign these rights to it.

Now it's our case, Your Honours, that a by far better and more realistic and indeed a far simpler analysis is to acknowledge that a digital file is a thing. It is a thing which exists in the real world and which is perfectly capable of being defined, transferred, alienated, it exists entirely independently of a person, and it can be owned in exactly the same way as any other piece of property.

ELIAS CJ:
Mr Boldt, is there not a risk that that will swallow up the whole of 249(a), because if just obtaining information from, by accessing a computer completes the offence because it's property, then why do we need to look to privilege through this pecuniary advantage et cetera?

MR BOLDT:
Well it depends very much on what, I think Your Honour answered the question earlier in the day in the course of discussing the section, because a digital file may not be the only thing a person might obtain by accessing someone else's computer. They might –

ELIAS CJ:
Well does it mean –

MR BOLDT:
– subscribe –

ELIAS CJ:
Is the difference if you download, if you just look, you're still accessing, and you might obtain an advantage. So the student who accesses the university internal system and sees the exam paper, but doesn't download it, or otherwise copy it, obtains a benefit?

MR BOLDT:
Yes, or a privilege you might say. Also services caught up in there and you could imagine fraudulently obtaining, well, any number of services having dishonestly accessed a person's computer.

ARNOLD J:
If you access the computer and change the file in the computer in a way that enabled you as a person to access a secure area at the university, let's say a hospital, not downloading anything, you're changing something in there –

MR BOLDT:
Quite, and pecuniary advantage you can imagine any kind, all manner of manipulations that would enable a person to obtain a dishonest pecuniary advantage. We're talking here though about what happens when you walk away with something, when you walk away with something you didn't have to begin with, and if that's a digital file it's certainly our submission that constitutes an item of property.

And then perhaps the best articulation and it's a, it could almost have been written as a direct rebuttal to the Court of Appeal's conclusion in this case. It can be found in this decision of the Louisiana Supreme Court and we do have a number of decisions of the American State Courts in the various bundles. But if I can ask Your Honours to have a look at tab 26 and I think that's volume 2 of our bundle. It's on page 573 of the bundle. There's a hole is the, is where the case begins. And the Court first of all talks about what's the difference between tangible and intangible property.

ELIAS CJ:
Sorry what –

MR BOLDT:
And I think in the particular passage I'd like to direct Your Honours to is at page 8 of the decision on page 580 of the bundle itself and it's paragraph 2. South Carolina *[sic]* Bell argues that the software is merely knowledge or intelligence and as such is not corporeal and is thus not taxable. We disagree with South Central Bell's characterisation. The software at issue is not merely knowledge but rather is knowledge recorded in a physical form which has a physical existence, it takes up space on a disc, or a tape disc or hard drive, makes physical things happen and can be perceived by the sensors. As the dissenting Judge in the Court of Appeal pointed out, "In defining tangible, seeing is not limited to the unaided eye, weight is not limited to the butcher or bathroom scale and measured is not limited to a yardstick. That we use a read, write head to read the magnetic or unmagnetic spaces is no

different than any other machines that humans use to perceive those corporeal things which our naked senses cannot perceive."

ELIAS CJ:

When I did have a quick look at these tax case applications, it did seem to me that the decisions themselves turn very much on the wording of the particular provisions?

MR BOLDT:

Yes they do. Although and well, and certainly in this case the Louisiana Court was dealing with a particular definition of tangible and that –

ELIAS CJ:

Yes.

MR BOLDT:

– and the issue was because there were different, arose because there were different tax implications for tangible versus intangible property.

ELIAS CJ:

Yes.

MR BOLDT:

But nonetheless the point is articulated by the Court there, was a direct rebuttal to the very argument advanced in the Court of Appeal in which that Court accepted which the – we're really just talking here about information or knowledge. And I with –

ELIAS CJ:

But it wasn't an issue about property or information that dichotomy, it was about tangible or intangible, what property?

MR BOLDT:

Yes.

ELIAS CJ:

So intangible was property as well?

MR BOLDT:

Yes, yes but the submission which the Court rejected was this isn't a tangible thing because it's just knowledge, it's just – in other words it's pure information, it doesn't exist as a separate thing in the real world. And it's that rebuttal, it's that conclusion as articulated in that paragraph which really sums up what the Crown in this case says a digital file is. It is a thing that exists and the observation in this passage that it takes up space on a disc is an important one because that once again proves that it is a thing which exists. We're all familiar with the fact that storage devices have a finite capacity to them and when you have put more, when you have put as much material onto, say, a USB stick as it can take, it won't take anymore because it's full. And in this case the appellant transferred files onto his USB stick and when he walked out that day his USB stick was a little bit more full than it was when he entered. And that is because he had acquired something, he had acquired a microscopically small thing but he had acquired a thing nonetheless. And not only that, of course he'd acquired a thing that had a very practical real world value. It was, as I've said in the written submissions, the functional equivalent of a reel of film and it was that that made it an immensely valuable asset which he thought he was able, would be able to sell for a very large sum of money.

Now I will take Your Honours through the, a series of statutory definitions and as I say in my written submissions, it may even be that the Court doesn't need to look very far beyond the way the New Zealand Parliament has defined property over the last 12 years in order to reach the conclusion that digital files undoubtedly qualify. In particular we have –

O'REGAN J:

Well they qualify for the purposes of those other Acts but not necessarily for the purposes of this one.

MR BOLDT:

Well perhaps Your Honour, although the Property Law Act 2007 is a property statute of absolutely general application. It was really enacted in 2007 and following a very careful and lengthy consideration by the Law Commission. And as Your Honours will have seen just from the introduction to the Law Commission report which I've reproduced in the bundle, it was intended to state the law of property, not just for the context of very particular transactions but to state the whole or to govern all property law transaction in New Zealand.

O'REGAN J:

To the extent that the 2007 Property Law Act is different from the 1952 one –

MR BOLDT:

Yes.

O'REGAN J:

– are you saying that amended the criminal law?

MR BOLDT:

The definition of "property" in the Crimes Act is an open and inclusive one. It is plainly designed to enable changes to the general law of property to impact upon the definition of property for the purposes of the Crimes Act. That was the whole reason for not locking it in one place but rather having an inclusive definition of the sort.

O'REGAN J:

I was looking for a "yes" or "no" –

MR BOLDT:

Well the answer is yes, absolutely. And that's because the Crimes Act was specifically designed to bend and amend as the broader law of property changes. And that –

GLAZEBROOK J:

I still have some difficulty with the broader law of property changing because of definitions, in particular statutes which by definition do apply only to that statute. They can I suppose be an indication of general changes to the law of property underlying?

MR BOLDT:

And Your Honour –

GLAZEBROOK J:

I mean just looking at the introduction they say it's not intended as a codification even of property law and the Crimes is not actually property law as such anyway.

MR BOLDT:

No albeit that it imports the notion of what property is from the general law.

GLAZEBROOK J:

Well from – exactly.

MR BOLDT:

But in any event Your Honours the definition of property in the Property Law Act which is anything capable of being owned, is a very cut down shorthand, but as you will see, a pretty comprehensive reflection of where the common law had got to by the time of that enactment in any event. In fact in the Supreme Court of New Zealand decision of Justice Stringer in 1927 which I included in the material, His Honour even back in 1927 said property is just shorthand for anything that's capable of being owned and that's also the way the term has been applied consistently, even in very recent times in other jurisdictions such as in the *Yearworth v North Bristol NHS* [2010] 1 QB 1 (CA) case which is the case about the ownership of the sperm which the Court held. The Court analysed what were the indicia of ownership and was the degree of control the donors had over the frozen sperm sufficient to qualify as ownership and therefore to qualify it as property.

So the Property Law Act definition in 2007 which talks about ownership, in our submission that's sufficient in and of itself but if we need to look more broadly we can also say it was a clear reflection of the common law in terms of property. And so the issue becomes is a digital file capable of being owned and of course it's our submission that plainly a digital file is capable of being owned and it is owned. If any of us drafts a document on our computer or takes a digital photograph, it's ours, every bit as much as the hardware on which it's created and we are entitled to do with it as we pleased, as long as we act lawfully. So in my submission that focus on ownership is enough almost by itself to dispose of the case.

I've also noted a number of the consumer protection pieces of legislation which were passed in 2003 which include within the definition of personal property for the avoidance of doubt, computer software. That's the way that Parliament expressed the definition of goods and the way the definitions work were goods were defined as including all personal property and personal property was defined as including, for the avoidance of doubt, computer software.

GLAZEBROOK J:

I suppose computer software is a good and there is that argument about services and goods but it actually does something as against a file which can be seen as more pure information. So that's what some of the cases say, it actually does something, it makes your computer work in a particular way, it organises your information or whatever it might be doing, spits out tickets or – bus tickets or –

MR BOLDT:

And I've tried avoid using the word "software" in the submissions except where I've absolutely had to and I've tried to explain in the written submissions why that is and that's because the word "software" is used in the cases and also in the dictionaries in two different and conflicting ways and some regard software as everything other than hardware which therefore includes both computer programmes and data whereas in other contexts it's clear software refers only to computer programmes and not to hardware but what's interest is the Court of Appeal's decision would apply with equal force to computer programmes and to data. They are both on the Court of Appeal's analysis simply a stored sequence of bites which are contained on a particular medium and don't have a physical or incorporeal existence separate from the medium on which they are held. It's significant though in my submission, the really significant thing about the consumer protection statutes is the use of that phrase "for the avoidance of doubt" because that is an indication of course that Parliament regarded those things as already items of personal property and already goods and that those amendments weren't therefore meant to change the law in any respect.

ELIAS CJ:

Sorry which ones are you referring to?

MR BOLDT:

I'm referring to that suite of provisions, Your Honour, that were enacted in 2003 and those were the amendments to the Sale of Goods Act 1908, the Fair Trading Act 1986, the Commerce Act 1986 and one or two others. I've set them out in the written submissions but they all – the definitions in all of those provisions are the same and they all talk about – and the Consumer Guarantees Act was another one. They all say, goods "means personal property of every kind (whether tangible or intangible), other than money and choses in action." You see that is a very interesting observation in and of itself because the traditional property law dichotomy talks about intangible property as only comprising choses in action and so it's very interesting

that Parliament there is contemplating there may be a form of intangible property which is not a chose in action but in any event -

ELIAS CJ:
And that it should be money. It seems rather strange.

MR BOLDT:
Yes, yes, well except money and choses in action, except money and choses in action but – so it means personal property of every kind but then goes on to say, "And includes" and it sets out several examples of what it includes and finally, "To avoid doubt water and computer software." So there's a clear contextual argument that at least in 2003 Parliament was already satisfied that computer software qualified both as personal property and as goods for the purposes of those –

ELIAS CJ:
It doesn't deal with data.

MR BOLDT:
Well the question there is which sense, in which sense is software being used in that section and Your Honour Justice Glazebrook is absolutely right to say there have been some commentators who have suggested that probably just means programmes and not data but as far as I'm aware that's not been definitively settled and certainly –

GLAZEBROOK J:
You would have thought it does in those type of sections though because – but maybe not.

MR BOLDT:
Well I see we've reached 11.30, would that be a convenient time? We can come back to this.

ELIAS CJ:
Yes it would thank you.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.47 AM

ELIAS CJ:

Thank you.

MR BOLDT:

We were dealing just before the break with the provisions in the consumer protections statutes and they do raise a small, and I venture to suggest pretty much a side issue, as to what sense software is, in which sense is software used in those provisions. I've addressed it to a, only in passing, in my written submissions in a footnote on page 12 of the submissions, it's footnote number 35.

ELIAS CJ:

Yes, I've highlighted that footnote.

