IN THE SUPREME COURT OF NEW ZEALAND

SC 16/2007
[2008] NZSC 3

NICOLA BRONWYN HAYES

v

THE QUEEN

Hearing:	15 August 2007
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	P Davey and D Hayes for Appellant D B Collins QC Solicitor-General and S Edwards for Crown
Judgment:	15 February 2008

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The convictions are set aside.**

C **A new trial is ordered.**

REASONS

(Given by Tipping J)

Introduction

[1] The appellant, Ms Hayes, was found guilty on 24 counts of fraudulently using a document contrary to the then s 229A[1] of the Crimes Act 1961 and five counts of dishonestly using a document contrary to the present s 228. All 29 counts related to medical certificates which Ms Hayes submitted to the Accident Compensation Corporation between 10 September 1998 and 7 October 2004. Her purpose in submitting them was to obtain weekly compensation payments. The certificates were in more than one form. It is sufficient for the moment to say that Ms Hayes certified she was not working and not able to work when, as the jury found, she was. Ms Hayes' appeal against conviction was dismissed by the Court of Appeal.[2] We will refer a little later to the basis on which the case was argued and determined in that Court. It is convenient first to outline the material facts.

[2] Ms Hayes was involved in a car accident in 1997. She suffered head and neck injuries. At the time of the accident she was working as a primary school teacher. She sought and received weekly compensation from the Corporation for about seven years. The medical certificates which Ms Hayes submitted from time to time contained a "claimant declaration" which she signed. The form of the certificates and declarations changed several times over the period in question, although for present purposes nothing turns on the differences between them. On occasion Ms Hayes was simply required to declare that the medical certificate accurately reflected her activity restrictions. More frequently she was required to sign a fuller standard form declaration along the following lines:

> I declare this certificate to be an accurate reflection of my fitness for work, and there is nothing else I need to tell ACC about my circumstances. I understand that I must notify ACC of any employment (part-time, full-time,

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1 Repealed in 2003, as discussed below, when a new Part 10 of the Crimes Act 1961 was introduced by s 15 of the Crimes Amendment Act 2003.

2 [2007] NZCA 6 (Robertson, Ronald Young and Venning JJ).

paid or unpaid) that I undertake and of any income that I receive over the time I am receiving compensation.

[3] The circumstances which gave rise to the charges, as summarised by the Court of Appeal,[3] were these. From October 1997 Ms Hayes was involved, successively, in running two companies which were in the business of emptying effluent ponds on dairy farms. She took an active physical role in assisting her partner with work on the farms and effectively ran the first business after her partner himself suffered injuries in a car accident in 2001. From October 2002, after she separated from her partner, Ms Hayes ran her own effluent removal business. During these periods she continued to provide declarations to the Corporation to the effect that she was unfit for work and was not in any form of employment.

[4] Section 229A provided and s 228 now provides as follows:

> **229A Taking or dealing with certain documents with intent to defraud**
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> Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to defraud,—
>
> (a) Takes or obtains any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration; or
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> (b) Uses or attempts to use any such document for the purpose of obtaining, for himself or for any other person, any privilege, benefit, pecuniary advantage, or valuable consideration.
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> …
>
> **228 Dishonestly taking or using document**
>
> Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—
>
> (a) dishonestly and without claim of right, takes or obtains any document; or
>
> (b) dishonestly and without claim of right, uses or attempts to use any document.

[5] Counts 1 and 25 of the indictment demonstrate how the counts under each section were framed. Count 1 charged Ms Hayes that on or about the tenth day of

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[3] At para [4].

September 1998, with intent to defraud the Corporation, she used a document capable of being used to obtain a pecuniary advantage, namely an ARC18 medical certificate, for the purpose of obtaining for herself a pecuniary advantage, namely weekly compensation payments. Count 25 charged Ms Hayes that on or about the twelfth day of November 2003, with intent to obtain a pecuniary advantage, she dishonestly and without claim of right used a document, namely an ARC18 medical certificate.

Pecuniary advantage

[6] The grounds on which Ms Hayes was granted leave to appeal on this aspect of the case were:[4]

> (a) Whether, in terms of s 229A, now replaced by s 228, of the Crimes Act 1961 "pecuniary advantage" includes a situation where there is an avoidance of the risk of losing a compensation benefit under accident compensation legislation.
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> (b) Whether the trial Judge erred in law in not directing the jury in respect of the legislative provisions relating to continuing entitlement to a compensation benefit.

[7] The concept of pecuniary advantage first entered New Zealand law in 1973 with the enactment of s 229A by s 4 of the Crimes Amendment Act 1973. Its source was the Theft Act 1968 (UK). The English authorities on pecuniary advantage do not assist because of the definition which applied to its use there and the way it was interpreted. In New Zealand the expression is not defined.

