

REASONS OF THE COURT

(Given by Lang J)

[1] Ms Freeman is due to stand trial in the District Court on two representative charges of obtaining a pecuniary advantage by deception and one representative charge of causing loss by deception.¹ On 18 December 2014, Judge Dawson granted an application by the Crown to adduce propensity evidence at Ms Freeman's trial.² The propensity evidence comprises 35 previous convictions for theft in a special relationship. Ms Freeman seeks leave to appeal to this Court against the Judge's decision.

Leave to appeal out of time

[2] The Judge delivered his decision on 18 December 2014 but Ms Freeman did not file her notice of appeal until 23 July 2015. Ms Freeman has filed an affidavit explaining why the appeal was filed out of time, and the Crown does not oppose an extension of time in which to apply for leave to appeal. We grant leave accordingly.

The Crown case

[3] In March 2012, Ms Freeman was working on a part-time basis as a contractor for a company owned and operated by Mr Anthony Acton, with whom she was boarding at the time. Her duties included the preparation of accounts, the payment of trade creditors and general administration work for the company. She worked from home, and had full access to the company's electronic banking and accounting systems. She was paid the sum of \$460 per week for these services.

[4] On 15 March 2012 Mr Acton purchased a laptop computer for use by Ms Freeman in carrying out her duties for the company. He purchased the computer on interest-free terms offered by the vendor. These included the provision of a credit card from a finance company. The Crown alleges that Ms Freeman obtained the credit card when it arrived in the mail. She then began using it without Mr Acton's knowledge and authority to purchase goods and services for her own use. The

¹ Crimes Act 1961, s 240(1)(a) and (d).

² *New Zealand Police v Freeman* DC Manukau CRI-2014-092-4871, 18 December 2014.

Crown alleges that between 22 March 2012 and 12 May 2013 Ms Freeman used the credit card on 119 separate occasions to withdraw cash and purchase items for her own use to a total value of \$23,663.17.

[5] During the same period, the Crown alleges that Ms Freeman transferred funds totalling \$15,842.23 from the company's bank account in order to meet payments due on the credit card. In addition, the Crown alleges that between 20 May 2012 and 24 April 2013 Ms Freeman transferred funds totalling \$35,322.85 from the company's bank accounts to her own bank accounts. The Crown case will be that Ms Freeman engaged in all these transactions without Mr Acton's knowledge or authority.

The propensity evidence

[6] Between 2003 and 2004 Ms Freeman was employed as an accounting clerk for a company that operated a business in Queenstown. In this role she had access to the company's electronic accounting system. This was operated using a software package to which only Ms Freeman held the password. During this period Ms Freeman stole cash from her employer totalling \$36,091.35.

[7] The thefts were made possible by false entries that Ms Freeman created in the company's accounting records. Each day she received sales figures from the company's sales departments. She was then required to record these in daily sales summary sheets and in the company's internal accounting records. Ms Freeman employed a method by which she recorded the sales figures accurately in the daily sales summary sheets, but regularly understated the level of sales in the accounting entries that she made within the company's accounting system. She then took the difference in cash from the cash float. The discrepancy between the two sets of figures could only be detected by comparing the daily sales summary sheets and the company's internal accounting records, to which only Ms Freeman had access. As a result of this offending Ms Freeman pleaded guilty to 35 charges of theft by a person in a special relationship.

The issue at trial

[8] The sole issue in relation to the present charges will be whether the Crown can prove that Ms Freeman acted deceptively in relation to the transactions in question.³ The Crown case will be that she did so because Mr Acton had no knowledge of any of them. Ms Freeman therefore undertook the transactions without his authority and thereby deceived him. The defence case will be that Mr Acton was fully aware of what was happening, and that he authorised all of the transactions in question. Mr Acton's credibility will therefore obviously be in issue, as will Ms Freeman's in the event that she elects to give evidence.

The Judge's decision

[9] The Judge considered that the proposed propensity evidence had high probative value, and that the only prejudice it created arose from its highly probative nature. The Judge expressed his conclusion as follows:⁴

[10] I note that the defendant's previous offending involved 35 discrete false representations over a prolonged period of time. It is submitted by the Crown that the gap in offending from that time until these charges may have simply been a lack of opportunity in the meantime. The extent of similarities between the previous offending and those alleged in this case are that the offending occurred in an employment position where the defendant occupied a position of responsibility and trust in an accounts role in both jobs and she also had control over the accounts of the business. The other similarity would be taking small amounts of money, usually several hundred dollars at a time, at regular intervals over a prolonged period of time and that suggests a common modus operandi between the previous offending and the offending alleged in this matter.