MR BOLDT:

And that was in response to a passage in Gault on Commercial Law which suggests it really does apply only to programmes and not to data and I've suggested that such a narrow interpretation of software wouldn't make a lot of sense in the context of a consumer protection suite of programmes and you should be no less entitled to the protection of those provisions if you buy a very expensive, say, piece of music from the Internet and it fails, as you would if you purchased a piece of, if you purchased a computer programme, and that there doesn't, certainly didn't appear at the time of any of these enactments to be any intention to draw any such distinction. I also have to acknowledge that in 2003 it did tend to be software in the sense of computer programmes that was traded far more frequently. You didn't have iTunes back then, for example, where you could buy movies and books and pieces of music quite so readily as you're able to now. It doesn't matter however except to make the point that these, that software, which would have been regarded on the Court of Appeal's analysis as pure information and therefore not goods, was something plainly, even in 2003, Parliament thought already qualified both as personal property and as goods. I should also say in that *South Cent. Bell Telephone v Barthelemy* (La,1994) 643 So.2d 1240 case, which was the Louisiana judgment I had already taken Your Honours to, just on the very page before the one we were looking at before, which is page 579 of the bundle, the Court there refers to the two definitions of software. It says just after 1246 at the top of the page, "In its broadest scope, software encompasses all parts of the computer system other than the hardware, that is the machine and the primary non-hardware component of a computer system

is the program … in its narrowest scope, software is synonymous with program, which, in turn, is defined as a complete set of instructions that tells a computer how to do something." So there are these two possible definitions of "software" and as we can see it's, the words used in both senses, throughout a lot of the commentary and in the cases, the important point though is that the Court of Appeal's reasoning applies to software, whatever definition we employ. It draws no distinction between computer programs and data.

So I've tried simply to refer to digital files or digital assets because in my submission at least you acquire an asset when you buy a piece of software and you acquire an asset when you buy a song or a movie or whatever you've purchased.

WILLIAM YOUNG J:
And I supposed people buy credits and games too, don't they?

MR BOLDT:
Yes, yes, and that, they become traceable and can be, could form part of someone's estate as long as they continue to have value. In other words, as long as the virtual world in which they might be currency, remains in existence.

So that's why, in any event Your Honours, we say first of all that digital files, digital assets should be characterised as things, have a real world presence and can be traded and owned and alienated and it can be, and you can divest yourself of it in exactly the way you can with any other item of property and it's why we say the various statutory provisions, including the Crimes Act, but also with some support from what we know Parliament thought regarding these things in 2003, and also with that focus on ownership in 2007, all combine to indicate that even simply an analysis of New Zealand statutory law gets us to the point where we can say that digital files and digital assets constitute pieces of property.

Now the next –

ELIAS CJ:
Are you going to take us to any – sorry, you were going on to other…

MR BOLDT:

Well I was going to go on to talk about these cases which talk about information as property and why the law ultimately has arrived in the state it has today regarding pure information but if –

ELIAS CJ:

And you're then going to go back on to look at the, or are you going back to look at the statutory landscape in terms of the concern that I expressed at the outset, that too expansive a view of section 249 may cut across specific provisions?

MR BOLDT:

I can do that. I mean I've, and I will come back to that, I can only reaffirm what I said earlier and that is that we're not talking about an analysis that will cut across anything, other than to acknowledge that if you acquire a digital file you've acquired something which the law recognises as property, and I'm, I understood also from the submissions filed on behalf of the appellant in this case, there were concerns about broader implications and cutting across the law of copyright for example. But it's our case that copyright is an entirely separate analysis which exists at another stage of the enquiry.

ELIAS CJ:

Is that because copyright protection is for the benefit of the copyright holder whereas this protects the owner of the thing?

MR BOLDT:

Yes.

ELIAS CJ:

Yes.

MR BOLDT:

Exactly and of course as with any other piece of property which also imports an intellectual property component, you can assign those rights separately. The best example is if I take a digital photo and someone is – the immediate digital file I have created belongs to me, as does the copyright in it, and if somebody then decides it's a beautiful photograph and they want to pay money for it, well, I can either assign the file to them and give them the intellectual property as well, or I could assign the

photograph and keep the intellectual property rights for myself. That's always going to be a case by case analysis and different types of digital files and different providers of digital assets approach that question differently. As I say some – you can download a lot of material on the internet which is completely free of any intellectual property restrictions and you're entitled to do with it exactly as you please. There are others, on a case by case basis, where there are very heavy restrictions around what you can do and some which are in the middle where you aren't physically restricted from doing things with the digital assets you acquire but where you would be in breach of terms and condition you've signed up to if you were to do so and you would potentially be infringing and able to be sued if you breached but in all of those circumstances the position is really no different from what we find ourselves looking at in real world equivalents we've long been familiar with. As I say in the written submissions, when we buy a record from the shop we acquire a piece of property, we acquire a tangible thing we can look at and hold in our hand and we acquire an entire bundle of possessory rights over that, including the right to have the law defended on our behalf if someone tries to take it from us wrongly but at the same time there is a bundle of intellectual property rights that exist over that same piece of property where the rights are held by somebody else and which we might infringe depending on the way we then were to deal with it.

And so in my submission it's not a concept where there is potential for things to get out of hand or go wrong because the intellectual property analysis remains separate and the rights that exist over the files exist quite separately from the files themselves and that at least was going to be the answer to the – that I planned on giving to the concerns expressed on behalf of the appellant in the reply submissions and I'm not entirely sure though Ma'am whether that's the same set of concerns Your Honour was anxious about.

ELIAS CJ:

Well it goes a long way to meeting them, it's just I have not conducted a review of the statues but I'm just slightly worried that the legislature has dealt with access to computers in different ways.

MR BOLDT:

Mmm.

ELIAS CJ:

But the other question I have for you just on the statute on section 249 itself is, is your position that the difference between subsections (1) and (2) is simply that under (1) you have actually obtained the benefit property et cetera and under (2) you've accessed the computer but haven't actually obtained it although you had that intent.

MR BOLDT:

Yes.

ELIAS CJ:

Is that the difference between the two sections?

MR BOLDT:

Yes , yes and in fact in the *Watchorn v R* [2014] NZCA 493 case the Court of Appeal referred back to this case and said in fact the appellant here could also equally, easily and quite uncontroversially have been convicted under section 249(2) because he, on the facts as established, certainly intended to obtain a pecuniary advantage upon accessing the computer system.

ELIAS CJ:

Because otherwise you're cast on the rather difficult argument that it was of value in itself, the file obtained.

MR BOLDT:

Well yes of course it doesn't have to be of much value to qualify as property.

ELIAS CJ:

No, no I understand that.

MR BOLDT:

And here certainly the appellant's intention was that it should be exchanged for a very large sum of money but –

ELIAS CJ:

So you then really would disagree with the Court of Appeal's characterisation in *Watchorn?*

MR BOLDT:

In *Watchorn*?

ELIAS CJ:

Yes sorry, that this case is more appropriately under 249(2).

MR BOLDT:

I don't know that that was quite the way the Court of Appeal put it. The Court was looking there at examining the issue of substituted convictions because the way the Court – the position the Court found itself in *Watchorn* was *Dixon* had only recently been decided in the Court of Appeal and it conclusively determined that files of the kind Mr Watchorn obtained were not property and of course again that was the provision he had been charged under at first instance. So the Court regarded itself bound by *Dixon* and indeed the Crown conceded *Dixon* governed the position. So the issue then immediately switched to well could the Court in *Watchorn* do what it did in this case, namely to exercise its section 386(2) power to substitute a conviction on a different charge and the Court concluded in that case that the benefit was nowhere near as clear in *Watchorn* and concluded therefore it would not be safe to substitute a conviction for obtaining a benefit or from anything else.

ELIAS CJ:

But on your argument if the offence is completed when you obtain the thing and the thing can be of any value.

MR BOLDT:

Yes/

ELIAS CJ:

That's wrong.

MR BOLDT:

Yes and it's certainly our submission that under the law, as I'm inviting the Court to state it in this case, *Watchorn* would be decided differently. The Court would – the position in *Watchorn* would be that the digital assets he obtained in that case were pieces of property, the fact he – part of the problem in *Watchorn* was no one was quite sure what Mr Watchorn intended to do with the material he had obtained. He certainly had obtained it but he hadn't tried to sell it. I think there was some

suggestion he might have kept it up his sleeve to the advantage of a future employer but nothing was every proved.

ELIAS CJ:
But it's only relevant here what the intention was because otherwise the access might not have been unlawful.

MR BOLDT:
Correct.

ELIAS CJ:
Whereas in *Watchorn* that wasn't an issue, it was never authorised, is that right?

MR BOLDT:
I believe that's the case. I would need to check the facts on that but – and there were a number of other criticisms of the conviction but in the end the only ground on which the Court allowed the appeal was the property point. The Court said, look on the basis of *Dixon* what he obtained is not property and in this case, unlike in *Dixon* we don't feel able to substitute a conviction on a different charge. And of course in *Watchorn* the Court then concluded with a coda saying and I say this entirely with respect to Your Honour Justice O'Regan who sat on that case, certainly on my reading it was this doesn't appear a very satisfactory situation and the law really needs to be looked at and so that's – *Watchorn* highlighted however an immediate consequence of the Court of Appeal's decision in this case because certainly something had been dishonestly obtained from a computer. Computer files had been obtained. They were things that existed in the real world that he could have done things with, albeit in that case he didn't, and yet the offence was unable to be established because of the definition of property, as a result of the Court of Appeal's decision here.

ELIAS CJ:
And then the final question I have on 249 is in the light of the argument we've now heard, I'd be helped if you would take me to the legislative history or at least tell me what light it throws on the meaning you say of section 249?

MR BOLDT:
I can do that.

ELIAS CJ:

If any.

MR BOLDT:

Well it doesn't shed a lot of light but it was certainly something we spent a bit of time with. The Crimes Amendment Act (No 2) from 2003 and in fact Your Honours what I have included in the new bundle is some of the legislative history. We've got the select committee report, behind the first tab, sorry behind the second tab. The first tab is the Bill is introduced, in particular the explanatory note and the select committee report and it's fair to say a lot of these reforms, particularly in the computer crime area were the result of the decision of the Court of Appeal in *R v* Wilkinson [1999] 1 NZLR 403 (CA). In *Wilkinson* the appellant was charged there with in effect theft of a chosen action, it was a bank credit and –

ELIAS CJ:

So he accessed the computer and manipulated it in order to obtain a payment, is that right?

MR BOLDT:

Well I think it was even, I think it was even less subtle than that, I think it was a fraudulent statement of his financial position which induced the bank to extend a loan to him which he then happily took and spent. The question was, could that be theft and the Crimes Act as it stood at that time required that for the offence of theft to be established you obtained dishonestly a thing capable of being stolen and so in other words there was no reference to property at all in the crime of theft as it stood at that time. And also the law hadn't been updated for quite some time to deal with new technological developments and so the way Parliament approached that was first of all by redefining theft and by putting in place, by removing things capable of being stolen as the touchstone of something to which the crime of theft would apply but rather to say theft means in effect dishonestly taking any property. And what the Act initially or what the Bill initially contemplated was that there would be a separate definition of property which would be encompassed by, that would govern those provisions. And that definition of "property", in fact, is set out in the Court of Appeal's decision in the present case. Now that decision and it was interesting that the Court of Appeal in paragraph 17 of its judgment in the present case, suggested that the originally proposed definition of "property" which would have governed not only the

new crime of theft, but also the new suite of computer crime provisions Parliament introduced, would have been broad enough to cover digital files and the Court then attached some significance to the fact Parliament declined to proceed with this definition. So so if Your Honours can see there the original proposal which would have governed these provisions was property, "Includes real and personal property and all things animate or inanimate in which a person has any interest or over which any person has any claim." It also includes money, things in action and electricity.

