IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2014-004-2293
[2019] NZHC 222

BETWEEN	THE QUEEN
AND	PAUL BUBLITZ, BRUCE McKAY and RICHARD BLACKWOOD

Hearing:	13-17, 20-23, 27-28 August, 3-5 September 2018
Appearances:	DG Johnstone, SS McMullan and S Closey for the Crown SJ Lance, SNB Wimsett and F Iggulden for Defendant, P Bublitz GNE Bradford and S Withers for Defendant, B McKay S Kilian and R McCausland for Defendant, R Blackwood
Verdicts:	5 February 2019
Reasons:	21 February 2019

VERDICTS AND REASONS OF TOOGOOD J
[Judge-alone trial under Part 4, Subpart 1 of the Criminal Procedure Act 2011]

This judgment was delivered by me on 21 February 2019 at 3.00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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VERDICTS AND CONSEQUENTIAL ORDERS - Delivered orally at 10am on 5 February 2019

[1] Paul Neville Bublitz: you have been tried on ten charges under s 220 of the Crimes Act 1961 of theft by a person in a special relationship, and two charges under s 242 of the Crimes Act of making a false statement as a promoter of securities under the Securities Act 1978.

[2] Bruce Alexander McKay: you have been tried on three charges of theft by a person in a special relationship; one charge of making a false statement as a promoter of securities and one charge of making a false statement to a trustee for debenture holders under s 377 of the Companies Act 1993.

[3] Richard Timothy Blackwood: you have been tried on four charges of theft by a person in a special relationship; one charge of making a false statement as a promoter and one charge of making a false statement to a trustee of debenture holders.

[4] I regret that, because of late changes that I have made to the way in which I have set out my reasons for the verdicts I have reached, I am not in a position to deliver my written reasons today. I propose to deliver my verdicts now but to provide the written reasons on either Thursday or Friday of this week. I apologise for that delay. But I want to make a comment which may give the parties an understanding of at least part of my reasoning.

[5] In general terms, the charges fell into two categories; first, those relying on alleged breaches of the Priority Finance or Viaduct Capital trust deed and, second, those relying on alleged breaches of the Mutual Finance Crown guarantee. An essential element of all of the charges is proof that Mr Bublitz was in control of the transacting entities so as to make the relevant transactions related party transactions. For the purposes of the charges relying on the Priority Viaduct Trust Deed, that is charges 1 to 9, the definition of "control" in the Priority Viaduct Trust Deed is that which is found in the New Zealand Accounting Standard NZ IAS 24. I have accepted that, among other things, it required proof that Mr Bublitz was in control of Viaduct by reason of what Mr Johnstone described as "an abiding, secret arrangement ceding control" to him. For charges 10 to 15, however, the relevant definitions of "control"

are those in the Mutual Crown guarantee; they are alternatives, either of which may apply. One definition incorporates the accounting standard NZ IAS 24. The other is a broader definition requiring proof, for the purposes of this case, that Mr Bublitz was able to exercise real or effective control directly or indirectly over the parties to the transaction, whether pursuant to a contract, an arrangement, an understanding or otherwise. The differences between the requirements in the two sets of charges goes some way to explaining my verdicts.

[6] Will the defendants please stand? For the reasons that I shall deliver in writing I have reached the following verdicts:

CHARGE	**VERDICT**
Charge 1: Theft by a person in a special relationship	**Mr Bublitz: Not guilty**
Charge 2: Theft by a person in a special relationship	**Mr Bublitz: Not guilty**
Charge 3: Theft by a person in a special relationship	**Mr Bublitz: Not guilty**
Charge 4: Making a false statement as a promoter	**Mr McKay: Not guilty**
Charge 5: Theft by a person in a special relationship	**Mr Bublitz: Not guilty**
Charge 6: Theft by a person in a special relationship	**Mr Bublitz: Not guilty**
Charge 7: Theft by a person in a special relationship	**Mr Bublitz: Not guilty**
Charge 8: Making a false statement as a promoter	**Mr McKay: Not guilty** **Mr Blackwood: Not guilty**
Charge 9: Making a false statement to a trustee	**Mr McKay: Not guilty** **Mr Blackwood: Not guilty**
Charge 10: Theft by a person in a special relationship	**Mr Bublitz: Guilty** **Mr McKay: Guilty** **Mr Blackwood: Guilty**

CHARGE	VERDICT
Charge 11: Theft by a person in a special relationship	**Mr Bublitz: Guilty** **Mr McKay: Guilty** **Mr Blackwood: Guilty**
Charge 12: Theft by a person in a special relationship	**Mr Bublitz: Guilty** **Mr McKay: Guilty** **Mr Blackwood: Guilty**
Charge 13: Theft by a person in a special relationship	**Mr Bublitz: Guilty** **Mr Blackwood: Guilty**
Charge 14: Making a false statement as a promoter	**Mr Bublitz: Guilty**
Charge 15: Making a false statement as a promoter	**Mr Bublitz: Guilty**

[7] I discharge each of you on the charges on which I have found you not guilty.

[8] On all charges on which you have been found guilty, you are remanded on bail on your existing terms, to appear in this Court for sentencing at **9:00 am on Wednesday, 27 March 2019.**

[9] I call for pre-sentence reports and, in each case, without giving any indication about the likely sentences that will be imposed, I direct that home detention appendices be prepared.

Addendum

[10] Mr Kilian, on behalf of Mr Blackwood, signalled that he is instructed to make an application for a discharge under s 106 of the Sentencing Act 2002 and requested that no convictions be entered. I indicated that I considered such an application had almost no prospect of success but Mr Johnstone, for the Crown, did not oppose the deferral of convictions. The matter will be dealt with at the time of sentencing and I recalled orders that I made entering convictions for the defendants.

REASONS FOR VERDICTS: Delivered in writing on 21 February 2019

Introduction

[11] On 13 May 2010, finance company Viaduct Capital Limited (Viaduct or VCL) was placed into receivership by the trustee for the finance company's debenture holders. On 14 July 2010, receivers were appointed to another finance company, Mutual Finance Limited (Mutual or MFL). This criminal proceeding follows subsequent investigations by the Treasury, the Serious Fraud Office and the Financial Markets Authority into the affairs of the two companies and the actions of their shareholders, directors and managers.

The Crown's case

[12] The essence of the Crown's case is that the defendant Paul Neville Bublitz, as the ultimate owner of a group of investment companies known as the Hunter Capital Group (Hunter, Hunter Capital, Hunter Group or the Group), arranged the acquisition of, and controlled, the two finance companies, primarily to use them as vehicles for obtaining funding from members of the public to support property development ventures he was undertaking through the Group.

[13] It is alleged that, in the wake of the 2007-2008 global financial crisis (GFC) and the ensuing recession, Mr Bublitz's several ventures were experiencing serious cash-flow problems by late 2008. A strategy was developed to create a "distressed asset" fund to take advantage of opportunities to acquire distressed assets (in the form of property loans) at low prices. The plan involved the acquisition of a Crown-guaranteed finance company that would seek deposits from the investing public, purchase Hunter assets for cash, and lend cash to Hunter and other business ventures associated with Mr Bublitz, in order to reduce Hunter Capital's debt servicing burden.

[14] In a proposal put to share brokers Forsyth Barr in December 2008, Mr Bublitz and an associate, Mr Nicholaas Wevers, indicated an intention to raise at least $25 million by way of a public debt instrument. They explained that:

> The impact of the current economic and investment climate on the property sector, and finance companies that fund the sector, is well documented. Property values are under considerable downward pressure and certain

> financiers have compromised. Illiquid capital markets are compounding the situation.
>
> The confluence of these factors provides a rare opportunity for an experienced and entrepreneurial property financier to acquire/structure and manage distressed property loans.
>
> The success of this venture is predicated as much on appropriate capitalization as management capability.

[15] The Crown Retail Deposit Guarantee Scheme was established under the Public Finance Act 1989 during the recession which followed the GFC. It was designed to support the New Zealand banking system and give some degree of assurance to New Zealand depositors at a time of financial market uncertainty. The Scheme guaranteed that the New Zealand government would repay depositors affected by the failure of the New Zealand financial institutions who participated in it.

[16] Mr Bublitz and Mr Wevers saw the Crown guarantee as an essential prerequisite for obtaining the required funding from capital markets at that time, the Crown's assertion being that the acquisition of a finance company that already had the guarantee would enable Mr Bublitz to extend its benefits through the Hunter Group.

[17] A potential difficulty with the proposal – limitations on related party transactions – was identified at an early stage by the defendant Bruce Alexander McKay, who was at that time the manager responsible for the financial management and reporting of the Group. In a memorandum dated 12 December 2008 addressed to Mr Bublitz and Mr Wevers, Mr McKay said that it was preferable for presentations to investors not to propose a structure that would involve related party transactions because, although they may be commercially sound, the mere fact that they were between related parties might be considered to be a negative in the eyes of potential investors.

[18] It is not disputed that related party transactions are neither uncommon nor inherently improper, but they can impact significantly on the financial performance of a company. The relevant accounting standard, NZ IAS 24 issued by the Financial Reporting Standards Board of the New Zealand Institute of Chartered Accountants,[1]

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[1] A body established under the New Zealand Institute of Chartered Accountants Act 1996.

explains the significance of related party relationships and transactions in the following terms:

> 5. Related party relationships are a normal feature of commerce and business. For example, entities frequently carry on parts of their activities through subsidiaries, joint ventures and associates. In these circumstances, the entity's ability to affect the financial and operating policies of the investee is through the presence of control, joint control or significant influence.
>
> 6. A related party relationship could have an effect on the profit or loss and financial position of an entity. Related parties may enter into transactions that unrelated parties would not. For example, an entity that sells goods to its parent at cost might not sell on those terms to another customer. Also, transactions between related parties may not be made at the same amount as between unrelated parties.
>
> 7. The profit or loss and financial position of an entity may be affected by a related party relationship even if related party transactions do not occur. The mere existence of the relationship may be sufficient to affect the transactions of the entity with other parties. For example, a subsidiary may terminate relations with a trading partner on acquisition by the parent of a fellow subsidiary engaged in the same activity as the former trading partner. Alternatively, one party may refrain from acting because of the significant influence of another - for example, a subsidiary may be instructed by its parent not to engage in research and development.
>
> 8. For these reasons, knowledge of related party transactions, outstanding balances and relationships may affect assessments of an entity's operations by users of financial statements, including assessments of the risks and opportunities facing the entity.[2]

[19] As a consequence, debt security trust deeds related to the creation and issuing of secured debentures, unsecured deposits and unsecured subordinated capital notes commonly contain covenants restricting dealings between related parties and requiring certain forms of disclosure. The Crown's guarantee scheme similarly imposed limitations on, and obligations concerning the disclosure of, transactions between related parties.

[20] It is said that Mr Bublitz, Mr Wevers and Mr McKay knew that Mr Bublitz could not formally take a controlling interest in the acquired finance company or be

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[2] New Zealand Equivalent to International Accounting Standard 24, *Related Party Disclosures* (NZ IAS 24), Financial Reporting Standards Board of the New Zealand Institute of Chartered Accountants, issued November 2004 and incorporating amendments up to November 2008.

seen to undertake key management roles until after the finance company's Hunter asset purchase and lending programme was concluded. On the other hand, without the programme Hunter was likely to fail and Mr Bublitz would be exposed to very considerable personal liability. The Crown alleges that a scheme to avoid the serious constraint on related party dealings was developed in a meeting held in Pauanui on 13 January 2009 by Mr Bublitz, Mr McKay and Mr Peter Chevin, an associate of Mr Bublitz who was then a bankrupt. Mr Wevers was not present at that meeting.

[21] The Crown's case is that Mr Bublitz, Mr McKay and Mr Chevin proposed the acquisition of a finance company that would be affordable but which would also have a relatively permissive related party definition and be covered by the Crown guarantee. Mr McKay and Mr Wevers subsequently provided Mr Bublitz with advice on various prospects, comparing each target's treatment of capital notes and equity ratios, balance sheet, price, the existence of the Crown guarantee and the requirements of each company's trust deed. Having identified a Christchurch-based company, Priority Finance Limited (Priority), as a potential target, Mr Bublitz and his associates incorporated Phoenix Finance Holdings Limited (Phoenix) as the vehicle for the acquisition. It is alleged that Mr McKay devised the acquisition structure which featured:

(a) with the cooperation of the vendors of the finance company, Mr Bublitz selling certain Hunter loan assets and shares to Priority for cash;

(b) Hunter lending that cash to a holding company, Phoenix, the shares in which would be held by a private company owned by Mr Wevers; and

(c) Phoenix acquiring Priority.

[22] Under this plan, notwithstanding that Mr Bublitz's Hunter Group would provide all of the finance for the acquisition of Priority by Phoenix, Mr Wevers' company would be the sole holder of the shares in Phoenix which would in turn be the sole shareholder of the finance company. The advantage of this order of events was that, prior to its acquisition by Phoenix, Priority was not controlled by interests associated with Mr Bublitz or Mr Wevers, so pre-acquisition transactions and the

acquisition itself would not involve related parties when they occurred on Friday, 13 February 2009.

[23] The parties to the acquisition sought professional advice on whether the acquisition would involve related party dealings, and offered that advice to the trustee appointed under Priority's debenture trust deed. Mr Wevers and Mr McKay let the advisors know of the prospect that, following its acquisition, Priority might consider further dealings with Hunter entities, and that Mr Bublitz might seek a shareholding in its parent. The Crown asserts, however, that they did not disclose to the advisors:

(a) the details of a settled plan to acquire a series of Hunter assets immediately after Priority's acquisition;

(b) that Mr Bublitz and Mr Wevers had agreed Mr Bublitz would take a 60% shareholding in the finance company's parent, Phoenix; or

(c) the full extent to which they anticipated Mr Bublitz would be in a position to control, and act in a key management role for, the finance company.

[24] Much occurred on the next working day after the acquisition, Monday 16 February 2009:

(a) Mr Wevers and Mr McKay were appointed the directors of the finance company, which was renamed Viaduct Capital Limited.

(b) Viaduct was assigned the lease of premises at Viaduct Harbour Avenue, Auckland from which the Hunter Group operated and assumed primary responsibility to make lease payments.

(c) As well, Viaduct purchased Hunter's plant and equipment held at those premises for cash in the order of $135,000.

(d) On that day, and over the ensuing weeks and months, a number of transactions occurred which the Crown says were part of the pre-arranged plan.

[25] The Crown alleges that, because Mr Bublitz controlled Viaduct and the Hunter-related parties with whom it contracted, the transactions were between related parties. It says that the failure of the defendants to disclose them and, where necessary, obtain prior approval, breached the defendants' obligations under the relevant trust deeds and the Crown guarantees.

[26] The Crown maintains that various techniques and elaborate structures were implemented to disguise Mr Bublitz's overall control of each of the parties to the ongoing asset purchases and loans. It is said, for example, that the transactions involved requests of associates, who were not truly undertaking investments, to "warehouse" or store shares for a limited period, or to have them held off the Hunter Group balance sheet, in order to generate cash-flow for the Hunter entities by on-selling them to Viaduct. Some associates were asked to "front" an ostensibly independent entity to which Viaduct would advance funds or from which Viaduct would purchase pre-existing lending. Most significantly, it is alleged by the Crown that, although Mr Wevers appeared to own 100 per cent of Viaduct through his private investment company, there was in fact a shareholder arrangement between Mr Bublitz and Mr Wevers giving Mr Bublitz actual control over Viaduct's governance and management. This arrangement was not disclosed to the advisors engaged by the Hunter Group and Viaduct from time to time, the Viaduct trustee or the New Zealand Treasury.

[27] The Crown alleges that, in reliance on the benefits provided by the Crown guarantee, a prospectus was issued by Viaduct on 3 March 2009 for the subscription of up to $20 million of debenture stock. It is said that, while the prospectus noted the Viaduct trust deed's restrictions on related party lending, Mr McKay and Mr Wevers, as the directors responsible for issuing it, deliberately omitted any reference to what the Crown says were the numerous related party transactions that Viaduct had already undertaken after the 13 February 2009 acquisition. The Viaduct offer was said to lead to a $6 million increase in Viaduct's cash position.

[28] On 20 April 2009, however, Treasury advised Viaduct that it intended to withdraw the Crown guarantee from Viaduct Capital Limited. The Secretary to the Treasury considered that Viaduct's activities included breaches of the guarantee deed, demonstrating that the business or affairs of Viaduct were being, or were intended or likely to be, carried on in a manner which may extend the effective benefit of the guarantee to persons who were not intended to receive that benefit and that was otherwise inconsistent with the intentions of the Crown in entering into the guarantee deed.

[29] The withdrawal of the guarantee led to a renewed tightening of Viaduct's cash-flow such that, on 13 May 2009, Mr Bublitz issued what the Crown says was a directive to Mr Wevers to cut senior executive base salaries by 40 per cent with effect from 1 June 2009. Matters did not improve and, in September 2009, Mr Wevers advised Mr Bublitz that "drastic actions" were required, including a suggestion that Mr Bublitz should sell his house and other Hunter assets to raise cash. Mr Wevers said that serious consideration should be given to winding up Viaduct. It is alleged that Mr Bublitz's control over Viaduct is demonstrated, among other things, by his arranging for Mr Wevers to be replaced as a director of Viaduct by the defendant Richard Timothy Blackwood, another long-term associate of Mr Bublitz, and for the transfer of 51 per cent of the shareholding in Phoenix (Viaduct's owner) to Mr McKay "for a peppercorn price". The Crown alleges Mr Bublitz remained in effective control of Viaduct nevertheless.

[30] Mr Bublitz set about purchasing another finance company which had the benefit of the Crown guarantee. Through a Hunter Group company, Argus Capital Limited, he arranged the purchase of Mutual Finance Limited on 11 December 2009. Being conscious of the need to leave Viaduct at arms' length from Mutual, ostensibly at least, the acquisition was structured on the basis that Mr Bublitz's company would acquire 60 per cent of the shareholding initially, with the balance of the shares to be acquired in two further tranches in March and October 2010 respectively. Upon initial acquisition, the managing director of Mutual, Mr Lindsay Kincaid, remained a director; he resigned on 21 April 2010.

[31] Mr Bublitz was managing director of Mutual and the ultimate owner of its shares. It is not disputed that he controlled Mutual. Mr Bublitz appears to have been alert to the prospect that, having removed the Crown guarantee from Viaduct, Treasury officials would take a close interest in the circumstances of the Mutual acquisition. The Crown says that, to pre-empt any Treasury intervention, and notwithstanding that there was no legal requirement to do so, Mr Bublitz sought the Treasury's "comments and questions about the proposed transactions so that the parties [could] be informed as to The Treasury's view of the transaction".

[32] After saying that the Hunter Group proposed to settle the purchase of an initial 60 per cent stake in Mutual for cash, Mr Bublitz said:

> HCG does not intend to or propose to sell any assets to MFL or undertake any other form of capital restructuring.

[33] In a letter dated 27 November 2009, Mr Bublitz told the Treasury's team leader of the guarantee scheme:

> Mutual currently does not intend to purchase any assets from Viaduct Capital. However, if in the future Mutual does consider purchasing assets from Viaduct Capital, an independent expert will be employed to assess the merits of any such transaction and to ensure it is on arms' length terms.

[34] It is the Crown's case that those assurances were disingenuous in that Mr Bublitz always intended that Mutual would be operated as part of and for the purposes of providing related party funding to Viaduct and other Hunter Group entities, including through selling in loans. For example, responding to concerns expressed by Kiwibank in February 2010 about the state of the Hunter Group's bank accounts and Kiwibank's exposures to three Hunter Group projects, Mr Bublitz addressed in tandem the circumstances of both Viaduct and Mutual, and referred to "a number of interdependencies within the funding structure of the [Hunter] group".

[35] The Crown says that, in issuing prospectuses in March 2009 and October 2009, Mr McKay and, in respect of the latter document, Mr Blackwood also, failed to disclose related party dealings which ought to have been disclosed to potential investors. Similarly, in prospectuses issued by Mr Bublitz on behalf of Mutual in

March 2010, the extent of related party transactions entered into was withheld improperly from potential investors.

[36] The Crown alleges that, up to the receivership of Viaduct in May 2010 and of Mutual in July 2010, the defendants conducted a considered and sophisticated deceit. Drawing on their experience in finance and commerce, it is said the defendants understood the importance of appearances, including those created by regular business documentation. The Crown says that the defendants maintained a façade of legitimacy designed to support representations made to those who could not abide related party transactions, such as the Treasury and the trustees of both Viaduct and Mutual.

[37] It is common ground that advice was sought, from time to time, from reputable professional advisers, such as law firm DLA Phillips Fox and accounting firm BDO Spicers, concerning the acquisition of Priority Finance Limited (Viaduct) and its initial lending arrangements. The Crown alleges, however, that in establishing the scheme Mr Bublitz, Mr McKay and Mr Wevers carefully controlled the scope of the advice and the information on which it was based, particularly when initial advice was not favourable. It is said that what the Crown calls the "layers of deceit", intended to convey a false impression that Viaduct was under the control of Mr Wevers and Mr McKay, were difficult to maintain. The Crown says that the staff and contractors employed or engaged by the finance companies and the Hunter entities effectively merged the activities of the various entities, sharing premises and resources, under Mr Bublitz's overall control. Although Mr Blackwood joined the enterprise after the initial planning and implementation of the scheme, it is asserted that he knew at times relevant to the charges against him that Mr Bublitz had control of Viaduct and the other entities and that undisclosed related party transactions had occurred and were continuing to occur.

[38] The central proposition in the Crown's case is that whether any particular transaction is a restricted or prohibited related party transaction is a question of substance, assessed by reference to all of the facts relating to the transaction. The Crown says that is particularly so where a transaction may have been structured with the intention of avoiding characterisation as a related party transaction.

[39] It is the Crown's case that restrictions on related party transactions and the requirement that they must be reported presented Mr Bublitz and the Hunter Group with an insurmountable legal obstacle to their ongoing reliance upon the finance companies it acquired for the purpose of resolving Hunter's serious cash-flow issues following the GFC. It is alleged that to rescue the Hunter Group, Mr Bublitz, Mr McKay and Mr Blackwood needed to use for the benefit of entities within the Hunter Group funds provided by investors who believed that the Crown guarantee and Viaduct's trust deed prevented the finance companies from entering into more than a minimum of related party transactions. It is submitted that despite the legal obstacles, the defendants created an elaborate deception reaching well beyond the ordinary bounds of commerce, or even risky commercial decisions, into deceit and fraud. The defendants are alleged to have exploited weaknesses in the systems designed to prevent their actions, establishing sophisticated structures designed to disguise the substance of lending arrangements and carefully controlling the disclosure of information of the structures' true substance. It is said by the Crown that Mr Bublitz's control must be inferred because, among other things, many of the transactions under scrutiny were not managed commercially in Viaduct's interests but in the interests of the Hunter entities he owned and controlled which obtained much-needed cash as a result.

The consequences of the alleged offending

[40] Although it is not relevant to proving any element of the charges, I record the Crown's submissions about the recoveries and stakeholder losses said to arise from the alleged offending to put the proceeding into context. It is said that assessing the total amount of recoveries and losses following the failure of the two finance companies is difficult. First, the receiverships have not as yet concluded. Moreover, recoveries relating to Mutual have been complicated by the involvement of Crown Asset Management Limited (CAML) which, upon the Crown guarantee to Mutual being met by way of payment directly to Mutual's depositors, acquired its remaining assets for the purpose of off-setting the Crown's losses under the guarantee.

Viaduct losses

[41] It is said that minimal recoveries have been made from the more than $8 million in loans that were outstanding at the date of the Viaduct receivership. In particular, Viaduct's receivers recovered little on amounts outstanding under Viaduct's loan to Hunter-related entities. Nothing was recovered from the Northgate, Homebush, Hilltop and NKE loans. At the time of receivership, depositors with Viaduct had advanced amounts totalling about $7.85 million of which around $530,000 was not guaranteed under the Crown guarantee because it had been advanced following withdrawal of the guarantee on 20 April 2009. In total, the Crown paid the Viaduct deposit holders who were covered under the guarantee the sum of $7.6 million.

