

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2014
[2015] NZSC 147

BETWEEN JONATHAN DIXON
Appellant

AND THE QUEEN
Respondent

Hearing: 24 March 2015

Court: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: Appellant in person
D J Boldt and F G Biggs for Respondent

Judgment: 20 October 2015

JUDGMENT OF THE COURT

- A** The appeal is dismissed.
- B** The decision of the Court of Appeal quashing the appellant's conviction for obtaining property contrary to s 249(1)(a) of the Crimes Act 1961 and substituting a conviction for obtaining a benefit contrary to s 249(1)(a) is quashed. The appellant's original conviction is reinstated.
- C** The appellant is to contact the Probation Service in South Dunedin by 10.30 am on Wednesday 28 October 2015 to make arrangements to complete his sentence.
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REASONS

(Given by Arnold J)

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Introduction

[1] During the 2011 Rugby World Cup, the English rugby squad visited Queenstown during a break between matches. One evening some members of the squad, including the vice-captain Mike Tindall, visited a local bar. During their time at the bar, Mr Tindall, who is married to a member of the Queen’s family, was seen socialising, and then leaving, with a female patron. This was recorded on the bar’s closed circuit television (CCTV) system.

[2] The appellant, Jonathan Dixon, worked for a company which provided security services to the bar. He obtained a compilation of the relevant CCTV footage and attempted, unsuccessfully, to sell it to overseas media interests. He eventually posted it on a video-sharing site, which resulted in something of a media uproar.

[3] Mr Dixon was charged with accessing a computer system for a dishonest purpose contrary to s 249(1)(a) of the Crimes Act 1961. Section 249(1)(a) provides that a person commits an offence if he or she “directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right ... obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration”. The Crown case was that Mr Dixon had obtained “property”, namely the digital footage. Judge Phillips ruled that the digital footage was property and directed the jury accordingly,¹ whereupon Mr Dixon was found guilty. Judge Phillips sentenced him to four months’ community detention and 300 hours of community work.²

¹ *R v Dixon* DC Invercargill CRI-2011-059-1122, 18 April 2013 [*Dixon* (Summing up)] at [29].

² *R v Dixon* DC Invercargill CRI-2011-059-1122, 2 August 2013 [*Dixon* (Sentencing)].

[4] Mr Dixon then appealed to the Court of Appeal against both conviction and sentence.³ The sole ground of the conviction appeal was that the Judge had erred in finding that the digital footage was “property” for the purposes of s 249(1)(a). The Court of Appeal accepted that the footage was not property but considered that Mr Dixon was guilty of accessing a computer to obtain a benefit, also an offence under s 249(1)(a). Accordingly, exercising its powers to substitute a verdict under s 386(2) of the Crimes Act, the Court of Appeal quashed his conviction and substituted a conviction for obtaining a benefit.⁴ The Court dismissed Mr Dixon’s sentence appeal.⁵

[5] The judgment of the Court indicates that after the hearing, Mr Dixon’s then counsel advised the Court that Mr Dixon wished to listen to the audio recording of the Judge’s summing up to the jury as he (Mr Dixon) was concerned that something had been omitted from the written transcript. The Court directed that Mr Dixon be given seven days to listen to the audio recording; if he wished to advance further argument as a consequence, he could do so only through counsel. Counsel subsequently filed a memorandum, to which he attached “without comment” an outline of submissions prepared by Mr Dixon. The Court noted that the new submissions raised allegations against trial counsel and alleged the summing up was flawed although not identifying any discrepancy between the taped and transcribed versions of the summing up. The Court said that this was outside the scope of the leave granted but that, in any event, it was satisfied that none of the matters raised, whether viewed individually or collectively, would justify quashing the conviction.⁶

[6] This Court granted Mr Dixon leave to appeal on the question whether the Court of Appeal erred in dismissing his appeal.⁷ The Court said:⁸

[1] The approved question encompasses whether the Court of Appeal was correct to hold that the CCTV files are not property, as well as the question of whether the Court of Appeal should have used s 386(2) of the Crimes Act 1961 to substitute a conviction for accessing a computer system and thereby dishonestly and without claim of right obtaining a benefit.

³ *Dixon v R* [2014] NZCA 329, [2014] 3 NZLR 504 (Harrison, Wild and French JJ) [*Dixon* (CA)].

⁴ At [49].

⁵ At [57].

⁶ At [58]–[61].

⁷ *Dixon v R* [2014] NZSC 151.

⁸ Footnotes omitted.

[2] Mr Dixon also sought leave to appeal against the Court of Appeal's conclusion that the submissions filed by Mr Dixon after the Court of Appeal hearing were "outside the scope of the leave granted" and that they did not individually or collectively justify quashing the conviction.

[3] The question for the appeal also encompasses any specific matters raised in those submissions filed after the Court of Appeal hearing which Mr Dixon argues should have led to his appeal being allowed.

The hearing

[7] Mr Dixon was to be represented by Marie Dyhrberg QC and Barbara Hunt on the appeal in this Court and they filed written submissions on his behalf. Shortly before the hearing, however, Mr Dixon filed an application seeking leave to file written submissions and to make oral submissions himself, in addition to those made by his counsel. The Court declined that application. Mr Dixon then dismissed his counsel and appeared for himself at the hearing. We have, nevertheless, considered the written submissions of counsel, in addition to those made by Mr Dixon.

The legislation

[8] We begin with the legislation. As we have said, s 249(1) of the Crimes Act provides:

249 Accessing computer system for dishonest purpose

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right,—
 - (a) obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
 - (b) causes loss to any other person.

[9] Section 248 contains two relevant definitions:

access, in relation to any computer system, means instruct, communicate with, store data in, receive data from, or otherwise make use of any of the resources of the computer system

...

computer system—

- (a) means—

- (i) a computer; or
 - (ii) 2 or more interconnected computers; or
 - (iii) any communication links between computers or to remote terminals or another device; or
 - (iv) 2 or more interconnected computers combined with any communication links between computers or to remote terminals or any other device; and
- (b) includes any part of the items described in paragraph (a) and all related input, output, processing, storage, software, or communication facilities, and stored data.

[10] The relevant feature of these definitions is that the term “computer system” includes stored data and “access” includes receiving data from a computer system. There is, accordingly, no doubt that Mr Dixon accessed a computer system within the meaning of s 249(1)(a).

[11] Finally in relation to the Crimes Act, “property” is defined in s 2 as including:

real and personal property, and any estate or interest in real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest[.]

As can be seen, the definition is:

- (a) inclusive rather than exclusive;
- (b) circular, in that property is defined as including “real and personal property”; and
- (c) in wide terms. In particular, it includes tangible and intangible property.

