

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**CR NOS 482, 534, 574-6/21
492-4, 532, 536, 577-581/21**

**441, 463-4, 466-473
479-483, 495-8, 518-523
528-531, 533, 535/21**

R

v

**ROBERT TAIMOE TAPAITAU,
DIANE MOEROA-O-TARE CHARLIE-PUNA
AND
NGATOKOTORU PUNA**

Hearings: 12 June – 5 July 2023
7 August 2023
18 December 2023

Appearances: P Wicks KC, K Hogan and J Crawford for the Crown
N George and M Tangimama for Tapaitau
B Mason for Charlie-Puna
L Rokoika and T Vakalalabure for Puna

Date: 31 January 2024, 7 February 2024

REVISED JUDGMENT OF KEANE, CJ ¹

[1] In the Cook Islands government departments, and state agencies, entrusted with public money - money appropriated by Parliament and project aid money² - are subject to clear statutory principles, standards and controls.

[2] Public money is the property of the Crown;³ and heads of government departments, and state agencies, are charged by statute with ensuring that those public entities have sound financial management systems and internal controls.⁴

¹ This revised version of this decision is issued under s 44 of the Judicature Act 1980-81; see Minute (No. 21) of Keane, CJ, dated 7 February 2023.

² Ministry of Finance and Economic Management Act 1995-96, s 2 ‘public money’.

³ MFEMA, s 43(1).

⁴ MFEMA, s 29(2).

[3] The Public Expenditure Review Committee and the Audit Office are charged by statute with safeguarding public money, and the integrity of all public accounts, including those of government departments and state agencies.⁵

[4] Within each government department, and state agency, accounts and records must be faithfully and properly kept:

- (a) Revenue must be properly assessed and collected.
- (b) Expenditure must be valid and correctly authorised.
- (c) Revenue, expenses, assets and liabilities must be properly recorded and accounted for.
- (d) Financial and operating information must be reliable.⁶

[5] On 21 July 2020 the Financial Secretary advised all government departments and state agencies that the Ministry of Financial and Economic Management was to carry out a whole of government review, by internal audit, of cash receipting and banking for the 12 months ending March 2021.

[6] On 24 March 2021 an internal audit of the National Environment Service (NES) resulted in a preliminary report, which said, ‘There is clear evidence of improper use of public funds and public resources and at this point in time, it seems deliberate’.

[7] The internal auditor recommended that the NES bank accounts be frozen, that the investigation be referred to PERCA, and that the legal implications be discussed with the Solicitor General. On 30 March 2021 the Financial Secretary made a formal complaint to the Police.

⁵ Public Expenditure Review Committee and Audit Act 1995- 96.

⁶ PERCAA s 27 (d)(i),(ii),(iii), (iv).

[8] As a result of the wider investigation the Police then made the three defendants were charged with a series of thefts of public money, and related offences. On the Crown case at trial the amount alleged to have been stolen was of the order of \$70,000.

[9] After a four week hearing in June-July 2023, I decided on 6 November 2023 (following a further hearing on 7 August 2023 and related written submissions) to substitute for the theft offences charged equivalent charges of document fraud.

[10] I begin with the charges each defendant now faces. In two annexures to this decision I set out: (i) the elements of each offence charged, which the Crown must prove beyond reasonable doubt to displace the presumption of innocence; and (ii) the principles of law governing every criminal trial.

CHARGES

[11] Robert Tapaitau, the Deputy Prime Minister, whose portfolios during the times material included the Ministry of Infrastructure (ICI) and NES, now stands charged with three document frauds between 16–18 July 2019, and a conspiracy to defraud between 9 September–11 October 2019.

[12] Diane Charlie-Puna, the then ICI Secretary, now stands charged with five document frauds between 9 April 2019–7 April 2020. She pleaded guilty to the conspiracy to defraud and a related theft (now a document fraud), and I convicted her of those offences. I discharged her on a theft charge, dated 20 March 2020.

[13] Ngatokotoru Puna, the then NES Director, and Mrs Puna's husband, now stands charged with 22 document frauds between 29 August 2019 –24 March 2021, the conspiracy to defraud, six forgeries and a charge of uttering.

[14] All three defendants elected to give evidence and denied any offence. Each said, with one exception, that any benefit they received in the ways charged lay within their entitlement; or that, if it did not, they had acted honestly in that belief and without any intent to defraud.⁷

⁷ The single exception is that Mrs Puna has pleaded guilty to the third cluster theft and conspiracy

[15] The primary issue on each of the charges, therefore, is not principally the documentary context, which is largely uncontested. The issue is whether the Crown, on the evidence called, is able to prove beyond reasonable doubt that the defendants did act dishonestly and with intent to defraud.⁸

EIGHT CHARGE CLUSTERS

[16] At trial the Crown grouped the 42 charges against the three defendants in eight clusters to which I adhere in this decision.

[17] In the *first* cluster is a single charge against Mrs Puna alleging document fraud (\$2881.28). In April 2019 she and her family travelled to New Zealand to attend her father's funeral. ICI met her accommodation cost by a cheque she co-signed before she left. In issue is: (i) her entitlement if any; (ii) the decision was made by her deputy or her; (iii) her related state of mind.

[18] In the *second* cluster are six document fraud charges: three against Mr Tapaitau and three against Mrs Puna (\$3454). They arise from a trip he made to New Zealand between 16-20 July 2019, paid for by ICI. In particular issue is: (i) his entitlement if any; (ii) his purpose - to meet Matson South Pacific executives in Auckland to ensure prompt shipment of a bitumen truck, or attend his uncle's funeral; (iii) his related states of mind.

[19] In the *third* cluster are two charges Mrs Puna has admitted: a \$3035 document fraud by her, arising from a July 2019 weekend her family spent at the Edgewater Resort at ICI expense; and a conspiracy in September 2019 to conceal any such fraud by passing off the stay as a management retreat. In particular issue is: (i) Mr Tapaitau and Mr Puna were parties to any such agreement; (ii) their states of mind.

[20] In the *fourth* cluster are two document fraud charges against Mr Puna, involving NES accommodation and daily allowance payments (\$6700), arising from a trip he and his family made to Aitutaki over Christmas and New Year 2019-20. In

charges, para [18].

⁸ The forgery and uttering charges against Mr Puna obviously raise other quite distinct issues.

particular issue is: (i) he worked for just two of the 17 days claimed for; (ii) Crown Counsel stayed less than half the 17 days accommodation claimed for; (iii) his entitlement if any; and (iv) his related state of mind.

[21] In the *fifth* cluster are three document fraud charges against Mr Puna (\$7353.50), arising from a 28 day trip his family made to Aitutaki in March 2020, on the eve of the COVID lock down. In particular, the issue is: (i) his entitlement if any; (ii) the NES allowances and expenses claimed were warranted for work required on Aitutaki; (iii) his related state of mind.

[22] In the *sixth* cluster are five document fraud charges against Mr Puna (\$8860.04), arising from an Aitutaki trip he made in September 2020 accompanied by six rugby players who trained there for three days. In particular issue is: (i) his entitlement if any; (ii) the players lay within any entitlement; (iii) his related state of mind.

[23] In the *seventh* cluster are two document fraud charges against Mr Puna (\$2228.50), arising from an NES Christmas three day retreat at the Edgewater Resort in December 2020. In particular issue is: (i) his entitlement if any; (ii) his entitlement to his room upgrade, two extra rooms and extra food and drinks; (iii) his related state of mind.

[24] In the *eighth* cluster are the remaining ten charges, which do not relate to specific trips or events, and involve the same generic issues, which I state more broadly. They are:

- (a) Two document fraud charges against Mr Puna, alleging offences on 29 August and 15 November 2019 (\$9,800). In particular issue is the character of the payment and any underlying entitlement to payments, and belief in it, to reduce his student loan.
- (b) Three forgery charges against Mr Puna relating to vehicle hire invoices dated 21 November 2019, 12 May and 18 June 2020, and three related document fraud charges alleging offences on 22 November 2019, 14

May and 18 June 2020 (\$12,500). In particular issue is whether the invoices were forgeries and any underlying entitlement, and belief.

- (c) A \$5000 document fraud charge against Mr and Mrs Puna alleging an offence on 13 January 2020 involving the purchase of a motorbike for Mrs Puna's mother. In particular issue is whether this involved public or personal money.
- (d) An uttering charge against Mr Puna concerning a car cleaning company invoice, dated 18 June 2020, and a document fraud charge (\$5000) alleging a related offence that day. Again the underlying issues are whether the invoice was a forgery, and as to Mr Puna's entitlement, and belief in it.
- (e) A document fraud charge against Mr Puna alleging an offence on 29 June 2020, together with forgery of a letter from his Minister, Mr Tapaitau, dated 24 March 2021, approving payment of a performance bonus. Here too, entitlement, and belief in it, and whether the letter was forged, are in issue.
- (f) A document fraud charge against Mr Puna alleging an offence on 28 February 2021 arising from a second NES bereavement payment on the death of his mother. Here too in issue, finally, are entitlement and any belief in it.

CLUSTER 1: APRIL 2019

Charge 5: 9 April 2019

[25] This single charge alleges that on 9 April 2019, at Rarotonga, Mrs Puna fraudulently used, or procured the use of, an ICI cheque to pay for a week's Auckland accommodation for her family and herself, during her father's funeral.

[26] The cheque, dated 8 April 2019, was for \$2381.18 cash. It was drawn on ICI's account with Bank of South Pacific. It was authorised by the acting permanent head,

Felix Matapuku. The co-signatories were Mrs Puna and another authorised officer, Solomona Solomona.

[27] The Crown's case is that Mrs Puna was in New Zealand in her private capacity, on bereavement and compassionate leave and paid accordingly. As she well knew, her accommodation payment was not authorised, and was inconsistent with, government policy governing international travel. Mr Matapuku acted under her direction, and she co-signed the cheque. All four elements of the offence are established

[28] Mrs Puna denies any offence. She says the decision was not hers. It was taken by Felix Matapuku, acting on his own initiative, as acting permanent head, and that is why on her return she endorsed with thanks his memorandum to staff on the issue.

[29] Once she returned, Mrs Puna says, she thought it right to keep the payment, after discussing that with Mr Matapuku, because her ICI work extended throughout her three weeks in New Zealand.

[30] Mrs Puna's evidence is also that, during her three weeks in New Zealand, the last two at her deceased father's house, she worked continuously on ICI matters, now only able to be outlined because of a government website outage and data loss:

- (a) She responded on ICI budget issues, to finalise the ICI business plan.
- (b) She helped Mr Matapuku prepare a ministerial brief on the single plastic ban policy.
- (c) She prepared a power point for select committee public meetings on the Infrastructure Bill.
- (d) She responded on issues relevant to the regulations to underpin that Bill.

[31] Against that background, I now set out the Crown's primary evidence and after that my conclusions.

Primary evidence

[32] On Friday, 5 April 2019, at 4.00pm, Mrs Puna received word that her father, who lived in Auckland, had died by drowning while out fishing on the Manukau Harbour.

[33] On Saturday, 6 April 2019, Mrs Puna made arrangements to leave for New Zealand, beginning with a 12:16pm text to Mr Matapuku:

Hey Felix you know of any cheap accommodation around Auckland airport or Mangere Bridge for 2 weeks?? Desperate and urgent pls ra.

7 guest 6 adult and 1 child age 7 for 7 nights starting Monday 8th.

[34] At about 2 pm that day Mrs Puna met her directors and at 3.03 pm sent an email to Russell Thomas, the Public Service Commissioner:

Please accept my sincere and humblest request to take time away from the office on Bereavement Leave. I will depart tomorrow Sunday 7 April ... back to work Tuesday 23 April ... while I'm away I will maintain contacts with the office on a daily basis.

[35] At 3.25 pm Mrs Puna emailed ICI staff:

I write to inform you all that I will be away from the office for 2 weeks and travelling to Auckland for my biological dad's funeral ... Felix will be your acting secretary

[36] At 4.07 pm Mr Matapuku texted Mrs Puna:

Hi Diane, I've just spoken to Pehau and she said: 1) she will coordinate with you this arvo the Bank Chq signature Authorisation form to be signed by you. She said she'll bring hard copy form. 2) Once your accommodation is finalised and booked to raise an invoice and the office will cover first thing Monday morning. Cheers.

[37] At 4.09 pm Mrs Puna replied, 'Can I leave Greenlan[e] accommodation to you to sort pls.' At 5.04 pm Pehau Browne texted Mrs Puna, 'am I able to come home for you to sign 5 checks for us to sort nz accommodation, 500 donation for you e[tc].'

[38] On Sunday, 7 April 2019, Mrs Puna wrote a letter appointing Mr Matapuku the acting ICI Secretary; and that day she, Mr Puna, and their family, flew to New Zealand at 3:00 pm, arriving on 8 April (NZT).

[39] At 4.21 pm (CIT) that day Mr Matapuku and Mrs Puna received an Airbnb receipt for the accommodation booking. And at 4.34 pm Mr Matapuku texted Mrs Puna, 'I will arrange reimbursement with Pehau tomorrow.'

[40] On Monday, 8 April 2019 (CIT), Mr Matapuku, in a memorandum to staff, explained that he was acting Secretary, and why that was:

On Saturday 6th April 2019, our HOM called an urgent meeting for all HOD's in which I attended. It was at this meeting at 2pm that we were told of the sad news of the passing away of Diane's dad in New Zealand. It was also at this meeting that Diane appointed myself as Acting Secretary as she and her family were leaving for New Zealand the next day ...

[41] Mr Matapuku went on to say: 'I met with my Finance Manager to discuss the financial parameters and policy, if any, regarding committing funds towards bereavement affecting a staff member'; and that 'after some careful consideration' he decided on seven night's accommodation and a \$500 donation.

[42] The payment voucher, dated 8 April 2019, prepared by ICI officer, Monica Wichman, was correspondingly explicit:

'Payment for reimbursement of HOMs accommodation in NZ for 7 days for family bereavement and ICI Donation towards bereavement'.

There was a related purchase order, dated 8 April 2019, prepared by Pehau Browne another ICI officer.

[43] The ICI cheque used to make the payment was one of the five Mrs Puna had signed in blank before she left. It was countersigned by Solomona Solomona, one of the three other authorised signatories.

[44] At 11.21 am, Mr Matapuku texted Mrs Puna, '... just confirming reimbursement for your accommodation \$2381.28 has been deposited into Nga's BCI account this morning.' The Puna payment reimbursed was made by MasterCard at 2.11 pm that day.

[45] On her return to Rarotonga, after first travelling to the Northern Group for select committee hearings on the Infrastructure Bill, Mrs Puna made this note on Mr Matapuku's staff memorandum:

This is to confirm this assistance was received into my husband's debit card to make payment to this accommodation costs. Unexpected support and very grateful for this. My late father 3 bedroom house, were packed with family members and having a place to rest during the time was appreciated. Thank you, Felix.

Conclusions

[46] There is, and can be, no issue that this ICI cheque was capable of, and did, confer on Mrs Puna a pecuniary advantage. It met the cost of her first seven days accommodation in Auckland, independently of her father's house, while she was attending his funeral.

[47] The fact that, as Mrs Puna accepts, she co-signed that cheque is also capable of supporting the inference she 'used or procured the use of' the cheque to obtain that advantage. It is not, standing alone, sufficient to support that inference. It needed first to be authorised, completed and co-signed.

[48] On Saturday, 6 April, Mrs Puna did ask Mr Matapuku about where to stay in Auckland and on the Sunday, before she and her family flew out, and she did ask him to make that booking. He used her MasterCard, or Mr Puna's, and told her she would be reimbursed, so it is clear she knew what was to happen.

[49] The fact remains that on Monday, 8 April (CIT), when Mrs Puna was in Auckland with her family, Mr Matapuku, in his memorandum to staff as acting secretary, assumed responsibility for the payment after, as he said, speaking with the ICI finance manager.

[50] Mr Matapuku's decision may be open to question under the statutes and protocols applying. But it was a decision he made openly. And there is nothing to suggest he took it in bad faith, or made it on Mrs Puna's direction. Or that either of them then knew it was plainly unauthorised.

[51] This decision was one of an array taken at short notice, after Mrs Puna had just learnt of her father's tragic death, and had to extract herself from her pressing responsibilities as permanent head to travel rapidly to New Zealand.

[52] In Auckland Mrs Puna needed not just to house her family, when wider family were in her father's house. As she saw it, she had also to free herself to work. And I have no reason to doubt that, during those three weeks in New Zealand, she did the work she speaks of.

[53] In Mrs Puna's mind, she says, that justified her retaining the payment, once she returned from the Northern group, after her return from New Zealand. The Crown contends her endorsement on Mr Matapuku's staff memorandum was self-serving. But that is not self-evident.

[54] The Crown has not proved beyond reasonable doubt, that Mrs Puna co-signed the cheque to use it, or procure its use, for her own advantage. Nor that she did so dishonestly, without any honest if mistaken belief in her right to the payment. I dismiss this first charge.

CLUSTER 2: JULY 2019

Charges 1-3, 6-8

[55] These six charges allege three joint offences by Mrs Puna and Mr Tapaitau, two on 16 July and one on 18 July 2019: the fraudulent use, or procured use of, three cheques to finance Mr Tapaitau's personal travel to New Zealand.

[56] Two of the cheques, dated 15 July 2019, and drawn on ICI's BSP account, were made out to cash. One was to pay for Mr Tapaitau's New Zealand accommodation (\$836), the other his car rental (\$288). Both were authorised and signed by Mrs Puna, and co-signed by Mr Matapuku.

[57] The third cheque, also dated 15 July 2019, was made out to Air New Zealand to secure Mr Tapaitau's flights (and those of his wife). It was for \$2330. Here too Mrs Puna authorised and signed the cheque. Mr Matapuku co-signed it.

[58] The Crown's case is that, as to the three cheques issued, Mr Tapaitau and Mrs Puna are each principal offenders: he procured their fraudulent use for his pecuniary advantage, and she enabled their fraudulent use for that purpose.

[59] Mr Tapaitau and Mrs Puna deny any offence. Mr Tapaitau, they say, needed to travel to Auckland to meet Matson Line executives to ensure a bitumen truck, long delayed, was shipped immediately and not taken off the manifest at the eleventh hour. And that meeting did take place. His uncle's funeral was incidental; and the Prime Minister, in his evidence, considered that normal and acceptable.

[60] The Crown's case is that the Matson meeting served no purpose and merely masked Mr Tapaitau's real purpose, to attend his uncle's funeral. This was not, and never approved as, ministerial travel. It was personal travel he had to pay for himself, but had paid under a pretext by ICI; a fact Mrs Puna confirmed in text messages to his secretary when the bookings were made.

[61] I now set out the evidence on which the Crown relies to support the inferences the defendants deny; and after that my conclusions.

Primary evidence

[62] The immediate narrative, on which the Crown's case hinges, begins on 13 July 2019 with a Facebook post stating that Mr Tapaitau's uncle had died in New Zealand.

[63] On a 14 July 2019, between 7.10 - 8.13 pm Mr Tapaitau and Mrs Puna exchanged texts concerning an imminent flight booking. He asked whether it would be 'business or deluxe' to which she replied 'premium economy'. And she asked and commented:

Is your ministerial support office paying for Meli? I'm not able to do this through ICI! I can cover yours and use bitumen truck as our justification.

[64] At 10.09 pm Mrs Puna a text to Frances Valoa, Mr Tapaitau's administrative assistant, between 10.23-25 pm, said this:

Girl between you and I the real reason is that an uncle of his passed away and he wants to go over I told him to pay his own fare he said he got no money ... so I'm creating a flight to NZ for him ... Trip for our bitumen truck ... Maki tikai

[65] On 16 July 2019, at 10.12 am, in a further text to Ms Valoa, Mrs Puna said:

Girl for your information only This is a private trip not work He's going for a funeral This is so wrong

[66] Shortly after, Mrs Puna texted: 'I will let him know we can't afford DSA.' And, 'Also to remind him this is a Personal Trip.' And, 'I'm talking to the ombudsman office because I need to be protected.'