[42] Viaduct's receivers have distributed seven cents in the dollar to the Crown and to non-guaranteed depositors, totalling $550,000. The receivers have estimated being able to pay a further 40-50 cents in the dollar because the Financial Markets Authority have reached a settlement with Viaduct's trustee in the sum of $4.5 million, based on a claim that the trustee failed to prevent the defendants' conduct which gave rise to the losses.

Mutual losses

[43] All Mutual deposit holders were guaranteed by the Crown. Under the guarantee, the Crown paid the debenture holders just over $9 million, but it is said that the Crown is unlikely to recover all of that sum. To date recoveries have been made as follows:

(a) around $1.8 million by way of interim distribution; and

(b) around $2.8 million, the proceeds of the sale of assets that CAML acquired from the receivers, although the costs incurred in realising that amount from those asset sales has not been taken into account. The Crown also expects to recover the bulk of a sum of $1.12 million in cash which Mutual's receivers continue to hold pending resolution of a

dispute with Viaduct's receivers arising out of the security sharing arrangements.

[44] It is said that, in total, the Crown is likely ultimately to have lost around $3.38 million because of Mutual's failure and the Crown's obligation to honour its guarantee.

The respective roles of the defendants

[45] In the Hunter Capital corporate profile of December 2009, Mr Bublitz was described as the major shareholder and managing director. It was said that Mr Bublitz drove the overall Group's strategic direction and that he took a lead role in the structuring and negotiation of transactions. Mr McKay was said to be the chief financial officer for Hunter Capital, responsible for the financial management and reporting for the Group and its various entities. He was described as taking a key role in the analysis of investment opportunities and as being responsible for risk management for the Group. The profile said Mr Blackwood was chief investment officer for Hunter Capital, responsible for the lending and equity investment activities of the Group.

[46] The outcome of this prosecution, however, does not turn on the broad description of the positions held by and the experience of these three men. It turns on what may be proved by an analysis of the activities conducted by each of them in the period from 8 March 2009 to 14 July 2010; more specifically, on what each of them knew, intended and did at material times during the period.

[47] The defendants are charged with a variety of offences. Mr Bublitz faces ten charges under s 220 of the Crimes Act 1961 of theft by a person in a special relationship, and two charges under s 242 of the Crimes Act of making a false statement as a promoter of securities under the Securities Act 1978.

[48] Mr McKay also faces three charges of theft by a person in a special relationship. In addition, he faces two Crimes Act charges of making a false statement as a promoter and one charge of making a false statement to a trustee for debenture holders under s 377 of the Companies Act 1993.

[49] Mr Blackwood faces four charges of theft by a person in a special relationship; one charge of making a false statement as a promotor and one charge of making a false statement to a trustee of debenture holders.

The regulatory framework

[50] Restrictions on the dealings between related parties and the requirements to disclose any such dealings at relevant times are at the heart of this case. There is nothing inherently wrong or unlawful about transactions between related entities, but commercial decisions in such dealings may be motivated by factors that result in an exchange of assets at less than the value that might apply in an arms-length transaction. The framework within which funds are sought from members of the investing public is intended to ensure that potential investors are fully and fairly informed about the true nature of the investment they are invited to make, and sufficiently aware of the proposed use of their funds, to undertake a reasonable assessment of the risk.

[51] The protections provided for the investing public involved in this case are contained in:

(a) the Priority/Viaduct trust deed between the finance company and subscribers whose investments were secured by the issue of debentures; and

(b) the provisions of the Crown guarantees.

[52] While the related party provisions of the relevant documents addressed similar issues, they were not in identical terms and it is necessary to set them out.

The Priority/Viaduct trust deed

[53] Clause 6.4 of the Priority trust deed relevantly reads as follows:

> **6.4 Restrictions on Dealings**
>
> Neither the Issuer nor any of the Charging Subsidiaries will without the prior written consent of the Trustee:

Related Party Transactions

6.4.3 Enter into:

6.4.3.1 any Related Party Transaction except in the ordinary course of business and where the terms thereof are evidenced in writing and the consideration therefor is on the basis of an arms' length transaction as between two unrelated parties contracting in an open market, provided however that in any twelve month period the aggregate value of all Related Party Transactions entered into or remaining outstanding shall not exceed 2% of the Total Tangible Assets, or

6.4.3.2 any Related Party Loan.

[54] Clause 1.1 (headed "Definitions") relevantly read as follows:

In this Deed unless the context otherwise requires:

"Accounting Standards" means "generally accepted accounting practice" as defined in Section 3 of the Financial Reporting Act [1993].[3]

"Charging Group" means the Issuer and the Charging Subsidiaries (if any) or when the context so admits or requires any one or more of them.

"Related Party" means:

(a) a Related Company; or

(b) any shareholder and director of any member of the Charging Group or any Person with the first degree of relationship to such Person or *any Person who is a related Person under any applicable Accounting Standards* [Emphasis added].

"Related Party Loan" means:

(a) the provision of financial accommodation by a member of the Charging Group to a Related Party, or

(b) the giving of a guarantee or indemnity by a member of the Charging Group to the benefit of a Related Party,

but, for the avoidance of doubt, does not include the provision of financial accommodation, in the ordinary course of business, and on arms' length commercial terms, to a person who is not a Related Party but who has entered into a contract, in an open market, with a Related Party.

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[3] Now replaced by the Financial Reporting Act 2013 but in force at all relevant times. Section 3 provided materially that "financial statements … comply with generally accepted accounting practice only if those statements comply with … (a)pplicable financial reporting standards…."

"Related Party Transaction" means a transaction of any nature between a member of the Charging Group and a Related Party including, but not limited to:

(a) the investment by a member of the Charging Group in the capital or equity of a Related Party;

(b) the transfer of assets between a member of the Charging Group and a Related Party;

(c) the provision of services by or to a member of the Charging Group to or by a Related Party;

but does not include:

(d) a Related Party loan;

(e) the provision of a financial accommodation by a Related Party to a member of the Charging Group on arms' length commercial terms, or any payment by a member of the Charging Group to that Related Party of principal, interest or other moneys in respect of that financial accommodation in accordance with those terms;

(f) the provision of management and/or administration services to a member of the Charging Group by a Related Party on arms' length commercial terms;

(g) transactions with a Related Party in relation to investments of a member of the Charging Group which are, or are to be, held by that Related Party as nominee or trustee for a member of the Charging Group;

(h) payment of reasonable salary and other remuneration benefits to a Related Party who is employed by a member of the Charging Group, or

(i) payment of reasonable remuneration and expenses to a Director for his or her services as a Director,

and, for the avoidance of doubt, does not include the provision of financial accommodation, in the ordinary course of business, and on arms' length commercial terms, to a person who is not a Related Party but who has entered into a contract in an open market, with a Related Party.

[55] As will be seen from the particulars of the charges set out below, the restrictions on the Priority/Viaduct trust deed on related party dealings differ depending on whether the subject transaction is a "loan" as defined in the trust deed, or a "transaction" as defined. Importantly, the trust deed contemplates that related party transactions other than loans will be permitted so long as they meet certain conditions and, significantly, do not take the aggregate value of all related party transactions conducted over a 12-month period beyond specified limits.

The New Zealand Accounting Standards

[56] All of the charges, including those related to allegations regarding the relevant prospectuses, rest on an allegation of a failure by the defendants to disclose the undertaking of related party transactions on the basis that Mr Bublitz, at relevant times, was a related person under any applicable accounting standards.[4] It is common ground that, as the Crown has submitted, the primarily applicable accounting standard during the period 16 February 2009 to 13 May 2010 was New Zealand Equivalent to International Accounting Standard 24 – *Related Party Disclosures* (NZ IAS 24). This standard was issued in November 2004 and incorporated amendments up to and including 30 November 2008. Its interpretation is assisted by cross-reference to the New Zealand Equivalent to International Accounting Standard 27 – *Consolidated and Separate Financial Statements* (NZ IAS 27).

NZ IAS 24

[57] The relevant provisions of paragraph 9 of the NZ IAS 24 are:

> *Related party* A party is related to an entity if:
>
> (a) directly or indirectly, through one or more intermediaries, the party:
>
> (i) controls, is controlled by, or is under common control with, the entity (this includes parents, subsidiaries and fellow subsidiaries);
>
> (ii) has an interest in the entity that gives it significant influence over the entity; or
>
> (iii) has joint control over the entity;
>
> …
>
> (d) the party is a member of the key management personnel of the entity or its parent;
>
> …
>
> (f) the party is an entity that is controlled, jointly controlled or significantly influenced by, or for which significant voting power in such entity resides with, directly or indirectly, an individual referred to in (d) or (e); or …

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[4] For the purposes of Charges 11 to 15, an alternative definition of "control" may apply under the provisions of the Mutual Crown guarantee.

A *related party transaction* is a transfer of resources, services or obligations between related parties, regardless of whether a price is charged.

Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

Key management personnel are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.

Significant influence is the power to participate in the financial and operating policy decisions of an entity, but is not control over those policies. Significant influence may be gained by share ownership, statute or agreement.

[58] Under paragraph 10:

In considering each possible related party relationship, attention is directed to the substance of the relationship and not merely the legal form.

[59] And relevantly under paragraph 11:

In the context of this Standard, the following are not necessarily related parties:

(a) two entities simply because they have a director or other member of key management personnel in common, notwithstanding (d) and (f) in the definition of "related party".

…

(c) (i) providers of finance,

…

simply by virtue of their normal dealings with an entity (even though they may affect the freedom of action of an entity or participate in its decision-making process); …

NZ IAS 27

[60] The meaning of "control" in NZ IAS 24 is informed by NZ IAS 27 *Consolidated and Separate Financial Statements.* This standard adopts the same meaning of "control" as appears in NZ IAS 24; namely:

Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

[61] Paragraph 13 of NZ IAS 27 provides:

> Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than half of the voting power of an entity unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control. Control also exists when the parent owns half or less of the voting power of an entity when there is:
>
> (a) power over more than half of the voting rights by virtue of an agreement with other investors;
>
> (b) power to govern the financial and operating policies of the entity under a statute or an agreement;
>
> (c) power to appoint or remove the majority of the members of the board of directors or equivalent governing body and control of the entity is by that board or body; or
>
> (d) power to cast the majority of votes at meetings of the board of directors or equivalent governing body and control of the entity is by that board or body.

[62] I return to these issues below in discussing the evidence upon which the Crown relies.

The Mutual Crown guarantees

[63] The provisions of the Crown guarantees also formed part of the regulatory framework. Clause 6.2(b) of the replacement Crown guarantee to which Mutual was a party from 8 December 2009 (headed 'Related Party transactions') reads:

> The Principal Debtor shall not (and shall ensure that its subsidiaries shall not), without the prior written consent of the Crown, enter into any transaction (or series of linked or related transactions) having a value (at the time of entry) exceeding one per cent (1%) of the Total Tangible Assets of the Principal Debtor (at the time of entry) to which a Related Party of the Principal Debtor (other than a wholly-owned subsidiary of the Principal Debtor) is party unless:
>
> (i) that transaction is on arms' length terms; and
>
> (ii) an independent expert approved by the Crown in writing first certifies to the Crown in writing that the transaction is, in the opinion of that expert, on arms' length terms.

[64] Clause 1.1 (headed "Definitions") relevantly provides as follows:

> *GAAP* means "generally accepted accounting practice" within the meaning of that term under the Financial Reporting Act 1993.

Person includes an individual, a body corporate, any association of persons (whether corporate or not), a trust (including the trustees of a trust acting in that capacity), and a state and any agency of a state (in each case whether or not having separate legal personality).

Related Party of the Principal Debtor means a Person who is, or at any date after the Announcement Date was, a Person who would be a "related party" as that term is defined in section 157B of the Reserve Bank Act 1989, as if:

(a) the Principal Debtor was a "deposit taker"; and

(b) "related party" included any Person who controls the Principal Debtor and any Person who is controlled by any such Person or by the Principal Debtor.

[65] And clause 1.2 (headed "Construction"), so far as is relevant, reads:

In this Deed, unless the context requires otherwise:

…

(f) Control: a Person ("A") is "controlled" by another Person ("B") if:

(i) A is a subsidiary of B under the law of incorporation of A or for the purposes of GAAP; or

(ii) B is able to exercise real or effective control, directly or indirectly, over A or over a material part of A's business or affairs (whether pursuant to a contract, an arrangement or an understanding, as a result of the ownership or control of securities or other interests in or issued by A, or otherwise) except where A is a natural person and B's control arises solely under an enduring power of attorney granted by A in favour of B.

[66] The Crown case in respect of each of Mutual's transactions with related parties said to breach the Crown guarantee is as set out in the Crown Charge Notice; that is, in terms of the Crown guarantee, Mr Bublitz controlled both parties, because:

(a) each party was a subsidiary of Mr Bublitz for the purposes of GAAP/NZ IAS 24; or

(b) Mr Bublitz was able to exercise real or effective control, directly or indirectly, over each party or over a material part of each party's business or affairs.

[67] In Charge 13, the Crown alleges that Mr Bublitz breached the related party provision of the Crown guarantee because he controlled both Mutual and Hilltop Ridge Farms Limited; the Priority/Viaduct trust deed does not apply so the Crown's case rests on the application of the accounting standards to Mr Bublitz's relationships with Mutual and Hilltop Ridge Farms Limited or, alternatively, on the "real or effective control" definition.

The conduct of the trial

[68] The trial was conducted by me without a jury in accordance with the provisions of s 105 of the Criminal Procedure Act 2011. As directed by me under s 105(1)(a), counsel provided me with written opening and closing statements, supplemented (except in one instance) by oral submissions, addressing me on matters of law and fact.[5] I was assisted by counsel's submissions on aspects of the Crown Charge Notice and a draft question trail I had prepared to assist me to identify the elements of the alleged offending the Crown is required to prove beyond reasonable doubt for each charge against each defendant.

[69] At the conclusion of the hearing, I reserved my decision on the verdicts to be entered in respect of each charge and adjourned the sitting of the Court until 14 December 2018. I later remanded the defendants to appear on 5 February 2019 for the delivery of my verdicts.

[70] Having heard the evidence adduced by the Crown and the submissions on behalf of both the Crown and the defendants, I gave the verdicts recorded above at [6] when the case resumed.

The first trial

[71] It is not insignificant that this is a re-trial of a prosecution first tried before Woolford J as a Judge sitting without a jury. In that case, there were four defendants: Mr Bublitz, Mr McKay and Mr Blackwood, and a fourth man, Lance

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5 Although he filed comprehensive written closing submissions, Mr Bradford elected not to address me orally in closing the case for Mr McKay.

David Morrison, who was an accountant who advised and worked on behalf of Mr Bublitz and the Hunter Group entities and was a trustee of several relevant trusts.[6]

[72] Woolford J described the 12 weeks initially allocated for the first trial as "grossly inadequate". The trial started on 8 August 2016 and was aborted nine months later, on 10 May 2017, because of late disclosure by the Crown. The original Crown Charge Notice contained 49 charges which would have required the Judge to deliver 125 separate verdicts. The defendants were discharged on a number of charges throughout the trial, in some cases because the charges duplicated allegations concerning the same transactions, or to remove allegations of offending as parties despite the defendant having no direct role in the transactions, or administrative reasons, to render a complex case more manageable in view of the significant over-run in the duration of the trial.

This trial – evidential issues

[73] The re-trial before me was initially set down for 22 weeks of hearing. Responsibly and sensibly, the prosecuting agency, the defendants and their respective counsel took a focused approach to the charges that remained for determination. That resulted in an agreement between counsel, approved by me, that much of the oral evidence given at the first trial could be included as part of the evidential record for this trial by consent, with the briefs of evidence and the transcript of oral evidence from the first trial, including cross-examination and re-examination, being made available without the witnesses having to be called. That evidence was treated for all purposes as if it had been given on oath in this trial. Other witness statements were admitted by consent. Several witnesses, including Mr McKay, gave evidence orally.

[74] Most significantly, several hundred documents considered by the parties to be relevant were also admitted by consent, subject to challenges to admissibility by one or more of the defendants. Although I was asked to address the objections to the admissibility of some exhibits prior to trial, I concluded that a detailed knowledge of the factual basis for the Crown's allegations was required before decisions could be made as to the relevance of certain challenged documents, especially in view of the

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6 Mr Wevers was also charged, but he died before the trial.

different roles said to be played by each defendant and issues about the admissibility of documents on hearsay grounds or on relevance grounds under ss 7 and 8 of the Evidence Act 2006.

[75] Most of the exhibits were produced en masse, the Crown's evidence being that each of the documents other than those created specifically for the purposes of the prosecution or the trial, had been located on various computer drives or servers seized in the course of the investigation pursuant to search warrants. In a mid-trial ruling which summarises the position I had taken, largely without strong objection by counsel, I indicated my view that most, it not all, of the documentary evidence appeared to be admissible against at least one or more of the defendants, but that a determination of which document is admissible against whom and for what purpose was best made on a document by document basis in the context of reaching my findings on the facts.[7]

[76] I held that the documents produced through the Crown's witnesses should be treated as admissible on the basis that they met the threshold test of relevance, either to establish the factual background to and ingredients of the charges faced by a particular defendant, or to prove what he did, what he knew and what he intended at relevant times, or all of the above. I also held that the documents would be received into evidence on the basis that each of the documents had probative tendency which made them admissible, leaving open for later determination whether the evidence found to be admissible on close analysis had sufficient probative tendency to establish the Crown's allegations. I appreciated that some of the documentary evidence in the form of email correspondence or memoranda, while meeting a test of general relevance as to proof of the background or from which inferences as to the occurrence of certain events might be drawn, might have little or no probative value in respect of any defendant who was not proved to have been a party to the document, or to have been aware of its contents. I have been particularly mindful throughout that, to the extent that any document authored by a defendant may be taken as an admission by that defendant, the admission would be admissible against only that defendant and not against any other defendant who had not adopted it.

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7 *R v Bublitz* HC Auckland CRI-2014-004-2293, 17 September 2018.

[77] Where a document was not referred to or explained by a Crown witness, I have taken the view that unless its meaning is plain on its face, I should not draw any adverse inference from it against any defendant unless it is plainly admissible against that defendant and its meaning or import is clear on the face of the document.

Mr Nicholaas Wevers

[78] Nicholaas Wevers, who was a central figure in the acquisition of Priority Finance Limited, its conversion into Viaduct Capital Limited and the operation of that finance company in conjunction with Mr Bublitz and Mr McKay, was originally charged with the others as a defendant. Mr Wevers died before the trial. He had been interviewed twice by Mr Jason Weir, a member of the forensic team of the chartered accounting firm, Deloitte, who was engaged by the Financial Markets Authority to conduct an investigation into the affairs of both Viaduct and Mutual. The defendants sought to have the transcripts of the two interviews, on 15 and 21 November 2012 respectively, admitted as evidence, notwithstanding that it is hearsay, on the grounds provided by s 18 of the Evidence Act 2006, given that Mr Wevers was regrettably no longer available as a witness. The statements had been admitted by the Crown as evidence at the first trial. After initially objecting to that course on the grounds that the circumstances relating to the statements did not provide reasonable assurance that the statements were reliable, the Crown admitted the statements as evidence by consent, reserving its right to criticise Mr Wevers as an untruthful witness.

The approach to setting out the reasons for the verdicts

Reasons must be concise

[79] Because this matter proceeded as a Judge alone trial, I am required by s 106(2) of the Criminal Procedure Act to give reasons for the verdicts. The Court of Appeal's judgment in *R v Connell* directs me to give a statement of the elements of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of my essential reasons for finding as I have.[8]

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8 *R v Connell* [1985] 2 NZLR 233 (CA) at 237-238.

[80] My reasons should be enough to show that I have considered the main issues raised at the trial and to make clear in simple terms why I have found that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. In this case, the credibility of Mr McKay is in issue, so I should say explicitly whether key evidence given by him is either definitely accepted or definitely rejected.

[81] In expressing these reasons, I have taken into account also the directions of the Court of Appeal in *R v Eide* that I should have regard to how the case will be addressed on any appeal.[9] A judgment which is so concise that some of the key facts in the case are required to be reconstructed by the Court on appeal is too concise. In a complex case such as this, it is not possible to explain the key elements of the Court's reasoning without an adequate survey of the relevant facts. Although the evidence of the witnesses in this case occupies many hundreds of pages and over 1700 documents have been produced in evidence, I have been assisted by the pragmatic approach of all counsel to identify the key issues for determination; much of what the Crown must prove for each charge, while not conceded, is not seriously disputed.

[82] I acknowledge, however, that this case arises out of the collapse of two finance companies and involves allegations of theft and deliberate misconduct in dealing with funds invested by the public. The public interest is also engaged by the background to the alleged offending of the Crown Retail Deposit Guarantee Scheme and the need for the taxpayer to meet substantial costs and losses said to have flowed from the failure of the two companies. I am conscious, therefore, that these reasons are of interest to an audience which is wider than the prosecutor and the defendants so that I should explain in a comprehensible form the particular features of the scheme which has led to the bringing of these charges.

Relevant rules of law and practice

[83] These are the rules of law and practice I applied in making my findings and reaching my verdicts in respect of each charge against each defendant.

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9 *R v Eide* [2005] 2 NZLR 504 (CA) at [21].

Burden and standard of proof

[84] The Crown carried the burden throughout of proving each element of each charge against each defendant beyond reasonable doubt before I could bring in a verdict of guilty. The starting point was the presumption that the defendant was innocent of any charge until the contrary was proved beyond reasonable doubt. A reasonable doubt requiring me to enter a verdict of not guilty on any charge is an honest and reasonable uncertainty left in my mind about the guilt of the defendant on that charge, after I had given careful and impartial consideration to all of the relevant evidence.[10] The standard is very high: it was not enough for the Crown to persuade me that the defendant was probably guilty or even that he was very likely guilty of any charge he faced. If I am left with an honest and reasonable uncertainty as to his guilt, I was required to find him not guilty.[11]

[85] That said, it is virtually impossible to prove everything to an absolute certainty when dealing with a reconstruction of past events and the Crown did not have to do so.[12] Further, the Crown was not required to prove beyond reasonable doubt every fact upon which it relied in support of its case on any charge. To put that into the context of deciding on the crucial issue of Mr Bublitz's control of Viaduct Capital Limited, it was necessary for me to be satisfied beyond reasonable doubt that Mr Bublitz was in control of Viaduct in terms of the accounting standards, but the Crown was not required to prove to that same high standard every piece of evidence on which it relied to prove that element.

Defendants giving or calling evidence

[86] Mr McKay gave evidence and Mr Bublitz called evidence from an expert witness, Mr Hucklesby, but a defendant does not assume any burden of proof by giving or calling evidence. As a general principle, the evidence given or called by a defendant is admissible for all purposes for or against all defendants and it simply becomes

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10 *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49]; *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [52] and *R v Harbour* [1995] 1 NZLR 440 (CA) at 448.

11 *R v Wanhalla* at [49].

12 *R v Whale* [2013] NZHC 731 at [48] and *R v Wanhalla* at [24]-[25].

evidence in the trial for consideration along with the other evidence adduced.[13] I accept Mr Johnstone's submission that the content of the professional advice received by the defendants from time to time is relevant to prove only the nature of the advice received.

[87] Mr Bublitz and Mr Blackwood did not give evidence. They were not obliged to do so and the mere fact that they did not give evidence did not add to the Crown's case against them.

A circumstantial case and the drawing of inferences

[88] Despite the vast scope of the documentary material seized and examined during the inquiry into Viaduct's affairs by the regulatory authorities, no document proving the terms or even the existence of a "secret arrangement" vesting control of Viaduct in Mr Bublitz has been produced to the Court. The Crown's case on that essential element, and on other elements related to the state of mind of any defendant at a relevant time, was circumstantial, relying on inferences drawn from established facts to prove that Mr Bublitz had been given the power to govern Viaduct and to prove other elements.