[8] The issue, as the Court of Appeal saw it, was whether, in order to obtain a pecuniary advantage, the accused had to obtain compensation payments to which she was not entitled; or whether a pecuniary advantage included the situation where she avoided the risk of losing compensation. In the former case, the question of the accused's entitlement to compensation would be a material issue and the Judge's failure to direct the jury on that issue would have been a material error. The Court of Appeal concluded that a pecuniary advantage included Ms Hayes avoiding the risk that, on a reassessment, compensation payments would have been stopped. On this

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4 *Hayes v R* [2007] NZSC 31.

premise the Judge was justified in not directing on the question of entitlement. Ms Hayes' stance, in this Court and below, was that for her to gain a pecuniary advantage the Crown had to show more than the avoidance of the risk of the payments being stopped. It had to show she had gained an actual monetary advantage to which she had no entitlement. The Judge had therefore erred in not directing the jury on that basis.

[9] The way in which the argument developed in the Court of Appeal, and indeed in this Court, was substantially influenced by previous decisions of the Court of Appeal on the subject of pecuniary advantage. Those decisions held that obtaining something to which the accused is entitled cannot amount to obtaining a pecuniary advantage. Hence the Crown must show lack of entitlement.

[10] In *R v Firth* the Court of Appeal said:[5]

> We have not been referred to any case which specifically discusses the point but we think it is implicit in the term "advantage" that if a defendant were legally entitled to receive the money in question, he has not obtained a pecuniary advantage to which he was not entitled. In *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 at p 163 this Court recorded, seemingly without argument on the point, that that was the position in regard to the Social Welfare benefit there in issue.

[11] The passage in *Ruka* to which the Court was referring is contained in the judgment of Blanchard J in which Richardson P joined. Their Honours there said of charges under s 229A:[6]

> Miss Ruka was charged that with fraudulent intent she used applications under the Social Security Act for the purpose of obtaining a pecuniary advantage. If, as we have concluded, she qualified for the benefits in question because she was not in a relationship in the nature of marriage, it follows that she did not, whatever her intent, use a document to obtain an advantage; that is, something to which she had no entitlement.

[12] We consider the approach taken in *Ruka* and followed in *Firth* does not reflect either the text or the purpose of the legislation. In its terms the legislation does not require proof of lack of entitlement. The concept of entitlement can arise, if at all, only by implication from the word advantage. But if a person seeking to

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5 [1998] 1 NZLR 513 at p 516.
6 At p 163.

obtain a pecuniary advantage uses a document with intent to defraud (s 229A), or dishonestly and without claim of right (s 228), we do not consider it is any defence to say that the user of the document was entitled to the advantage. The statutory purpose is to criminalise the use of dishonest means directed to gaining the advantage even if the accused is otherwise entitled to it. Questions of actual entitlement may well be relevant to sentence, but they are not relevant to guilt, save that a belief in entitlement will, of course, be relevant to mens rea.

[13] In view of the tenor of some of the submissions, it is worth stating at this point that for present purposes an unsuccessful use of a document is just as much a use as a successful one. An unsuccessful use must not be equated conceptually with an attempted use. The concept of attempt relates to use, not to the ultimate obtaining of a pecuniary advantage, which is not a necessary ingredient of the offence. Because the use does not have to be successful it may be difficult to draw a clear line between use and attempted use. That seems to be why attempts have been brought within the definition of the offence ("uses or attempts to use any document"), rather than being left to be dealt with, as is usual, under s 72 of the Crimes Act.[7] This supports the view that the offence is directed at the dishonest conduct by means of which the pecuniary advantage is sought.

[14] Both s 229A and s 228 use the expression "pecuniary advantage" in conjunction with the expression "valuable consideration". The composite expression is "pecuniary advantage or valuable consideration". The second part of this conjunction does not say or *other* valuable consideration. That must, however, be the effect of the terms pecuniary advantage and valuable consideration when they are read together in their statutory context. Leaving aside the other concepts addressed in the sections, the statutory purpose must have been to encompass anything capable of being valuable consideration, whether of a monetary kind or of any other kind; in short, money or money's worth.

[15] The construction we would adopt of the expression "pecuniary advantage" in ss 229A and 228 also derives support from the fact that if the charges against Ms

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[7] The practical effect of including an attempt within the substantive crime is to avoid the lesser penalty for attempts generally, as specified in s 311(1) of the Crimes Act.

Hayes had been framed on the basis that her purpose or intent was to obtain valuable consideration as opposed to pecuniary advantage, the implicit comparison with entitlement said to be inherent in the word "advantage" could not be present. It is self-evident that the weekly compensation payments represented valuable consideration, irrespective of entitlement. The same can be said of the concepts of property and service, which are also found in s 228. The more is this so because property is defined in s 2 as including money. Hence money is actually included within three of the four concepts covered by s 228. It cannot be right that the question of entitlement should be regarded as relevant on the basis of one framing of the charges and not on the basis of another. Whether the recipient is entitled to receive the weekly compensation payments does not make them any more or less property or valuable consideration; nor should it make them any more or less a pecuniary advantage.