[11] Both sets of offending involve the defendant making false representation, either to the employer or third parties.

[12] When considering the application, I must have regard as to whether the evidence is unlikely to unfairly predispose the fact finder against the defendant. It is submitted by the Crown, and I accept, that the relevance of the propensity evidence and the prejudicial effect is as a direct result of its highly probative nature. I accept that the propensity evidence the Crown wish to lead is highly probative and I accept also that it is prejudicial to the defendant to a high extent.

³ We record a concern we raised during the hearing that the present charges may unnecessarily complicate the jury's task. The unauthorised use of the credit card might be more easily presented to the jury in the form of a charge of dishonestly using a document under s 228 of the Crimes Act, whilst the unauthorised taking of funds from the company's bank accounts may well support charges of theft.

⁴ *New Zealand Police v Freeman*, above n 2.

[13] However, in my view, the higher level of prejudice is because of its particular relevance to the charges in this trial and, although it is highly prejudicial, it is not unfairly prejudicial and the propensity application is granted accordingly.

The argument on appeal

[10] Mr Pyke argued on Ms Freeman's behalf that the circumstances surrounding the current charges are vastly different to those which gave rise to the propensity evidence. He submitted that the Queenstown offending occurred in circumstances where Ms Freeman was employed as an accounting clerk, and breached her obligations to her employer in that capacity. He contends that the present charges arise out of a situation in which Ms Freeman was effectively providing assistance to her flatmate, and undertook the transactions in question to meet household living expenses.

[11] Mr Pyke submits that the propensity evidence will not provide the jury with any real assistance in relation to the issue of whether Ms Freeman acted with Mr Acton's knowledge and authority. The jury will need to determine that issue having regard to the view they take of Mr Acton's credibility. As a result, Mr Pyke contends that the propensity evidence will have little probative value, but it will create very obvious unfair prejudice for Ms Freeman.

Decision

[12] Propensity evidence can often be of significant probative value in relation to issues of credibility in criminal proceedings. Utilising concepts of linkage and coincidence, it may provide valuable and legitimate support for the evidence given by prosecution witnesses. It may also undermine the version of events relied upon by the defence. This most commonly occurs in sexual cases, where evidence of previous similar acts by the defendant may provide support for the evidence given by a complainant.

[13] The admissibility of propensity evidence is governed by s 43 of the Evidence Act 2006 (the Act). It will only be admissible where the probative value of the

evidence in relation to an issue in dispute outweighs the risk that it may have an unfairly prejudicial effect on the defendant.⁵

[14] In assessing the probative value of propensity evidence, the factors listed in s 43(3) of the Act may be taken into account. To the extent that they are relevant in the present case, all of those factors point to the admissibility of the evidence. As the Judge found, there are significant similarities between the circumstances comprising the Queenstown offending and the allegations giving rise to the present charges. In both cases Ms Freeman was employed in a position that gave her the ability to control her employer's banking and accounting systems. She then used, and is said to have used, her position over a prolonged period of time to regularly divert her employer's funds for her own benefit. Most of the transactions were for relatively small amounts. The overall similarity between the two sets of acts means that the eight year gap between them is of very little consequence.

[15] We therefore view the probative value of the evidence as being high. The jury may consider it to be no coincidence that Ms Freeman used a similar method to steal monies from her employer just eight years before the events giving rise to the present charges. It may therefore assist the jury to conclude that Mr Acton is telling the truth about his lack of knowledge of the transactions and that Ms Freeman is not.

[16] We also agree with the Judge's assessment that the principal prejudicial effect for Ms Freeman flows from the probative value of the evidence. That is legitimate, however, and does not give rise to unfairness. Any risk that it may also prompt the jury to engage in illegitimate reasoning can be adequately met by firm directions to the jury regarding the manner in which they may use the evidence.

Result

[17] Leave to appeal is granted but the appeal is dismissed.

[18] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on

⁵ Evidence Act 2006, s 43(1).

the internet or other publicly available database until final disposition of trial.
Publication in law report or law digest permitted.

Solicitors:
Crown Solicitor, Manukau for Respondent