30/11

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

T 51/84

1710

THE QUEEN

v

RONALD ALBERT CONNELL

Appeal judgment reported

Counsel: D C H Percy for Crown
W D Baragwanath QC and R B Lange for Accused

Verdict: 26 October 1984

VERDICTS AND REASONS FOR VERDICTS PRONOUNCED BY THORP J

The accused, Mr Ronald Albert Connell, appeared for trial on Tuesday, 25 September, on an indictment containing nine counts.

Counts 1 to 7 related to borrowings from the Broadbank Group by the company, Southwest Helicopters Limited (which during the period with which the Court is concerned changed its name to RCS International (1981) Limited but for convenience is called "Southwest"), of which company the accused was at all relevant times governing director and 99.9% shareholder. Those borrowings occurred between September 1981 and January 1982.

Counts 8 and 9 charged breaches of s 461A of the Companies Act 1955, alleging fraudulent application and concealment of bullion, or the proceeds of sale of bullion, which had been purchased by Southwest as an investment, those offences being said to have occurred in or about January 1982.

At the conclusion of the Crown's case on 17 October I ruled that there was no evidence to support Counts 3, 5 and 7, which charged fraudulent use of deposit slips, and that the Crown had not proved a duty to account for the moneys which were the subject of Counts 4 and 6. The accused was accordingly discharged on those five counts.

I am now required to determine his guilt or innocence on Counts 1, 2, 8 and 9 of the indictment.

Counts 1 and 2 relate to the borrowing of $US350,000 by Southwest from Broadbank in September 1981, ostensibly for the purpose of purchasing in America a Mitsubishi aircraft, registration JL 28, which throughout the trial was called "Juliet Lima" and selling it in New Zealand to Air Central Limited in accordance with a firm order said to be held from that company.

Count 1 charges that Southwest, by means of a false pretence with intent to defraud, caused Broadbank to execute a bill of exchange on or about 8 September 1981 for the sum of $NZ467,582.89 by falsely representing that the aircraft "Juliet Lima" was unencumbered and available for purchase from Dick Sawyer International Incorporated, and further or in the alternative that a firm order from Air Central Limited had been confirmed in respect of that aircraft.

The defence contended that the first representation was in the form that the aircraft "would be" - not "was" - unencumbered and available for purchase. Subject to that variation, it acknowledged the making of both representations, and that they were matters inducing the execution of the bill by Broadbank. It contended that the Crown had not shown either representation to be false, or that either had been made fraudulently.

Count 2 charges that on or about 18 September 1981 Southwest, having received the proceeds of a telegraphic transfer of $NZ442,160.61 from Dick Sawyer International Incorporated, on terms requiring it to account for or pay the proceeds to Broadbank, fraudulently omitted to account for the proceeds, and that the accused thereby committed theft by failing to account, in breach of s 222 Crimes Act 1961. The receipt and retention of those proceeds is not in issue, but the defence contends that the Crown has not established that the transaction between Southwest and Broadbank was not effectuated and that in any event it has not established a duty to account in terms of s 222, or proof of fraudulent intent.

Count 8 charges that in breach of s 461A(a) of the Companies Act 1955, the accused, between 19 and 31 January 1982, being an officer of Southwest, fraudulently applied bullion valued in excess of $51,500 or the proceeds thereof, the property of that company, for his own benefit.

It is not in issue that the accused did sell the bullion in question and apply the proceeds to his own account. The defences urged are, first, that the accused was entitled to apply those moneys in settlement of a debt owed to him by the company, and secondly, that the Crown has failed to prove fraudulent intent.

Count 9 charges that between 19 January 1982 and 18 October 1983, the accused fraudulently concealed the bullion or the proceeds thereof.

Mr Baragwanath said he did not seek to distinguish between counts 8 and 9 as these were so closely related that a conviction on one must lead to a conviction on the other. I agree, and express the corollary implicit in his submission, namely that in the circumstances of this case an acquittal on one must require a similar verdict on the other.

He also advised that, save in one respect, the defence could see no real distinction between the responsibility of the company and that of Mr Connell, "its alter ego". The exception suggested was that statements made by officers or servants of the company about company business occurring after 26 January 1982, when Connell left NZ, should not be admitted against him.

During the trial I was asked to make a number of rulings on questions of law. The more significant have been engrossed as "Rulings 1 to 9". It seems convenient simply to note, without repeating them, that these are adopted, so far as they remain relevant, as part of the reasons for the Court's decisions.