[67] On 15 July 2019, at 8:59 am, between these exchanges, Mrs Puna, in an email to Mr Matapuku and two other ICI officers, asked they give priority to Mr Tapaitau's travel:

Please prioritise this request this morning ... Our Minister have requested for a short trip to Auckland departing tomorrow ... The purpose of this trip is to follow up on our bitumen track in transit to Auckland (I hope) and to work with MATSON agent to ensure the truck [is] on the next available scheduled flight across to Rarotonga. Also on this trip, the Minister will be visiting the Culvert, Box Culvert and Pipe suppliers, these are in transit and MATSON also handling these materials on our behalf ...

[68] On 16 July 2019 Mr Tapaitau flew to Auckland, Air New Zealand business class, and returned to Rarotonga on 20 July 2019. (Mrs Tapaitau accompanied him, and he later reimbursed ICI her fare.) On 18 July 2019 (NZ) he lunched at Villa Maria with a Matson executive, Greg Chiu.

[69] On that date the bitumen truck was still with the manufacturer in Palmerston North, complete, but awaiting a safety certificate. On 29 July 2019 it was transported to Auckland, scheduled to leave for Rarotonga on a Matson vessel shortly after. Bad weather caused delay, and it arrived in Rarotonga on 15 August 2019.

Conclusions

[70] It is not in issue, and is incontestable, that the three NES cheques were documents capable of use for a pecuniary advantage: Mr Tapaitau's flights to and from New Zealand (and those of his wife); and their accommodation and car rental costs.

[71] It is not in issue, and is incontestable, that in authorising the issue of those cheques Mrs Puna used them or procured their use, in the sense that she enabled their use in order to create those pecuniary advantages for Mr Tapaitau's benefit.

[72] It may be contested but is incontestable, that even though he did not have a direct hand in their issue and in that sense 'use' them, in law that is not essential. It will suffice if, to travel to New Zealand, as he wished, he procured their issue through Mrs Puna; an inference plainly open on his initial text exchange with her.

[73] It is contested, but is incontestable so far as Mrs Puna is concerned, that she was aware that any need to travel to New Zealand to ensure prompt delivery of the bitumen truck was her fiction. Her exchange with Ms Valoa speaks for itself.

[74] Mrs Puna contends this exchange is not to be taken literally. Ms Valoa, she says, was suspected of leaking ministerial information, and she wanted to flush that out. I do not accept that evidence.

[75] To begin with that would have been a very high risk strategy. The last thing Mrs Puna and Mr Tapaitau would have wished to see in the public arena was any rumour she and he were acting corruptly.

[76] But that apart, it is inconsistent with Mrs Puna's text exchange with Mr Tapaitau very shortly before, in which she said that to have ICI cover his travel costs she would 'use [the] bitumen truck as our justification'.

[77] I find, therefore, that Mrs Puna is fixed with her admissions to Ms Valoa and that, subject to any contrary wider evidence, they fix her with fraudulent intent when she authorised and co-signed the three ICI cheques in question.

[78] Mr Tapaitau was not privy to that text exchange but, as I held in my first ruling it is admissible against him under the common law exception to the hearsay rule where there is a joint enterprise. In his case, however, there is even greater need to test it against the wider evidence.

[79] That evidence begins with the very fact that Mr Tapaitau looked to ICI to arrange and finance his travel. Ministerial travel is governed by statute and protocol. It calls for approval. Why then did Mr Tapaitau look to Mrs Puna?

[80] Mr Tapaitau's case is that his need to meet Matson executives in New Zealand, to ensure the bitumen truck was dispatched without further delay, was so urgent he looked to ICI out of necessity. But that is implausible.

[81] To begin with that is at least open to question on his initial text exchange with Mrs Puna in which she described the bitumen track as 'our justification' for the ICI expenditure she was to authorise.

[82] It is also telling that, on his return, he reimbursed ICI his wife's airfare, accepting Mrs Puna's logic - that his trip could be justified as ICI ministerial travel relating to the bitumen truck. His wife's could not.

[83] More basically, Mr Tapaitau's stated need to meet Matson executives face to face is implausible. If his need was so urgent, why did he not engage with them by A/V Link? What more could he accomplish at a face-to-face meeting?

[84] That apart, his bookings were made before his meeting was arranged; not, as one might have expected, the other way around. And the meeting, itself, was inconsequential.

[85] Matson executives did value meetings with Mr Tapaitau, and he with them. But nothing of consequence was discussed at this lunchtime meeting at the Villa Maria restaurant; certainly nothing concerning the bitumen truck. And that is unsurprising

[86] The bitumen truck was urgently needed, and manufacture in Palmerston North had been long delayed. Earlier in the year Mr Tapaitau had visited the supplier to check progress, and that was then entirely justifiable.

[87] At that earlier meeting, as Mr Tapaitau then confirmed, however, the interests of the Cook Islands government were in the safe hands of the Crown Solicitor, Palmerston North, and a private investigator who was active and efficient.

[88] Mr Tapaitau had predicted in Parliament the truck would be delivered on an unattainable date. And by the Matson meeting, as ICI officers responsible knew, the truck was complete, soon to be dispatched to Auckland, and securely booked for prompt shipping. All that delayed it was the weather.

[89] Those officers did not at the time look for any greater assurances from Matson; or raise that as a concern within ICI. Why then did Mr Tapaitau, who did not consult them, begin to see this as an issue? Why did he not pursue it at the Matson lunch meeting?

[90] Of no less concern has to be that Mr Tapaitau made no attempt in evidence to account for the balance of his three days in New Zealand. He did not suggest any attempt to visit the pipe and culvert manufacturers, to whom Mrs Puna referred.

[91] I conclude that Mrs Puna told Ms Valoa the literal truth. Mr Tapaitau wanted to travel to New Zealand for his uncle's funeral. He did not have the money and, at his behest, Mrs Puna had ICI meet his travel costs on the bitumen truck fiction.

[92] I find they were each fraudulent in procuring the 'use' of the three cheques, the subject of the charges in this cluster; and neither acted under any honest, if mistaken, belief as to Mr Tapaitau's entitlement.

CLUSTER 3: JULY, SEPTEMBER 2019

Charges 4, 9, 10, 15

[93] The first of these charges alleges Mrs Puna fraudulently used an ICI cheque (\$3035) to pay for a family holiday at the Edgewater Resort on 5-8 July 2019, and she has admitted it.

[94] The second charge alleges all three defendants conspired fraudulently in September 2019, when Mrs Puna was under investigation, to characterise that family stay as a management retreat involving all three.

[95] The Crown case is that all text exchanges between the three, culminating in a letter from Mr Tapaitau to the Prime Minister asserting he had authorised the retreat, served a single unlawful purpose.

[96] That purpose, the Crown contends, was to justify the ICI Edgewater funding, to negate any charge of theft against Mrs Puna, and to have her reinstated. And in that they succeeded, until the police reinvestigation.

[97] Mrs Puna has admitted that second offence as well. Mr Tapaitau and Mr Puna deny it and put the Crown to proof. To sustain it, and Mrs Puna's plea and conviction, the Crown must sustain it against Mr Tapaitau, or Mr Puna, if not both. It takes at least two to conspire.

[98] The evidence is in three parts: (i) the agreed facts as to Mrs Puna's admitted offending; (ii) the salient text exchanges I have held admissible against all three; (iii) two documents: a Mrs Puna -Tapaitau memorandum and a letter from Mr Tapaitau to the Prime Minister written by Mr Puna.

Agreed facts

[99] The facts agreed, which concern 'Ms Charlie-Puna's offending in July and September 2019', are as follows:

From 5 July to 8 July 2019 Ms Charlie-Puna, Mr Puna and some of their children stayed at Edgewater Resort to celebrate Ms Charlie-Puna's birthday.

There was no such retreat and Ms Charlie-Puna did not work during the stay.

Ms Charlie-Puna accordingly stole \$3035 worth of Crown property while she was employed by ICI and so committed the crime of 'theft as a servant'.

Ms Charlie-Puna pleaded guilty to, and was convicted of, this 'theft as a servant' on 1 June 2023.

In September 2019 the Public Service Commission began investigating Ms Charlie-Puna's theft and Ms Charlie-Puna was stood down.

Ms Charlie-Puna, in a conspiracy with at least one other person, took steps to represent there was an ICI management retreat at Edgewater in July 2019 and the costs were legitimately met – she was involved in sending a letter to the Prime Minister falsely stating that; and she made false statements to that effect to the Public Service Commission.

The conspiracy aimed to ensure Ms Charlie-Puna suffered no consequence for her theft of ICI funds.

Ms Charlie-Puna pleaded guilty to, and was convicted of, this 'conspiracy to defraud' on 1 June 2023.

Text exchanges

[100] The text exchanges on which the Crown relies commence on 9 September 2019, the date on which Mrs Puna was suspended by the Public Service Commission.

[101] There was first this exchange between Mrs Puna (DP) and Mr Puna (NP):

14:32 NP: Stick to retreat. Nothing wrong with family joining you.

14:33 DP: Like you did for Master's degree. Thinking space.

14:40 DP: Baby someone at Edgewater release infor on us.

14:43 DP: Do I tell Rob?

14:44 NP: Ae.

14:44 NP: He needs to endorse it.

14:44 NP: He requested it.

14:44 NP: Ring him now.

[102] Mrs Puna texted Mr Tapaitau (RT) asking to speak, and he agreed. Then, just as immediately, Mr Puna sent Mrs Puna these two texts:

14:45 NP: Tell him truth but he needs to be in the other room. Basically time away from wirj (sic) to discuss projects etc.

14:46 NP: And at the last minute pulled out for personal reasons.

[103] In the next half hour or so Mrs Puna sent Mr Puna these further texts:

14:52 OK spoken to rob he was in the other room!

14:55 What day did we check in

15:01 5 July rob is on board.

15:19 Rob said he was there with us.

[104] Later in the afternoon Mrs Puna and Mr Tapaitau exchanged their first related texts:

16:17 DP: Sorry, I can't talk right now.

16:18 DP: Russell here to announce to my team of my suspension.

16:18 RT: On my way.

16:19 DP: OK come pls.

16:19 DP: Just come straight in.

[105] That evening they texted each other again:

20:25 DP: Mate Mark Ford was also part of this retreat to talk projects not stay though lunch.

20:26 RT: Okay mate.

20:26 RT: Can you please send me Mark Ford CV resume please.

[106] Then there was this further exchange:

21:39 DP: I have emailed you marks CV.

21:40 RT: Okay mate thank you.

21:41 DP: I'm not going to let you down and won't resign over this! Thank you for your support.

[107] On 10 September 2019 Mr and Mrs Puna exchanged texts about an apparently related letter, which Mr Puna was drafting and Mrs Puna wished to see before it was sent.

[108] On 11 September Mrs Puna asked Mr Tapaitau if she could come to his office to finalise the letter and asked Mr Puna to send it to her. She also confirmed with Mr Tapaitau she could use his laptop.

[109] On 13 September 2019, in a 14:15 text to Mr Puna, she said, 'I'm working on my memo for the discussion', as to which she is more explicit to Mr Tapaitau on 18 September. And on 16 September 2019, in a 10:48 text to Mr Tapaitau,, said:

'Hey Mate Russell only want to confirm that you and mark worked at Edgewater that weekend by asking you both then shut it down. Mark is aware. Will be in touch.

A more extensive exchange as to the extent of the Public Service Commission investigation took place later in the day.

[110] On 18 September 2019 Mrs Puna and Mr Tapaitau went into greater detail as to the July weekend:

15:59 DP: Hey Mate Psc wants to confirm details with you. Your room number was 2008 us in 2009 all charges for the weekend to 2009! Few breakfast charges x 3 on 20 ... (your room) by our girls but I made sure all charges for the weekend was on my room 2009! This is beyond ridiculous but psc wanting to go this far. Edgewater will not release any information to them again!

16:18 RT: Where did you get this information that PSC want this information? And the breakfast for x 3 was the invoice signed? For room 2008

16:34 RT: Hey mate the invoice that Russell showed you that Kiana signed what was that for

16:35 DP: Breakfast

16:36 RT: was it for breakfast or lunch? Just trying to see if PSC is setting a trap.

[111] Other such texts followed and then on 18 September 2019 Mrs Puna sent Mr Tapaitau two further texts, which are especially in point:

17:18 DP: Yes I'm writing up the accounts of that weekend so we both have same story if need be. I can just imagine that girl [] shaking when she talks to yo

18:17 DP: Just emailed you! Open word doc first page what happened that weekend Second Page discussion points: work talk held that weekend. You have any question ... pls ask away. Mark is aware of his involvement Saturday Island night dinner and Sunday lunch after church!

In texts which followed shortly after Mr Tapaitau confirmed he had received the memorandum.

[112] On 19 September 2019, in a 13:34 text Mr Tapaitau told Mrs Puna he understood 'Russell said they will interview me on Monday if all good you will be pl@ reinstated by the end of next week'; and then there was this exchange:

13:48 DP: did you go through doc I emailed you? What do you think?

14:01 RT: ... Yes went through your email let make work my magic and see how they ... go, hope they can withstand what they are about to get ...

[113] Other related texts follow. These appear to be the salient texts, which supply a context to the two documents to which I now refer.

Memo and letter

[114] Mrs Puna's four page memo to Mr Tapaitau, discovered on his laptop, is titled 'Discussion Records of Meetings held with Min Tapaitau (these talking points were noted in my personal diary as I was preparing myself)'.

[115] The first three and a half pages record topics discussed over lunch and during the night on Saturday, 6 July 2019, with comments attributed to him, and end with detailed action points. The remaining one and a half pages, to the same scheme, concern discussions at lunch and during the evening on Sunday, 7 July 2019.

[116] Mr Tapaitau had this memo when interviewed by the Public Service Commission; and adhered to its logic in the letter, which the texts between Mr and Mrs Puna refer to - a letter to the Prime Minister, as Minister of the Office of the Public Service Commission, dated 9 September 2019.⁹

[117] The subject of that letter was, as Mr Tapaitau begins by saying, 'a serious matter, allegations made against my HOM [Mrs Puna] for the management retreat weekend of the 5th of July 2019, at the Edgewater Resort'.

[118] Mr Tapaitau first explained that the retreat was necessary because work, and travel, had made it impossible for them to meet 'to discuss project plans and to brainstorm our capital programming'; and thus, he said:

Without going into further details, the weekend was at my request and I fully endorsed [it]... I normally never interfered with my HOM's family time, weekend, but time wasn't on my side, additionally, a longer Uri Ariki Day was looming. Hence the retreat at the Edgewater Resort which her children popped

⁹ 9 September 2019, the date of this letter, is the date on which Mrs Puna was suspended and the text traffic suggests it was devised after that date, during the PSC investigation. I have not identified why the two coincide.

in[to] during the day and evenings would allow us to relax and talk business during this weekend.

[119] ‘An added bonus’, Mr Tapaitau said, was that his other portfolio HOM, Mr Puna, who also had ‘a very busy schedule ahead’, was there to discuss the NES programme. And, Mr Tapaitau added ‘I can confirm that during this weekend the children of my HOM’s joined us for lunch and dinner.’

[120] The Prime Minister acceded to Mr Tapaitau’s request that the investigation stop immediately, and Mrs Puna be reinstated. In a letter to the Commissioner, dated 11 September 2019, attaching Mr Tapaitau’s letter, he said this:

Subject to your views, I take it that the Minister’s letter goes a long way towards addressing all concerns over this incident. If you concur, then Ms Diane should be reinstated immediately and to be allowed to resume normal duties without any penalty or endorsement on her employment record.

There is one lesson that we can all take away from this incident. Anyone accused of any wrongdoing should and must be given ample opportunity to defend himself/herself against the allegations or complaint before any disciplinary action is taken against him or her. This is a basic requirement of natural justice.

Perhaps in addition to reinstatement, an apology is also warranted in this case.

[121] Mrs Puna thus resumed and retained her position as ICI Secretary until she was dismissed two years later as a result of the police investigation; the subject of this trial.

Conclusions

[122] It is admitted that on 5- 8 July 2019 the Puna family stayed at the Edgewater Resort to celebrate Mrs Puna’s birthday at a cost, \$3035, met by ICI cheque.

[123] It is admitted that, having been suspended and investigated by the PSC two months later, Mrs Puna was reinstated, as the result of the letter from Mr Tapaitau to the Prime Minister, dated 9 September 2019.

[124] It is admitted, or uncontested, that this letter fraudulently asserted a lie - that the weekend was a management retreat for Mr Tapaitau and his ICI and NES permanent heads, Mrs and Mr Puna.

[125] It is incontestable from the preceding text traffic that on the day she was suspended Mr and Mrs Puna devised this lie and recruited Mr Tapaitau to endorse and advance it. It is equally incontestable he was more than willing to do so.

[126] Mrs Puna admitted she briefed Mr Tapaitau in detail as to the form their fictional management retreat took; and, as he confirmed, he read her memorandum. He must have relied on it when questioned himself. It was found on his laptop.

[127] Mr Puna, I am satisfied equally, despite his denial, drafted Mr Tapaitau's letter to the Prime Minister asserting their shared lie. That is foreshadowed in Mrs Puna's text exchanges with him. A form of the letter was found on his mobile phone. He later ensured the letter was on the right letter head.

[128] In short, I am satisfied that the September 2019 agreement in the text traffic to conceal Mrs Puna's July 2019 Edgewater offence, to which she herself has admitted, is a fraudulent conspiracy for which Mr Puna and Mr Tapaitau are equally answerable.

[129] As against both Mr Tapaitau and Mr Puna, I find the charged proved, thus sustaining Mrs Puna's related plea and conviction.

CLUSTER 4: DECEMBER 2019 – JANUARY 2020

Charges 19, 20

[130] These two charges allege two offences on Mr Puna's part in December 2019: fraudulently using, or procuring the use of, two NES cheques to benefit himself or others.

[131] The first NES cheque for \$5100, dated 19 December 2019, made out to cash, was to pay for accommodation and a daily allowance for a 17 day trip to Aitutaki between 20 December – 6 January 2020. His alleged misuse is as to \$4500.

[132] The second NES cheque for \$3400, also dated 19 December 2019, made out to Rino's Restaurant, Aitutaki, according to the cheque butt, was to meet the

accommodation cost of Crown counsel, Alex Herman. His alleged misuse is as to \$2200.

[133] Mr Puna authorised the first cheque and was a co-signatory. Who signed the second is unknowable because it cannot be traced. It was authorised by the NES senior finance officer, Ms Kamana. Mr Puna's personal assistant, Ms Scheel, was also instrumental.

Entitlement issue

[134] The Crown's case is that Mr Puna authorised the first cheque, and obtained the second, on the basis that his 17 day trip to Aitutaki was required to undertake NES work and that Ms Herman was required there for that purpose.

[135] In fact, the Crown's case is, on 20 December 2019 Mr Puna's family travelled to Aitutaki to be with their wider family for the festive season. Mr Puna did no more than two days' work, and Ms Herman was there for no more than 5-6 days.

[136] Mr Puna denies any offence. He contends he had work to be done on Aitutaki. He also did other NES work. He also took leave due to him. As NES director he had the right to authorise both payments under cl 1.5.1 of the MFEM financial policy manual.

[137] If he did not have that entitlement, Mr Puna says, however mistaken he may have been, he honestly believed he did have that entitlement. He did not act with fraudulent intent.

[138] I must then first review Mr Puna's spending authority as agency head, set against his employment contract entitlement and the Government's official travel policy.

Spending authority

[139] Clause 1.5.1, ‘Authority Levels’, lies within the Government’s ‘Purchase and Sale of Goods and Services Policy (Procurement Policy)’, approved on 4 October 2016.¹⁰

[140] This policy applies to every government agency - ‘all Ministries, Crown Funded Agencies and State Owned Enterprises’. It applies to NES and Mr Puna is entitled, as he does, to invoke it.

