IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA124/2020
[2024] NZCA 80

BETWEEN	LYNETTE MARY COLECLOUGH Appellant
AND	THE KING Respondent

Hearing:	22 August 2023
Court:	Wylie, Ellis and van Bohemen JJ
Counsel:	J E L Carruthers for Appellant M R L Davie for Respondent
Judgment:	27 March 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Ms Coleclough's convictions are quashed.

C No retrial is ordered.

REASONS OF THE COURT

(Given by Ellis J)

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[1] On 5 December 2019, following a trial by Judge D McNaughton and a jury, Ms Coleclough was convicted on two counts of theft by a person in a special relationship.[1] She was later sentenced to six months' community detention and ordered to pay reparation in the sum of $7,401.25, and additional emotional harm reparation of $5,000.[2]

[2] Ms Coleclough now appeals both her conviction and sentence.[3] In summary, she says:

(a) the Judge's decision to split the original single charge in two was wrong and unfair;

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1 Crimes Act 1961, ss 220 and 223(a) (maximum penalty of seven years' imprisonment).

2 *R v Coleclough* [2020] NZDC 3298 at [33]–[34].

3 Her sentence is automatically suspended pending the outcome of her appeal. No reparation has yet been paid.

(b) the Judge materially misdirected the jury on mens rea;

(c) no properly instructed jury could reasonably have convicted her (on either charge);

(d) the Judge invited the jury to speculate about the meaning of a particular piece of evidence in a way that was prejudicial to her; and

(e) failing any of that, she should have been discharged without conviction.

Factual narrative

[3] The following narrative is based on the evidence at trial. Where there are relevant disputes, they are noted.

[4] In August 2014, Mr Murray Wagener offered Ms Coleclough a job as an "Account Manager". The offer was written on Wagener Building Ltd (WBL) letterhead. WBL is a construction company. But the position to which the offer related was itself was described by reference to another of Mr Wagener's business enterprises, Cobblestone.[4] The letter said:

> Essentially the role is sales with some administration being critical — particularly the recording of minutes of meetings with clients or subcontractors. Keeping a daily work diary is critical as is the allocation of the time spent on various projects.
>
> We are conscious of the need to make these records as concise as possible but emphasise that any meeting that has financial consequences must be recorded.
>
> There are a number of specific issues that we would like you to concentrate on that may change pending the results of the forthcoming Homeshow.
>
> Essentially we would like you to support and increase the sales for Cobblestone by visiting clients with supply and lay enquiries, negotiating with trade outlets and developing a new product we have in mind for erosion control.

[4] WBL was previously known as the Cobblestone Factory 1992 Ltd but, according to Mr Wagener's evidence at trial, The Cobblestone Factory remains the trading arm of Cobblestone Limited Partnership. Mr Wagener owns other companies, including MA Wagener Ltd and Ripiripi Farms Ltd.

> The other part of your role will be to liaise and sell to clients who wish to purchase the cabin you have worked on. This will require an extension of your current skills base but we are quite sure you are more than capable of adapting to the requirements of the role.
>
> You will need to do a one day Site Safe course — this is a one day course paid for by the company.
>
> Cobblestone pricing is simple and we have systems already in place, however the safest course of action is to meet with one of the paving contractors on site with the client and establish a price and scope of works that you will add a margin onto to cover your time and present to the client. There may be a number of contractors involved i.e excavators, pavers and carpenters. Price package and sell.
>
> Basically the same process in the building work though we are keen [to] establish as near as possible the cabins as a set price.
>
> Margins on costs in both cases will be varied to obtain the optimum level of sales, that is sell everything for as much as you think it is worth rather than just cost plus a margin.
>
> …

[5] After advising that "the job is not necessarily a 40hr week but it is the basis of employment" the letter advised the "start up pay rate will be $30/hr as previously discussed".[5]

[6] At trial, there was the following exchange with Mr Wagener about the nature of Ms Coleclough's employment pursuant to this contract:

> Q. And what company was she employed by?
>
> A. She was employed by Wagener Building.
>
> Q. Maybe I should've asked this another way, did you have — do you have any other building companies or any other companies?
>
> A. I have, I have other companies, I also have a company called The Cobblestone Factory and she did work within — in — within The Cobblestone Factory and indeed she also did work within M A Wagener Limited which did landscaping and supply work as well, so yeah, she was employed to a very large degree as a — I suppose the easiest description would be as a PA, to be honest, just to help out what was happening.

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5 At trial, the evidence was that the salary paid to Ms Coleclough around 15 months later equated to a yearly salary of around $52,000 after tax.

[7] After Ms Coleclough started working for Mr Wagener, the two developed a romantic relationship; they began living together. Mr Wagener was married to someone else (Sue Wagener) at the time.

[8] Early in 2015, WBL pitched for a job renovating the New Lynn Bowling Club (NLBC). It seems Ms Coleclough's role in WBL had developed or expanded in this time, as she was to be the project manager. She started discussing the specifics of the job and engaging subcontractors. NLBC were keen to go ahead.

[9] On 16 September 2015, WBL sent the NLBC a letter of acceptance to proceed. It recorded:

> As no council approval is required for the following, Wagener Building are now in a position to proceed, with your approval, with the following works:
>
> Commencement will proceed as follows:
> Confirm with subcontractors fixed quotation prices for the below works:
>
> …

[10] The letter then set out a detailed list of the scope of works with quoted prices. The letter was signed by Mr Wagener (as director) and Ms Coleclough (as project manager).

[11] According to Mr Wagener's evidence at trial, Ms Coleclough did not have a formal employment contract with WBL. He said the absence of an employment contract was initially due to WBL's rather lax business practices but later, because neither Ms Coleclough nor his estranged wife wanted Ms Coleclough to be in a contractual relationship with WBL — a company in which Mrs Wagener was a shareholder. Mr Wagener said Ms Coleclough had the idea of setting up a new company called A1 Progressive Limited (A1). He explained this to the prosecutor during his evidence in chief as follows:

> Q. And tell us about how that [establishing A1] ended up happening?
>
> A. Um, the — as I indicated before, we had reached a situation where she was very unhappy with the idea that Sue Wagener would have, um, any, um, recompense from her efforts. As it was I was continuing to pay the mortgage on the family home and that didn't go down very well so, um, she wouldn't sign a contract of employment and so there weren't too many options left given that everybody else had to be on

an employment contract she was effectively going to have to become self-employed basically.