[89] The answers to the several questions I was required to answer in considering each charge turn essentially on the inferences which may be drawn from memoranda, emails and documents that were prepared. A combination of circumstances, taken together as a whole, may create a strong conclusion of guilt even though no one of them would raise a reasonable conviction or more than a mere suspicion.[14] Whether I drew these inferences was for me as the judge of the facts. If it was necessary to infer a fact to establish an element of an offence, I was required to be satisfied beyond reasonable doubt that it can be drawn, but only those inferences that are required to prove an element of an offence need to be proved beyond reasonable doubt.[15]

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13 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [54].

14 *Thomas v R* [1972] NZLR 34 (CA) at 37 and 39-41, adopting *R v Exall* (1886) 4 F & F 922 at 928; (1866) 176 ER 850 at 853. See also, *Milner v R* [2014] NZCA 366 at [15].

15 *R v Sullivan* [2014] NZHC 2501 at [405].

[90] A permissible inference is a logical conclusion drawn from facts that I accept are reliably established.[16] It is not a guess. If one or more inferences are equally available, what is left is mere speculation or conjecture. On ultimate issues, in order to avoid the possibility of inappropriate speculation, the inference most favourable to a defendant should be drawn.[17] Mr Johnstone correctly identified the ultimate issues to be determined in this case as whether, to the extent relevant:

(a) Mr Bublitz controlled Viaduct, Mutual and the various entities in the Hunter Capital Group with which the finance companies transacted; and, if so

(b) the defendants knew that to be the case.

[91] I accept Mr Johnstone's submissions that "the mere fact that some circumstances might arguably permit an inference inconsistent with guilt is not enough" to raise a reasonable doubt,[18] and that "speculation in aid of a defendant is no more permissible than speculation in aid of the prosecution".[19]

[92] Circumstantial evidence allows a fact-finder to infer that a particular fact exists, even if there is no direct evidence of it. A single piece of circumstantial evidence will generally allow for more than one explanation. However, a number of separate items of circumstantial evidence, when considered together, may strongly support the drawing of a particular inference. Circumstantial evidence derives its force from the involvement of a number of factors that independently point to a particular factual conclusion.[20] Juries are commonly referred to the analogy of a rope in that while any one strand may not support a particular load, the combined strands are sufficient to do so. It is only the ultimate issue in a circumstantial case that must be proved to the required standard. The Crown is not required to prove separately each

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16 *R v Sullivan* at [404], adopting *R v Gunthorp* [2003] 2 NZLR 433 (CA) at [142]. See also, *R v Douglas* [2012] NZHC 1746 at [16].
17 *Edwardson R* [2017] NZCA 618 at [77] and *R v Sullivan* at [403].
18 *R v Seekamut* CA82/03, 10 July 2003 at [21].
19 *Edwardson R* at [77].
20 Commissioner of Police v de Wys [2016] NZCA 634 at [9].

individual strand of evidence beyond reasonable doubt before the Court can take that evidence into account.[21]

Expert evidence

[93] Both the Crown and Mr Bublitz called experts to offer opinions about whether certain transaction ought to be disclosed as related party advances. They also provided views about the application of relevant accounting standards. Their opinions are each entitled to considerable weight.

[94] Expert witnesses are permitted to give opinions on subjects within their area of expertise if the fact-finder at trial "is likely to obtain substantial help from the opinion of understanding other evidence in the proceeding or in ascertaining any fact that is of consequence" to its determination.[22] While an expert opinion may be rendered on the ultimate issue in a proceeding,[23] it is not determinative. It is for me to determine how much weight or importance I should give to the opinions offered by the experts, or whether they should be accepted or rejected, in the context of all the evidence I have heard.

[95] My approach to the expert evidence is to evaluate what both Mr Lee, the Crown's expert witness, and Mr Hucklesby, the expert witness called by Mr Bublitz, have said and to consider whether their evidence is helpful to me in resolving the factual questions arising for decision. I acknowledge that, to the extent that each of them referred to documents, they accepted that they were providing assistance from an accounting perspective, and were not purporting to give evidence on questions of law. Mr Hucklesby inadvertently overstepped the proper limits of the scope of the opinions he was entitled to express, by giving his view on whether there was evidence of Mr Bublitz's control of Viaduct. I rejected that evidence as inadmissible. In any event, it was not founded on a proper approach to the standards, being based principally on the absence of any documentary proof. I have ignored that part of his evidence.

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21 At [10]. And see *Thomas v R* [1972] NZLR 34 (CA) at 38.
22 Evidence Act 2006, s 25(1).
23 Evidence Act 2006, s 25(2)(a).

Separate trials and verdicts

[96] In the context of this case, although several charges have been heard together, it was necessary for me to consider and decide each charge separately. Generally speaking, it is necessary to avoid assuming that simply because a jury or a judge sitting alone has come to a certain view as to the proof of the Crown's case in respect of one of the charges, the same conclusion should necessarily follow in respect of any one or more of the others. In this case, as I have said, all but one of the charges necessarily involved a common consideration of the single element of Mr Bublitz's control of Viaduct, which has proved to be determinative. But in addressing that issue I was mindful that for each charge the question was whether Mr Bublitz had control at the time of the events giving rise to the particular charge. I also bore in mind the change of shareholding in September 2009 when Mr McKay acquired 51 per cent of the shares in Phoenix Finance Limited.

[97] A criminal trial in which there are multiple defendants and multiple charges involves the joint conduct of several separate trials, for obvious reasons of convenience. But I have been required consider the position of each defendant, and each charge faced by him, separately. This principle is particularly important because I have been urged by defence counsel to ensure that documents are only used against a particular defendant if properly admissible against him.

The corporate structure

[98] Because it is not in dispute, it is convenient to adopt from the Crown's opening submissions a brief discussion of the corporate set-up for the Hunter Capital Group including the three main entities and the related companies which undertook the various projects in which the group was engaged. The group comprised three main entities: Hunter Capital Group Limited; Hunter Capital Property Trust and Hunter Capital Limited. The ultimate owner of the companies was Mr Bublitz's family trust, the Nicholson Trust.

[99] Hunter Capital Limited was the Group's services arm, providing management services to various entities. It controlled Hunter's operations as lessee (from Hunter Capital Group Limited) of their premises at 6 Viaduct Harbour Avenue and owner of

Hunter's plant and equipment. Hunter Capital Property Trust Limited owned Mr Bublitz's home on Marine Parade, Herne Bay, and held shares in the Northgate development. Hunter Capital Group Limited was the main entity responsible for Hunter's various projects, including Northgate/Silverdale; Docklands; NKE/Helensville; Hilltop/Kawakawa and Homebush/Cashmere/Khandallah, all of which are the subject of charges and which are described more fully in the next section. By 2008, Mr Bublitz had built up, through Hunter, a large portfolio of assets, on paper at least. As at 31 March 2008, the Group's total equity was just short of $20 million comprised largely of illiquid assets including shares in, or loans to, associated entities which developed properties that Mr Bublitz ultimately owned and controlled.

The projects

[100] In order to give an indication of the nature of the various projects undertaken by the Hunter entities, Viaduct's and Mutual's dealings with which have given rise to the charges, I have again adopted the largely undisputed summary from the submissions of counsel for the Crown.

Homebush/Cashmere/Khandallah

[101] Homebush Trustees Limited was the entity responsible for the Cashmere Eleven Project, a Hunter property development in Lakshmi Place, Khandallah Wellington, undertaken as a joint venture with Mr John Babbington. Mr Babbington, was a director of the trustee of Mr Bublitz's personal trust, Nicholson Trust Limited, with Mr Morrison, the Hunter Group accountant. It is the Crown's case, however, that Mr Bublitz largely controlled the Homebush/Cashmere project as a joint venture with Mr Babbington and that in terms of the New Zealand accounting standards he controlled Homebush Trustees Limited. Homebush Trustees Limited was the trustee of the Cashmere 11 Trust in respect of which Mr Bublitz had power of appointment. Mr Bublitz characterised Homebush as an "off-balance sheet special purpose vehicle" for the Cashmere Eleven Project.

Dockland Holdings Limited

[102] Dockland Holdings Limited owned the ground lease for Sheds 19-20 and 22-24 at Princess Wharf, Auckland. The shares were held by a number of different people, including Mr Bublitz. Although the shares appear to have been valuable, they did not pay dividends or generate any income. The transfer of funds by Viaduct to the Hunter Group in exchange for the acquisition of the Docklands shares is the basis of Charge 2. The transfers of funds were made in April, May and June 2009 respectively.

Northgate/Silverdale Project

[103] The Northgate/Silverdale Project was for the development of bare land in Silverdale, Auckland. The intention was to have 9.6 ha of the 12.9 ha site rezoned into industrial land and to build a Business Park. Mr Bublitz was one of Northgate's Directors. He provided a personal guarantee for its lending from Kiwibank as did his trustee, Nicholson Trust Limited. Shares in the development were held by the Hunter Capital Property Trust, which also owned Mr Bublitz's home. The Crown's case is that Mr Bublitz controlled the Northgate entity (Northgate Business Park Stage 2 Limited) at all material times. Following a public subscription for shares in the company, Hunter was left with around $1.8 million worth of shares. To convert the value of those shares into cash for Hunter, Mr Bublitz arranged for associates of Hunter Group executives to enter into loan agreements with Hunter for $600,000 in order to acquire 750,000 shares each (paid up to 80 per cent). Recourse under the loans was limited to the Northgate shares and the borrowers did not provide a personal guarantee. The loan to a Mr Bruce was purchased from Hunter by Priority Finance Limited on 13 February 2009, prior to the acquisition of that company by Mr Wevers, and the loans to a Mr Ebert and a Mr Roseneder were acquired by Viaduct on 16 February 2009 using the investor funds it had on hand.

The Hilltop/Kawakawa project

[104] Through the Kawakawa Dairy Trust, Mr Bublitz and his father, Neville, owned an under-performing dairy farm at Kinloch, Lake Taupo. The beneficiaries of the Trust were Mr Bublitz's Nicholson Trust, Hobson Investment Trust and Hunter Capital Property Trust. Mr Bublitz was a Director of Kawakawa's trustee (the Kawakawa

Dairy Trust Limited) until 13 May 2010, as was Lance Morrison (until 10 February 2009). Kawakawa borrowed money from Kiwibank and South Canterbury Finance. By late 2008 the farm was not performing well and the Trust was coming under pressure from its lenders.

[105] Part of the plan devised at the Pauanui meeting on 13 January 2009 was to convert the dairy farm to a goat milking operation, with Mr McKay and Mr Chevin taking the lead on preparing a business plan as to how they could grow a 10,000-head herd to become operational in June 2009. It seems Mr Chevin had a particular interest in the project as he had grown up on a goat farm.

[106] In May 2009, Mr Bublitz, Mr Wevers, Mr Chevin, Mr Neville Bublitz and a Mr Peter Mackie met as the "Project Board" for the goat farm; Mr Chevin was appointed project director to carry out the day-to-day activities of the project. However, Mr Chevin was a banned director. In an interview with the National Enforcement Unit of the Ministry of Economic Development in November 2010, Mr Bublitz accepted that it was he, rather than Mr Chevin, who made the key decisions. Hilltop Ridge Farms Limited was formed as an "off balance sheet special purpose vehicle" for the project and Mr Mackie was appointed sole director and shareholder. Mr Mackie, an experienced farmer, became involved because of his friendship with Mr Wevers. He resigned as a director and relinquished his shares in September 2009 when Mr Wevers resigned as a director of Viaduct and sold 51% of his shares in Phoenix to Mr McKay. An associate of Mr Chevin, Mr Peter Hill, acquired Mr Mackie's directorship and shares but contributed no funds. Mr Hill regarded his involvement as a short term one, following discussions he had had with Mr Bublitz and Mr McKay. Mr McKay conceded in evidence that his view of Mr Hill's involvement at that time was that he was "a puppet shareholder-director". Both Viaduct and Mutual advanced funds to the Hilltop project.

NKE/Awaroa/Helensville project

[107] NKE Trust Limited was the owner of a bare section of 120 ha at 134 Awaroa Road, Helensville for the benefit of a Hunter company, Noske Kaeser Engineering Limited. It was Mr Bublitz's plan to convert the farm into a number of lifestyle blocks.

Morrison Creed Trustee 2008 Limited was NKE Trust's sole shareholder and Mr Bublitz was its sole director until 17 June 2009. NKE Trust had been established in 2007 to enable NKE Limited to obtain financing for the development project. Mr Bublitz was a director of NKE Limited until 23 April 2009. NKE's financial position was unhealthy and, as discussed at the Pauanui meeting on 13 January 2009, it was suggested that the property would have to be sold if development funding was not secured by 31 March that year. It was suggested that in order to obtain financing from the proposed finance company a friend of Mr Bublitz, Mr Dean Franklin, would "front the deal to get the loan from FinCo".

[108] In promoting the idea to Mr Franklin, Mr Bublitz explained that in order to obtain funding for the project he needed to take NKE off the balance sheet and have the new finance company lend NKE the money so it was not treated as a related party loan. Mr Bublitz told Mr Franklin that he was not asking him to put up a personal guarantee as he had already provided a personal guarantee to the bank for the funding. He said, however, that what he needed was someone to become the sole shareholder/director of NKE Trust Limited (the company which owned the land) and to be seen as effectively controlling that entity other than Mr Bublitz. Mr Franklin became a director of NKE on 17 June 2009, although Mr Bublitz retained the right to remove Mr Franklin from that position.

The charges

Theft by a person in a special relationship

[109] The predominant charge faced by the defendants alleges theft by a person in a special relationship under s 220 of the Crimes Act 1961. The section provides:

> **220 Theft by person in special relationship**
>
> (1) This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person—
>
> (a) to account to any other person for the property, or for any proceeds arising from the property; or
>
> (b) to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.

> (2) Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.
>
> (3) This section applies whether or not the person was required to deliver over the identical property received or in the person's possession or control.
>
> (4) For the purposes of subsection (1), it is a question of law whether the circumstances required any person to account or to act in accordance with any requirements.
>
> ....

[110] Mr Bublitz is charged as the principal offender in ten charges under s 220; Mr McKay is charged as a secondary party to Mr Bublitz's alleged offending on three occasions, and Mr Blackwood on four.[24] The elements which the Crown must prove beyond reasonable doubt have been explained in a number of decisions in the Court of Appeal and this Court, and are not in dispute.[25] Putting the elements of the offence into the context of the case, for Mr Bublitz to be convicted as a principal offender, the Crown must prove beyond reasonable doubt that he:

(a) had control over property, namely Viaduct's or Mutual's investors' funds (as the case may be) – s 220(1);

(b) was under an obligation to deal with the funds in accordance with the restrictions on related party lending or other dealing in the Viaduct trust deed or the Crown guarantee (as the case may be) – s 220(1)(b);

(c) knew of that obligation – s 220(2); and

(d) dealt with the funds in a manner that he knew and intended was in breach of the relevant obligation.

[111] It is obvious, of course, that Mr McKay and Mr Blackwood may be convicted under s 220 as parties to any offending by Mr Bublitz only if Mr Bublitz is found

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[24] Crimes Act 1961, s 66(1).

[25] *Nesbit v R* [2011] NZCA 285, [2011] 3 NZLR 4; *R v Douglas* [2012] NZHC 1467 and [2012] NZHC 1746; *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548; *R v Whale* [2013] NZHC 731.

guilty of the offence. I accept the Crown's proposition, not disputed by the defendants, that on the charges under s 220 faced by Mr McKay and Mr Blackwood, the elements that the Crown must prove before they may be found guilty on those charges in that way are that, for each transaction, the defendant:[26]

(a) incited, abetted or assisted Mr Bublitz to steal Mutual investors' funds, by advising him which transactions should be made and assisting him to prepare the necessary documentation and carry them out;

(b) intended to incite, abet or assist Mr Bublitz to steal Mutual investors' funds, knowing that:

(i) Mr Bublitz had control over Mutual investor funds;

(ii) was obliged to deal with them in accordance with the restrictions on related party lending contained in the Crown guarantee; and

(iii) Mr Bublitz intentionally dealt with the funds in breach of the restrictions on related party lending contained in the Viaduct trust deed and Crown guarantee.

[112] Whether Mr Bublitz had control over the investors' funds for the purposes of s 220(1) turns on whether he was in a position to determine how the funds deposited with either Viaduct or Mutual, as the case may be, would be dealt with.[27] That is a question of fact to be determined in the particular circumstances of the case[28] and it is not necessarily answered by the position Mr Bublitz occupied in the company's structure.[29] There has been no suggestion that Mr Bublitz did not have control over the Mutual investors' funds; the real contest is whether he had control over investor funds deposited with Viaduct.

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26 *Ashin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [82]–[83].
27 *R v Douglas* [2012] NZHC 1746 at [202]–[203]; *Cropp v R* [2012] NZHC 2498 at [30].
28 *Cropp v R* at [27]; *R v Sullivan* [2014] NZHC 2501 at [459]–[464]
29 *R v Whale* [2013] NZHC 731 at [59].

[113] On Charges 1 to 12, 14 and 15, for the purposes of proving that Mr Bublitz acted in breach of the related party restrictions in the Viaduct trust deed or the relevant Crown guarantee, the Crown must prove that Mr Bublitz had control over Viaduct Capital in terms the accounting standards.[30] That is, that he had, as NZ IAS 24 and NZ IAS 27 require:

> The power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

[114] It follows that I accept the Crown's proposition that, if Mr Bublitz is found to have been in control of Viaduct in terms of the accounting standards, that control will be sufficient to prove control of Viaduct's investor funds under s 220(1). Defence counsel did not disagree. Similarly, the concession that Mr Bublitz controlled Mutual in terms of the accounting standard is sufficient to establish control of Mutual's investor funds.

[115] I summarise the charges brought under s 220:

> Charge 1 alleges an offence by Mr Bublitz between 8 March 2009 and 10 September 2009 in relation to loan advances made by Viaduct to Homebush Trustees Limited as trustee of the Cashmere Eleven Trust without consent of the trustee. It is said the advances amounted to related party loans because Mr Bublitz controlled both Viaduct and Homebush.
>
> Charge 2 relates to the purchase by Viaduct from Hunter Capital Group and/or Morrison Creed (DHL) Trustee Limited of shares in Dockland Holdings Limited between 14 April 2009 and 5 June 2009 without consent of the Viaduct trustee. The use of the Viaduct funds to purchase the shares resulted in transfers directly to Hunter Capital Group on 15 April 2009, 27 May 2009 and 4 June 2009. It is alleged that each individual transfer amounted to a related party transaction because Mr Bublitz controlled Viaduct, Hunter Capital Group and the Morrison Creed trust, and also that each transfer exceeded 2% of Viaduct's total tangible assets (when aggregated with other related party

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[30] On Charges 11 to 15, the Crown relies, to the extent that it is necessary for it to do so, on the alternative definition of control set out in the Mutual Crown guarantee.

transactions in the preceding 12-month period), and thereby breached the requirement to obtain the trustee's consent.

Charge 3 alleges that on or about 4 June 2009 Mr Bublitz dealt with the investor funds in Viaduct contrary to his obligations to the trustee, by transacting the purchase by Viaduct from Hunter Capital Group of its loan to Homebush without the trustee's consent, the purchase being both a related party transaction and involving the acquisition of more than 2% of Viaduct's total tangible assets.

Charge 5 alleges that, between 1 July 2009 and 31 March 2010, Mr Bublitz dealt with Viaduct's investor funds without the trustee's prior consent by procuring Viaduct to redeem for cash capital notes held from time to time by Hunter Capital Property Trust and/or the Hunter Capital Group on the basis of an arrangement other than that set out in each capital notes certificate. It is said that the capital notes were redeemed for cash on the direction or approval of Mr Bublitz, but with such redemption amounting to a related party transaction and also one exceeding 2% of Viaduct's total tangible assets in aggregate with preceding related party transactions.

Charge 6 alleges that between 15 June 2009 and 4 November 2009 Mr Bublitz procured loan advances by Viaduct to Hilltop Ridge Farms Limited without the trustee's consent, the advances amounting to related party loans in that Mr Bublitz controlled both Viaduct and Hilltop.

Charge 7 alleges that between 16 August 2009 and 30 April 2010, Mr Bublitz committed theft in respect of loan advances by Viaduct to NKE Trust Limited without the trustees' consent, the advances amounting to related party loans because Mr Bublitz controlled both Viaduct and NKE.

Charge 10 alleges that Mr Bublitz, between 25 January 2010 and 11 February 2010, misused investor funds in Mutual Finance contrary to the requirements of the Crown under the replacement Crown guarantee dated 8 December 2009, and that Mr McKay and Mr Blackwood were parties to that

offending. The allegations relate to the purchase in two tranches by Mutual from Viaduct of the Homebush loan without the Crown's prior consent. It is said consent was required because the transaction overall had a value exceeding one per cent of Mutual's total tangible assets. It is also alleged that it was a related party transaction because Mr Bublitz controlled both Viaduct and Mutual in terms of the accounting standards and/or because Mr Bublitz was able to exercise real or effective control, directly or indirectly, over each company. Further, it is said that the requirements of the guarantee were breached because an independent expert had not certified, prior to each transaction, that the transaction was on arms' length terms.

Charge 11 alleges that Mr Bublitz misused investor funds in Mutual Finance by procuring the purchase by Mutual from Viaduct of the Bruce (Northgate) loan in breach of the replacement Crown guarantee in that the loan exceeded 1% of Mutual's total tangible assets, it was a related party transaction and had not previously been certified by an expert as being on arms' length terms. Messrs McKay and Bradford are alleged to have been knowing parties to that transaction.

Charge 12 alleges that Mr Bublitz, between 5 April 2010 and 27 April 2010, misused investor funds in Mutual in relation to the purchase by Mutual from Viaduct of the Hilltop loan without the prior written consent of the Crown and therefore in breach of the replacement Crown guarantee. The transaction was alleged to have a value exceeding 1% of Mutual's total tangible assets, it was with a related party of Mutual and that it had not been previously certified as being an arms' length transaction. Again, Messrs McKay and Blackwood are alleged to have been knowing parties to that offending.

Charge 13 alleges that Mr Bublitz misused investor funds in Mutual in breach of the replacement Crown guarantee in respect of loan advances by Mutual to Hilltop Ridge Farms Limited without the prior written consent of the Crown. Again, it is said that the loan had a value exceeding 1% of Mutual's total tangible assets, that it was a related party transaction and that it had not been

certified as being an arms' length transaction. Mr McKay and Mr Blackwood are alleged to be knowing parties to that offence.

False statement by a promoter

[116] Mr McKay faces one charge under s 242 of the Crimes Act of making a false statement as a promoter in respect of the Viaduct prospectus issued on 3 March 2009, and Mr McKay and Mr Blackwood are charged under that section with making a false statement as a promoter in publishing Viaduct's 9 October 2009 prospectus. Mr Bublitz is also charged under that section in respect of Mutual Finance Limited's 3 March 2010 prospectus and the amendment of that prospectus dated 28 April 2010.

[117] Section 242 materially provides as follows:

> **242 False statement by promoter, etc**
>
> (1) Every one is liable to imprisonment for a term not exceeding 10 years who, in respect of any body, whether incorporated or unincorporated and whether formed or intended to be formed, makes or concurs in making or publishes any false statement, with intent—
>
> (a) to induce any person, whether ascertained or not, to acquire any financial product within the meaning of the Financial Markets Conduct Act 2013 ….
>
> (2) In this section, false statement means any statement in respect of which the person making or publishing the statement—
>
> (a) knows the statement is false in a material particular; or
>
> (b) is reckless as to whether the statement is false in a material particular.

[118] There has been no dispute by defence counsel about the Crown's proposition that to prove that a defendant made a false statement or statements in a company prospectus, the Crown must prove beyond reasonable doubt:[31]

(a) that the defendant made or concurred in making a particular statement in a prospectus;

(b) the statement was false in a material particular;

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[31] *R v Sullivan* [2014] NZHC 2501 at [431].

(c) the defendant knew the statement to be false in a material particular, or was reckless as to that possibility; and

(d) the defendant intended to induce investors to subscribe for the debt securities on offer.