[141] Clause 1.5.1, as it says itself, is a table, which ‘sets out who may authorise spending for a particular purpose’; and Mr Puna relies on the authority it then gave him, as head of agency, to authorise NES purchases ‘up to \$30,000’.

[142] That authority must, however, be set against the policy as a whole (and any other cognate policies), beginning with its purpose:¹¹

to ensure that the Crown conducts all sales and purchases in a uniform manner which is open, transparent and provides value for money for the Crown.

[143] That authority must also be set against the duty, imposed on all agency staff, to:¹²

observe the highest standard of ethics...including good governance, accountability and transparency in accordance with standards of fiscal responsibility as required by the MFEM Act.

[144] Highly pertinently, the policy imposes a specific duty relevant in this context:¹³

Any payments to the head of agency must be countersigned by the senior finance officer and where possible another manager. A copy of this approved invoice must be kept on a separate file and be available to Audit.

[145] It is also notable that amongst the practices the policy defines as antithetical is any ‘fraudulent practice’:

¹⁰ Ministry of Finance and Economic Management Act 1995- 96, s 63, which empowers MFEM, as this policy says in para 1.1.1 ‘to issue instructions to ministries and line agencies to ensure compliance with financial disciplines’.

¹¹ Purchase and Sale of Goods and Services Policy (Procurement Policy), para 1.3.1

¹² Ibid, para 1.11.1.

¹³ Ibid, para 1.6.5.

Any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.

Employment contract

[146] To underpin his asserted right Mr Puna relies here, as he does elsewhere, on his contract of appointment with Mr Tapaitau, as Minister, ostensibly dated 4 March 2019, specifying amongst other things his ‘remuneration and allowances’.¹⁴

[147] There is no independently verifiable version of this contract, which Mr Puna drafted. Mr Tapaitau recalled signing only once. But a number of versions have been retrieved from Mr Puna’s computer, some ostensibly signed, some not. Mr Puna redrafted critical aspects over time, as he said, to clarify it for audit purposes; it was an ‘ongoing project’. That is disingenuous.

[148] Mr Puna redrafted critical aspects over time, as he said, to clarify it for audit purposes; it was an ‘ongoing project’. That is disingenuous.

[149] A feature of Mr Puna’s retrieved contract in its various versions is that each party, he and the Minister, was to witness the signature of the other. That enabled Mr Puna to revise the contract as extensively as he did, whenever he chose.

[150] Mr Tapaitau said he relied on and trusted Mr Puna and signed whatever Mr Puna put in front of him without ever reading it. Mr Puna also had access to Mr Tapaitau’s electronic signature; and, for that matter, to his ministerial letterheads.

[151] As a result, Mr Puna was able to take advantage under cl 4 of his contract, always ostensibly dated 4 March 2019, declaring that it ‘superseded and replaced’ ‘any prior contract, agreement or arrangement’.

[152] More pertinently, he was able to bypass cl 3, which imposed this fundamental constraint:

¹⁴ Environment Act 2003, s 7.

This Contract may be varied at any time by mutual agreement in writing between the Parties including an extension of this Contract either during or at the end of this Contract.

[153] This term, correctly reflecting a basic tenet of contract law, required any variation to be set out in a further specific contract. It meant that any variation could only be of future effect, unless expressed to have retrospective effect.

[154] By altering his contract, without varying it by further contract with Mr Tapaitau, Mr Puna bypassed both. His contract, ostensibly always as it was originally, became whatever he wanted it to be. He could assume whatever entitlements he wanted, or had assumed.

[155] The earliest retrieved signed version, last modified on 16 September 2019, differs materially from the last, created on 23 March 2021, which Mr Puna sent to the MFEM auditor that day, as if expressive of his rights since 4 March 2019.

[156] Between the two there was at least one other, created on 26 September 2019 and last modified on 21 March 2021. And within the life of each Mr Puna might have varied more frequently.

[157] None of these unilateral variations to Mr Puna's original contract, whatever its terms, could have any effect under his contract. All were ineffectual. All were fraudulent.

Contract authenticity

[158] I am very hesitant, then, to accept even the earliest signed version retrieved, especially once it is set against its context, beginning ostensibly with the Minister's letter to Mr Puna, dated 21 February 2019.

[159] This letter, headed 'Director of National Environment Services - Job Offer and Terms of Agreement', which Mr Puna drafted, says this:

It gives me great pleasure to offer you the position of Director of National Environment Services. This letter outlines the offer which you and I have discussed and considered through negotiations in the past few weeks. The following are the main terms of our agreement and my offer to you.

- Position: Director of National Environment Services.
- Effective: 4th of March 2019
- Term: 3 years.
- Remuneration package:
 - Base salary: \$130,000.00 per annum
 - Base salary - Plus additional benefits (on top of Base Salary):
 - \$5000.00 (after tax). Your student loan obligations to be paid in March every year until contract finishes as director commencing this year 2019.
 - \$250.00 per week (after tax) for housing allowance. For an Outer Islander living in Rarotonga with no home and paying rental accommodation.

Your leave entitlements will be 20 days annual leave and 10 days sick leave per financial year, other leave entitlements as per the Government Leave Policy. Superannuation payments will be made on your behalf in accordance with the Cook Islands National Superannuation Fund Scheme. PAYE will be deducted on your behalf.

Congratulations on your new appointment/position. I look forward to working closely with you in your new role and to deliver the objectives of my Portfolio in the national environment services through team work and excellent service delivery to our people.

[160] At the end, under the heading ‘Offer Acceptance’, Mr Puna endorsed it: ‘I, Nga Puna accept this letter of offer and terms of the agreement’; and signed it, ostensibly, on 21 February 2023.

[161] There then followed the Minister’s Cabinet memorandum, dated 7 March 2019, under the heading, ‘Recommendation for Director of the National Environment Service:

Preamble

The appointment of the Director of the National Environment Service is mandated by s. 7 of the Environment Act 2003 (‘the Act’). The Act provides that the Minister from time to time, with the concurrence of Cabinet, appoint a Director as head of the service.

The Recruitment Panel’s report was tabled with the Minister in December 2018. The Minister of the National Environment Service advised the Public Service Commissioner on Tuesday 26 February, 26 February 2019 that he had recommended Mr Nga Puna to the position of Director of the Service.

Proposal

It is being proposed that Cabinet:

1. Consider and approve the appointment of Mr Nga Puna to the position of Director of the National Environment Service for a term of 3 years effective as at 4 March 2019 to 3 March 2022.
2. Consider and approve the remuneration of \$130,000 p.a. And use by the Appointee of a Government vehicle as governed by the Cook Islands Vehicle Policy.

Policy Description

On 27th October 2018, the position of the Director of the National Environment Service was advertised. A Recruitment Panel chaired by the Public Service Commissioner and comprising representatives from the private sector, interviewed two of the five applicants for this position on 3 December 2018 and made a recommendation to the Minister for his consideration. Shortlisting was undertaken using a desk top analysis from the applications and CVs received.

Nga Puna Is currently serving in the role of chief executive officer for Minister Tapaitau's Office. He was previously a Policy Adviser at Infrastructure Cook Islands and also served as the Principal of a primary school in Aitutaki. Prior to that, he also served as the Head of the Maths Department at Tereora College. Puna has a Bachelor of Arts from Auckland University and a Master of Business Administration from the University of the South Pacific. Puna is fluent in both Cook Islands Maori and English which will serve him well particularly for our communities in the Pa Ennui. He is familiar with government processes and systems and is innovative in thinking and action oriented. It was determined that Puna's extensive experience and expertise would prove valuable and suitable for this role.

....

Recommendation

It is being proposed that Cabinet:

1. Consider and approve the appointment of Mr Nga Puna to the position of director of the National environment service for a term of 3 years effective as at 4 March 2019 to 3 March 2022.
2. Consider and approve the remuneration of \$130,000 and use by the Appointee of a Government vehicle as governed by the Cook Islands Government Vehicle Policy.

[162] On 12 March 2019, the Acting Secretary, Cabinet Services, issued a Cabinet minute, which 'approved' Mr Puna's three year appointment, Cabinet having 'considered' the remuneration just described.

[163] The Minister's letter to Mr Puna, offering him the Director's position, dated 21 February 2019, and his Cabinet memorandum, dated 7 March 2019, with which Cabinet concurred, differ materially.

[164] The letter offers two additional benefits over base salary, but does not refer to use of a government vehicle. The memorandum offers the use of a government vehicle, but does not refer to the benefits over base salary.

[165] These letters put in issue what terms, if any, Mr Tapaitau and Mr Puna ever agreed, and when; and whether they ever did; and whether indeed Mr Tapaitau just let Mr Puna write his own contract and ticked it, without knowing what was in it.

[166] These questions become even more insistent when, as here, the entitlement in question, which the earliest retrieved version of Mr Puna's contract confers, is materially expanded in the later versions.

[167] That apart, in this immediate context, the issue is also whether the benefits conferred were ever within Mr Tapaitau's power as Minister to agree to, if they went beyond the Government's official travel policy.

Contract entitlements

[168] In the earliest retrieved version Mr Puna's contract, that last modified on 16 September 2019, entitlements begin at cl 8 (b), conferring as an aspect of his remuneration:

... reimbursement of the actual and reasonable expenses incurred by the Director in the proper performance of the duties under this Contract, consistent with stated policies in expenditure.

[169] Secondly, cl 14 (a) entitled Mr Puna to represent NES locally, nationally and internationally 'on matters relating to the Cook Islands Environment'; and cl 14(b) stated:

The Director shall be entitled coverage of all travel costs including an Entertainment Allowance to be met by [NES] and or Funding Agencies as per its own guidelines to their respective request for representation. ...

[170] Thirdly, cl 2 of the second schedule, Remuneration and Benefits, restated that entitlement:

The Director shall be entitled to a payment of an Entertainment Allowance to host important Guests, including Ministers and Consultants. Additionally, a Travel Allowance including Transition/Stopover coverage and an Entertainment Allowance to host as budgeted under the Environment Service Operation Cost.

Other travel entitlements include Koru Membership; Premium Economy for all International Travels; And Business Class for long haul international travels of 5 hours or more, at the Director's discretion. These costs are met by the National Environment Service.

[171] The 23 March 2021 version of the contract, however, sent to the auditor that day, gave Mr Puna larger cl 2 benefits, adding to the first paragraph just set out:

... an Entertainment/Meeting Allowance of at least \$500 per meeting hosts, for networking/engagements/seeking leverage/ etc, as budgeted under the Environment Service Operation Cost or at the Directors discretion.

[172] The second paragraph just set out above was also augmented:

Additionally, motel/hotel/resort, accommodation of any type whilst on duty travel, has to be a minimum of 4 star or better, to ensure the safety and comfort of the director; if expenses are not borne by NES, then NES pays the difference in accommodation standards as per director's aforesaid minimum standards of accommodation.

[173] In assessing Mr Puna's entitlements, when travelling, to the extent they arise here, I take no account of these unilaterally assumed entitlements. I assess his entitlement within the Government's official travel policy.

Official Duty Travel Policy

[174] That policy, effective since June 2019, governs as it says:

Domestic and international travel undertaken by the employees of the Cook Islands Public Sector in their official capacity, as representatives of the Government.

[175] This policy, too, sets a high ethical standard. It identifies as the 'values for public servants to adhere to': honesty, impartiality, service, respect, transparency, accountability, efficiency and effectiveness. And it imposes this duty:

All international and domestic travel by Officials must reflect the prudent use of government and/or donor funding; they should be transparent, legitimate and able to withstand scrutiny.

[176] As to the question of authorisation the policy is specific:

All official travel, allowances and travel related matters must be approved by the employer prior to embarking on the travel. For the Head of Ministry (HOM), this includes seeking approval from the Minister. ...

Travel notification forms with required supporting documents must be submitted to the employer as soon as practically possible, no less than three days prior to travel.

Unauthorised official travel and amendments is prohibited. Any costs incurred from unauthorised travel will be borne by the official travelling.

[177] Official travel is also subject to limiting conditions, and the following are especially in point:

Official travel must fall within the scope of the agencies functions ...

All proposed travel must specify:

- The purpose of the travel – representation at training/meeting/...etc.
- The official travel or engagement, supported by an invitation, programme or official notice.
- Level of participation and any accompanying officials.
- Duration of meeting and travel time.
- Confirmation of funding - Cook Islands Government or Donor.
- Details of additional leave taken in conjunction with official travel, including copies of any leave application via the automated electronic system (ESS).
- Benefits to the country – ministry/agency and NSDP goals.
- Delegated authority during the Official's absence due to travel and the extent of that authority ...

[178] The policy prescribes daily allowances. It imposes on officials a duty to report in detail within five days of their return. It requires 'all records relating to the official travel process [to] be kept for at least seven years'.

[179] As these terms make plain, clause 1.5.1 did not confer on Mr Puna an unconditional discretion to authorise NES funding for whatever travel he chose. He had to comply, strictly and ethically, with this and any other cognate policy and procedure.

[180] It is against that high standard that the travel arrangements and funding in this instance are to be assessed; and I now turn to the primary evidence on which the Crown relies.

NES-Puna funding claims

[181] On Tuesday, 17 December 2019, at 1:33pm, Mr Puna sent the following email to Ms Scheel, his personal assistant, and Ms Kamana, the NES finance manager:¹⁵

Please process reimbursement for my return Work trip to Aitutaki.

This should come out of the Authority Administered payments as I will be doing some work with the AIE on the Regulations amongst other work for Aitutaki NES staff.

[182] On Wednesday, 18 December 2019, Mr Puna sent another email to Ms Kamana, and copy to Ms Scheel:

FYI, my trip to Aitutaki and the work I am doing there:

- Aitutaki Environment Authority (AEA) Regulations
 - Review and go through whole document
 - Alex Herman will then join me to finalise the item lines that should stay in the document and recommendations of what to remove.
 - Then I will need to do some consultation with the AEA members to finalise document before January AEA meeting.
- Develop GEF 7 Project Design for the \$6m allocated for the Cook Islands and preparations for the National Dialogue in January 20 – 23 2020
- New initiatives for the NES Budget 20/21 due in Jan 3rd 2020 – to MFEM Budget Team.

¹⁵ Mr Puna attached the Air Rarotonga confirmation number for his family's Aitutaki flights, an online booking, costing \$2443.50. made it seems by Mr Puna on 31 October 2019 and paid for the following day.

Please organise my accommodation and DSA to come out of the Authority Administered Payments. (waiting for accommodation invoice).

[183] On Thursday, 19 December 2019, at 8:43am, Ms Scheel emailed Mr Puna:

May I please have the invoice Rino's sent you so that I may process payment?
Would it be \$200 per night for 17 nights?

[184] At 10:54 Mr Puna confirmed her supposition:

So far as I am calculating:

- Accom: \$200/night for 17 nights = \$3400
- DSA: \$100/ night for 17 nights = \$1700

[185] On 19 December 2019 Ms Scheel prepared an NES requisition, drawing on the NES Project Aid Account, which was approved by Ms Kamana, as senior finance officer, and Mr Puna as director.

[186] This requisition authorised the issue of a cheque for \$5100 funded, as Ms Kamana might have suggested, from four project aid funds in equal parts (\$1275 each), on the following particulars:

Director's working holiday in Aitutaki (as per attached receipt/reports).

* Accommodation @ \$200/night \$3400

* DSA@ \$100/night \$1700

20 Dec - 6 Jan 2020 = 17 nights

[187] The cheque issued that day for \$5100 was drawn on the CIG-Tuanga Taporoporo-Project AID account. Ms Scheel cashed the cheque that day; and in the early afternoon she and Mr Puna confirmed this by text:

13:17 NP: Minister just rang me. Is my money ready for pick up. As I go home from there. Buzz me please.

13.39 RS: Money is all ready.

14:25 RS: I'm at Air Raro.

[188] Mr Puna's evidence was that he only received \$3900 of the \$5100 cashed. That was not put to Ms Scheel and leaves unanswered why that was, and what happened to the balance. The more natural inference is he received it all.

[189] On 19 December 2019 Ms Scheel prepared a second NES requisition, against the project name/budget line 'ABS Project', authorising a \$3400 payment to Rino's, Aitutaki, for, 'Alex Herman's accommodation for period 26/12/19 – 31/12/19'. This was approved by Ms Kamana and another officer, not Mr Puna.

[190] This requisition is starkly internally inconsistent. Ms Herman was only to stay five nights (six eventually), attracting a \$1000-1200 charge. But the requisition, as for Mr Puna, is for 17 nights, \$3400. It authorises a \$2200 -2400 overpayment.

[191] Despite that, a cheque in that amount did issue. It has not since been located. But the butt states it was made out to Rino's on 19 December 2019; and Rino's issued a receipt to Mr Puna on 23 December 2019 for a \$3400 cheque.

Rino's bookings - payments

[192] Mr Puna's Rino's bookings, which he made a week before, anticipate the two requisitions. His Rino's payments, at the end of his stay, reconcile with the funding he received.

[193] On Tuesday, 10 December 2019, at 2:28 pm, Mr Puna, using his NES email, wrote to Rino's, Aitutaki:

Can you please send me a quote for a beachfront room from the 20th Dec arrival 7pm to the 6th of Jan depart 7pm.

If there's room for a better price, that would be awesome too.

Please make it out to the National Environment Service c/o Nga Puna.

[194] On Wednesday, 11 December 2019, at 7.55 am, Rino's replied:

We have a beachfront room available and that's \$200 a night for single occupancy. Room is fully aircondition[ed]. Room rates includes daily continental breakfast and airport transfers. Would you like to go ahead and book the rooms?

[195] Mr Puna responded at 8:04 am, 'It's for me and my wife ... is it a big bed?' At 8:06 am Rino's confirmed, 'Yes it's a king bed', and at 8:24 am Mr Puna confirmed the booking, 'Please send me an invoice'. And at 2:48 pm made that request or specifically:

Can you please send me an invoice for that beach room you gave a price for so I can sort out the payments @ \$200 from 20th Dec to 6th Jan.

[196] Then two minutes later, at 2:50 pm, Mr Puna asked about a second room:

Also enquiring, is there any other rooms available. Not beachfront ... same timeframe and how much please?

[197] On Thursday, 12 December 2019, at 8:19 am, Rino's replied, 'yes there is a lagoon view non aircon room available at \$155 a night'. At 8:22 am Mr Puna responded, 'Can you please send my invoice for beachfront so I can pay soonest'. At 8:26 am Rino's asked, 'do you want the beachfront with air con or just lagoon view?' At 8:27 am Mr Puna answered, 'I wanted 2 rooms. But send me my one, the air con Beachfront first plz.'

[198] At 8.29 am Rino's sent that invoice, then at 8.39 am an amended invoice, and at 9.16 am Mr Puna asked that it made more specific:

Can you please make it out to:

- National Environment Service NES (not Education)
- One for me (Director of NES)
- One for NES Consultant c/o Nga Puna

[199] In a further exchange later that morning Rino's sent Mr Puna an amended invoice to which he responded 'perfect thanks', and Rino's replied 'you're welcome and see you soon'.

[200] On 12 December 2019, Rino's issued NES two invoices for \$3400 (one for each beachfront room, Mr Puna's and the consultant's, each for the 17 days, 20 December 2019 - 6 January 2020, at \$200 a night) - \$6800.

[201] On Saturday, 21 December 2019, Mr Puna sent one final email to Rino's as to the bookings and payment:

Please confirm my room from 20th Dec to 5th Jan. sorry got my dates wrong. Work starts 6th. We leave 5th. Beachfront.

I will just use same invoice for mine. Pay to the 6th, so the extra day from mine will be transferred to the Consultants room.

So paying \$3400 by cheque. With \$200 credit to transfer.

And Consultant is now from the 26th Dec to the 3rd of Jan. Beachfront. So should be paying \$1600 but because of transfer of \$200 from my room, only paying \$1400 by cash

... I will be paying my booking when I get there and Consultant when she gets there.