[16] This Court is not bound by the decisions in *Ruka* and *Firth*. We respectfully consider they should not be followed on this point. As already foreshadowed there is a different way of construing the expression "pecuniary advantage" which better reflects both the statutory language and purpose and does not involve the difficulties inherent in an approach which has been held to require consideration of entitlement to and risk of losing compensation. The preferable construction treats the expression "pecuniary advantage" as meaning simply anything that enhances the accused's financial position. It is that enhancement which constitutes the element of advantage. If what the accused person is seeking to obtain is of that kind, it does not matter whether he or she is entitled to it, or may be trying to avoid the risk of not continuing to receive it. It follows that even if the person from whom the pecuniary advantage is sought has an obligation to supply it to the recipient, that will not prevent the use of dishonest means to procure the advantage from being an offence.

[17] As the Court of Appeal put it in *R v Thomas*,[8] a pecuniary advantage advances the economic interests of the recipient. Some of the submissions seem to have proceeded on the assumption that somehow the continuation of the weekly

[8] (Court of Appeal, CA 71/00, 7 June 2001, McGrath, Ellis and McGechan JJ).

compensation payments could not in itself be an advantage. It must have been for this reason that the argument focused on questions such as the risk of the compensation being stopped or being lost. On the view we take, each weekly payment of compensation, which it was Ms Hayes' purpose to obtain, constituted a pecuniary advantage to her.

[18] This approach overcomes what we see as a potentially difficult aspect of the Court of Appeal's reasoning in *Firth*.[9] Immediately after the passage cited above the Court said that it did not necessarily follow that in all cases the Crown must establish that the accused was not entitled to the advantage. The Court then gave as an example a case (*R v Gunthorp*[10]) in which the concept of entitlement could not apply. The advantage in that case was attaining better loan terms than were available in the marketplace. The concept of legal entitlement could not apply to such an advantage. The difficulty is two-fold. First, it seems unlikely that Parliament envisaged that lack of legal entitlement would be a formal ingredient of the offence in some situations but not others. Second, *Firth* raises the potential for uncertainty as to when entitlement is an issue and when it is not. We consider that the example given and this uncertainty both demonstrate that the concept of advantage should not be construed as involving a comparative notion, that is, obtaining a better financial outcome than that to which you are entitled in law. The underlying notion is practical rather than comparative. By practical we mean simply getting something which enhances your financial position. As we have said, this construction better aligns the concept of pecuniary advantage with the cognate concepts of property, service and valuable consideration found in s 228.

[19] Support for the approach we are taking also comes from the decision of the Court of Appeal for England and Wales in *Attorney-General's Reference (No 1 of 2001)*.[11] In that case the defendants were the parents of a young woman who had been arrested overseas and charged with a criminal offence. A trust fund was established to assist the family with the proceedings. Contributions were made by

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9 See the reference to this aspect of *Firth* in Robertson (ed), *Adams on Criminal Law* (looseleaf, Crimes Act, 1992), vol 1, para [CA 228.03] (last updated 23 November 2007).

10 [2003] 2 NZLR 433, date of judgment 9 June 1993.

11 [2003] 1 WLR 395 (Kennedy LJ, Curtis and Pitchford JJ).

members of the public. Some money which had been donated to the defendants personally, to use as they chose, was mistakenly paid into the trust fund. The defendants presented a forged invoice to the trustees of the fund seeking payment for accommodation expenses they had never incurred. The trustees paid the invoice.

[20] The defendants were charged with dishonestly furnishing false information with a view to gain for themselves, contrary to s 17 of the Theft Act 1968 (UK). The trial Judge held that since at least some of the money in the trust fund "must have belonged" to the defendants they could not be said to have acted with a view to gain for themselves. He accordingly directed that they be acquitted.

[21] The Attorney-General referred the point to the Court of Appeal which held that, even if the accused were entitled to payment, they still committed an offence because of the dishonesty with which they sought to procure it. In the course of giving the judgment of the Court, Kennedy LJ said:[12]

> The successful submission focused on the words "with a view to gain for themselves". "Gain" is defined in section 34(2)(a) as including "a gain by keeping what one has as well as a gain by getting what one has not". In relation to blackmail, which is also governed by section 34, the question has arisen whether a person demanding money undoubtedly owed to him did have a view to gain. In *R v Parkes* [1973] Crim LR 358 that question was answered by Judge Dean QC in the affirmative. As he put it, by intending to obtain hard cash as opposed to a mere right of action in respect of the debt the defendant was getting more than he already had, and in his commentary on that case Professor Smith submitted that gain means acquisition, whether at a profit or not. That was the intention of the Criminal Law Revision Committee's Eighth Report on Theft and Related Offences (1966) (Cmnd 2977), which in para 121 stated: "the person with a genuine claim will be guilty unless he believes that it is proper to use the menaces to enforce his claim." …
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> In our judgment, *R v Parkes* [1973] Crim LR 358 was rightly decided, and it follows that on the facts of the present case, contrary to what was decided by the trial judge, there was clear evidence that [the defendants] were acting with a view to gain for themselves. Even if they had a valid claim to some of the money in the trust fund on the basis that the money should never have gone into the fund, and even recognising that they were beneficiaries under the trust, makes no difference, because none of that relates to what they were doing at the material time: they were dishonestly making use of a false invoice to substantiate a claim for expenses, and thus to extract from the trustees a cheque for £9,113.50. As Judge Dean QC put it in *R v Parkes*, they were seeking to obtain hard cash as opposed to a mere right to claim.