Q. Yes.

A. That was the only path we had left as far as that was concerned.

Q. Okay, and from your perspective were there any other reasons for setting up this new company?

A. To be honest, I didn't have a — I didn't have a particularly big problem with working as A1. If at some stage of the piece, because I still had a separation process to go through with my wife, I could see there were all sorts of difficulties possibly involved, we — and we were under a bit of pressure at the time and so it seemed not necessarily a bad idea, seeing as we were living together, to perhaps have a vehicle for any money together, so for that reason I became a signatory to the number one account that was there.

Q. I'll get onto the bank account at the moment, I just want to talk first of all about setting up the company with the Companies Office.

A. Yes.

Q. Were you involved in that process?

A. No, I wasn't.

Q. Were you made aware by Ms Coleclough that she was setting up this company?

A. Yes, I was.

[12] A1 was incorporated on 1 October 2015. The company was also registered for GST; Mr Wagener confirmed at trial he was aware of this. Ms Coleclough was the sole director and shareholder but both she and Mr Wagener were signatories on the company's bank account (also opened that day). There appear to be no dispute that Ms Coleclough and Mr Wagener mistakenly understood this to mean they both needed to authorise any transactions.

[13] The next day Mr Wagener sent a draft contract to the NLBC. On the first page, both WBL and A1 are named as the "Contractor". In his covering email to the NLBC, Mr Wagener explained that "we have added A1 Progressive Builders as the contractors due to my current domestic situation".

[14] And during Mr Wagener's evidence in chief, there was the following exchange:

> Q. So we see there, and were you responsible for the preparation of this contract or did Ms Coleclough do it or was it somebody else?
>
> A. This was something that we did jointly, um, she did not have a lot of experience in contracts and so we worked through this exercise. She got a lot of the paperwork together and then we went through basically line by line what needed to happen so, yes.
>
> Q. Okay.
>
> A. Um, I ultimately something of that nature is my responsibility, I certainly wouldn't, yeah, for that sort of money, yes.
>
> Q. Okay, and so I just make sure I get the dates right. And we see there that the contract is for alterations to the New Lynn Bowling Club?
>
> A. Correct.
>
> …
>
> Q. And the contractor is listed as Wagener Building Limited/A1, it says Progressise, but I assume that –
>
> A. It's meant to be Progressive, yes.
>
> Q. Right, what was the reason for adding A1's Progressive Builders Limited to, as a contracting party?
>
> A. Wagener Building had been struggling financially and it was a question of whether or not what was going to happen cashflow wise, would the Wagener Building continue, what we were doing in terms of separation. All of those sorts of deals so to be honest, I shouldn't have put the A1 Progressive in there but at that stage of the [piece] it allowed us, if you like, the flexibility of a plan B if plan A didn't work, and you know, it didn't. At the time of course you assume that everything was going to be fine but it wasn't.

[15] Elsewhere in the draft contract, only WBL is referred to as the contractor.

[16] The draft contract was never finalised or executed, apparently because NLBC was concerned that the draft was prepared on an outdated form.[6] So there was never any written contract between WBL and NLBC or between A1 and NLBC (or, for that matter, between WBL and A1).

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6 This was NLBC's evidence at trial.

[17] Nonetheless, work on the NLBC job began early in October. There is no dispute that, as project manager, Ms Coleclough was a constant presence on site, supervising subcontractors, placing orders, and so on.

[18] Within a week or so, Ms Coleclough drew up an invoice for $35,065.86 in the name of A1 and hand delivered it to the NLBC.[7] The invoice said it related to a deposit for stage one of the building project. On being presented with the invoice, the NLBC's treasurer, Mr Frederickson, asked Ms Coleclough about A1 and was told (consistently with Mr Wagener's earlier email) the company had been established and added as the contractor because of Mr Wagener's domestic situation. On 13 October 2015, Mr Frederickson made out a cheque to A1 for the invoiced amount, which both he and the President of the NLBC initialled.

[19] A week later, Ms Coleclough opened a second bank account in the name of A1 Progressive. There is a dispute about whether Mr Wagener was aware of this at the time.[8] There is no dispute that Ms Coleclough was the sole signatory on the account.

[20] Ms Coleclough paid the NLBC cheque into this new account. She said she did this because Mr Wagener was scheduled to spend about six weeks overseas and she needed to be able to access the funds to pay subcontractors and meet other costs of the renovation while he was away.

[21] On 6 November 2015, Ms Coleclough did in fact use some of the funds to pay two subcontractors on the NLBC job.

[22] The next day, Ms Coleclough told Mr Wagener that she had paid the money into the new bank account and that two contractors had been paid. Mr Wagener confirmed in his evidence that this is what she told him then, but denied that it was in accordance with his plans or wishes. He nonetheless confirmed that it had been his

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7 The invoice was misdated July 2015.

8 Ms Coleclough's evidence was that Mr Wagener had accompanied her to the bank that day, where they also discussed life insurance. Mr Wagener denied this.

intention that Ms Coleclough would be running things during his six weeks away.[9] Mr Wagener said he asked Ms Coleclough to transfer the money to WBL but she did not do so. There is no written record (of either a formal or informal kind) of any such request.

[23] A week or so later — on the day before Mr Wagener's departure overseas — his relationship with Ms Coleclough came to an abrupt end. Mr Wagener assaulted her, causing her head injuries which required overnight treatment in hospital. The next day (Saturday 14 November) while Ms Coleclough was in hospital, Mr Wagener emailed the NLBC, saying:

> Unfortunately there was a major parting of the ways on Friday night resulting in me being assaulted and charged with assault by Lynette. Very messy.
>
> It appears that Lynette has also had money paid into an unauthorised account which could be a problem.
>
> Peter and Anton can continue to work on site to make everything tidy but under no circumstances can Lynette represent Wagener Building.
>
> I will sort out the financials on my return.
>
> Lynette has claimed she had the deposit paid into her account so she can pay subcontractors while I am away — I had already made provision for this so I am a little concerned at her actions. They could however be OK as she claims to have paid the demolition contractors etc and none of them are complaining.
>
> …

[24] At the same time, Mr Wagener terminated the tenancy on the property he had shared with Ms Coleclough, removed her work computer and took steps to take back her cell phone and car. He then went on holiday.

[25] Between 15 November (when Ms Coleclough discharged herself from hospital) and 22 November there was a series of texts between her and the Secretary of the NLBC, Joanne Thornber. Ms Thornber and Ms Coleclough were on friendly terms, and Ms Thornber also knew about the personal situation between Ms Coleclough and Mr Wagener.

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[9] His evidence was that any invoices falling due during this time would be paid by WBL's accountants.

[26] These texts make it clear Ms Coleclough was aware of the contents of Mr Wagener's email to NLBC and that she was trying to get some certainty around whether NLBC wished her to continue in her Project Manager role. She said she was seeking a meeting with the Building Committee. The texts also make it clear that work on the site had effectively stopped at this time. There was mention of Ms Coleclough bringing an unjustified dismissal claim.

