ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF DEFENDANTS PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-044-2968
[2022] NZHC 1755

THE QUEEN

v

EF

and

FG

Hearing:	7–10, 13–17, 20–21, 23 and 27 June 2022
Appearances:	JCL Dixon QC, P F Wicks QC, JEL Carruthers and R J Williams for the Crown EF in person, with D J Gates T D Clee for FG
Date of judgment:	22 July 2022

DECISION AND REASONS OF JAGOSE J

This judgment was delivered by me on 22 July 2022 at 10.00am.

……
Registrar/Deputy Registrar

Counsel/Solicitors:
JCL Dixon QC, Auckland
P F Wicks QC, Auckland
JEL Carruthers, Barrister, Auckland
T D Clee, Barrister, Auckland
Serious Fraud Office, Auckland

Copy to:
EF

[1] The defendants, EF and FG, face two charges, by deception and without claim of right, they obtained control over nearly $750,000 alleged to be party donations in terms of the Electoral Act 1993.[1] The charges arise from the Serious Fraud Office's investigation into fundraising activities intended to benefit New Zealand First, a political party registered under the 1993 Act.

[2] At issue are 16 payments totalling almost $69,000 deposited into GH's ("GH") bank account between 31 October 2015 and 20 October 2017, and 154 payments totalling almost $678,000 deposited into a bank account held for the New Zealand First Foundation ("NZFF") between 21 April 2017 and 14 February 2020. EF is GH's sole director and shareholder.[2] He is alleged to have acted together with FG in obtaining control over payments deposited into GH's bank account. NZFF is a trust settled by EF on himself and FG as trustees for beneficiaries including the party. All money was applied for the party's benefit.

[3] Under the Electoral Act, anyone in receipt of a party donation must either transmit it to, or deposit it into a bank account nominated by, the party secretary.[3] The party secretary then is required to "keep proper records of all party donations received by him or her".[4] None of the money at issue was so transmitted, deposited, received or recorded. The prosecution alleges that was the result of the defendants' use of GH's and NZFF's bank accounts with intent to deceive the party and party secretary, such being the 'deception' by which the defendants retained control over the money.

[4] Before trial commenced, I granted EF and FG leave to withdraw their elections for trial by jury.[5] I now am to consider if each EF and FG is guilty or not guilty of the offences with which they are charged, and to give reasons for my decision,[6] which I reserved at the close of trial.

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1 Crimes Act 1961, s 240, carrying a maximum penalty of seven years' imprisonment (s 241).
2 GH changed its name to HI from 16 February 2018.
3 Electoral Act 1993, s 207B.
4 Section 207N.
5 *R v EF and FG* HC Auckland CRI-2020-044-2968, 31 May 2022 at [4]–[5].
6 Criminal Procedure Act 2011, s 106; *R v Connell* [1985] 2 NZLR 233 (CA) at 237–238, affirmed in *R v Eide* [2005] 2 NZLR 504 (CA) at [20]–[21], and *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [15]–[18] and [36].

Statutory background

[5] The Electoral Act regulates a variety of issues relating to the election of members of the House of Representatives — that is, Parliament — including registration of political parties and, materially here, donations made to them.

[6] Section 207B(2) relevantly provides:

> **207B Donations to be transmitted to candidate or party secretary**
>
> …
>
> (2) Every person to whom a party donation is given or sent must, within 10 working days after receiving the donation, either—
>
> (a) transmit the donation to the party secretary; or
>
> (b) deposit the donation into a bank account nominated by the party secretary.

By 'party donation' is meant:[7]

> A donation (whether of money or of the equivalent of money or of goods or services or of a combination of those things) that is made to a party, or to any person or body of persons on behalf of the party who are involved in the administration of the affairs of the party …

By 'party secretary' was meant:[8]

> the person (whatever his or her designation or office) whose duties include responsibility for—
>
> (a) carrying out the administration of the party; and
>
> (b) conducting the correspondence of the party[.]

Subsequent sections establish subsidiary requirements for disclosure of particular aspects of such donations, failures to comply with which constitute offences against the Act carrying a maximum $40,000 fine. (Failure to comply with s 207B is not an offence against the Act.)

[7] Section 207N similarly provides "[a] party secretary must keep proper records of all party donations received by him or her". Section 210 then requires the party

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7 Electoral Act, s 207, definition of "party donation". The definition continues to include and exclude particular presently immaterial contributions.

8 Electoral Act, s 3, definition of "party secretary". The definition was substituted by s 3EA on 1 April 2020, by section 16 of the Electoral Amendment Act 2019.

secretary, by 30 April of the following year, to "file with the Electoral Commission, for each year, a return of party donations" in specified detail. The return is to be accompanied by an auditor's report stating if the return "in the auditor's opinion, fairly reflect[s] the party donations received by the party secretary". For that purpose, the auditor:

> (a) must have access at all reasonable times to all records, documents, and accounts that relate to the party donations and that are held by the party or the party secretary; and
>
> (b) may require the party secretary to provide any information and explanations that, in the auditor's opinion, may be necessary to enable the auditor to prepare the report.

Section 210E requires the party secretary to "take all reasonable steps to ensure that all records, documents, and accounts that are necessary to enable returns under [section] 210 … to be verified are retained". Section 201F makes the returns and reports publicly available for the next two general election cycles.

[8] Section 213 provides "[a] party may enter into a loan only with the authorisation of the party secretary" and "[o]nly the party secretary may enter into a loan on behalf of the party". Section 214B requires the party secretary to "keep proper records of all loans entered into on behalf of the party". As with donations, under ss 214C and 214D, loans are required to be returned to the Electoral Commission along with an auditor's report and, under ss 214I and 214J, records are required to be retained and returns and reports also are publicly available.