[202] For this stay Rino's issued one other receipt to Mr Puna, apart from the \$3400 cheque receipt to which I have referred. That was on 3 January 2020 for \$1200 cash, for accommodation 27 December 2019- 2 January 2020.

[203] These two payments support the inference Mr Puna met his own room charge (17 nights) using the \$3400 cheque; and Ms Herman's charge (6 nights) by the \$1200 cash payment, from the \$5100 cash requisition. If that is so, that left him \$3900 to use as he wished.

[204] Rino's invoiced NES separately \$2050 for ten Tamanu Restaurant charges between 13 November 2019 – 3 January 2020. Of those charges eight are attributable to this visit, and Mr Puna's text messages suggest one or more were for his daughters.

Puna-Herman exchanges

[205] The Puna-Herman emails also anticipate the second requisition, relating to her; and supply the only record of their work together on the Aitutaki environment regulations, Mr Puna's primary justification for the first requisition

[206] On Thursday, 12 December 2019, at 1:53 pm, Ms Herman emailed Mr Puna:

I had a look at the dates - could I leave Raro Friday 27 December and return Tuesday 31 December?

Will I just be working on Regs - but not meeting with AEA members? I assume they'll be on holiday, but if they are willing to meet, I'm happy too.

[207] At 2:05 pm, Mr Puna responded:

Just the regs. I will see if I can gather some of them but let's not calendar that in for now. Doesn't have to happen.

[208] On Friday, 13 December 2019, at 7:42 am Ms Herman replied 'Yeap sweet. At least I'll have the weekend in Aitutaki.'

[209] On Saturday, 28 December 2019, at 5:40 pm MS Herman texted Mr Puna:

... did you want me to meet with one of the AEA members to discuss Aitutaki Regs while I'm here? If so, Monday probably best time to do it.

[210] Mr Puna immediately responded:

... Ok. I can get some of the AEA together. Maybe at the Tamanu just before lunch. For a chat have ... lunch and carry on chatting. Maybe 11am.¹⁶

[211] On Monday, 30 December 2019, at 9:40am, Ms Herman texted Mr Puna:

... shall we meet at Tamanu a little earlier? Say 10.45 - to chat about the Aitutaki Regs. I've been going through it this morning, and have some comments about progressing it.

[212] At 9:42 am Mr Puna texted, '10.30 am' and shortly after confirmed he would bring refill paper.

[213] According to the Aitutaki Environment Authority draft minutes Mr Puna seems to have prepared, this 'special' meeting began at 11am, and the six there agreed they needed the draft regulations before they could discuss them. That was to happen by the next scheduled meeting, 27 January 2020.

[214] They discussed broadly, and without result, two other topics, management of the Aitutaki lagoon, and issues concerning the island of Manuae.

¹⁶ On Monday, 30 December 2019, at 7.15 – 27 am, Mr Puna sent a series of texts notifying AEA members of the 11am meeting at the Tamanu Restaurant with Ms Herman to discuss the regulations.

[215] The minutes do not record when the meeting ended. But, as anticipated, it appears to have been before lunch. According to the Tamanu Restaurant -NES invoice, a lunch that day cost \$391.50.

[216] At 5:50 pm that afternoon, Ms Herman texted Mr Puna:

... I've changed my flights to leave Aitutaki on Wednesday instead of tmrw
... I was wondering if I could extend my stay at Rinos one more day? I'm
happy to pay for the extra day.

Mr Puna immediately responded, 'That's ok. I will take care of it.' And, in an exchange straight after, Ms Herman said she was on a Wednesday morning flight.

[217] The Puna-Herman email and text exchanges, relating to their shared work, end there; and Ms Herman chose not to collect the daily allowance Ms Scheel offered her on 19 December 2019. (It cannot be claimed for weekends, statutory holidays, or other holidays taken.)

[218] Mr Puna claims Ms Herman did collect the daily allowance. But that was not put to her, there is no evidence of it, and I accept her evidence.

Conclusions

[219] It is uncontested, and incontestable, that the two cheques, indeed the preceding requisitions, are documents capable of use for a pecuniary advantage.

[220] It is uncontested, or incontestable, that Mr Puna procured their use and used them for pecuniary advantage. He required and authorised the first requisition and co-signed the cheque. He was not engaged in the second. But it had to be at his direction.

[221] The second requisition was completed on the same day as the first. It was consistent with his prior Rino's booking, and his arrangement with Ms Herman. He received the Rino's receipt for the cheque issued.

[222] The evidence is clear, furthermore, that Mr Puna's intent could only have been fraudulent; and not honest but mistaken.

[223] Mr Puna must have known that his general justification for the funding, a 17 day ‘working holiday’, was irreconcilable with the Government’s Official Duty Travel Policy.

[224] The policy authorises and funds travel for work in an ‘official capacity’ away from home on another island or overseas. It distinguishes between time away working, and leave taken, and requires the days attributable to each to be declared afterwards.

[225] The most, therefore, that he was entitled to was funding for work he could only do on Aitutaki; and that could only have been to meet the Authority to discuss the draft regulations as was to happen on 27 January 2020, in any event.

[226] He was not entitled, as he claimed, to travel to Aitutaki to line review the draft regulations before any such meeting, or to meet Ms Herman there to review the draft together, when that could have taken place on Rarotonga.

[227] Secondly, the Puna-Herman exchanges confirm that Mr Puna made no attempt to advance the draft regulations, as he undertook to do in the first requisition.

[228] Mr Puna did not make a line review of the draft regulations before meeting Ms Herman. She arrived not long after he did, and it was she, not he, who worked on the draft and asked that they meet to discuss it.

[229] There is no independent evidence that, after the unscheduled ‘special’ meeting on 30 December 2019, to which Mr Puna invited members on the day, he did any further work on the draft regulations while on Aitutaki.

[230] There is no independent evidence Mr Puna worked on the two other projects identified in the first requisition, the NES budget before 3 January 2020, or the GEF 7 Project design. His own evidence was unspecific and implausible.

[231] The Crown says Mr Puna may, at most, have qualified for two days funded travel to Aitutaki. That, to my mind, is generous. The unscheduled 30 December 2019 meeting did not and could not achieve anything. It did not justify a day trip to Aitutaki, or the cost of a lunch.

[232] Thirdly, the second requisition \$2200-2400 overfund allowed Mr Puna to use the \$3400 Herman cheque to meet his own room charge, and to retain the first requisition cash, \$5100, except as to her room charge (\$1200), \$3900.

[233] Mr Puna may indeed have invited Ms Herman to Aitutaki, to bring about that result. But that is not essential to my conclusion. His use of the cheque, itself, was fraudulent.

[234] I am satisfied Mr Puna had no honest, if mistaken, belief that he had any entitlement to the cash payments procured by the NES cheques. As to each he was fraudulent. I find both offences proved.

CLUSTER 5: MARCH 2020

Charges 13, 22-25, 28

[235] These six charges allege Mr Puna fraudulently funded a trip to Aitutaki for Mrs Puna, himself, and three of their daughters, between 20 March - 17 April 2020, just as a COVID lockdown was about to begin.

[236] Mr Puna is charged, firstly, with fraudulently using, or procuring the use of, two cheques: the first on 20 March 2020, \$1273.50, to Air Rarotonga to pay his children's airfares; the second that day, \$1080 cash, a daily allowance payment to Mrs Puna (in respect of which Mrs Puna was jointly charged and I have discharged her).

[237] Mr Puna is charged, next, with fraudulently using, or procuring the use of, a third cheque on 16 April 2020, \$5000 cash, to meet the cost of accommodation on Aitutaki at Tuiatara Lodge. Also, with a related offence on 23 June 2020, the forgery of an invoice.

[238] Finally, Mr and Mrs Puna are jointly charged with an unrelated offence: fraudulently using, or procuring the use of, a cheque on 7 April 2020, \$400 cash, to pay for a lunch for workers at their Rarotonga home address.

[239] Mr Puna again contends that he had work to do on Aitutaki entitling him to travel funding, and that these funding decisions, and the final lunch payment, lay within his authority under cl 1.5.1 of the MFEM financial policy.

[240] I focus first on the four Aitutaki related charges against Mr Puna; and, after that, on the joint unrelated charges against Mr and Mrs Puna.

Cheques 1-2, 20 March 2020

[241] On Wednesday, 18 March 2020, in an exchange of texts in the morning, Mr Puna instructed Ms Scheel, to make Air Rarotonga bookings for Mrs Puna and himself, to travel to Aitutaki on Saturday, 21 March 2020, for a one-week stay.

[242] Mr Puna explained he needed to go to Aitutaki for his ‘Manuae work’ and that Mrs Puna’s airfare, and daily allowance, were also payable in this instance by NES (not ICI):

She’s suppling builders to help out with this scoping exercise to Manuae. Also buying desalinisation plant off ICI, and assistance overall of Manuae project. Will get narrative sorted when I come back to Office.

[243] In this exchange, on the eve of a COVID lockdown, Mr Puna asked Ms Scheel to make the bookings ‘Asap’, because ‘They shutting the flights to Aitutaki’; and she replied:

Bad situation. They can book you to go on Saturday but there are no flights coming back to Raro yet confirmed. You might get stuck there. She said she can let me know when flights start flying back to raro.

[244] Mr and Mrs Puna were not able to leave on the Saturday. They flew out at 6:00pm on Friday, 20 March 2020. Nor were they able to secure return flights the following Saturday. Their bookings were one way. Accompanying them, furthermore, were three of their daughters.

[245] The daughters’ bookings were also made at NES expense by Ms Scheel on 18 March, even though neither she nor Mr Puna referred to that in their prior email exchange, and Ms Scheel confirmed it obliquely that day in a 3:38pm email, attaching the ticket: ‘Your babies (excl.policy team lol)’.

[246] As that email indicates, those bookings were made separately and on a distinct basis.

Daughters' flight bookings

[247] On 18 March 2020, ostensibly, Mr Puna sent a memo Ms Kamana (the NES finance team and one other officer):¹⁷

I have organised a meeting in Aitutaki with the Aitutaki Environment Authority to be held next week to discuss issues surrounding Manuae. At this point in time, I have asked Rachel to secure 5 seats with Air Rarotonga today as they have advised that they are selling out quickly. I am hoping to visit Aitutaki with a good support team to help me discuss matters regarding the Manuae logistics. However, due to the last minute nature of this trip, I am still waiting on the Policy team and two other staff to get back to me regarding their availability. Please have payment processed for this flight to secure it and when they have confirmed their availability, Rachel will update the itinerary with Air Rarotonga.

[248] This resulted in a requisition, ostensibly on 18 March 2020, prepared by Ms Scheel and approved by Ms Kamana and the Deputy Director, for a \$1273.50 payment to Air Rarotonga, on these particulars:

5 x pax one way airfare to Aitutaki on 20/03/2020 for Manuae logistics.

(Return flight yet to be confirmed)

Air Raro credit voucher B17439 = \$566.00.

Payer Name: Tuanga Taporoporo – project aid.

The \$1273.50 cheque to Air Rarotonga, dated 18 March 2020, was co-signed by Ms Kamana and Mr Puna.¹⁸

[249] On 18 March 2020, at 1:32pm Ms Scheel made the related Air Rarotonga booking for five one-way bookings on the 20 March, 6 pm, flight: three for the three daughters, and two for NES officers.

¹⁷ Ms Kamana had left Rarotonga on 3 March 2020 on leave, putting in issue why this letter was addressed to her, whether she could have received it, and when it was written.

¹⁸ The requisition cannot have been signed by Ms Kamana on 18 March, but she had signed a number of cheques in blank before she left Rarotonga on 3 March 2020.

[250] On 19 March 2020, consistent with her 3:38 pm email to Mr Puna the day before, Ms Scheel emailed the two NES officers, 'Please be advised that I have cancelled your flights for reasons you are aware of'. Only the three daughters were on the flight.

Mrs Puna's NES daily allowance

[251] On 20 March 2020 Ms Scheel prepared a requisition, approved by Mr Puna but not by any other officer, for a \$2160 daily allowance payment to Mr and Mrs Puna on these particulars:

DSA for HOM of NES @ \$120/day x 9 days \$1080

DSA for HOM of ICI @ \$120/day x 9 days \$1080

[252] The total, \$2160, was reduced to \$1452 with this note: 'Total amount DSA minus airfares for 3 x pax to Aitutaki Reg Form #1441'. The cheque butt, dated 20 March 2020, says it was for \$1452. Mr Puna said Ms Scheel gave him this in cash and he gave it to Mrs Puna.¹⁹

20 March NES memo

[253] At 9:56 am on 20 March 2019, Mr Puna's last day on Rarotonga, he sent this memo to NES staff anticipating the then imminent COVID lockdown:

Due to the COVID-19 prep, my 1st week of April mission to scope Manuae Island, (now part of our work at NES after successfully receiving endorsement from the people of Aitutaki to manage the place and have Rangers look after it), has been brought forward to next week.

Since Aitutaki borders will be closed to Raro, I leave this evening to carry on the work for Manuae and also the Aitutaki Regulations (part of it Manuae as well). I am not sure when theres flights coming back from Aitutaki, hopefully end of next week that Rachel will sort out.

[254] In this memo Mr Puna issued a series of instructions to take account of, and comply with, the lockdown. Three are relevant, and the first was this:

¹⁹ ICI paid Mrs Puna a daily allowance for this period independently of NES, and she and Mr Puna were jointly charged with theft of this NES allowance. Before Mr Puna gave this evidence, I had discharged Mrs Puna, absent any evidence she had received it.

... Rachel will continue to look after our Finances (as Ms K is not here) and have given strict instructions to her on payment processes. Please work with her as I have cheques already signed by Ms K and myself ... this is very limited but if you have any request for funds especially above \$1000, I need an email seeking my endorsement and instructions of which cheque to use ... otherwise below this, Rachel will still check with me so I can let her know signatories for respective accounts. Meitaki.

[255] The two other instructions were these:

Social distancing has been encouraged especially people that you don't know and please, as a family unit, I expect each and every one of us to self-isolate if you feel you have come in contact with a person with the virus. Please stay home when you have the flu or feeling sick. It's not even worth it. Please let's be clean. 'Cleanliness [is] is next to Godliness!'

Teariki will let us know what his plans are for his 3 Pa Enuu workers currently here with us.

[256] Mr Puna ended his memo:

That's it for now. I want people to go home and clean their yard after we finish here, as we have the strand 2 of Dengue fever (2 cases), the worst one, so let's also worry about that, cos it's already here ... and at the same [time] keeping COVID-19 at bay. Keep safe!

Cheque 3, 16 April 2020

[257] The third cheque, the subject of charge, was one of a number Ms Scheel sent to Mr Puna as a result of a text exchange on 31 March 2020 on the 1 April Air Rarotonga freight run.

[258] This cheque had been signed in blank by Ms Kamana and on 16 April 2020 Mr Puna completed and co-signed it. It was for \$5000 cash, and he cashed it that day on Aitutaki.

[259] The related requisition was not completed until 23 June 2020. It was prepared by Ms Scheel, and approved by Ms Kamana (then back from overseas) and by Mr Puna.

[260] The requisition reflected an email Mr Puna sent Ms Kamana and Ms Scheel that morning:

I just realised that we didnt prepare payment voucher for my 28 days in Aitutaki. As I had the cheque with me in Aitutaki.

Need of these reimbursed from Pa Enuu administered payments into projects, first thing this morning please Ms K.

Activities:

- Manuae Scoping Mission 5 days. 2 days prep. 2 days travel. 1 day unpack n debrief
- Several meetings with Manuae Interim Committee
- Several catch up meetings with AEA re Aitutaki Environment Regulations
- Recruitment of Aitutaki Environment Officer
- And my normal day to day Operations as Director via Zoom meetings

NB. Meetings were done in very small groups as code yellow did not allow too many people at meetings. So had do several meetings.

Tuiatara Lodges @ \$180 for 28 days with discount of \$540, total \$4500.

And Recruitment for Aitutaki Environment Officer expenses \$500.

[261] The \$500 expenses claim for the recruitment of the officer was not supported by any invoice. The invoice supporting the \$4500 Tuiatara Lodges claim, is the subject of the related forgery charge.

[262] That 'INVOICE' has the following features:

- (a) It was issued by Tuiatara Lodges, Aitutaki, Cook Islands.
- (b) It described itself as INVOICE #1, dated 16 April 2020.
- (c) It was issued to NES at its Rarotonga postal address.
- (d) It was issued for: 'Accommodation for Director Nga Puna'.
- (e) Under Description it stated, 'Accommodation 1x villa for Nga Puna'.
- (f) Under Days – '28 days', and under Rate – '\$180/ day'.

(g) Under Description it stated, secondly, 'Discount of \$540.00'.

(h) Under Amount, and against Total, it stated '\$4500'.

(i) Underneath these particulars it stated:

Make all checks payable to Tuiatara Lodges. Total due in 15 days.
Overdue accounts subject to a service charge of 1% per month.

(j) Then, 'Thank you for your business!'

Conclusions

[263] There is, and can be, no issue that the three NES cheques, the two dated 20 March 2020, and the third dated 16 April 2020 supported by the invoice also dated that day, were documents capable of use for a pecuniary advantage.

[264] There is, and can be, no issue that Mr Puna used them or procured their use for that purpose. He authorised their issue and co-signed them. The issue as to all three is whether he did so with fraudulent intent; and, as to that, the evidence is clear

[265] The justification for the two 20 March 2020 cheques, the first to pay three daughters' air fares, the second a daily allowance for Mrs Puna, does not withstand scrutiny.²⁰

[266] On the evidence there was no compelling need on 18-20 March 2020 to bring forward from the first week of April to the next week any Manuae scoping trip, because of the then impending COVID lockdown.

[267] That it was brought forward for that reason points rather to a concern that the lockdown might last beyond April; and that throws into question whether any trip to and from Aitutaki confined to the next seven days was remotely viable.

²⁰ Mrs Puna's daily allowance payment was unjustifiable even if the trip had served its stated purpose. ICI paid her a daily allowance independently.

[268] Texts between the Punas, and with Ms Scheel, confirm that he knew Aitutaki flights were about to be curtailed indefinitely. (The NES officers, booked to fly to Aitutaki to scope Manuae pulled out, ostensibly, because they did not want to be caught there.)

[269] The evidence shows instead that, during the lockdown, the Punas did not want to be caught on Rarotonga. They wanted to return to their home island, Aitutaki, to be amongst their wider families. The Puna daughters' bookings are fully consistent.

[270] Their booking could not be claimed as an NES travel expense, as Mr Puna clearly knew. On the requisition he approved, their bookings, with those of the two NES officers, are just '5 pax'. And he set out to meet their fares, relying on an offset he was not entitled to.

[271] In his staff memo, dated 20 March 2020, furthermore, Mr Puna issued instructions well capable of lasting beyond the week he said he was to be away. (The blank cheques he and Ms Kamana had signed, and left with Ms Scheel, are perhaps the most obvious example.)

[272] Finally, what did the scoping trip accomplish that could not be accomplished on Rarotonga? The work required could have been decided in principle, leaving the practicalities to those who did the work. Funding a ranger was a simple policy decision.

[273] The 23 June 2020 requisition, supporting the accommodation claim, 'Mission 5 days. 2 days prep. 2 days travel. 1 day unpack n debrief', lacks any demonstrable basis. (The other heads of claim are equally undemonstrable and inflated.)

[274] But, as to the third cheque that requisition supported, that is not the central point. Mr Puna's claim was not for any daily allowance, or expense he actually incurred.²¹ He claimed for 25 days accommodation, \$4500, relying on a fictitious invoice, and an unsupported \$500 expense.

²¹ On 2 April 2020 he incurred a \$1260.25 day car hire charge with Rino's; and on 16 April 2020 \$600 accommodation charge.

[275] Every aspect of that ‘invoice’ lied about itself. Tuiatara Lodges did not exist. Mr Puna’s graphic fabrication to establish that it did, and that he incurred the discounted charge claimed, is his crowning lie within this cluster. I find all four charges proved.