[27] On 18 November, Ms Thornber texted Ms Coleclough, telling her that she had just been at a meeting with NLBC's lawyers and that the President of the NLBC was trying to arrange a meeting for later that week. In a further text sent around five minutes later, Ms Thornber said "[w]as a good result your way from the lawyers". And in response to Ms Coleclough's request for elaboration, she texted:

> The lawyer has said basically we have a contract with you for the 1st stage only and Murray [Wagener] needs to grow up ... so it will be to continue as stat[ed] [pr]ior to that email.

[28] On 20 November, Ms Thornber texted again, saying: "I'm not [too] sure what's going on now … they had a meeting and I wasn't there could be [G]ail [WBL's accountant] stirring …".

[29] Later the same day, Ms Thornber texted: "I hope [you're] going for that unfair dismissal". On 22 November, there is another text from Ms Thornber that, in the version that was in evidence at trial, is completely unintelligible, but to which Ms Coleclough replied, saying "[t]hank you, you are a gem. Will send through a fax on Monday to let them Know I'm ok with Not carrying on with the job."

[30] It seems Ms Coleclough was then excluded from the site.[10] According to Mr Wagener, the absence of a written contract eventually caused the works to stop after stage one.

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[10] Ms Coleclough's position at trial was that she was trespassed from the site but it appears more likely on the evidence that she was telephoned by a police officer (who had been contacted by Mr Wagener) and simply advised to stay away.

[31] On 19 December, Ms Coleclough wrote to NLBC:[11]

> Further to my letter of Thursday, a couple of points[12]
>
> 1. You have no contract signed with Wagener Building.
>
> 2. The quote for the works are signed by myself and are cancelled by me no longer doing this work.
>
> 3. Murray does not have all the paperwork, payment of contractors etc so he will be unable to give an accurate costing of the jobs. I have had the works done at under what we have quoted and the difference should go to the Bowling Club. i.e The [recladding] was estimated by Murray to be a three week two man job. I got it done in one week as I was on the site and working with the boys.
>
> 4. I have had soil holes done to establish the subsurface of the car park area these have shown fill in certain areas thus excavation has to be taken down below this level, because of this and consulting with engineers you do not have to use the permeable pavers (crossels) and can simply concrete the area with adequate drainage this is **vastly** less expensive than using the crossals but as Murray's cobblestone company makes the crossals they will be pushing you hard to use them.
>
> On my brief visit there on Thursday there were two trucks sitting waiting and a small digger. The trucks charge per hour and they are sitting there doing nothing.
>
> The excavation is a one day job with a large digger which should work on its own putting the soil into piles and then the trucks brought in one after the other and loaded no down time.
>
> Clearly Peter Robinson does not know what he is doing.
>
> By allowing him to continue in a role he is clearly unsuitable for, you are opening yourselves to further technical and legal problems as it stood on completing the cladding it was clear cut and the dispute was only between Murray and myself.
>
> I think you should consult your lawyer.

[32] Between 20 November and 24 December 2015, Ms Coleclough withdrew almost all the remaining funds from the A1 account. She said she gave the funds to a friend for safekeeping.

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[11] The letter appears to have been sent by fax on 24 December.

[12] We interpose to note the "letter of Thursday" was not in evidence, but Ms Coleclough's evidence at trial was that it contained advice from her to the NLBC about asbestos removal.

Charges are laid and progress to trial

[33] On 5 May 2016, as a result of complaints made by Mr Wagener to police, multiple charges were laid against Ms Coleclough. One of those related to the funds Ms Coleclough had received from the NLBC and was a charge of theft in a special relationship, laid under s 220 of the Crimes Act 1961.[13] We return to consider the nature of that charge later in this judgment.

[34] For a variety of reasons, the progression of the prosecution was tortuous, to say the least. From the date Ms Coleclough entered a not guilty plea at her first appearance in the Manukau District Court on 18 May 2016, it took another three and a half years to get to trial. From October 2017 onwards Ms Coleclough was representing herself, although counsel were appointed to assist her.[14] She also suffered a stroke, and injuries in a car accident during this time, resulting in cognitive difficulties. After a hearing in mid-2019, Judge McIlraith found that Ms Coleclough was fit to stand trial, although noted that a number of accommodations could be made in the trial process for the issues faced by Ms Coleclough. An application for a permanent stay was declined.[15]

[35] When the theft in a special relationship charge finally proceeded to trial on 25 November 2019, this was Ms Coleclough's ninth allocated trial date.

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13 She was also charged with assaulting Mr Wagener with a weapon and the theft of various of his and his company's possessions, including cash and vehicles. Ms Coleclough was found not guilty of assaulting Mr Wagener and all other charges were dismissed. The disputes over the cell phone and a car were taken to the Disputes Tribunal. The Tribunal found in Ms Coleclough's favour, finding that the phone had been returned and that it was Mr Wagener who had wrongly appropriated Ms Coleclough's car. Mr Wagener was also found guilty of assaulting Ms Coleclough.

14 Because Ms Coleclough and Mr Wagener were both to be called as witnesses, and were both complainants and defendants in other proceedings, restrictions under s 95 of the Evidence Act 2006 applied on cross-examination of the parties in person. Over the lifespan of the case, there were two counsel assisting: Mr Le'au'anae and Mr Leabourne.

15 *R v Coleclough* DC Manukau [2019] NZDC 14801 at [42]–[43].

Ms Coleclough pays a refund to NLBC

[36] In the meantime, on 13 August 2018, Ms Coleclough had deposited $17,389.90 into the NLBC's bank account. In a letter she wrote to NLBC at around this time, she explained the payment as follows:

> This is the refund is due to the club for work unable to be completed on the 1st stage of project work commissioned in 2015 by the New Lynn Bowling Club to A1 Progressive Building Ltd.
>
> Completion of the contract was halted due to actions of a Mr Murray Wagener (who now how has been to court and has a criminal conviction against him) and the thief by him of A1 Progressive Building Ltd company documents thus delaying this settlement.
>
> The work carried out by A1 Progressive Building Ltd till January 2016 included the following:
>
> Manual Labour, removal of building cladding, removal of out buildings, trees and paving. Engineering reports and asbestos reports. Truck hire and driver hire for disposal of cladding, tip fees, safety/security barriers and fencing. Demolition of concrete water tanks and removal of debris. Removal of trees from the front of the New Lynn Bowling Club and removal of trees from the new proposed car park area. Demolition and removal of debris of the concrete brick surrounding wall and project management fees.
>
> The total sum charged for all worked carried out by A1 Progressive Building Ltd amounts to $17,675.90. Leaving the balance of $17,399.96 credit owed to the New Lynn Bowling Club from the initial deposit of $36,065.86 (13/10/2015).[16]
>
> Please Note:
>
> Al Progressive Building Ltd is no longer trading and its bank accounts are now closed.
>
> Murray Wagener from Wagener Building Ltd has never lodged any invoices with A1 Progressive Building Ltd although labour work had been done on the New Lynn Bowling Club by his labourers over this period of time therefore no payments have been made to his company. Any claims from Wagerner Building Ltd [therefore] should be directly negotiated with the Club.
>
> This refund brings the contact with A1 Progressive Building Ltd to a conclusion.