Factual background

[9] EF and FG have long associations with New Zealand First: FG is **[Redacted]** EF is **[Redacted]** At least during the period at issue in this proceeding, each were heavily involved in background strategising for the party.

[10] The party is established under its constitution as "a non-profit making body set up to undertake political activity". Its affairs are managed by its Board, initially partially funded by annual subscription fees set at the party's annual general meeting for levy on its members, with discrete functions settled on subsidiary committees and officeholders. It otherwise is structured by the electorates in which its members reside.

[11] In 2018, the party's constitution changed to achieve its current structure. Internal tensions leading to the constitutional change had been evident for some years. The tensions were discussed at a 17 August 2015 Board meeting, at which the party's leader — the Rt Hon Winston Peters, then the elected member of Parliament for the Northland electorate, and ex officio a member of the Board — identified the party's need for "magnesium, a tool to make this Party glow".

[12] Making the party "more professional and more organised" was a broad goal for a number of the party's supporters. Apirana Dawson — who had become involved with the party during his university years' internship in Mr Peters' office until the 2008 election, and returned as a Parliamentary Services funded consultant reporting directly to Mr Peters after each the 2011 and 2014 elections — "talk[ed] a lot" with each Mr Peters and FG "about ways to professionalise and modernise the party". FG advocated Mr Dawson's prompt establishment of "the entity that is going to receive money and from where you send out emails and so on", to facilitate creation of a "leaders fund" to finance election campaigning "free of interference" from the Board.

—GH

[13] At the 17 August 2015 Board meeting, Mr Peters proposed the Board acquire "a digital communication campaign tool" to monetise its contacts with supporters. He explained a third party was prepared to fund the tool through to the end of 2017, after that year's national election, at no cost to the party. The Board authorised Mr Peters to "proceed in tandem" with the party president, Brent Catchpole, and report back.

[14] That day, although possibly the following New Zealand day in North American time, the party placed an order with 3DNA Corp for its NationBuilder service for the period from 31 August 2015 to 30 December 2017 at a total price of some USD 92,400. Seemingly defined by reference to the size of New Zealand's electoral roll, the price was made up by central (or party) capacity for 4 million records and 200,000 email addresses at USD 37,800; distributed (or electorate-by-electorate) capacity each for 50,000 records and 5,000 email addresses at USD 47,100; and USD 6,500 for training

and implementation services. The last was due for payment on 31 August 2015 and about USD 28,300 for the substantive service due on each 31 August 2015, 2016 and 2017. USD 34,800 thus was due for payment on 21 August 2015.

[15] Mr Peters directed Mr Dawson to liaise with 3DNA Corp, and Mr Dawson signed the sales order on the party's behalf on 2 September 2015. Mr Dawson subsequently understood EF would be paying for NationBuilder, and sent EF details for payment to 3DNA Corp.

[16] On 30 September 2015, EF opened a bank account for GH. On 9 October 2015, FG created a document titled "Bank Account for Donations", detailing GH's account name and number. On 31 October 2015, NZD 14,000 was direct credited to the account annotated with the name of the payer and "Donation Anon". A later document attributed to FG refers to his visit to the payer's home, who "promised a sum of between $10,000 and $20,000 as a donation", and apprehended receipt accordingly. On 10 November 2015, NZD 25,500 was transferred to the account by EF. On 11 November 2015, some NZD 37,800 was withdrawn annotated "3DNA CORP", and transferred to that company. (Self-evidently, the due sum's amount and currency was misunderstood.)

[17] On 19 November 2015, GH entered into an agreement with New Zealand First "[f]or the provision of web based computer services", being services provided exclusively to New Zealand First under GH's contended licence to operate NationBuilder in New Zealand, on consideration of a monthly fee "equivalent to 15% of the funds raised by [NationBuilder]", reducing to "10%, after the fees have exceeded $40,000 (including GST) during any one calendar year". The agreement included the party's warrant it would authorise the transaction as a confidential commercial agreement, on terms including the party's establishment of "a special account for the deposit of any donations raised during the agreement" under the control of the party's president, treasurer and leader, and to which bank statements GH would have access only for analysis. The Board approved the agreement on 12 December 2015.

[18] NationBuilder provides a platform for web-based communications and fundraising on websites constructed to facilitate its use, and data derived or input accordingly. It also operated as a conduit for subscription fees paid through its facilities to the party. The party's NZD 10 annual subscription fee often was paid in larger denominations, the party treating the balance as donations.

[19] In early 2016, Mr Dawson engaged an Australian third-party provider, WebEdge Marketing, to reconstruct New Zealand First's website for which WebEdge charged an initial AUD 7,900 and further sums for issue-specific webpages and design. Mr Dawson forwarded WebEdge's invoices to EF for payment. In all, GH disbursed some NZD 93,000 in payments to 3DNA Corp, and NZD 41,400 to WebEdge. Together with other associated software development and web design costs, GH incurred expenses of some NZD 155,000.

[20] GH's account number was advised to various people for their payments. Some were paid directly to GH by EF, FG, Mr Dawson and members of the party's caucus, as well by the party itself, to put GH in funds to pay the NationBuilder and associated services' initial costs, including foreign currency shortfalls when USD and AUD amounts due were paid only in NZD sums.[9] (The USD shortfall led to the party's exclusion from its membership database, only rectified by the party's direct payment to 3DNA.) Others were from party supporters. Overall, payments into GH's account of some $86,000 were obtained from the party's caucus and operatives; $69,000 from external supporters; and $15,000 from the party itself — together totalling some $170,000.