Although the remaining issues are limited in number, the length of the trial, the number of issues raised, the incomplete nature of the records of Southwest, the number of corporate entities involved, and the need to explain their inter-relationship, all make it desirable to commence with a brief summary of the background facts as I find them to be. I shall next consider the principles of law requiring general application and finally determine the issues of fact and law necessary to reach verdicts on the four individual counts.

BACKGROUND FACTS:

Southwest was incorporated in 1972 with an initial capital of $5000, to carry on the business of deer recovery and sale, and helicopter hire. It enjoyed a considerable success, and by 1976 had accumulated over $200,000 in shareholders' funds.

That year it joined the South Island company, T J Edmonds Ltd, in a joint venture for the development of similar businesses in the North Island. The two companies each purchased half the shares of a group of companies based in Hawke's Bay. Those which figured in the transactions I have

to consider were Helispray (NZ) Limited, Airepair (1976) Limited and Lakeland Aviation Limited ("Lakeland"). Mr Connell also held all the capital of a company called Te Whakao Tourist Company Limited, ("Te Whakao") which had ceased trading by 1980.

Between 1976 and 1980 the company's businesses continued to flourish. It bought a block of land in Taupo from Mr Connell, giving him a second mortgage back for $55,000, and extended its deer farming operations to that property.

In the year ended 31 March 1979 it had a net profit of $230,000, as well as capital profits of $130,000 from recovery of insurance on a helicopter which had crashed and from the sale of some of its aircraft. The capital profits were converted to a capital dividend and distributed to Mr Connell's loan account, as was done on other occasions with similar profits.

In the 1979/80 year the company added the business of trading in aircraft to its original businesses. Some time previously Mr Connell had taken up part of the shareholding in an American corporation called RCS International Incorporated, (RCS), of which he was president and one of the directors, and Mr Dick Sawyer the other director. Mr Sawyer operated as an aircraft dealer through the company Dick Sawyer International Incorporated, (DSI), both RCS & DSI being based in Oklahoma. Southwest used Sawyer and DSI to find aircraft in the United States and to process the purchase and export of these to New Zealand, RCS sometimes being involved, apparently as an intermediary.

Southwest's gross profit in its aircraft trading account for 1979/80 was $184,709. This, added to record profits from the deer operations, resulted in a total profit before tax of $625,763, and taxpaid profit of approximately $490,000.

Since the deer business produced prompt cash returns from a relatively modest capital base, the company not only enjoyed high profitability but good liquidity. It was during this year that Mr Connell invested $100,000 of the company's funds in gold bullion. This was placed in his safe deposit in the National Bank at Taupo, apparently to save renting a second deposit facility in the company's name.

In 1980 the deer market slumped. This produced a turnaround in Southwest's profitability even more dramatic than the advances made over the previous two years.

As drawn, the 1980/81 accounts showed a loss of $365,700 in place of the previous year's profit of $625,763. Mr Mace, an accountant of considerable experience and one of the joint receivers subsequently appointed by Broadbank, considered the actual loss was greater. His was the only expert accounting advice I received on this or any other matter. He did make it plain that the inadequate business records kept by Southwest and his inability to obtain the assistance of Mr Connell to fill out the gaps in those records, limited his ability to make accurate assessments of the position of the company at the various relevant times. However, his opinion about the understatement of the 1980/81 loss was firm, and is supported by a number of matters which appeared during the hearing.

That most relevant to the central issues in this trial was Southwest's practice of recording as "sales" in its trading account transactions between itself as vendor and Lakeland or Te Whakao as purchaser. These were evidenced by hire purchase agreements in which the purchasing company purported to pay a 20% cash deposit and the balance was financed by NZI Finance Limited ("NZIF") under an "80% finance" facility. In fact the deposit was provided by Southwest, which recorded the sale price in its books at the net 80% figure, and paid the subsequent instalments provided under the agreements.

The accountant who prepared the company's annual accounts considered there was no need to show the contract sale prices as the transactions were "100% finance deals". He advised that Te Whakao was a paper company with no assets, in respect of which Southwest had written off a debt to it of some $10,000 the previous year.

Mr Mace said that in the difficult negotiations he had with the Edmonds Group, the co-owners of Lakeland, following the receivership, the Group had claimed no interest in any of the aircraft.