[37] At trial, Ms Coleclough maintained that the money refunded was really hers, but she did not have the documentation to prove it. She said she had given the money to a friend for safekeeping.

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16 The deposit slip makes it clear that the amount actually deposited was $17,389.90.

[38] Mr Wagener said the refund is money that belongs to WBL. While it seems the NLBC agreed with that, at the time of trial it had not been paid by the NLBC to WBL.

[39] Ms Coleclough also accepted she had retained around $3,600 for own use — the "10% builders margin" and "A1 PBL Project Management fee", maintaining that she was "entitled to do so".

[40] In her closing address, she said:

> … [I gave] myself a small amount of money for the work I had done, given that it was probably about four months of hard slog, and I don't think that's unreasonable, and I think as part of my company I'm entitled to pay myself for that work. …

Theft in a special relationship

[41] It is useful at this point to say a little about the offence of theft in a special relationship. As noted, the offence is contained in s 220 of the Crimes Act, which provides:

> **220 Theft by person in special relationship**
>
> (1) This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person—
>
> (a) to account to any other person for the property, or for any proceeds arising from the property; or
>
> (b) to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.
>
> (2) Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.
>
> (3) This section applies whether or not the person was required to deliver over the identical property received or in the person's possession or control.
>
> (4) For the purposes of subsection (1), it is a question of law whether the circumstances required any person to account or to act in accordance with any requirements.

[42] In *Tallentire v R*, this Court approved the following articulation of the elements of an offence under s 220:[17]

> (a) Did the accused have control over property?
>
> (b) Was the property in the control of the accused, in circumstances that required him to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person?
>
> (c) Did the accused know of those circumstances? And,
>
> (d) Did the accused intentionally deal with the property, or any proceeds of the property, otherwise than in accordance with those requirements?

[43] As the learned authors of *Adams on Criminal Law* have noted:[18]

> Particular care will be necessary in framing charges under s 220. It is suggested that the prosecution must firstly elect whether it is charging theft by failure to account or by improper dealing … but it must then also determine whether it is alleged the failure to account or the dealing related to specific property or rather related to any of the proceeds of that property. Care will also be needed to identify correctly any intangible property which is the subject of the charge if the difficulties evident in *Wilson v Wellington District Court* … are to be avoided.

[44] Section 220(4) makes clear that whether the circumstances require a defendant to account or act in accordance with any requirements is a question of law, for the judge. And as to that, it is noted in *Adams on Criminal Law*:[19]

> Subsection (4) provides that it is for the judge to determine, as a question of law, whether or not "the circumstances" required any person to account or act in accordance with any requirements. The Court of Appeal set out in *Nisbet v R* … the principles governing the determination of a sufficient legal requirement or obligation. Where there is no dispute about the facts allegedly giving rise to the requirement, the judge can determine the issue without leaving any part of that issue to the jury. Under the predecessor section it was held that it was for the judge to determine, as a question of law, whether the relationship of the parties, as disclosed by the evidence, is capable of giving rise to the implication that moneys were received "on terms" as required by the section: *R v Norris* … If the parties are in a contractual relationship and the determination of the respective obligations of the parties involves construction of the contract, the judge must interpret the contract and direct the jury as to the correct legal meaning of the words used by the parties: compare *R v Baxter* …

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17 *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548 at [51] and [80].

18 Matthew Downs (ed) *Adams on Criminal Law — Offences and Defences* (online ed, Thomson Reuters) at [CA220.10].

19 At [CA220.09] (citations omitted).

> More difficulty attaches to cases where the arrangements between the parties are disputed and both oral and written statements are relevant. In *Nesbit v R* the Court held that where there is a dispute about the facts allegedly giving rise to the obligation, the judge must make a conditional decision premised on the basis that the Crown will be able to prove the identified facts and then provide the jury with directions as to the factual matters the Crown must prove in order to establish guilt. Where the judge is required to rule on the issue at the close of the Crown case, the issue must be reconsidered if the defence calls evidence.

[45] In Ms Coleclough's case, the s 220 charge was framed in the Crown charge notice given to the jury as follows:

> That Lynette Mary Coleclough, between 20 October 2015 and 24 December 2015 at Auckland, having received property on terms or in circumstances that she knew required her to deal with the property in accordance with the requirements of any other person, intentionally dealt with property otherwise than in accordance with those requirements.
>
> **Particulars**: Dealings with $35,065.86 that she received from New Lynn Bowling Club.

[46] It will be observed that it is the "dealing with" — rather than the "accounting to" arm of s 220 that is referred to in this charge.

Crown opening

[47] In the prosecutor's opening address to the jury, he described the Crown case in relation to each of the four elements of s 220 as follows:

> … The first thing that you need to be sure of is that she received property. In other words, she had control over the $35,000 that she received from the New Lynn Bowling Club. That is probably not going to be an issue, there does not appear to be any dispute that she was the one who received the cheque for $35,000 from the New Lynn Bowling Club.
>
> The second thing that the Crown will need to prove is that she received it on terms or in circumstances that she knew required her to deal with the property in accordance with the requirements of any other person. The any other person in this case is Murray Wagener or Wagener Building Limited. The Crown case is that when she received that money in her role as project manager for that particular job, she was required to pay that money into the Wagener Building bank account and to use it for the benefit of Wagener Building
>
> The third thing that the Crown needs to prove is that she [knew] that she was required to deal with the property in that way, and at the end of the trial, the Crown is likely to point to various pieces of evidence that you are likely to hear during this trial. But, just to summarise them now, I expect that you will hear during the trial that she was employed by Wagener Building and in

> particular, you will see that she was receiving salary payments from Wagener Building until 12 November 2015, so about a day or so before the relationship with Mr Wagener ended. You will see that there is going to be evidence that suggests that she prepared two invoices for the New Lynn Bowling Club job; one for the Wagener Building records, which had Wagener Building letterhead on it and the other one, which was the other version of it, which was given to the New Lynn Bowling Club, which had A1 Progressive Building on it, exactly the same invoice just different letterheads.
>
> You are going to see for example that one lot of expenses for the New Lynn Bowling Club was being paid out of the Wagener Building bank account, that invoices from suppliers for that job were all addressed to Wagener Building Limited and that she herself initially used that money for the benefit of Wagener Building when she paid the two contractors in early November 2015.
>
> The fourth thing that the Crown is going to need to prove is that she intentionally dealt with the money otherwise than in accordance with those requirements, and the Crown case on this point is actually pretty simple. When she deposited the money in a bank account which Murray Wagener and Wagener Building could not control, she was acting otherwise [than] in accordance with her obligations to give the money to Wagener Building Limited.