We should also mention one aspect of the broader statutory context. The term “goods” in the Commerce Act 1986, the Consumer Guarantees Act 1993, the Fair Trading Act 1986 and the Sale of Goods Act 1908 is defined, “to avoid doubt”, to

include “computer software”.⁹ The principal Acts were amended in 2003¹⁰ following the High Court’s decision in *Electricity Supply Association of New Zealand Inc v Commerce Commission*, in which it was held that electricity and associated line function services were neither goods nor services for the purposes of the Consumer Guarantees Act.¹¹ In its report back on the amending legislation, the Commerce Committee said:¹²

Some submitters proposed that computer software should be removed from the definition of goods because the consumer receives only a licence to use the software. These submitters believe that it is more appropriate, and more technically correct, for computer software to be considered to be a service for the purposes of the principal Act, the Commerce Act 1986 and the Fair Trading Act 1986.

We do not accept this proposal. The interest in the software the consumer receives does not differ significantly from other goods involving the transfer of an interest in intellectual property, and for which the guarantees and remedies relating to goods are more relevant and applicable than the guarantees and remedies relating to services. We recommend that computer software be added to the definition of goods for the avoidance of doubt.

Some more background

[12] By way of further background, the bar which Mr Tindall and his colleagues visited was operated by a company called Base Ltd (Base). It had installed a CCTV system in the premises. Mr Dixon learnt that there was footage of the incident involving Mr Tindall on the bar’s CCTV system and asked a receptionist to go through the footage and save any relating to Mr Tindall. The receptionist compiled the relevant footage from several cameras and saved the files onto a desktop computer in the reception area, in a way which allowed a viewer of the footage to follow Mr Tindall and his female companion as they socialised inside the bar before

⁹ See Commerce Act 1986, s 2, definition of “goods”, para (b)(v); Consumer Guarantees Act 1993, s 2, definition of “goods”, para (b)(vi); Fair Trading Act 1986, s 2, definition of “goods”, para (b)(v); and Sale of Goods Act 1908, s 2, definition of “goods”, para (c).

¹⁰ See Commerce Amendment Act 2003, s 3(1); Consumer Guarantees Amendment Act 2003, s 3; Fair Trading Amendment Act (No 2) 2003, s 3(1); and Sale of Goods Amendment Act 2003, s 3.

¹¹ *Electricity Supply Association of New Zealand Inc v Commerce Commission* (1998) 6 NZBLC 102,555 (HC). There have been several decisions in courts of comparable jurisdictions to the effect that software per se does not fit within the term “goods” (which included “all personal chattels other than things in action and money”) because software is intangible: see *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 (EWCA) at 493 per Glidewell J and *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd* [2010] NSWSC 267, (2010) 77 NSWLR 479 at 481–489.

¹² Consumer Protection (Definitions of Goods and Services) Bill 2001 (154–2) (select committee report) at 4.

leaving together. Mr Dixon then transferred the files from the desktop to a personal USB stick, and deleted them from the desktop. Mr Dixon attempted, unsuccessfully, to sell the footage to overseas media organisations, and supplied at least one still image to The Sun newspaper in the United Kingdom.

[13] When Mr Impey, who worked for Base, discovered what had happened, he asked Mr Dixon to return the footage. Mr Dixon said that he planned to sell it, and asked Mr Impey if he could do so. Mr Impey said that he could not. Subsequently, Mr Dixon posted the footage on the video-sharing site YouTube. Base complained to the police.

[14] At trial, Mr Dixon sought to explain his conduct by saying that he was involved in “Project Lucy”. He said that as part of the project, he had obtained the footage, researched its market value and looked for a buyer. He indicated that he intended to present the project to the bar’s management for approval. Project Lucy was, he said, work of a type that he had done previously for the bar’s owners on numerous occasions. Mr Dixon explained his reason for uploading the footage onto YouTube as being that Base had rejected his Project Lucy proposal and were intent on releasing the footage slowly. Mr Dixon said he could not condone that, and accordingly released the entire footage immediately.

[15] The jury rejected Mr Dixon’s explanation for his conduct. At sentencing, Judge Phillips said that Mr Dixon had posted the footage out of spite and to prevent anyone else from having the opportunity to make money from it.¹³

Were the digital files “property” for the purposes of s 249(1)(a)?

[16] Before we begin our discussion of whether the digital files obtained by Mr Dixon were “property” for the purposes of s 249(1)(a) we will summarise the decisions of the Courts below on the point.

¹³ *Dixon* (Sentencing), above n 2, at [11].

District Court decision

[17] When the Crown closed its case at trial, Mr Dixon’s counsel made an application that Mr Dixon be discharged under s 347 of the Crimes Act on the ground that Crown had failed to prove that he obtained “property”. Judge Phillips dismissed the application.¹⁴ Having summarised the Crown evidence and the submissions of counsel, Judge Phillips said:

[13] ... the definition of property in the Crimes Act is wide; in my view clearly [it] is sufficiently wide to cover here the situation. I have regard to the overall position relating to what we are talking about here. I see that what a computer does is receives, digests and analyses data. I consider that data can include anything that is capable of being stored on a computer system, being a word document or a programme file or a script, that enables the operator to do something quickly for example and can clearly include picture files and the like.

[14] What the receptionist did, under the instructions of the accused on the evidence, was retrieve data from a CCTV camera and store it on the desktop. At that point in time, of course, nothing at all had happened other than there had been the creation of a separate file, being a picture file containing this video. At that point in time the property remained in the possession of Base. The accused arrives, then physically himself moves that picture file from the desktop onto his USB stick and then deletes the picture file. I refer back to the definition of property. In my view we have in fact clear property, being the picture file, which is data from a computer taken into the possession of the accused on the Crown’s case. Quite clearly the management/owners/directors or whatever of Base would be able to say that they had that document (that picture file) under the company’s control and thus could make a claim to possession of it. It was taken from the desktop, onto the USB stick and the company’s document was then deleted.

[15] I consider that there is sufficient evidence before this Court that at this point in time establishes that the accused did obtain property as the result of accessing the computer owner by Base. I dismiss the application accordingly.

Court of Appeal decision

[18] The Court of Appeal disagreed with the Judge’s conclusion, while acknowledging that it was an understandable view, likely to be shared by many.¹⁵ The Court held that digital files are not property within the meaning of s 2 of the Crimes Act because they were simply “pure information”,¹⁶ the orthodox view being

¹⁴ *R v Dixon* DC Invercargill CRI-2011-059-1122, 17 April 2013.

