

CITATION: *The Queen v Deutrom* [2018] NTSC 74

PARTIES: THE QUEEN

v

DEUTROM, Christopher

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 21717070

DELIVERED: 23 October 2018

HEARING DATES: 14-15 March 2018; 16-18 April 2018;
4 June 2018; 2 August 2018 and
11 October 2018

JUDGMENT OF: Blokland J

CATCHWORDS:

CRIMINAL LAW – Evidence – s 85 *Evidence (National Uniform Legislation) Act* – whether employer has the capacity to influence prosecution – whether admissions reliable – whether unlikely that the truth of the admissions was adversely affected – whether admissions to be excluded under ss 84, 85 or 90 of *Evidence (National Uniform Legislation) Act* – admissions admitted.

CRIMINAL LAW – Evidence – representations made by accused to Director of Public Prosecutions in anticipation of a plea of guilty – whether representations to be excluded – s 131 *Evidence (National Uniform Legislation) Act* – whether cross-examination subject to discretionary exclusion – s 137 *Evidence (National Uniform Legislation) Act* – prosecutor not permitted to cross-examine accused on previous representations.

Evidence (National Uniform Legislation) Act ss 84, 85, 90, 131, 137, 189(3).

The Queen v BL [2015] NTSC 85; *The Queen v Lieske* (2006) 166 A Crim R 213; *The Queen v Rooke* [1997] NSWSC 363; *The Queen v Ye Zhang* [2000] NSWSC 1099, referred to.

REPRESENTATION:

Counsel:

Prosecutor:	D Morters SC
Defendant:	J Tippett QC

Solicitors:

Prosecutor:	Office of the Director of Public Prosecutions
Defendant:	Maleys Barristers & Solicitors

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Deutrom [2018] NTSC 74
(21717070)

BETWEEN:

THE QUEEN

AND:

CHRISTOPHER DEUTROM

CORAM: BLOKLAND J

REASONS FOR RULING

(Delivered 23 October 2018)

Background

- [1] Christopher Deutrom is to stand trial for eight counts of obtaining a benefit by deception, contrary to s 227(1)(b) of the *Criminal Code*. The alleged offending took place in 2015 and 2016 during the course of his employment with Elders Rural Services Australia Limited (“Elders”). The parties sought pre-trial rulings on the admissibility of certain admissions and on the question of whether the accused could be cross-examined on prior representations made on his behalf. Counsel were informed of the rulings on 11 October 2018. These are the reasons for those rulings.

- [2] For the purposes of these rulings the Court can safely rely on a number of agreed facts, which although not fully finalised for the purposes of the trial, are sufficient when taken with the other evidence tendered on the *voir dire*, including the evidence of the accused.
- [3] The accused was employed as the branch manager for Elders Real Estate Darwin from July 2011 until October 2016. At all material times, Elders, Nationwide News Pty Ltd and realestate.com.au Pty Ltd were companies incorporated under the *Corporations Act 2001* (Cth). Further, at all material times, Deutrom Pty Ltd was a company duly incorporated under the *Corporations Act*. The accused was the owner of the one share issued by Deutrom Pty Ltd and was the sole director of that company. Deutrom Pty Ltd held an account with the National Australia Bank (“NAB”), account number 154097722 (“Deutrom Pty Ltd account”). The accused held an account in his name with NAB, account number 162372173 (“accused’s personal account”). Further, he held a joint account with his partner, Helen Marie Parker, with NAB, account number 570343611 (“accused’s joint account”).
- [4] It is alleged that on or about 22 June 2015, the accused represented in an email to Cecilla Quek, an employee of NT News, that he was entitled to payment of part of an advertising rebate payable to Elders, when he knew

this representation was false.¹ On 24 August 2015 the NT News made a payment of \$77,871.20 into the accused's personal account.²

[5] It is alleged that on 13 November 2015, the accused represented in an email to Aaron Leach of realestate.com.au that he was entitled to a payment of the advertising rebate payable to Elders, when he knew this representation was false.³ On or about 22 December 2015, realestate.com.au paid an \$8,651.55 credit from its account into the Deutrom Pty Ltd account.⁴

[6] A further alleged deception of Aaron Leach and realestate.com.au on 13 November 2015 is in similar terms as count 2, resulting in a further payment being made by realestate.com.au of \$5,761.07 into the Deutrom Pty Ltd account.⁵

[7] It is alleged that on or about 23 December 2015 the accused falsely represented to Greg Thompson, an employee of the NT News, that he was entitled to payment of the advertising rebate payable to Elders. He made the same representation to Greg Thompson on 22 January 2016.⁶ On 15