The decision to split the charges

[48] On 28 November 2019, there were in Chambers discussions with the Judge about the proposed question trail. At the Judge's instigation, the single theft charge was split into two such charges.

[49] For example, the evidence records that the splitting of the charge is first mentioned by the Judge to Mr Leabourn, as follows:

> Q. I know that and that's why we used to direct juries about assaults, but the Court of Appeal has said: "No, you've got to actually tease out these separate events and make sure that the jury is unanimous on whichever one it is," and the only way to sensibly do that here is to split the charge.
>
> A. Would your Honour be giving it as an alternative or —
>
> Q. No, it'd be a second charge.

[50] And later, the Court addressed Mr McCaughan for the Crown:

> Q. Mr McCaughan, do you need any more time to consider this or take advice?
>
> A. What I just wanted to test, Sir, and I'm sorry if I'm doing this out loud.

Q. That's okay. We're all doing this out loud.

A. I'm inclined to agree with your Honour …

[51] The Judge had formed the view that the alleged offending disclosed two discrete, potentially culpable, acts:

(a) Ms Coleclough paying the funds into the A1 account, thereby making it unavailable to Mr Wagener/WBL; and

(b) Ms Coleclough using the money for her own purposes.

[52] In the course of the discussion the Judge observed that he had "been dealing with this for four years" and was still struggling "to find out exactly what path the prosecution is on about".

[53] The prospect of two charges was resisted by Ms Coleclough and by counsel assisting, Mr Leabourn.

[54] Ms Coleclough's exchange with the Judge included the following:

MS COLECLOUGH:

Can I just say something there? Your Honour, excuse me, because of the splitting of the charge, the charge read that I was not entitled to take any money at all from my own use. Now what I've written in the email was that I would be breaking — I would then be found guilty of that charge if I was to pay for a bandage to cover a cut while I was working on the site. So I would be guilty of that charge in the way — in the context that it's written. If it had been, "she will be found guilty, if she used money for her own personal use without, without earning it," then it's different — it's a different context to it because that second charge —

THE COURT TO MS COLECLOUGH:

Q. Well that's not a defence though.

A. But you've got that as a second charge.

Q. If the jury decide that you used that money in any way without your employer's authority because the money belonged to the employer and you had no authority to deal with it, then it doesn't matter whether you thought it was legitimate or not. That's what I'm going to tell the jury. So we're not going to sit down and go through, "[t]hat's legitimate, that's not." I'm going to tell them none of that matters.

A. No — but the actual way the charge is written, I never had a chance to defend that charge, because there were all these other invoices and all these other things that I paid for.

Q. Well Ms Coleclough, that's where we're at. So if you —

A. But that wasn't the original charge your Honour. So how could I have a chance to defend myself over a second charge?

Q. Well you did have a chance to defend yourself because it was amended at the conclusion of the Crown case before your defence began.

A. And when — I hadn't got a chance to go to Auckland and track down all these people and get a written statement from them, because I'm going back to Whangārei every night and then driving down every morning.

Q. Well, look, I'm not having an argument with you now. I'm summing up to the jury. So you don't like it, you got your remedies after the trial if you're found guilty, but I'm not doing anything about that now. We've also got a jury question here which I'll have to tell them we can't answer. Okay, let's have the jury in.

[55] And the discussion between Mr Leabourn and the Judge was as follows:

A. But she couldn't steal the money twice would be my comment there, Sir.

Q. Why not?

A. Well once she's stolen it, she's got it.

Q. The offence is dealing with it, dealing with it in breach of this trust relationship and she's done that twice in two different ways, on the Crown case.

A. On the Crown case.

Q. Well, three different ways on the Crown case, but we're going to drop one.

A. So my idea is that it's all part and parcel of the same thing.

…

A. So that I'm on the record, Sir, I'm expressing concerns that you can't steal the money twice. Once it's in her possession, once it's stolen, you can spend it on Ferraris, you can spend it on —

Q. That's because you're thinking about theft as taking without colour of right, the old crime of theft. This isn't what this is. This is a totally different new offence of theft by a person in a special relationship which means that you dealt with it in breach of your legal obligation to whoever it was and here it's happened in three different ways.

> If you lump it all in together, the difficulty is the jury won't be unanimous on which act or acts it was and it also makes it tricky at sentencing. If the defendant were found guilty on the charge as it presently reads, would I be sentencing her on the basis that she banked the money into the account or would I be sentencing her on the basis that she used it for her own purposes, or both? How would I know? All I'd know is that the jury returned a verdict of guilty.
>
> A. But if she had banked, just banked the money into the bank account and then it had gone to Wagener Building, then she wouldn't be in breach of receiving funds in circumstances that required her to transfer it because she would have just banked it, it would have gone there and then it would have gone to — because it was an A1 Progressive cheque, you see. So if it had been A1 Progressive cheque, it had gone to A1 Progressive and then she'd go: "[n]ow I've got it here and I'm moving it to Wagener," then there would be no crime, would there?
>
> Q. Yes, well if that had happened immediately there wouldn't be a problem, but that's not what happened. It stayed in that unavailable account and then we've got all these withdrawals. So everyone's just forgotten about the withdrawals like they're incidental but, you know, they're a separate criminal course of conduct.
>
> A. Your Honour's heard my submissions on the point, Sir.

[56] There was then a discussion with the prosecutor who made the point that, if there were two charges, a not guilty verdict on the first would inevitably mean a not guilty verdict on the second.

[57] The Crown charge list was subsequently amended to include a second charge. The amended charges were expressed as follows:

> **Charge 1** That Lynette Mary Coleclough between 20 October 2015 and 24 December 2015 at Auckland, having received property on terms or in circumstances that she knew required her to deal with the property in accordance with the requirements of any other person, intentionally dealt with property otherwise than in accordance with those requirements.
>
> **Particulars:** Failing to transfer funds received from New Lynn Bowling Club to Wagener Building Ltd.
>
> **Charge 2** That Lynette Mary Coleclough between 20 November 2015 and 24 December 2015 at Auckland, having received property on terms or in circumstances that she knew required her to deal with the property in accordance with the requirements of any other person, intentionally dealt with property otherwise than in accordance with those requirements.