¹⁵ *Dixon* (CA), above n 3, at [21]–[22].

¹⁶ At [31].

that information, whether confidential or not, is not property.¹⁷ The Court referred in particular to the decision of the English Court of Appeal in *Oxford v Moss*.¹⁸

[19] The Court noted that some authorities had drawn a distinction between information and the medium on which it was stored or contained, giving as an example, a computer disc containing information – the disc would be property but the information on it would not.¹⁹ The Court considered whether digital footage could be distinguished from information on this basis. It concluded that it could not. It said:

[31] ... we have reached the view that electronic footage stored on a computer is indistinguishable in principle from pure information. It is problematic to treat computer data as being analogous to information recorded in physical form. A computer file is essentially just a stored sequence of bytes that is available to a computer program or operating system. Those bytes cannot meaningfully be distinguished from pure information. A Microsoft Word document, for example, may appear to us to be the same as a physical sheet of paper containing text, but in fact is simply a stored sequence of bytes used by the Microsoft Word software to present the image that appears on the monitor.

[32] Accordingly, we consider that if confidential information is not property digital footage also cannot be.

[20] The Court then considered whether it should depart from the orthodox view that confidential information cannot be property. It noted that the distinction drawn between information, which was not property, and the medium on which it was contained, which was property, had been criticised as “illogical and unprincipled”.²⁰

[21] However, the Court said that any illogicality was outweighed by strong policy reasons that militated against the recognition of information as property, particularly the risk that it would impact detrimentally on the free flow of information and freedom of speech.²¹ While acknowledging that legal concepts of property are constantly evolving to reflect societal changes and new developments, the Court noted that when Parliament had created the new computer related offences,

¹⁷ At [36].

¹⁸ *Oxford v Moss* (1979) 68 Cr App R 183 (QB).

¹⁹ See, for example, *St Albans City and District Council v International Computers Ltd*, above n 11, at 493 per Glidewell J.

²⁰ *Dixon* (CA), above n 3, at [33], referring to J C Smith “Theft: *Oxford v Moss*” [1979] Crim LR 119 at 120.

²¹ At [34].

it had amended the definition of property only to the extent of adding money and electricity.²² Given the absence of any reference to digital files in the definition of “property”, the authorities and the policy considerations, the Court declined to depart from the orthodox approach.²³ The Court said it was reinforced in its view by s 230 of the Crimes Act.²⁴ That section criminalises the taking, obtaining or copying of trade secrets. The Court considered that, if confidential information was property in terms of the s 2 definition, this section would be unnecessary.

[22] The Court also considered what might fall within the concept of property in s 249(1)(a) if digital files were not property. The Court said:

[38] We have considered whether in creating a crime of accessing a computer in order to obtain property, Parliament should be taken to have intended that digital files must be property. To put it another way, is it still possible to access a computer and obtain property if digital files do not qualify as property? What other types of property could be obtained? In our view, excluding digital files as property does not render the provision meaningless. We consider that the offence is aimed at situations such as where a defendant accesses a computer and uses, for example, credit card details to unlawfully obtain goods.

Discussion

[23] We should at the outset identify the scope of this judgment. As noted, the Court of Appeal held that the digital files at issue were “pure information” and accordingly, on the authorities, were not “property”. It saw no reason to depart from what it described as the orthodox view that information, even confidential information, is not property.²⁵

[24] We do not propose to reconsider that orthodox view. This is because Mr Boldt for the Crown did not contend that “pure information” was property. Rather, he argued that digital files were not simply information but were properly regarded as things which could be owned and dealt with in the same way as other items of personal property. Accordingly, the Crown’s challenge was confined to the

²² At [35].

²³ At [36].

²⁴ At [37].

²⁵ While it is true to say that the current view is that information cannot be property, that was not always the case: see, for example, *New Era Printers and Publishers Ltd v Commissioner of Stamp Duties* [1927] NZLR 438 (SC).

Court of Appeal’s characterisation of digital files as simply information. Moreover, since Mr Dixon chose to dismiss his counsel shortly before the hearing and did not address this aspect of the case at all in his oral or written submissions,²⁶ this would not be an appropriate occasion on which to reconsider the orthodox view.

[25] The meaning of the word “property” varies with context. As Gummow and Hayne JJ put it in *Kennon v Spry*:²⁷

[T]he term “property” is not a term of art with one specific and precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used.

In the present case we are concerned with the dishonest acquisition of property from a computer system under s 249(1)(a). In that context and in light of the definition of property in s 2, we have no doubt that the digital files at issue are property and not simply information. In summary, we consider that the digital files can be identified, have a value and are capable of being transferred to others. They also have a physical presence, albeit one that cannot be detected by means of the unaided senses. Whether they are classified as tangible or intangible, the digital files are nevertheless property for the purposes of s 249(1)(a).

[26] We now explain this conclusion in more detail.

[27] Sections 248 to 252 were introduced into the Crimes Act in 2003, when the Crimes Amendment Act 2003 came into force.²⁸ The Amendment Act replaced pt 10 of the Crimes Act with a new pt 10 containing a suite of changes designed to modernise the criminal law in relation to crimes against rights of property, particularly by taking better account of the increasing role of computers in society. When the relevant Bill, the Crimes Amendment Bill (No 6), was first introduced in 1999, the explanatory note highlighted the definitions of “deception”, “dishonestly”, “document”, “obtain” and “property” in the new pt 10, saying that the focus was

²⁶ We did have the benefit of counsel’s written submissions on the point, however.

²⁷ *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [89] (footnotes omitted). See also the discussion in R T Fenton *Garrow and Fenton’s Law of Personal Property in New Zealand* (7th ed, LexisNexis Ltd, Wellington, 2010) ch 1.

²⁸ See the Crimes Amendment Act 2003, s 15. For a fuller discussion of the background, see Kevin Dawkins and Margaret Briggs “Criminal Law [2007] NZ L Rev 131 at 166–168.

“now on the concept of being deprived of property, rather than the concept of things capable of being stolen”.²⁹

[28] Initially, it had been intended that there would also be a special definition of “property” for the purposes of the new pt 10. That definition was intended to reverse the effect of the decision of the Full Court of the Court of Appeal in *R v Wilkinson*, where the Court had held that the words “capable of being stolen” in the former s 246(2) of the Crimes Act did not cover intangible property.³⁰ The proposed definition of “property” for pt 10 purposes was:³¹

“Property” includes real and personal property, and all things, animate or inanimate, in which any person has any interest or over which any person has any claim; and also includes money, things in action, and electricity.