[21] As to that $69,000 from external supporters, FG developed contacts in the horse-breeding and racing industries, and obtained their payments into GH's bank account. The same bank account detail was provided to Clayton Mitchell, then the party's member of Parliament for the Tauranga electorate, who assisted FG in fundraising and developed his own contacts in the natural health industry, again to obtain payment into GH's bank account. (Mr Mitchell was one of the members of the party's caucus who earlier put GH in funds, which Mr Mitchell considered a loan

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9 This judgment's subsequent currency references are to NZD.

although remaining unpaid.) FG, Mr Dawson or Mr Mitchell accompanied Mr Peters to meetings with supporters, and followed up with GH's bank account details for receipt of payments. The payments' details typically were annotated by the payer with the word 'donation' in some reference to the party.

—NZFF

[22] On 31 January 2017, EF settled $10 on himself and FG as trustees of "The New Zealand First Foundation", with an object "[t]o establish a capital protected trust to receive donations from persons who wish to achieve the objects of this trust where the capital cannot be distributed until vesting day". The trust deed anticipated "the purchase of capital items (owned by the Trust)" for use "[t]o provide an income stream to further [specified] objects", essentially being those of the principles of New Zealand First.

[23] In February 2017, EF and FG opened a bank account for NZFF. To satisfy the bank of NZFF's bona fides as other than "a standard Family trust", EF advised it comparable to the National Foundation's provision of support to the National political party. NZFF was unrelated to New Zealand First but "its purposes are to support the party as in the deed" as a "capital retaining trust … [to] provide for example a building, physical items like computers, software etc to the party". Its "source of wealth" would be "[d]onations … sought on an ongoing basis from those who support the purposes of the trust, which are the principles of New Zealand First Political party". On the bank's enquiry if the funds would be used for campaigning, EF replied:

> NO! the trust is a capital raising fund, it is prohibited from distributing the monies raised, it can buy assets but it must keep ownership of them. It can only distribute capital at its dissolution and then the assets go to charity.
>
> It cannot and will not be involved in any campaigning activities. The limitations in the deed expressly control this side of the trustees powers. It is not a political party.

[24] EF provided FG with a copy of his correspondence with the bank, which concluded with its agreement to "open the trust account" on verification of FG's identity. FG passed it on to Mr Dawson, noting the opacity of the GH account was "[n]ot such a biggie for me now that this other one is getting set up". FG previously was curious to know what fundraising efforts had garnered from whom.

[25] To enable Mr Dawson to prepare an explanatory pamphlet, FG emphasised election campaigns were to be run separately from the party's political operations: "[s]eparate budget, different personnel, separate offices and private money". Prospective sources for such funding could be told words to the effect:

> To this end we have formed The New Zealand First Foundation which will raise and hold funds for the party but be separate from it in administration and law. The Foundation will not disperse funds to the party but hold them and purchase assets and hardware.
>
> Trustees will administer the fund and also be responsible for raising money. That money will be sought from individuals and businesses who share similar views to New Zealand First on how our country should be run and what our aspirations for the future should be.
>
> If donors share our views and agree generally with our policies then there can be very little fear that the politicians who represent New Zealand First in Parliament are being persuaded to take a course of action for, or, be swayed by money.
>
> Therefore, If a representative of the new Zealand First Foundation approaches you or your business for a donation you can be assured that they are backed by a registered trust which is required by law to only expend monies in a prescribed fashion.

[26] After NZFF had been established, Mr Dawson discussed a concept along the lines of the National Foundation with the party's treasurer, John Thorn. Mr Thorn developed a proposal for a "strategic Fundraising and Management Vehicle for New Zealand First", to be known as the "New Zealand First Foundation", which the Board accepted at its 13 March 2017 meeting. Mr Thorn worked up his proposal for the Board's April 2017 meeting, at which he sought agreement to the Foundation's establishment modelled on the National Foundation. On Mr Dawson's later advice it was "all done, it's in operation", Mr Thorn advised the Board at its May 2017 meeting the Foundation had been established. His subsequent enquiries of FG, and subsequently EF, as to the Foundation's operation and registration were met by responses it was operating as a trust and "that's all he needs to know".

[27] In the aftermath of the 2017 election, the party had outstanding invoices for election advertising in the amount of some $73,000. By email of 17 December 2017, hoping the 'Foundation' had funds available, Mr Thorn asked EF if it would advance the party that sum "on commercial terms and conditions", including by "promissory

security on tax rebate and 2018 members' fees". EF advised NZFF's trustees' agreement by email the following day.

[28] Meanwhile, Mr Mitchell provided FG with a draft letter intended to be sent to prospective New Zealand First supporters, in the first instance the horse-breeding and racing industries' attendees at a February 2017 event attended by Mr Peters with Mr Mitchell, also outlining Electoral Act disclosure obligations and inviting payment to NZFF's bank account. Mr Mitchell explained the draft letter was "a living document, would be modified I guess to suit the person or the people that I was going to be forwarding it to". The letter — in various iterations presented on party letterhead — drew no distinction between the party and NZFF and expressly sought funds to support the party. It directed funds to either NZFF's or the party's bank account depending on "whoever was asking and needing it the most". On at least one occasion Mr Mitchell confused the two, describing the party's determinedly Kiwibank account, but specifying NZFF's ASB account number.