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12 At p 409.

There is a sufficient conceptual parallel between "advantage" and "gain" to make the Court of Appeal's reasoning helpful in the resolution of the case before us.

[22] On this basis, it is not necessary to discuss the reasoning of the Court of Appeal or the submissions which were made in this Court seeking to attack or uphold that reasoning. It is, however, appropriate to record that the Court of Appeal was not asked, nor was it free, to depart from the view that has hitherto been taken about the role that the question of entitlement should play in construing the term "pecuniary advantage". Our focus from this point on will necessarily depart somewhat from the precise formulation of the first ground of appeal with its reference to "risk of losing" a compensation benefit. We return to the circumstances of this case on that basis.

[23] The offence created by s 229A, as it related to Ms Hayes' case, involved proof that:

(1) with intent to defraud;

(2) she used a document;

(3) which was capable of being used to obtain a pecuniary advantage;

(4) for the purpose of obtaining a pecuniary advantage.

The offence created by s 228 involved proof that:

(1) Ms Hayes used a document;

(2) dishonestly and without claim of right;

(3) with intent to obtain a pecuniary advantage.

[24] The crucial elements for present purposes are, respectively, the fourth and the third; specifically, whether Ms Hayes had the purpose of obtaining or the intent to obtain something that constituted a pecuniary advantage when she used the medical certificates by supplying them to the Corporation. As documents the medical

certificates were clearly capable of being used to obtain a pecuniary advantage.[13] Ms Hayes' purpose and intent when using them was undoubtedly to obtain weekly compensation payments. What she was endeavouring to obtain was unquestionably a pecuniary advantage in that its receipt would enhance her financial position. Provided she had an intent to defraud, or acted dishonestly and without claim of right, Ms Hayes therefore committed offences against s 229A and s 228.

[25] When the essential elements of the offences are analysed as they should be, there is nothing to support the contention that the trial Judge erred in not directing the jury on the legislative provisions concerning what entitlement Ms Hayes may or may not have had. Proof that her purpose was to obtain the pecuniary advantage of weekly compensation did not require any examination of her legal entitlement to that compensation. She committed an offence if she used the medical certificates for the purpose of obtaining weekly compensation and with the requisite dishonest mind. The actus reus of the offence was constituted by her use of the relevant document for the purpose of obtaining a pecuniary advantage. The Crown was required to prove that purpose, but not that she actually obtained a pecuniary advantage. The weekly compensation monies she was seeking were in themselves a pecuniary advantage, irrespective of entitlement. The trial Judge did not therefore err by failing to direct on the subject of entitlement.

[26] We should mention finally Mr Davey's reference to s 308 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRC Act). This section makes it an offence to make a statement knowing it to be false for the purpose or with the result that the person receives or continues to receive any payment *whether or not entitled to it* under the Act. Counsel contended that as the position was covered in this way in the IPRC Act and use of a false document was an offence

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[13] The absence of this element from s 228 means that although the capacity of a document to be used to obtain a pecuniary advantage is of evidentiary relevance to whether the intent of the accused was to use it for that purpose, proof of that capacity is no longer a formal element of the offence. In practical terms however, if the document is not capable of being used to obtain a pecuniary advantage the offence cannot be committed.

under that Act irrespective of entitlement, there was no reason why entitlement should not be relevant under ss 228 and 229A of the Crimes Act. But the express reference in s 308 to the irrelevance of entitlement in the accident compensation context does not logically influence the correct construction of the term "pecuniary advantage" in the general and much more wide-reaching context of s 228 and its predecessor.

[27] For the reasons we have given the first and second grounds of appeal cannot succeed. The Judge did not misdirect or fail adequately to direct the jury on this aspect of the case.

Must an "honest" belief also be reasonable?

[28] The third ground of appeal is that the trial Judge erroneously directed the jury several times in his summing up that any belief Ms Hayes had that she was entitled to act as she did had to be both honest and reasonable. The appellant did not argue in the Court of Appeal that the reasonableness element of these directions was in error. We do not therefore have the benefit of that Court's views on it.

[29] Part of Ms Hayes' defence was that she honestly believed her declarations in respect of her capacity to work related only to her capacity to work in her pre-accident occupation as a teacher. There was evidence from a neuropsychologist who had examined Ms Hayes in 2004 and concluded that her level of cognitive functioning was in the lowest 4% of the population. Ms Hayes said in evidence that she did not view herself as being "employed" and, for that and other reasons, she honestly believed she was entitled to receive the weekly compensation payments despite what she was doing to assist her partner and run the business. One of her contentions in this respect was that she was not taking any drawings or other remuneration for her efforts.