[29] There seems little doubt that, had that definition been retained, digital files would have been included, on the basis that they are “things” in which a person has an “interest”. However, when the Law and Order Select Committee reported back in July 2001, it noted that the definition of “property” proposed for pt 10 was different from the definition applicable to the Crimes Act generally and recommended that there be one definition for the Act as a whole. Accordingly, it recommended that the definition be removed from pt 10 and the definition of property in s 2 be amended,³² which is what occurred. There was no indication, however, that the Committee intended in making that recommendation to narrow the scope of the definition that would otherwise have applied.

[30] The new pt 10 also carried over (and slightly amended) an extended definition of “document” that had originally been introduced into the Crimes Act in 1974, when the Crimes Amendment Act 1973 came into force.³³ That extended definition refers to a document “in any form” and includes:³⁴

²⁹ Crimes Amendment Bill (No. 6) 1999 (322-1) (explanatory note) at iv. The Bill as introduced named the proposed part “Part 10A”, but this became “Part 10” in the Bill as reported back from the Law and Order Select Committee.

³⁰ *R v Wilkinson* [1999] 1 NZLR 403 (CA).

³¹ Crimes Amendment Bill (No 6) 1999 (322-1), cl 19.

³² Crimes Amendment Bill (No 6) 1999 (322-2) (select committee report) at 17.

³³ See Crimes Amendment Act 1973, s 5.

³⁴ Crimes Act 1961, s 217(c).

any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded, stored (whether temporarily or permanently), or embodied so as to be capable, with or without the aid of some other equipment, of being reproduced.

[31] In our view, material held in electronic form on a computer (such as a Microsoft Word document) falls within this definition of document. We note that the Court of Appeal reached a similar view quite apart from the extended definition. In *R v Mistic* an offence against the previous s 229A (to which the extended definition of “document” did not apply) was at issue.³⁵ The question was whether either a computer program or a computer disk was a “document” for the purposes of the section. The Court held that each was:³⁶

[W]e have no difficulty accepting that the computer program and computer disk in question are each a “document” for the purposes of s 229A. Essentially, a document is a thing which provides evidence or information or serves as a record. The fact that developments in technology may improve the way in which evidence or information is provided or a record is kept does not change the fundamental purpose of that technology, nor a conceptual appreciation of that function. Legislation must be interpreted with that in mind.

Later, the Court said:³⁷

It is unarguable that a piece of papyrus containing information, a page of parchment with the same information, a copper plate or a tablet of clay, are all documents. Nor would they be otherwise if the method of notation were English, Morse code, or binary symbols. In every case there is a document because there is a material record of information. This feature, rather than the medium, is definitive.

The Court held that the computer programme and the disc constituted “material things which record and provide information” and as such were “readily comprehended by the term ‘document’”.³⁸

[32] In relation to crimes involving computers, the new Part 10 introduced four new offences:

³⁵ *R v Mistic* [2001] 3 NZLR 1 (CA). Section 229A penalised both taking or obtaining “any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration” and using or attempting to use any such document to obtain any privilege, benefit, etc.

³⁶ At [31].

³⁷ At [32].

³⁸ At [34].

- (a) section 249, which deals with accessing computer systems for a dishonest purpose;
- (b) section 250, which deals with damaging or interfering with a computer system or any data or software in a computer system;
- (c) section 251, which deals with making, selling, distributing or possessing software or other information that would enable that person or another person to access a computer system without authorisation, in the knowledge that the principal use of the software or other information is for the commission of a crime; and
- (d) section 252, which deals with accessing a computer system without authorisation.

[33] The question for us is the meaning of property in s 249(1)(a), taking into account the definition of property in s 2. Even though this is a criminal statute, the language must be given a purposive construction³⁹ and must be applied in circumstances as they arise.⁴⁰

[34] In the judgment under appeal, the Court of Appeal said that the word “property” in s 249(1)(a) was aimed at situations “such as where a defendant accesses a computer and uses, for example, credit card details to unlawfully obtain goods”.⁴¹ We accept that instances of that type could be prosecuted under s 249(1)(a),⁴² although they are likely also to constitute other offences, particularly the s 240 offence of obtaining by deception.⁴³ However, we do not accept that the word “property” was included in s 249(1)(a) simply to cover that type of situation. Rather, we think it was included for a broader purpose.

³⁹ See s 5(1) of the Interpretation Act 1999 and *R v Karpavicius* [2002] UKPC 59, [2004] 1 NZLR 156 at [15].

⁴⁰ Interpretation Act, s 6.

⁴¹ *Dixon* (CA), above n 3, at [38].

⁴² See, for example, *R v Hayes* (2006) 23 CRNZ 547 (CA) and *Harford v Police* [2014] NZHC 1886, both of which involved the use of bank account details to unlawfully obtain funds.

⁴³ Prior to the 2003 amendments such instances were covered by the offence of obtaining by false pretences: see the former s 246 of the Crimes Act.

[35] We begin with the definition of “computer system” in s 248, which is quoted above at [9]. As we have said, it is a wide definition and includes items such as software and stored data. Software and data are also referred to in s 250, which provides in part:

250 Damaging or interfering with computer system

...

- (2) Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly, and without authorisation, knowing that he or she is not authorised, or being reckless as to whether or not he or she is authorised,—
- (a) damages, deletes, modifies, or otherwise interferes with or impairs any data or software in any computer system; or
 - (b) causes any data or software in any computer system to be damaged, deleted, modified, or otherwise interfered with or impaired; ...

...

Accordingly, there is no doubt that Parliament had stored data in mind when these provisions were drafted. Equally, there is no doubt that Parliament had in mind situations where stored data was copied. “Access” is defined to include receiving data from a computer:⁴⁴ data is received from a computer even though it is copied rather than permanently removed from the computer.

[36] Given that Parliament contemplated situations where a person copied stored data from a computer, which of the offences might apply where the person taking the data did so without authority? There are three possibilities – ss 249, 250 and 252. It is not obvious that s 250 would apply. If someone simply took a copy of existing data, but did not damage, delete or modify it, could it be said that the person “interfered with” or “impaired” the data? We rather doubt that it could. Section 252 could apply. It creates an offence of intentionally accessing a computer system without authority and provides for a maximum penalty of two years’ imprisonment. However, that offence focuses on unauthorised access simpliciter: it does not address the issue of dishonest purpose. Where the access is for a dishonest purpose, s 249

⁴⁴ Crimes Act, s 248: see above at [9].

applies and there are significantly higher maximum penalties (for a s 249(1) offence the maximum penalty is seven years imprisonment).