1 Particulars, count 1.

2 Particulars, count 1; Agreed Facts at [12].

3 Particulars, count 2.

4 Particulars, count 2; Agreed Facts at [13].

5 Particulars, count 3; Agreed Facts at [14].

6 Particulars, count 4.

February 2016 the NT News paid \$61,257.90 into the Deutrom Pty Ltd account.⁷

- [8] It is alleged the accused made a further false representation to Aaron Leach of realestate.com.au on 13 November 2015 that he was entitled to payment of Elders' advertising rebate.⁸ On 24 June 2016 realestate.com.au made a payment of \$7,474.90 into the Deutrom Pty Ltd account.⁹
- [9] A further false representation is alleged against the accused on 13 November 2015, with similar particulars to those of count 5 involving Aaron Leach of realestate.com.au.¹⁰ On or about 24 June 2016 realestate.com.au transferred a \$10,388.03 credit from its account to the Deutrom Pty Ltd account.¹¹
- [10] It is alleged the accused falsely represented in an email to Greg Thompson of the NT News on 17 August 2016 that he was entitled to payment of the advertising rebate payable to Elders.¹² On 19 September 2016 the NT News made a payment of \$51,415.42 into the accused's joint account.¹³
- [11] Finally it is alleged that on 13 November 2015 the accused falsely represented to Aaron Leach of realestate.com.au that he was entitled to the

7 Agreed Facts at [15] states \$5,761.07, however this is likely to be an error, noting the Particulars, count 4 states \$61,257.90. There is likely to be a correction to Agreed Fact [14] or [15]; transcript, 14 March 2018 at 14.

8 Particulars, count 5.

9 Particulars, count 5; Agreed Facts at [16].

10 Particulars, count 5.

11 Particulars, count 6; Agreed Facts at [17].

12 Particulars, count 7.

13 Particulars, count 7; Agreed Facts at [18].

advertising rebate payable to Elders. According to the particulars, it was on 24 June 2016 that realestate.com.au made a payment of \$14,410.00 into the Deutrom Pty Ltd account.¹⁴

[12] The agreed facts state that on or about 27 September 2016, realestate.com.au transferred the corresponding sum to the Deutrom Pty Ltd account.¹⁵

[13] On 18 October 2016 the accused transferred \$14,410.00 from that account to an account held by Elders.¹⁶ On 17 January 2017 the accused transferred \$90,000 from an account held in his name to an Elders account.¹⁷

[14] At all material times the accused had access to the email address Chris.Deutrom@elders.com.au.¹⁸

Should the emails constituting admissions be excluded?

[15] In part proof of the charges and to attempt to negative a defence or excuse based on an honest claim of right or other form of defence based on a belief of entitlement to the alleged diverted funds, the Crown relies on the contents of three emails sent from the accused to Mr Greg Dunne, the general manager of the northern zone for Elders. The three emails are: from the accused to Greg Dunne on 20 October 2016 (exhibit 2A), from the accused

14 Particulars, count 8.

15 Agreed Facts at [19].

16 Agreed Facts at [20].

17 Agreed Facts at [21].

18 Agreed Facts at [22].

to Greg Dunne on 23 October 2016 (exhibit 2B), and from the accused to Greg Dunne on 27 October 2016 (exhibit 2C).

[16] Although the accused was the first witness to give evidence in the *voir dire*, it is convenient to deal with some of the background relevant to the genesis of the emails. On 17 October 2016, Mr Dunne received an email from a staff member, Jenny Birrell,¹⁹ who drew concerns to his attention that had been raised by another staff member about anomalies in payments to the accused's account.²⁰ Mr Dunne told the Court he finalised an employee Personal Development Plan in respect of the accused on 18 October 2016. Although he had some awareness of the \$14,000 anomaly, he said he did not raise it with the accused at that time as he wanted Mr Tim Walker, his operational manager, to look into the issue.²¹ Otherwise, he considered his performance report about the accused to be complimentary of him. Between 18 and 20 October 2016, Mr Dunne could not "categorically" rule out having a conversation with the accused, although he assumed he spoke to him on those days, but it was not in relation to the email from Ms Birrell which first alerted him to the possible anomaly with Elders' funds.²²

[17] Mr Dunne recalled that he thought he had a conversation with the accused about the irregularity drawn to his attention in respect of a \$14,410

19 Exhibit P14.

20 Transcript, 16 April 2018 at 63.

21 Although the precise amount alleged is \$14,410, at times in the evidence it is referred to in shorthand as \$14,000.

22 Transcript, 16 April 2018 at 65-7.

payment. Mr Dunne asked Mr Walker to look into it. He recalled the accused told him the \$14,000 was put into his account and was to cover off for some training costs previously incurred.²³ The accused had said it had accidentally gone into his account. Mr Dunne said he thought at the time, before receiving the first email the subject of this *voir dire* dated 20 October 2016 (exhibit 2A), there would have been communications between Tim Walker and the accused. He also said that at that point he understood the funds were going to be returned to Elders. At the time of the initial conversation between himself and the accused about the \$14,410 payment, Mr Dunne said he did not say anything about any action that might be taken against the accused because of the payment into his account of Elders' money, aside from advising him that he would need to speak to the CEO of Elders, to the extent that \$14,000 had been misdirected and was going to be repaid.