[30] The following passages in the summing up are the principal ones of which complaint is made:

> … you are to determine, Members of the Jury, what you make of that declaration in terms of the obligations that we've talked about. That you act dishonestly, if you act in breach of legal obligations. In addition and as I pointed out to you, without an honest belief that you're entitled to act in that way. Now that's conjunctive as I've put it but "an honest belief that you are entitled to act in that way" is a belief that if you considered was held by the accused in this case and you considered was reasonable and importantly that you come to a finding the Crown have not proved that it was not reasonable, then the combination of those two things could provide a defence for the accused in this case.
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> …
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> She says that she would only have felt obliged to inform the Corporation of income and her working ability if in fact she'd gone back and been able to have work as a teacher, been able to have income as a teacher and if that is the one matter that I suggest you concentrate on in terms of the defence, it would need to be that because Mr Barnsdale's argument is that you should accept her evidence about that. That you should determine that her belief about those things was reasonable and that effectively she had a claim or [sic] right in that way to think that what she was doing was lawful in the circumstances as it applies to those latter counts.
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> …
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> He's asked you to consider here that this company, well the two companies were effectively a no-profit business and he says on that basis if there was no income coming into the hands of the accused then that is a factor that you should take into account in supporting a finding that she did have a reasonable belief, that she thought "well I'm not getting any income from this company". Then he says, isn't that supportive of a reasonable belief that she then didn't have to declare anything, didn't have to meet those obligations.
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> …
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> With that, you'll understand what Mr Barnsdale asks is an acquittal on all charges, asking you to accept here that the accused in these circumstances had a claim of right, had a reasonable belief in the way that I've explained it in terms of the elements of the offence and the defence to that.

[31] Mr Davey argued that these directions were wrong in law and had given rise to a miscarriage of justice. The Solicitor-General argued that the directions were not wrong in law and, even if they were, they were not in all the circumstances sufficiently material to cause a miscarriage; and, if necessary, the proviso to s 385(1) should be applied. We will deal with the submissions made in support of these propositions in greater detail, as may be necessary, in what follows.

[32] The starting point is to identify the mental ingredients of the offences created by ss 229A and 228. In relation to s 229A the key mental ingredient was an intent to

defraud. As that section has been repealed, and the issue before the Court is confined to the reasonableness issue, it is enough for present purposes to say that an intent to defraud was conventionally equated with dishonesty.[14] Hence, if Ms Hayes believed that what she was doing was in accordance with her legal rights and obligations she would have a defence. In the past this belief was often referred to as an honest belief. The question is whether that "honest" belief also had to be reasonable.

[33] The question under s 228 is similarly confined. That section requires the Crown to prove that, with intent to obtain any of the things mentioned, the accused "dishonestly" and "without claim of right" took, obtained, used or attempted to use any document.

[34] "Dishonestly" is defined by s 217 in these terms:

> **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

Two things have present significance about this statutory definition. The first is that the word "belief" is not accompanied by the word "honest".[15] The second is that there is no suggestion that the belief has to be reasonable or based on reasonable grounds. It is the existence of the belief which matters, not its reasonableness. Of course the word "honest", in the phrase "honest belief", was designed to signify that the belief must actually be held. Despite the tautology,[16] its usage in that sense is unobjectionable. It is preferable, however, to follow the drafting of the definitions of dishonestly and claim of right by not qualifying the word belief at all. The potential difficulty with the word "honest" in the phrase "honest belief" is its capacity to be understood as signifying an ability for the accused person to frame their own moral code (the so called "Robin Hood" defence).[17] That, of course, is not its purpose but

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14 See for example *R v Coombridge* [1976] 2 NZLR 381 at pp 386 – 387 (CA).

15 As it was in the previous definition of colour of right: see para [57] below.

16 See Lord Diplock's speech in *Horrocks v Lowe* [1975] AC 135 at p 150, albeit in the context of defamation.

17 See *R v Ghosh* [1982] 1 QB 1053 at p 1064 (CA) where it was said that to abandon all standards but that of the accused himself would mean that "Robin Hood would be no robber".

juries can be confused as to the sense in which the word is used. It is best to avoid the issue when summing up by using language such as "did the accused believe" rather than "did the accused have an honest belief". The verb in this context is easier than the noun.

[35] The expression "claim of right" has replaced the older and more familiar expression "colour of right". It is defined in s 2 of the Crimes Act as follows:

> **claim of right**, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed

The same two points can be made about the word "belief" in this definition. A qualifying belief does not have to be reasonable or based on reasonable grounds nor have those responsible for the drafting thought it necessary to qualify the word "belief" by reference to honesty. A belief is a belief.

The Crown's arguments

[36] The Crown advanced three arguments to resist the proposition that the Judge had erred by introducing the reasonableness criterion. The first contention was that, in the context of the summing-up as a whole, the Judge was not introducing a "mandatory objective consideration" by his reference to reasonableness. We do not, however, consider the Judge would have been understood by the jury as saying, as the Solicitor-General contended, that the reasonableness of Ms Hayes' belief was relevant only to the extent that it bore on whether she actually held it. The natural understanding of what the Judge said is that the belief Ms Hayes asserted not only had to be actually held, it also had to be a reasonable belief, and the jury was required to determine whether that was so.