Now it's certainly true that the House declined to proceed with that as a separate definition of property to govern these provisions and the reasons for that we can see in the select committee report which is behind tab 2 of the supplementary bundle and it's at page 17 of the select committee's report. And in effect the select committee just thought, well we don't, there is no need to have two separate definitions of property in the one Act so what we –

ELIAS CJ:
There's nothing left out of the general definition that's covered.

MR BOLDT:
No. It's certainly my submission but there's really not much of a material distinction between that definition that was proposed in clause 19 of the original Bill and what we have now in section 2 of the Crimes Act. If that definition in paragraph 17 was broad enough to cover computer files of the sort we're talking about here, then the current definition is equally capable of doing that.

ELIAS CJ:
When was the current definition enacted or was it later, is it?

MR BOLDT:
In its current form it was enacted in 2003 so instead of proceeding with this –

ELIAS CJ:
I see, yes.

MR BOLDT:
– as a separate definition for the new offences, and for the new crime of theft, Parliament simply amended the existing definition of "property" in section 2. The only

change was to add in “money” and “electricity” because they had been deemed previously to be things capable of being stolen and so what the offence now does is it just says anything that is property is capable of being stolen and they’ve incorporated those specific items within the inclusive definition of “property”.

So it certainly is not, it’s certainly not correct to the extent there’s any submission to the contrary to say there was a deliberate decision on the part of Parliament in 2003 to keep computer data out. In fact, it was simply an exercise in tidier drafting in making sure there was a single definition of “property” which governed the whole Act.

ELIAS CJ:
So did it cover the same amendment?

MR BOLDT:
Yes.

ELIAS CJ:
Yes.

MR BOLDT:
And so in other words instead of passing that as a separate definition –

ELIAS CJ:
Yes.

MR BOLDT:
– Parliament simply amended the definition of “property” in section 2 to incorporate the only things there that were new, which was money and electricity.

ELIAS CJ:
Yes.

MR BOLDT:
And the Act, well the Amendment Act was designed to modernise the law. It was well acknowledged that such were the technological developments over the previous decade and a bit, that new crimes specifically relating to computers needed to be enacted.

ELIAS CJ:

So where's the policy, is there any in this select committee report at tab 1 about 249?

MR BOLDT:

No, except that it was simply designed to ensure that because this was now something it was possible for people to do and to – it was another mechanism by which fraud could be committed, that it required a separate provision.

ELIAS CJ:

So it's to protect the integrity of computer systems?

MR BOLDT:

Yes.

ELIAS CJ:

Is the policy referred to at page 12.

MR BOLDT:

Yes and I've spent some time with the Parliamentary debates and other than talking in very general terms about the need to make sure the Crimes Act kept pace with modern technology and to recognise all the various new forms of computer based crime, there wasn't anything that I found particularly illuminating in terms of these provisions. But we can see there, at page 12, the select committee sets out the four new computer offences.

ELIAS CJ:

Was it the same time that they, there was another definition, wasn't there, the linkage.

MR BOLDT:

The consumer protection ones?

ELIAS CJ:

No, I'm sorry, I'm thinking of something else.

MR BOLDT:

Because, yes, those ones were also 2003 but in a completely –

ELIAS CJ:

Different legislation.

MR BOLDT:

– separate bit of legislation, absolutely.

ELIAS CJ:

Yes.

MR BOLDT:

So to the extent there was any policy behind it, it was simply that we have, in light of the new technologies, multiple new ways by which frauds can be committed and Parliament sought to create a series of new offences. So, for example, hacking is an offence in the Crimes Act now, and that doesn't –

ELIAS CJ:

Was that in 2003 as well?

MR BOLDT:

Yes, that's part of the –

ELIAS CJ:

So which provision is that, do we have that?

MR BOLDT:

That, I'm not sure if it's, if our it's about 253 or so of the Crimes Act Your Honours. I need to – oh I think we stop –

ELIAS CJ:

Pruned it.

MR BOLDT:

– just short of that but I can tell Your Honours exactly how that's expressed. Yes it's 252 which is simply accessing computer system without authorisation and that just

says, “Every one is liable to imprisonment for a term not exceeding 2 years who intentionally accesses, directly or indirectly, any computer system without authorisation, knowing that he or she is not authorised to access that computer system, or being reckless as to whether he or she is authorised to access that computer system.” And then subsection (2) says, “To avoid doubt, subsection (1) does not apply if a person who is authorised to access a computer system accesses that computer system for a purpose other than the one for which that person was given access.”

So, for example, this case would not quality on that definition as hacking given the appellant had authority to access the computer terms in general terms, just not for the purpose on which he accessed it on the day.

ELIAS CJ:
Thank you for that.

MR BOLDT:
So the next section of the submissions I’d like to take Your Honours to is just the way the law has treated information as property over the years and this is all designed to support the submission that when we say information is not property or pure information is not property, the law was actually getting at something very, very different to the sort of situation we find ourselves confronting in the present case. We don’t take any issue with the Court of Appeal’s starting point, namely that pure information, and that is the contents, something you hear or see and which then resides in your brain, that’s not property and the Court of Appeal was right about that. Where we say the Court was wrong was to apply that by analogy to what happened in this case.

Now the position in the 19th and early 20th centuries is that information was indeed regarded as property and there’s an interesting comment, for example, in the decision of Justice Stringer from 1927, the New Zealand case, where – and that’s at page 445, its set out in my written submissions.

ELIAS CJ:
So is that for the purposes of criminal law?

MR BOLDT:

Well it was for the purposes of the law of property and –

ELIAS CJ:

Yes but that's very different.

MR BOLDT:

Ah, yes, except of course to the extent that the Crimes Act imports notions of property from outside.

ELIAS CJ:

Yes, no, I understand that but, yes.

MR BOLDT:

And what His Honour Justice Stringer said in 1927 was, "While the owner retains the secret in his brain, it is as much in his physical possession as anything in his pocket." Now that represented at least the view on the basis of quite a number of cases from the late 19th century and early 20th century and it was only in more recent times the law began to apply a more subtle and rigorous analysis to this question of whether information was property. The first case, certainly, that I found where I could see an examination of this was the *Victoria Park Racing and Recreation Ground Co Ltd v Taylor* (1937) 58 CLR 479 case, which was a decision of the High Court of Australia from the 1940s, and there was a very, there as a clear concern there, the *Victoria Park Racing* case regarded a fellow who lived next door to the rack track and who built a platform on his property from which it was possible to see everything that was going on in the race track, and he then found himself doing very nicely because he invited broadcasters to come and broadcast the races from his place, and that meant people could place their bets away from the track and so nobody went to the races, and so the race track sued and tried to close him down, and one of the bases on which it sought to do so was an assertion that he was breaching their property rights over the spectacle they had created and there was real concern in the High Court of Australia's decision and Your Honours can find that decision in our bundle of authorities. I'll just take you to the particular authority.

ELIAS CJ:

I'm not sure by the way, others may have different views, but I'm not sure that you need to do more than touch on some of these things because we have read your submissions. It is quite an arresting case although actually tell me where it's found?

MR BOLDT:

It's the first case in volume 2, Your Honour, it's *Victoria Park Racing*, and this was a case that Professor Gray then wrote about it at some length in an outstanding paper called *Property in Thin Air* which I've also included in the –

ELIAS CJ:

But it can't be the case that the crime we're concerned with here displaces or even covers the same field or do you say it does cover the same field as actions for breach of confidence or tort of other civil claims?

MR BOLDT:

It certainly doesn't cover the same field as breach of confidence. There will some overlap, for example with the tort of conversion, because as currently, as the law has been stated by the Court of Appeal and it would certainly be used as authority, if I were to appropriate my learned friend's digital files in a manner inconsistent with his right of ownership and possession over them, he couldn't sue, he couldn't invoke the law to protect his property rights in those things because the Court of Appeal has held they are nothing but pure information and therefore are not property and in fact –

ELIAS CJ:

Well they're doing that for the purposes of the Crimes Act provision. My concern is over criminalisation and whether there doesn't have to be some limit, given that there are civil remedies available to those who are adversely impacted by that sort of activity.

MR BOLDT:

I think the best answer to over criminalisation is the requirement that criminal intent be established. We don't –

ELIAS CJ:

But that's without authority, that's all you're saying.

WILLIAM YOUNG J:
Dishonestly.

MR BOLDT:
It's dishonestly.

ELIAS CJ:
No, but I thought you said that dishonestly in this context is knowing that you don't have lawful authority?

MR BOLDT:
Well yes and that was certainly the way the case was presented with the agreement of all parties in the District Court. It's –

GLAZEBROOK J:
Well sort of, by the time of the summing up it was not lawful authority for selling it, so it wasn't just the access. I think in the opening it seemed to be just access without authorisation but later the case was put on the basis the dishonestly came from the acquisition for sale.

MR BOLDT:
Well yes and I think we discussed earlier probably –

ELIAS CJ:
Oh hold on a moment but that must be because you accept that access for other purposes might not have been dishonest.

MR BOLDT:
Well quite and as I said earlier –

ELIAS CJ:
So it was necessary to show that it was for the purposes of sale.

MR BOLDT:
That was the indicator here. That was what showed that this access was beyond any implied authority the appellant might have thought he had in this case and we talked

about that at some length earlier in the day. As I say an employer does give authority to employees to access their computers for work related reasons and even perhaps to a limited extent for personal reasons but here the point was it had to have been well beyond any scope of any actual or even implicit authority the appellant might have thought he had.

ELIAS CJ:

But your position is that if it's accessed knowing it's beyond the scope of authority it's a crime?

MR BOLDT:

Yes. Well that is – that's on the facts of this case. The section requires that it is dishonestly and by deception, dishonestly or by deception, those are the requirements to establish an offence under section 249. Now here the indicator of dishonesty and deception was the fact the appellant knew he had no authority to access the computer for the purpose he was accessing it for. The way it was put by the Crown and this is in the question trail and it sums up at least what the Crown said proved intent.

ELIAS CJ:

Sorry which one is this one in?

MR BOLDT:

It's in the first volume of the Court of Appeal case on appeal at page 148. I don't have a separate case on appeal for this Court and have been operating on the Court of Appeal one throughout.

ELIAS CJ:

Thrift.

MR BOLDT:

Yes well it's equally – there's nothing else that needed to be in there.

ELIAS CJ:

It's not 148 in this bundle. I have seen it, oh I think it's at – oh yes it is at 148 I'm sorry.

MR BOLDT:

And so the first question was –

ELIAS CJ:

148 of the big numbering, yes.

MR BOLDT:

Yes and so the question was are you sure that such access was for a dishonest purpose and there the Judge set out the two competing contentions. The Crown said that dishonesty had been proved because the accused did not have permission and did not think he had authority to access the computer system, isolate and take the particular footage for the purpose of selling it. So that was a submission, that's not a statement of law for general purposes, that was just –

ELIAS CJ:

Where's the direction on it on the law? Is that at 149?

MR BOLDT:

Well that's the way the Judge helpfully set it out in the question trail. In fact it's referred to very many times by the Judge in his summing up as well and the Judge set it all out in a nutshell early in the summing up and then went on to explain it again in some detail later on but for present purposes our point is not that simply accessing a computer without authorisation will always establish the crime. The crime is established upon proof of dishonesty. It just so happens that in the present case the evidence the Crown advanced in support of that was acting knowing there was no authority to do what he did.

ELIAS CJ:

Well why is that not a definition of "dishonesty" in this case? That is what the definition of "dishonesty" the jury was given was.

MR BOLDT:

Yes and I suppose the question –

ELIAS CJ:

Is that adequate? I'm sort of just trying to dredge back into thinking – well how does he explain it in his direction on the law?