[119] A prospectus is a living document in the sense that once it is issued and is in the marketplace it is always "speaking" to potential investors in present day terms. I accept Mr Johnstone's proposition, therefore, that a defendant will be criminally liable if he became aware during the period of publication of a prospectus that a statement was untrue or had become untrue but failed to correct it by way of amendment to that effect.[32]

[120] A statement in an offer document or advertisement will be false if it is a lie, a half-truth or if, by the omission of any material particular, it conveys a false impression.[33] A statement will be material if it is likely to influence an investor's decision to invest.[34]

[121] The particulars of the charges brought under s 242 of the Crimes Act are these:

> Charge 4 alleges that Mr McKay, between 2 March 2009 and 8 June 2009 made or concurred in the making or publishing of a false statement in Viaduct's 3 March 2009 Prospectus because it asserted that Viaduct would focus on providing funding packages to a diverse client base spread across a range of industries and classes, the transactions which were the subject of Charges 1 to 3 were undertaken for the benefit of Mr Bublitz and entities controlled by him and not "a diverse client base". Second, in the alternative, it alleges that although investors were alerted to the restrictions on related party lending in the Viaduct Trust Deed and the Crown guarantee, one or more of the transactions which are the subject of Charges 1 to 3 breached the terms of Viaduct's Trust Deed as alleged in those charges.

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32 See *R v Petricevic* [2012] NZHC 665 at [105]; *R v Sullivan* [2014] NZHC 2501 at [435].
33 *R v Sullivan* at [437], citing *R v Douglas* [2012] NZHC 1467 at [198].
34 *R v Sullivan* at [440]-[441].

Charge 8 alleges that Messrs McKay and Blackwood, between 8 October 2009 and 1 January 2010 made or concurred in the making or publishing of false statements in Viaduct's Prospectus dated 9 October 2009 because the transaction the subject of charges 1 to 3 and 5 to 7 were not made to a diverse client base, were in breach of Viaduct's Trust Deed requirements relating to related party loans and transactions, or that there was an arrangement that capital notes held from time to time by Hunter were redeemed on the direction or approval of Mr Bublitz, contrary to the arrangements set out in the Capital Notes Certificates.

Charge 14 alleges that Mr Bublitz, between 2 March 2010 and 28 April 2010 concurred in the making or publishing the false statement in Mutual's 3 March 2010 prospectus. The Crown alleges that the prospectus drew particular attention to Mutual having entered into the initial Crown guarantee and the replacement Crown guarantee, and to a wide range of risks pertaining to Mutual, including the risk of the Crown guarantee Scheme expiring on 12 October 2010 without being extended or replaced. It is said, however, that the prospectus failed to disclose the breaches of the Crown guarantees the subject of charges 10 to 13 and the consequent risk of the replacement Crown guarantee being withdrawn at short notice, thereby affecting Mutual's business operations disadvantageously.

Charge 15 alleges that Mr Bublitz, between 27 April 2010 and 14 July 2010 made or concurred in the making or publishing of a false statement in Mutual's 3 March 2010 prospectus as amended by the memorandum dated 28 April 2010. As for Charge 14, the Crown alleges that the prospectus drew particular attention to Mutual having entered into the initial Crown guarantee and the replacement Crown guarantee, and to a wide range of risks pertaining to Mutual, including the risk of the Crown guarantee Scheme expiring on 12 October 2010 without being extended or replaced. It is said, however, that the prospectus failed to disclose the breaches of the Crown guarantees the subject of charges 10 to 13 and the consequent risk of the replacement Crown guarantee being withdrawn at short notice, thereby affecting Mutual's business operations disadvantageously.

False statement to a trustee

[122] Mr McKay and Mr Blackwood face a charge that they made a false statement in the December 2009 quarterly report to the trustee for Viaduct Capital debenture holders. Section 377(2) of the Companies Act 1993 materially provides:

> **377 False statements**
>
> ...
>
> (2) Every director or employee of a company who makes or furnishes, or authorises or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to—
>
> (a) A … trustee for debenture holders of the company …
>
> knowing it to be false or misleading, commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

[123] There is no dispute that a defendant is guilty of that offence if the Crown proves beyond reasonable doubt:

(a) as a director of Viaduct, they prepared and sent to Viaduct's trustee a report related to Viaduct's affairs;

(b) the report was false or misleading in a material particular; and

(c) they knew the report to be false or misleading.

[124] The essence of the false statement allegations by the Crown in the charge under s 377(2) of the Companies Act is that the report to the trustee was deliberately false or misleading in that it concealed or failed to disclose loans or other transactions that the defendants knew were related party transactions because, as they also knew, Mr Bublitz was in control of Viaduct Capital Limited in terms of NZ IAS 24.

The question trails

[125] It is recognised as best practice in New Zealand for judges presiding over criminal jury trials to provide the jury with a question trail or decision path designed to focus the jury's attention, in considering its verdict, on the essential findings of fact

which must be made on the charge they are required to decide. The questions are directed specifically at the facts of the particular case, and are structured in such a way as to obviate the need for the jury to consider what might sometimes be difficult questions of law about the elements of the charge.

[126] Hearing this case without a jury, I considered I would be assisted by the discipline of preparing and following a question trail setting out what the Crown was required to prove beyond reasonable doubt for a defendant to be found guilty of a charge. In preparing the question trail, I was assisted by the submissions I received from counsel. Although it appeared to me that, after discussion, there was a general consensus between counsel as to the content of the respective question trails, it was for me to determine the final form that was appropriate for each charge.

Charges 1, 6 and 7 against Mr Bublitz – Theft by a person in a special relationship

[127] Mr Bublitz is charged under s 220 of the Crimes Act with theft in a special relationship by procuring Viaduct to make loan advances in breach of the restrictions in the Viaduct trust deed. To illustrate the Crown's approach, Charge 1 in the Crown Charge Notice alleges:

> That PAUL NEVILLE BUBLITZ, between 8 March 2009 and 10 September 2009, at Auckland or elsewhere in New Zealand, had control over property, namely investor funds in Viaduct Capital Limited (Viaduct), on terms or in circumstances that he knew required him on behalf of Viaduct to deal with the property in accordance with the requirements of Prince & Partners Trustee Company Limited (Prince) as trustee under a Debt Security Trust Deed dated 6 October 2006 (Viaduct's Trust Deed), and intentionally dealt with the property otherwise than in accordance with those requirements.
>
> *Particulars*
>
> Loan advances by Viaduct to Homebush Trustees Limited (Homebush) as trustee of the Cashmere Eleven Trust without Prince's consent, such loan advances amounting to a Related Party Loan (in that in terms of NZ IAS 24 Mr Bublitz controlled both Viaduct and Homebush).
>
> [Refer cl 6.4.3.2 of Viaduct's Trust Deed]

[128] Considering the elements of the offence and the matrix of alleged facts underpinning the Crown's allegations, the following question trail will lead to a decision on the appropriate verdict on this charge:

> Has the Crown proved beyond reasonable doubt that, between 8 March 2009 and 10 September 2009, at Auckland or elsewhere in New Zealand:
>
> 1. Mr Bublitz had control over Viaduct's investor funds that were required to be dealt with in accordance with Viaduct's trust deed?
>
> 2. On any one of the occasions alleged (being 9 March 2009, 10 June 2009, 10 July 2009 and 9 September 2009), Mr Bublitz intentionally dealt with those funds by procuring Viaduct to make a loan advance to Homebush Trustees Limited?
>
> 3. At the time of that advance, Viaduct and Homebush were related parties under Viaduct's trust deed because Mr Bublitz controlled both Viaduct and Homebush in terms of NZ IAS 24?
>
> 4. The trustee did not give its prior written consent to that advance?
>
> 5. At the time of that advance, Mr Bublitz knew that:
>
> (a) Viaduct's investor funds were required to be dealt with in accordance with restrictions on related party lending contained in Viaduct's trust deed; and
>
> (b) the advance breached those restrictions?

The question trail is structured so that, if the answer to all of those questions is "Yes", Mr Bublitz must be found guilty of Charge 1. If the answer to any one of those questions is "No", Mr Bublitz must be found not guilty of that charge.

[129] A similar question trail, addressing the particular facts, will be applied to Charges 6 and 7 against Mr Bublitz which also allege breaches of the trust deed in relation to loans and are in terms similar to Charge 1.

Charges 2, 3, 5, 8, 10, 11, 12, and 13 against Mr Bublitz; Charges 10, 11 and 12 against Mr McKay; Charges 10, 11, 12, and 13 against Mr Blackwood – Theft by a person in a special relationship

[130] Mr Bublitz is also charged with theft in a special relationship by procuring Viaduct to enter into transactions other than the making of loan advances in breach of the restrictions in the Viaduct trust deed or the replacement Crown guarantee: Charges 2, 3, 5, 8, 10, 11, 12, and 13. The question trail is complicated by the requirement that the Crown must prove not only that the transaction amounted to a related party transaction on account of Mr Bublitz's control of Viaduct and the other entity or entities involved, but also that the transaction breached the cap on related party transactions set out in the trust deed or Crown guarantee. Charges 10, 11, 12 and 13

are further complicated by Mr McKay and Mr Blackwood (or Mr Blackwood alone) being charged as parties to that alleged offending. The question trail must also accommodate the alternative allegations of control available under the Mutual Crown guarantee.

[131] The principles and the core ingredients are the same for this group of charges. I set out Charge 12 and the question trail for it as an example:

> That PAUL NEVILLE BUBLITZ, BRUCE ALEXANDER McKAY and RICHARD TIMOTHY BLACKWOOD, between 5 April 2010 and 27 April 2010, at Auckland or elsewhere in New Zealand, had control over property, namely investor funds in Mutual, on terms or in circumstances that they knew required Mr Bublitz on behalf of Mutual to deal with the property in accordance with the requirements of the Crown under the replacement Crown guarantee, and intentionally dealt with the property otherwise than in accordance with those requirements.
>
> *Particulars*
>
> The purchase by Mutual from Viaduct of the Hilltop loan without the prior written consent of the Crown, such purchase involving a transaction (or series of linked or related transactions):
>
> - having a value exceeding one per cent of Mutual's Total Tangible Assets;
>
> - to which a Related Party of Mutual (other than a wholly owned subsidiary of Mutual) was a party (in that in terms of 1.2(f)(i) or (ii) of the replacement Crown guarantee Mr Bublitz controlled both Viaduct and Mutual in terms of GAAP/NZ IAS 24 and/or Mr Bublitz being able to exercise real or effective control, directly or indirectly, over each company or over a material part of each company's business or affairs (whether pursuant to a contract, an arrangement or an understanding, as a result of the ownership or control of securities or other interests in or issued by each company, or otherwise)); and
>
> - not first certified to the Crown in writing, by an independent expert approved by the Crown in writing, that the transaction was, in the opinion of the expert, on arms' length terms.
>
> [Refer cl 6.2(b) of the replacement Crown guarantee]
>
> *Question trail*
>
> Has the Crown proved beyond reasonable doubt that, between 5 April 2010 and 27 April 2010, at Auckland or elsewhere in New Zealand:
>
> 1. Mr Bublitz had control over Mutual's investor funds which were required to be dealt with in accordance with the Crown guarantee dated 8 December 2009?
>
> 2. Mr Bublitz intentionally dealt with those funds by procuring Mutual to purchase the Hilltop loan from Viaduct?

3. At the time of the purchase, Viaduct and Mutual were related parties under the Crown guarantee because Mr Bublitz:

    a. controlled both Viaduct and Mutual in terms of GAAP/NZ IAS 24; or

    b. Mr Bublitz was able to exercise real or effective control, directly or indirectly, over each company or over a material part of each company's business or affairs (whether pursuant to a contract, an arrangement or an understanding, as a result of the ownership or control of securities or other interests in or issued by each company, or otherwise)?

4. The value of the purchase exceeded 1% of Mutual's Total Tangible Assets?

5. An independent expert approved by the Crown in writing had not first certified that the purchase was on arms' length terms?

6. At the time of the purchase, Mr Bublitz knew that:

    a. Mutual's investor funds were required to be dealt with in accordance with restrictions on related party transactions contained in the Crown guarantee; and

    b. the purchase breached those restrictions.

7. At the time of the purchase, Mr McKay and Mr Blackwood (as the case may be):

    a. had incited, abetted or assisted Mr Bublitz to procure Mutual to purchase the loan from Viaduct; and

    b. had intended to incite, abet or assist Mr Bublitz to procure Mutual to purchase the loan from Viaduct; and

    c. knew:

        i. Mr Bublitz had control over Mutual's investor funds; and

        ii. Mutual's investor funds were required to be dealt with in accordance with restrictions on related party transactions contained in the Crown guarantee; and

        iii. Mr Bublitz intentionally dealt with those funds by procuring Mutual to purchase the loan from Viaduct; and

        iv. the purchase breached those restrictions?

[132] The question trail is structured so that, if the answer to all of Questions 1 to 6[35] is "Yes", Mr Bublitz must be found guilty of Charge 12. If the answer to any one of Questions 1 to 6 is "No", Mr Bublitz must be found not guilty of that charge. If the answer to all of Questions 1 to 7 is "Yes", Mr McKay or Mr Blackwood, as the case may be, must be found guilty of Charge 12. If the answer to any one of Questions 1 to 7 is "No", Mr McKay or Mr Blackwood, as the case may be, must be found not guilty of that charge.

[133] Charge 13, also alleging theft by Mr Bublitz under s 220, is in similar terms to Charge 12 except that, rather than alleging that the relevant transactions were related party loans because Mr Bublitz controlled both Viaduct and Mutual, the relatedness is alleged to be Mr Bublitz's control of both Mutual and Hilltop Ridge Farms Limited, to whom the loans were advanced.

Charge 4 against Mr McKay; Charge 8 against Mr McKay and Mr Blackwood; Charges 14 and 15 against Mr Bublitz – Making a false statement as a promoter

[134] To illustrate the approach required for the charges of making a false statement as a promoter under s 242 of the Crimes Act, I set out the charge and question trail for Charge 4 against Mr McKay as follows:

> That BRUCE ALEXANDER McKAY, between 2 March 2009 and 8 June 2009, at Auckland or elsewhere in New Zealand, in respect of Viaduct, made or concurred in the making or publishing of a false statement, with intent to induce any person to subscribe to any security within the meaning of the Securities Act 1978.
>
> *Particulars*
>
> Viaduct's 3 March 2009 prospectus, which amounted to a false statement because, notwithstanding the assertions on pages 13 and 14 under the heading "Policies" and on page 20 relating to the Trust Deed's prohibition of related party lending without trustee consent, the transactions the subject of Charges 1 to 3 were undertaken:
>
> - in contradiction of the stated "Policies", with and for the benefit of Mr Bublitz and entities controlled by him, and not "a diverse client base"; and
>
> - in breach of Viaduct's Trust Deed requirements relating to Related Party Transactions and Related Party Loans.

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[35] Bearing in mind that the Crown needs to prove only one of the alternative elements in Question 3.

Question trail

Has the Crown proved beyond reasonable doubt that, between 2 March 2009 and 8 June 2009, at Auckland or elsewhere in New Zealand:

1. Mr McKay made, or concurred in Viaduct making or publishing Viaduct Capital Limited's 3 March 2009 prospectus, which contained assertions that:

    (a) Viaduct's credit exposure strategy focuses on providing funding packages over a finite period of generally between six months to three years, to a diverse client base spread across a range of industries and classes (page 13); and

    (b) Viaduct's Trust Deed imposes a restriction on related party lending, limiting related party transactions to 2% of the Company's Total Tangible Assets (page 14); and

    (c) The Crown guarantee also restricts related party lending to 1% of Total Tangible Assets (page 14); and

    (d) Viaduct's Trust Deed prohibits the Company from entering into a Related Party Loan without the prior written consent of the Trustee (page 20).

2. At the time of making or concurring in the making or publishing of the prospectus, Mr McKay intended to induce any person to subscribe to any security within the meaning of the Securities Act 1978?

3. At any time during the periods in which the prospectus was registered, it amounted to a false statement in that Mr McKay knew, or was reckless as to whether, the prospectus was false in a material particular because:

    (a) the transactions the subject of Charges 1 to 3 were undertaken for the benefit of Mr Bublitz and entities controlled by him and not "a diverse client base"; or

    (b) one or more of the transactions the subject of Charges 1 to 3 was or were undertaken in breach of Viaduct's Trust Deed's requirements as alleged in Charges 1 to 3.

If the answer to all of those questions is "Yes", Mr McKay must be found guilty of Charge 4. If the answer to any one of those questions is "No", Mr McKay must be found not guilty of that charge.

[135] A similar question trail applies for Charge 8 against Mr McKay and Mr Blackwood. It applies also for Charges 14 and 15 against Mr Bublitz, although the allegations relate to alleged breaches of Mutual's 3 March 2010 prospectus and the

amended prospectus of 28 April 2010. Charge 14 and the question trail, for example, are as follows:

> That PAUL NEVILLE BUBLITZ, between 2 March 2010 and 28 April 2010, at Auckland or elsewhere in New Zealand, in respect of Mutual, made or concurred in the making or publishing of a false statement, with intent to induce any person to subscribe to any security within the meaning of the Securities Act 1978.
>
> *Particulars*
>
> Mutual's 3 March 2010 prospectus, which amounted to a false statement because:
>
> (a) The prospectus drew particular attention to Mutual having entered the initial Crown guarantee and the replacement Crown guarantee (refer: pages 4, 6, 10, 12 and 44).
>
> (b) The prospectus referred at pages 14 to 16 to a wide range of risks pertaining to Mutual, including the risk of the Crown guarantee scheme expiring on 12 October 2010 without being extended or replaced.
>
> (c) The prospectus failed to disclose:
>
> - any of the breaches of the initial Crown guarantee and the replacement Crown guarantee the subject of Charges 10 to 13; and
>
> - the consequent risks of the replacement Crown guarantee being withdrawn at short notice, and of Mutual's business operations being disadvantageously affected.
>
> *Question trail*
>
> Has the Crown proved beyond reasonable doubt that, between 2 March 2010 and 28 April 2010, at Auckland or elsewhere in New Zealand:
>
> 1. Mr Bublitz made, or concurred in Mutual making or publishing Mutual Finance Limited's 3 March 2010 prospectus?
>
> 2. At the time of making or concurring in the making or publishing of the prospectus, Mr Bublitz intended to induce any person to subscribe to any security within the meaning of the Securities Act 1978?
>
> 3. At any time during the period in which the prospectus was registered, it amounted to a false statement in that Mr Bublitz knew, or was reckless as to whether, the prospectus was false in a material particular because it failed to disclose:
>
> (a) any breaches of the replacement Crown guarantee as alleged in charges 10 to 13; and
>
> (b) the consequent risks of the replacement Crown guarantee being withdrawn at short notice, and of Mutual's business operations being disadvantageously affected?

Charge 9 against Mr McKay and Mr Blackwood – Making a false statement to a trustee

[136] Charge 9 against Mr McKay and Mr Blackwood, of making a false statement to a trustee, reads as follows:

> That BRUCE ALEXANDER McKAY and RICHARD TIMOTHY BLACKWOOD, between 28 January 2010 and 3 February 2010, at Auckland or elsewhere in New Zealand, as directors of Viaduct, made or furnished, or authorised or permitted the making or furnishing of, a statement to a trustee for debenture holders of the company, that related to the affairs of the company and was false or misleading in a material particular, knowing it to be false or misleading.
>
> *Particulars*
>
> Viaduct's Directors' Quarterly Report as at December 2009, which amounted to a false or misleading statement because notwithstanding the assertions at paragraph 2.4 and at paragraph 4 as to Related Party Transactions and Related Party Loans, the transactions and lending the subject of Charges 1 to 3, and 5 to 7, were undertaken in breach of Viaduct's Trust Deed requirements relating to Related Party Transactions and Related Party Loans.

[137] The question trail for Charge 9 is:

> Has the Crown proved beyond reasonable doubt that, between 28 January 2010 and 3 February 2010, at Auckland or elsewhere in New Zealand:
>
> 1. The defendant being considered, as a Viaduct Capital Limited director, made or furnished, or authorised or permitted the making or furnishing, of the statements set out at paragraphs 2.4 and 4 (as to related party transactions and related party loans) of the December 2009 quarterly report?
>
> 2. The statements at paragraphs 2.4 and 4 of the December 2009 quarterly report were statements to the trustee for debenture holders of Viaduct and related to the affairs of Viaduct?
>
> 3. One or more of the transactions the subject of Charges 1 to 3 and 5 to 7 was undertaken in breach of Viaduct's Trust deed's requirements relating to related party transactions and related party loans?
>
> 4. At the time of the making or furnishing of the statements, the defendant you are considering knew for the reason set out in Question 3 above that that statement was false or misleading in a material particular?

Control of Viaduct by Mr Bublitz

[138] It can be seen from the analysis of the charges just undertaken that it a common element in all charges except Charge 13 that Mr Bublitz was in control of Viaduct Capital Limited in terms of NZ IAS 24. That element provides the foundation for the Crown's assertion in each case of alleged theft under s 220 of the Crimes Act that the conduct alleged amounted to a related party dealing, either by way of a loan advance[36] or another transaction such as the purchase of shares,[37] the purchase of a loan,[38] or the redemption of capital notes.[39] Proof of the charges alleging the making of a false statement as a promoter[40] turns on the Crown having proved at least one of the related charges under s 220 of the Crimes Act, as one of the alternative bases for the offence as alleged by the Crown. Similarly, on the charges against Mr McKay and Mr Blackwood of making a false statement to the Viaduct trustee, the Crown must prove the defendant to be guilty at least one of the s 220 charges alleged.

[139] For Charge 13, it is necessary for the Crown to prove that Mr Bublitz was in control of Mutual Finance Limited, rather than Viaduct, but that element is conceded by Mr Lance on behalf of Mr Bublitz and not disputed on behalf of the other defendants. The contest over the relatedness element in Charge 13 is whether the Crown has proved that Mr Bublitz was in control of Hilltop Ridge Farms Limited.

The nature of the Crown's case

[140] The evidence and submissions presented by the Crown provide a detailed account and analysis of the conduct of the business of the Hunter Group, and of the two finance companies, Viaduct Capital and Mutual Finance. The Crown's propositions comprise allegations that Mr Bublitz was the principal driver and decision-maker in a deliberate scheme to fund the property development activities of the various entities in the wider Hunter Group, all ultimately controlled by Mr Bublitz, out of funds subscribed by the finance companies over which he also had ultimate control.

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36 Charges 1, 6 and 7.
37 Charge 2.
38 Charges 3, 10, 11 and 12.
39 Charge 5.
40 Charges 4, 8, 14 and 15.

[141] Counsel for the Crown have devoted considerable attention to an analysis of the hundreds of emails exchanged and memoranda produced by the defendants and their associates, particularly key players such as Mr Wevers and Mr Chevin, who appears to have been a close associate of Mr Bublitz and instrumental in the preliminary decision-making over the plans to acquire a finance company. The outline of the scheme was said to have been devised by Mr Bublitz, Mr McKay and Mr Chevin at the meeting in Pauanui on 13 January 2009. Much of the evidence led by the Crown was devoted to establishing the extent to which the plans devised at the Pauanui meeting were put into effect. The Crown's case also devotes considerable attention to the nature of the information provided to professional advisers from time to time but particularly in January and early February 2009 when Mr Bublitz, Mr McKay and Mr Wevers had identified Priority Finance as a target which met the desired criteria for acquisition. The focus of the Crown's argument in that regard has been on the extent to which information relevant to the question of whether certain proposed dealings would amount to related party transactions was tailored in its presentation by the defendants to ensure the desired outcome: that is, to receive and then rely on advice that what was proposed would not require disclosure and the prior approval of the finance company's trustee.

[142] The Crown's evidence and submissions also contain a thorough analysis of documents which are said to demonstrate a mindset of intentional breaches of the constraints on related party transactions imposed by both the Viaduct trustee and the Mutual Crown guarantee.