Cheque 4 – 7 April 2020

[276] The fourth NES cheque for \$400, dated 7 April 2020, stands in contrast to the other three, the subject of the charges I have just dealt with. It rests on distinct evidence, and both Mr and Mrs Puna are charged.

[277] This cheque was one of those held by Ms Scheel, which Ms Kamana and Mr Puna had signed in blank, and she completed on Mr Puna’s direction. That he instructed her to in this instance, the Crown contends, is attributable to Mrs Puna. They are equally implicated.

[278] The purpose for which this cheque was used, at Mr and Mrs Puna’s behest, was to pay for a lunch for workers at their Rarotonga home, who were there to work on aspects of water tank storage.

[279] The Crown case is that Mr and Mrs Puna’s intent was fraudulent. The workers, some employed by ICI, others by NES, did this work as a favour to the Punas. Some ICI workers (EOC workers) were not at involved at all.

[280] Mr and Mrs Puna say their house was government property. The work needed doing. Some NES workers were from the Pa Enuu, caught on Rarotonga under the lockdown. The lunch was a gesture, especially to them, within Mr Puna’s authority.

[281] There is no NES requisition to support the issue of the cheque, even one made retrospectively. The only record lies in the text traffic.

Texts

[282] On 7 April 2020, at 10:19 am, Mrs Puna texted her sister:

Sissy help ... Can you sort out some meat pies and drinks for each of the men up at home pls ... Tepuka store ... Sister I'll send you money now.

[283] There was then the following exchange between Mr and Mrs Puna:

10:21 DP: Baby can I send some money to manea pls from your. 1. Angai our workers at home just pies and drinks 10 of them 2. Some pizzas for Nikao EOC team 10. About 300 Or up pls.

10:23 NP: I can organise Rachel to buy those things on NES. EOC? VENUE'.

10:24 DP: Macs office. What about for home? Manea organising it.

10:24 NP: Rachel will.

10:26 DP: Baby tell us off on messenger.

10:27 NP: No need. Kare a kotou moni hehe

10:27 DP: Don't tell them nes buying.

10:28 NP: Not at that level my darling. Way advanced hehehe.

10:29 DP: Hahahaha I love you. Ask Rachel to give Nikao EOC to Manea to deliver this evening. Or I leave to you.

[284] There was also this exchange between Mr Puna and Ms Scheel:

10:26 NP: Buzz me please asap.

10:36 RS: What's up?

10:36 NP: Ring me please.

12:17 NP: Lunch sorted?

12:17 RS: Yes. Have just dropped it off.

Conclusions

[285] There is no issue, and cannot be, that the cheque was capable of being used for a pecuniary advantage, or that they procured its use. Mrs Puna asked Mr Puna to have NES pay, and Mr Puna instructed Ms Scheel to use a cheque he had pre-signed. The sole issue is whether their intent was fraudulent.

[286] The Crown's case is the payment was beyond his authority. It was to secure a personal benefit. It could not extend to a lunch expense for non-NES employees. It

involved Mrs Puna's family members. That both knew this appears in their texts (for example, 'Don't tell them nes is buying').

[287] This payment by cheque may well, I accept, have been a misuse of public money. But the house belonged to the government, and the work needed to be done. The payment was a gesture, after the event, to NES and ICI staff during the lockdown.

[288] I cannot then exclude the possibility that both may have had an honest, if mistaken, belief the payment by cash cheque was within Mr Puna's power to authorise. I cannot be sure one or both were fraudulent. I find neither charge proved.

CLUSTER 6: SEPTEMBER 2020

Charges 34 – 37

[289] The first four of these charges allege Mr Puna fraudulently used, or procured four NES cheques, dated 1 September 2020, and co-signed them, to fund a trip to Aitutaki between 2-4 September 2020 for himself and six Rugby players:

- (a) The first, \$2800, to Tamanu Beach Resort, to pay for accommodation.
- (b) The second, \$1560 cash, to pay a daily allowance.
- (c) The third, \$1500 cash, to pay for catering.
- (d) The fourth, \$2264, to Air Rarotonga, to pay for flights.

[290] The fifth charge alleges that on 2 September 2020 he used or procured an Aquila Rentals tax invoice for \$736.04, charged to NES, to pay for motor cycle or scooter hire.

[291] The Crown's case is that Mr Puna, as chair of Cook Islands Games - Aitutaki, began to arrange this camp for the Aitutaki rugby team at least a week before; and

masked it fraudulently as a trip he and land owners needed to make to resolve Manuae issues.

[292] Mr Puna contends, as he did to the Prime Minister on 29 June 2021, before he was dismissed, that he had set up the trip in good faith for the landowners and himself. But, after the bookings, decided taking the rugby players would be more acceptable and effective.

[293] His purpose, he contends, was always to convince Manuae land owners on Aitutaki to work with him and NES; and taking the rugby players was the better way to win their confidence and support.

Primary evidence

[294] On Wednesday, 26 August 2020, at 8:30 am, Mr Puna texted Robert Nicholas, the rugby player with whom he was apparently in contact:

Bro need the names and date of birth of your boys. Sending registration midday. Last day cheers.

[295] At 9:22 am Mr Nicholas began to send those details to Mr Puna. He did not complete doing so until 5:31 pm, Friday, 28 August 2020; and Mr Puna then replied:

Sweet as thanks bro. Any other names just let me know. I've got extended to Sunday for registration.

[296] In evidence, Mr Nicholas said he knew of the Aitutaki training camp at least a week before it took place. He and Mr Puna are highly likely, then, to have discussed it by or before 28 August 2020.

[297] On Monday, 31 August 2020, at 9:32 am, Mrs Puna texted Mr Puna, 'Baby I want to come to Aitutaki with you', to which he replied, 'Come Friday'. (That was, presumably, Friday, 4 September 2020.)

[298] At 10 am that morning, Air Rarotonga confirmed a booking for Mr Puna and three unnamed persons; and at 1:21 pm Mr Puna emailed Ms Scheel, Ms Kamana, and Tohoa Puna, an NES administrative officer.

[299] This email, under the heading 'Aitutaki-Manuae Landowner Small Interest Group Meetings', said:

Please organise airfares, accommodation (4 rooms), DSA and transport for myself and 3 landowners (names TBC) to fly to Aitutaki this Wednesday and fly back Saturday morning ... and I will be staying on to work on our NES 19/20 Annual Report, so I will come back Monday morning.

I will be working on Manuae Follow Ups with other landowners in smaller groups that are not happy with the delays in the current Manuae Exec Committee. I will also be taking over some key back people to help the cause.

At the moment I have 3 confirmed meetings, so please, have these processed and ready for midday tomorrow.

Finance, please, funds from the Suwarrow and Manuae Management Administered Payments.

[300] At 1:47 pm, Mr Puna emailed Tamanu Beach Resort:

Please send invoice for 4 rooms:

- 3x for 2nd Wed to Sat 5th
- 1x for Wed 2nd to Mon 7th.

[301] On Tuesday, 1 September 2020, in the morning, there was a text exchange between Mr Puna and Ms Scheel:

9:41 NP: Is it paid

9:41 RS: Not yet, was waiting to confirm the names first. Want me to just pay it?

9:41 NP: Pay now.

9:41 RS: they are requesting the names no later than this afternoon tho

9:41 RS: May I come to you? For signature. Or get someone else to sign?

9:42 NP: Come to me Nikao.

9:43 RS: Okay. Up at home?

9:45 NP: Ae. Or use Teariki's yourself and 1 more name from NES. Tohoa maybe

11:12 RS: You still in Nikao. Drop of cash

[302] By then Ms Scheel must have paid by cheque both Air Rarotonga (\$2264) and Tamanu (\$2800), and cashed the two cash cheques (\$1500 and \$1560). Ms Scheel and Mr Puna agree she gave him the cash before going to Air Rarotonga at 4:00 pm.

[303] The related cheque butt entries, with which the purchase orders are consistent, were as follows:

- (a) As to the Air Rarotonga cheque (in Ms Scheel's hand), '4 x airfares to Aitutaki', and (in Ms Puna's), 'Manuae'.
- (b) As to the \$1500 cash cheque (in Ms Scheel's hand), '3 x meetings to organise and cover in Aitutaki-Manuae follow up'.
- (c) As to the \$1560 cash cheque (in Ms Scheel's hand), 'DSA for Director and 3 landowners for Aitutaki-Manuae mtg'.
- (d) As to the Tamanu Resort cheque (in Ms Scheel's hand), '4 x accom for Director & 3 land owners', and (in Tohoa Puna's) hand, 'Manuae Management'.

[304] The daily allowance purchase order, dated 1 September 2020, stated that for the period 2 - 7 September Mr Puna was entitled to \$120 each day, \$720. The three land owners were each entitled to \$70 each day for the period 2- 5 September, \$840.

[305] At 12:04 pm Mr Puna sent to Ms Scheel the names of the three travelling with him. At 1:22 pm he also told Ms Puna, who replied 'Okay will let Rachel and airraro know'. (Mr Puna also had her add the names to the purchase order.) At 2:00 pm, Air Rarotonga added the names to the booking.

[306] In a text exchange with Aquila Rentals between 2:46- 2:50 pm Mr Puna confirmed he was hiring a van between 2-7 September 2020, and a small car between 2-5 September.

[307] At 4:00 pm Mr Puna went to Air Rarotonga to cancel the bookings for the three accompanying him, to substitute a booking for six – those three and three more.

These were the six rugby players, according to the agreed facts, who on 2 September 2020 flew with him to Aitutaki.

[308] According to those agreed facts also, all six rugby players represented Aitutaki during the Cook Islands Games, between 30 September – 17 October 2020, and:

... travelled to Aitutaki with Mr Puna for three days of training. All their costs (airfares, accommodation at Tamanu Resort and transport in a van and on motorbikes were met. They were also given pocket money to buy drinks and food.

[309] Mr Puna hired the motorbikes, it appears, once he arrived in Aitutaki, and charged them to NES just as he had the van and small car. All are the subject of the tax invoice to NES, the subject of the final charge.

[310] On 4 September 2020 according to the agreed facts, five of the six players flew back to Rarotonga and Mr Puna and the sixth flew back the following day. On 4 September Mr Puna texted him:

Bro if you want. Go restaurant and charge dinner to Room 201. Nga Puna. I am with my parents ... Please go ahead if you want. My shout.

[311] On 7 April 2021 the Prime Minister wrote to Mr Puna suspending him as NES director; and on 16 June 2021 he was invited to a disciplinary meeting concerning his alleged misconduct:

Fraudulent misuse of NES funds to pay for travel and accommodation of 6 rugby players.

[312] Mr Puna, in his letter to the Prime Minister in reply, declined to attend the meeting and instead denied the allegation:

I assure you that when I made those bookings it was not my intention to use the booking all the monies for the rugby players.

What happened is this.

Almost as soon as I had made bookings, I realised I had made a big mistake.

I had not thought through how my uncle Teuira was going to react to this. I had focused on arranging things so the Rarotonga representatives would feel respected and valued by NES.

Looking at it from the other side, I realised I was making Rarotonga owners look akatangata, by flying them in, accommodating them at Tamanu and hiring cars for them.

The more I thought about it, the more I can see this looking like the Crown flying in outsiders, paying them off, and using public money to try to interfere with the private processes of a landowner incorporation.

Uncle Teuira would blow that up to a big thing.

I thought I had made the right call, but once committed to the spending realised I had not - with respect PM, I could see you making a similar mistake in a complicated family/ political/ land problem like this.

So; I realised I needed to do something and came up with a much better plan; don't bring people from Rarotonga to make Aitutakians angry, bring people from Rarotonga to make them happy.

At this very time, I was involved in trying to build an Aitutaki rugby team that would not be thrashed by Rarotonga. This was for the Cook Islands Games.

As Minister of Finance you will know about the huge time, effort, and money Government was putting into the Games at that time.

For me, stuck with these bookings and accommodation, I could see how I could change the whole look of what NES was doing. Instead of arriving on the island with a hit squad to take over my uncle's Committee, I could arrive with NES providing strong rugby players so that Aitutaki could win in the Games.

I was sure this could change the whole relationship between NES and Aitutakians around the Manuae issue. Win one, win the other.

So, as your letter sets out, I altered the travel arrangements and took a larger number of rugby players instead. The results on the sports field speak for themselves.

....

I should finish, again, by strongly denying any idea of fraud in changing the bookings in the way that I did; for me, personally, it made no difference if I went to Aitutaki with landowners or with rugby players; for NES, the difference was between buying into the incorporation fight vs showing NES as part of the Aitutaki community – insiders rather than outsiders.

Conclusions

[313] There is, and can be, no issue that the four NES cheques, dated 1 September 2020, and the tax invoice charged to NES, dated 2 September, were documents capable of use for a pecuniary advantage.

[314] There is, and can be, no issue that Mr Puna used them or procured their use for that purpose. He authorised their issue and co-signed them. The issue is whether he did so with fraudulent intent; and, as to that, the evidence is clear

[315] The documented sequence of events on which the Crown relies is consistent only with that inference:

- (a) Between 26 – 30 August 2020 Mr Puna had elicited from Mr Nicholas the names and details of the six rugby players he was recruiting for Aituaki.
- (b) Mr Nicholas clearly knew then (a week before the flight out, 2 September) of the Aitutaki training camp.
- (c) On 31 August Mr Puna booked rooms for himself and three others at Tamanu Beach Resort (he between 2-7, they between 2-5, September), and the consistent Air Rarotonga flights.
- (d) Mr Puna's email that afternoon to Ms Kamana and Ms Scheel, stating he was going to Aitutaki with three landowners, and asking Ms Scheel to arrange bookings was, to that extent, misleading.
- (e) Even then he had still to confirm the landowners; and whether they were to be the 'back people to help the cause' he also spoke of still remains in the air.
- (f) On the morning of 1 September, the day before the flight, Mr Puna had still to identify the landowners and instructed Ms Scheel to give Air Rarotonga, 'Teariki's, yourself and 1 more name from NES. Tohoa maybe'.
- (g) Then, just after midday, Mr Puna finally gave Ms Scheel and his daughter the names of three rugby players; and at 4:00pm went to Air Rarotonga to enlarge that number to six.

[316] In his final hand in those flight bookings on 1 September Mr Puna acted completely inconsistently with the cheque requisitions he had authorised earlier that day and, as he concedes though disclaiming fraud, that was deliberate.

[317] In June 2021, he claimed to the Prime Minister that, when he switched from landowners to rugby players, he was already ‘stuck’ with the requisitions and bookings. That is clearly false.

[318] It is also at odds with the complete lack of any evidence in the record, or otherwise, that Mr Puna had ever approached three landowners, or sorted out three meetings on Aitutaki between 2 – 7 September.

[319] It is also at odds with the six motorcycle hires he made for the rugby players on Aitutaki, and his offer to the one who flew back with him on 5 September to charge his dinner the night before to Mr Puna’s room, as he was to be with his family.

[320] I am in no doubt that in authorising and co-signing the four NES cheques, and in charging NES for all the vehicle hire, the subject of the tax invoice, Mr Puna was deliberately fraudulent from the outset. I find all five charges proved.

CLUSTER 7: DECEMBER 2020

Charges 39, 40

[321] These two charges allege Mr Puna offended twice: two offences also involving the fraudulent misuse of NES cheques, in relation to the NES Christmas function at the Edgewater Resort between 11-14 December 2020.

[322] The NES social club funded this function from contributions during the year. The club paid for standard rooms and also for shared food to the extent of \$4000. Staff had to meet any charges they incurred beyond those parameters. The Crown case is Mr Puna charged NES instead.

[323] The first of these two charges concerns an NES cheque to Edgewater for \$968.50, dated 14 December 2020, for food and beverages. The second a cheque for \$1260, dated 8 December 2020, for an extra room.

[324] Mr Puna denies both offences. He contends he had the authority as the director of the agency to invite Mr Tapaitau, as NES Minister, and two NES interns even though both were his daughters, and to have NES pay.

Primary evidence

[325] On 8 December 2020, there was this text exchange between Mr Puna and Ms Scheel during the morning:

9:08 NP: Book 2 beachfront rooms please for the weekend. Non—connected ones. 1 for 3 days, 1 for 4.

9:10 RS: Are these for the Minister? I'm on the phone with them right now. Have Minister booked for Friday to Monday.

9:11 RS: Who is the second one for?

9:11 NP: Me

9:12 NP: Rooms have Queen bed and single bed

9:12 NP: There's 7 in my big family

9:13 NP : Just have rooms under NES

9:14 RS: Oh because we already booked you two rooms 2007, 2008. Do you want another room?

9:15 NP: Sleeps 6 people. Yes please

9.16 NP: NES pays

9:17 RS: Okay all done. I have one extra beachfront room for you Thursday to Monday.

9:18 RS: Your room extension for your other two cost 280 – where is this coming out of? Where is cost for extra room coming out of in NES? Have the Minister b

9:19 RS : @ooked Friday to Monday. Where is this cost coming out of? Please and thank you. I'll get everything paid today.

9:20 NP: Everything paid NES. Entertainment. I am inviting Minister as my guests

[326] On 8 December 2020, the day of that exchange Mr Puna co-signed with Ms Kamana the \$1260 NES cheque for the extra room; the cheque butt recording: '1x accom extension, 2 x accom for Minister'.

[327] On 8 December 2020 also, Ms Scheel prepared the related voucher, which Mr Puna approved, stating under 'Account Name' 'Director's Entertainment'; and setting out these 'Payment Details':

1 x accommodation for Director (extension of room to accommodate whole family during NES Xmas) - \$280

2 x accommodation for Minister Robert Tapaitau & family as gift from NES during Xmas & for interns - \$980

[328] On 9 December 2020, at 2:50 pm, Mr Puna sent the following email to Ms Kamana, Ms Scheel and his daughter, Tohua:

Please book 2 rooms at Edgewater for my invites to join our NES Social Club Xmas weekend:

- 1st room for our Portfolio Minister and his family as my gesture of congratulations to him being appointed as the Deputy Prime Minister of the Cook Islands. And also our special guests for our Xmas Sunday lunch with our NES family.
- The other room is to include our 2 University interns in our Xmas celebrations as a Social Club, so they are part of our traditions as NES family.

Please pay from my Entertainment budget. Opex.

[329] At 2:52 pm Ms Scheel texted Mr Puna, 'Hi, email just received ... is it just to support payment made yesterday?' At 2.53 pm he replied, 'Ae'.

[330] On Thursday, 10 December 2020, the day NES staff checked into the resort, Mr Puna texted Mr Tapaitau at 12:11 pm, 'Room 2005 at Edgewater Resort. 2 pm check in tomorrow afternoon'. He received an instant reply.

[331] At 12:35 pm Ms Scheel called Edgewater to swap room 3004 to 2005; and, according to the resort's charge records the 'Nga Puna (Kids)' checked into room 2008, 'Nga Puna' into room 2009 (connecting with 2008), and 'NES Director' room 2005.

[332] Mr Puna said in evidence that his five daughters (not just the two NES interns) occupied the two connecting rooms, 2008, 2009) and he and Mrs Puna were in 2005.

[333] On Friday, 11 December 2020, at 4:41 pm, after prompting by Mrs Puna, and checking with Ms Scheel, Mr Puna texted Mr Tapaitau:

Sorry your room number is 3004. Next to the Tennis Court. Beachfront. 2005 was a connected room. That's for me and my family. You can do your own thing if you want. Just order room service or charge your meals to your rooms. I will take care of the bill on Monday. ...

[334] On Sunday, 13 December 2020, NES staff checked out of the resort. Mr Puna and Mr Tapaitau checked out the following day, 14 December. The resort asked who was to pay the room food and beverage expenses, and was told Mr Puna.

[335] On Monday, 14 December 2020, of the resort invoiced all food and beverages charged to room 2005, transferring \$100 from Mr Tapaitau's room, 3004, and \$7.50 from 2008.