MR BOLDT:

Well I'll do my best to find those passages for you. Perhaps paragraph 26 of the summing up. In fact we can go back even further to perhaps paragraph 21. Now the first part of 21 His Honour just sets out some of the facts and then says, "The Crown says it was not part of his job as security but for his own purposes." He says, "He took the footage and attempted to sell it for himself. The Crown says the accused did act dishonestly and that he breached his legal obligation to the Altitude Bar and its owners and that he did so deliberately and that he could not have held any honest belief he was entitled to use and take this footage in this way for his own gain."

ELIAS CJ:

What's his legal obligation? Is that explained further? It's just his legal obligation as an employee is it?

WILLIAM YOUNG J:

A contract.

MR BOLDT:

Yes and I think that is right.

ELIAS CJ:

Well that's the form.

MR BOLDT:

Sir there was evidence about the material only or the requirements to maintain privacy over the material the accused acquired in the course of his duties but it's at perhaps paragraph 26 that the Court or the Judge sets out in a nutshell what the test was. "Has the Crown made you sure that such access was for a dishonest purpose?"

GLAZEBROOK J:

If you actually look at the early stuff though, on page 116 and 132, the directions before the trial started was that all that was required for dishonesty was without a belief that there was express or implied authority to take the footage or to access the computer.

MR BOLDT:

Yes, I don't think that I've –

GLAZEBROOK J:

So at page 116 and sorry 13 – oh 131 at paragraph 51.

MR BOLDT:

We might be operating again off, is this – we might be operating off different numbers –

GLAZEBROOK J:

Well I'm not sure what I'm operating off but there was a memorandum of preliminary directions to the jury which was presumably a written memorandum and there was also an opening address of Judge Phillips.

MR BOLDT:

I've certainly got the opening address –

GLAZEBROOK J:

It's okay, paragraph 51 of that says the same thing and then there was a, seemed to be a written memorandum of preliminary directions. Very helpful I would have thought for the jury to have but it is just, it's not put in the way that it was put in the summing up which was effectively the, how you put it that the dishonest purpose was the purpose of selling it.

MR BOLDT:

Yes.

ARNOLD J:

Well this wouldn't thought, I mean the memorandum given to the jury just replicates the definition in section 217 and you wouldn't expect the Judge to go –

GLAZEBROOK J:

Sorry, dishonesty.

ELIAS CJ:

It's the explanation of dishonesty.

GLAZEBROOK J:
Well yes that's true, that's true.

ARNOLD J:
It just takes section 217 and says this is how the term is defined.

GLAZEBROOK J:
That's right. And so that's –

ARNOLD J:
And you wouldn't really expect more at the outset –

GLAZEBROOK J:
No, no, no. I'm not, it wasn't a criticism, I was just saying that it was put more broadly to start. No it certainly wasn't a criticism and one would expect that you wouldn't be saying anything more until the end of the trial about the particular proof that had come out in the course of the trial?

MR BOLDT:
Well that's right and –

GLAZEBROOK J:
But that's really putting your point that this was a, this was to show that it was dishonest as against being an element of dishonesty?

MR BOLDT:
Indeed Your Honour and that's – and I do maintain the submission that's not a bad answer to concern about over-criminalisation here.

ELIAS CJ:
Sorry Justice Arnold referred to section 217.

MR BOLDT:
Yes, there's an interpretation section in section 217. Now I'm not sure if that's in the materials before Your Honours –

ELIAS CJ:

Yes I was trying to get –

MR BOLDT:

– but I can read to Your Honour what it says.

ELIAS CJ:

Yes please.

MR BOLDT:

Interpretation – this is at the very beginning of part 10 of the Crimes Act which is crimes against the right of property and under "interpretation" the Act says, "Dishonestly in relation to an act or omission means done or omitted without a belief that there was express or implied consent to or authority for the act or omission from a person entitled to give such consent or authority."

ELIAS CJ:

Sorry, well that's a complete answer to the question that I was raising.

MR BOLDT:

So well, and so it certainly is my submission though and I understand Your Honour's concern, in part just because of the sheer ubiquity of digital files that in venturing in –

ELIAS CJ:

And the shared access to files.

MR BOLDT:

Indeed, indeed. That we need to be careful about ensuring there isn't over-criminalisation in this area but in my submission that requirement for there to be dishonesty before the crime is going to be established provides us with a very strong measure of reassurance that that isn't going to happen.

ELIAS CJ:

Well except that the definition is pretty broad.

GLAZEBROOK J:

And one concern might be that it's the dishonest is related to the obtaining any property not actually to access in the computer system and so in fact is that right that you are dishonest if you access the computer system without authorisation for 249 or does the dishonesty, which I think is what the answer actually is, have to be related to obtaining any property?

MR BOLDT:

Well the dishonesty in 249 relates to the obtaining of the property –

GLAZEBROOK J:

Yes, yes.

MR BOLDT:

– and not to the accessing the computer, that's right.

GLAZEBROOK J:

But here in fact the obtaining of the property was the, on the Crown's case, in order to sell it, was the aim of accessing the computer system at that particular access?

MR BOLDT:

Yes. That's right.

ELIAS CJ:

But wherever you download on the Crown argument you have obtained – I'm just not sure whether the, for the purposes of sale affects the authority to access, doesn't it?

MR BOLDT:

Well, on the facts of this case it was the Crown case that it did because the Crown said whatever belief the appellant might have had about his authority to access the computer system, he could never have had any belief he was authorised to access it to obtain this material for the purposes of sale. That was the key indicator of dishonesty and that was, for example, what the bar owner explained and, which the appellant answered in his evidence. The appellant said, look I, in effect he said, look I have done this sort of thing for this bar on many occasions in the past. I've engaged in a number of projects for the bar which have involved this sort of accessing of computer, which had involved marketing at least on behalf of the bar

and I saw this as simply another project which I was undertaking for the bar with at least its implicit authority and that, in the end, was the issue the jury had to resolve. It was a question of whether the Crown had excluded the possibility the appellant's explanation regarding his honesty or the honesty of his belief was, whether the Crown had excluded that beyond reasonable doubt, and the Judge appropriately directed the jury on that, and that if the jury, in effect, thought the accused might have honestly believed he was entitled to do what he did, then the appropriate verdict would be not guilty.

So as I say here, and that would have been exactly the same answer in *Watchorn* had Mr Watchorn's defence been, look I really thought it was okay for me to take these files away with me after I left the employment of this company. I thought that was something the company would think was absolutely fine. Now it was, it would have been, in that scenario, incumbent upon the Crown to prove beyond reasonable doubt that there could have been no such honest belief, and that he therefore had a dishonest intent.

ELIAS CJ:
I'm just looking at the parallels between 249(1) and (2) and how it is drafted because 249(1) is concerned with the actual completion of obtaining the property, it doesn't need to talk about intent, but surely the same intent in (2) is to be read just because of general principles of criminal culpability into (1) so that accesses any computer system with intent, dishonestly or by deception to obtain and doesn't obtain –

MR BOLDT:
Yes.

ELIAS CJ:
– is probably the meaning. So it has to be a accessing with intent dishonestly into which you read that –

MR BOLDT:
I, that's my reading too Ma'am. So of course the downloading of the file needed to be a deliberate, he needed to have intent to obtain the thing he obtained and plainly here there was no question, know about that, because –

ELIAS CJ:

So it's with intent effectively in this case being in the definition without authority to obtain property?

MR BOLDT:

Yes. So he intended to obtain exactly what he did obtain. He also intended to obtain, on the Crown case and it was accepted by the jury, a pecuniary advantage which would quite separately establish the Crown under section 249(2). But he needed to intend to obtain the piece of property he did obtain before the Crown would attach. I think that's first principles in criminal intent which needs to be read in where it's not expressly stated.

ARNOLD J:

Can I just ask something you may have dealt with it, forgive me if you have, but the definition of "computer system" includes in paragraph (b) not simply the computers and so on, but all related input/output processing, storage, software or communication facilities and stored data –

MR BOLDT:

Yes.

ARNOLD J:

– so is stored data a part of a computer system?

MR BOLDT:

Yes.

ARNOLD J:

So when 249(1) talks about accessing a computer system it's also talking about accessing the data stored on the system, that's part of the definition of "computer system" right?

MR BOLDT:

It is and I must say –

ARNOLD J:

Now if that's right it would be a little odd to talk about that stored data as property where no one can readily see it accessing the stored data to get a benefit out of it or a pecuniary advantage or valuable consideration but it would be a little odd to talk about it as property wouldn't if it is part of the definition?

MR BOLDT:

Well certainly my reading Sir of that paragraph (b) in the definition is just making sure that the statement of what constitutes a computer system for the purposes of these provisions is absolutely broad as possible. So in other words it prevents you from saying well, I didn't really access a computer system, all I did was access a USB stick which happened to contain some data, that's not a computer system, that's just a repository of data for example. And so I see that simply as an attempt to create a very broad coverage for the term "computer system" to make sure that no technologically-savvy person comes along later with a particular definition of computer that does not include the materials stored on the system for example.

ELIAS CJ:

But the critical thing is that it's linked isn't it and for that I think one of the commentators, it maybe Ashworth says that you should look at it from the perspective of the person who owns the system. So you might have as part of a system, storage systems or different linked computers or so on. If you introduce your USB though that doesn't perhaps become part of the system and if you extract data I can see that your argument would still be available, that it is property, once abstracted.

MR BOLDT:

Mmm. I do simply see this as saying that the data is part of the system and as Your Honour says can be –

ELIAS CJ:

Yes.

MR BOLDT:

– accessed and what it means is too that if somebody, as a lot of people do, simply store all their data on an external hard drive which can be independently accessed from the –

ELIAS CJ:
Or on the Cloud.

MR BOLDT:
Or in the Cloud.

ELIAS CJ:
As we do.

MR BOLDT:
And so – but anyway certainly that's at least as how I read that provision in section 248. Now I do sense, I probably don't need to take Your Honour and Your Honours –

ELIAS CJ:
I should say that this argument illustrates why it is always helpful to have the whole part of an Act that you're dealing with because these statutes do need to be read as a whole.

MR BOLDT:
Indeed, no I appreciate that Your Honour and I apologise for not having the whole of the relevant section before the Court or the relevant part before the Court. Now I think before this important diversion in the facts and also into the legislation, I was taking Your Honours through the cases that dealt with information as property and I don't need to spend very much longer on that I think. *Boardman v Phipps* [1967] 2 AC 46 is regarded by many of the commentators and scholars in this area as heralding the sea changes on the question of whether information could be described as property and that was a case where there was a trustee or trustees who had acquired knowledge and experience by virtue of that role and were later able to deploy that in making some very good investment decisions which proved very profitable. And the beneficiaries of the estate said well that know how you acquired is our trustee's, is our trust property and therefore we insist there be some accounting

ELIAS CJ:
You know I think it would be much better to stay close to the statute because the more you go into those sort of cases the more worried I become about over-criminalisation.

MR BOLDT:

Well there's no over-criminalisation because in the end, of course, the Court said well no that's, well that was where we got, that was how we got to the point where we say no knowledge is not property, knowledge isn't property. The House of Lords split two-two with Viscount Dilhorne in the middle saying maybe sometimes but not on this occasion but since then equity has taken over and has said we're not going to regard as property something that exists only in a person's mind and that's the critical distinction. That was what was decided in *Oxford v Moss*. That also was what the Canadian Supreme Court was concerned about in the case of *R v Stewart* (1988) 1 SCR 963 and *Stewart* was a case about an attempt to obtain the names of employees of a particular large hotel, and it was agreed as part of the agreed summary of facts in that case, that no physical tangible item would have changed hands. I'm not quite sure how they were then going to transmit the names of the employees but in any event that was the agreed fact. It was that there was going to be no physical item like a list recording the names would change hands. So the question was, was trying to procure someone to do that a crime, and the Canadian Supreme Court said, well no, it can't be, because we're there talking only about what's in the, in someone's mind. The Court cited *Oxford v Moss* but it also made the very good point, well what if I've got something in my mind and I can't forget it, and if that turns out to be someone else's property, if it turns out to be stolen property, am I liable for possession of stolen goods every day of my life I can't forget it.