[18] On 20 October 2016 Mr Dunne received the first email from the accused (exhibit 2A). At that time, Mr Dunne was not aware of any other transactions involving redirected payments to accounts held by the accused. Mr Dunne said he spoke to the CEO when he was in Adelaide on 20 October 2016. His recommendation to the CEO was that if the redirection was a one-off transaction, which he believed it was at that time, that the individual should be spoken to and given a warning letter, however his employment should continue. At that time the CEO agreed with his recommendation. The email (exhibit 2A) sent by the accused on 20 October 2016 at 9:06am states:

23 Transcript, 16 April 2018 at 66.

Hi Greg,

Firstly, I remember the day we met at the hotel for my interview and you said to me that we will get on fine as long as I don't lie to you or steal from you! I have betrayed this trust and feel like an absolute "fuck wit" and am prepared to suffer the full consequences.

In 2013 and 2014 I took 8-10 of our leading staff members away on team building trips. The first one was to Singapore and the second one was to Kuala Lumpur. I paid for the majority of these costs out of my own pocket. Last year I just couldn't afford it and many of the staff were disappointed that I had cancelled the annual "Reward for Excellence" trip. I was chatting to the re.com person and they suggested that I use their training levy to do a trip with the staff. I was concerned that if the money came into Elders it would be chewed up and we would not be able to go away again. It has been a tough 24 months for all the staff and little things like this mean a lot to them. In an absolute moment of stupidity I changed the bank account for the training levy to be paid in to the Deutrom Pty account so that I could use the money to take the team away. I even told Diane and Matt that I had worked out a way that we could re-introduce the trip again this year.

The first payment went into the account on the 27th September and Helen thought it was our profit share. I didn't tell her what it was for but told her not to use it as I had a use for it.

I have lied to Tim and to you and feel sick to the stomach and whilst this is not an excuse, I thought it was going to be good for the team.

I love working for you and for Elders and understand this will most likely mean the end of my employment with Elders. You have been a father figure to me over the past 5 years and I am most disappointed that I have let you down.

I will await your phone call.

Cheers

Chris

[19] Mr Dunne then emailed the following response (exhibit 4):

Thanks Chris

I need to get my head around this but as you can imagine I am really disappointed as I thought our relationship and trust was better than

this and in my mind you had a number of opportunities over the last couple of days to bring this to light.

I will give you a ring later today!

Regards

Greg

[20] Mr Dunne told the Court that at around this time he was to attend a grand final in Tamworth and various corporate activities. He intended to speak to the accused after he spoke to Mr Walker. He was travelling until he left Tamworth on Monday 24 October. Mr Dunne said although he was disappointed about the \$14,000, he had not expressed any intention to refer the matter to police and he was not contemplating action of that kind given it was, to his mind, a one-off situation. While he was still in Tamworth he received the email of 23 October 2016 (exhibit 2B). Between 20 October 2016 and receiving the second email he did not recall having any further conversations with the accused.²⁴ At the time of receiving that email, he was not aware of any other misdirected payments from Elders. After a number of introductory comments about how busy he had been and how much he respects Mr Dunne, the email from the accused states as follows (exhibit 2B):

Did I do the wrong thing, absolutely! Did I lie to you and to Tim, absolutely! The fact that I have betrayed your trust upsets me more than anything in this situation. I did what I did and I can't change that and whilst I may try to justify what I did by saying it was for the greater good, it was wrong.

24 Transcript, 16 April 2018 at 70.

In 2013 and 2014 I took staff away on what I called “Awards for Excellence” trips. In 2013 I took [seven staff names are mentioned] and myself to Singapore for three days. The trip was funded through several sources but personally I contributed just under \$10k. In 2014 I took [eight names are mentioned] and myself to Kuala Lumpur. Again this trip was funded through several sources but I made a significant personal contribution. Each of these trips the staff had to hit hurdles in income and new business to become eligible. On both trips we visited international real estate offices, brand new developments and conducted training. This became a serious goal for the staff and a great motivator. Unfortunately in 2015 we just didn’t have the funds and I had to cancel the trip. I had considered paying for all the staff myself but as I was building the house I just couldn’t justify it. Our EBIT in the business went from \$1.9m to \$1.2m and I thought that there was no way I could ask Elders to pay for the trip.

Fast forward to 2016 and many of the staff had been asking about the trip. We had just had several staff leave, morale was super low and I felt that we needed to do something to boost the morale and get us back on track. I started taking staff out for reward breakfasts, more often than not, paying for it myself. I ramped up the Friday drinks for the PM’s, again more often than not paying for it myself. But the market was still super tough and I really felt I had to do more.