[336] This invoice was met by the second NES cheque for \$968.50, that dated 14 December 2020, co-signed by Mr Puna and Ms Kamana; the cheque butt saying simply, 'Edgewater Host'.

[337] The payment voucher, also dated 14 December 2020, certified for payment by Ms Kamana and approved by someone other than Mr Puna, was prepared by Tohoa Puna, and gave these 'payment details', set against four invoices:

Director & Deputy Prime Minister room balance, for Director's host of NES Xmas Party.

Here, too, the payment was attributed to 'Directors entertainment'.

Conclusions

[338] There is, and can be, no issue that the two NES cheques, dated 8 and 14 December 2020, were documents capable of use for a pecuniary advantage.

[339] There is, and can be, no issue that Mr Puna used them or procured their use for that purpose. He authorised their issue and co-signed them. The issue is whether he did so with fraudulent intent; and, as to that, the evidence is clear

[340] The Edgewater function, between 10 – 13 December 2020, was not an NES work function Mr Puna had to attend as director. It was an NES Social Club Christmas celebration, and he attended it, in his own words, as a member of the NES ‘family’.

[341] All who attended had to pay the resort any charges they incurred beyond the standard room rate, and the food and beverages up to \$4000, which the social club had met from their staff contributions throughout the year.

[342] This meant that, unless Mr Puna had some right under his contract, he was responsible for any excess over the standard rate for the three beachfront rooms his family occupied; and for the food and beverages charged.

[343] It also meant, in the absence of some right, that he was responsible for Mr Tapaitau’s room and charges. He had invited Mr Tapaitau and assured him NES would meet his charges.

[344] Mr Puna’s justification for charging his and his family’s charges to his entertainment budget, when all other staff members were paying from their own pockets, does not withstand scrutiny. These charges, like theirs, were entirely personal.

[345] Mr Puna’s justification for charging Mr Tapaitau’s charges to his entertainment budget was equally specious. His contract of employment may have given him that ability, had the charge had been incurred consistent with his duties as director. But that was not so.

[346] As Mr Puna confirmed in the payment voucher he approved, this was, ‘my gesture of congratulations to him being appointed as the Deputy Prime Minister of the Cook Islands’. This was his gesture, not any required of NES.

[347] I am satisfied, finally, that Mr Puna cannot have been honest, but mistaken. He must have known he was no more entitled to charge NES this time, than Mrs Puna had been entitled to charge ICI for their family's first Edgewater stay.

[348] That was precisely why on that earlier occasion he and she, and Mr Tapaitau, conspired to pass off that birthday celebration the Punas had to pay for themselves, as a work related leadership retreat. I find both charges proved.

GROUP 8: AUGUST 2019-FEBRUARY 2021

[i] Charge 14

[349] This charge alleges that on 29 August 2019 Mr Puna fraudulently used, or procured the use of, two NES cheques to benefit himself, together with a related deposit to his account.

[350] The Crown case is that in August 2019, at Mr Puna's behest, Mrs Puna deposited in his bank account \$4440 cash retained in his desk drawer, derived from two NES cheques for \$4800, issued and cashed for the just completed 22-26 August 2019 staff retreat on Aitutaki

[351] This cash deposit, the Crown contends, was in turn used to pay an instalment due on Mr Puna's New Zealand student loan; a benefit to which he was not entitled. His procured misuse of the cheque proceeds was fraudulent.

[352] Mr Puna denies this offence. He says the cash deposited was cash retained from his travel entitlements over the preceding five months; and, that apart, NES was obliged under his contract of employment to meet his loan obligations.

Cheque-cash link evidence

[353] In the month before, the NZIRD wrote to Mr Puna two letters. The first, dated 15 July 2019, stated his loan stood at \$105,000. The second, dated 17 July 2019, required a \$30,000 lump sum payment and \$500 payments fortnightly.

[354] On 6 August 2019 Mr Puna, who was to travel to New Zealand on 9 August, emailed the NZIRD to confirm he would not be arrested for non-payment of his loan. (He had experienced arrest once already.)

[355] Within that span also, on 21 August 2019, Ms Scheel cashed the two NES cheques, the subject of this charge, one for \$4000, the other for \$800, for the then forthcoming Aitutaki staff retreat.

[356] At 2:29 pm Ms Scheel texted Mr Puna, 'Hello, Haley's asking if you can wait till we get back to the office so that she can give you the cash for Aitutaki please ray'. At 2:31 pm he replied 'Ok'.

[357] Mr Puna flew to Aitutaki on 22 August 2019 for the staff retreat, but left early on 24 August to fly to Tahiti, and then Samoa, for two weeks. Before he flew out of Rarotonga on 24 August he and Ms Scheel, still on Aitutaki, had this exchange:

11:30 NP: Did you guys have enough money for the Cruise?

12:20 RS: No short 100

12:22 NP: Teariki?

12: 47 RS: He didn't come. But still didn't peke. But mii and then said its okay, we will sort it out.

[358] On 29 August 2019 Mr Puna and Ms Scheel had this further exchange:

9:41 NP: Rachel. Can you please, when you are free, grab the money in my draw and personally deliver it straight to aunty Diane. I have been worried about it. Please don't mention anything to anyone. Just want it safe somewhere else. Maybe ring her first to see where she is. She's expecting you. Cheers.

9:42 RS: Okay Mr Puna, I'll get this done. Will text you once delivered. Have a good day.

9:43 NP: Cheers.

9:46 NP: 800008 aunty di number.

[359] Mr and Mrs Puna also had this nearly simultaneous exchange:

9:43 NP: Baby Rachel is dropping off just 4k. I want it all paid on my Student loan asap. If you can take some out of my account and make it up to 5k

9:43 NP : Ok I will today.

9:46 NP: Thanks baby. Love you.

[360] An hour later Mrs Puna texted Mr Puna:

10:40 DP : Can I use your vaka card to pay pls

10:45 NP: please recall your email to Rachel. I'll explain later. Shes at Workshop now. Will contact you Lunch. Its ok. I Get her to bank it.

[361] Mr Puna next texted Ms Scheel:

10:46 NP: Rachel. Change of plans. Please, just bank into my account at BCI

10:47 NP: As soon as you're free

10:47 RS: Okay ra. Will get this done at 1 pm

10:48 NP: Sweet as thanks.

[362] Mr Puna immediately let Mrs Puna know: 'She will bank it around 1 pm. She will let me know.' At 1:39 pm he asked Ms Scheel, 'Banked yet?' without eliciting a reply.

[363] At 2:33 pm Ms Scheel deposited \$4440 into Mr Puna's account and said in evidence that she had taken money from her own drawer as well as Mr Puna's drawer.

[364] The final text exchange that day was between Mr and Mrs Puna:

4:07 DP: Baby send me your card details pls

4:34 DP : What year am I paying

4:35 DP: March 2019???

4:36 NP: Does it matter? Just 5k on it.

[365] On 30 August 2019, at 11:34 am Ms Scheel deposited \$680.20 in Mr Puna's account, but could not remember whether this also came from his drawer. On 1 September 2019 Mr Puna's due student loan instalment was paid to the NZIRD.

Contract entitlement evidence

[366] The earliest retrieved signed version of Mr Puna's contract, dated 4 March 2019, a version last modified on 16 September 2019, does confer on him a right to be assisted with his student loan; a right not expressly approved or considered by Cabinet.

[367] Under cl 3(e) of the second schedule, 'Remuneration and Benefits' NES assumed this liability:

Director's Student Loan obligation payments to be paid annually, at the end of every March, to the Director's Student Loan Account, effective immediately. Or these could be paid in smaller amounts at the end of March and at the end of September annually. This cost shall be met by the National Environment Service, until the end of contract or when student loan gets fully paid, whichever lapses first.

[368] A yet further version of cl 3(e) found on Mr Puna's computer, in the version created on 26 September 2019, and last modified on 21 March 2021, goes further still.

[369] In the first sentence of cl 3(e) this new version specifies 'payments of \$5000'; and significantly modifies the third sentence:

This cost shall be met by [NES] at the discretion of the Director, where the Budget allows it, until the end of this Contract or when [the] Student Loan gets fully paid; whichever lapses first.

[370] This new version also added one further sentence:

Additionally, when budget allows it, and at the discretion of the director, pay the repayment of the student loan at \$1,000 per month, with the same conditions as the obligation payments.

[371] It is unclear which version confers on Mr Puna the more extensive entitlement. The first entitles him to have paid his annual loan obligations, whatever they may be. But it limits payments to March and perhaps September. The second may cap annual payments at \$5000, or it may not. It does allow for a wider array of payment options.

[372] What is clear is that this version aligns more closely with the Minister's letter, ostensibly dated 21 February 2019, and puts in issue the authenticity of that letter. It

may also explain why that letter does not foreshadow the Minister's Cabinet memorandum, dated 7 March 2019.

[373] These issues become more acute in respect of Charge 16, concerning a further \$5000 payment reducing Mr Puna's student loan; this second payment, within three months of that presently in issue, on 15 November 2019.

Conclusions

[374] There is, and can be, no issue that the two NES Aitutaki cash cheques, dated 21 August 2019, were documents capable of use for a personal benefit; or that Mr Puna was instrumental in their issue.

[375] The issue is whether, instead of deploying the resulting cash for the retreat, he retained that cash and on 29 August 2019 deployed it for his own benefit to pay his then due student loan instalment; and was therefore fraudulent.

[376] The only direct evidence as to the source of the cash is from Mr Puna; and he says it was his. He had saved it from travel entitlements over the preceding five months. The Crown's evidence, by contrast, is indirect and more equivocal.

[377] A nearly equivalent sum came from the two cash cheques for the Aitutaki staff retreat cashed just days before; and that was given to Mr Puna before the retreat. As to that the evidence is clear. What is not clear is what then happened to it.

[378] By 29 August 2019 the retreat was over, Mr Puna had left early for Tahiti and was offshore when he instructed Ms Scheel to collect the cash (eventually \$4440), and make the deposit.

[379] How much of the cash requisitioned did Mr Puna spend on Aitutaki? Had Mr Puna ever taken it to Aitutaki? Had he dropped it back before flying to Tahiti? How much had come from Ms Scheel's own drawer, and where from? On the Crown's evidence one cannot safely say.

[380] The same questions arise, equally, as to the \$680.20 deposit Ms Scheel made the following day. The Crown contends it was likely to be NES petty cash, because it was in suggestive denominations. That is as much as the Crown can say

[381] Mr Puna's evidence, that the cash was his saved travel entitlements, is equally open to question. But, even if one puts his evidence to one side, as I do, I find that the Crown's evidence does not establish reliably the Aitutaki cheques as the real source.

[382] As to Mr Puna's claimed entitlement under his employment contract, it does not square with the Minister's cabinet memorandum. And there has to be an issue as to the Minister's ostensibly earlier letter to Mr Puna.

[383] Also, even if Mr Puna can claim that benefit, it does not assist him, if he deliberately retained the NES cash earmarked for the Aitutaki retreat. He would still have fraudulently used those two cheques for his own benefit.

[384] Absent, however, evidence safely underpinning the inference that Mr Puna did fraudulently misuse for his own benefit the cash proceeds of the two NES cheques, issued for the retreat, and thus the cheques themselves, I must dismiss this charge.

[ii] Charge 16

[385] This charge alleges that on 29 August 2019 Mr Puna fraudulently used for his own benefit, or procured the use of, an NES cheque, dated 15 November 2019, again to pay an instalment due on his student loan.

[386] The Crown's case is that, to justify the issue of this cheque for his own benefit, Mr Puna relied fraudulently on a right first to be found in the contract version he created on 26 September 2019.

[387] Mr Puna denies the offence. He contends this payment was within his general authority as NES director and within his contract entitlement. It was a payment made when NES had funds available. He was in no sense fraudulent.

Primary evidence

[388] The evidence relating to this charge is confined almost entirely to 15 November 201, the date on which the NES cheque for \$5000 cash was issued, co-signed by Mr Puna and Ms Kamana.

[389] Ms Kamana completed the requisition authorising this cheque to meet an instalment due on Mr Puna's NZ student loan; and he approved it. Her evidence was this was very unusual. But she had seen his employment contract.

[390] Ms Scheel cashed the cheque that day, and at 2:17 pm Mr Puna texted her, 'Please text when banked. Need to pay something soonest'. At 2:28 pm she made that cash deposit. On 20 November 2019 NZIRD received that payment.

Conclusions

[391] There is, and can be, no issue that this 15 November 2019 NES cash cheque for \$5000 was a document capable of use for Mr Puna's personal benefit; or that he was instrumental in its issue.

[392] The issue is whether he had, or honestly if mistakenly believed he had, any such entitlement under his employment contract; or whether, fraudulently, he retrofitted his contract with it and misled Ms Kamana. I am in no doubt it was the latter.

[393] In the sequence relevant to this, and the preceding charge, there is only one independently verifiable document concerning Mr Puna's entitlement. It is the Minister's Cabinet memorandum, dated 7 March 2019, recommending his appointment.

[394] There the Minister advanced two proposals he invited Cabinet to endorse. The first was Mr Puna's appointment. The second his remuneration, his salary and a further benefit. He recommended Cabinet:

Consider and approve the remuneration of \$130,000 and use by the Appointee of a Government vehicle as governed by the Cook Islands Government Vehicle Policy.

[395] This invites the inference, first, that the Minister, and Cabinet, saw it as Cabinet's statutory responsibility to approve not just Mr Puna's appointment, but also his remuneration in the fullest sense – his salary and benefits.²²

[396] It also invites the inference that those agreed were set out in the recommendation. And, as I said earlier, that must throw into question the authenticity of the Minister's offer, dated 21 February 2019, conveying significantly wider benefits.

[397] It must, more immediately, throw into question Mr Puna's entitlements in his earliest retrieved signed contract version, last modified on 16 September 2019, containing the first version of the student loan entitlement in issue here.

[398] This was not a question Mr Tapaitau could begin to answer. He recalls signing Mr Puna's contract once, but not when, let alone what its terms were, or whether they were consistent with Cabinet's approval. He relied entirely on Mr Puna.

[399] This was not an acute question when Mr Puna resorted to cash retained to make his first NZIRD payment, around \$5000, on 29 August 2019; the subject of charge 14. It had become an acute question by the second payment, the subject of this charge.

[400] Mr Puna was under pressure. In its letter, dated 17 July 2019, NZIRD had required him to pay \$30,000, then \$500 fortnightly. And that pressure, I find, explains why he created a fresh version of his contract on 26 September 2019.

[401] The fresh version lacks clarity. But it clearly gives him the ability to make \$1000 payments monthly; and that is hardly coincidental. I find he introduced that version before the second payment, that in issue here, was made.

[402] Ms Kamana cannot recall when she saw Mr Puna's student loan contract, or what his entitlement was. But that is not decisive. By the date of the second payment,

²² The Environment Act 2003, s 7, requires Cabinet to concur in the Minister's appointment, but requires the Minister to be party to the contract of employment, leaving the issue whether the terms are for the Minister to agree without the need for Cabinet approval.

Mr Puna had dishonestly retrofitted his contract to assume a right never remotely conferred.

[403] In co-signing the NES cheque, dated 15 November 2019, Mr Puna fraudulently used it, or procured its use, to obtain a benefit to which he was not entitled. I find the charge proved.

[iii] Charges 17-18, 26-27, 31-32

[404] These six charges allege, essentially, that on three occasions (21, 22 November 2019, 12, 14 May 2020, 18 June 2020) Mr Puna obtained from NES payments to which he was not entitled for use of his private vehicle.

[405] These charges allege that each time Mr Puna forged receipts from a fictional entity, Avauta Rentals, and fraudulently used, or procured the use of, three NES cheques to be reimbursed car rental payments he had never made.

[406] Here too, the Crown contends, Mr Puna relied dishonestly on a retrofitted contract entitlement inconsistent with his Cabinet approved entitlement, which was subject to the Government's Motor Vehicle Policy.

[407] Mr Puna denies any forgery. Avauta Rentals was his trading name, he says, and the invoices were created to document legitimate expenses. He denies any fraudulent misuse of NES cheques, invoking his spending authority as agency head.

NES vehicle use

[408] When Mr Puna began at NES in March 2019 he had the immediate use of a blue Hilux truck. He soon replaced it with a black Prado utility. But, on a date not identified, that was transferred to the King's Representative.

[409] Then for some eight months, before Mr Puna's new NES vehicle, a grey Ford Ranger, arrived in the country in April- May 2020, he used his own vehicle, to which the offending alleged relates.

21, 22 November 2019

[410] The first Avauta Rentals invoices, dated 21 November 2019, \$2500, was for:

Rental/hireage of 4WD truck to supplement NES fleet for training & support of Compliance work c/o Vavia Tangatataia. This work commenced from 21st October 2019 @ 90 per day.

[411] Mr Puna signed the requisition form for the \$2500 cheque, which authorised payment from the NIP Update POPS funds (Project account). He and Ms Kamana co-signed the cheque, which Mr Puna's daughter, Nadtazkia, then working as an NES intern, cashed the next day.

[412] The cheque butt recorded, 'Avauta Rentals. Rental Vehicle Hireage. NIP Update POPS'.

12, 14 May 2020

[413] The second Avauta Rentals invoice, dated 12 May 2020, \$5000, was for:

Rental/hireage of 4WD truck to supplement NES fleet for training & support of Compliance work c/o Vavia Tangatataia. This work commenced from the 22nd of October to the 21st of November @ \$90 per day. And 22nd November to 23rd December.

[414] That day, Mr Puna sent a copy of the invoice to Tohoa,Puna:

Please prepare payment voucher for the attached invoice. Please pay from NIP Project Aid Account. The request came from Vavia for hireage of 4WD truck late year, as our NES White truck has been playing up and now written off by the mechanics. The need to have a replacement truck for Compliance duties is high priority. And I have given approval for this transaction. ... Please get Vavia to sign off as it comes out of his NIP Project ... and bring to me for endorsement.

[415] Mr Puna signed requisition and he and Ms Kamana co-signed the cash cheque. The cheque butt recorded, 'Avauta Rentals. Hireage of Trucks for Compliance Division'.

18 June 2020

[416] The third Avauta Rentals invoice, dated 15 June 2020, \$5000, was for:

Rental/hireage: 4WD truck to supplement NES fleet for training and support of compliance work c/o Vavia Tangatataia. This work commenced during the months of January- February (56 days) @ \$90 per day.

[417] Mr Puna signed the requisition and with Ms Kamana co-signed the cash cheque, which Ms Scheel cashed on 18 June 2020. The cheque butt recorded, 'Avauta Rentals. Rental hireage 4WD supplement NES fleet.'

Invoices

[418] The three invoices have these features:

- (a) They are attributed to a fictitious entity, Avauta Rentals,.
- (b) They give an entity address which, according to Mr Puna, is his own.
- (c) They give an entity telephone number, which is that of Mr Puna's daughter.
- (d) They charge for the hire of vehicles never required or obtained.
- (e) They have such usual invoice features as 'Thank you for your business!'

Crown witnesses

[419] Ms Kamana said Mr Puna had told her he was going to charge NES for hire of his own vehicle. She processed invoices because he instructed her to, without having heard of Avauta Rentals, though noting the invoice telephone number was Nad tazkia Puna's.

[420] Mr Tangatataia said vehicles were not hired for compliance work. If a vehicle was hired, Ms Kamana hired it from Avis. He never requested an extra vehicle for compliance. He had never heard of Avauta Rentals. He was unaware of the invoices.

Puna evidence

[421] Mr Puna said, under his contract, he was entitled to an NES vehicle; and during the eight month hiatus when he was without an NES vehicle, NES could not afford to hire a vehicle for him and so he hired his own.

[422] He said, when re-examined, that he was authorised in March 2021 to modify his employment contract to confirm he had been entitled to hire his own vehicle on behalf of NES..

[423] He said, inally, that he invoiced NES under the name Avauta Rentals, his trading name, on Ms Kamana's advice; and he truly believed that was justified and he was entitled to authorise the expenditure.