ELIAS CJ:

Lobotomy the only option.

MR BOLDT:

Or dementia, yes, and it's, and of course the Court said well this can't possibly be right. Albeit interestingly the Ontario Court of Appeal that said it was but the Supreme Court understandably unanimously said no it's not, that isn't property. But that's because again we were talking about, as I began with Baroness Hale's definition of "what is property". It's something that is separate from the individual. It's not personal to you and it's capable of all this – it has all of these qualities of alienation, excludability, exhaustion, and of course the contents of your mind don't have any of those characteristics. But that was the analysis the Court of Appeal applied in the present case. It applied, and in my respectful submission erroneously,

an analysis based on – a rule designed for the contents of someone's brain and applied it to the contents of someone's USB stick and that's literally the way the analogy was applied in this case. The Court said the, that the USB stick performed the function, was the functional equivalent of Mr Moss' brain and the data, the file footage, was the functional equivalent of the writing that he read and absorbed and put back. In my submission that's simply not right. The appellant here didn't acquire knowledge or information, he acquired a thing. He acquired, as I say in my respectful submission, the functional equivalent of a reel of film and sought to sell it as such and that's why we say it's property and that the Court of Appeal in that respect was wrong.

Now Your Honours you've got the remaining submissions and I perhaps don't need to take you through those in any greater detail than is set out in the written material. I've noted and I've quoted at length from the decision of the New York Court of Appeals which is the highest Court in New York State in the *Thyroff v Nationwide Mutual Insurance Company* (2007) 8 MY 3d 283 case, which developed the law of conversion in that state by saying, to require there to be a physical, tangible thing before we say the law of conversion applies, is not longer realistic given the ubiquity of digital files these days, and the Court made the point, well we drafted this judgment on a computer, we exchanged emails about the judgment on our computers. There is no functional or sensible distinction to be drawn between a Microsoft word document that sits in our computer and a document that is printed on the page, they perform the same function and should have exactly the same sort of protection from the law of property.

What I've also done, I've included and I'll just tell Your Honours about them, I won't take Your Honours through them, unless you'd like me to. They're the other materials that I've put in, in a supplementary bundle. Behind tab 3 is a chapter from a very good learned text called *The Tort of Conversion* by Sarah Green and John Randall QC. Now that text – this particular chapter devotes a number of pages to the property status of digital files and that begins at page 118 of that chapter and I commend it to Your Honours as a – and I came upon this only after having filed my submissions in this case but it's reassuring the analysis adopted by the learned authors in that chapter is entirely consistent with the way we have sought to present the case to Your Honours and in particular to say these are things, they have a presence in the real world, they are alienable and they should be treated in the same way as any other non-digital assets and also cites a case called *Kremen v Cohen*

337 F.3d 1024 which is a decision of the US, I think it's the 9th circuit Court of Appeal in the United States. So it's a Court of Appeal decision from the federal jurisdiction and from the other coast. That decision *Kremen v Cohen* is behind tab 5. It's also consistent in terms of saying look it would be a curious jurisprudence that required the existence of a physical thing before extend the rights of property protection. I commend *Kremen v Cohen* in part because it gives a very sound, in my submission, recitation of the law. I also commend it because Your Honours will enjoy reading it. It's one of the most –

ELIAS CJ:

Kozinski visited New Zealand last year, some of us met him.

MR BOLDT:

And he is – I should ask if he's as funny in real life as he is in his judgments.

ELIAS CJ:

Yes he is, he is.

MR BOLDT:

His outline of the facts starts at page 8 and if you just take even five seconds the very beginning of the judgment you'll see what I'm talking about.

ELIAS CJ:

Yes.

MR BOLDT:

So I do commend that decision as a further re-statement of the principle in *Thyroff* and that is a retreat from the old notions that you actually need a – that you need a physical tangible thing before you can say you have a piece of property. The old law which required something physical and firm was based on the fact we didn't used to have pieces of property where you could so easily and readily separate the content from the medium on which they were stored. So a piece of paper, you can't subtract the writing from the piece of paper and put it somewhere else. The only development that the law requires to the extent the law doesn't provide for this already in our respectful submission, is to acknowledge that digital files are a valuable thing which exists and have an existence quite separate from the medium on which they are stored and can be transferred and dealt with quite separately from the medium on

which they are stored but they are no less property because of that and they meet all of the other definitions of property our law provides.

So it's our submission, in light of all that, that the Court of Appeal was wrong in its conclusion that the digital footage wasn't property. It was incorrect to apply *Oxford v Moss* to the acquisition of something that existed in the real world and which filled up the appellant's USB stick to a small extent and that he took away with him after accessing the computer. Now beyond that, Your Honours, the submissions, the written submissions I've made were only relatively brief. If Your Honours are with the Crown on the property point, then the second ground of appeal, namely the substituted conviction, falls away entirely. It is my submission, however, that even on the basis of the submissions made this morning by the appellant, the inconsequentiality of the substitution of valuable consideration – of benefit for property which the Court of Appeal exercised under section 386(2) was apparent. As Mr Dixon himself said to Your Honours this morning, the defence was always that he was entitled or believed he was entitled to act in the way he did. Nothing whatsoever turned on which particular limb of section 249(1)(a) was specified in the indictment. It was, as I've said in my written submissions, it certainly wasn't any kind of a material change, it was a minor variation of the same provision, relying on all the same facts, all the same evidence and on the same transaction.

ELIAS CJ:
Well on your argument it was unnecessary to make it but he could equally have been convicted of both.

MR BOLDT:
Oh yes and obtaining the valuable consideration also very clearly and the clearest evidence that this was valuable consideration was the fact he then tried to sell it for a lot of money. So there were multiple limbs of section 249(1)(a).

ELIAS CJ:
Except that he didn't obtain valuable – well that buys into the question of whether the thing itself was valuable.

MR BOLDT:
Yes.

ELIAS CJ:

Because he didn't obtain it. He might have been convicted under subsection (2).

MR BOLDT:

I mean he would certainly have been convicted under subsection (2) but certainly the appellant sought to enter into a contract with purchasers whereby the consideration they provided was £1.37 million and the consideration he would provide was the footage, was the digital file. So in other words he was offering it at least as consideration in a transaction. So in my submission it would equally have been open to the Court of Appeal to substitute a conviction under that limb but in any event it was certainly a benefit and indeed the Court of Appeal's decision in *Watchorn* which examined this concept of what represents a benefit for the purposes of 249(1)(a) was equally clear that what happened at least in this case constituted a benefit to the appellant. So it's our submission that the substitution was entirely appropriate, given the admitted facts and given the fact the only at first instance was dishonesty and claim of right.

Now as to the criticisms of the Judge's summing up, again I've dealt with those in the written submissions. The criticisms which were levelled on the appellant's behalf and I appreciate they are different from the criticisms he is levelling before Your Honours today but certainly those criticisms of the summing up tended by in large to take extracts from the summing up out of context and I've dealt in my written submissions with why certainly it's our submission there was nothing at all wrong with the way the Judge directed the jury on the particular issues and that indeed this was a very thorough and very well balanced summing up. It was very clear and also of course what the jury was left with in the form of the question trail was a set of very clear instructions they could take away with them. So the jury could, in our submission, have been under no illusion about the issues they had to resolve. Indeed the Judge, right from the outset in the summing up, effectively said there are two things you need to deal with members of the jury. The first is whether the Crown has proved the appellant acted dishonestly and secondly whether the Crown has excluded claim of right, and those two questions were very closely related and the answer to one would almost certainly answer the other.

So unless there is any particular area of the summing Your Honours are concerned about I don't propose to address those submissions in detail orally but of course Your Honours do have my written submissions on those points.

O'REGAN J:
If you're successful what do you say this Court should do because it's not your appeal, is it?

MR BOLDT:
No, and if we are successful, if Your Honours agree on the property point, it would, in our submission, be an important thing to indicate the Court is upholding the Court of Appeal's judgment on different grounds and that it departs from the Court of Appeal on the property analysis, and that that property analysis is not the law. But of course I invite Your Honours to dismiss the appeal on whatever basis but it is very important, obviously from the Crown's point of view, that the property question is addressed and given further consideration given what we say was a clear error.

ELIAS CJ:
Why do you say it's so important? Just because it's wrong or because…

MR BOLDT:
It's important because it's wrong and it's had an immediate impact, for example, in terms of the case of *Watchorn* and where the Court felt obliged to follow the decision in *Dixon.*

O'REGAN J:
That was because Watchorn's trial had taken place before the Court of Appeal's decision. Presumably if he'd been charged later he would have been charged with something, obtaining one of the other components of section 249(1)(a), a benefit or a valuable consideration or something –

MR BOLDT:
Well of course the problem in *Watchorn* was Your Honour's examined the various alternatives under section 249(1)(a) and decided there was no, they could be confident it would apply.

O'REGAN J:

Well again only because that's the way this trial had been run but if it had started from the premise that the law is, as the Court of Appeal has stated it, that wouldn't have been a problem, would it?

MR BOLDT:

I guess it would have depended on what other evidence came out because it's certainly, on my reading of the case, the problem with the other limbs of that of that paragraph were that there wasn't unequivocal evidence that any of them had been satisfied, and that if it wasn't property it's perfectly possible it wasn't anything. So Your Honours obviously that's entirely a matter for you how you deal with this. What I would say, though, is this is a very important point of general application. It would be a shame not to address it, given it's here and it's argued, and it would certainly clear up a point which not only caused difficulties in the present case, it caused difficulties in other cases and it may very well be that other charges that might otherwise be laid can't be laid in light of the law as it has currently been stated.

O'REGAN J:

But are you contending for Mr Dixon's appeal to be dismissed and the conviction as entered in the Court of Appeal to be upheld or are you asking us to substitute a conviction on the same basis as the District Court decision? Because I've just not, what I'm trying to get at is can we do that when it's not your appeal?

MR BOLDT:

I haven't given a moment's thought to that question Your Honour. The – what I've –

ELIAS CJ:

I suppose the –

MR BOLDT:

– sorry Ma'am?

ELIAS CJ:

No, I was going to say I suppose the formal order is a conviction under section 249(1), but –

MR BOLDT:

Well –

O'REGAN J:

Without specifying.

ELIAS CJ:

But, no, but the difference in reasoning would be explained in our judgment.

MR BOLDT:

It's certainly our case there is no substantive difference between a conviction under the benefit limb and the property limb and so if the appeal is simply dismissed then that's fine, if that's the way Your Honours consider it appropriate but –

ELIAS CJ:

I am still a little bothered though about the benefit limb being on an expectation of benefit. How was it put, it was a…

MR BOLDT:

It was the opportunity to sell.

ELIAS CJ:

The opportunity, yes, the opportunity. Because that does seem to be a little inconsistent with the dual approach in section 249(1) and (2).

MR BOLDT:

Yes, 249(2) is –

WILLIAM YOUNG J:

It's like an attempt.

MR BOLDT:

It is like an attempt, I was going to say Sir, it's –

ELIAS CJ:

Well that's on one view what this was, unless it was property, and then you buy back into and if it wasn't –

GLAZEBROOK J:

Or you just have to assume that because you tried to sell it for 1.3 that it must have been worth $10 but is that a jury question.

MR BOLDT:

So the question would be did he obtain any benefit.