[37] An obvious example of accessing a computer system for a dishonest purpose is a case such as the present, where a person accesses a computer system without authority in order to locate, copy and then deal with valuable digital files contrary to the interests of the files' owner. The inclusion of such conduct is consistent with the features of the legislation we have just described. Of the various concepts identified in s 249(1)(a) – “property, privilege, service, pecuniary advantage, benefit or valuable consideration” – “property” seems most apt to capture what was obtained by Mr Dixon as a result of the unauthorised access.

[38] In this context, we consider that the fundamental characteristic of “property” is that it is something capable of being owned and transferred. In *New Era Printers and Publishers Ltd v Commissioner of Stamp Duties*, Stringer J held that anything which is owned by one person and can be sold and transferred to another is property within both the popular and legal meanings of the term.⁴⁵ The definition of “property” in s 4 of the Property Law Act 2007 is to similar effect:⁴⁶

property—

- (a) means *everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property*; and
- (b) includes any estate or interest in property; ...
- ...

[39] The digital files which Mr Dixon downloaded to his USB stick and then deleted from the reception's computer were a compilation of sequenced images from the bar's CCTV system. That compilation of digital files had an economic value and was capable of being sold. While the files from which the compilation was constructed remained on the CCTV system, the compilation contained what was valuable in the full files. Moreover, the compilation had a material presence and altered the physical state of whatever medium it was stored on (eg, computer, disc or

⁴⁵ *New Era Printers and Publishers Ltd v Commissioner of Stamp Duties*, above n 25, at 444.

⁴⁶ Emphasis added.

USB stick), as is illustrated by the fact that electronic storage space can become fully utilised.

[40] As a result of this material presence, some courts in the United States have been prepared to treat software as tangible property, at least in some contexts. For example, in *South Central Bell Telephone Co v Barthelemy*⁴⁷ the Supreme Court of Louisiana described the physical processes involved.⁴⁸ The issue was whether certain computer software⁴⁹ which a telephone company was licensed to use was “tangible personal property” as defined and therefore subject to municipal use tax. The definition of “tangible personal property” in the relevant legislation was:⁵⁰

[P]ersonal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. The term “tangible personal property” shall not include stocks, bonds, notes or other obligations or securities.

[41] The Court concluded that the software fell within the definition. It described the basic characteristics of software as follows:⁵¹

In its broadest scope, software encompasses all parts of the computer system other than the hardware, i.e., the machine; and the primary non-hardware component of a computer system is the program. ... In its narrowest scope, software is synonymous with program, which, in turn, is defined as “a complete set of instructions that tells a computer how to do something.” ... Thus, another definition of software is “a set of instructions” or “a body of information.” ...

When stored on magnetic tape, disc, or computer chip, this software, or set of instructions, is physically manifested in machine readable form by arranging electrons, by use of an electric current, to create either a magnetized or unmagnetized space. ... The computer reads the pattern of magnetized and unmagnetized spaces with a read/write head as “on” and “off”, or to put it another way, “0” and “1”. This machine readable language or code is the physical manifestation of the information in binary form.

[42] In response to the telephone company’s argument that the software was merely “knowledge” or “intelligence” the Court said:⁵²

⁴⁷ *South Central Bell Telephone Co v Barthelemy* 643 So 2d 1240 (Lou 1994).

⁴⁸ See also Sarah Green and John Randall *The Tort of Conversion* (Hart Publishing, Oxford, 2009) at 118–119.

⁴⁹ The software at issue was switching system software and data processing software.

⁵⁰ *South Central Bell*, above n 47, at 1243.

⁵¹ At 1246.

⁵² At 1246.

The software at issue is not merely knowledge, but rather is knowledge recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses. ... That we use a read/write head to read the magnetic or unmagnetic spaces is no different than any other machine that humans use to perceive those corporeal things which our naked senses cannot perceive. ...

Later, the Court said that the software was “ultimately recorded and stored in a physical form upon a physical object”.⁵³ When it acquired the software, the telephone company did not merely obtain intangible knowledge or information but rather obtained recorded knowledge stored in some sort of physical form that its computers could use.⁵⁴

Recorded as such, the software is not merely an incorporeal idea to be comprehended, and would be of no use if it were. Rather, the software is given physical existence to make certain desired physical things happen.

[43] Examples of other decisions where a similar analysis has been adopted are *Wal-Mart Stores Inc v City of Mobile*,⁵⁵ *Andrew Jergens Co v Wilkins*⁵⁶ and *American Business Information Inc v Egr*.⁵⁷ In their article “Software as Goods”, Sarah Green and Djakhongir Saidov argue that software is tangible, for the same reasons as given by the Court in *South Central Bell*.⁵⁸ However, as Ken Moon has explained, the United States courts have not been consistent on this point, with some holding that software is intangible property.⁵⁹

[44] Ronald Young J considered *South Central Bell* in *Erris Promotions Ltd v Commissioner of Inland Revenue*.⁶⁰ As agent for certain investors, a company had purchased some software packages. The investors sought to claim depreciation losses from the software but the Commissioner of Inland Revenue disallowed their claim. One of the issues was whether the software code was tangible property and therefore depreciable. Ronald Young J concluded that it was intangible rather than

⁵³ At 1247.

⁵⁴ At 1247.

⁵⁵ *Wal-Mart Stores Inc v City of Mobile* 696 So 2d 290 (Ala 1996).

⁵⁶ *Andrew Jergens Co v Wilkins* 109 Ohio St 3d 396, 848 NE 2d 499 (Ohio 2006).

⁵⁷ *American Business Information Inc v Egr* 264 Neb 574, 650 NW 2d 251 (Neb 2002).

⁵⁸ Sarah Green and Djakhongir Saidov “Software as Goods” [2007] JBL 161 at 164–167. See also Green and Randall, above n 48, at 118–119.

⁵⁹ See Ken Moon “The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?” (2009) 31(8) EIPR 396 at 399.

⁶⁰ *Erris Promotions Ltd v Commissioner of Inland Revenue* [2004] 1 NZLR 811 (HC).

tangible property. The Judge noted that the Court's decision in *South Central Bell* that software was tangible property for the purpose of the payment of sales tax was based on a particular definition of "tangible property"; but, more importantly, in the case before him, the source code had been separated from the copyright in it (which had been sold separately) and the sale of the source code specifically excluded any physical manifestations of it, including the medium on which it was stored. So it was only the source code that was at issue. The Judge described this as "a set of instructions separate from any physical manifestation".⁶¹

[45] In the present case, the Court of Appeal considered that it was problematic to treat computer data as being analogous to information recorded in physical form, on paper, computer disk or magnetic tape, for example. In the passage cited above at [19], the Court said that a computer file is essentially just a "stored sequence of bytes", which cannot be meaningfully distinguished from pure information. To reiterate, the Court said:⁶²

A Microsoft Word document, for example, may appear to us to be the same as a physical sheet of paper containing text, but in fact is simply a stored sequence of bytes used by the Microsoft Word software to present the image that appears on the monitor.