[29] Responses to iterations of the letter were immediate and significant. FG provided Mr Dawson and Mr Mitchell with copies of NZFF bank account statements, showing a $305,000 balance by mid-July 2017. Payments into the account typically were annotated by the payer "NZ First" and "donation", sometimes including messages of support for the party such as "Good luck Winston". A cheque expressly made out to the party was banked into NZFF's account. The money was obtained from fundraising efforts initially to support the party's 2017 election campaign. Funds continued to be raised under iterations of the letter after the 2017 election, totalling some $678,000 by February 2020.

[30] But, by that time, NZFF's account balance was only minorly in excess of $1,200. Over the period from its establishment in February 2017, NZFF paid some $140,000 in connection with the 2017 election, including rental and other expenses of commercial premises in Wellington's Lambton Quay used as the party's "campaign headquarters", and on expenses associated with the party's 2017 annual general meeting and convention, including production of a video of the party's "bus tour" of electorates. Some $280,000 was paid for NationBuilder and associated costs for the party's website development. Nearly $250,000 was paid in relation to consultants'

services to the party, notably some $160,000 to companies associated with EF, including GH (then renamed HI). The party contracted HI to operate its interface with NationBuilder, managing outgoing messaging to the party's membership and incoming membership data. Other expenses paid included Mr Mitchell's travel to observe European Union elections, and the printing of copies of the party's revised constitution for presentation to its 2018 convention.

—NZ First

[31] GH's and NZFF's involvement in fundraising and other matters for the party generally was not visible to the party's Board and officers. When, at its December 2015 meeting, the Board was asked to approve GH's agreement with the party — on terms including the party's establishment of "a special account for the deposit of any donations raised during the agreement" under the control of the party's president, treasurer and leader, and to which bank statements GH would have access only for analysis — the party secretary of the day, Anne Martin, identified the party's disclosure obligations under the 1993 Act as likely triggered by donations obtained through NationBuilder.

[32] In March 2009, the party had engaged the chartered accountant John Lennie as its auditor of the various returns required to be provided to the Electoral Commission. In subsequent years, Mr Thorn and Ms Martin — and her successor as party secretary, Elizabeth Witehira — worked with him to prepare the party's annual donations and loans returns to the Electoral Commission. Mr Lennie examined the party's central and electorate bank statements to identify donations made to it, relying on the party secretary's representations as to the party's disclosures to him, resulting in an audit report giving a qualified opinion the party's return complied with the 1993 Act. The qualification was his reliance on the information provided to him.

[33] After the party contracted for NationBuilder's services, the party's bank accounts included two respectively for 'stripe' and 'swipe' deposits. Mr Thorn explained to Mr Lennie these were subscriptions and donations deposited in the former "that have come via the NationBuilder database" and the latter "that have been made

by credit card" through their respective merchant accounts. Mr Lennie did not consider either required further investigation as to those intermediaries.

[34] In reviewing the party's bank accounts for its 2017 year returns, Mr Lennie enquired after a $73,000 deposit of 21 December 2017, annotated "direct credit loan [FG/EF] transfer". After speaking with FG and EF, and inspecting EF's mid-December 2017 exchange of emails with Mr Thorn, Mr Lennie took the view the loan was irregular as not authorised by the party secretary. The loan was reissued on 11 May 2018 in its outstanding amount and terms, although now without any security, between NZFF and Ms Martin for the party. Otherwise Mr Lennie had no information from or about funds received by GH or NZFF. He accepted their annotations as "donations" in NZFF's bank account statements would have caused him to enquire further if they were subject to Electoral Act disclosure requirements.

[35] On commencement of work for the party's 2019 returns, Ms Witehira asked Mr Lennie to consider also circumstances of the party's involvements with GH and NZFF, including donations to the party sought after fundraising dinners by letters to be paid to NZFF's bank account and adjustment of the party's 2017 election expenses return to account for invoices paid by NZFF. Mr Lennie sought supporting information from NZFF, which Ms Witehira requested of NZFF.

[36] EF and FG jointly responded as NZFF's trustees:

> 1. The Foundation has had no part in any dinners as fund raisers.
>
> 2. We note the [letters are] not a Foundation document.
>
> 3. No payments have been received by the Foundation for transmitting to the New Zealand First party.
>
> 4. To the best of the Foundations knowledge no cheques were received by the trustees all payments the Foundation received being the result of direct banking by the donor to the foundation.
>
> 5. All donors to the foundation are higher net worth individuals and to the writers knowledge most are also major contributors to the Labour and National political parties and their Foundations
>
> 6. The New Zealand First Foundation has one bank account

7. New Zealand First Foundation does not accept its role has ever been as a "transmitter /conduit to channel donations from donors to New Zealand First.

8. The new Zealand First Foundation has NO agreement with the New Zealand First political party.

9. The agreement between GH and the NZF party predates the establishment of the Foundation, the Foundation is a capital restricted trust as per its trust deed which we have requested the ASB to provide a copy of as part of the documents it received at the establishment of the bank account.

10. The aim was to develop a business that not only made the Foundation a profit (which it uses for its own trust purposes) but also provided the NZF party a strong cash flow by the monetarisation of the NZF database. The successful development of this business was in the best interests of both the Foundation and the NZF party.

11. The subsequent investment in GH/HI by the Foundation does not constitute an agreement between the Foundation and the Party.

12. The Foundation was never to transmit funds from donors to any Political Party, for example when it became apparent that NZF … invoices had been paid by mistake at the same time as NZFF invoices the Trustees recovered the same as a debt from the party.