An opportunity presented itself when re.com introduced the training levy and I changed the payment details from Elders to Deutrom Pty Ltd. This way I could be assured that the funds would be available to take the staff away, morale would increase, hopefully the market would get better and we would all be back on track. The new agreement was signed on 8th August and the first payment came in on the 27th September. I had actually forgotten that I had changed the bank details and when Helen rang and asked what the money was for I told her it was our profit share and not to allocate it as I needed it. The new agreement with re.com allowed for 4 payments totalling \$55k over two years. It was my intention to change the details back to Elders once the first payment had been made and this has been done. Re.com were working under my instructions and are in no way responsible for this. The second payment is due in March 2017, the third in September 2017 and the last in September 2018.

Over the past 5 years Elders has been my life. I treat every staff member (not just Darwin) like they are family members and I treat the business as though it is mine. As you already know I am sometimes unorthodox in my style and often run close to the line.

This is the only way you can successfully run this business. I came down to Brisbane at my own expense to attend Janene's husband's funeral, not because I had ever met him but because I thought Janene would appreciate me making the effort. Financially, I am always digging into my own pocket, in November alone so far I have spent over \$700 of my own money on the staff and the business, I say this not to justify my action or because I want the money back but to show you that I bleed for this business and again this is what is needed to run it successfully. I even came in and painted one of the offices three weekends ago because one of the staff was moving into it and I wanted it to look and feel great for her. It took up most of my weekend but it was well worth it. If I am to stay in this business you will continue to get all of me, the good, the bad and the special.

[21] Other matters referred to at the end of the email are praiseworthy of Elders.

Mr Dunne then sent a further email to the accused at 3:58pm on 23 October 2016,²⁵ stating that he appreciated him being upfront and that while he understood the reasoning, he was disappointed that the accused felt he could not have a conversation with him. He asked for confirmation as to whether there were other issues or situations that needed to be aired. He said his aim was to keep the accused in the business, but he expressed the need "to be 100% sure that nothing like this will occur again". He said he was "trying to confirm that nothing else is going to bite you (or me) when I put all this together for discussion next week". Mr Dunne said that at that time he knew of no other issues.²⁶ He said his intention was to make sure that he was dealing with the \$14,000 and nothing else as he was meeting the CEO the following week to finalise the matter. He could not recall having any oral communication with the accused on that day, although he said he could not

25 Exhibit P6.

26 Transcript, 16 April 2018 at 71.

categorically say. He forwarded the email exhibit 2B to Mr Walker as Mr Walker was handling the operational side of finding out what had happened.

[22] On 27 October 2016 Mr Dunne received a further email from the accused (exhibit 2C). He said he was driving at that stage as he had visited various pastoral properties and towns in regional Queensland. He said he noted that he had missed calls from the accused and Tim Walker and two voice messages. At around the same time, he spoke to Mr Walker who advised he had found a number of other transactions for a considerable amount of money. Mr Walker told him to expect a call from the accused advising that he had misappropriated some money. After speaking to Mr Walker, Mr Dunne spoke to the accused, who advised there was more than the \$14,000 and that there were a number of transactions that had been misdirected out of Elders' accounts into his own accounts. He said it was going to be approximately \$160,000. Mr Dunne said he told the accused he was pretty disappointed. He may have said he was "pretty gutted".²⁷ Mr Dunne said he thought he may have received a phone call the night before from Mr Walker indicating there were two more anomalies and that he just asked Mr Walker to continue to check it out. He said he did not say anything to the accused about referring the matter to police in the conversation of 27 October 2016. He said something like, "I don't know where we actually go to from here". Mr Dunne accepted that he had told the accused he needed to tell them

²⁷ Transcript, 16 April 2018 at 73.

everything so they could have a full appreciation of what the total or the full extent of the misdirection was. He thought he received the email when he was travelling between Kununurra and Moree. The email that is exhibit 2C commences as follows:

Hi Greg

I am sorry.

As discussed this morning I am glad that I have now come clean with everything. I have been in a very dark place over the past 6 months and whilst I am very relieved that I no longer have anything to hide from you or Helen, I am still sickened that I have put you and my family in this position. Helen is devastated and I am doing everything I can to ensure her (*sic*) that our family will be and that with your help we can work our way through this.

As discussed, I got myself into serious financial trouble with the house and diverted rebate funds from the NT News and re.com.au into my own accounts. I think there was about \$160k and I paid back \$14k last week. When I realised what a terrible mistake I had made I approached the bank for more funds so that I could put the money back but with the collapse of the Darwin market this was rejected. I convinced Helen to put our house on the market in the hope that I could somehow redirect the money to where it should have gone. I have not touched the trust account, the general account or any other accounts in Elders' name. I have not involved any other staff and Helen had no idea what I was doing.