[46] We make two comments about this. First, as we have said, the definition of "document" for the purposes of Part 10 is sufficiently broad to include Microsoft Word documents in electronic form. Given that definition, it would be odd if a Microsoft Word document in electronic form was not "property" for the purposes of s 249(1)(a).

[47] Second, we note that some courts in the United States have been prepared to treat electronic records and databases as property that is capable of being converted even though they have accepted that they are intangible property. For example, in *Thyroff v Nationwide Mutual Insurance Co* the Court of Appeals of New York was required to address an argument that a claim for the tort of conversion could not be brought on the basis of misappropriation of the claimant's electronic records and data because New York law did not recognise a cause of action for the conversion of

⁶¹ At [81].

⁶² *Dixon* (CA), above n 3, at [31].

intangible property.⁶³ The Court rejected this submission. In the course of doing so, it said:⁶⁴

It cannot be seriously disputed that society's reliance on computers and electronic data is substantial, if not essential. Computers and digital information are ubiquitous and pervade all aspects of business, financial and personal communication activities. Indeed, this opinion was drafted in electronic form, stored in a computer's memory and disseminated to the Judges of this Court via e-mail. We cannot conceive of any reason in law or logic why this process of virtual creation should be treated any differently from production by pen on paper or quill on parchment. A document stored on a computer hard drive has the same value as a paper document kept in a file cabinet.

Later, the Court reinforced this by saying “[a] manuscript of a novel has the same value whether it is saved in a computer's memory or printed on paper” and noted that the information stored in the electronic records and databases at issue was valuable to the claimant “regardless of whether the format in which the information was stored was tangible or intangible”.⁶⁵

[48] For the purposes of the tort of conversion, then, the Court held that electronic records or databases kept on a computer were indistinguishable from printed documents in a file cabinet. Although the Court accepted that the electronic records were intangible rather than tangible property, it considered that the tort of conversion should apply to them. As will be apparent, the Court's analysis was based on the notion of functional equivalence.

[49] By contrast, the contrary view has been taken in England. In *Your Response Ltd v Datateam Business Media Ltd* the Court of Appeal held that it was not possible to exercise a common law possessory lien over an electronic database.⁶⁶ While the Court did not rule out the possibility that such a database might be property, it said that it was at best intangible property and so, on the authorities (*OBG Ltd v Allan* in particular),⁶⁷ did not represent “tangible property of a kind that is capable of forming

⁶³ *Thyoff v Nationwide Mutual Insurance Co* 8 NY 3d 283 (NY 2007).

⁶⁴ At 291–292.

⁶⁵ At 292–293.

⁶⁶ *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41.

⁶⁷ *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1.

the subject matter of the torts that are concerned with an interference with possession”.⁶⁸

[50] The key question for us is whether the digital files are “property” for the purposes of s 249(1)(a) rather than whether they are tangible or intangible property, given that the definition of “property” in s 2 includes both tangible and intangible property. What emerges from our brief discussion of the United States authorities is that although they differ as to whether software is tangible or intangible, they are in general agreement that software is “property”. There seems no reason to treat data files differently from software in this respect. Even though the English Court of Appeal considered that an electronic database was not tangible property capable of being converted, it acknowledged that it might be property.

Conclusion

[51] Like the Court of Appeal, we consider that conduct such as Mr Dixon’s is clearly within the statutory purpose of s 249. However, we think it a more natural interpretation of s 249(1)(a) to say that Mr Dixon took “property” when he downloaded the compilation of digital files to his USB stick and deleted them from the desktop computer than it is to say that he acquired a “benefit”. A benefit is an “advantage”, “good” or “profit”⁶⁹ and it was not at all clear at the point he acquired them whether Mr Dixon obtained any advantage or profit from having the files: at best he acquired something that was potentially of advantage or profit to him. We consider that interpreting the word “property” as we have is not only required by the statutory purpose and context but is also consistent with the common conception of “property”.⁷⁰

[52] We note that electronic records have been similarly treated in other contexts. In *R v Cox* the Court of Appeal was required to consider whether the police could obtain a search warrant under s 198 of the Summary Proceedings Act 1957 in

⁶⁸ *Your Response Ltd*, above n 66, at [17] per Moore-Bick LJ, who delivered the principal judgment.

⁶⁹ *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford 2007) at 220.

⁷⁰ We do not regard the fact that Mr Dixon deleted the compilation from the computer after he copied it as critical. He would still have obtained property if he had simply downloaded a copy of the compilation.

relation to the content of text messages.⁷¹ Section 198(1)(b) provided that a search warrant could be issued where there were reasonable grounds for believing that there was in any place “any thing” which there was reasonable ground to believe might be evidence as to the commission of an offence. One of the arguments raised by the defendants was that s 198 did not authorise the search of text messages as a text message was not a “thing”. The Court rejected that, saying that electronic data “has a physical existence even if ephemeral”.⁷² Moreover, the fact that software is included within the definition of “goods” for the purpose of various consumer protection statutes provides some limited support for our view. It does at least show that Parliament has been concerned to update the law to reflect the ubiquity of computers, and the nature of their role, in modern society.

[53] For these reasons, we consider that Judge Phillips was right to hold that the digital files which Mr Dixon downloaded to his USB stick and deleted from the desktop computer were “property” for the purposes of s 249(1)(a). It follows that the Court of Appeal was wrong to quash Mr Dixon’s conviction for obtaining “property” and substitute a conviction on the basis that he obtained a “benefit”. In light of this conclusion, it is unnecessary that we consider whether the Court of Appeal was right to substitute a conviction under s 386(2) or to determine what constitutes a “benefit” for the purposes of s 249(1)(a).

[54] For the sake of completeness, we also note that we do not agree that the digital files obtained by the defendant in *R v Watchorn* were not property.⁷³ Mr Watchorn worked for an oil exploration company. He downloaded extensive geosciences data from his employer’s computer system onto a portable hard drive immediately before going on a trip to Canada. This data had a very high value to his employer and, in the hands of a competitor, would have been very damaging to the employer’s interests. Later, Mr Watchorn downloaded similar information to a USB stick. This occurred the day he resigned, and the next day he began employment with a Canadian-based competitor with interests in New Zealand. Mr Watchorn was convicted following a Judge-alone trial of three charges of accessing a computer

⁷¹ *R v Cox* (2004) 21 CRNZ 1 (CA).