The Foundation is providing the banking information to Mr Lennie on the understanding it shall enable Mr Lennie to satisfy himself that there have been no transmissions of donors money via the Foundation.

The transmission of capital is contrary to the intent of the Foundation.

The whole intent of the Foundation is to raise capital from which it derives income (as with the National Party Foundation(s)) which it can donate as per its Trust Deed to organisations that further the NZF principles.

[37] Mr Lennie subsequently received an unsigned copy of NZFF's trust deed and data exported from NZFF's bank account for the 2019 calendar year. He compared the party's list of dinner attendees with the sources of deposits to NZFF's bank account and, finding no commonality, concluded the NZFF bank account evidenced "no donations, no monies received through that bank account that needed to be included in the return". He was satisfied by EF's explanations expenses paid by NZFF to people related to the party were "payment of invoices for services rendered by those people on behalf of NZFF", other payments were of NZFF expenses, and "there were no donations received via NationBuilder that triggered any [commission] payment for [the 2019 year]". EF's explanations directly to Mr Lennie were prefaced "[t]he contents of this email are not to be distributed to NZ First". Mr Lennie concluded no

adjustments were required to the party's return. He confirmed that to Ms Witehira as founded on EF's explanations, without disclosing them.

[38] By the time of the party's 2019 donations and loans return, the Serious Fraud Office had begun an investigation into monies paid into GH's and NZFF's bank accounts. It found none of the funds identified at [2] above had been declared as party donations, but all had been "used to benefit the party".

"Obtaining by deception" offending

[39] The prosecution alleges, at Auckland and elsewhere in New Zealand, EF — together with FG in respect of $68,996 paid into GH's bank account between 17 August 2015 and 15 November 2017, and both in respect of $677,885 paid into NZFF's bank account between 31 January 2017 and 1 March 2020 — "by deception and without claim of right obtained control over [that] property".

[40] The two charges are brought under s 66 (in respect of GH) and 240(1)(a) of the Crimes Act 1961, and particularise the deception as being:

> With intent to deceive the Party and its Secretary, EF and FG used a fraudulent device, trick or stratagem whereby:
>
> (a) They arranged for persons seeking to make party donations to the Party to be provided, directly or indirectly, with the account number for the bank account of [respectively, GH or NZFF], causing party donations to be deposited into [that] bank account rather than a bank account of the party; and
>
> (b) EF [in relation to GH, and FG also in relation to NZFF] did not transmit those donations to the Party Secretary or deposit them into a bank account nominated by the Party Secretary with 10 working days after receipt or otherwise inform the Party Secretary of [respectively, GH's or NZFF's] receipt of those donations,
>
> in circumstances where the deception was a material cause of EF [in relation to GH, and FG also in relation to NZFF] retaining control of the property, in that, had the Party Secretary known of the true and full position about how the party donations had been obtained and/or were intended to be used, EF [in relation to GH, and FG also in relation to NZFF] would not have been permitted to retain control of the party donations.

[41] Section 66 relevantly provides:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—

(a) actually commits the offence; or

(b) does or omits an act for the purpose of aiding any person to commit the offence; or

(c) abets any person in the commission of the offence; or

(d) incites, counsels, or procures any person to commit the offence.

[42] Section 240 relevantly provides:

Obtaining by deception or causing loss by deception

(1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—

(a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; ….

…

(2) In this section, **deception** means—

(a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

(i) knows that it is false in a material particular; or

(ii) is reckless as to whether it is false in a material particular; or

(b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

(c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

[43] Section 2 defines 'claim of right' to mean:

> … in relation to any act, means a belief at the time of the act in a proprietary or possessory right in property in relation to which the offence is alleged to have been committed, 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.

It is in essence reference to a "belief that an act is lawful", without any requirement the belief be reasonable.[10] And s 217 defines 'obtain', "in relation to any person, [to mean] obtain or retain for himself or herself or for any other person".

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[10] *Hayes v R* [2008] NZSC 3, [2008] 2 NZLR 321 at [57]–[58], affirmed in *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [464].

Burden and standard of proof

[44] The burden of proof is on the prosecution throughout, to prove each element of each offence 'beyond reasonable doubt'.[11] These are well-comprehended standards.

[45] In a criminal context, the burden of proof falls on the prosecution, with some limited exceptions,[12] to prove each essential element of an offence 'beyond reasonable doubt'. The effect of the burden of proof is, if the prosecution fails to reach the appropriate standard of proof for each essential element, the defendant must be acquitted as remaining presumed innocent.[13]

[46] The relevant standard of proof is 'beyond reasonable doubt':[14] absolute or mathematical certainty is not required;[15] more than proof on the balance of probabilities is needed;[16] proof 'beyond reasonable doubt' is a very high standard and will only be met if one is sure the accused is guilty;[17] and "a reasonable doubt was an honest and reasonable uncertainty left in [the judge's] mind … after … careful and impartial consideration to all of the evidence".[18]

Discussion

[47] The essential elements of the s 240(1) offences alleged here are EF and FG (the latter aiding and abetting EF in respect of the alleged GH offending):

(a) retained control over money deposited into GH's and NZFF's bank accounts;

(b) by deception;[19]

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11 *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481–482 as affirmed in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [27]; and *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [475].

12 See *C (CA223/2020) v R* [2021] NZCA 80, [2021] 3 NZLR 152 at [47]; and Crimes Act, s 23.

13 *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49] (affirmed in *Hendriks v R* [2018] NZSC 98 at [6]; *Wilson v R* [2019] NZCA 485 at [1]; *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [55]; and *Hutchins v R* [2016] NZCA 173, affirmed in *Hutchins v R* [2016] NZSC 117); and New Zealand Bill of Rights, s 25(c).