[37] The Judge went as far as saying that the belief had to be held by the accused and the jury had to consider whether it was reasonable. He then added that the

Crown had to prove the belief was unreasonable.[18] The Judge was thereby treating the reasonableness of the accused's belief as a necessary ingredient rather than as simply having evidentiary significance on the question whether it was or was not held. On conventional principles this was a material misdirection which gave rise to a substantial miscarriage to which it would not be appropriate to apply the proviso to s 385(1). There must be a real risk that the jury, or at least some members, might have thought that Ms Hayes actually held the belief she asserted but that it was not reasonable for her to do so.

[38] The Crown's second point was that it was the defence which had introduced the idea that the appellant's belief "was reasonable and therefore honest". That may be so, but the defence could properly have been referring to the suggested reasonableness of the belief to show that it was actually held, without implying that reasonableness was a necessary ingredient. In any event an error made by defence counsel, if such it was, does not validate an erroneous direction.

[39] As his third point the Solicitor-General invited this Court to reconsider the lack of a reasonableness criterion in New Zealand's approach to assessing a qualifying belief. He suggested that the New Zealand position was out of line with the law in comparable jurisdictions. The Solicitor-General acknowledged that historically in New Zealand what was often called an honest belief on the part of the accused that he or she was entitled to act in the way alleged will provide a defence even if the belief held by the accused is objectively unreasonable. Provided there is evidence to raise the issue, it must be left to the jury, with the Crown having the onus of excluding any reasonable possibility that the asserted belief was held.[19]

[40] There are two reasons why we do not consider this Court should accede to the Solicitor-General's suggestion that a reasonableness criterion should be introduced. First, the jurisprudence of the other countries to which we were referred does not suggest that New Zealand is out of line. Second, even if New Zealand were out of line, the statutory definitions of dishonestly and claim of right introduced in

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[18] See the first passage cited at para [30] above.
[19] See *Coombridge, R v Williams* [1985] 1 NZLR 294 (CA) and *Firth*.

2003 have no reasonableness criterion. It would not be appropriate for this Court to read one in. We will expand on each of these reasons.

The international jurisprudence

[41] The Solicitor-General's international survey was directed primarily to the decision of the Court of Appeal in England in *Ghosh*, the decisions of the High Court of Australia in *Peters v R*[20] and *Macleod v The Queen*,[21] and the decisions of the Supreme Court of Canada in *R v Théroux*[22] and *R v Zlatic*[23] in which the judgments were delivered concurrently. It is not necessary for the resolution of the present appeal to examine all the intricacies of the various overseas approaches to questions of dishonesty generally. The approaches differ in material ways. The crucial point, for present purposes, is whether, by not requiring the accused's belief to be objectively reasonable, New Zealand is out of line with the jurisprudence of the countries to which the Solicitor-General referred. To the extent that the Solicitor-General's submissions were directed at broader questions relating to dishonesty, which do not specifically arise on the facts of this case, we prefer not to address them.

[42] It is important for an understanding of what follows to distinguish between two concepts. The first is whether conduct of the kind in question should be characterised as dishonest.[24] The second is whether the mind of the particular accused was dishonest. It is seldom that any issue arises at trial in respect of the first concept. But where it has arisen, the correct approach to its resolution has proved controversial. What is normally in issue at trial is whether the mind of the particular accused was dishonest. That is conventionally assessed subjectively by reference to what the accused knew or believed the circumstances to be. The principal focus of the cases cited has been on the first issue. Little, if any, difficulty has been

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20 (1998) 192 CLR 493.
21 (2003) 214 CLR 230.
22 [1993] 2 SCR 5.
23 [1993] 2 SCR 29.
24 For example it may be arguable that the use of a cheque in a particular way is not capable of being regarded as dishonest, whatever the state of mind of the accused.

encountered with the second. It is that second issue with which the present case is concerned.

[43] The objective facts of a particular case may be such that the jury can properly infer that the accused had a dishonest mind unless he or she can raise a reasonable doubt on the basis of a relevant but mistaken belief. In this respect the international jurisprudence is consistent with New Zealand's view that, provided the accused's belief is actually held, it does not have to be reasonable. This approach recognises the common law principle that mens rea is, in most cases, a subjective concept. Hence a mistaken belief in facts or circumstances that would, if correct, exculpate the accused, does not have to be reasonable or based on reasonable grounds.

[44] We will refer first to the position in England. In *R v Waterfall*[25] the defendant was charged under s 16 of the Theft Act 1968 (UK) with dishonestly obtaining a pecuniary advantage from a taxi driver. Lord Parker CJ, giving the judgment of the Court of Appeal, said:[26]

> The sole question as it seems to me in this case revolves round the third ingredient, namely, whether what was done was done dishonestly. In regard to that the deputy recorder directed the jury in this way:
>
> > "If on reflection and deliberation you came to the conclusion that [the appellant] never did have any genuine belief that [the appellant's accountant] would pay the taxi fare, then you would be entitled to convict him. […]"
>
> In other words, in that passage the deputy recorder is telling the jury they had to consider what was in this particular defendant's mind: had he a genuine belief that the accountant would provide the money? That, as it seems to this court, is a perfectly proper direction subject to this, that it would be right to tell the jury that they can use as a test, though not a conclusive test, whether there were any reasonable grounds for that belief. Unfortunately, however, just before the jury retired, in two passages the deputy recorder, as it seems to this court, was saying: you cannot hold that this man had a genuine belief unless he had reasonable grounds for that belief.