⁷² At [49]. The Court also said that, in any event, the computer componentry on which the electronic data was stored was a “thing”.

⁷³ *R v Watchorn* [2014] NZCA 493 [*Watchorn* (CA)].

system and thereby dishonestly and without claim of right obtaining property, contrary to s 249(1)(a).⁷⁴

[55] On appeal, the Court of Appeal accepted that Mr Watchorn had obtained the digital files dishonestly⁷⁵ and without claim of right.⁷⁶ In light of its earlier decision in the present case, however, the Court accepted the Crown's concession that the digital files downloaded were not "property".⁷⁷ In the circumstances, the Court declined to substitute a conviction on the basis that Mr Watchorn had obtained a benefit, or to order a retrial.

[56] It will be apparent from the analysis set out above that we consider that the digital files Mr Watchorn obtained were "property" for the purposes of s 249(1)(a) and, on the findings as to dishonesty and claim of right upheld by the Court of Appeal, he was properly convicted on that basis.

Did the appellant's trial miscarry?

[57] We now turn to the arguments concerning the trial that were raised by Mr Dixon in his oral submissions, and in the written submissions filed on his behalf by counsel. It was argued that there was a miscarriage of justice as a result of errors made by the Judge when summing up to the jury. There were two principal strands to the argument:

- (a) The Judge did not adopt a two stage test for dishonesty along the lines of that adopted by the Court of Appeal in *R v Watchorn* – ie, that the accused did not have Base's authorisation to download the files and did not believe he had such authorisation.⁷⁸

⁷⁴ *R v Watchorn* DC New Plymouth CRI-2012-043-3092, 29 April 2014.

⁷⁵ *Watchorn* (CA), above n 73, at [24]–[32].

⁷⁶ At [34]–[38].

⁷⁷ At [22].

⁷⁸ At [28].

- (b) The Judge should not have said that the case “comes down to credibility” and should not have asked the jury to pay careful attention to Mr Impey’s credibility.⁷⁹

A particular theme of Mr Dixon’s oral submissions was that his explanation that he was working on Project Lucy was not adequately put to the jury either by defence counsel in the way he presented the defence or by the Judge in his summing up.⁸⁰

[58] We begin our discussion by setting out what the Judge told the jury about the relevant elements of the charge. At the outset of the trial, the Judge gave the jury a Memorandum of Preliminary Directions. Its purpose was to assist the jury to follow the evidence. It contained a brief description of the elements that the Crown had to prove to obtain a conviction on the charge laid against Mr Dixon. The memorandum dealt with “dishonestly” and “claim of right” as follows:

“Dishonestly” is defined in s 217 of the Crimes Act. What is required is that the taking, obtaining or use must be without a belief that there was express or implied consent to, or authority for the act from a person entitled to give such consent or authority.

“Claim of right” is defined in s 2 of the Crimes Act as meaning a belief at the time of the act 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 definition [of] “claim of right” requires that the accused believe that the act is lawful. It is not therefore enough for an accused to believe that the action may be held lawful, that it ought to be held lawful or to hope or expect it will be held lawful. There must be a belief that if prosecuted the accused would be acquitted.

[59] In conjunction with his summing up, the Judge gave the jury a question trail. It identified four questions that the jury was required to ask:

- (a) Were they sure that Mr Dixon accessed a computer system?
- (b) Were they sure that such access was for a dishonest purpose?

⁷⁹ *Dixon* (Summing up), above n 1, at [61].

⁸⁰ At the hearing, we explained to Mr Dixon that we had limited ability to consider his complaints against trial counsel (or appellate counsel) given the way in which they had arisen.

- (c) Were they sure that Mr Dixon did not have a claim of right for such access?
- (d) Were they sure that Mr Dixon obtained property as a result of such access?

The critical questions were the second and third questions. This was because the first question was not contested and the fourth would be determined by the Judge's ruling that the digital files were "property" if the other questions were answered affirmatively.

[60] This brings us to the second and third questions. In relation to these questions the question trail read:

2. Are you sure that such access was for a dishonest purpose?

CROWN CASE: [Mr Dixon] did not have permission and did not think he had authority to access the computer system, isolate and take the particular footage for the purpose of selling it.

DEFENCE CASE: [Mr Dixon] obtained the footage as part of the "Project Lucy" he was working on for the Base management and any sale was to be a joint operation between he and the management of the Bar.

- If "yes", go to question 3.
- If "no", find [Mr Dixon] "not guilty".

3. Are you sure that Mr Dixon ... did not have a claim of right for such access?

CROWN CASE: [Mr Dixon] did not have a legal right to the downloaded footage and did not believe that he had any legal right to such footage.

DEFENCE CASE: [Mr Dixon] believed that he had the right to obtain the footage on the basis that it was going to be used as part of "Project Lucy".

- If "yes", go to question 4.
- If "no", find [Mr Dixon] "not guilty" and stop.

[61] The question trail then identified the issues in dispute as follows:

1 Did [Mr Dixon] act dishonestly?

It is for the Crown to have made you sure that [Mr Dixon] did not obtain the footage with any belief that he had express or implied consent or authority from the management of Base to obtain such footage with the intent to sell or similarly deal with the footage property.

2 Did [Mr Dixon] believe that he had a lawful right to obtain the footage?

It is for the Crown to make you sure that [Mr Dixon] could not have believed at the time he obtained the footage that [he] had a legal right to do what he was doing.

[62] Finally, the question trail referred to the Memorandum of Preliminary Directions to the Jury and gave further explanation of the concepts of “for a dishonest purpose” and “claim of right”.

[63] It was argued on behalf of Mr Dixon that the Judge did not properly instruct the jury on the meaning of “dishonestly” and “claim of right” as used in s 249(1)(a). In particular, it was said that the Judge’s instructions were not consistent with the approach adopted by the Court of Appeal in *Watchorn* to what the word “dishonestly” required. We reject that submission. The material provided by the Judge made it clear that the jury had to consider first, whether Mr Dixon in fact had express or implied authorisation to download the footage and second, if he did not have authorisation, whether he nevertheless believed that he had such authorisation. The Judge related the issue of whether Mr Dixon believed he had authorisation to Mr Dixon’s evidence that he obtained the footage as part of Project Lucy in the context of his work for Base and on the basis that any sale would be with Base’s agreement. This was reiterated in the Judge’s summing up. For example, the Judge said:⁸¹

[23] The defence case in a nutshell is that he did act honestly. He was not doing anything he did do for himself, but as part of this “Project Lucy” for the bar. In due course the bar would have been brought into it; [t]he defence would say prior to any transaction agreeing to release the footage to the media. That on the evidence the Crown cannot make you sure that [Mr Dixon] was acting dishonestly. The defence says [Mr Dixon] had a claim of right. He was, in his mind, acting entirely lawful[ly] in a lawful manner, taking the footage as he intended to deal with it for the benefit of the entity

⁸¹ *Dixon* (Summing up), above n 1.

that owned it. [Defence counsel] says that the Crown has not proven beyond reasonable doubt that [Mr Dixon] did not have a claim of right.