> **Particulars:** Using any portion of funds received from New Lynn Bowling Club for her own use.

[58] Before his summing up, however, the Judge decided that the charges did stand or fall together and should not have been split. He is then recorded as saying "…[m]aybe I should not have done it but it is too late now", and "… it is done now and I cannot really, I cannot put the [genie] back in the bottle".

Crown closing

[59] In closing, the prosecutor presented the Crown case in black and white terms: there were three key factual matters about which either Mr Wagener was not telling the truth or Ms Coleclough was not: "[t]here's no way that they can both be right". The three key factual matters were:

(a) whether the NLBC job was "always a Wagener Building job";

(b) whether Ms Coleclough was an employee of WBL when she was project managing the NLBC job; and

(c) whether Mr Wagener was present when Ms Coleclough deposited the NLBC cheque into the A1 account on 20 October 2015 (or whether only came to know about Ms Coleclough depositing the money on 7 November 2015).

[60] The prosecutor told the jury it was their job to decide whether they could be sure that Mr Wagener was telling the truth about these three things. He said:

> Once you reach a view on those three particular issues, I'm going to suggest to you that the elements of the two charges that you have to decide really fall away, really fall into place one way or the other, guilty or not guilty, and the Crown case is obviously that when you stand back and you examine all of the evidence that you've heard over the past week or so, you'll be sure that it was Murray Wagener who was telling you the truth about those three points. Murray Wagener's account is consistent with all of the other evidence that you've heard in this trial from the witnesses and also from the documents that have been produced to you.

[61] The prosecutor took the jury through the question trail.[20] After noting there was no issue that Ms Coleclough had received the cheque from the NLBC (question one), he said:

> For charge 1, the next point that you are going to need to consider is really the big one, this is the key question I'd suggest, "[a]re you sure that she received those funds in circumstances that required her to transfer those funds to Wagener Building?". That is really the key question, was she required to transfer those funds to Wagener Building? Has the evidence made you sure of that point?

[62] At considerable length and in great detail, the prosecutor then took the jury through the evidence relied on by the Crown in relation to each of the three factual matters said to support its case in relation to that second question. After very briefly dealing with the third question (whether Ms Coleclough failed to deal with the funds as required), the prosecutor addressed the fourth question (whether she *knew* she was obliged to deal with the funds in the required way) as follows:

> Are you sure that she knew that she was obliged to transfer those funds into the Wagener Building account? Well, I'd suggest that for basically the same reasons I've already discussed with you, she must have been well aware that this was a Wagener Building job and that she was operating as a Wagener Building employee. I suggest what's actually happened here is that she's manipulated the situation to get sole control over that $35,000 cheque from the New Lynn Bowling Club. She wanted to make sure that she wasn't left out or she didn't suffer financially depending on how Murray Wagener worked things out with his wife when — who was still a shareholder of Wagener Building at that stage. So she's deliberately taken control of that cheque, of those funds, without Murray Wagener knowing about it. The fact is that when you look through the evidence, the defendant simply must know that there was no agreement to split the A1 profits equally. She knows about the draft contract which was sent through on the 2nd of October. She's said that she's seen that email. Everyone else involved in this project, everyone else, believed that it was Wagener Building who had the contract for the job. She simply must have been aware of that too. For whatever reason, perhaps ongoing bitterness with Murray Wagener, not wanting to [lose] face in a situation with him, she can't bring herself to accept that, so I suggest that she clearly knew that she was obliged to transfer those funds to Wagener Building.

[63] It may be observed at this point that the prosecution case on knowledge had changed (and weakened) in one important respect since the Crown opening. By the time of its closing address, the Crown was no longer alleging that Ms Coleclough had deliberately created two NLBC invoices — one on A1 letterhead and one on WBL

[20] The question trail had not yet been given to the jury, but had been given to the parties.

letterhead. For obvious reasons, had the Crown been able to establish that she had done so, an inference of the relevant knowledge would be plainly available. But we return to the wider question of knowledge later.

[64] And as to the fourth question, the prosecutor said:

> The fourth require — the final requirement for this first charge, are you sure that she deliberately acted in breach of that requirement? Well, Murray Wagener's evidence was that after the 7th of November, he repeatedly asked the defendant to transfer the money to the Wagener Building account. If you accept Murray Wagener's evidence then you will also be sure that she deliberately acted in contravention of that account, and for the reasons that I've already [given], and I won't bore you any more with those, Murray Wagener's evidence that he did ask about the, her to do that, is consistent with the meetings that he had with the accountants, particularly the one on the 12th of November.

[65] The Crown closing on the second charges was (necessarily) in very similar terms and we do not need to traverse the detail here.

The Judge's summing up

[66] In his summing up, the Judge effectively endorsed the Crown's submission that there were two irreconcilable competing narratives and that there were three key matters for the jury to decide. He said:

> [7] Those are all the general directions and now I want to come to the case itself and go through the issues, prosecution and defence in turn. As Mr McCaughan has said to you when he started, there are two diametrically opposed narratives here and there is no way you can reconcile those two versions. Somebody is not telling you the truth. The Crown say the person not telling the truth is the defendant, the defence say the person not telling the truth is Murray Wagener. As the prosecutor has already said, it is not a case of which version you prefer, which version do you like more, which is more likely. That is not what is happening here. It is for the Crown to prove its case and prove it beyond reasonable doubt. When it comes to the defence case you will need to ask yourselves, "[i]s this a reasonable possibility on all of the evidence?" It is the Crown's task to eliminate that reasonable doubt from your minds to the point where you can say, "[w]e are sure the prosecution version is correct." The Crown ask you to focus on three issues:
>
> (a) Number 1, was Wagener Building Limited the [principal] contractor on this bowling club job?
>
> (b) Number 2, was Ms Coleclough an employee of Wagener Building and employed by that company as project manager on the bowling club job?

> (c) Number 3, was Murray Wagener unaware that [Ms Coleclough] had created this separate 02 account over which she had sole control and banked the cheque into it?
>
> [8] Because on the Crown case he was not at the bank when that cheque was deposited and he did not find out about it until later on, he says about 7 November when he recorded this conversation in his diary. Those are the three central issues, say the Crown, and when you stand back and look at this that is probably right. Those are the three major issues that you are going to have to decide here.