[143] On the ubiquitous issue of whether Mr Bublitz had control of Viaduct, a principal foundation of the Crown's proposition is that decisions on behalf of Viaduct, concerning Viaduct's loans and other transactions with entities associated with Mr Bublitz and the Hunter Group, were made in the interests of Mr Bublitz and his other entities, not Viaduct. It is said that the decisions to enter the transactions under scrutiny were commercially unjustifiable from Viaduct's point of view. I am asked to infer, therefore, that the only reasonably possible explanation for Viaduct's post-acquisition conduct is that there was an "abiding, secret arrangement" with Viaduct's shareholders and directors ceding control of Viaduct to Mr Bublitz.

[144] I have considered all of this material. It is abundantly clear that the defendants understood, from an early stage of their involvement in the various transactions with which they were associated (bearing in mind that Mr Blackwood joined the enterprise later than Mr Bublitz and Mr McKay), that they would not be in a position to carry out the necessary fundraising to support the various Hunter projects through the acquisition of the two finance companies without working around the constraints of the related parties' provisions. Put at its simplest, the defence proposition in answer to the Crown's case is that it is not sufficient for the Crown to prove simply that the defendants put in place structures to enable Viaduct or Mutual investor funds to be made available to Hunter Group entities. It must satisfy the Court to the high standard of proof required that, on all but one of the charges, Mr Bublitz had control of Viaduct at the time the transactions took place and that the defendants knew that the transactions breached the related party restrictions for that reason.

[145] The defendants emphasise the registered shareholding and directorship of Viaduct at the relevant times and submit that Crown has failed to prove an essential element of the charges; namely, that Mr Bublitz had control of Viaduct in terms of the accounting standards or the replacement Mutual Crown guarantee. Where the accounting standards are relied upon, the defence is that the Court cannot be satisfied on the evidence that the only reasonable inference to be drawn from the proved facts is that there was a secret agreement between Mr Wevers and Mr Bublitz, which both Mr McKay and Mr Blackwood knew about, that Mr Bublitz had "the power to govern the financial and operating policies of [Viaduct] so as to obtain benefits from its activities."[41]

[146] It is necessary, therefore, to first determine the meaning of "control" as defined in the relevant documents.

"Control" in terms of NZ IAS 24

[147] As I have explained, the accounting standard NZ IAS 24 is relevant to all charges. If the Crown has failed to prove beyond reasonable doubt that Mr Bublitz was in control of Viaduct at the relevant times, the defendants must be acquitted on

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41 NZ IAS 24 at paragraph 9: the definition of "control".

Charges 1 to 9, and Charges 10 to 15 must be considered by reference to the definition of control in the Mutual Crown guarantee.

The expert witnesses

[148] In determining the meaning and application of NZ IAS 24, the accounting standard relied upon by the Crown as the determinant of related party transactions for the purposes of proving the charges, I was assisted by evidence from two expert witnesses. The Crown's witness, Mr Simon Lee, is a Technical Director at leading international accounting firm KPMG. He heads the firm's New Zealand Accounting Advisory Services team specialising in the provision of technical accounting advice. This team provides technical advice and support on accounting and financial reporting matters, assisting clients to implement new standards, determine the appropriate financial reporting treatment for complex transactions, transition to new reporting frameworks and generally keep up to date with a changing financial reporting environment. Mr Lee holds a Bachelor of Management Studies and a Bachelor of Commerce and Administration with First Class Honours, and has 25 years' experience in technical accounting.

[149] I was also assisted by evidence from Mr Mark Hucklesby, who is the National Technical Director for the Grant Thornton New Zealand Audit Partnership. Mr Hucklesby was called on behalf of Mr Bublitz. Prior to taking on that role in April 2009, Mr Hucklesby spent three years in London as International Financial Reporting Standards Director at Ernst and Young Global Limited. That was a specialist group created to deal with the development and interpretation of international reporting standards released up to that date. Mr Hucklesby has had considerable experience over the 25 years prior to that period of service in full-time roles interpreting applying or commenting on Generally Accepted Accounting Practice in New Zealand, including contributing extensively to publications explaining the application of IFRS.

[150] Although it appeared from the briefs of evidence of Mr Lee and Mr Hucklesby that they held conflicting views on important aspects of the meaning and application of the relevant New Zealand accounting standards, it became apparent after each had

been cross-examined that there was a significant degree of concurrence between them on the key issues. When confronted with the proposition that the views he had initially expressed did not address adequately the prospect of fraudulent activity leading to a breach of the standards, Mr Hucklesby was prepared to acknowledge that documentary evidence of shareholding or other arrangements concerning the governance of an entity did not necessarily trump evidence suggesting that arrangements other than those documented had been agreed.

[151] The general concurrence between the experts, therefore, means that rather than setting out their views and indicating which I have preferred and which I have not followed, it is sufficient for me to summarise my conclusions based on the helpful analyses of the experts and counsel's submissions.

Discussion to the relevant accounting standards

[152] In reaching my views, I have taken into account the concept of control elaborated in NZ IAS 24 (the related party standard), NZ IAS27 which deals with consolidated and separate financial statements, and a publication by leading accounting firm KPMG,[42] as defined in the standards which were in force throughout the relevant period.

[153] The starting point for the application of generally accepted accounting standards in New Zealand is s 3 of the Financial Reporting Act 1993 which sets out the legislative basis for the adoption of individual accounting standards relating to particular accounting issues and an interpretation of accounting issues originating from the International Accounting Standards Board. Since 2005, when New Zealand adopted the standards, the Accounting Standards Review Board in New Zealand has picked up standards developed by the International Accounting Standards Board based in London. After taking the standards through its own process of analysis and formulation, the standards (NZ IAS) become part of the regulatory regime in New Zealand.

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42 KPMG Insights into International Financial Reporting Standards (5th ed) 2008/09.

[154] The purpose of financial statements generally is to provide information to enable readers to make economic decisions or to hold people or organisations accountable in circumstances where the readers might not otherwise be able to obtain or contract to obtain information they need for their investment decisions or other decisions about dealing with certain entities.

NZ IAS 24

[155] As indicated in the standard, NZ IAS 24 should be read in the context of its objective, which the standard describes as follows:

> The objective of this Standard is to ensure that an entity's financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties and by transactions and outstanding balances with such parties.[43]

[156] The standard requires disclosure of related party transactions and outstanding balances in the separate financial statements of a parent, venturer or investor presented in accordance with NZ IAS 27 - *Consolidated and Separate Financial Statements*.[44]

[157] Put in lay terms, therefore, the standards may be seen as providing guidance to entities who are required to prepare financial reports in accordance with the accounting standards in force in New Zealand about the provision of information which best informs readers seeking financial information about the entity.

[158] It is convenient to repeat the relevant definitions contained in paragraph 9 of the NZ IAS 24:

> *Related party* A party is related to an entity if:
>
> (a) directly or indirectly, through one or more intermediaries, the party:
>
> (i) controls, is controlled by, or is under common control with, the entity (this includes parents, subsidiaries and fellow subsidiaries);
>
> (ii) has an interest in the entity that gives it significant influence over the entity; or

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43 NZ IAS 24 at paragraph 1.
44 NZ IAS 24 at paragraph 3.

(iii) has joint control over the entity;

…

(d) the party is a member of the key management personnel of the entity or its parent;

…

(f) the party is an entity that is controlled, jointly controlled or significantly influenced by, or for which significant voting power in such entity resides with, directly or indirectly, an individual referred to in (d) or (e); or …

A *related party transaction* is a transfer of resources, services or obligations between related parties, regardless of whether a price is charged.

Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

Key management personnel are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.

Significant influence is the power to participate in the financial and operating policy decisions of an entity, but is not control over those policies. Significant influence may be gained by share ownership, statute or agreement.

[159] Under paragraph 10:

In considering each possible related party relationship, attention is directed to the substance of the relationship and not merely the legal form.

[160] And relevantly under paragraph 11:

In the context of this Standard, the following are not necessarily related parties:

(a) two entities simply because they have a director or other member of key management personnel in common, notwithstanding (d) and (f) in the definition of "related party".

…

(c) (i) providers of finance,

…

simply by virtue of their normal dealings with an entity (even though they may affect the freedom of action of an entity or participate in its decision-making process).…

[161] The standard specifies, among other things, the circumstances in which entity must consolidate the financial statements of another entity (being a subsidiary) and the information that an entity must disclose to enable users of the financial statements to evaluate the nature of the relationship between the entity and its subsidiaries.

[162] I also repeat, for convenience, the provisions of NZ IAS 27 dealing with control:

> *Control* is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

[163] Paragraph 13 of the standard provides:

> Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than half of the voting power of an entity unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control. Control also exists when the parent owns half or less of the voting power of an entity when there is:
>
> (a) power over more than half of the voting rights by virtue of an agreement with other investors;
>
> (b) power to govern the financial and operating policies of the entity under a statute or an agreement;
>
> (c) power to appoint or remove the majority of the members of the board of directors or equivalent governing body and control of the entity is by that board or body; or
>
> (d) power to cast the majority of votes at meetings of the board of directors or equivalent governing body and control of the entity is by that board or body.

[164] As explained by Mr Lee and Mr Hucklesby, the power to govern focuses on whether the ability to exercise control has a legal or contractual basis. The experts agreed that at the relevant time – in 2009 and 2010 – there was no clear acceptance that informal control through influence would suffice. Some experts held the view at the time that the definition of control in NZ IAS 24 and NZ IAS 27 included the concept of de facto control. Some entities adopted that approach in consolidating financial statements in accordance with the standard; others did not.

[165] The meaning of control in NZ IAS 27 is also informed by the New Zealand Equivalent to Interpretation SIC-12 C*onsolidation - special purpose entities* (NZ SIC-

12). Although it is not said that any of the entities with which this case is concerned were special purpose entities to which NZ SIC-12 had direct application, the Financial Reporting Standards Board expressed a view in that standard about the meaning of NZ IAS 27.13. At paragraph 9 of NZ SIC-12 the following comment appears:

> NZ IAS 27.13 indicates several circumstances which result in control even in cases where an entity owns one-half or less of the voting power of another entity. Similarly, control may exist even in cases where an entity owns little or none of the SPE's equity. The application of the control concept requires, in each case, judgement in the context of all relevant factors.

[166] Paragraph 10 of NZ SIC-12 relevantly provides:

> 10. In addition to the situations described in NZ IAS 27.13, the following circumstances, for example, may indicate a relationship in which an entity controls an SPE and consequently should consolidate the SPE:
>
> ...
>
> (b) In substance, the entity had the decision-making powers to obtain the majority of the benefits of the activities of the SPE ....

[167] The effect of the relevant accounting standards as they applied in 2009 and 2010 is usefully summarised in the KPMG Insights document which was referred to and relied upon by both expert witnesses. Addressing the need for the inclusion of subsidiaries in consolidated financial statements, KPMG Insights identifies that the definition of a subsidiary focuses on the concept of control and has two parts, both of which need to be met in order to conclude that one entity controls another:

> (a) the power to govern the financial and operating policies of an entity; and
>
> (b) an intention to obtain benefits from its activities.[45]

[168] Bearing in mind the definition of related parties in NZ IAS 24, the same views of the implications of the standards may be applied to the question in this case of whether any parties to transactions were related parties. KPMG Insights contains the

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[45] KPMG Insights at 2.5.10.20.

following proposition which accord with the views of the two experts and which I accept:

(a) There is no requirement for the parent to have a shareholding in a subsidiary, and this is not a necessary pre-condition for control.[46]

(b) Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than half of the voting power of an entity. This presumption of control may be rebutted in exceptional circumstances if it can be demonstrated clearly that such ownership does not constitute control.[47]

(c) Even if the parent owns half or less of the voting power of an entity, control exists in any of the following circumstances:

(i) the investor has power over more than one-half of the investee's voting power through an agreement with other investors;

(ii) the investor has the power to govern the investee's financial and operating policies by virtue of a statute or agreement;

(iii) the investor has the power to appoint or remove the majority of the investee's board of directors or governing body members, and control of the entity is exercised through that board or body; or

(iv) the investor has the power to cast the majority of votes at meetings of an investee's government body (board of directors or other governing body) through which control of an entity is exercised.

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46 At 2.5.10.30.
47 At 2.5.10.40.

The power to govern

[169] KPMG Insights notes at 2.5.30.10 that the assessment of whether one entity controls another entity depends on the application of the control concept in NZ IAS 27. The document then reflects the evidence of the experts about the differing views as to how the NZ IAS 27 concept should be applied. It says that one view is based on the existence of the power to govern, considering whether the ability to control has a legal or contractual basis rather than whether that control actually is exercised. The other view is that in addition to the power to govern analysis, the evaluation of whether consolidation is required to take into account de facto circumstances such as when an entity holding a significant minority interest can control another entity without legal arrangements that would give it majority voting power.

[170] It was accepted during the hearing by the Crown and the defence that this is not a case in which the de facto control concept is relevant. The Crown has rested its proposition firmly on the power to govern analysis. That is demonstrated by Mr Johnstone's concession that it is necessary for the Crown to prove the existence of an agreement between Mr Bublitz and the directors and shareholders of Viaduct from time to time ceding to Mr Bublitz the power to govern the financial and operating policies of Viaduct so as to obtain benefits from its activities.

[171] I accept Mr Lance's proposition on behalf of Mr Bublitz, founded on the observation at 2.5.30.20 of KPMG Insights, that what must be considered is whether the power or ability to control the entity has a legal or contractual basis rather than whether that control actually is exercised. It must be, as Mr Lance submitted, an enforceable right or power although not necessarily one which is recorded in writing. Although Mr Hucklesby would normally look for, and would expect to find, documentary proof that such an agreement vesting power of control would be in writing, he conceded that the accounting standard does not mandate written evidence of the existence of an agreement. He acknowledged under careful cross-examination by Mr Johnstone that the factual circumstances may be indicia of the existence of an oral agreement, for example.

[172] I do not accept the proposition, advanced during defence arguments, that the power to govern approach requires that a finding of control must be based only on an agreement between persons or entities registered as holding shares. Consistently with the view that "(d)etermining whether control exists requires a careful analysis of all facts and circumstances",[48] and as a matter of plain logic, the proposition at 2.5.50.40 of KPMG Insights that "an oral shareholders' agreement may be as important as a written agreement in assessing control" applies with equal force to agreements between registered shareholders and those whose interests are not recorded on the register. That view is expressly confirmed at 2.5.10.30 of KPMG Insights.

Summary of evidence from which Crown says Mr Bublitz's control of Viaduct should be inferred

[173] It is the Crown's proposition that, despite not formally being a director or shareholder, it was in fact Mr Bublitz who controlled Priority/Viaduct upon its acquisition by Phoenix. It is said that the true extent of Mr Bublitz's control was deliberately concealed other than from Mr Bublitz, Mr Wevers, Mr McKay and, later, Mr Blackwood. A concise summary of some of the circumstances from which Mr Bublitz's control of Viaduct can and should be inferred was provided by the Crown to Mr Lee as part of the briefing he received prior to reporting on his views and giving evidence. The background was included in his brief of evidence and, although the circumstances were expanded upon by the Crown in considerable detail in evidence, the summary provides a useful framework for considering whether the Crown's submissions should be accepted.

[174] The proposition put to Mr Lee was that the circumstances from which Mr Bublitz's control of Viaduct should be inferred included:

(a) the implementation from 16 February 2009, on an apparently pre-determined basis, of the Hunter asset purchase and lending programme, notwithstanding a paucity of independent consideration by its directors and despite criticism arising upon enquiry by Treasury and its contract

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48 KPMG Insights at 2.5.30.50.

at PwC in respect of concerns about the use being made of the Crown guarantee;

(b) the apparently poor quality of some of those assets purchases and loans;

(c) the apparent expectation of control required to justify Mr Bublitz advancing the entirety of the funding necessary for Viaduct's acquisition to Mr Wevers' holding company pursuant to a loan agreement which did not in its own terms provide for any form of security (albeit a GSA appears to have been registered immediately upon Treasury signalling its interest around a month after the acquisition), and which was not supported by a personal guarantee from Mr Wevers;

(d) Mr Bublitz's formal role extending beyond that of lender to Viaduct's parent to include acting as a contractor to Viaduct under a management contract providing for remuneration at a level equivalent to that of Mr Wevers and in excess of Mr McKay and other executives;

(e) Viaduct's ongoing redemption for cash of a substantial value of capital notes which it had issued to Hunter as consideration for the several post-acquisition asset purchases, despite such capital notes being convertible to shares at Viaduct's election and notwithstanding a deepening cash crisis at Viaduct, for purposes apparently designed to further Hunter's interests rather than those of Viaduct, and at Mr Bublitz's apparent direction;

(f) various items of internal correspondence indicating Mr Bublitz's ability to control decision-making by Mr Wevers and Mr McKay, including the setting of salaries at Viaduct;

(g) the fact that when, in September 2009, Mr Wevers:

(i) advised Mr Bublitz of deep concern about the value of three loans which Viaduct had purchased from Hunter and a potential breach of Viaduct's trust deed;

(ii) pointed out that "everything now relies on cash being able to be taken from [Viaduct]" (referring to Hunter-associated ventures and its banker, National Bank);

(iii) listed a number of options as to what could be done, including Mr Bublitz's selling his house and Viaduct being wound up, adding that cash could only come from Mr Bublitz selling his assets (or finding outside investors) and not from Viaduct,

the outcome was not Viaduct's winding up or an immediate injection of cash from outside Viaduct. Instead, Mr Wevers resigned as director and transferred 51 per cent of his shares in Phoenix, Viaduct's sole shareholder, to Mr McKay. Another associate of Mr Bublitz who had always been working on its business (Mr Blackwood) became the second director (rather than Mr Bublitz);

(h) Hunter's acquisition in December 2009 of another Crown-guaranteed finance company (Mutual), which then embarked on a series of loan asset purchases from Viaduct intended to support Viaduct's cash-flow as it scaled back its operations (including withdrawing its Prospectus as from 30 December 2010) prior to it entering receivership on 13 May 2010.

[175] The loan asset purchases referred to in the last item included a loan purchase by Mutual from Viaduct within a few days of Mutual's acquisition by Hunter. Unbeknown to Mutual's continuing minority shareholder/director, Mr Kincaid, the transaction was necessary to fund a capital note cash redemption by Viaduct to Hunter, which cash Hunter used to make a late payment on Mutual's purchase price. In that way, Mutual effectively bought an asset to allow itself to be bought.

[176] To that list provided to Mr Lee, I add that the Crown appears also to rely on transactions which it says were carried out dishonestly around the time of Viaduct's receivership. It is suggested that it might be inferred from those actions that Mr Bublitz and the other defendants were determined to use whatever means were available, including dishonest means, to benefit the Hunter Group at the expense of Viaduct's receivers (and, therefore, debenture holders) and to conceal having done so.

[177] Bearing in mind that these reasons are confined to a concise account of the facts and a plain statement of my essential reasons for my findings, I do not attempt to record the comprehensive evidence relied upon in the Crown's closing. I have been assisted by, and am grateful for, the industry of counsel in referring me to the many documents upon which the Crown's propositions are based. I have considered all of the material carefully but I summarise only some of the evidence to illustrate the broad propositions which the Crown put to Mr Lee and which I have just repeated.

Did Mr Bublitz have control of Viaduct in terms of the accounting standards?

Did an "abiding, secret arrangement ceding control of Viaduct to Mr Bublitz" exist from the date Priority Finance was acquired?

[178] Despite the absence of a written agreement giving Mr Bublitz control of Viaduct, the Crown says the Court is compelled to conclude by inference from the evidence that underlying all of the activities was an abiding, albeit secret, arrangement giving Mr Bublitz the power of control over Viaduct's financial decisions. I have held that such an arrangement must have been enforceable to meet the test. In that regard, I take the Crown to have conceded that it is not sufficient for the Crown to show only that Mr Bublitz was influential – even hugely influential and forceful – in persuading the directors and shareholders of Viaduct to take the decisions and act as they did, but that he had the right to require those decisions to be made and actions to be taken.

[179] Although the first of the alleged offences by Mr Bublitz is not said to have occurred until 9 March 2009 with the first loan advance by Viaduct to Homebush, the Crown is critical of the transactions which were entered into on 16 February 2009, the first working day after Priority was acquired, as being the implementation of the allegedly unlawful plan. For the Crown's proposition to have any force, therefore, the

secret arrangement with Mr Wevers had to be one entered into from at least the time of the acquisition of Priority. Mr Johnstone did not identify – by reference to some significant event or circumstance – any later time at which the secret contractual arrangement may have been entered into. I consider it necessary, to avoid falling into the trap of placing undue importance on hindsight, to look at the events leading up to the acquisition and immediately afterwards to identify any basis on which I am compelled to accept the Crown's core proposition. What occurred during January and early February 2009; on the date of the settlement (13 February 2009); on the next business day (16 February 2009) and thereafter was relied upon as evidence from which the existence of the agreement should be inferred, the Crown arguing that the decisions were predicated on advancing Hunter interests rather than doing what was best for Viaduct. Reference to those events may be useful to test my initial conclusions but I repeat the caution that undue reliance on hindsight would be wrong.

What occurred around the time of the establishment of Viaduct

[180] Conceding that no shareholder deed was ever located during the investigation into these matters, the Crown points to the existence of the signed but undated share transfer anticipated by Mr Bublitz's email of 20 January 2009 to Mr Wevers as evidence of the means by which the pre-arranged plans settled at Pauanui would be implemented. In it, Mr Bublitz's proposition was that Mr Wevers and he:

> (s)hould incorporate a company called Phoenix Finance Holdings Limited with 900 shares owned by you and for you to be the sole director. Then what we should do is have a share transfer signed, along with resolution (both undated) whereby I purchase 600 shares and are appointed to the Board & and we act on these the day after settlement or whenever.
>
> I can't help but feel we may need this flexibility (it's a gut instinct & nothing else) so we should keep our powder dry.
>
> For example:
>
> We may need to break the related party chain to one more degree to complete settlement
>
> It may be better to then restructure the shareholding of Phoenix completely to be more tax efficient
>
> It may be better to completely resell the shares in the target from Phoenix to a hunter tax loss entity

> I am not sure yet as we haven't looked at anything other than the restructuring of settlement & capitalizing of the target. Anyway, let me know thoughts & if ok get Lara to organise with my accountant Lance the setting up of the company. Meanwhile I have already another shelf company called HCL Finance Holdings Limited sitting there as well.

[181] I infer that the dating of the documents was intended to be deferred until Mr Bublitz determined that it was appropriate for him to take ownership of a majority of the shares and to have the ability to put the transfer of shares into effect unilaterally; that is, without requiring Mr Wevers' further consent. Mr Wevers responded by saying he was happy with Mr Bublitz's proposal and agreed on the need for flexibility around the time of settlement. He said he would probably put the shares into a company owned by his wife, his children and him equally but agreed that if it made sense to have the shares of the target owned by a Hunter entity for tax reasons he would happily go along with that on the understanding that full disclosure is made and the risks are clearly known.

[182] I consider it to be a reasonable inference from this exchange that, on 20 January 2009, it was intended by both Mr Bublitz and Mr Wevers that Mr Bublitz would be a majority shareholder owning 60% of Phoenix or whatever vehicle was used to acquire the target finance company (which turned out to be Priority Finance Limited), but for that shareholding not to take effect until after the acquisition. If Mr Bublitz had become Phoenix's majority shareholder, that would have created a presumption that he was in control of both Phoenix and the finance company acquired by it. But Mr Johnstone acknowledged that, while the existence of the signed but undated share transfer anticipated by Mr Bublitz in the 20 January 2009 exchange is of assistance to the Crown, it is neither essential nor determinative of the issue. Mr Johnstone submitted that the more fundamental questions relate to what the entirety of the evidence, including the evidence of the share transfer, establishes about the issue of control.