Government Motor Vehicle Policy

[424] In its decision, dated 12 March 2019, it will be recalled, Cabinet approved, in addition to Mr Puna's salary, 'use by the Appointee of a Government vehicle as governed by the Cook Islands Government Vehicle Policy'.

[425] That policy, which has been effective since April 2019, like the travel policy, sets high ethical standards and governs the use of both rental and privately owned vehicles.

[426] As to rental vehicles, it says:

The use of rental vehicles to deliver government services should not be the preferred option with suitable alternatives exist. Where the employer considers it necessary to rent a vehicle, a vehicle should be procured on a short-term basis, at the economy available rates.

[427] As to privately owned vehicles, it says:

It is the responsibility of employees to provide their own transportation to and from their place of work, unless specified otherwise in an employment agreement.

In circumstances where the use of privately owned vehicles is required to deliver government services, reimbursements for the cost of such use must be authorised by the employer, according to one of the options set out below.

Reimbursements do not cover travel to and from the employee's normal place of work.

Reimbursement based on a standard rate

- Apply a standard rate per kilometre irrespective of engine size or whether the vehicle is powered by a petrol or diesel engine
- Travel destination and kilometres must be recorded

....

Reimbursement based on a fixed standard rate based on travel zones

....

Employment contract entitlements

[428] According to the earliest retrieved version of Mr Puna's employment contract, dated ostensibly 4 March 2019, last modified on 16 September 2019, under the second schedule, para 3(a), Mr Puna was to be provided:

A motor vehicle fit and practical for purpose, especially a 4WD with a big and spacy cabin for the Director's height and size, and can access sites up the hills, for the duration of this Contract; this includes personal use of this vehicle.

[429] As well, para 3(b) entitled him, even when using that vehicle privately, to: 'All fuel, diesel, oil and other consumables and insurance cost of the motor vehicle ... met by [NES]'.

[430] According to the further version, created on 26 September 2019, and last modified on 21 March 2021, Mr Puna was to be provided with:

A motor vehicle and practical for purpose, especially a 4WD with a big and spacey cabin for the Director's height and size, and can access sites of the hills, wetland areas, beach sites, for the duration of this Contract; this includes the Director's entitlement to the personal/private use of this vehicle. And in the event that there is no dedicated vehicle available to the Director, for whatever reason, a rental vehicle should be hired by NES, with the same specs aforesaid even if it is the Director's personal 4WD.

Conclusions

[431] There is, and can be, no issue that Mr Puna used for his own benefit, or procured the use of, the three NES cash cheques, totalling \$12,500, paid into his account.

[432] The issue is whether he did so dishonestly, and without any honest if mistaken belief that he was entitled to; and that is also germane to whether the three Avauta Rental invoices, he accepts he created, are forgeries.

[433] Here too the starting point has to be the only verifiable document defining his contract entitlements; the Minister's Cabinet memorandum, allowing him, 'use ... of a Government vehicle as governed by the Cook Islands Government Vehicle Policy'.

[434] On a literal reading, this did not entitle him to a government vehicle for his personal use. The policy does allow that, if employment agreement allows that, but that is not a benefit Cabinet expressly conferred.

[435] Supposing, however, this further benefit was implicit, there is a related question: did Cabinet require NES to fund his personal use, paying for his fuel and any related costs?

[436] Here too, these questions are compounded by the final version of Mr Puna's contract, created on 26 September 2019, which he says he was authorised to modify in March 2021, to assume the right to hire his own 4WD fully funded by NES.

[437] This was not put to Mr Tapaitau. Just as Mr Puna's evidence that Ms Kamana advised him to render the invoices was never put to her. Rather, I find, Mr Puna did this because NES was then subject to cash audit. He was about to be exposed.

[438] This late amendment is, in any event, irreconcilable with the Government's vehicle policy, which dictates when, and within what limits, employees may be reimbursed for hire of their vehicles.

[439] That apart, the way in which Mr Puna sought payment by Avauta Rentals invoice is completely inconsistent and is dishonest, beginning with the fact that Mr Puna claimed, not in his own name, but as Avauta Rentals.

[440] Not just that, Mr Puna created Avauta's invoices, just as he did the non-existent Manuia Resort invoice, with all the hallmarks of a commercial invoice I listed there, to tell about itself a convincing lie.

[441] That lie, that a vehicle had been hired from an entity called Avauta Rentals, resulting in charges totalling \$12,500, which NES was liable to meet, was within this cluster Mr Puna's crowning lie.

[442] Mr Puna, I find, forged the invoices to justify the three payments for use of his own vehicle, the three cheques he misused for his own benefit, dishonestly and without any honest if mistaken belief that he was entitled to them.

[443] The three forgery charges, and the three documentary fraud charges, are intimately linked. The forgeries enabled the frauds and confirmed that Mr Puna well understood he had no underlying entitlement. I find all six charges proved.

[iv] Charges 11, 21

[444] These charges, against Mr and Mrs Puna individually, allege that on 13 January 2020, they each fraudulently used, or procured the use of, an NES cash cheque for \$5000 to buy a motorbike for Mrs Puna's adoptive mother on Aitutaki.

[445] The Crown case is, relying largely on a coincidence between texts they exchanged and the cashing of the NES cheque, that they planned this offence together, Mr Puna accomplished it, and Mrs Puna collected the cash from NES and completed the purchase.

[446] Mr Puna denies receiving money, or knowing about the cheque, or what it was for. It has not been traced. The signatories are unknown. There is no supporting documentation.

[447] Mrs Puna says the cash she collected she had saved from her travel expense allowances, and Mr Puna had kept it for her. He was their Exchequer. She too denies receiving any NES money.

Text evidence

[448] On Thursday, 9 January 2020, Mrs Puna emailed Mr Puna, 'Baby, \$3300 cash for the bike. Same as HP arrangement'.

[449] On Friday, 10 January 2020, Mrs Puna exchanged texts with a person, called 'Ali', about buying two motorbikes:

10:50 DP: Ok thank you! We want two bikes, 1x Honda wave (red) 1x scooter vision (black) Both under my names Can I HP both and what's my deposit pls

11:17 A: Ok.. I'm off today Di please ring Mariana deposit will be 1200 minimum .. only blue visions left currently

11:19 A: Marianna Phone + 6825 2770

11:59 DP Ok cool I'll wait for the black vision

[450] On Saturday, 11 January 2020, Mrs Puna exchanged texts with 'Marianna':

10:42 DP: Marianna Ali gave me your number you have work today? Coming to put deposit on bike

10:45 DP: Diane Puna here

10:45 M: Hi, sorry I'm off today and of the island. I'll be back at work on Monday if you want to wait

10:46 DP: Ok ra

[451] On Monday, 13 January 2020, Mrs Puna exchanged further texts with 'Ali':

8:29 DP: P@ Ali husband feeling rich I'll cash mums bike and HP ours. So no petrol in mums the blue and black Honda wave. No fuel in it and pls ask your lovely boys P@@ to drop it off at air Raro once paid. Be over later on today with payment

8:31 A: Please email Mariana registration details and instructions I'm currently out of office

8:48 DP: Ok

[452] Later that morning Mr Puna exchanged these texts with Ms Scheel:

11:24 NP: Money on your table?

11:24 RS: Yes under my book

11:24 NP: Ok

[453] Immediately after Mr and Mrs Puna had this exchange:

11:27 NP: Baby I got money now. Come pick up please 12 noon lunch

11:27 DP: Baby we go lunch pls

11:27 NP: We got Workshop lunch in my Office. Please come

11:35 DP: Baby can I send the girls to pick up payments?

11:37 DP: I will go cash to pay bike before 2pm

11:37 NP: Its cashed

11:38 DP: Oh wow. Ok I come to lunch at 12?

11:38 NP: Ae

11:56 DP: !@ Baby I'm having doubt for the scooter note going to suit us now but I'm 6 months killer taua I runga. So ka oko rai ae e scooter for our babies for now t !@@ his is for the second bike

Cheque evidence

[454] The only NES documentary evidence to support the issue of the cash cheque for \$5000 on Monday, 13 January 2020, is the butt, , dated but not completed by Ms Scheel: 'Aitutaki Retreat – Manuae Regs'.

[455] A Bank of South Pacific officer gave evidence that the cheque was cashed that day at 10:11am.

Purchase evidence

[456] On Tuesday, 14 January 2020, Mrs Puna purchased from the Cook Islands Motor Centre a motorbike (serial number AAZ260) for \$3650 cash. There is a related invoice

[457] On Wednesday, 15 January 2020 at 11::45 am Mrs Puna texted Mr Puna:

@ Baby Kua tae te bike o mum she cried and she just called Me nana rai I pick up I te airport with dad. Tania was going to hold but Tairi rang mum to pic@@k up. Thank you baby!

[458] On 21 July 2021 this motorbike was located on Aitutaki in the possession of Nadtazkia Puna, and a friend.

Conclusions

[459] There is, and can be no issue, that the NES cash cheque for \$5000, dated 13 January 2020, was capable of being used fraudulently for a qualifying advantage by Mr and Mrs Puna on the Crown case.

[460] The issue is whether the evidence establishes to the criminal standard that they did fraudulently use that cheque for their personal benefit absent evidence as to who authorised it, and co-signed it. I am satisfied that it does.

[461] First, on Friday, 10 January 2020, Mrs Puna's texts to 'Ali', who can only have been from Cook Islands Motor Centre, show she wanted that day to buy on hire purchase, in her own name, two motorbikes, one for her mother, and one for her family.

[462] Second, the only reason why that transaction did not happen then or over the weekend, according to the texts on that and the following day, was because Centre sales staff were absent.

[463] Third, first thing on Monday, 13 January 2020, at 8:29 am Mrs Puna sent a completely contrasting text to 'Ali' saying she would pay cash for her mother's motorbike because her 'husband feeling rich'.

[464] Fourth, at 11:24 am Ms Scheel (wherever she then was) confirmed that cash she was to obtain for Mr Puna was already on her desk; and at 11:27 am he texted Mrs Puna to come and collect it.

[465] Fifth, that cash can only have been that obtained from BSP, when the \$5000 cash cheque was presented and honoured at 10:11 am; and that cheque must have been authorised if not signed by Mr Puna.

[466] The cheque butt, part completed by Ms Scheel, attributing the cheque to the ‘Aitutaki Retreat – Manuae Regs’, is consistent with Mr Puna’s justification for his recent Aitutaki ‘working holiday; the subject of Cluster 4.

[467] This evidence is entirely inconsistent with Mrs Puna’s claim to have made the motorbike cash purchase from funds of hers, held for her by Mr Puna at NES. To the contrary, it points to one conclusion only.

[468] On Monday, 13 January 2020, Mr and Mrs Puna acquired cash they did not have on Friday, 10 January 2020; and that can only have come from the \$5000 cash cheque cashed that morning.

[469] On the evidence it no less plain that Mrs Puna knew how Mr Puna was to acquire that cash: by fraudulently procuring for their shared benefit an NES \$5000 cash cheque; the cheque cashed.

[470] In short, I am fully satisfied that she, as much as he, wanted the cheque to issue, and so procured its use, and that they are equally culpable. I find the charges against each of them proved.

[v] Charges 29, 30

[471] These two charges allege, essentially, that on 18 June 2020 Mr Puna fraudulently obtained from an NES a \$5000 payment by cheque, by relying on (uttering) a forged invoice, dated 15 June 2020, from a fictional entity, Manea Cleaning Services.

[472] Mr Puna contends this invoice documents a legitimate expense – car cleaning services by his nephew to which he was entitled under his contract; and that, as agency head, the payment lay within his authority to authorise.

Primary evidence

[473] The \$5000 invoice, dated 15 June 2020, was rendered that day for, ‘Cleaning of NES work truck (interior and exterior) 3 times a month @ 75 cleaning session’.

[474] The most notable features of this 15 June 2020 invoice were these:

- (a) It is attributed to a fictitious entity, Manea Cleaning Services,
- (b) It charges \$5000 for future as well as past cleaning services (January – December 2020).
- (c) It has such usual invoice features as ‘Thank you for your business!’

[475] On 18 June 2020 a voucher approving payment from the NES operating account was prepared by Ms Scheel, and approved by Mr Puna. The \$5000 cash cheque was completed by Ms Scheel, co-signed by Ms Kamana and Mr Puna, and cashed by Ms Scheel that day.

[476] The cheque butt, in her hand, stated ‘Manea Cleaning Services for cleaning NES trucks Jan-Dec 2020’. The receipt, as Mr Puna accepted, was prepared during the March 2021 internal audit.

Internal audit preliminary report

[477] The preliminary audit report (in March 2021) put in question the authenticity of the invoice, saying this:

NES car cleaning service by a company ‘Manea Cleaning Services’ cash cheque paid in June 2020 for services up to December 2020 (advance payment), verbal explanation from Director that it was paid to Bates Manea that cleans the NES truck regularly. Cheque was cashed by the Director’s PA and given to Nga.

[478] The report goes on to say:

Internal audit approached Mr Bates at his residence where he confirmed that he did clean the NES Director’s truck from time to time, but only gets paid online when he completes each cleaning job. He did not receive any lump sum payment in cash for \$5000.

[479] Mr Puna says he did not engage Bates Manea Snr. He engaged Bates Manea Jnr; at the time of trial unable to be called for the defence because he was in New Zealand comatose after an accident.

Conclusions

[480] There is, and can be, no issue that the 18 June 2020 NES cash cheque for \$5000, was capable of supplying Mr Puna a qualifying benefit, or that he used it or procured its use.

[481] The issue is whether he did so fraudulently and that is intimately connected with the whether he relied on (uttered) the invoice from Manea Cleaning Services, dated 15 June 2020, knowing it to be a false document, a forgery.

[482] The invoice was a forgery: a false document created to deceive. Its central lie was that it was issued by a commercial entity for services rendered, when neither was true. I am satisfied equally created it, and relied on it, to justify a payment he knew he had no right to.

[483] Mr Puna knew, I find, that the Director's work vehicle was cleaned by staff, or a car cleaner already engaged, Mr Teataiariki. He was well aware, as to January-June 2020, he had no right to charge for his personal vehicle, masked as an Avauta Rentals hire.

[484] Mr Puna knew finally, I find, he had no basis to charge for such future services between June – December 2020. He did not pretend otherwise. He said, in effect, he paid himself in advance, not expecting to have sufficient funds in the next financial period.

[485] Mr Puna, I find, forged the invoice, and relied on it (uttered it) to justify the \$5000 payment; and he procured the cheque for his own benefit, dishonestly and without any honest if mistaken belief he was entitled to it.

[486] In short, the uttering charge, and the documentary fraud charge, are intimately linked. The uttering enabled the fraud. I find both charges proved.

[vi] Charges 33, 42

[487] These two charges allege, essentially, that on 29 June 2020 Mr Puna fraudulently obtained from NES a \$5000 payment by cheque, relying on a forged Minister's letter, created on 24 March 2021, endorsing his right to a \$5000 performance bonus.

[488] These charges succinctly express the Crown case, beginning with an email Mr Puna sent Ms Kamana and Ms Scheel on 29 June 2020 under the heading 'Performance Management – Director':

Please process the payments from Opex, for the Contractual Obligations re Performance - Director, reference as per Director's Contract of Employment, Section 7 (c) (i), Performance Review Payments, the second option of this specified section ... soonest

[489] The NES cash cheque for \$5000, was filled out by Ms Kamana on 29 June 2020, it was co-signed by Mr Puna, and cashed that day for him by Ms Scheel.

[490] The cheque butt narrated: 'Mr Nga Puna Director Contractual Obligations'. The payment voucher narrated: 'as per Directors contract of employment section 7c(i) performance review'.

[491] Mr Puna contends the Minister granted him this bonus; that the Minister signed the letter and it was not a forgery; that he was entitled to the payment under his contract, and was not fraudulent in procuring it by the NES cheque.

Contract entitlement

[492] Such a performance bonus is not one the Minister recommended that Cabinet approve or consider. Such a right is to be found, however, in the earliest retrieved version of Mr Puna's contract, last modified on 16 September 2019.

[493] Under the heading 'performance', cl 7 (a) required the Minister to evaluate Mr Puna at least once a year; and cl 7 (b) said this:

The results of this performance review shall be used to set the level of annual performance bonus or salary increase, and can be used as grounds for action taken under clause 16.

Clause 16 enabled the Minister to terminate Mr Puna's contract for breach of its terms or misconduct.

[494] There is a larger such right, more consistent with the payment made, in the last contract version, dated 23 March 2021, sent to the auditor that day. But because Mr Puna referred to it in his 29 June 2020 email to Ms Kamana and Ms Scheel, it must have been in the version created on 26 September 2019.

[495] Clause 7 (b), just set out, must by then have become cl 7 (b), (c):

The results of this performance review shall be used to set the level of annual performance bonus or salary increase; and can be used as grounds for action under clause 16 – if justifiable

Performance review payments:

- I. Performance bonus payment of 5% of the Director's salary, tax inclusive, or a lesser payment of \$5000 after tax; at the Minister's discretion.
- II. Salary increase - to be negotiated with the employer, Minister responsible for national environment service; increase the Minister's discretion.

Minister's letter

[496] The Minister's letter justifying the bonus payment under cl 7(c) (i) is dated 28 April 2020. It is on the letterhead of the Office of the Deputy Prime Minister'. Its subject heading is 'Annual Performance Review – Director of NES March 2019 to February2 February 2020'.

[497] In this letter to Mr Puna, Mr Tapaitau, as deputy prime minister and NES minister, says this:

I am pleased to say that I am really impressed with the Achievements that you have made in your first term as Director of National Environment Service. For a first timer in the Environment space, you have clearly made your mark as a go-getter with clear intentions and has satisfied-by-far all my views in my selection of you to be the Director of the NES.

As your Employer, I am proud of your excellent achievements, our achievements as Team NES, and would like to endorse the performance bonus payment, for the latter lesser payment (highlighted- as per your request) instead of the 5%; and As per your Contract of Employment, Section 7(c):

...

I wish you all the best for the second year of your term, and I look forward to greater things to come for the national environment service.

[498] Mr Puna said this letter reflected Mr Tapaitau's review of his performance in April 2020 after the COVID lockdown. Mr Tapaitau recalled making an unqualified review of Mr Puna, but not the year it related to. He recalled signing the letter.

[499] This letter, according to the metadata, was created and modified on Mr Puna's laptop on 25-26 March 202 and it is on the wrong letterhead. Mr Tapaitau did not become deputy prime minister until 1 October 2020. At 1:51pm on 25 March Mrs Puna, also involved, texted Mr Puna, 'He's signed'.

Conclusions

[500] There is, and can be, no issue that Mr Puna procured the 29 June 2020 NES \$5000 cheque for his own benefit. He required it, co-signed it and received the cash; and I am satisfied he did so fraudulently in the fullest sense.

[501] First, he had no right to any bonus under his contract, as remuneration approved or considered by Cabinet. And the clause he claimed under does not appear in the earliest retrieved version of his contract. By June 2020 he had inserted it to be able to claim on it. That is fraudulent in itself.

[502] Second, the Minister's letter, to justify this payment on the March 2021 audit is frankly false. It holds out it was written a year before, about the year before that, when it was not. It wishes Mr Puna well for the year to come, when by then that year had just passed. It endorses a payment to Mr Puna to which he had no right.

[503] Mr Puna, I find, forged the letter retrospectively to justify the bonus payment dishonestly and without any honest if mistaken belief he was entitled to it. The forgery

masked the fraud and confirmed Mr Puna well understood he had no underlying entitlement. I find both charges proved.

[vi] Charge 41

[504] This final charge alleges that on 23 February 2021 Mr Puna fraudulently procured an NES cash cheque for \$1000 on the basis that he was entitled to such a bereavement payment on the death of his mother.

[505] The Crown's case is that he had no such right, as he well knew. NES rarely made such payments. It usually only funded flowers, though it had once contributed \$500 for catering on the death of an NES employee of 10 years.