[67] Later, when he came to take the jury through the question trail, he began by saying that there was no dispute as to the first question for the first charge, which was whether Ms Coleclough had received the $35,065.86 from the NLBC. Then, he said:

> Question 2, are you sure that the defendant received those funds in circumstances that required her to transfer those funds to Wagener Building Limited? This, as Mr McCaughan has said, is the key question. …

[68] The third question was whether the jury was sure that Ms Coleclough failed to deal with the funds in accordance with that requirement. The Judge said that, as a matter of logic, the jury would answer "yes" to this question if they had answered "yes" to the second. The fourth question related to mens rea — Ms Coleclough's knowledge of the relevant requirement. The Judge said:

> Question 4, are you sure that the defendant knew she was obliged to deal with the funds in terms of that requirement? Well if the answer to question 2 is "yes", if you are sure she was an employee and she was not an independent contractor and you are sure it was a Wagener Building job not an A1 Progressive job and if you are sure that Murray Wagener was not there when she created this new account and put the cheque into it, then on the Crown case again as a matter of logic and deduction she had to know that she had no authority to do that to keep the money from her employer so the answer to question 4 would have to be "yes" …

[69] After briefly dealing with the fifth question ("are you sure that the defendant deliberately acted in breach of that requirement?"), the Judge reiterated the point that "[r]eally the critical issue here is going to be question 2. It all hangs or falls on that."

[70] In terms of the second charge, the Judge said:

> [46] Charge 2 is an identical form. It is the same charge. The first question is exactly the same. The only thing different is the second question, "[a]re you sure that the defendant received those funds in circumstances that required her

> not to disperse any portion of those funds for her own use?" This is a separate requirement. …
>
> [47] Again on question 2 on the Crown case the answer is "yes" and for the same reasons in respect of the previous charge the answers to questions 3, 4 and 5 will also be "yes" and you should find the defendant guilty. On the defence case, the money was rightfully in that account because A1 Progressive Building Limited was the [principal] contractor, it was rightfully in that account because Ms Coleclough was not an employee and it is rightfully in that account because Murray Wagener knew it was there and he was present when she deposited it. If you had a reasonable doubt about any of those three issues, again your verdict on count 2 would be not guilty. If on the other hand you are sure there was a requirement not to disperse any of those funds for her own use you would find the charge proved. What Ms Coleclough believed that she was entitled to do with any of this money is not relevant here. …

[71] The jury found Ms Coleclough guilty on both charges.

The appeals

[72] We have summarised the grounds of Ms Coleclough's appeals at the beginning of this judgment. To reiterate, however, she says:

(a) the splitting of the original charge in two at the conclusion of the Crown case was wrong and unfair;

(b) the Judge erroneously steered the jury away from the mens rea requirements of the charges, which, given the evidence, was a live issue;

(c) no reasonable and properly instructed jury could have concluded beyond reasonable doubt that Mr Wagener's company was the sole contractor; and

(d) the Judge invited the jury to speculate as to the meaning of a notebook entry made by Mr Wagener's accountant.

[73] Ms Coleclough therefore relies on both limbs of s 232(2) of the Criminal Procedure Act 2011 (CPA): unreasonable verdicts and miscarriage of justice.

[74] In the event her conviction appeal is not successful on any of these grounds (or is only partly successful), she says the sentence was manifestly excessive and she should have been discharged without conviction.

Our approach

[75] Because — for the reasons we explain below — we consider Ms Coleclough's conviction appeal should be allowed on the grounds summarised in [71(a)] and [71(b)] it will be unnecessary to address the other grounds — or the question of discharge without conviction — further.

Adding the second charge

[76] The relevant CPA powers to amend, add or substitute charges are as follows:

(a) section 21: the court may (on application or on its own motion, and in the interests of justice) order that any charge worded in the alternative or that is representative be divided into two or more charges, or that two or more charges should be amalgamated;

(b) section 133: the court may (on application or on its own motion) at any stage prior to verdict *amend* a charge;

(c) section 136: notwithstanding ss 21 and 133, the court may *substitute* one charge for another during the trial, but only if:

(i) there appears to be a variance between the proof and the charge;

(ii) the amendment will make the charge fit with the proof; and

(iii) the defendant will not be or has not been misled or prejudiced in their defence by the amendment;[21]

[21] The authorities are unclear as to whether s 136 (or its predecessors, s 43 of the Summary Proceedings Act 1957 and s 335 of the Crimes Act 1961) permitted the addition of a new, cumulative charge: *R v Johnston* [1974] 2 NZLR 660 (CA). The touchstone was, however, always prejudice to the defendant.

(d) section 136A: the court may grant leave to the prosecutor to *add* a new charge during trial, if satisfied:

   (i) there is a variance between the proof and the existing charge or charges;

   (ii) the new charge fits with the proof;

   (iii) the time for filing a charging document under section 25 for the new charge has not expired; and

   (iv) the defendant will not be, or has not been, misled or prejudiced in their defence by the addition of the new charge during the trial.[22]

[77] For different, but obvious enough, reasons none of ss 21, 133 or 136 apply in the present circumstances.[23] The only possible basis for turning the original single charge into two must therefore have involved the adding of a charge. And if that is so, s 136A makes it clear that this can only happen in the course of a trial on the initiative of the prosecutor. We accept the submission of Mr Carruthers that the Court may not add a charge on its own motion, as it seems clear the Judge did here.[24]

[78] And even if the provision could be read more widely (or what happened here, interpreted more generously), there are other problems. The first is that the second charge is duplicitous: in terms of criminality it could add nothing to the first. As the Crown made clear in opening, what was alleged — consistently with the wording of s 220 — was that Ms Coleclough had failed to deal with the funds in accordance with the alleged requirements, by failing to pay them to WBL and/or apply them for WBL's benefit. Applying some or all of the funds for her own use was merely a

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22 The court may adjourn or postpone the trial to remedy any unfairness or prejudice.

23 Section 21 does not apply because the original charge was neither representative nor expressed in the alternative. Section 133 does not apply because amending a charge does not involve amending *and adding* a further charge. Section 136 does not apply because substituting one charge for another does not involve *adding* a further charge.

24 Noted in Matthew Downs (ed) *Adams on Criminal Law — Procedure* (online ed, Thomson Reuters) at [CPA136A.02(a)].

manifestation — or evidence — of that more fundamental and relevant failure; it was not a distinct criminal act. The fact that a guilty verdict on the first charge would require the same verdict on the second was — as the Judge later recognised — telling.