In my view the correct construction of those transactions is that the purchasers were simply nominees of Southwest, and the transactions not sales in any real sense but arrangements to raise loan finance based on artificial and overstated sale prices. The transactions of this nature effected in the 1980/81 year left the aircraft concerned in the possession and control of Southwest, provided $1.26 million in loan capital, and even at the figures used in the accounts added $55,000 to profit in the Aircraft Trading Account, and reduced the overall loss for the year by the same amount.

Also of significance in this regard are the purchases and sales during that year of Juliet Lima and a second Mitsubishi aircraft ZK WAL, both the subject of more than one sale by Southwest, which will have to be examined in greater detail later.

The depressed state of the deer market continued through 1981.

In July 1981 NZIF became concerned about the extent of Southwest's borrowings, which had been allowed to run above the originally agreed limit of $2.75M. In August, following receipt of a copy of the 1980/81 accounts, it advised Southwest that it wanted accounts of its associated companies, and an audited set of accounts as at the end of August prepared by a

national firm of accountants approved by NZIF, that further advances would only be made against firm orders for on-sale, and that advances were to be repaid from proceeds of sale or placed on deposit under NZIF's control pending maturity of any bill issued in relation to import transactions.

Mr Connell then commenced discussions with the Broadbank Group, one officer of which, Mr Oliver, had knowledge of the extent of Southwest's business with NZIF and supported the taking up of that business by Broadbank. He was prepared to recommend a substantial "import facility" to finance Southwest's importation of aircraft, and a second "domestic facility" to finance on-sales or wholly New Zealand transactions. A $3 million import facility and a $3.15 million domestic facility, both supported by debenture and Mr Connell's personal guarantee, were finally approved by Broadbank in September 1981.

While Broadbank was considering the grant of the continuing lines of credit just mentioned, Southwest sought and obtained three "one-off" loans on special terms for the purpose of financing the purchase and importation of three aircraft, one of these was the loan for the purchase of Juliet Lima, which is the subject of Counts 1 and 2.

The evidence of the company's accountant, Mr Clout, was that he completed the 1980/81 annual accounts on 25 July 1981, and first advised Mr Connell of the extent of the loss disclosed in them a short time previously.

Mr Connell forwarded a copy of these accounts to Broadbank. In a covering letter he advised that he had expected a loss, but that the loss shown was "bigger than I would have liked". He said he was closing down the deer operations and would concentrate on trading in aircraft. He enclosed a "projected sales analysis" for the 1981/82 year. This listed "known sales" of aircraft at $3.8 million and "sales under negotiation" totalling $8.7 million. It estimated a surplus of $991,000 in aircraft trading for the year.

The accounts ultimately prepared by the receivers for the period 1 April 1981 to the date of receivership, 29 January 1982, show a trading loss in that period of $1.9 million, nearly double the $1,067,000 of Shareholders' Funds shown in the 1980/81 accounts, leaving aside any question of overstatement of those funds. It is accordingly not surprising that Mr Mace concluded the company could not have carried on beyond January 1982 without a major injection of capital.

Some aspects of the calculation of the $1.9M loss were criticised by Mr Baragwanath, principally the valuations of aircraft and parts and the introduction of a depreciation allowance. Giving those objections a broad and liberal application, I remain unable to see any basis on which Mr Mace's estimated loss can be reduced to a figure which would leave the Shareholders' Funds account in credit at 29.1.82. I add that Mr Mace's response to the criticisms certainly did not suggest that he would be prepared to accept the possibility of any such reduction. He did say that because of the inadequacy of the business records of Southwest, it would be difficult for Mr Connell to know the precise position of his company at any particular time. He also noted that the state of the bank account would have plainly disclosed the recurring cash flow crises arising during the 1981 year.

During the period from 1 April 1981 to 29 January 1982, further inter-company transactions had produced further advances by Broadbank, which enabled Southwest to keep within reasonable distance of its overdraft limit with its bankers. Despite those receipts and the assumption by Mr Connell in December 1981 of over $400,000 of the company's liability to T.J. Edmunds Ltd. by giving it his personal notes, the company was faced with the need to meet bills to Broadbank for $66,000 due on 8 February 1982 and $1.3M due on 8 March 1982.