[506] Quite exceptionally, the Crown says, NES had already made a \$1000 bereavement payment to the Puna family (to Tohoa Puna, a niece I understand). Mr Puna required a further such payment. This second payment was clearly illegitimate.

[507] Mr Puna contends the first payment was not to the family; the recipient did not qualify. As agency head he considered he had the ability to authorise a second payment out of the entertainment allowance budget.

[508] NES, he says, did not have a bereavement policy, leaving him free to exercise his discretion as agency head; and the payment and reason for it were duly documented. He was in no sense fraudulent.

Primary evidence

[509] On 14 February 2021 Mr Puna's mother died and on 22 February 2021 Ms Kamana completed and signed a cash cheque for \$1000 for this recorded purpose:

NES donation Puna Family Bereavement

\$1000 to the Puna Family, Director, Senior Finance Officer, Aitutaki Environment Officer and the 2 interns for the loss of their beloved mother, grandmother Mama Purotu Puna.

[510] Ms Kamana's evidence was that Mr Puna was angry that this cash had been given to Tohoa Puna, evidently the senior finance officer she refers to. She said he demanded a second payment.

[511] On 23 February 2021 Ms Kamana filled out and signed a second NES cash cheque for \$1000, which Ms Scheel cashed. This was recorded as 'NES Catering' and of there is this contemporary note:

Further to our brief discussion this morning this memorandum serves as confirmation to donate a further \$1000 to the Puna family to assist with funeral costs incurred by the Director for grave and catering expenses.

[512] Mr Puna denies he was the author of this note. He maintains the further payment was approved by Ms Kamana. That may be. The note is consistent with her evidence that this second payment needed somehow to be justified.

Conclusions

[513] This evidence satisfies me, firstly, that Mr Puna did procure the issue of this second NES \$1000 cash cheque on account of the Puna family bereavement. Ms Kamana, I find, completed and signed it on his direction.

[514] As the record relating to the first cash cheque the day before confirms Ms Kamana had approved the first cash cheque as an extraordinary and unprecedented gesture, because of the number of NES employees within the Puna family.

[515] Ms Kamana, I find, would not have issued the second such cheque, an even more unprecedented, extraordinary gesture, without Mr Puna requiring her to do so. The contemporary note is consistent.

[516] Mr Puna, I find, procured this second cheque without any semblance of honest, if mistaken belief, that he was entitled to it. The payment was obviously unprecedented. It conferred on him and his family a singular, extraordinary benefit.

[517] By this date, on the eve of the March 2021 audit, Mr Puna had a settled propensity to abstract NES funds for his and his family's needs. He had no interest in

whether that was legitimate; only whether it could be made to look legitimate. I find the charge proved.

CONCLUSION

[518] In the result, my decision is this:

- (a) Mr Tapaitau is guilty of all offences with which he is charged; and I convict him accordingly.
- (b) Mrs Puna is guilty of all offences with which she is charged, including those to which she has pleaded guilty, except those on which she has been discharged and charges 5,13; and I convict her accordingly.
- (c) Mr Puna is guilty of all offences with which he is charged, except charges 14, 25; and I convict him accordingly.

[519] I will issue a separate Minute as to sentence.



P J Keane, CJ

ANNEXE 1 - FOUR OFFENCES

Fraudulent use of document

[520] Section 251A(b) states:

Everyone is liable to imprisonment ... who, with the intent to defraud - uses or attempts to use [any] document [capable of being used to obtain any privilege, benefit, pecuniary advantage or valuable consideration] for [one or more of those] purposes ...

[521] This section is derived from, and identical to, s 229A of the Crimes Act 1961 (NZ), there repealed in 2003; and according to the NZ Supreme Court in *Hayes v R*:²³

... [Its] statutory purpose is to criminalise the use of dishonest means directed to gaining the advantage [charged] even if the accused is otherwise entitled to it. Questions of actual entitlement may well be relevant to sentence, but they are not relevant to guilt, save that a belief in entitlement will, of course, be relevant to mens rea.

[522] Against that premise, the Court identified what the Crown must prove: (i) the intent to defraud; (ii) the use of a document; (iii) the document's capacity to obtain the advantage charged; (iv) the requisite purpose.²⁴ These elements divide into the second and third, and the first and fourth. I will set them out in that order.

Use of a document

[523] 'Use of a document' has been widely defined in the New Zealand cases, and can involve the 'use' of more than one document and a series of separate steps involving more than one other person.²⁵

[524] Such uses can include, pertinently, drawing a cheque to pay for goods or services.²⁶ Also, as pertinently, procuring the use of a document by an alleged co-offender or innocent agent.²⁷ Nor need the agent be directed to act in any way. They need only play their part as the transaction normally requires.

²³ *Hayes v R* [2008] NZSC 3, [2008] 2 NZLR 321, (2008) CRNZ 593, at [12].

²⁴ *Hayes*, at [23].

²⁵ *R v Baxter* [1998] 3 NZLR 144, (1998) CRNZ 580; *R v Hadfield* [2007] NZCA 414.

²⁶ *R v McGrath* [2009] NZCA 293.

²⁷ *R v Fowlds* CA 222/00, 13 December 2000; *R v Findlay* [2007] NZCA 553.

[525] In *Ngamu v R*,²⁸ which concerned a cheque theft ring in which some appellants stole the cheques, some altered them, and some deposited them in third-party accounts, and some recruited those account holders, all were held to be principals, who actually ‘used’ the documents, as part of a continuing use from theft to banking.

[526] ‘Use’, in this context, the Court said, is an ‘elastic term’.²⁹ All four activities were agreed, and were held by the Court to be, ‘uses’ for the purpose of the offence; and the fact that an appellant might have been involved in one, but not all activities, was no impediment.³⁰

The criminal law recognises that an accused can be liable as a principal in respect of his or her part of the actus reus, provided that another does or others do the things necessary to complete the actus reus.

[527] In the earlier case, *R v Gunthorp*,³¹ a highly complex series of commercial frauds orchestrated by one of the five appellants, Allan Hawkins, there was an issue whether he ‘used’ a cheque in the ‘money-go-round’, absent any evidence that he signed the requisition or the cheque, or authorised or directed any aspect of that transaction.

[528] As to that, the Court began by saying this:³²

It was not disputed that a person may ‘use’ a document without directly handling it.³³ An instruction or direction to deal with the document in a particular way will suffice. Counsel submitted that nothing less than that will do. This is too narrow an approach. An instruction to carry out a particular transaction necessarily carries with it an instruction to do what is normally and reasonably necessary for the purpose.

[529] As instructive is a very broad basis on which the Court upheld the trial judge’s inference, in the absence of specific evidence, that it was ‘inconceivable’ the transaction would have taken place without Hawkins’ express instruction.

²⁸ *R v Ngamu* [2010] 3 NZLR 547, CA,

²⁹ *Ngamu*, [12].

³⁰ *Ngamu*, [16].

³¹ *R v Gunthorp* [2003] 2 NZLR 433, CA.

³² *Gunthorp*, [134].

³³ Citing *R v Paterson* [1976] 2 NZLR 394

[530] A source of adverse inference there, not literally present here, was Hawkins' election not to give evidence, as the trial judge put it, an already strong prima facie case was strengthened by 'the failure of Mr Hawkins to give the evidence he would otherwise be expected to give if he were innocent'.³⁴

[531] The Court of Appeal accepted that 'an inference may be drawn only from evidence, not from the absence of evidence. And as the Court said, quoting from earlier cases, an accused's failure to give evidence cannot, on the one hand, 'supply the want of necessary proof'.³⁵ But as the Court then said:³⁶

Where facts are proved which call for an explanation by the accused he 'preserves silence at his peril ... the silence of an accused person has always been a major indication of guilt in cases where he might be expected to speak if he were innocent.

[532] The Court held that what inference might be taken was a question of commonsense in the circumstances; and highly material in that case was that Mr Hawkins was the primary, the indispensable player.³⁷

[533] *Hayes* confirms just how widely 'use' is to be understood. The Court held that, 'an unsuccessful use of the document is just as much a use as a successful one'.³⁸

An unsuccessful use must not be equated conceptually with an attempted use. ... the offence is directed at the dishonest conduct by means of which the pecuniary advantage is sought.

As the Court said, 'the ultimate obtaining of a pecuniary advantage ... is not a necessary ingredient of the offence'.

Document's capacity to obtain advantage

[534] The word 'document', itself, is to be understood equally widely. It can include, for instance, a computer disc or program.³⁹ But, as *Hayes* says, it must be

³⁴ *Gunthorp*, [137]; *Trompert v Police* [1985] 1 NZLR 357.

³⁵ *Gunthorp* [142], *R v Burdett* (1820) 4 B & Ald 95, 140

³⁶ *Gunthorp* [142], *Purdie v Maxwell* [1960] NZLR 599, 605.

³⁷ *Gunthorp* [142], *Haw Tua Tau v Public Prosecutor* [1982] AC 136, 153

³⁸ *Hayes*, [13].

³⁹ *R v Misic* [2001] 3 NZLR 1, (2001) 19 CRNZ 139 (CA); *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678, (2015) 27 CRNZ 593.

capable of obtaining the ‘advantage’ charged, though understood expansively in three respects.

[535] First, the Court interpreted the concepts ‘pecuniary advantage or valuable consideration’ as distinct but allied:⁴⁰

... the statutory purpose must have been to encompass anything capable of being valuable consideration, whether of a monetary kind or of any other kind; in short, money or money’s worth.

[536] Secondly, the Court interpreted ‘pecuniary advantage’ as ‘simply anything that enhances the accused’s financial position’:

It is that enhancement which constitutes the element of advantage. ... even if the person from whom the ... advantage is sought has an obligation to supply it ... that will not prevent the use of dishonest means to procure the advantage from being an offence.

[537] Thirdly, the Court made clear that ‘the concept of advantage’ is not a ‘comparative notion’. It is not ‘obtaining a better financial outcome than that to which you are entitled in law’. As the Court next said:

The underlying notion is practical rather than comparative. By practical we mean simply getting something which enhances your financial position.

Qualifying purpose and intent

[538] The fourth offence element, that the defendant used a document, capable of securing the advantage charged, with that very purpose, will normally follow as a natural inference. And the Crown, as I have said, need not prove that this purpose was accomplished.⁴¹

[539] The first element issue, whether the defendant used the document in question with intent to defraud, is linked but distinct and is not answered as naturally by inference. It turns not just on the defendant’s intent understood as purpose. It turns finally on the defendant’s state of belief.

⁴⁰ *Hayes*, at [14].

⁴¹ *Hayes*, at [25].

[540] In *Hayes* the Court equated fraudulent intent with dishonesty; and therefore concluded that if the appellant, ‘believed that what she was doing was in accordance with her legal rights and obligations she would have a defence’; that of ‘an honest belief’. The question on that appeal was whether that ‘honest’ belief had also to be reasonable.

[541] The Court declined to introduce reasonableness for two reasons, the international jurisprudence and the statutory matrix, and said this: [43]

The objective facts ... may be such that the [fact finder] can properly infer that the accused had a dishonest mind unless he or she can raise a reasonable doubt on the basis of a relevant but mistaken belief. ... the international jurisprudence is consistent with New Zealand’s view that, provided the accused’s belief is actually held it does not have to be reasonable.

[542] At [44] the Court endorsed the question posed in *R v Waterfell* [1970] 1 QB 148, 150-151, by Lord Parker CJ:

The test here is a subjective test, whether the particular man had an honest belief, and of course whereas the absence of reasonable ground may point strongly to the fact that that belief is not genuine, it is at the end of the day for [fact finder] to say whether or not ... this particular man ... did have that genuine belief.

[543] That is the position here too. In *Tepaki v Framhein*,⁴² our Court of Appeal held that two things must be proved: (i) what was done was dishonest by ordinary standards; (ii) the defendant must have realised that to be so.

[544] Where, therefore, a defendant contends that he or she did not act ‘dishonestly’, having acted under an honest belief of a ‘claim’ or ‘colour’ of right, the Crown must negate that to establish dishonesty.

Conspiracy to defraud

[545] Fraudulent conspiracy is an offence against s 280 of the Crimes Act 1969:

Everyone is liable to imprisonment for a term not exceeding five years who conspires with any other person by deceit or falsehood or other fraudulent

⁴² *Tepaki v Framhein* CA 5/07, December 2007, 45

means to defraud the public, or any person ascertained or and unascertained,
...

[546] This offence has three elements, which the Crown must prove: (i) a conspiracy involving the relevant defendant; (ii) an intent to defraud; (iii) an agreed deceitful, false, or fraudulent means.

[547] The first element consists in this agreement:⁴³

A criminal conspiracy ... consists in an intention which is common to the mind of the conspirators and the manifestation of that intention by mutual consultation and agreement among them. It is of the essence of a conspiratorial agreement that there must not only be an intention to agree about also a common design to commit some offence, that is to put the design into effect.

[548] The second element consists in this intent:⁴⁴

To defraud ordinarily means ... to deprive a person dishonestly of something which is his or of something to which he is or might but for the perpetration of the fraud be entitled.

[549] The third element consists in the means the statute specifies; some agreed means which is deceitful, false or fraudulent; and those means speak for themselves.

[550] Especially apposite is *Adams v R*⁴⁵, where the first of a series of conspiracy charges alleged fraud by concealment, 'in that they did agree to use dishonestly a system of disguising the source and utilisation of moneys from legitimate inquiry' by the company of which they were directors, its subsidiaries, and others.

[551] As to that charge, sustaining the conviction appealed, the Judicial Committee of the Privy Council adopted this earlier statement of its own:⁴⁶

The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that ... the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss ...

⁴³ *R v Gemmell* [1985] 2 NZLR 740, (1985) 1 CRNZ 496, at 743, 500.

⁴⁴ *Scott v Metropolitan Police Commissioner* [1975] AC 819, (1974) 60 Cr App R 124, at 839.

⁴⁵ *Adams v R* (1994) 12 CRNZ 379 (PC).

⁴⁶ *Yu-tsang v R* [1992] 1 A.C. 269, (PC), 279-80.

[552] Conspiracy by concealment can be closely akin, as the Crown submits, to conspiracy to defeat justice.⁴⁷ On the Crown case the defendants were as intent on avoiding prosecution, as they were on justifying ICI expenditure.

Forgery

[553] Forgery is defined by s 287 (1) of the Crimes Act 1969:

Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within the Cook Islands or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Cook Islands or not.

[554] This offence has three elements, which the Crown must prove: (i) making a false document; (ii) knowing it to be false; (iii) intending that it be used or acted on as genuine, or to induce some person to act or not act on that belief.

[555] The first element, making a false document, is elaborated by definitions of ‘document’ and ‘false document’ and the latter is, so far as is relevant:

A document- of which the whole or any material part purports to be made by (or on behalf of) any person who did not make it or authorise its making.

[556] The second and third elements speak for themselves and, again so far as is relevant, forgery is finally defined by s 287 (3):

Forgery is complete as soon as the document is made with such knowledge and intent ... , although the offender may not have intended that any particular person should use or act upon it as genuine, or should be induced by the belief that it is genuine to do or refrain from doing anything.

Uttering

[557] Uttering forged documents is an offence against s 289 (1), which states:

Everyone is liable to imprisonment ... who, knowing a document to be forged,

—

(a) Uses, deals with, or acts upon it as if it were genuine; or

⁴⁷ *McMahon v R* [2009] NZCA 472 (CA); *R v Kong* [2011] NZCA 537 (CA).

- (b) Causes any person to use, deal with, or act upon it as if it were a genuine.

[558] This offence has these two elements on the Crown's case: (i) knowledge that a document is forged; (ii) using it as if it were genuine.

ANNEXE 2 – TRIAL PRINCIPLES

[559] First *each defendant must be tried separately*: The defendants, though tried on evidence that in varying degrees relates to all three, are nevertheless each entitled to be tried separately one from another.

[560] I must try each on the evidence relating to him or her, and only take account of evidence relating to another defendant if the law requires or permits. And if I find one jointly charged defendant guilty, I must not infer on that basis alone that another is too.

[561] Second, *each charge must be tried separately*: I must decide whether a defendant is guilty of each charge on the evidence relevant to it; and not take into account that I may have found the defendant guilty of another charge, unless the two are logically related on the evidence.

[562] Though I have a broad discretion, a related charge as to which I find guilt cannot be probative on the sole basis it may show a relevant proclivity. On the evidence, the resolved charge must be so ‘strikingly similar’ I am assisted in deciding the charge I have still to resolve.⁴⁸

[563] Where, as here, there are related charges of forgery and document fraud, proof of the forgery will also be relevant to the related fraud.⁴⁹

[564] Third, *the presumption of innocence*: I must deem each defendant to be innocent of each charge they face unless and until the Crown has proved them guilty beyond reasonable doubt.

[565] Fourth, *the onus of proof*: The Crown must prove guilt beyond reasonable doubt and that onus never shifts. The defendants do not have to prove their innocence. They are innocent until the Crown proves their guilt.

⁴⁸ *Police v Benioni*, High Court of the Cook Islands, Cr Nos 18/16, 480/16, 7 March 2017, Williams CJ.

⁴⁹ *R v Rowley* [2015] NZCA 233, at [20]: ‘Proof that add invoice ... was not real or genuine inevitably created a strong prima facie inference of dishonesty ...’.

[566] Fifth, *the standard of proof*: Beyond reasonable doubt is a very high standard of proof. The Crown must do more than persuade me the defendants are very probably or even very likely guilty. The Crown does not have to convince me to the point I am certain. But must convince me to the point where I am sure.

[567] Sixth, *a reasonable doubt*: I will not be sure of guilt if I have a reasonable doubt about that; an honest and reasonable doubt after I have neutrally and carefully considered all the evidence.

[568] Seventh, *defendants' evidence*: The defendants elected to give and call evidence. They did not have to. The onus of proving their guilt remains with the Crown. There are three conclusions I might come to, as to a charge:

- (a) The defendant's evidence credible, reliable and a convincing answer to the Crown's evidence: That would be a complete answer. As to that charge, I must find that defendant not guilty.
- (b) The defendant's evidence is not entirely convincing, but I am left with a reasonable doubt about guilt: As to that charge I must again find the defendant not guilty.
- (c) The defendant's evidence is entirely unconvincing and I reject it: I must then put it to one side, and decide on the Crown evidence whether it has proved guilt beyond reasonable doubt.

[569] Eighth, *admissibility between co-defendants*: as to this issue I rely on my first trial ruling.

[570] Ninth, *assertions not put to prior relevant witnesses*: One defendant gave evidence contradicting Crown witnesses, despite the fact that his evidence had not been put to them by his counsel.

[571] That is open to two inferences, the second more adverse than the first: (i) that, when they were cross-examined, he had still to settle his evidence; or, (ii) that he knew he would be contradicted, and wished to deprive the Court of their evidence. The

second especially entitles me to exclude the defendant's evidence, or give it lesser weight.⁵⁰

[572] Tenth, *indirect inference evidence*: offence elements may be proved by indirect as well as direct evidence; and at trial there was an issue as to the standard to which facts relied on to support such an inference had, themselves, to be proved.

[573] Only offence elements need be proved beyond reasonable doubt. Facts relied on to support that inference need only be 'proven'; and be capable, singly or with others, of supporting that inference in a manner, which is 'logical [and] not mere speculation or guesswork'.⁵¹

[574] Eleventh, *party liability*: I may find a defendant guilty of an offence on the basis he or she actually committed it. Or that he did or did not do something to aid, abet, incite, encourage or procure another person to commit the offence.⁵²

[575] Twelfth, *my ultimate duty*: If I am sure a defendant is guilty of a charge I must find him or her guilty. If I am not sure about that, I have a reasonable doubt it, I must find him or her not guilty.

⁵⁰ *Browne v Dunn* (1893) 6 R. 67 (HL).

⁵¹ *R v Puttick* (1985) 1 CRNZ 644 (CA); endorsed *Graham v R* [2012] NZCA 372.

⁵² Crimes Act 1969, s 68(1); I need not refer to s 68(2).