GLAZEBROOK J:

Yes, in terms of a jury question, did he obtain a benefit. He certainly attempted to obtain a benefit, because he attempted to, that's assuming that you've got rid of the Project Lucy, which the jury must have done –

MR BOLDT:

Yes.

GLAZEBROOK J:

– so he certainly attempted to obtain a benefit but was there a benefit just in the footage and maybe you'd need some expert evidence or something on that, rather than merely the perhaps deluded belief of a – which would be enough for the second limb but not necessarily for the first.

MR BOLDT:

Although it does actually sound as though the appellant got quite some way down the track in terms of the disposal –

GLAZEBROOK J:

Which might be sufficient.

MR BOLDT:

– and indeed it was the contract that came back which required him to certify that he had full and unimpeded rights to the property he was selling. Certainly on the Crown –

GLAZEBROOK J:

So it was a contractual difficulty.

MR BOLDT:

On the Crown case that was what prompted the return to the personnel at Base and what caused the entire thing to come unstuck.

ELIAS CJ:

Well and it maybe that properly construed it is – oh no it is and does obtain, it's not just with intent to obtain. The problem also is that if there is no equivalence between those two provisions, it does in subsection (1), it does rather leave some unease about the width of the property limb.

MR BOLDT:

I don't invite Your Honours in terms of any expansion in the definition of "property" for the purposes of this case, and of course we say it doesn't require any expansion because that's, it's property already. But I certainly don't invite anything to be regarded as property where a real world equivalent would not also be property and here there is no material distinction between what the appellant did and what would have occurred if he had gone into Base, had obtained a duplicate reel of celluloid film, put it in a box and walked out with it. That's, he has obtained the functional equivalent of a reel of celluloid, and as long as we keep it –

ELIAS CJ:

I'm beginning to think it has to be property or nothing but the section where it refers to "benefit" is using the computer to obtain a different benefit than the tangible property.

WILLIAM YOUNG J:

So it's information which is the benefit.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

That's *Oxford v Moss*.

ELIAS CJ:

Yes, yes, well I think that's a benefit, that could well be a benefit.

MR BOLDT:

Yes, no it was a strong, there was a careful examination of what constitutes a benefit for the purposes of the Crimes Act by the Court of Appeal in *Watchorn* given the Court was there trying to see whether it could fit what occurred in the case into that benefit framework in the same case the Court was able to in *Dixon* and the Court noted that benefit is not in any way confined to financial benefits. It's –

GLAZEBROOK J:

It wasn't really asserted here that this was for anything other than financial benefit though, was it?

MR BOLDT:

No, no, and it was certainly intended to obtain a financial benefit and the way the Court of Appeal characterised it, and I apologise if it sounds like I've been slightly caught on the hop by this, but that's simply because there hadn't been any challenge to the definition of "benefit" and its application in this case and so I'm going slightly off the cuff with respect to this part of the argument. But the way the Court of Appeal put it was that he obtained at least the chance to sell it. He was able to make the various entreaties he made. He was able, in fact, to provide some stills to the *Sun* newspaper –

ELIAS CJ:

But why have an expression "benefit" if it includes a chance to make a benefit?

WILLIAM YOUNG J:

An opportunity to make a benefit which is one –

ELIAS CJ:

It's pretty expansive.

WILLIAM YOUNG J:

It does or it doesn't.

ELIAS CJ:

It's pretty expansive. Anyway.

MR BOLDT:

Your Honours I'm a little uncomfortable about sitting down now simply because this issue has just arisen and –

ELIAS CJ:

No, no, why don't we take the adjournment and we'll resume at 2.15 pm.

MR BOLDT:

I promise Your Honours that subject to this I'm finished.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 1.11 PM

COURT RESUMES: 2.18 PM

MR BOLDT:

May it please Your Honours, I've spent a bit of time over the break looking at this question of benefit and really I can't improve on the way the Court of Appeal dealt with the subject in the *Watchorn* decision which is behind tab 11 of volume 1 of our bundle. The Court there, as Your Honours know, was faced with the question of whether to substitute a conviction for obtaining a benefit, having concluded Mr Watchorn or having been obliged, in light of the present case, to conclude he hadn't obtained any property. The parties divided along the lines of whether a financial benefit was required before that limb of the section was satisfied or whether anything to a person's advantage might qualify as a benefit and if I can take Your Honours to paragraph 69 of the decision first. We can see the way the issue was dealt with in a High Court decision of Justice Gendall which ultimately the Court of Appeal declined to depart from. In the District Court in this case of *Police v Le Roy* [2006] BCL 987 which is described at paragraph 69, the District Court had held the term "benefit" meant a benefit that could be result in advancement of a person's material situation and was confined to a benefit of a financial nature. Now Justice Gendall in the High Court disagreed and the passage that's set out there, reproduced in paragraph 70 is instructive in the present case. The learned Judge sets out examples of possible non-material benefits, including acquiring knowledge or information to which one was not otherwise entitled. It might be an invasion of another's privacy. It might be knowledge or information that could be used to exploit another person. It goes on to

suggest, well at least for political purposes or purposes of embarrassment. It talks about the Harassment Act and the Domestic Violence Act.

So the question for the Court of Appeal in *Watchorn* was whether that correctly stated the law when that term is considered in section 249. The Court went through the legislative history, drew particular attention to the fact that section 228 of the Crimes Act was deliberately amended to make it clear that that section, which is dishonestly taking or using a document, was intended only to apply to financial benefits and again I apologise this section isn't before Your Honours but section 228 says, "Everyone is liable to imprisonment for a term not exceeding seven years who with intent to obtain any property, service, pecuniary advantage or valuable consideration, dishonestly and without claim of right takes or obtains any document." And the Court of Appeal in *Watchorn* drew attention to the fact that at the select committee stage and it was part of the same legislative package we're dealing with in the present case, at the select committee stage the reference to benefit was removed and it was removed to make it clear that section 228 was talking about financial benefits only, leading to the clear implication that benefit, where it is present, applies to things other than financial benefits or is not confined to financial benefits.

The Court examined a number of other statutory provisions, none of which provided any support for the contention that you needed to acquire a material financial benefit before you acquired a benefit for the purposes of the section.

GLAZEBROOK J:
What's the non-financial benefit asserted here though, because isn't only a financial benefit?

MR BOLDT:
Well it provided –

GLAZEBROOK J:
Or unless you say the opportunity to get a financial benefit is in itself a benefit.

MR BOLDT:
The ultimate conclusion of the Court of Appeal which is at paragraph 81 is we don't consider there's any proper basis to limit the scope of the term benefit to financial advantage or to limit its normal meaning of anything that is of advantage of the

person concerned and so I guess Your Honour's question is well what was the advantage here to the appellant by having obtained this and if we – and the first answer and the one I do submit the Court of Appeal was entirely correct was to say that even the opportunity to trade and deal with this and to enter into negotiations with a view to obtaining a significant financial return represented a benefit as far as it went but also if we look at the way Justice Gendall set out other examples of possible non-financial benefit, I respectfully submit that here, for example, the opportunity to place this footage on YouTube in associate with personal commentary from the appellant which is the form in which this has been placed on the internet, it's footage interspersed with commentary, provided an advantage the appellant wouldn't otherwise have and that falls very squarely within the sorts of non-pecuniary advantage Justice Gendall is discussing there in paragraph 11 of *Le Roy* which is reproduced at paragraph 70 in *Watchorn.*

So giving it that very broad and expansive definition, it's certainly my submission that the benefit limb was well and truly satisfied and also in the event it becomes necessary to look for yet another offence that's satisfied here, in case the Court remains in any doubt, I do agree with and adopt what the Court of Appeal said in *Watchorn* about section 249(2) being plainly satisfied in this case because the access was done with an intent to obtain a pecuniary advantage.

Now, Your Honours, unless I can assist the Court further, those are my submissions.

ELIAS CJ:
Sorry, what that submission, is it directed at any action you're urging on us? I mean are you not saying that we would be entitled to enter a conviction under 249(2) are you?

MR BOLDT:
Oh yes Ma'am.

ELIAS CJ:
You are?

MR BOLDT:
Certainly I'm suggesting that.

ELIAS CJ:

What about sentencing then?

MR BOLDT:

Well 249(2) is certainly a lesser offence in that it carries a five year maximum as distinct from a seven year maximum and if the Court's concerned here though that the non-custodial sentence the appellant received might have been different had the head conviction –

ELIAS CJ:

It's still an infringement of liberty. Non-custodial but restriction on liberty.

MR BOLDT:

Yes well, if we got to that stage, Your Honour, it would certainly be my submission that the difference between a five year and a seven year maximum, given all the underlying facts are the same, the intention is the same, the outcome as far as the victim was concerned, and as far as the –

ELIAS CJ:

Who was the victim?

MR BOLDT:

The victim is Base, the people –

ELIAS CJ:

Right.

MR BOLDT:

– whose property was taken.

ELIAS CJ:

Why did the Judge in sentencing go beyond considering Base?

MR BOLDT:

In what respect Ma'am?

ELIAS CJ:

It was a, well it was an exacerbating circumstance that the person filmed –

MR BOLDT:

Oh yes, yes, well, it's in its narrowest sense to say that Base was the victim but what was also infringed was I guess Base would think its duty to preserve the privacy of its customers, so in other words it harms Base if you go to the bar and think you're having a drink within the confines of the bar and suddenly find it's on the Internet and everyone can see it. So it is one of these situations where the culpability would be, in my submission, absolutely identical as between the two subsections here, and that certainly given that we were getting, we're nowhere near the maximum penalty, that there would not need to be any alteration to the penalty imposed. But Your Honours I hope it's unnecessary in any event for Your Honours to look beyond the property point and to indeed, in my submission, re-affirm the conviction on the same basis as it was originally entered rather than on the substituted bases as entered by the Court of Appeal.

So unless I can assist the Court further, those are my submissions.

ELIAS CJ:

Thank you Mr Boldt. Yes Mr Dixon?

MR DIXON:

Your Honours, in regards, and respectfully, in regards to what I believed what was happening to, with my case in regards to the Supreme Court and putting forward the original argument that was going to the appeal Court, and respectfully that over the last four years and four trials and four lawyers that I understand the impact and the gravity of this Court hearing in regards to the property issue and obviously the swapping of the charge, in relation to my charge, and what was put forward by my solicitor. But respectfully that's not what I have been fighting for, for the last four years, wasn't about property issue. It was about the conduct of my counsel and the Judge's summing up in my, in my case. Now I'm at the end of the road, this is – as I've been told, that this is it. You are for me the last chance in being able to explain that and I understand that I cannot go into the trial in regards to the conduct of my lawyer and I'm stuck. I will argue the summing up in regards to, in regards to the trial. But as to the property issue I just wanted to let you know that I actually agree with Mr Boldt in regards to it and I think, I think it is property. So yes I –

ELIAS CJ:

I'm afraid it's one of those things that very often people end up in leading cases which don't have much to do with what they're really concerned about in the particular case. It is as you will have heard from the exchange with Mr Boldt it is a matter of some importance in the law and that's why we've really heard the case, yes.

MR DIXON:

Yes. And I understood that it was like putting a – in the box, understanding that it may set a new precedent and it will be put in journals and it, or will be used in cases in regards to claim of right or colour of right defence around the globe but again, respectfully that wasn't – like I tried my best within the justice system to get a fair trial, to be able to put my case forwards in regards to the appeal Court and then points forward in the Supreme Court and I thought that my first submission to the Supreme Court with my barrister in point 3, because I call it point 3, had – it was in regards to two points and those two points were the trial, the conduct of the trial counsel and the Judge's summing up. In the initial submission that was accepted and that's what I was led to believe that I would be able to put forward the submissions but I... And then in regards to page 14, number 49 it says, "The Court of Appeal dismissed the detailed written submissions as being outside the leave granted and not worthy of argument. And for that reason the applicant argues that the Court of Appeal denied him his statutory right under 383 of the Crimes Act." Now then it says, "This Court has however granted leave on that ground." And that's what I believed was the, gave me the ability to be able to put forward the points that I originally put forward to the Appeal Court so that they can be heard. So I'm left with arguing the Crown's point – sorry the –

ELIAS CJ:

Summing up point.