[79] And the second difficulty is the question of misleading and prejudice, which is particularly acute in a case where the charge was added late in the trial. As McCarthy P said in *R v Johnston*:[25]

> The situation in the present case was made especially difficult for the appellant by the fact that the amendment was not made until the conclusion of the Crown's case. In *R v Johal* … Ashworth J, delivering the judgment of the English Court of Appeal, said:
>
> > "On the other hand this court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby" …
>
> … The words of Ashworth J … in this instance are of general application and are equally applicable here.
>
> …

[80] There is nothing to suggest that these words are also not of application here; as in *Johnston* itself, the further charge was also added after the close of the Crown's case. Up until that point, Ms Coleclough had understandably focused her defence on whether she was required to transfer the funds to WBL or apply them for WBL's purposes. Her defence was that she was not required to do so because A1 was, in fact, the contractor on the NLMC job. But the framing of the second charge appeared to require a focus on whether she had dispersed "any portion" of the funds for her own use. That arguably invited a much closer analysis of what she had done with the funds after she had paid them into the A1 account and is arguably more akin to the different "failing to account" charge under s 220. The significant reservations around adding a charge at the end of the Crown case expressed by Richmond J in *Johnston* seem to us to apply equally here.[26]

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25 At 664 (citations omitted).

26 *R v Johnston*, above n 21, at 666. The same point was made by McCarthy P, at 664.

[81] The Judge was, accordingly, wrong to add a second charge.

[82] While we consider the question of error is clear cut, the consequences of such error are, perhaps, less so. The question is whether it means that the trial as a whole has miscarried and both verdicts are nullities, or whether the effect is limited to the verdict on the second charge only. Although this Court in *Johnston* was of the view that both convictions should be quashed and a new trial ordered, it is unnecessary for us to form a concluded view on the issue.[27] That is because we are, in any event, of the view that both convictions must be quashed on the grounds that the directions on mens rea were inadequate, as we discuss below.

Mens rea

[83] We have set out the relevant parts of the summing up earlier in this judgment. As noted there, the Judge adopted the Crown's approach in closing that the answer to both the actus reus element and the mens rea element could be found in the answer given to the three key questions. In particular, it was suggested that if the jury found that WBL was in fact the sole contractor, and that Ms Coleclough was an employee of WBL, then the question of knowledge would effectively answer itself in the Crown's favour.

[84] We agree with Mr Carruthers that this oversimplified and wrongly minimised the knowledge requirement. He essentially told the jury that if they were sure the money did belong to WBL and so was subject to a requirement that it be transferred to WBL or dealt with accordingly, then it followed that Ms Coleclough knew that. This can, perhaps, most starkly be seen at [47] of the summing up (set out at [70] above) when the Judge said: "[w]hat Ms Coleclough believed that she was entitled to do with any of this money is not relevant here."

[85] We agree with Mr Carruthers that this direction was wrong. Whether Ms Coleclough knew that that WBL was the sole contractor and that she was a mere employee, and whether she therefore *knew* that she was required to treat the NLBC funds as belonging to WBL, was undoubtedly a live issue, as we explain below.

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27 At 669.

[86] For the purposes of what follows, we proceed on the assumption — but make no finding — that it was not unreasonable for the jury to conclude that WBL was in fact the sole contractor and that Ms Coleclough was, in fact, a mere employee.[28] But even proceeding on that basis, we consider there was a raft of evidence which might have been seen by a jury as giving rise to a reasonable doubt about whether Ms Coleclough knew those things, and (so) knew the money belonged to WBL and/or was not A1's to deal with as she saw fit. For example:

(a) Mr Wagener not only knew of, but was active in A1's establishment;

(b) Mr Wagener was instrumental in the naming of A1 as the contractor on the draft contract with NLBC;

(c) Mr Wagener had a reason, advised to NLBC by him in writing, for wanting (at some point) to distance WBL legally from the job, through the use of A1;

(d) that reason was known to Ms Coleclough and was also given by her to NLBC at the time the invoice was presented, with no demur by NLBC;

(e) Ms Coleclough (the owner and director of A1) was, indisputably, acting as project manager on the NLBC job;

(f) contrary to the position taken by the Crown and by the Judge in summing up, her role as project manager was not necessarily inconsistent with her also being an employee of WBL;

(g) more particularly:

    (i) she had no written employment agreement with WBL;

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28 That it was *not* reasonable for the jury to conclude that is, of course, a further ground of appeal. But, in light of our conclusion on the question of mens rea, it is not necessary for us to consider that issue.

(ii) because of this, Mr Wagener admitted in evidence that “she was effectively going to have to become self-employed basically”;

(iii) her WBL job description (something akin to Mr Wagener’s PA) and salary are at least arguably inconsistent with her role as project manager;

(h) Mr Wagener was in fact going overseas for six weeks and so Ms Coleclough may well have believed it would be necessary for her to pay the subcontractors in the meantime;

(i) Mrs Coleclough did in fact use the money (before her falling out with Mr Wagener and the cessation of her involvement with the project) to pay sub-contractors; and

(j) Ms Coleclough eventually repaid the money (minus a fee) to NLBC, not WBL.

[87] And as noted earlier, a key plank of the Crown’s “knowledge” case at the start of trial — that Ms Coleclough had deliberately placed on the WBL file a duplicate invoice on WBL letterhead to obscure the fact that the invoice she had given to NLBC was from A1 — had disappeared by the end of the trial.[29]

[88] So had there been a focus on the matters discussed above, we consider the jury might well have entertained a reasonable doubt about whether Ms Coleclough knew of the requirements alleged here. There was an available inference — based on the evidence — that she believed A1 was the contractor, she was acting independently of WBL for the purposes of the NLBC job and so, she was entitled to deal with the money received from NLBC on that basis. And if that was a reasonable possibility based on the evidence (as we think it was) then Ms Coleclough would, necessarily, have been found not guilty on both charges.

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29 On our reading of the evidence, the invoice on the WBL letterhead may simply have been an artefact of the WBL computer system (which Ms Coleclough had used to prepare the A1 invoice). In any event, an inference of deliberate deception was belied by Mr Wagener accepting that Ms Coleclough had in fact told him what she had done.

[89] We agree with Mr Carruthers that the Judge's summing up essentially precluded the jury from reasoning in this way. It was an error that was more than capable of creating a real risk that the outcome of the trial was affected. We are far from sure that the jury would have found Ms Coleclough guilty were it not for the error and it follows that a miscarriage has occurred.

Conclusion

[90] By way of summary:

(a) Adding a second charge was not permitted by s 136A, was duplicitous and unfair to Ms Coleclough.

(b) The Judge's directions on mens rea in relation to both charges were inadequate. In our assessment there is a reasonable possibility that different verdicts would have been reached had the jury been properly directed.

[91] It follows that Ms Coleclough's conviction appeal is allowed. It is unnecessary to consider the appeal against sentence.

Result

[92] The appeal is allowed.

[93] Ms Coleclough's convictions are quashed.

[94] In the unusual and, in our view, unfortunate, circumstances of this case there is no public interest in a retrial and we do not order one.

Solicitors:
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