[23] Much of the rest of the email concerns expressions about how much the accused loves his job and would like to “work through it” and to save his job. He suggests other options for paying the funds back. He said he had not discussed the issue with anyone in the business, except for Tim and Helen.

[24] The accused sought to exclude the emails principally on the basis of s 85(1)(b) of the *Evidence (National Uniform Legislation) Act* (“UEA”).

Section 85 UEA provides as follows:

85 Criminal proceedings – reliability of admissions by defendants

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
 - (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
 - (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.
- (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
 - (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
 - (b) if the admission was made in response to questioning:
 - (i) the nature of the questions and the manner in which they were put; and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

[25] The accused argues Mr Dunne and Mr Walker were persons who fall within s 85(1)(b) as they were persons the accused knew or reasonably believed to be, capable of influencing the decision whether a prosecution against him could or should be brought. Statements constituting admissions cannot be admitted unless the circumstances were such as to make it unlikely that the truth was adversely affected. The Court may take into account any relevant

conditions or characteristics of an accused including those expressly referred to in s 85(3).

[26] In broad terms it is accepted Mr Dunne and/or Mr Walker, as effectively the accused's employers, had some capacity to influence whether a prosecution was to be brought. In the usual course, it would be expected that an employer would be in a position to determine whether a complaint or referral would be made to police, which may be the start of the process. The Office of the Director of Public Prosecutions is institutionally vested with the power to commence or continue prosecutions and in most circumstances possesses the sole authority to make those decisions; however, the authorities relevant to the construction of s 85(1)(b) embrace a broader range of persons that may be considered "capable of influencing the decision".

[27] In the context of his application to exclude the emails under s 85(1)(b), the accused's evidence is essentially that he wrote the emails because he felt immense pressure from Tim Walker and Greg Dunne, that Greg Dunne had told him on several occasions he would keep his job, that Tim Walker had said he could go to jail, and that prosecution would be an available option to them. He said he was told that if he did what Greg Dunne asked of him, he had the ability to stop any prosecution and the board would do exactly what he told them to do. He believed Greg Dunne had this power.²⁸ He said Greg

28 Transcript, 14 March 2018 at 23.

Dunne was the most senior person, was like a father figure to him and he trusted him. To avoid losing his job he was asked or directed to email them telling them what he had done.²⁹ Greg Dunne told him to do everything Tim Walker told him to do and he would make sure everything would be “sorted out”. He would keep his job and Greg Dunne would even put him up for a promotion in Queensland and he would ensure there was no prosecution at all.

[28] The accused told the Court he wrote and forwarded the three emails rather than just one because Tim Walker kept asking him “over and over again” and they wanted an admission. Essentially his evidence was that they could help him retain his job if there was an explanation.³⁰

[29] On the accused’s version, the first email was sent before the finalisation of the Personal Development Program (“PDP”) and there was an assurance that if he did what they told him to do, he would achieve his position in Queensland and there would be no prosecution. He said that was the effect of the PDP on 21 October 2016.³¹ He said he wrote the second email because Tim Walker asked him to write an admission that he had done the wrong thing. He said they spoke every day and every day Tim Walker would put pressure on him saying that if he did not “get this right” he could go to

29 Transcript, 14 March 2018 at 23-24.

30 Transcript, 14 March 2018 at 24.

31 Transcript, 14 March 2018 at 24.

jail.³² As to the third email, the accused said it was in response to Tim Walker saying, “We need to get more out of you” and that the NT News rebates needed to be included. He said Mr Walker had asked him if he had a gambling or drug problem or was in financial distress. He said Mr Walker had said it would be preferred if he could include “something like that” in an email.³³ The accused said he “stewed on” this all night and tried to ring Greg Dunne seven or eight times. He rang Tim Walker and said, “I’m going to do what you told me to do. I don’t feel good about this. But I need to talk to Greg before I do”. He said he rang Greg Dunne and said, “I’m going to do it. I feel very, very uncomfortable about it”. He said he broke down and said, “Tim keeps saying that I could go to jail. I don’t want to go to jail, it wouldn’t be right for my family. So I’m going to do what you wanted me to do”. They then discussed the PDP and what was written, and he said Greg Dunne said, “I promise you we will look after you, write the email”.³⁴ He said he understood this to mean that he would ensure absolutely no prosecution.³⁵

[30] In my view the accused’s account is unbelievable. I kept an open mind for as long as possible, as in criminal cases, sometimes bizarre and seemingly fanciful facts and circumstances turn out to be true, or at least possible.