MR DIXON:

The summing up.

ELIAS CJ:

Yes.

MR DIXON:

That's all I have. Okay. And I shall do my best. I shall try my best to do that. There was a response, sorry there was a response that I wanted to give Mr Boldt was in regards, he says that I had attempted to sell it in regards £1.3 million and so forth but I just wanted to say that inside the evidence of the Crown there was no evidence whatsoever that says that I had attempted to sell it. That there wasn't – that wasn't put forward in any manner or fact towards any, anyone and the *Sun,* the *Sun* releasing it was part of them releasing it and they weren't allowed to so I just wanted to put that in to straighten it up.

Now in regards to the Judge's summing up. In the submissions made by my counsel it says that, "The Judge misdirected the jury on certain accounts in regards to the summing up at the end of the Court case." Now I believe that is true. My defence of the claim of right or the colour of right was the belief in which I held, my belief and that I held that honest belief and to be able to prove that belief obviously I had to give evidence and so forth and so the Court and my trial counsel represented me in that.

Now part of what happened in that summing up was in relation to what the Judge said in regards to one of the trial's – one of the Crown witnesses, Mr Impey. Now the Judge states that, at the end of his summing up, that the issue comes down to, is a point that should be looked at by – and places a lot of weight on the issue, that it comes down between what seems to be a competition of credibility between myself and Mr Impey's credibility. Now I say that that is wrong. I say that is wrong and that the Judged erred there and errored there because I believe that it comes to my belief, my belief that I had at the time of which I accessed that computer system, that at that time it was what was my belief and not the belief or not the credibility of Mr Impey of which the Judge summed up.

Now what the Judge refers to in that was obviously Mr Impey's statements that he gave in examination and cross-examination while he was on the stand. Now in that examination I say that my defence counsel asked Mr Impey a range of questions, a number of questions and in a line of a questioning that defence counsel did, he's proffered that Mr Impey had talked to Mr Impey's father and they had kind of got into cahoots over about trying to make more money off this video of the Tindall video. Now I say that the problem that I'm trying to bring up here is that that phone call, that conversation inside that phone call never happened, never happened at all. It's nowhere in my defence papers, it's nowhere in my questioning, it's nowhere. I'd

given my defence counsel a paper of that phone call that I had with Mr Impey and Mr Impey's father in relation to it. What my lawyer had done is he had proffered his own – how would you put it?

ELIAS CJ:

His own spin, you mean, his own interpretation of –

MR DIXON:

Yes, well he tried to bring something out from Mr Impey, he thought he saw something and then he – what he did at that time was he changed the structure of my – because obviously my lawyer is the person that's speaking for me and that he's putting forward questions that obviously are relevant to my defence strategy but they weren't, they were never there. So what he did was he put forward an imaginary situation that never happened, that never happened and Mr Impey on the stand obviously said, "Well no that never happened" and it didn't, it just never did. I swear to Mr Impey Senior and lovely man and everything but he was nothing to do with the cahoots of making money or anything like that with his son and the phone call. That was something my lawyer brought up, that was against my defence – well a lot of things but what happened then was my lawyer actually brought that up again when he summed up my case at the end of the trial and with that, what he did was he gave the Judge the ability to be able to use that point, that fictitious point that my lawyer had proffered and he used that point in relation to finding Mr Impey's credibility more than mine. So when the Judge wrongly emphasised that the jury, in deliberations, should use the credibility of Mr Impey in his deliberations, that I say that I didn't have – it wasn't fair that there's no way that they could have found Mr Impey not credible and therefore if they were to find in favour of Mr Impey's credibility, then they would find in favour of mine, therefore it was less likely that I would come out with a more favourable outcome in the verdict itself.

Now I say in essence that that was wrong. That the Judge, not only should he not have weighed up at the end of his summing up that the jury should have deliberated and used Mr Impey's credibility over mine, the Judge should have looked at what happened, or looked at the facts that were brought up in the case in relationship to my, not my credibility but to my belief, what would be held in my belief. Now the Judge at one stage says that, that, he puts forward the Crown's case that you, that the jury shouldn't take into account anything that has happened before previously in relationship to Mr Dixon, or my relationship, to Base in any form or for any access to

their computer system or anything. The thing is, if it's my belief, and I'm putting that forward as my defence on this charge against me, then what I've done in the past and the relationship that I've had with Base and the work that I've done for them and the use of those computer systems and everything before it obviously would make up what would be my thought in my head in my belief that I would be allowed to access that computer system. Not, not take it.

The Crown proffers the case that I, that I came into a company that I was working for and accessed a computer system and accessed a security video system at the time while I was on the same video system being filmed and then stole it and then they proffer that it must be common sense that then I left, tried to sell it, couldn't, came back, and then asked, told the people that I stole it from that I'd stolen their property and then asked them if I could sell it. Now that's what they proffered forward for common sense for what the case was against me. So as ridiculous as that sounds they did find me guilty and I say that it is wrong that they found me guilty on the, on these points when if you look at what it was, what the Crown said that they shouldn't take into contention anything that I'd done before or any past history or any relationship with Base, that those working relationships with Base should have been heavily used or put forward by the Judge in his summing up on my side of the defence. So therefore it wouldn't be left up to Mr Impey's credibility strongly advised by the Judge but to look at what happened in the past. What happened with my relationship with Base.

The thing is, as in the paper, the primary argument is that the failure to identify the belief of myself as the key to accessing the question of dishonesty and my claim of right and in that case when I gave, when I gave evidence, or those people that gave evidence such as, for instance –

ELIAS CJ:
So what you're criticising in terms of what your counsel did on the credibility issue, is that at page 177 in the address to the jury, or page 72 I think is the big number.

MR DIXON:
Ma'am, I've taken it and shortened it down. I've written the pages down, I might have marked them down wrongly. Let me just grab the summing up.

ELIAS CJ:

Well take us to the summing up. It's probably –

MR DIXON:

Well it was, Ma'am it was that – let's see.

ELIAS CJ:

The hidden agenda that Base had.

MR DIXON:

Well, sorry Ma'am, on the summing up on page 82, again, sorry 98, page 98 onto – at the start of page 98, it's the summing up Mr Westgate was saying, "Well at the time the plan was decided upon by Mr Impey and his father, that Mr Impey says he required the return of the footage, Mr Dixon said so we drip feed," and a few lines down, "That what Mr Impey was saying was not a bluff it was all part of a preconceived plan with his father." All of that is my defence counsel's proffer and so what it did is it made me look like I was trying to blame Mr Impey and tried to make it convoluted that Mr Impey and Mr Impey's father were involved with it too which completely wasn't anything to do with my strategy but then neither were the questions in regards to what was meant to be proffered or what was meant to be adduced by the questions list that I had for my defence counsel.

ARNOLD J:

Can I just ask something, in your evidence –

MR DIXON:

Yes.

ARNOLD J:

– you explained at one point that you got annoyed because Mr Impey was talking about a sort of slow release of the images.

MR DIXON:

Yes, of the video footage. The images themselves yes.

ARNOLD J:

With a view to creating greater impact.

MR DIXON:

Yes.

ARNOLD J:

And you were upset about that because of the impact that it would have on Mr Tindall's wife.

MR DIXON:

Yes.

ARNOLD J:

Now isn't that what the counsel was talking about here?

MR DIXON:

No.

ARNOLD J:

Or are you saying it's something different?

MR DIXON:

No, it's something completely different. The conversation that Mr Impey and I had was on the night of when it was actually released, it was that Mr Impey Junior is the general manager of Base Backpackers at the time. Now him and I, a pretty good relationship, but at the time what happened was, is that Mr Impey Junior told me what he had been speaking to Senior, apparently to Senior Base I don't know because I wasn't in the phone call but talking to other people and so forth about it and what he did was, he then told me what it was that they had thought they could get more out of it, in relation to being able to place the story so it could be run longer because they would appear on the front pages of th e tabloids in England so to speak and that was worth much more marketing power which in a business sense is probably perfectly true but I told them that that was crap, that that was –

ARNOLD J:

That all came out in evidence didn't it?

MR DIXON:

That came out in evidence but that was – the thing is that was –

ELIAS CJ:

And it was put to Mr Impey too because he said, "Well I was just playing along because I wanted to get my hands on the footage."

MR DIXON:

Yes.

ELIAS CJ:

Well how does that fit? There is a credibility issue isn't there?

MR DIXON:

Well at that point I wanted to release it but not on the actual part of when I took it. The thing is the only – when I took it my intention at that time was to find out how much it was worth, was to package it in Project Lucy and just as a point, when the Crown said that's just a made up fictional thing that Mr Dixon did, but in the evidence itself there's folders with "Project Lucy" on it. So it's like the project is there, it was in the makings of it and so that credibility issue that comes towards me and Blair was well after the – was after the fact that I didn't want to do what he was suggesting that they were going to do and I says, "No I'm not going to do that." But he already had the video, so and there's the evidence of which was meant to be submitted in the Court if it was, then that would've been allowed to have been taken into consideration by the jury at the time to be able to show, I had no evidence. I had absolutely nothing put forward, nothing submitted, Your Honour and I have it all open. It was within the memorandum that was in for the Appeal Court, the videos that I'd made and put up on YouTube channels, the websites that I built with them, it wasn't about security or a bouncer, obviously that –

ARNOLD J:

But that part of it you did get the opportunity to explain to the jury. I mean you did say that you'd done other work for them.

MR DIXON:

But did I –

ARNOLD J:

And you identified it and that topic was raised in your evidence probably three or four times.

MR DIXON:

Yes and in the end, in the summing up, it was just brushed over.

ARNOLD J:

Right, so that's your complaint? It was brushed over in the summing up?

MR DIXON:

Well there was the – the thing is I find if I was on the jury and someone said to me, "I've done lots of projects and I've done – I've got a large background for five years, five years with that company" and I would expect, if I was on that jury to say, "Well prove it, like let's see it, at least just one project to back up that story, to be able to say that there is a project, that this Project Lucy was just another project, it was just another project" but I had the evidence that was meant to be submitted at the time. My lawyer didn't submit it and I couldn't cross-examine on it. I couldn't cross-examine Mr Impey or talk to Richard Dean who was the general bar manager about any of the other work that I had done, nothing. So it was minimised. So my –

WILLIAM YOUNG J:

What was the other work? As I understand it there was evidence about fine tuning or something, the website.

MR DIXON:

Yes there was – I think mentioned Blair mentioned it but really briefly that they says that I had done some work on it and that Mr Dixon had some background, was quite knowledgeable on computers and so forth but like I had security footage camera that I had access to that system before. I had marketing videos that I created and produced for Base. It wasn't – like these are things that are outside of the bounds of a bouncer. These are not the job characteristics of a bouncer as they were trying – as the Crown was proffering forward and it's a nice – it's a good story if there's no evidence to prove the contrary. So when I provided the evidence to my counsel and he didn't submit it, that's when this whole thing – that's where it all started, what I'm saying is.

ELIAS CJ:

I think we do understand what you're saying. You're saying that there was a whole history of dealings in which you had been using your initiative and for the benefit of Base and that this dealing should have been put in that wider context to the jury.

MR DIXON:

Exactly Ma'am. So they could –

ELIAS CJ:

But I suppose what's being – what can be said is that that background, in general terms, was put before the jury, detail wasn't given, so it's really a matter of degree and also they were different sort of dealings than this one. There's no other. If you had had an example of accessing the footage for this sort of purpose before it might have been extremely relevant but the others are a little bit further away from that, aren't they?