[64] It was also submitted that the Judge's reference to access to the computer being for a dishonest purpose was misleading: the element of dishonesty related to the obtaining of the property, not to accessing the computer. In referring to access being for a dishonest purpose, the Judge used the language of the heading to s 249. As the Court of Appeal noted in *Watchorn*, that language is not an accurate summary of the offence created by s 249(1).⁸² However, in the explanations he gave in the question trail and in his summing up, the Judge made it clear that Mr Dixon's authority to access the computer and to download the digital files were at issue, as well as Mr Dixon's beliefs as to those matters. Given that the access and download were part of a single transaction, the point has no substance.

[65] Next, it was said that there was a critical error in the opening paragraph of the summing up. The Judge said:⁸³

When looking at this case last evening and considering how I should begin my summing up to you I came to the clear point of view that in reality here the issue in this case is what the Crown would argue is [Mr Dixon's] intentions at the time he accessed and obtained the footage onto his USB stick; as to what he intended to use the property for in the relevant circumstances – all the other evidence that the Crown has led and [defence counsel] has cross-examined relate to that particular position. *Because of course we cannot point to any statement on the part of [Mr Dixon] as to what his intention was at that particular point in time.*

It was argued that the italicised sentence is incorrect as Mr Dixon gave direct evidence of his intention.

[66] While the sentence could have been formulated more precisely, it is clear that the Judge was picking up on a point made by both counsel in their closing addresses, namely that in the absence of any contemporaneous statement of Mr Dixon's intention or knowledge, inferences had to be drawn from his conduct and the surrounding circumstances. The Judge noted in both the question trail and the summing up the explanations that Mr Dixon had given for his conduct at trial. There

⁸² *Watchorn* (CA), above n 73, at [26].

⁸³ Emphasis added.

is no risk that the jury would have misunderstood the position. Obviously, the jury rejected Mr Dixon's explanation that what occurred was part of Project Lucy.

[67] Next, it was argued that the Judge was wrong to say that "in the end it comes down to credibility", referring specifically to the evidence of Mr Impey. However, Mr Impey's evidence was critical to the Crown case, in particular to the rejection of the defence's Project Lucy explanation, as Mr Dixon's trial counsel acknowledged in his closing address to the jury. In relation to Mr Dixon's evidence, the Judge had earlier given a detailed tripartite direction. Accordingly, we see nothing in this point.

[68] Finally, in relation to Mr Dixon's complaint that he was not given a proper opportunity to explain why he believed he had authority to access the computer system on the basis of his earlier work for Base, we note that when Mr Dixon referred in his evidence in chief to Project Lucy, his counsel asked him if he had done projects for Base in the past. Mr Dixon then identified various forms of business analysis that he said he had carried out for Base, claiming that he would have done "60 or 70" such projects over the previous six years. After Mr Dixon had explained how he went about these projects, counsel asked him where Project Lucy fitted in. Mr Dixon said:

What Project Lucy was is set down in three objectives. [The first] was to research and find out the going price or the price of footage that ... was obviously on the cameras from Project Tindall. The second part of the objective was to find ... a media outlet ... which would offer that money and the third part of it was ... to locate a point of contact from that media outlet which would offer that much money ... for the footage, the Tindall footage, we'll call it Tindall footage, Project Lucy.

Trial counsel then asked Mr Dixon what the next step would have been. Mr Dixon said:

I'd wrap it up the same as usual. I'd go to ... [Mr Impey] or the general manager, well over the six years there's been three general managers. At this stage it was [Mr Impey] who was the general manager of Base Backpackers at the time. I would go sit down with [Mr Impey] and we would go through the project and then he would go to Base senior management or senior execs, top brass, we'd call it.

Counsel then asked Mr Dixon to explain why it was that things had not worked out as anticipated on this occasion. When Crown counsel cross-examined Mr Dixon, she also asked him about Project Lucy. Having asked Mr Dixon to explain again what Project Lucy was, Crown counsel challenged his version of events. During the course of this questioning, Mr Dixon referred on numerous occasions to Project Lucy and to other projects that he said he had carried out for Base.

[69] In addition to this, Mr Dixon’s counsel cross-examined Mr Impey about projects that Mr Dixon had done for Base in the past. Mr Impey accepted that Base had engaged Mr Dixon to do some website optimisation work after he had shown Mr Impey that Base’s website was not effective on Google. Mr Impey agreed that Mr Dixon was entitled to access the computer system as part of this work. Apart from that, Mr Impey said that Mr Dixon was only allowed to access the computer system for purposes related to security and liquor licensing. Counsel asked Mr Impey whether he remembered Mr Dixon using the word “project”, to which Mr Impey replied “Maybe, I don’t know”. When asked specifically about Project Lucy, Mr Impey said he had never heard of it. Mr Impey did acknowledge, however, that Mr Dixon had said that he wanted to sell the footage of Mr Tindall and wanted Base to be part of that. Mr Impey said that Base was not prepared to go along with the idea.

[70] Having reviewed the notes of evidence, we have no doubt that Mr Dixon had the opportunity to put his explanation for his conduct before the jury. His counsel canvassed the topic with Mr Impey in cross-examination and emphasised Mr Dixon’s explanation in his closing address to the jury. The Judge referred to it both in the question trail⁸⁴ and in his summing up.⁸⁵ Accordingly, Mr Dixon’s explanation was squarely before the jury, but they rejected it.

[71] In the result, then, we do not accept that there was any risk of a miscarriage of justice as a result of the way the case was left to the jury.

⁸⁴ See the extracts quoted above at [60]–[61].

⁸⁵ See the extract quoted above at [63].

Decision

[72] The appeal is dismissed. The decision of the Court of Appeal quashing the appellant's conviction for obtaining property contrary to s 249(1)(a) of the Crimes Act 1961 and substituting a conviction for obtaining a benefit contrary to s 249(1)(a) is quashed. The appellant's original conviction is reinstated. The appellant is to contact the Probation Service in South Dunedin by 10.30 am on Wednesday 28 October 2015 to make arrangements to complete his sentence.

Solicitors:
Crown Law Office, Wellington for Respondent