Lord Parker CJ then set out the passages in question and continued:[27]

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25 [1970] 1 QB 148.
26 At pp 150 – 151.
27 At p 151.

> … the court is quite satisfied that those directions cannot be justified. The test here is a subjective test, whether the particular man had an honest belief, and of course whereas the absence of reasonable ground may point strongly to the fact that that belief is not genuine, it is at the end of the day for the jury to say whether or not in the case of this particular man he did have that genuine belief.

[45] The decision in *Waterfall* was followed shortly afterwards in *R v Royle*,[28] another case under s 16 of the 1968 Act. Edmund Davies LJ, giving the judgment of the Court of Appeal, said:[29]

> The charges being that debts had been dishonestly "evaded" by deception, contrary to s 16(2)(a), it was incumbent on the commissioner to direct the jury on the fundamental ingredient of dishonesty. In accordance with *R v Waterfall* they should have been told that the test is whether the accused had an honest belief and that, whereas the absence of reasonable ground might point strongly to the conclusion that he entertained no genuine belief in the truth of his representation, it was for them to say whether or not it had been established that the appellant had no such genuine belief.

[46] These passages were cited with approval by the Court of Appeal in *R v Ghosh*,[30] a case which has been found problematic on other points, but not on that which we are now addressing.[31] Although the issue did not arise directly in the House of Lords in *R v Hinks*,[32] the tenor of their Lordships' speeches suggests no departure from the view that the reasonableness of an asserted belief is of evidentiary significance but is not a necessary ingredient. An actual belief, even if unreasonable, will suffice.

[47] In Australia a convenient starting point is the decision of the High Court in *He Kaw Teh v R*.[33] In that case Gibbs CJ said that if guilty knowledge is an element of an offence, an honest belief, even if unreasonably based, may negative the existence of the guilty knowledge and thus lead to an acquittal.[34] The decision of the

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28 [1971] 1 WLR 1764.

29 At pp 1769 – 1770.

30 [1982] 1 QB 1053 at pp 1061 – 1062.

31 For further discussions of *Ghosh* and the concept of dishonesty and its difficulties in the civil arena (dishonest assistance in a breach of trust) see the speeches in the House of Lords in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 as explained by the Privy Council in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476.

32 [2001] 2 AC 241.

33 (1985) 157 CLR 523.

34 At p 534.

High Court in *Peters* was concerned primarily with the first of the two issues referred to above, that is, how to identify an external standard for determining what constitutes dishonest conduct. As to the second issue, Gleeson CJ, Gummow and Hayne JJ, in their joint judgment in *Macleod*, said of a claim of right:[35]

> Secondly, the claim must be made honestly, leading to the proposition expressed by Callaway JA in *R v Lawrence* [1973] 1 VR 459 at 467 that, although an honest claim "may be both unreasonable and unfounded", if it is of that quality then the claim "is less likely to be believed or, more correctly, to engender a reasonable doubt".

This statement was confirmed by the Court (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ) in *Doyle v Australian Securities and Investments Commission*.[36] The Court there said that a claim of right was a manifestation of the principle in criminal law that an honestly held belief, whether reasonable or otherwise, may be inconsistent with the existence of that intent which forms an ingredient of a particular crime.[37]

[48] The Canadian decisions of *Théroux* and *Zlatic* did not directly involve the question whether a genuine belief must also be reasonable. The position in Canada with regard to dishonesty generally need not be discussed. The Canadian approach to the accused's belief distinguishes between mistake of fact and colour of right. The preponderance of authority in Canada supports the view that a genuine mistake does not also have to be reasonable. That is apparent from the discussion in *Canadian Criminal Law: A Treatise* by Don Stuart,[38] citing in particular Cartwright J in *Rees*[39] and in *Beaver*[40] and the majority in *Pappajohn*.[41]

[49] In relation to colour of right Stuart says:[42]

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35 At p 244.
36 (2005) 227 CLR 18.
37 At p 29.
38 (4th ed, 2001), pp 278 – 279.
39 [1956] SCR 640.
40 [1957] SCR 531.
41 (1980) 14 CR (3d) 243 (SCC).
42 At pp 338 – 339. Stuart notes, in a footnote to this passage, that the only recent ruling that the mistake must be honest and reasonable is by Lamer JA in *Spot Supermarket Inc* (1979) 50 CCC (2d) 239 (Que CA), but that the Canadian authority cited supports the opposite view.

> In the case of offences in which the colour of right defence operates, the requirements of the defence are now reasonably clear. There must be a mistake rather than simple ignorance, advertence rather than not thinking at all. It is accepted that the belief must be as to a legal rather than a moral right. Since the offences for which the defence is available are full *mens rea* offences and none of the colour of right clauses import reasonableness, it is not surprising that the courts have, at least recently consistently required that the mistake be honest and not necessarily reasonable.