[183] On 26 January 2009, Mr Bublitz and Mr Wevers exchanged emails discussing the terms of the arrangements between them for the purchase of the finance company which had by then been identified as Priority Finance Limited. Mr Bublitz proposed that Hunter Capital Group would fund "say $5M of assets into the vehicles Phoenix and PFL" and that it would lend Phoenix $2.15M to buy the PFL shares, the loan being

repayable on demand with interest paid at 11% per annum. It was proposed that Hunter would be issued with $2.9 million worth of capital notes at 9% which would be signed to another party so as not to create a related party issue after settlement; also, that Hunter would have an option to buy two-thirds of Phoenix for $1 which would be "a few days after PFL has settled". There was then discussion about the assets that Hunter Capital would "vend in" to PFL, being the loans to the various project entities – Helensville, Cashmere, Silverdale and Docklands. The email exchanges referred to the transfer of staff from Hunter Capital to the finance company, and how salaries and other administrative expenses would be handled. Any losses incurred from the assets vended in would be addressed by Hunter Capital's ownership of capital notes and the loan to Phoenix.

[184] It was agreed that Phoenix would be renamed Hunter Capital Holdings Limited and Priority would be renamed Hunter Capital Finance Limited, although that never occurred.

[185] Observations made in the exchange made it clear that Mr Bublitz and Mr Wevers were very conscious of related party issues. After Mr Bublitz had said that the capital notes would be assigned to another party "so as not to create a related party issue after settlement", Mr Wevers responded by saying that they needed to be very careful about what, if any, documentation surrounded the assignment. He referred to the Crown guarantee talking about a related party being anyone the principal debtor controls "... pursuant to a contract, an arrangement, an understanding or otherwise". Mr Wevers said this needed to be handed "very carefully".

[186] On 3 February 2009, Mr Wevers reminded Ms McCormick to prepare the undated share transfer suggested by Mr Bublitz and executed the incorporation documents for Phoenix. Mr Bublitz also requested Ms McCormick to prepare a share transfer and director's resolution (undated) to be prepared and signed by Mr Wevers. Ms McCormick sent them to Mr Wevers on 4 February saying in the covering email:

> Docs for signing enclosed, if you want to keep it confidential, I can witness them tomorrow for you when I'm in CHCH.

[187] On 10 February 2009 Mr Wevers emailed Mr Bublitz, Mr McKay, Mr Macmillan and Ms McCormick with a draft biography referring to each of them he had prepared for insertion into the new finance company's prospectus. The draft began with Mr Bublitz being designated as director and recording that he was "the majority shareholder of Hunter Capital Finance Limited".

[188] Neither a share transfer nor a shareholders' agreement between Mr Bublitz and Mr Wevers was ever located during the investigation. I am satisfied, however, that it is reasonable to infer that Mr Wevers did execute the documents taken to him by Ms McCormick when they met in Christchurch, even though there was no direct evidence that he did so.

[189] It is significant, in my view, that these documents pre-date the legal advice received from Ms Rachel Taylor of DLA Piper and the accounting advice from Mr Rhys Barlow of BDO Spicer Wellington, about the related party issues arising from the proposed transactions.

[190] Ms Taylor's advice focused on the arrangements for the acquisition of Priority Finance, at a time before Mr Bublitz acquired any shareholding. Mr McKay was largely responsible for the preparation of instructions to and discussions with the advisors, and his awareness of the related party issues is plain from his exchanges. In evidence, Mr McKay accepted that the plan was to "hold back Mr Bublitz's relatedness until such time as Priority's dealings with Hunter were substantially complete".

[191] The Crown suggests that this concession is evidence of a settled plan, originally formed at the meeting in Pauanui in mid-January 2009, for Mr Bublitz to assume ownership of the majority shareholding in the finance company shortly after the acquisition. It is said that, although there is no documentary evidence that he did so, an agreement between him and the directors – Mr Wevers and Mr McKay initially and Mr McKay and Mr Blackwood latterly – should be inferred. I am not persuaded on the evidence so far traversed, however, that that inference should be drawn.

[192] I accept Mr Johnstone's suggestion that Ms Taylor's advice of 9 February 2009 that related party constraints were not engaged was predicated on an understanding

that Mr Wevers and Mr Bublitz merely intended, in the future, to discuss the conversion into equity of the loan made by Hunter Capital to Phoenix. Mr Johnstone's point was that she had been misled into believing that to be the position when in fact an agreement had been reached between Mr Bublitz and Mr Wevers that that would occur and quite soon after the acquisition.

[193] But it does not matter, in my view, that it may have been intended that Mr Bublitz would take ownership after the acquisition when that had not in fact occurred. A finding that that the Crown has satisfied me beyond reasonable doubt that there was a secret binding agreement by which Mr Wevers had ceded control over the finance company to Mr Bublitz from the time it was acquired cannot be justified solely on the basis of an expectation that a formal transfer of shares would occur at some unspecified time in the future. It is clear that the protagonists were acutely conscious of related party issues, notwithstanding the ratio analysis check prepared by Mr McKay on 10 February 2009 which anticipated the pre-acquisition transactions and then further steps being taken to vend assets into the new finance company through the Docklands arrangements and Cashmere. Although the analysis plainly anticipates the transactions, it says nothing about Mr Bublitz's ownership of the shares or an agreement that he would have control of the new finance company.

[194] I accept that after the mid-January meeting at Pauanui, Mr Bublitz set out to obtain assistance in creating a separation between him in his capacity as intended director and shareholder in the new finance company and as the owner in control of the various Hunter Group entities. For example, he corresponded with Mr Morrison on 20 January 2009 to say that, in order to raise funds from the public, he was working out the opportunity to buy a finance company with the government guarantee in place. He said:

> In order to do this I need to create a separation between you/me for the purposes of "related party issues" under the Securities Act, Reserve Bank Act & AFRS so that your trustee company can hold assets effectively off balance sheet and then FinCo can either lend or require these assets without causing issues or concerns. Accordingly can we please arrange for the following:
>
> Lance to resign from Hunter entities, Nicholson Trust and Kawakawa
>
> HCG wishes to sell its shares in Dockland Holdings Limited to a Morrison Creed Trustee Co (maybe set up a separate vehicle called Morrison Creed

> (DHL) Trustee Limited for this purpose) & the trustee co hold these on trust for HCG or a back to back loan is left owing between HCG & the trustee co, whichever is more appropriate.
>
> What we are wanting to do is use our shares in Docklands to help capitalize FinCo & John Harkness is preparing a Sale Agreement at present for this purpose.

[195] On the face of it, it is reasonably open to conclude that that request amounted to no more than Mr Bublitz reorganising the affairs of the Hunter Capital Group to recognise that, if he took "control" of the new finance company in terms of the definition in the Priority trust deed, he could not be in control of the various Hunter entities whom he wished to deal with the finance company so as to provide much needed cash for the Hunter Group projects. I regard it as significant that Mr Bublitz had explained his intentions to Mr John Harkness, a solicitor whom he asked to implement the steps Mr Bublitz considered necessary. If Mr Bublitz was acting fraudulently at that point, he could have been much more discreet. On the face of the documents, including the email to Mr Harkness, Mr Macmillan, Mr McKay and Mr Wevers on 14 January 2009 setting out what he intended should happen, an analogy can be drawn (as Mr Lance suggested in closing) to a tax payer legitimately reordering his affairs to minimise the incidence of tax. It is an analogy which had occurred to me as I listened to the evidence and the argument, and I agree it is apt.

[196] I place into the same category the approaches Mr Bublitz made on 25 January 2009 to Mr Franklin asking him to "front" NKE Trust Limited; the request to Mr Bruce to acquire shares in the Silverdale project on the basis of an advance of $600,000 to do so; and his request to Mr Lovegrove asking him to be a trustee/director of a company to hold some assets of his from time to time. Mr Lovegrove responded that he had no problems of being a trustee/director as long as he was not liable financially. Mr Bublitz then asked Ms McCormick to instruct Mr Morrison to incorporate the company called JL Trustees Limited which would acquire part of the Cashmere 11 loan from Hunter Capital and also hold capital notes earning interest.

[197] Whether or not such arrangements would be effective to avoid the proper application of the related party restrictions, those steps are open to the inference that Mr Bublitz was adopting measures that he considered to be purposeful but lawful in terms of the applicable definition of "control". Mr Bublitz's exchanges with Mr Ebert

about warehousing shares, on 30 January 2009 and 9 February 2009, can be interpreted as demonstrating a similar approach.

The significance of the advice from Mr Rhys Barlow of BDO Spicers

[198] On 22 January 2009, Mr Rhys Barlow of BDO Spicers had given initial advice to Mr McKay that the proposed transactions described to him by Mr McKay would not result in the occurrence of related party transactions, although he expressed some caution about that view. Mr Barlow said that, although certain anticipated transactions may not be related party transactions in nature, adequate disclosure was still required so as to provide adequate information for users of financial statements to make economic decisions. In addition, Mr Barlow said it was advisable that the trustee was consulted and that transactions were concluded on the basis that the trust deed's requirements were not breached. In other words, it appears that on 22 January 2009 Mr Barlow had been prepared to accept Mr McKay's assurances that no related party transactions were involved when giving his opinion that that was the correct position.

[199] On 11 February 2009, the day on which the sale and purchase agreement between Phoenix and Priority had earlier been executed, Mr Bublitz was provided with information that demonstrated that he may have been misled by Mr Barlow's earlier advice about the legality of the proposals he was implementing. At 5.11 pm Mr Bublitz was alerted by Mr McKay to advice from Mr Barlow which Mr McKay described as "not good news". Following confirmation from Mr McKay earlier that afternoon that Phoenix was a company owned and controlled by Mr Wevers, whereas Hunter Capital was owned and controlled by Mr Bublitz, Mr Barlow said, in an email to Mr McKay:

> Based on the information you have provided we have provisionally concluded that this is a substance over form issue and from an Accounting standpoint is a related party transaction.

[200] Mr Barlow said he was bound to refer the issue to BDO's technical division for clearance because he had become aware that the Christchurch office was the auditor for Priority Finance and he wished there to be consistent advice between the two branches of the firm.

[201] Mr Bublitz promptly registered his concern about the change in Mr Barlow's view because, he said, the deal and one other they were working on had been structured around the earlier advice. The next day, Mr Bublitz had a telephone discussion with Mr Barlow, following which he sent an email to Mr Barlow saying:

> ... I confirm that Hunter Capital Group Limited will not be negotiating next week (or in the foreseeable future) to acquire a majority in Phoenix Finance Holdings Limited. Also the re-registration (next week) of the Prospectus for Priority Finance Limited will not contain Hunter as a (potential) shareholder or me as a director.

[202] The Crown views this statement as representing such an extreme change in position, in a very short time, as to not be credible. The Crown's position, in essence, is that, on 12 February 2009, Mr Bublitz simply told Mr Barlow what he thought Mr Barlow needed to hear in order to obtain his approval to the acquisition of Priority Finance and future dealings between the finance company and the Hunter Group entities. That is an available inference, but I am not persuaded that at that stage it was the only reasonable inference to be drawn from the circumstances.

[203] By the time of Mr Barlow's second opinion, Phoenix Finance had already entered into the heads of agreement with the Gillmans for the acquisition of Priority Finance. The die was cast in that sense, and I accept that that was partly on the basis of Mr Barlow's earlier advice. It is hardly surprising that Mr McKay and Mr Bublitz were alarmed by Mr Barlow's change of view. If Mr Bublitz was to pursue the acquisition and the vending-in proposals in order to provide much needed cash to the Hunter Group, and to act legitimately in doing so, he had no option but to accept that he would not be able to acquire the shares in the new finance company as previously had been intended, at least so long as the new finance company was intended to deal with Hunter assets.

[204] I do not think the existence of signed but undated documents such as a share transfer between Mr Bublitz and Mr Wevers and a directors' resolution makes any difference to the proposition. From the outset, Mr Bublitz had indicated that he would not expect to obtain a shareholding or directorship in the new finance company until he was able to do so. It is open on the evidence to conclude reasonably that, after receiving Mr Barlow's revised opinion, in circumstances where it would have been

very difficult to back away from the Priority purchase, Mr Bublitz remained attracted to taking advantage of Mr Wevers' prior experience in property lending by entering into a joint venture with him for the acquisition of the finance company. Mr Bublitz would provide the resources through Hunter Capital and Mr Wevers would provide experience and the ability to operate the company. It is reasonable to conclude that the holding of the undated documents merely went to providing him with added security for the arrangements he had made to use Hunter assets to fund the new venture. He could put those documents into effect at any time but that would give him control only from that time, not earlier.

[205] I have not overlooked the significance of the Crown's submission that the nature of the decisions made by Viaduct's managers; the extent of Mr Bublitz's involvement in them and the manner in which key decisions were taken compels the inference that Mr Wevers had ceded control of the finance company to Mr Bublitz by "an abiding, secret arrangement". In that regard, I have considered carefully the Crown's reliance on a number of events or circumstances which might reasonably be said to point to efforts by the defendants to conceal Mr Bublitz's actual control of Viaduct. The matters, which I discuss more fully below, include:

(a) Mr Bublitz's efforts to avoid full transparency in making the revised arrangements for the shareholdings and directorships in the Hunter Group assets.

(b) The suggestion that Mr McKay withheld relevant information when requesting advice on related party issues from Ms Taylor and Mr Barlow.

(c) The terms of the management services agreement between Viaduct and Mr Bublitz.

(d) The absence of any reference to Mr Bublitz in the 3 March 2009 prospectus for Viaduct.

(e) The allegedly misleading responses to questions raised by the Treasury leading up to the withdrawal of Viaduct's Crown guarantee, and the late preparation of documents designed to create the impression of arms' length dealing between Viaduct and the Hunter entities.

(f) A "Policy Directive" dated 13 May 2009 in which Mr Bublitz is said to have instructed Mr Wevers to cut the base salaries of Viaduct's senior executives by 40 per cent.

(g) Decisions by Viaduct, under Mr Bublitz's direction, to continue to transact with the Hunter entities solely for the benefit of the Hunter Group and to protect Mr Bublitz's investments in the various projects, rather than to make the best use of the investor funds for the benefit of the Viaduct investors.

[206] There is force in the proposition that Mr Wevers and Mr McKay did nothing after February 2009 that was contrary to Mr Bublitz's wishes or what he considered to be Hunter Capital's interests. Mr Bublitz was deeply engaged in the management of Viaduct to a far greater extent than merely providing advice, and that the decision-making in which he was involved extended to governance matters within the proper authority of the directors of the company. I accept also that the defendants attempted to conceal that measure of engagement from interested parties such as the Treasury and Viaduct's trustee.

[207] I cannot be sure, however, that those things occurred because Mr Wevers and Mr Bublitz had reached a binding arrangement giving Mr Bublitz control. In reaching that conclusion, I acknowledge the relevance of the circumstances in which the joint venture was formed; of Mr Bublitz's financial commitment to it; and of the considerable influence he had by dint of his personality and his overall supervision of the plan devised in Pauanui in mid-January 2009. I am mindful, however, of the provisions of the accounting standards that recognise the difference between the ability to make management decisions and the power to govern. Applying the standards, the question to be asked is not whether Mr Bublitz actually exercised a form of control over Viaduct but whether, as the KPMG Insight explanation of the standards indicates

at 2.5.30.50, control must be inferred because Mr Bublitz's ability to control the outcome had a legal or contractual basis.

[208] It is important to acknowledge also that, at the time the plans for the acquisition of a finance company were being made, and at the time of the acquisition of Priority, Mr Bublitz, Mr McKay and their associates were focussed on the issue of control in terms of the accounting standards. Control in the broader sense of real or effective control was not an issue until the purchase of Mutual Finance in December 2009.

Conclusion on control of Viaduct up to 29 September 2009 in terms of the accounting standards

[209] As Mr Lee and Mr Hucklesby eventually agreed, Mr Wevers' shareholding in Viaduct created a presumption of control which could nevertheless be rebutted in exceptional circumstances. Such exceptional circumstances did not require the existence of other documents rebutting the presumption and could be founded on an analysis of all of the circumstances. Such an analysis is very much a matter of judgment. After careful consideration of the evidence, I am not persuaded that Mr Bublitz must necessarily be taken to have reached an agreement with Mr Wevers that notwithstanding the documented position, he and he alone had the power to control Viaduct's decision-making.

[210] I return to the onus and standard of proof on what is a core issue. I accept that there is force in the several bases upon which Mr Johnstone advances the Crown's proposition about an arrangement, and acknowledge that suspicion must attach to the way in which Mr Wevers, Mr McKay and, particularly, Mr Bublitz conducted themselves up to and immediately after the acquisition of Priority Finance. But the Crown's case does not take me across the threshold into being sure that Mr McKay, Mr Wevers and Mr Bublitz knew that the steps they had taken and were taking amounted to wilful breaches of the related party restrictions in the Priority/Viaduct trust deed because was a secret, binding arrangement that Mr Bublitz had the power to control Viaduct.

[211] As Mr Lance said, in the absence of Mr Bublitz having an enforceable right to control the finance company, Mr Wevers' position and powers as a director and the

controlling shareholder meant that he could have taken Viaduct in any direction he thought fit. He had no incentive to do so, however, because realising the significant opportunities provided to him by the shareholding in Viaduct through Phoenix (including a substantial income stream) was entirely dependent on the retention of Mr Bublitz's goodwill. There is nothing inherently implausible about the notion of a genuine joint venture between Mr Bublitz and Mr Wevers, with Mr Bublitz providing the financial capital and Mr Wevers contributing his experience, expertise and time. That makes their equal financial packages explicable. But if Mr Wevers made decisions which ran contrary to Mr Bublitz's plans for the use of the finance company, the joint venture would fail. It is true that, in theory at least, Mr Wevers could have managed the finance company on the basis of the non-Hunter assets, including investor funds obtained through the issuing of the new prospectus. But Mr Bublitz had the ability to shut down Viaduct by calling in the advance to Phoenix for the acquisition of the finance company and enforcing the other rights that subsequently became available to him through the issuing of capital notes and a general security agreement.

[212] I conclude, therefore, that it is reasonably possible that, immediately after the acquisition of Viaduct, Mr Bublitz did not have control of the finance company by virtue of an abiding, secret arrangement with Mr Wevers that he would do so. It is reasonably possible that he was content at that stage to use his considerable influence over Viaduct as its principal funder and his ability to engage in financial transactions with Viaduct which had the potential for it to obtain revenue from the vending in of Hunter assets and ultimately to secure the repayment of those loans for further lending.

[213] As defence counsel were at some pains to point out, it is by no means clear that at the time Priority Finance was acquired it was doomed to fail. While there is no doubt that a number of the Hunter projects were in in financial difficulty, the injection of funding through the acquisition of the finance company and the access to its investor funds created opportunities for the growth of both Hunter and the finance company's business. There was nothing inherently unlawful or improper in the plan to acquire a finance company for the purpose of providing access to its investors' funds. Moreover, Priority was acquired as a going concern with existing investors and the potential for a significant amount of business other than through Hunter activities. The evidence

established that the transactions involving Hunter assets and entities did not represent even a majority of the finance company's business.

[214] It is plain that the withdrawal of the Crown guarantee had a profoundly adverse effect on Viaduct's prospects; in some respects, it is surprising that Mr Wevers remained engaged in the venture for as long as he did. Mr Wevers does seem to have been surprisingly compliant. It may be that he was negligent – even grossly so – of his duties as a director and to the Viaduct investors; or perhaps just not as competent as might have been expected; or somewhat weak in character, but I am not in a position to make that judgment. Mr Wevers' resignation as a director of Viaduct on 29 September 2009 and the transfer of 51 per cent of the shares in Phoenix to Mr McKay indicates that Mr Wevers saw the future of the joint venture as being bleak. It is clear that he no longer wished to be actively engaged in a business in which the serious concerns he expressed about the future viability and direction of the finance company were being ignored.

[215] It is not insignificant, however, that Mr Wevers did not transfer the whole of his shareholding to Mr McKay. If he had ceded control of that company and, therefore, Viaduct to Mr Bublitz by a secret agreement, there would have been no reason for him to have retained any shareholding in Phoenix. A minority shareholding cannot have been worth much at that time, so disposing of the entire parcel would not have caused any hardship. The retention of the 49 per cent is consistent with both Mr Bublitz and Mr Wevers believing the shares were his to keep if he wished.

[216] The matters the Crown has advanced may give rise to a suspicion – even a strong one – that Mr Bublitz and Mr Wevers had entered into an agreement, either in writing or orally, that Mr Bublitz was in control. But the evidence falls short of leading me to conclude that I am sure that, at any time before or after 16 February 2009, Mr Wevers had agreed that Mr Bublitz alone would have the power to govern Viaduct and that Mr Wevers was a mere functionary.

[217] For those reasons, I am not satisfied to the criminal standard of proof that, up to the time Mr Wevers resigned as a director on 29 September 2009 and transferred a

controlling interest of the shares in Phoenix to Mr McKay the following day, there was any agreement in which control of Viaduct was vested in Mr Bublitz.

Verdicts on Charges 1 to 9

[218] As is identified in the question trails setting out the elements of the alleged offences under s 220, it is an essential element of each of Charges 1 to 9 that, at the material times, Mr Bublitz was in control of Viaduct in terms of the accounting standard in NZ IAS 24. Charges 4, 8 and 9 rested, in part, on proof of breaches of the related party transactions that are the subject of Charges 1 to 3 and 5 to 7. The Crown has failed to prove beyond reasonable doubt the element of control as alleged. There is no need for me to consider whether the other elements have been proved.

[219] I find each of the defendants not guilty on each of Charges 1 to 9 inclusive.

Charges 10 to 15 – Control of Viaduct in terms of GAAP/NZ IAS 24 after Mr Wevers' resignation

[220] The departure of Mr Wevers from Viaduct at the end of September 2009 changed the dynamic for both the governance and management of the finance company. I have held that it is reasonably possible that Mr Wevers was genuinely a joint venturer with Mr Bublitz in the establishment and running of Viaduct, and in control of the company in terms of the accounting standards because of his shareholding, up to the time he left. The appointment of Mr Blackwood as a director of Viaduct and the transfer of Phoenix shares representing a controlling interest in the company to Mr McKay, however, changed the landscape. The 51 per cent shareholding in Phoenix gave rise to a presumption that Mr McKay controlled the holding company and Viaduct, at least in terms of the accounting standards. It follows that, for the Crown to prove that Mr Bublitz was in control of Viaduct in terms of the accounting standards after the transfer of a controlling interest to Mr McKay, it would have to prove that there was an agreement ceding such control to him. There is no evidence that that was the case and the Crown did not seek to argue that there was evidence from which I could reach the conclusion, beyond reasonable doubt, that Mr Bublitz assumed control at that point. The Crown's case, of course, was that

Mr Bublitz had always had control of Viaduct but I have rejected that proposition in terms of the definition in the accounting standards.

The nature of control in terms of the "real or effective control" definition in the Crown guarantee

[221] It is unnecessary for me to consider the accounting standards any further. For Charges 10 to 15, the Crown relies alternatively on the definition of "control" contained in the replacement Crown guarantee which applied to both Viaduct and Mutual from the date Mr Bublitz's company, Argus Capital Limited, acquired 60 per cent of the shares on 11 December 2009. On 8 December 2009, Mutual and the Crown had executed a replacement deed of guarantee containing restricted related party transactions.

[222] As the particulars of charges 10, 11 and 12 require proof by the Crown that Mr Bublitz controlled both Mutual and Viaduct, the real issue is whether the Crown has proved beyond reasonable doubt that Mr Bublitz controlled Viaduct in terms of the "real or effective control" definition at the relevant times, namely:

(a) between 25 January 2010 and 11 February 2010 (charge 10);

(b) between 14 March 2010 and 17 March 2010 (charge 11); and

(c) between 5 April 2010 and 27 April 2010 (charge 12).

[223] Moreover, proof of such control in terms of the alternative definition forms a necessary element of charges 14 and 15 which are predicated on Mr Bublitz's having reached the related party provisions of the replacement Crown guarantee as alleged in charges 10 to 13. I deal separately with whether Mr Bublitz was in control of both Mutual and Hilltop Ridge Farms Limited between 26 April 2010 and 4 June 2010 as alleged in Charge 13.

What is meant by 'real or effective' control?

[224] I repeat the relevant portions of the alternative definition of "control. It provides that entity (or person) B has control over entity A if:

> B is able to exercise real or effective control, directly or indirectly, over A or over a material part of A's business or affairs (whether pursuant to a contract, an arrangement or an understanding, as a result of the ownership or control of securities or other interests in or issued by A, or otherwise) ….