14 *R v Wanhalla,* above n 13.

15 At [54].

16 At [48].

17 At [49] and [52].

18 At [49].

19 *Wynyard v R* [2015] NZCA 610 at [26] and [34].

(c) intended to deceive the party and its secretary;[20] and

(d) did so without claim of right.

—retained control

[48] 'Property' for the purposes of the Crimes Act includes "any … interest in any … money",[21] which is what was deposited to GH's and NZFF's bank accounts. Under the Electoral Act, if 'party donations', the money was to be under control of the party secretary, for receipt or direction of payment.[22]

[49] EF's and FG's alleged retention of control of the money necessarily is to be regarded in contradistinction to that statutory requirement;[23] an alternative claim to control is required:[24]

> The normal meaning of "retain" is "keep possession", usually with the connotation that another person has sought to acquire, or re-acquire, possession of the property. This is the sense in which "retain" should be interpreted, so that it will require that the defendant has continued in possession or control of some property at a time when he or she should have ceded possession or control of it to another. …
>
> The novel inclusion of "retain" within the definition of "obtain" will be of importance in relation to the offence of obtaining by deception … in that it will now make criminal the retention of property by deception — that is where but for the deception, the owner of property would have insisted on its return.

In the first instance, then, there is a question if the secretary could — let alone, 'would' — have insisted on the money's payment to her or at her direction. That turns on if the money was 'party donations', as defined.

[50] If the money was 'party donations' for the purposes of the Electoral Act depends on it being "a donation … of money … that is made to a party, or to any person or body of persons on behalf of the party who are involved in the administration of the affairs of the party".[25] For the prosecution, John Dixon QC principally submits

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20 *Morley v R* [2009] NZCA 618, [2010] 2 NZLR 608 at [53].
21 Crimes Act, s 2(1), definition of "property".
22 Electoral Act, s 207B.
23 *Ortmann v United States of America*, above n 10, at [459], [484] and [487].
24 *Simon France (ed) Adams on Criminal Law — Offences and Defences* (online ed, Thomson Reuters) at [CA217.07].
25 Electoral Act, s 207(2), definition of "party donation".

the money at issue here was 'made to a party', citing comprehensive evidence of its payers' intentions. An issue nonetheless is if the 'on behalf' alternative is engaged.

[51] A 'donation' is a gift in respect of which ownership is transferred from one to another.[26] For the purposes of the Electoral Act, 'donation' means a "candidate donation" or a "party donation".[27] The money at issue expressly was solicited to "support" and "donate to" New Zealand First, "our party", and in terms referential to the Electoral Act's disclosure requirements. But, given the alternative, 'made' does not mean to specify the payers' intended beneficiary; it means instead the mechanism by which ownership of the money was transferred, as the 'party donation' definition's inclusion of "on behalf of the party" makes clear. Here, the payments were made to GH or NZFF, albeit frequently expressly and certainly inferentially, on behalf of New Zealand First.

[52] The Electoral Act distinguishes between the extended definitions of 'candidate donation' "to any person on the candidate's behalf", and 'party donation' "to any person or body of persons on behalf of the party who are involved in the administration of the affairs of the party".[28] The last words of the latter phrase require the recipient to be 'involved' in administration of the party's affairs. If receipt of donations on behalf of the party alone is to render the recipient so 'involved', the last words would be superfluous. They cannot be read out of existence on 'purposive interpretation', as Mr Dixon would have me do, "to ensure that monies provided to a person on behalf of the Party are properly understood as party donations". Electoral Act commentary considers 'donation' ambiguously to be defined,[29] the last words meaning to capture "any gift of money or the equivalent to a party via any of its officials", enabling "ruses" to evade the rules on donations.[30]

[53] The definitions originated in s 21 of the Electoral Finance Act 2007, and were imported into the 1993 Act by s 6 of the Electoral Amendment Act 2009. Nothing in

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26 *Oxford English Dictionary* (online ed, Oxford University Press, 2022), definition of "donation".
27 Electoral Act, s 207(1).
28 Section 207(2), definitions of "candidate donation" and "party donation".
29 Andrew Geddis "New Zealand's Electoral Finance Act 2007 and its discontents" (2008) 19 PLR 215 at 229.
30 Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at [9.4.1.1].

the 2007 Act's drafting, consideration or introduction casts any light on the distinct definitions. The 1993 Act elsewhere identifies for regulation people "involved in the administration" of either candidate or party affairs.[31] Similarly, in s 207G, an obligation to disclose the identity of an anonymous party donation donor is confined to "a candidate, list candidate, or any person involved in the administration of the affairs of a party" knowing of that identity. It is not a general obligation on any person with that knowledge.

[54] The last words' inclusion in relation to 'party donation' and not 'candidate donation' thus is significant in limiting the ambit of 'party donation'. It is not to capture gifts made without the party or on its behalf to people not involved in the administration of its affairs, irrespective if the gift is intended to benefit the party. 'Party donation' is not defined by the party's benefit, but by the party's receipt of the actual gift. Section 207B(2)'s "[e]very person" must be construed accordingly.

[55] Mr Dixon submits EF and FG nonetheless are to be regarded so involved. He points to FG's fundraising role, and to EF's multi-faceted involvement including as [**Redacted**] managing party positions and appointments to them, and attending internal executive meetings. Mr Dixon relies also on EF's involvement with HI as providing communication services on behalf of the party.