However, I do not believe the accused’s account. At the outset, although by

32 Transcript, 14 March 2018 at 27.

33 Transcript, 14 March 2018 at 27.

34 Transcript, 14 March 2018 at 27.

35 Transcript, 14 March 2018 at 28.

no means determinative, it seems most unlikely that a business such as Elders would contemplate advising they would waive going to police or cooperating in the prosecution in a case of clear misdirection of large sums of money, just to obtain an admission. The evidence is that if the \$14,410 was capable of an innocent or at least reasonable explanation then at least Mr Dunne was prepared not to take the matter further, either with respect to terminating employment or reporting the matter to police. However, the misdirected funds in the end were at times stated to be in the order of \$160,000 or \$240,000, of which \$14,000 was paid back by the accused in October 2016. While not determinative, it strikes as being highly unusual that a company would hold off on requesting a police investigation concerning a clear misdirection of funds, or seriously discuss ways that an employee who engaged in large-scale deception for gain could escape employment consequences and even be promoted. However, it was important to suspend disbelief until all of the relevant evidence was received.

[31] The *voir dire* was re-opened on 2 August 2018 as the accused adduced previously unavailable evidence of phone records during the relevant period, provided by the prosecution. The records show calls between the accused, Greg Dunne and Tim Walker in the relevant period.³⁶ In general terms, as submitted on behalf of the accused, the phone records show there were more calls between himself, Mr Dunne and Mr Walker than acknowledged by them in their evidence. In my view, while the phone record evidence shows

36 Affidavit of Shane McMaster sworn 13 July 2018.

in some instances that there were calls in some periods that were not recalled or were denied by Mr Dunne and Mr Walker, the records do not demonstrate any significant discrepancy that would justify reducing the weight to be given to their evidence on the basis of an assertion of a lack of credibility or reliability. One important matter to be considered is that their evidence was given some 18 months after the calls in question were made.

[32] A number of calls in the records do not establish whether the calls resulted in conversations, or were diverted or inconsequential for other reasons. Mr Dunne accepted in his evidence that he had a number of lengthy phone conversations with the accused. As it was not until 26 October 2016 that Mr Dunne knew of the diversion of funds beyond the \$14,000, this may well account for a lack of memory of calls of significance before that date. Mr Walker, who was tasked to initially look into the \$14,000, said he had no conversations with the accused between 18 October 2016 and 26 October 2016. The calls made by Mr Walker on 20 October 2016 were relatively short after the email (exhibit 2A) was sent to Mr Dunne. There was a further lengthier call from Mr Walker to the accused on 21 October 2016 and from the accused to Mr Walker on 21 and 24 October 2016. That Mr Walker did not recall those particular calls does not diminish his credibility. The accused may well recall them given his own particular circumstances at the time of being under pressure as he knew Elders were looking into the accounts which in turn may have implicated him. The accused's version

overall is significantly lacking in credibility as became apparent very quickly during cross-examination, if not before.

[33] Aside from the general improbability of the accused's account in these circumstances, the accused essentially maintained in cross-examination that Mr Dunne and Mr Walker knew about the extent of the diversions from the outset.³⁷ The evidence from Mr Walker was that when he first phoned the accused about the \$14,000, the accused said that he did not know, it must be a mistake, and he would ring Helen and find out and ring Mr Walker back.³⁸ The accused rang back and agreed the money was in his account and that it related to taking high-achieving staff away. It was a way of segregating the funds. His wife thought it was a profit cheque and he had instructed her to send the money back. At that point Mr Walker asked the accused if there was anything further and the accused assured him there was not.³⁹

[34] Other objective evidence tends to show the accused well knew that the funds had been directed to his account. A withdrawal of \$13,600 was made from his account on the same day that the \$14,000 was deposited. He said his wife made the withdrawal but that is an explanation that contradicts the effect of his other evidence. There was nothing at all in the evidence, including the substantial objective materials and records, to indicate anyone at Elders knew the full extent of the diversion of funds or that Mr Dunne or

37 For example, see transcript, 15 March 2018 at 98-100 and 16 April 2018 at 13.

38 Transcript, 17 April 2018 at 117.

39 Transcript, 17 April 2018 at 117.

Mr Walker were requiring admissions in respect of the total amount from the outset. The emails which are exhibits 2A and 2B relate solely to the \$14,000. All indications were that this would be treated as a misdemeanour or bad judgment but there was nothing to indicate the matter would be referred to police. There is nothing on the face of those emails to indicate there were any further outstanding sums or any questions of police involvement. There is nothing in the response from Mr Dunne, as above in exhibit P4, to indicate any suggestion of any further action, nor of any knowledge on Mr Dunne's part that there was more than one suspected transaction. Neither is there any indication in Mr Dunne's response to exhibit 2B⁴⁰ that he was aware of funds in the order of \$230,000 being diverted. It is appreciated that on the *voir dire* the truth of the admission is not to be considered,⁴¹ however in the inquiry of the relevant circumstances surrounding the admissions, the timing and content of the admission has some circumstantial value with respect to understanding the accused's awareness and belief and the credibility of what they assert the circumstances were.