[225] I was not addressed by counsel on the meaning of "real or effective" control, no doubt because the words need no explanation. The question is whether Mr Bublitz actually exercised control of the companies or over a material part of the companies' business in practice, by direct or indirect means, at the relevant times. A contract or other arrangement, or a shareholding or other interest, may provide real or effective control, but they are not prerequisites. I accept that for the purposes of applying the "real or effective" control test, just as for the "power to govern" test under the accounting standards, control cannot be exercised by more than one entity or person.

[226] Evidence of what actually occurred is more directly relevant and probative of whether Mr Bublitz exercised real or effective control than it is of the existence a secret, binding agreement giving him that control. I turn to the Crown's propositions about the evidence of what was done demonstrating that Mr Bublitz had control of both Mutual and Viaduct.

Control of Mutual Finance

[227] Notwithstanding the various permutations of share ownership of the Hunter entities, it is clear that Mr Bublitz controlled Argus Capital Limited, the purchaser of the Mutual shares, as he confirmed in an email dated 8 December 2009 to Mutual's trustee. He said that Argus Capital Limited would be:

> ... owned & controlled by interests associated with myself/Hunter Capital. Lance Morrison will resign as a director & shareholder, as he was asked to form the SPV for me.

[228] Defence counsel accept that Mutual was controlled by Mr Bublitz.

Did Mr Bublitz have "real or effective" control of Viaduct?

Factors leading to conclusion that Mr Bublitz had real or effective control of Viaduct

[229] I have held that I cannot be sure that control of Viaduct was ceded to Mr Bublitz by Mr Wevers and/or Mr McKay at any stage under an agreement that

engaged the definition of "control" in terms of the accounting standards. Nevertheless, I find that, notwithstanding the absence of an agreement, any presumption that Mr McKay controlled Viaduct by reason of his 51 per cent shareholding in Phoenix is displaced by significant evidence satisfying me beyond doubt that Mr Bublitz had either directly or, at least, indirectly real or effective control of Viaduct throughout the period of the alleged offending. In coming to that view, I rely among other things on a number of the circumstances referred to Mr Lee by the Crown in briefing him about the Crown's case that Mr Bublitz controlled Viaduct and which I am satisfied are supported by the evidence.[49]

[230] The circumstances leading me to that conclusion include circumstances existing and actions taken both before the acquisition of Viaduct, during Mr Wevers' tenure and after his departure. I rely on the observations and findings I have already made above concerning Mr Bublitz's involvement with Viaduct.

[231] Mr Bublitz effectively owned and controlled the entities comprised in the Hunter Group. His investments in the Hunter entities and their projects were at risk during the relevant periods from late 2008 or early 2009 to Viaduct's receivership in May 2010.

[232] Immediately after the Viaduct acquisition, the administrative arrangements for Hunter and Viaduct were closely integrated, including accommodation and staffing, with Viaduct relieving Hunter of significant administrative cost. There is no evidence that Mr Wevers, Mr McKay or (later) Mr Blackwood, as Viaduct's directors, ever questioned whether the assumption of such costs by Viaduct was equitable. Moreover, the senior executives, including Mr Bublitz, worked interchangeably and, sometimes, contemporaneously on matters between or affecting Viaduct and the Hunter entities.

Attempts to conceal or disguise Mr Bublitz's involvement

[233] There can be no doubt that Mr Bublitz was keen to avoid full transparency in the revised arrangements for the shareholdings and directorships in the Hunter Group assets. The language he adopted – referring to associates acting as "fronts",

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[49] See [173]-[174] above.

"warehousing" shares, and transferring assets "off balance sheet" – lends a devious air to the activities. While those arrangements were intended to distance Mr Bublitz from control of the Hunter entities rather than Viaduct, they demonstrate Mr Bublitz's awareness of the implications of the related party provisions for Viaduct's dealings with them.

[234] Although it may be that Mr McKay was not as frank as he might have been in advising Ms Taylor and Mr Barlow about what was intended post-acquisition when he sought their advice in early February 2009, I am not persuaded that that adds much to the analysis of what actually occurred and whether Mr Bublitz's real or effective control can be inferred from the events that followed Viaduct's acquisition.

[235] Mr Johnstone forcefully emphasised the failure of Mr McKay and Mr Wevers to include in the 3 March 2009 prospectus for Viaduct any reference to Mr Bublitz's membership of the "Viaduct Capital Team", despite the provision of biographies of Mr McMillan and Ms McCormack who were described as senior executives. The omission of references to Mr Bublitz's role from the prospectus was deceptive and misleading and should not have occurred in circumstances where full disclosure of relevant information was required. It gives rise to suspicion, even strong suspicion, that it was intended to conceal not only Mr Bublitz's apparent role as a deeply involved lender and adviser but also what the Crown says was his actual role as the person in control of the governance of Viaduct. However, the deception is also reasonably explicable on the basis that Mr Bublitz, Mr Wevers and Mr McKay were anxious to avoid triggering the concerns of the trustee and/or Treasury rather than to act unlawfully because Mr Bublitz had actual control of Viaduct. The deception might have given rise to other proceedings, such as under s 9 of the Fair Trading Act 1986, but I am not persuaded that it compels the conclusion that Mr Bublitz had real or effective control at that time.

The management services agreement

[236] Mr Johnstone refers to the terms of the management services agreement entered into by Mr Bublitz as demonstrating that his actual role went well beyond merely securing and managing loans on behalf of Viaduct. The services agreement

contracted Mr Bublitz, among other things, to lending to, facilitating and managing an efficient and profitable business that met its agreed targets for growth, profitability and business activity. The Crown also points to the level of salary ($240,000 per annum) which Mr Bublitz enjoyed, equivalent to Mr Wevers' salary and double that of Mr McKay. While the nature and scope of the duties and the substantial salary may indicate that Mr Bublitz was the person in control of Viaduct, I do not regard them as compelling that conclusion. The duties described reflect Mr Bublitz's considerable, if not dominant, importance to the success of the venture and the extent to which he was responsible, in comparison to Mr Wevers and Mr McKay, for the acquisition of Viaduct on terms which did not require Mr Wevers to put any assets at risk. The salary structure reflects that position.

[237] In coming to that conclusion, I have not overlooked that Mr McKay's evidence about the changes to the services agreement reflecting a more lending oriented role, when the earlier version had appeared to indicate a greater involvement in ultimate decision-making by Mr Bublitz than was desirable, was not entirely convincing. The changes were made only after Mr Bublitz's role was questioned by the Treasury investigators. Nor do I overlook that Mr Wevers conceded, when interviewed by Mr Weir and the FMA, that Mr Bublitz had undertaken services of the kind initially set out in the document.

The Treasury investigation and withdrawal of the Crown guarantee

[238] The investigation on behalf of Treasury at the end of March and April exposed considerable weaknesses in Viaduct's position regarding the Hunter assets. It is clear that the Hunter Capital Property Trust was in extreme financial difficulty. It was insufficient for Mr Wevers to claim, without any proper basis, that Viaduct was comfortable with the assets that had been acquired and the prices paid for them and that it had additional surety by the way of an indemnity from a substantial party. The reality is that Viaduct was exposed to considerable risk and that Mr Bublitz, Mr Wevers and Mr McKay knew that. Mr McKay's attempts to persuade PriceWaterhouseCoopers and the Treasury to a contrary view show signs of desperation and were plainly untenable. The attempt by Mr Wevers to backdate due diligence reports was similarly untruthful.

[239] The Treasury's notice of the withdrawal of the Crown guarantee gave rise to further obfuscation by Mr Bublitz and Mr McKay, particularly, with Mr Bublitz telling Treasury officials, much less than frankly, that he never intended to become heavily involved in the affairs of Viaduct beyond managing a lending position and assisting with the sourcing of loan transactions. There is no doubt that Mr Bublitz did not want Viaduct to do anything which put his investments at risk.

[240] It is hardly surprising that the Treasury became suspicious of the true relationship between the Hunter Group and Viaduct, and that the Treasury was not put off making fuller enquiry by Mr Wevers' assurances that he was not a related party to Hunter. In part, that may have been because Mr Wevers was unable to provide an independent valuation for the transactions. It is not surprising either that the status of the loan files came under general discussion amongst Viaduct's executives and Mr Bublitz as contractor in response to the Treasury's advice on 16 March 2009 that it was considering appointing an inspector. The discussion resulted in the late registration of various security interests that Viaduct had acquired in purchasing the Northgate, Homebush and other loans, as well as Hunter registering its general security agreement over Phoenix. Those steps, taken reactively rather than pro-actively, justify a suspicion that the arrangements between Hunter and Viaduct were at less than arms' length and that there was an attempt to cover up the true nature of the relationship. But the closeness of the relationship would have been abundantly clear to any knowledgeable person whether or not the securities had been put in place in a more timely fashion.

[241] Similarly, Mr Wevers' attempt to explain that he had undertaken proper due diligence before the Hunter transactions were entered into was not credible. I am satisfied that it was a retrospective but naïve attempt to satisfy an inquirer that Hunter and Viaduct were dealing on an ordinary commercial basis. The transfer of staff from Hunter to Viaduct on the acquisition of the finance company and the assumption by Viaduct of Hunter's obligations regarding the premises and other expenses; the continuing close relationship between those working for Hunter and those working for Viaduct, especially Mr McKay who continued to have senior, dual roles acting in the interests of both organisations, make it unrealistic for the two companies to be seen as entirely separate.

[242] I regard the disingenuous responses to the Treasury as tending to support the conclusion that Mr Bublitz was actually in control of Viaduct, and that Mr Wevers, Mr McKay and he intended to mislead the officials to conceal the true position at that time. In turn, that supports a conclusion that Mr Bublitz remained in real or effective control of Viaduct after the end of September 2009.

The 13 May 2009 "Policy Directive" on salaries

[243] In addressing the implications of what occurred at about the time of the withdrawal of the Crown guarantee from Viaduct and thereafter, a memorandum of 13 May 2009 from Mr Bublitz to Mr Wevers requires careful consideration. In that memorandum, Mr Bublitz issued what he called a "Policy Directive" on a staffing matter. The memorandum begins with the following paragraph:

> There is a significant amount of work to get through over the next 12 months, certainly to date we have had every conceivable hurdle thrown at us. Yet I remain very confident and determined that we will work our way over these issues. Further there are multiple viable business plans that come from this. I personally look forward to working with you and each of the Senior Team and meeting these challenges head on. We will need positive attitudes and at times, leaps of faith.

[244] The terms of that statement indicate that Mr Bublitz considered he was the undisputed leader of the group who had devised and then implemented the plan and was then in control of Viaduct. They may also indicate, however, that he was merely a joint venturer with Mr Wevers through the close associations and common interests between Hunter entities and Viaduct, and that he held very strong views as the person engaged in the management of Viaduct who had the most "skin in the game". By itself, the paragraph does not compel me to the exclusive view that Mr Bublitz was speaking as the real owner of the shares.

[245] Mr Bublitz said next:

> There are going to be some tough calls that I will need to make over the next 12 months, this is one of them. They are, however, integral to our success.

[246] I accept that the reference to Mr Bublitz needing to make the tough calls may refer to decisions he might have to make about the Hunter projects, but I am satisfied that, in context, he was referring to decisions by or on behalf of Viaduct. The tone of

the paragraph is strongly indicative that he regarded the decision-making responsibility as his alone.

[247] The next paragraph reads:

> In these times we need to act prudently in terms of fiscal constraints, hence, due to tight cash-flow constraints I want you to ask all non-administration staff ie Senior Executives (including MD/CEO) to cut base salaries by 40% effective from 1 June 2009.

[248] Bearing in mind Mr Bublitz's role as a contractor and adviser, and taking account particularly of the risk which he had assumed as a lender to Viaduct (contrary to the absence of any financial risk carried by Mr McKay and Mr Wevers), the firmness of his request that senior executives be asked to agree to a cut in base salaries is understandable. But, in reality, there is no indication that Mr Bublitz contemplated the possibility that Mr Wevers would refuse to make the request to the senior executives to agree to a salary cut or that the executives would refuse to agree. The self-labelled "directive" was written in terms which made it clear that Mr Bublitz expected to Mr Wevers to carry out the steps which he sought to be taken.

[249] I have contemplated the implications of this memorandum at length. The question to be asked is not whether Mr Bublitz had a legal or contractual right or power to tell the executives to take pay cuts but whether he actually exercised a form of control over Viaduct in issuing the directive and having it implemented. The firmness of Mr Bublitz's directive and the fact that it was implemented, despite Mr McKay's concern that he was not being adequately remunerated for his efforts on behalf of Viaduct, point strongly in the direction of Mr Bublitz's control.

Subsequent transactions said to favour Hunter over Viaduct

[250] I do not consider it necessary to discuss in detail the subsequent transactions upon which the Crown relies in support of its view that the decisions to continue to transact with the Hunter entities were designed solely to benefit the Hunter Group and protect Mr Bublitz's investments in the various projects, rather than to make the best use of the investor funds for the benefit of the Viaduct investors. They include the transactions undertaken after the withdrawal of the guarantee and the issuing of the

amended prospectus, including Viaduct's engagement with Hilltop Ridge Farms Limited.

Hilltop Ridge Farms Limited

[251] It would not be unreasonable to accept Mr Wevers' explanation that he placed considerable faith in Peter Mackie's involvement as sole director and shareholder of the company, given particularly that Mr Mackie had expertise which he called upon to assist Hilltop operationally. I accept Mr Mackie's evidence, however, that he considered himself to be out of his depth in dealing with the business and financial issues related to the project. I have noted that it was not until 23 September 2009 that Mr Mackie recorded in an email to Mr Bublitz and Mr Chevin his concerns about Hilltop's financial situation and his personal guarantees. In submitting his resignation as a director, he referred to the financial difficulties as "a stumble" and expressed some confidence in the ultimate success of the venture. But the decisions made to advance Viaduct investor funds to Hilltop during June, July and August 2009 were plainly predicated on Hilltop's needs rather than the interests of Viaduct's investors. A conclusion that Mr Bublitz was in real or effective control of Hilltop is not necessary to support the view that, if Mr Wevers and Mr McKay, acting consistently with their duties as directors, had been in control of Viaduct at that time rather than Mr Bublitz, much closer scrutiny of the merits of the advances would have resulted.

Capital note redemptions

[252] Capital notes were issued to the Hunter Group on 13 and 16 February 2009 at nine per cent, convertible at Viaduct's option into ordinary shares, as part of the security for Mr Bublitz's advance to fund the acquisition of Priority. I am satisfied that the Crown is right to rely on the extent to which key decisions concerning loan advances and asset purchases by Viaduct benefited Hunter entities at the expense of Viaduct's best interests. Even Mr McKay conceded in evidence on occasions that there was force in some of the Crown's propositions to that effect. To illustrate, I refer to an email Mr Bublitz sent to Mr Chevin, Mr Wevers and Mr McKay on 1 September 2009, in which he said:

> Gents
>
> As I said, redeem capital notes & stop the stuffing around. Also I need to "cash" in small amounts from VCL [Viaduct] to cover the following issues at this "tenuous" time (I don't care how we structure it)
>
> -not going over HCG Groups O/D limits
>
> -Paying Mr Chevin
>
> -Paying Neville [Bublitz, Mr Bublitz's father]
>
> Then there is the more major issue of capital requirements to fund the major projects (in the short term) we have on namely Goatco [Hilltop], Helensville, Silverdale & Cashmere. Following yesterdays [sic] meeting on Goatco I came away & felt that clearly the consensus was if we can't get investors then we were simply prepared to watch it go to the wall. This to me is not an option & as I said we either lend more money (somehow) to it or redeem capital notes. Now clearly shrinking the balance sheet doesn't help so a structured loan is the better option.

[253] A capital note for $50,000 was issued to Hunter that day. On 14 September 2009, Mr McKay tidied up the paperwork. He wrote a letter (purportedly dated 25 August 2009) to Mr Bublitz giving what purported to be five days' notice that Viaduct intended to redeem a capital note of $100,000 in favour of Hunter on 1 September 2009, "with $50,000 to be contemporaneously reinvested to a new capital note for a term of 30 days; thus a net redemption of $50,000".

[254] There is no doubt that, in his email of 1 September 2009 to the directors of Viaduct and Mr Chevin, Mr Bublitz was making a forceful demand of the three recipients rather than merely giving advice or making a suggestion. Mr McKay complied with it.

[255] There is considerable force in the reminder by counsel for the Crown that, despite Mr Wevers' concerns and Viaduct's poor financial prospects, the period October to December 2009 both began and ended with further capital note redemptions. I adopt as accurate the Crown's submissions on the December redemptions. First, the decisions to redeem are reasonably explicable only as being for Mr Bublitz or Hunter's benefit. On 24 November 2009, Mr McKay had emailed Mr Bublitz and Mr Chevin "wondering whether it is not time to put a bullet to all of this". He had lamented how little interest there was in Viaduct's prospectus ($25,000 was invested by the end of November in response to the October prospectus).

Demonstrating the inter-connectedness of the finance companies and the entities in the Hunter Group Mr McKay sought to save, he wrote that he considered the acquisition of Mutual to be partly a solution, but not enough of a solution. He observed that they could not let Viaduct fall over due to its impacts on the wider group. Second, the notices must have been post-dated as the decision to redeem could only have been made several days following the 4 December 2009 date of the redemption notice.

[256] On the issue of the December redemptions, Mr McKay conceded in evidence that it would have been better [for Viaduct] if Viaduct had not redeemed the capital notes "but, nevertheless, that's what happened". As Mr Johnstone said, it is apparent that Mr McKay was not in control of what, on paper, was his own company.

[257] The outcome of Viaduct's dealings with the Hunter entities was that little was recovered from the outstanding loans. Nothing, in fact, was recovered from the loans to Northgate, Homebush, Hilltop or NKE.

[258] A substantial value of the capital notes that were held by Hunter was redeemed for cash, for purposes obviously designed to benefit Hunter interests, at a time when Viaduct was suffering a cash crisis and the capital notes could have been converted to equity at Viaduct's election, as recommended by Standard and Poors on 8 October 2009. Instead, it was resolved that $1million of capital notes would be redeemed for cash to provide Hunter with the funds it required to purchase Mutual. The evidence establishes that those steps were taken at Mr Bublitz's direction. On 17 September 2009, Mr Wevers sent an internal memorandum to Mr Bublitz saying that he could not agree to any further redemption of capital notes or any increase "in payments to you". He said that was because he could not do anything to jeopardise Viaduct's financial position knowing the risk to the equity position. He acknowledged that, in terms of the Hunter Group's projects, almost everything relied on cash being able to be taken from Viaduct. It was then that he told Mr Bublitz that cash could only come from the sale of Mr Bublitz's assets, not from Viaduct. Among the steps he considered had to be taken were the sale of Mr Bublitz's house and the sale of the Dockland's shares at a substantial loss. The upshot was that Mr Wevers resigned less than two weeks later.

Other evidence of Mr Bublitz's real or effective control of Viaduct

[259] Because Mr Bublitz did not give evidence, I was unable to make any assessment of his personality during the hearing. I am able, however, to draw inferences from what he did and the way he did it so far as those matters are demonstrated by his email correspondence. Mr Bublitz was synonymous with the Hunter Group and its entities, over which he had ultimate control. Unlike Mr McKay, Mr Wevers and Mr Chevin, he was the person who would bear the principal cost of the failure of any of the Hunter projects and of the finance company. I was informed from the Bar and can accept, on the evidence, that the failure of the two finance companies in the longer term resulted in Mr Bublitz losing some $2 million worth of assets. And it would be unreasonable to lightly discount that Mr Bublitz was, through the Hunter Group's activities, a lender to Viaduct Capital and he was closely interested in ensuring that decisions were made by Viaduct that did not impact adversely on the value of his assets. He was by far the most successful of the businessmen engaged in this enterprise and plainly the dominant force in the Group, both because of the position he held as the person ultimately in control of the Hunter Group and by his direct and forceful manner.

[260] I have no doubt that, although the other executives were influential in the planning and decision-making before and after the acquisition of Priority, Mr Bublitz had the ability to exercise real and effective control of Viaduct whenever he considered it necessary to do so to protect or advance his overall interests. There is no evidence that any significant decision affecting Viaduct on a matter going to the governance of the company was made by Mr McKay or Mr Wevers contrary to Mr Bublitz's wishes or without his involvement. The major disagreement between Mr Bublitz and Mr Wevers in September 2009 about the direction in which Viaduct should be taken simply resulted in Mr Wevers' departure.

[261] I rely also on assertions by Mr Bublitz, consistently with his having control over Viaduct, at a meeting with Kiwibank representatives on 31 March 2010. Mr Bublitz was recorded as advising the bank that the cancellation of Viaduct's Crown guarantee had badly damaged the finance company's name and that it was his intention to trade Viaduct for 12 to 18 months and then potentially merge it with Mutual Finance.

There is no evidence that the record did not accurately reflect Mr Bublitz's statements or his intentions. Mr McKay was not recorded as having been present at that meeting; Mr Blackwood attended as a director of Viaduct.

[262] The evidence of Sandra Groom, who was engaged in a finance role for both Viaduct and Mutual, and some of the smaller Hunter entities, is pertinent. Ms Groom said that, in undertaking her duties on behalf of Viaduct, she reported to Mr McKay and received instructions from him but her understanding from her observations was that it was Mr Bublitz who had ultimate responsibility for Viaduct Capital, Mutual Finance, Hilltop Ridge Farms and all the other entities with which she was dealing. She said Mr Bublitz was privy to the discussions about the affairs of those entities and she could not recall any major transactions that were undertaken of which Mr Bublitz was not aware. Ms Groom's evidence was that when she first started working at Viaduct Capital she was told by Mr McKay that, "on paper", Mr Bublitz had no involvement with the company. She said, however, that from what she observed on a day-to-day basis she came to the conclusion that Mr Bublitz had ultimate responsibility and the ultimate ability to influence the decisions that were made. She based this view on the dynamic she observed within the office and the way she saw the business being managed as a group of companies, with Mr Bublitz having oversight and making decisions for the benefit of the overall group. While I accept that that is opinion evidence not requiring any expertise, it is relevant and admissible to explain the respective roles which Ms Groom observed Mr McKay and Mr Bublitz to fulfil.[50] It tends to confirm my own conclusions, reached independently, from the nature of the correspondence and the decisions that were taken.

[263] When Phoenix was placed into liquidation on 24 November 2010, the arrangements were made by Mr Bublitz. He instructed Mr Steven Khov of Waterstone Insolvency to act as liquidator for four companies, including Argus Capital Limited and Phoenix. Mr Bublitz personally guaranteed payment of the Phoenix liquidators' fees and eventually paid the costs of the liquidation through a Hunter Group entity. It was apparent that, on 29 October 2010, Mr McKay had not known whether steps had been taken for Phoenix to be liquidated, notwithstanding that he was a 51 per cent

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50 Evidence Act 2006, ss 23 and 24.

shareholder of the company. Mr McKay and Mr and Mrs Wevers eventually signed the Phoenix shareholders' resolution for the appointment of a liquidator, but only Mr Bublitz and his sister Lara McCormick were recorded as having attended the initial insolvency meeting with the liquidators on 24 November 2010.

[264] In complex cases such as this, a seemingly inconsequential piece of evidence sometimes captures the essence of a position one or other of the parties is advocating. On 29 March 2010, Mr McKay sent an email to Mr Bublitz, Mr Blackwood and Mr Chevin (using his own and the recipients' personal email addresses) which neatly encapsulates the Crown's core proposition on the defendants' motivations. Apparently, Mr McKay was responding to a question Mr Bublitz asked him that day about why it was so difficult to get anything like information memoranda and capital raisings done. Mr McKay said:

> We are spending a huge amount of time every week fighting fires - be it Kiwibank, IRD, Hilltop creditors, keeping VCL afloat ... all these issues are major drains in time that is not being dedicated to 'operating the business' - it feels like a full time job just to keep on top of the cash flow and cash management issues around the group because cash is so tight. We are barely running the businesses that we have because so much time is devoted to stopping it all from falling over ...
>
> What is the business of Hunter Capital?? If it is to run a finance company then lets just do that, if it is to do property developments then do just that ... Apart from digging PB out of the shit just what are we trying to achieve??