[56] The payments determinedly were not made to EF or FG in those capacities, even if to be considered qualifyingly 'involved', but to GH and NZFF. As to NZFF, they are payments to EF and FG only as trustees, in which capacity they were not "involved in the administration of the affairs of the party". 'Involvement in the administration of the affairs of the party' is to be construed in the context of the party's constitutional arrangements, for "governance and management oversight of all the Party's affairs … [as] vested in the Board", and thus derivative of the Board's oversight. But the evidence here is of GH's and NZFF's determinedly separate status.[32] As to NZFF, the payments are to EF and FG only as trustees, in which capacity they were not "involved in the administration of the affairs of the party". And HI was

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31 Electoral Act, s 204A, definition of "unregistered promoter", and s 204K.
32 See [17], [26] and [31] above.

contracted to provide services to the party, which does not make HI so involved. Instead, administration of the party's affairs resulted in that contract.

[57] Consequently, I am not satisfied beyond reasonable doubt EF and FG 'retained control' of the money against a better claim to it.

[58] If I am wrong, and the money is 'party donations', I would have been satisfied beyond reasonable doubt EF and FG retained control of monies in the GH and NZFF bank accounts against the party secretary's better claim to them (and FG aided and abetted EF in that respect with regard to GH).

[59] I do not accept the defendants' submission the party secretary must personally have a claim to property in the money. It would have been enough she could assert a better claim to its control than had EF or FG, as she would have had by reason of the Electoral Act's s 207B(2). Neither do I accept the s 217 definition of 'obtain', meaning the defendants' retention for themselves "or for any other person", is to be understood as excluding the party; instead, the defendants' retention even for the party is not to avoid s 240 liability if "by any deception".

[60] Also — if I am wrong, and the money is 'party donations' — I turn briefly to consider the balance of the alleged offences' essential elements.

—by deception

[61] Section 240 requires EF's and FG's retention of control over the money be "by any deception". The prosecution must prove the deception "actually caused" the retention.[33] The 'deception' relied on is s 240(2)(c)'s "fraudulent device, trick, or stratagem used with intent to deceive any person". Commentary proposes the paragraph is "a 'catch-all' for any dishonest scheme not within the more closely defined [preceding paragraphs]".[34]

[62] By 'fraudulent' only is meant 'dishonest' in the ordinary sense of the word — "the prosecution must prove that the defendant acted deliberately and with knowledge

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33 *Wynyard v R*, above n 19, at [26].
34 *Adams on Criminal Law*, above n 24 at [CA240.17].

that he was acting in breach of his legal obligation"[35] — as construed in connection with s 240's precursor s 246's obtaining by false pretence.[36] Leaving aside for the moment the dishonest scheme's use 'with intent to deceive any person', there was nothing inherently dishonest about GH or NZFF obtaining the money: it expressly was sought to support the party and, as the Serious Fraud Office investigation concluded, applied for that purpose.

[63] But if the money is 'party donations', it came charged with s 207B(2)'s obligation to transmit the donation to the party secretary, or to deposit it into a bank account nominated by her. Retention of control over the money in such circumstances would have been dishonest, whether or not it was "used with intent to deceive any person". It does not matter if the party secretary may have directed the donation be paid into, or effectively retained in, GH's or NZFF's bank accounts; the charged offence is not of retention of the money, but retention of control over it which s 207B(2) vested in the party secretary.

[64] From that perspective, EF's and FG's retention of control was 'by' the deception: that is, there was a causal relationship between the dishonest scheme and the retention, if not "the only operative factor, … [playing] a material part" in the retention.[37] An issue arises, however, if the dishonest scheme also must be "used … to deceive".

[65] Each of s 240(2)'s paragraphs defines 'deception' with reference to an intention to deceive. But paragraphs (a) and (b) identify the deceptive act itself as respectively "a false representation, whether oral, documentary, or by conduct", and "an omission to disclose a material particular … in circumstances where there is a duty to disclose it". As a matter of construction, proof of the offending act under s 240(2)(c) does not encompass proof the dishonest scheme was used to deceive.[38] Rather, 'use' is to specify the necessary accompanying intent.

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35 *R v Firth* [1998] 1 NZLR 513 (CA) at 518.
36 *R v Speakman* (1989) 5 CRNZ 250 (CA) at 258.
37 *Morley v R*, above n 20, at [34].
38 At [52].

[66] Such construction may step away from comprehensions under prior law "one element which will always be required to be proved is the effect of the dishonest representation upon the mind of the person to whom it is made", although there "irresistible inference" also would suffice.[39] In cases of obtaining by deception, such proof often may be required to establish cause; that possession, ownership or control of the property at issue was obtained from another by the dishonest act. But, at least in cases of retaining by deception, cause may be established without also proving the dishonest act affected a victim's understanding of the position. Rather, as here, proof of the act is complete on its dishonesty causing retention; 'retention' in the sense of avoiding a better claim, whether or not in fact made in the circumstances. 'Deception' is a defined term referring to particular acts, in which deceit only is to be intended.