[35] Further, from the accused's known email account, on 26 October 2016, before any further information is put to the accused, after a request for information from Mr Walker about an agency recovery account and the NT News rebate payments, details of the relevant accounts are forwarded to

40 Exhibit P6 is the emailed response.

41 *R v Ye Zhang* [2000] NSWSC 1099 per Simpson J; *R v Rooke* [1997] NSWSC 363 per Barr J at 14-15; *UEA* s 189(3).

“Greg and Tim”.⁴² This communication took place prior to the discovery of two further transactions with realestate.com. Effectively the accused was representing there was no problem with the NT News payments. The provision from the accused’s email of screen dumps on 26 October 2016 related to \$232,500 worth of transactions on 1 December 2015 diminishes the credibility of the accused’s suggestion that he was effectively being threatened all along with prosecution if he did not make admissions because Elders knew of all the transactions. The accused represented until he sent exhibit 2C that the only diversion was the \$14,410. He initially rejected the suggestion he sent that email with his signature block and maintained others may have sent it.⁴³ This scenario suggested by the accused is highly unlikely and is rejected. It is clear from an email from Denise Richards to Mr Walker and Mr Dunne on 26 October 2016 at 4:01pm that that was the first notification they had of further payments from realestate.com.au to accounts held by the accused.⁴⁴

[36] After receiving that information it is clear Mr Walker called the accused. The sequence of events as revealed in the various emails and texts supports the evidence of Mr Dunne and Mr Walker as to their state of knowledge about the extent of the diversion of funds. Having heard from Mr Dunne and Mr Walker, I conclude they are credible witnesses. They were professional, they kept an open mind about the accused’s potential explanations but were

42 Exhibit P8.

43 Transcript, 16 April 2018 at 14.

44 Exhibit P11.

obviously required by dint of their positions find out whether further funds had been diverted. They both rejected the accused's assertions that they told him in effect to admit wrongdoing and he would not be prosecuted.

[37] As above, by 26 October 2016 Mr Walker, who was investigating the accounts, was advised the diversion of funds was greater than they initially believed. Mr Walker asked the accused how the anomalies came about.⁴⁵ Mr Walker gave him the dates and he said he knew nothing about them, but rang back and said, "This just won't go away will it?" Mr Walker denied saying he would involve the police. The next day the accused called Mr Walker. The accused told him there was more, about \$145,000. He said he had not slept. He had got into serious financial trouble and hoped no one would find out. In response Mr Walker told him he needed to put in writing what had happened and send it to Greg Dunne. Following these reasonable inquiries the accused sent the email exhibit 2C. The representation made by the accused on 27 March 2017 recorded in the statement of Officer Maree Scott is, "He went on to say that he was informed that if he wrote a letter saying he was sorry he would keep his position".⁴⁶ This statement carries little weight. It was made some six months after the matters came to light. There is nothing in the statement that indicates the accused was threatened with prosecution or jail. The content of the representation is denied by credible witnesses.

45 Transcript, 17 April 2016 at 125.

46 Exhibit D17, sworn by Maree Scott, 20 April 2017.

[38] In my view not a great deal can be drawn from the meeting between the accused and Mr Dunne on 30 October 2016 when Mr Dunne came to Darwin to meet with the accused, a meeting that would most likely end with the termination of the accused's employment. Mr Dunne acknowledged he had three letters with him. Some of those letters were drafted before the full extent of the diversion of funds was known. After confirming certain details with the accused, Mr Dunne received authorisation from the CEO to terminate the accused's employment.

[39] Section 85(1)(b), as above, is not confined to law enforcement officials but rather includes persons who "the defendant knew or reasonably believed" were capable of influencing the decision to prosecute. In *R v Lieske*⁴⁷ it was held a complainant could be considered to be in such a position. In my view in theory, an employer or superior such as Mr Dunne and Mr Walker may, in these circumstances, be considered as being able to influence a prosecution in as much as they could request police to investigate or make a complaint. Clearly they had the capacity to influence the accused's employment, however that is not relevant to s 85(1)(b). The focus of the inquiry must be the circumstances surrounding the admissions.⁴⁸ There is nothing in the circumstances here to lead to the conclusion that the circumstances adversely affected the reliability of the admissions. The Crown bears the onus of establishing that the circumstances in which the admissions were

⁴⁷ [2006] ACTSC 97; 166 A Crim R 213.

⁴⁸ *R v Ye Zhang* [2000] NSWSC 1099 per Simpson J at [51].

made were such as to make it unlikely that the truth of the admission was adversely affected. I am satisfied on the balance of probabilities that the reliability of what the accused communicated in the emails in exhibit 2 was not impaired by reason of how the emails were obtained. At this point, the employment relationship has some relevance but in my view both Mr Dunne and Mr Walker made reasonable inquiries of the accused which were most unlikely to lead to unreliable admissions. The accused obviously felt he should give explanations for diverted funds, which he did in each email. He was motivated to keep his employment and to have his various explanations accepted by Elders.