[265] Not much more needs to be said. It is plain that the focus of the efforts of Mr Bublitz, Mr McKay, Mr Blackwood and Mr Chevin in managing the affairs of Viaduct Capital and Mutual Finance was to save Mr Bublitz's investments in the Hunter Group entities.

Conclusion

[266] I am sure Mr Bublitz had real or effective control of Viaduct at all times relevant to Charges 10, 11,12, 14 and 15.

Charges 10 to 13 – Theft by a person in a special relationship

[267] Charges 10, 11 and 12 allege breaches of the related party provisions in the replacement Crown guarantee in that Mr Bublitz controlled both Viaduct and Mutual

in terms of the "real or effective control" definition. My finding that he was in control of Viaduct and the undisputed fact that he was in control of Mutual makes that element of those three charges proved beyond reasonable doubt.

[268] As I have observed already, Charge 13 which relates to loan advances made by Mutual to Hilltop Ridge Farms Limited is founded, so far as the element of dual control is concerned, on the allegation that Mr Bublitz was able to exercise real or effective control, directly or indirectly, over both Hilltop and Mutual.

Charge 13 – Mr Bublitz's real or effective control over Hilltop Ridge Farms Limited

[269] I rely on previous general findings in concluding that, despite the warehousing of shares and other devices intended to conceal the true position, Mr Bublitz had the ultimate beneficial ownership of and control over the Hunter entities, including Hilltop. The associates who acted as "fronts" for him put no assets at risk. Personal guarantees put in place to give an air of legitimacy were cancelled whenever it suited Mr Bublitz's interests, whether the decisions to do so was commercially reasonable or not.

[270] It is unnecessary to go much further for proof of Mr Bublitz's real or effective control over Hilltop than his own statement to the National Enforcement Unit of the Ministry of Economic Development in November 2010, in which he accepted that it was he, rather than Mr Chevin, who made the key decisions about Hilltop. The company was formed as an "off balance sheet special purpose vehicle" for the project and although Mr Mackie was appointed sole director and shareholder I am satisfied that he was merely involved, because of his friendship with Mr Wevers, to provide advice and some operational assistance from time to time. Mr Mackie expressed surprise at his appointment as sole director and shareholder, claiming that he was not aware that that had occurred until he was asked to sign relevant documents. He confirmed that so far as that was concerned he simply did as he was directed by Mr Bublitz and others. After he became the shareholder of the company, Mr Mackie provided a cheque for $100 for the purchase, believing that that was the right thing to do. He had not been asked to make the payment and it was not clear on the evidence whether the cheque was ever banked. Moreover, when Mr Mackie resigned as a

director and relinquished his shares, the directorship and the share ownership were acquired by Mr Peter Hill, an associate of Mr Chevin, who joined the enterprise following discussions with Mr Bublitz and Mr McKay. Mr McKay conceded in evidence that his view of Mr Hill's involvement at that time was that he was "a puppet shareholder-director".

[271] On 12 February 2010, Mr McKay emailed Mr Bublitz, Mr Chevin and Sally Rosenberg (who by then had become CEO of the project) regarding the composition of the Hilltop Board for the purpose of an investor statement he was preparing. In it, he described Mr Bublitz as "the sponsor or 'visionary' and effectively the major shareholder". A decision taken by Mr Bublitz, in directions given by him concerning Hilltop's affairs from time to time confirm Mr McKay's opinion. I am satisfied beyond reasonable doubt, therefore, for the purposes of charge 13 that Mr Bublitz controlled both Hilltop and Mutual at all relevant times.

The other elements of Charges 10 to 13

[272] I turn next to the other elements of charges 10 to 13. I am conscious of the need for the Crown to prove that each element existed at the time of the alleged offence under each particular charge. However, the nature of the conduct of the Viaduct/Mutual businesses and the related Hunter entities, including the knowledge and involvement of the three defendants in their respective capacities, is such that it is appropriate to consider them globally.

Mr Bublitz's control over Mutual's investor funds

[273] It was not disputed that, if Mr Bublitz had control of Mutual (as was obvious and conceded), he had control over Mutual's investor funds.

Mr Bublitz's intentional dealings in the transactions

[274] It was not suggested that Mr Bublitz was not engaged either directly or indirectly with each of the transactions founding charges 10 to 13; namely, the acquisition by Mutual of part of the Homebush loan from Viaduct, the purchase by

Mutual of the Bruce (Northgate) loan from Viaduct, the purchase of the Hilltop loan from Viaduct and Mutual's loan advances to Hilltop.

Related party transactions

[275] It follows from Mr Bublitz's real and effective control of the relevant transacting parties that, on each of the alleged occasions of offending, there were transactions between related parties.

Other particulars

[276] The particulars alleged by the Crown in respect of each of these charges require the Crown to establish a breach of the related party restrictions in the replacement Crown guarantee because the transaction (or a series of linked or related transactions):

(a) had a value exceeding 1 per cent of Mutual's total tangible assets;

(b) involved Mr Bublitz having dual control of the transacting entities; and

(c) required prior certification to the Crown in writing, by an independent expert approved by the Crown in writing, that the transaction was, in the opinion of the expert, on arms' length terms.

[277] The analysis conducted by Mr Weir on behalf of the Financial Markets Authority established that between 31 December 2009 and 31 March 2010, one per cent of Mutual's total tangible assets ranged between $64,300 and $100,000 approximately. None of the transactions on which the Crown relies was under the threshold.

Certification of arms' length terms by independent expert

[278] Under the Mutual Crown guarantee, related party transactions were permitted only if an independent expert previously approved by the Crown in writing had certified prior to the transaction that it had been conducted on arms' length terms. Such prior approval and certification was never obtained.

[279] I accept the Crown's proposition that attempts by the defendants to rely on opinions expressed by Mr Bevan Wallace of Morgan Wallace Limited about the arms' length nature of the loan transfers from Viaduct to Mutual, so as to purportedly satisfy part of the terms upon which related party transactions could be sanctioned, cannot assist them. As the Crown submitted, Mr Wallace was not approved by the Treasury in writing; Mr Wallace's reports followed the events they purported to consider and so were not certified to the Crown in writing prior to the transactions being undertaken. Planning the reports was patently an after-event attempt by the defendants to justify to the Treasury transactions of a kind that Mr Bublitz had assured the Treasury was not contemplated.

Breach of limit of one per cent of Mutual's total tangible assets

[280] I am satisfied by the analysis undertaken by Mr Weir that in respect of each of the transactions relied upon in support of charges 10 to 13, the transaction exceeded one per cent of Mutual's total tangible assets and, therefore, required the Crown's prior written consent which was not obtained.

The defendants' knowledge and intent

[281] The only remaining issue to be established in respect of each of the charges against Mr Bublitz is whether he knew that the transactions were in breach of the restrictions and, in respect of Mr McKay and Mr Blackwood, that they assisted Mr Bublitz in undertaking the transaction knowing that the transactions breached the restrictions.

[282] The acquisition of Mutual Finance is the starting point for consideration of what Mr Bublitz, Mr McKay and Mr Blackwood knew and intended so far as charges 10 to 15 are concerned. However, the plans made at Pauanui to use a finance company to fund Hunter Group activities provide a relevant backdrop. The way in which the defendants (including Mr Blackwood after he joined Viaduct) managed Viaduct's affairs, including by the acquisition of loans, the making of advances and the redemption of capital notes to support the activities of the Hunter entities is also significant. It was, of course, vitally important for the success of the Pauanui plan for Viaduct to be able to attract investor funds with the support of the Crown guarantee.

When the guarantee was withdrawn, Viaduct's inwards flow of cash diminished to the point that, although a prospectus was issued by Viaduct in October 2009 as a short-term measure, attention turned to the acquisition of another finance company which had the benefit of the Crown guarantee.

[283] Initially, it was proposed that Viaduct would be the purchaser of the business, Mutual Finance. Consistently with what I have held to be Mr Bublitz's control over Viaduct, the proposals for the Viaduct purchase of another company were driven by Mr Bublitz. He sought Mr McKay's and Mr Blackwood's input on whether, in directing the terms of a draft offer letter, he had "missed anything" but, as Mr Johnstone correctly submitted, there was no invitation by Mr Bublitz to Mr McKay or Mr Blackwood (the Viaduct directors) to comment about the identity of the purchaser, the purchase price and instalment programme, vendor liabilities and ongoing involvement, name, contact with the Treasury, shareholdings or governance. It was Mr Bublitz who signed the letter to Mutual. I do not accept Mr McKay's evidence that Mr Bublitz's work was simply to form a proposal. In terms of deciding what was known and intended by Mr McKay and Mr Blackwood, it is significant that they were fully appraised of the details of Mr Bublitz's decisions.

[284] Mr Blackwood attended the Viaduct/Mutual meetings with Mr Bublitz who appeared to Mutual's then proprietor, Mr Lindsay Kincaid, to be in control of the Viaduct side of the negotiations. I am satisfied that Mr McKay signed the offer as a mere functionary and only because he was a director of Viaduct and, on paper, the majority shareholder in Phoenix which, in turn, held Viaduct's shares. Mr Blackwood and Mr MacMillan conducted the due diligence examination of Mutual on behalf of Viaduct. Viaduct was dropped as the purchaser and substituted by Hunter Capital Group Limited. Mr McKay prepared a draft letter for Mr Bublitz and Mr Kincaid to send to the Treasury setting out the scheme of the proposed acquisition, which included the purchase of an initial 60 per cent stake by a cash payment, with two further acquisitions each of 20 per cent, on 31 March 2010 and 31 October 2010 respectively. The final version of the letter was sent on 9 November 2009. Based on the draft, it assured the Treasury that Hunter did not intend or propose to sell any assets to Mutual or undertake any other form of capital restructuring. The letter also assured

the Treasury that Hunter would not seek to significantly change the business operations of Mutual and, notably, stated that:

> (a)lthough Viaduct Capital is not a related party of MFL, any transactions contemplated between MFL and Viaduct Capital will be treated as if they are related party transactions for the purposes of the Crown guarantee.

[285] The assurances that were reiterated in the letter included the statements that:

(a) Hunter did not intend to sell any assets to Mutual;

(b) the operations of Mutual would remain largely intact and that Mr Lindsay Kincaid would remain a director;

(c) Hunter did not intend to take full control of Mutual until 31 October 2010.

[286] The letter also assured the Treasury that there was no intention by either Hunter or Mutual that Viaduct Capital would have any ownership of Mutual or that there would be directors in common between the two entities. It was said that both "MFL and Viaduct Capital will remain entirely separate entities". Furthermore, it was asserted that Viaduct's activities in respect of MFL would be limited to sourcing and managing lending transactions.

[287] Given the way in which Viaduct had been operated up to that point and bearing in mind the motivation for the acquisition of Mutual, Mr Bublitz's statements in the letter to the Treasury, which I find were known and acquiesced to by Mr McKay and Mr Blackwood, were untrue and deliberately misleading. That the expression of present intention was not truthful is demonstrated by how quickly Mr Bublitz, Mr McKay and Mr Blackwood assumed control of Mutual and ran it in conjunction with Viaduct. That proposition is proved by, among other things, the means by which Mutual was acquired and by the marginalisation of Mr Kincaid as a director. That was achieved by dividing transactions up into "chunks" which meant that approvals could be given by Mr Bublitz alone operating under a $250,000 threshold which would have required approval by the board, including Mr Kincaid.

[288] The Treasury declined to indicate any approval of the transaction but did say that it would appreciate clarification on whether any of the current assets of Viaduct would be sold to Mutual. Mr Bublitz responded that Mutual "currently" did not intend to purchase any assets from Viaduct but he said that, if in the future Mutual did consider purchasing assets from Viaduct, an independent expert would be employed to assess the merits of any such transaction and to ensure it was on arms' length terms. That assurance reflected Mr Bublitz's knowledge and understanding of the related party limitations in the Mutual Crown guarantee.

[289] Both Mr Blackwood and Mr McKay were deeply involved in the acquisition process and they became discretionary beneficiaries of the Mutual Trust which was established by Mr Bublitz. He appointed his company, Argus Capital Limited, as trustee to acquire investments primarily to provide an income stream for the benefit of "the beneficiaries", including Mr McKay and Mr Blackwood as discretionary beneficiaries.

[290] Argus Capital Limited, which was ultimately owned by Mr Bublitz's family company, Nicholson Trust limited, purchased Mutual on 11 December 2009, holding its assets on trust for the Mutual Trust. It is simply not credible for Mr McKay to have claimed that he was not aware of the arrangement whereby Mutual would be acquired on the basis of his being a discretionary beneficiary of the Trust which held Mutual's shares as they were acquired as part of the staggered arrangements.

[291] Bearing in mind the close working relationships, the roles of Mr McKay and Mr Blackwood in all of the steps taken to acquire the finance company, and the extent to which each of them was involved in the operation of both Mutual and Viaduct after Mutual's acquisition, I am wholly satisfied that Mr McKay and Mr Blackwood were fully aware of the nature of the related party provisions in the Crown guarantee.

What each of the defendants knew about the transactions forming the basis for charges 10 to 13

[292] It could not reasonably be suggested that Mr Bublitz did not know about the transactions which are said to have been undertaken in breach of the related party provisions in Mutual's Crown guarantee: he was in control of the entities involved; he

either directed or was informed and approved of each transaction, either expressly or by silent acquiescence. As I have said, nothing was done contrary to Mr Bublitz's intentions.

[293] That each of the defendants was a knowing and active party to the transactions underlying the alleged offences is demonstrated graphically by Mr Chevin's record of a brunch meeting held on 30 January 2010 in which the affairs of relevant Hunter entities, Viaduct and Mutual would be managed collectively by the defendants, Mr Chevin and other executives such as Mr MacMillan. Mr Chevin's note contained a heading:

> VCL liquidity (Slicing and Dicing)

[294] Under that heading, the steps which I find were agreed to be taken included:

(a) packaging up and selling of the last of the Viaduct loans to Mutual (contrary to the misleading indication given to the Treasury at the time of the Mutual acquisition), resulting in between $300,000-$500,000 of cash being obtained by Viaduct;

(b) altering the discretions for loan sign-off to give Mr Bublitz alone the right to approve an advance, or under a higher threshold to give Mr Bublitz and one other the approval right, with full sign-off (by the board) being required for larger amounts; and

(c) a number of transactions involving the transfer of loans to Hunter entities between Mutual and Viaduct and other transactions intended ultimately to assist Viaduct's dwindling cash-flow.

[295] As Mr McKay and the others recognised, the collapse of Viaduct would create major problems for the Hunter Group entities and Mutual. There can be no doubt that both Mutual and Viaduct were being governed by Mr Bublitz and managed by Mr McKay and Mr Blackwood pursuant to an agreed plan. That was observed by Ms Groom and, shortly before he resigned as a director, by Mr Kincaid. When, on 24 February 2010, Mr McKay emailed the management team referring to a big

problem with Viaduct's cash-flow, Mr Bublitz simply forwarded the email to Mr Blackwood saying:

> Blackie:Please work some magic.

It was around this time that Mr Bublitz emailed Kiwibank acknowledging the "interdependencies" between the Hunter Group entities.

[296] On 25 March 2010, Mr Chevin sent an email to Mr McKay, Mr Blackwood and Mr Bublitz which demonstrates that all pretence of avoiding related party transactions had disappeared, at least internally. The email, which is headed "merry go round of funds", begins:

> 25/03 $220,000 Docklands SR, MFL buys slice 1. from VCL
> 26/03 $230,000 MFL loan advance to NKE, on to various others (KB interest, creditors, et al)
> 29/03 $220,000 Docklands (RB Person), MFL buys slice 2. from VCL
> 31/03 $220,000 Docklands (RB Person), MFL buys slice 3. from VCL
> 31/03 $230,000 MFL purchases $230,000 of the front end of VCL HTRFL loan

The reference to "RB Person" is to a person introduced by Mr Blackwood.

[297] It is telling that Mr Chevin said:

> Please be warned that this keeps VCL ok, BUT, it does not solve all the various HCL [Hunter Capital Limited] issues. Some are dealt to, but not enough of them.

[298] I was encouraged by counsel for Mr McKay and Mr Blackwood to take the view that there was insufficient proof that each of them had played an active, knowing part in the transactions on which Charges 10 to 13 are founded, and that they knew not only that the transactions were between related parties but that they were also in breach of the limits requiring prior Crown approval. I am satisfied, however, that the only reasonable inference from the way in which the defendants operated after the acquisition of Mutual is that each of them was fully aware that what was done was done contrary to the obligations imposed by the Crown guarantee in the interests of Mutual's investors.

[299] It was established by Mr Weir, the investigator engaged by the Financial Markets Authority, that Mutual purchased $3,923,365 in Viaduct loans by 16 transactions. Although seven transactions were supported by reports considering whether the transaction was subject to arms' length commercial terms, none of those reports were obtained and provided to the Crown before the transaction occurred. Viaduct advanced a further $793,373.53 to the Hunter Group entities and the various projects in which they were engaged.

[300] As Mr Johnstone submitted, Mr McKay's and Mr Blackwood's incitement and assistance in those transactions are manifest. Mr McKay was directing which transactions needed to occur and when in order to keep Viaduct afloat. Mr Blackwood received his emails, was present at the various cash-flow meetings and must be taken to have encouraged these loan sales by Viaduct, a company of which he was regarded as joint managing director.

[301] Although I accept that Mr Blackwood did not prepare all of the credit submissions intended to provide a façade of analysis as to the risks involved, he signed many of them and I accept that he must have known about and authorised the others. It was Mr Blackwood who undertook the task of keeping Mr Kincaid onside and encouraging him, to the extent that his approval was sought for any transaction, to agree. It is clear Mr Blackwood fully understood the details of each transaction and the implications in terms of the impact on cash-flow and the relationship to the transaction limits in the Crown guarantee.

Mr McKay's credibility

[302] It follows from the conclusions I have just expressed that I do not accept Mr McKay's denials in evidence that he knew and intended that the transactions with which charges 10 to 13 are concerned involved:

(a) Mr Bublitz's engagement in related party transactions because he had real or effective control of both Viaduct and Mutual and, where relevant, Hilltop and

(b) that the advanced breached the related party restrictions.

[303] Having seen Mr McKay in the witness box over several days both giving evidence-in-chief and under cross-examination, and having read countless reports, letters and emails drafted by him, I am satisfied that Mr McKay was an extremely knowledgeable and capable financial manager. He had a complete grasp of the detailed information which he was required to obtain and understand in order to take a pivotal role in the "merry go round of funds" that had absorbed so much of his attention over the period of more than a year from the time of the planning meeting at Pauanui in January 2009 to the ultimate demise of the two finance companies late in 2010. He also understood the implications of every transaction, many of which were undertaken because he had alerted Mr Bublitz, Mr Blackwood and others to the need for the transactions to be undertaken. Although Mr McKay had apparently plausible explanations for a number of the decisions made within the group which appeared to have no genuine commercial purpose except in terms of the ultimate wellbeing of the Hunter entities, there were occasions in the course of his evidence when he was stumped for an answer. I found much of his evidence evasive under careful cross-examination by Mr Johnstone. Although I am prepared to accept that Mr McKay may not have set out to act dishonestly in February 2009, I am satisfied beyond reasonable doubt that from the acquisition of Mutual to the end of the downward spiral, he knew that there had been a complete failure of compliance with his obligations and those of Mr Bublitz and Mr Blackwood under the Crown guarantee. His emails and those of Mr Chevin and others demonstrate that caution had been abandoned because of the desperate circumstances in which they found themselves. As I said, they were reduced to digging Mr Bublitz out of the manure.

Verdicts on Charges 10 to 15

[304] I am satisfied beyond reasonable doubt, therefore, that each of the defendants is guilty of charges 10, 11 and 12, and that Mr Bublitz and Mr Blackwood are guilty of charge 13 (the loan advance by Mutual to Hilltop Ridge Farms Limited) within which Mr McKay was not charged.

Charges 14 and 15 - False statements by a promoter

[305] I turn, finally, to charges 14 and 15 which allege that Mr Bublitz was guilty of making false statements as a promoter by making or publishing the 3 March 2010 Mutual Prospectus and the amended Prospectus of 28 April 2010.

[306] Mutual registered its first prospectus under the new ownership on 3 March 2010. It continued to provide information to prospective investors until it was amended on 28 April 2010. Between 28 February 2010 and 30 April 2010, the offer had resulted in an increase in Mutual's secured debenture stock of some $5 million. Mr Bublitz signed the offering as one of the directors, immediately below a statement which read:

> The Directors of Mutual Finance Limited, after due enquiry by them in relation to the period between 30 November 2009 and the date of the registration of this Prospectus, are of the opinion that no circumstances have arisen that have a material adverse effect on:
>
> (a) the trading or profitability of Mutual Finance Limited;
>
> (b) the value of Mutual Finance Limited's assets; or
>
> (c) the ability of Mutual Finance Limited to pay its liabilities due within the next 12 months.

[307] The prospectus also contained the directors' assurance, under the heading: OTHER MATERIAL MATTERS:

> There are no material matters relating to the Secured Stock offered by this Prospectus other than those set out in this Prospectus.

[308] The Crown asserts that, at the time the prospectus was issued and thereafter until its amendment at the end of April 2010, Mutual's business was being conducted with the aim of supporting Viaduct's business and indirectly the interests of the Hunter Group owned and controlled by Mr Bublitz. The transactions supporting that proposition, which I accept as accurate, were well known to Mr Bublitz and because they were between related parties were highly material to the interests of prospective investors. I find that Mr Bublitz cannot have helped but to know that, and that he knew that the statement was false in that there were material matters which had not been disclosed.

[309] The Crown also alleges that the prospectus was false in that it misled investors as to the significance and benefit of the Crown guarantee as providing security both to the investors and to the future health of Mutual.

[310] The directors, including Mr Bublitz, said they were pleased to report that Mutual was one of the early recipients of a Crown guarantee which was said to provide "a great deal of comfort to [Mutual's] investors" but noted that the guarantee was set to expire on 12 October 2010. In considering regulatory risk, the prospectus recorded that the directors were unable to determine the impact on the company's operation should the Crown guarantee scheme not be extended or replaced.

[311] The Crown submits that the failure to mention breaches of the Crown guarantee, particularly the prohibited related party transactions inherent in purchasing the Homebush, Northgate or Hilltop loans and the subsequent advances was misleading. Those transactions put at risk the Crown guarantee which could have been withdrawn at short notice and with immediate detrimental effect to Mutual in the way in which the loss of the guarantee had adversely affected Viaduct.

[312] I have no doubt that Mr Bublitz was aware that the failure to disclose what I have held he knew to be breaches of the Crown guarantee was misleading in that such activities were inappropriate and would have justified the Treasury in immediately withdrawing the guarantee as it had done with Viaduct.

[313] I have given careful consideration to the further proposition which the particulars of Charge 14 require also to be proved; namely, that Mr Bublitz knew that the failure to alert investors to the prospect that the Crown guarantee might be removed because of the breaches of the related party provisions. It occurred to me that that might be too subtle a consideration to found a criminal charge. On reflection, however, I have decided that the enthusiastic reference by the directors to the "great deal of comfort" provided to investors by the guarantee was misleading without being qualified by a reference to the fact that related party transactions had been undertaken without approval and in breach of the guarantee and that continuation of the guarantee was at risk as a result. Having regard to Mr Bublitz's experience with the withdrawal of the Viaduct guarantee and the disastrous consequences for that company as a result,

Mr Bublitz knew of the risk and was, at the very least, reckless in not drawing it to the attention of investors.

[314] As the Crown properly submits, similar considerations apply in respect of the misleading statements of a similar kind provided in the amended prospectus issued on 28 April 2010, which is the basis for Charge 15.

Verdicts on Charges 14 and 15

[315] I am satisfied beyond reasonable doubt, therefore, that Mr Bublitz is guilty of charges 14 and 15.

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Toogood J