[67] Mr Dixon principally relied on *Adams*' characterisation of "[t]he less common form of the offence, where the deception does not operate on the mind of the victim",[40] citing Canadian precedent to the effect there need only be "proof that there is a sufficient causal connection between the fraudulent act and the victim's risk of deprivation".[41] The Supreme Court of Canada there cited earlier of its decisions relying on the House of Lords finding "no support for the view that in order to defraud a person, that person must be deceived": rather 'fraud' means "to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled"; "[d]ishonesty of any kind is enough".[42]

[68] That also would have been my conclusion, supported by legislative history.[43] The harm arises out of the defined deception, not who is deceived,[44] or how.[45] I do not

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39 *R v Lambie* [1982] AC 449 (HL) at 461. The prior law was replaced by the Fraud Act 2006 (UK), the "most prominent characteristic" of which offences is "they are drafted in the inchoate mode: they set out to penalize fraudulent conduct, whether or not it succeeds in deceiving anyone and whether or not it leads to the obtaining of any property" (Jeremy Horder *Ashworth's Principles of Criminal Law* (10th ed, Oxford University Press, Oxford, 2022) at 462). See also Jonathan Fisher *Arlidge and Parry on Fraud* (6th ed, Thomson Reuters trading as Sweet & Maxwell, London 2020) at 4-094 and following, especially 4-166–4-195.

40 *Adams on Criminal Law*, above n 24, at [CA240.04].

41 *R v Riesberry* 2015 SCC 65, [2015] 3 SCR 1167 at [22]–[24].

42 *R v Olan* [1978] 2 SCR 1175 at 1181, citing *Scott v Commissioner of Police for the Metropolis* [1975] AC 819 (HL) at 839 and 841.

43 *R v Xu* [2018] NZHC 1433, [2018] 3 NZLR 626 at [52].

44 At [55].

45 *R v Li* [2016] NZCA 237 at [28].

accept the defendants' contentions the party is essentially to be regarded as having delegated all fundraising to Mr Peters, who inferentially is to be regarded as having approved their scheme. To the contrary, the evidence includes handwriting attributed to Mr Peters annotating a draft of the fundraising letter to redirect payment to the party's bank account. And Mr Peters' contended approval still would not be effective to discharge the scheme's qualifying dishonesty.

—with intent to deceive

[69] 'Intent to deceive' is an essential element of the offence, required to be proved by the prosecution. That is to require proof "the deception is practised *in order* to deceive the affected party. Purposeful intent is necessary and must exist at the time of the deception."[46]

[70] If the money is 'party donations', there is comprehensive evidence EF and FG deployed the dishonest scheme in order to deceive the party and party secretary as to their better claims to the money paid into GH's and NZFF's bank accounts. Provision of those bank account numbers for deposit of funds intended for the party's benefit — which the defendants' joint closing submission expressly does not dispute — alone is to evade the party's, let alone the party secretary's, better claim to the funds' disposition.

[71] EF's and FG's intent to deceive also can be gleaned from their desires to avoid Board oversight; recharacterisation of the party's contract with 3DNA for NationBuilder as GH's "licence" for its subsequent exploitation; drafting and approval of fundraising letters in terms including payment to NZFF; expenditure of all funds wholly at odds with assertion of NZFF's capital retention trust deed; NZFF lending the party $73,000 on commercial terms, initially including security, and refusing to forgive the loan; and denials of information to party officers, including on the party's preparation of donations and loans returns. All is intended deceitfully to assert control over the money for its retention and expenditure by EF and FG, irrespective if the object of their benefice is the party.

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[46] *Morley v R*, above n 20, at [53].

[72] The evidence included various internal party intrigues, including creation of Mr Thorn's 'shadow' Foundation, and attempts by various party office-holders and members of Parliament to clarify the party's funding. I do not rely on any of those as directly or indirectly attributable to EF or FG as evidence of their intent to deceive. Neither do I rely on EF's construction of the relationship between NZFF and HI as being of NZFF's investment in the latter.

—without claim of right

[73] Last, if the money is 'party donations', the prosecution must prove neither EF nor FG believed they had at least a possessory right to it.[47]

[74] Mr Dixon argues the prosecution only is put to that test if the defendants had established some evidential basis for a claim of right defence, and unachievable in circumstances of a finding of dishonesty. That is wrong: the absence of any claim of right is an essential element of the offence, required to be proven by the prosecution beyond reasonable doubt.[48] It is not a defence only to be rebutted if raised. But a conclusion the defendants had acted dishonestly may negate the claim, if the evidence for dishonesty goes to the same end.[49]

[75] Here, however, the dishonesty would have been in disregarding s 207B(2) of the Electoral Act,[50] which is "other than the enactment against which the offence is alleged to have been committed".[51] Thus the defendants' belief in a possessory right to the money subject to s 207B(2) remained open, however ignorant or mistaken. Under s 207B(2), having been given a party donation, the defendants had a possessory right to the money, however transient, to be able then to transmit it to the party secretary or to deposit it in a bank account nominated by her (even if GH's or NZFF's bank accounts). The possessory right arose on the defendants being given the money; any ignorant or mistaken belief in its persistence beyond the 10 working days reserved for the money's transmission or deposit is not disqualifying. And plainly the

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47 See [43] above.

48 *R v van der Kaap* CA58/05 1 September 2006 at [14], citing *R v Wanhalla*, above n 13, at [51]; *Brown v Police* (1984) 1 CRNZ 576 (HC) at 578; and *R v Heard* (1985) 1 CRNZ 474 (HC) at 480.

49 *Adamson v R* [2017] NZCA 175 at [23]–[25]; *Ortmann v United States of America*, above n 10, at [487].

50 See [63] above.

51 Crimes Act, s 2, definition of "claim of right".

defendants did believe they had a possessory right to the money: that was the essence of their defence — from the point of the money's payment to them, they were entitled to retain it for the party's benefit.

[76] If the money is 'party donations', I therefore would have held the prosecution had not proved the absence of any claim of right.

Result

[77] I find the defendants each **not guilty** of either s 240(1) charge filed by the prosecution.

—Jagose J