[50] Hence in Canada, whether the case is put on the basis of mistake or colour of right, it seems clear that, to qualify, a belief does not have to be reasonable or based on reasonable grounds. Of course, as is universally the case when this approach is taken, the reasonableness of the belief is relevant to whether it was actually held.

[51] It is therefore clear that New Zealand is not out of line and, in any event, we now have statutory definitions of "dishonestly" and "claim of right". They are both directed to the accused's belief. Section 228 does not require the use of a document to be "objectively" dishonest. It is the user's state of mind which will determine whether his use was dishonest. All elements of the crime are now covered by the statutory language and definitions. There is no call for any common law overlay.

The statutory definitions

[52] The Solicitor-General submitted that the introduction of the definition of "dishonestly" in s 217 of the Crimes Act provided this Court with the opportunity to assess whether it was appropriate for New Zealand to continue to assess dishonesty solely on the basis of what he called subjective considerations. The definition in s 217 has already been set out. It does not, in itself, suggest or encourage a movement away from the traditional approach which is to consider whether the accused actually held the asserted belief. From the evidentiary point of view, the more reasonable the belief, the more likely it was held, and vice versa; but it is not necessary that the belief itself be reasonable.

[53] It is clear that ordinarily when Parliament wishes a question of belief to have some objective control, it makes express provision to that effect. A good example is sexual violation. A belief in consent must be based on reasonable grounds.[43] The

[43] Section 128 of the Crimes Act 1961.

absence of any reference in s 217 to the relevant belief having to be reasonable or based on reasonable grounds is significant.

[54] The legislative history of s 217 also supports the view that the definition it enacts was designed to allow a defence of belief in lawfulness even if that belief is unreasonable. The section began life as cl 178 of the Crimes Bill 1989. In that form it was longer and much more complicated than s 217. There was no defence of "colour of right" or "claim of right". Rather, cl 178 stated that an act or omission requiring the authority of another person would be dishonest if the accused did not believe that any such authority had been given and had "no reasonable grounds for believing" that the other person would have given that authority had he or she been asked. The intention of the drafters, as demonstrated by the following statement in the Explanatory Note, was to remove the capacity of an accused to argue a "Robin Hood"[44] type defence:[45]

> [Clause 178] restricts the present law to the extent that it will no longer allow by way of defence a subjective view of what is morally right or wrong.

[55] The Bill was revised by the Crimes Consultative Committee under the chairmanship of Sir Maurice Casey. The revised Bill, which accompanied the Committee's report in 1991, contained a new and simpler definition of "dishonestly" in cl 176. This definition was ultimately enacted in 2003 as s 217. It is not necessary to trace the intervening parliamentary history as it has no relevance to the point under consideration. The revised Bill adopted, for offences of dishonesty generally, the formula "dishonestly and without claim of right", adapted from the then existing legislative definition of theft, which used the formula "fraudulently and without colour of right".[46]

[56] There are two aspects of the Committee's revision that are significant for the purposes of this case. The first is the deliberate removal of the reference to the accused having "no reasonable grounds for believing" that authority would have

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44 See footnote 17 above.

45 Explanatory Note, p xxii.

46 See s 220(1) of the Crimes Act 1961 as it stood prior to these amendments.

been given if sought. The Committee's report contains the following passage under the heading "Matters of Interpretation":[47]

> The revised definition of "dishonestly" … deletes the objective test of "reasonable grounds" for belief that an act or omission is authorised.

[57] The new formula also introduced to the Bill a defence of "claim of right"; distinguishable from the earlier legislative term "colour of right". Colour of right, subject to certain qualifications, had meant "an honest belief that an act is justifiable". As we have seen, claim of right refers to a "belief that an act is lawful". The change from "justifiable" to "lawful" and the dropping of the word "honest" as a qualifier of the word "belief" confirmed the intention behind the 1989 Bill that a "Robin Hood" defence should not be available. The Committee explained:[48]

> The term "dishonestly" remains but is confined by our proposed definition to conduct which is known or believed to be without proper authority. While the Committee does not support the use of an objective standard to assess the defendant's belief that the act in question was authorised, at the same time the bill should remove any doubt that an idiosyncratic moral view about what actually constitutes dishonest behaviour will excuse the defendant from liability.

[58] The significance for present purposes of this history is that it is clear those who framed the new definitions did not seek to introduce any reasonableness qualification of the relevant beliefs. The beliefs contained in the definitions of "dishonestly" and "claim of right" were not meant to be subject to a reasonableness control, albeit their reasonableness will obviously have evidential relevance to the question whether they were actually held. It would in these circumstances be wrong for this Court to read in a requirement that the beliefs referred to in the statutory definitions must be reasonable.

Result

[59] For the reasons given the trial Judge materially misdirected the jury. A substantial miscarriage of justice resulted. The appeal must be allowed and the

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47 The Report of the Crimes Consultative Committee on the Crimes Bill 1989 (1991), p 64.
48 At p 65.

convictions set aside. There should be an order for a new trial, albeit we record that the Solicitor-General indicated that in all likelihood he would not proceed with it.

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