[40] There is nothing in terms of the condition or the characteristics of the accused that would tend to indicate unreliability. This is to be readily distinguished from the circumstances in *The Queen v BL*,⁴⁹ which involved a youth who spoke only partial English. The accused presents as experienced and confident in the business world, and presented as articulate and intelligent when giving evidence.

[41] In my view there is no credible evidence to suggest threats of the kind envisaged by s 84 *UEA* were made or were operating on the accused. Nor is there a case for exclusion on a discretionary basis under s 90 *UEA* for want of fairness to the accused.

49 [2015] NTSC 85.

[42] The admissions contained in exhibits 2A, B and C will be admitted, as well as the associated relevant conversations between the accused, Mr Dunne and Mr Walker.

Should the Crown be permitted to cross-examine the accused on previous representations made to the Office of the Director of Public Prosecutions?

[43] The Crown sought a ruling to permit the prosecution to cross-examine the accused, should the accused give evidence, on previous representations made on the accused's behalf to the Office of the Director of Public Prosecutions following an earlier offer to plead guilty.⁵⁰ The Crown alleges, as a result of investigations undertaken by police as a result of the offer to plead on a particular basis, that the many items represented to be work-related items are false or are deceptions.

[44] An earlier indictment dated 21 June 2017 charged one count of stealing covering the whole amount alleged, namely \$237,180.07. The filing of that indictment followed an indication of a plea of guilty in the Local Court on 14 June 2017. The accused was committed on agreed facts.

[45] The letter dated 5 July 2017 from the accused's solicitor mentioned above annexes a list of items and corresponding costs the accused alleges he incurred on behalf of Elders and personally paid. These were represented to

⁵⁰ Letter, Maleys Barristers & Solicitors, 5 July 2017.

be business expenses. It is asserted the subsequent police investigation has revealed that this is not the case.

[46] As the accused has elected to go to trial rather than to plead guilty, the prosecutor is conscious the accused may rely on claims of right. The Crown therefore seeks a ruling that it be permitted to cross-examine on the materials annexed to the accused's solicitor's letter if the opportunity arises to cross-examine the accused, not as evidence of consciousness of guilt but as evidence going to the accused's credit.

[47] Section 131 of the *UEA* excludes evidence of settlement negotiations but that does not include an attempt to negotiate a settlement in criminal proceedings under s 131(5)(b). The Crown maintains the communication from the accused is not covered by the Director of Public Prosecutions Guidelines as the letter was unsolicited. The relevant Guideline 6.2 provides:

In any case of complexity or sensitivity, the defence should be asked to put in writing a negotiated charge after including their arguments in support of such an offer. Such offers will always be considered on a without prejudice basis. In some cases it may be appropriate to inform the defence that the prosecution will not consider an offer unless its terms are clearly set out in writing.

[48] While it is the case that the "offer" was not solicited, it was my previous understanding that communications of this kind between defence counsel and the DPP were confidential, without prejudice and were not readily amenable to be adduced as evidence unless some unfairness to a party by

reliance on a representation had or would occur. However, it is accepted the *UEA* excludes such communications from protection and the DPP's Guidelines do refer to requests for offers and negotiations. In any event, counsel for the accused and the accused in a case of this kind involving alleged dishonesty might anticipate police would be requested to investigate whether what has been asserted can be established by objective evidence. It was proper for the prosecutor to request police investigate in these circumstances as it would be obviously wrong, and potentially an offence against justice, if evidential material that was manufactured or was patently not true formed the basis of the facts given before the Court.

[49] The problem I foresee with using the material gathered in the manner suggested as previous inconsistent statements is that it will inevitably lead to revealing a previously stated intention to plead guilty. Even if the prosecutor does not identify the source of the previous representation, in order to properly answer questions directed to any previous statement, the accused may need to refer to the relevant context. A line of cross-examination based on the material suggested would unavoidably involve the accused revealing why and in what circumstances such a statement or statements were made. The proposed cross-examination relates only to credit, although it is acknowledged credit may be important in this trial.

[50] In my opinion the proposed cross-examination on the previous representations made to the DPP is more prejudicial than probative as it is likely to lead to the revelation of a previous intention to plead, or lead to an

inability to fully answer questions for fear of revealing the same. The proposed questioning will be excluded under s 137 of the *UEA*. I do not, however, consider the gathering of any evidence about the accused's representations as improper – quite the opposite. If the evidence itself becomes admissible or is relevant for a different substantive purpose, provided it has been disclosed to the defence, this ruling is not intended to apply to other possible uses of the evidence that may have been obtained through the investigation of the claims made on the accused's behalf.

[51] By arrangement with counsel, these reasons will be forwarded by email.

These reasons will not be published until after the trial.