MR DIXON:

They are, they're – and they are, they are. This was and I grant that it was different in the scope, like the other ones are different too. Like the one for, for instance I did the back end research against the top competitor in Queenstown and that was quite a large project and that was using their systems. I grant it was different but the intention was the same, to find out, to research. All I wanted to do was to find out how much it was worth, hence the reason – and again in the Judge's summing up when he talks about the Splash Media contract, that Splash Media contract was basically my saviour when I got back to Base, when I says, "Look I really stuffed up." I trusted the son because these guys that were there says, "You can trust him and they'll give you the price" then I can go back and then wrap up Project Lucy and they didn't. What happened they released the picture and that's what turned everything into turmoil. Now I had to somehow save myself because I knew that I was in trouble at that stage, so I had to find a place, a business that would hold a contract, that wouldn't release it, that would pay a lot of money and once I had secured that contract that no one could release it and there was a contract that was signed and it was provided to the Court.

Now my side was never proffered. The Judge never gave that side to the jury to be able to deliberate on. All he talked about was that – the Splash Media contract in a negative way, that once Mr Dixon found that he couldn't sell it from Splash Media,

then he came back and asked if he could sell it – advised them that he'd stolen it and now if he could sell it, that's... My side of the defence, the Judge never put forward at that stage and again you're right Ma'am, it was a different project but it was a research – but I'd done before profit – put it forward to Base management, Base management would put it forward to senior management so I could show that there was a, there – as you say, a history but it was a working history outside the bounds of just this rogue bouncer that they kept on proffering forward, that I was this person that did that.

And again with what happened in the courtroom and the Judge's summing up and the actual appeal, the in Court process for, sorry the in Court application for, to have the whole thing thrown out, it was done in a way that was, things – yeah... I may – it's just a piece of paper with, and it just has what happens on it. Now and I don't know if you know about the Invercargill Court system but you don't sit next to your lawyer, you sit way over in the corner so you don't actually have to, you don't talk to your lawyer or tell him anything, he just goes and does it. Now for this application that has been run, that may set this precedent, it all comes from this piece of paper that I had no input in for anything, not to say that I would stop but I just didn't know what he was talking about and I say that's wrong, that I should have been consulted. Not to say that it's, yeah... I'm saying that my rights under the New Zealand Bill of Rights to have a fair trial, it just wasn't fair and it – like I believe in the New Zealand justice system, that's why I'm here. Like it's our country's justice system and I followed it like you're meant to.

Another point Your Honours, in regards to that, in the submission book on page 14, point 51 is a critical error again in the opening statement of the summing up, a trial Judge states in the first paragraph that, "He can't point to any statement on the part of the accused as to what his intention at the time he obtained the footage was." Now at – the Judge erred or made a mistake in that but that's a heavy mistake, if you were the jury and you weren't paying too much of attention into the detail of actually the statements that were made by myself on the stand, saying that someone doesn't give a reason why the accessed or took something or, in this case stole it, makes you look more guilty than not and what – he, what he should have said was that my intention was never to sell the video, I was to find out the price of the video and then get back to exactly what my statement was but he never proffered that forward and I say that's an error that helped out the, helped out the Crown instead of my side.

O'REGAN J:

So is your complaint here about the Judge or about your counsel?

MR DIXON:

Well it's, I think, it's hard to say as there's points in it that make it look like the Judge might have been slightly biased. I don't want to like discredit the Judge at all because he's the Judge but there are parts in it, like for instance when he says, "This case is crying out for common sense," I say that that, that doesn't give the ability for it to be neutral, that there could be two sides of a story or –

O'REGAN J:

No, hang on I'm just talking about this point you've made at paragraph 51 on Ms Dyhrberg's submission that the trial Judge said that he, we can't point to a statement as to what your intention was –

MR DIXON:

Yes.

O'REGAN J:

– are you saying there was a statement and the Judge was wrong –

MR DIXON:

Yes.

O'REGAN J:

– or are you saying there wasn't a statement and that was my counsel's fault?

MR DIXON:

No that there was a statement that was –

O'REGAN J:

But the Judge was wrong, okay, that's all I wanted.

MR DIXON:

Sorry Your Honours, I had it marked down here. Again Your Honours I'll wrap this up. It comes down to like I said before, I've been in the system for four years, four trials and four lawyers, and I've been trying to clear my name all the way through. I've

been fighting all the way through this because of a property point of, of, per se what they say on TV, a technicality. I've been doing it because I believe that I honestly have a miscarriage of justice in relationship to my case in regards to just accessing the computer system for dishonest purposes. I wanted the chance to be able to speak today, to be able to put forward the evidence and the information that I have, but I understand now that, that leave wasn't particularly sought by my ex-counsel and the reason why, it may seem mad or crazy that I dismissed counsel at this time, was because I was afraid that the only thing that would be talked about today would be –

ELIAS CJ:
The property.

MR DIXON:
The property.

ELIAS CJ:
Yes. It virtually was.

MR DIXON:
So I just want to say if you could, if you could think about what I said in regards to it. I'm not asking for it to be thrown out and, a mis-trial, and then that's it. I have to clear my name and I want to go back to Court. I'm asking this, that it was an unfair trial and if you are to, if you were to look at it and think that okay well what Mr Dixon put forward, or could have put forward, I believe would have changed in the minds of the people in that jury to come out with a more favourable verdict and that my trial counsel at the time, be it that he's not here, made errors to such a degree that it caused a miscarriage in that case. I'm not asking for a second go, I'm asking for a first go. And if you consider it and it's a yes then I thank you. But I thank you today for listening to me. I thank you today for listening to me.

ELIAS CJ:
Thank you Mr Dixon. Mr Boldt was there anything that you wanted to say in response?

MR BOLDT:
The particular bits of the summing up Mr Dixon referred Your Honours to are dealt with in my written submissions. I've given the various references. I suppose I can

say this. To the extent the summing up doesn't reflect the way Mr Dixon thinks the case should have been put, that really is a criticism, I think, of defence counsel rather than of the judge because the way the Judge summed the defence up to the jury closely accorded with the way defence counsel put the case to the jury. For example, the emphasis on Mr Impey's credibility was something that had been repeatedly stressed by Mr Dixon's trial counsel as a key and probably the key critical assessment for the jury – now that's not to say that neither the Judge nor defence counsel gave appropriate emphasis to the assessment the jury needed to bring to Mr Dixon's own evidence. As I've said in my written submissions, there was a very detailed tripartite direction given to the jury and given this was a case which turned on whether the explanation Mr Dixon had given might possibly be true, that tripartite direction was going to give the jury pretty much everything it needed in any event. In other words if you think what Mr Dixon has told you in his evidence about what he was doing, even might be true, then your immediate response must be to acquit him and of course the remainder of the case only fell to be considered if the jury had reached that conclusion. And that was a very thorough tripartite direction and that meant to the extent these defences that were subjective to Mr Dixon needed to be considered, the jury was appropriately directed and given proper emphasis on them.

But in any event, Mr Impey's credibility arose from Mr Westgate's closing. Other things too, for example, that we don't have a device that enables us to look inside someone's head and I'm sure that's what His Honour was talking about in terms of saying, you know we can't know what was in someone's head for sure when – in any sort of precise mathematical way. So in assessing what someone's intention is, it's important to examine what they did in light in of all the surrounding circumstances.

ELIAS CJ:

There is one thing though that slightly bothers me. At paras 49 to 50, the Judge is selecting, and that the Judge having said that the critical thing is credibility and that you can't decide you know what the intent was, which is the critical thing in the case, except by inferences. He selects one example. He selects the Splash letter and says that the Crown position is that that was only when there was nothing to be sold unless he got authority and that's why he went to Impey at that stage and in response to that you get this rather limp defence thing that it's a regular occurrence from all levels of staff. So what's missing in this is the point that Mr Dixon's put to us that he wasn't just all levels of staff, he had been involved in schemes to promote the

business. There's nothing of that in this so it's really on the critical question the jury is being told to consider.

MR BOLDT:

Yes and I accept that that is the way that Mr Dixon tells us he wanted his defence put and those were the aspects of his prior conduct. He was –

ELIAS CJ:

It is pretty critical on any view however, the basis on which a staff member has access and what they might think they could reasonably use it for.

MR BOLDT:

Indeed Ma'am and I suppose the question on this really, of course, and I'm getting into a level of detail that perhaps in this Court you know we would ordinarily hope for at least a considered view of the Court of Appeal on; in the broad context of the case as a whole, and it's certainly my submission that given the number of times the learned Judge stated and restated the issues and appropriately directed the jury as to the burden and standard of proof, exactly which two issues were in dispute and what each of them meant, the jury could have been in, under no illusion as to the context before it and as to what it had to find before it was entitled to convict the appellant. And certainly you know we can always lift out a paragraph here and there and say, well this could have been fuller or this could have been better.

ELIAS CJ:

Well I'm not just lifting it out, there's nothing else. I mean this is a very admirably neutral summing up but it's the, it's where he ends up and on what we've been told and I'd have to go back and look at the evidence but on what we've been told it doesn't really put the defence case at the highest.

GLAZEBROOK J:

If you look at 58 maybe, it starts to do a bit more.

MR BOLDT:

Well it certainly is my submission that the summary of the defence case, and this is only the, this is only the fullest of the summaries of the defence case because throughout the summing up the Judge has referred the jury to the appellant's point of view each time he has stated the issues and each time he's – what he has done from

time to time is give what he described as in a nutshell summaries of where we're up to so far and even there's he evenly handed, even-handedly setting out the Crown position followed by the defence position. But the defence in the way it's summarised at, big number 97, page 97, is a pretty good reflection of the way the case was put by counsel. Now I can't comment, and none of us really can given the absence of the normal waivers and affidavits, on the degree to which that might have departed from express instructions given by the appellant, that evidence is simply not before us. But what we can say is that there was a strong defence put up on the appellant's behalf and it was fairly and clearly reflected in the summing up at each stage, and that there aren't any errors in the summing up that might have led the jury astray. Everything else, in my respectful submission, is a matter of emphasis and there is no realistic possibility of it being misled.

ARNOLD J:
Does the Judge, at any point when summarising the defence case, mention the previous projects?

MR BOLDT:
He talks at 37 I think is probably the best paragraph that talks about that and this is really answering a point about the policies and control of the computers. But it is certainly true that the defence did not emphasise, in the way Mr Dixon now tells us he wanted emphasised, the prior conduct.

ARNOLD J:
Well it was certainly raised because at page 66 in his closing defence counsel does make the point that he'd had access to computers and presented projects. He noted that he accepted this one was a bit different but still said he – so, I mean it's not developed but the point is there.

MR BOLDT:
No, and I accept that, but if we look at the defence as a whole. Now rightly or wrongly that wasn't something Mr Westgate at the time decided to accord the prominence we now hear from the appellant he wishes it had been and I understand Your Honours' concerns and if there was a failure to follow instructions I also understand the appellant's concern, but the problem here is –

ELIAS CJ:

We're not seized of that.

MR BOLDT:

We aren't seized of that, and when we look at the way the other projects were really so lightly touched on, it's my submission the Judge can't be criticised for failing to make more of that than the defence had elected to make at the time. But beyond that we are in a situation of having no evidence before us on which we're able to make those sorts, or draw those sorts of conclusions.

ELIAS CJ:

Thank you.

MR BOLDT:

Now is there anything else I can assist the Court with in terms of this material?

ELIAS CJ:

No, thank you Mr Boldt. Thank you Crown counsel and thank you Mr Dixon for your submissions. We'll take time to consider our decision in this matter.

COURT ADJOURNS: 3.14 PM