By 26 January 1982, Southwest's borrowings having exceeded the limit agreed with Broadbank in September, Oliver rang Southwest to speak to Mr Connell. As Mr Connell was not present he spoke to his personal secretary, Miss Sharon Webber, whom Mr Connell had said could act for the company in his absence. Oliver sought advice about the importation of two Mitsubishi turbo prop aircraft for which advances had been made by Broadbank, Miss Webber told him the purchases had not been completed, and that the funds had come back to Southwest. Oliver advised her "to get the funds to us smartly". Miss Webber said she could not do so because the funds had been used in the company's business.

Mr Oliver travelled to Taupo the following day and confirmed the accuracy of Miss Webber's advice. He asked the whereabouts of Mr Connell and was told by Miss Webber he had left for Hawaii on a buying trip. This information was confirmed by Mr Prince, the manager of Southwest.

He then returned to Auckland. Broadbank promptly made demand under its debenture and appointed Messrs Mace and Kensington as receivers. They proceeded to Taupo but were unable to ascertain Mr Connell's whereabouts. A few weeks afterwards they discovered that the bullion bought for the company had been uplifted by Mr Connell from the Bank on 19 January 1982, but could not find what had happened to it subsequently. In fact Mr Connell had sold the bullion to a dealer in Auckland, and lodged the proceeds in an account he had with the Bank of New Zealand, Cromwell. Those facts became known to the Police and the receivers only in late 1983, after Mr Connell had been extradited from Queensland, where he had been living under his own name without any attempt to conceal his identity.

Mr Connell did not give evidence at the trial, but through his counsel mounted a strong attack on the propriety of the actions of Broadbank and of several Crown witnesses.

His departure from New Zealand without leaving any contact address was said to have been due to his having a breakdown by reason of the pressures of his business and domestic affairs, and his retention of the proceeds of sale of the bullion merely the application of those funds in repayment of his mortgage back. Those were the explanations he had given to the officer of the Australian Police who interviewed him in August 1983 when extradition was sought by New Zealand.

It was contended on his behalf that he had advised, through his solicitors, his willingness to return to New Zealand if charged with any criminal offence, and that his actions throughout had been justified and in no sense fraudulent.

The Crown's case, by contrast, is that Mr Connell became acutely aware of the increasing liquidity crisis facing his company throughout 1981, that he borrowed against fictitious purchases to try to cover the liquidity problem, and that he took the proceeds of sale of the gold when he realised that his efforts would not succeed and that his empire was going to crash to obtain preferment over other creditors.

It is against those background facts and those very divergent interpretations of them, that I turn to consider the principles of law to be applied and then to determine the particular issues involved in each count.

LEGAL PRINCIPLES:

I note as basic to determination of the accused's guilt or innocence the duties of the Court:

1. To require the Crown to prove each essential ingredient in each charge beyond reasonable doubt;

2. To determine the charges solely upon the evidence put before the Court at this hearing; and

3. To determine each of the charges severally and solely upon the evidence relevant to that charge.

I note that had the trial been before a jury I should have thought it an appropriate case to comment on the accused's failure to give evidence.

The occasions on, and the purposes for which, a Judge may give heed to the failure of an accused giving evidence were recently discussed by the Court of Appeal in Trompert v. Police (See Ruling No.9). I believe that application of the principles there discussed in the circumstances of this case:-

(a) That so many of the critical factual issues are matters within Mr Connell's personal knowledge;

(b) That the failure of the company to observe a statutory obligation to keep adequate accounts even to the standard required before the 1980 Amendment, left gaps in the record which only he could fill; and

(c) That Mr Connell chose to attack the honesty and credibility of witnesses of events of which he must have personal knowledge

require that in the specific areas noted later I should take account of his absence from the witness box.

Any other rules of law requiring application which have not already been the subject of rulings can more conveniently be considered in relation to the counts they particularly affect, and I now turn to consider the individual charges.

COUNT 1 charges two misrepresentations:-

FIRST: That the aircraft "Juliet Lima" was unencumbered and available for purchase from DSI, and;

SECONDLY: That a firm order from Air Central Ltd had been confirmed in respect of that aircraft.

Both this count and Count 2 relate to the borrowing by Southwest from Broadbank of the sum of $US370,000 as the purchase price of the aircraft "Juliet Lima", that price to be paid to a bank in Oklahoma to the credit of DSI against delivery of commercial and customs invoices.

The contract was set up by three documents:-

(1) A telex from Southwest to Broadbank on 31.8.81 asking for "90 day funding" of the purchase;

(2) A telex from Broadbank to Southwest dated 1.9.81 offering "90 day import finance", on 12 stated terms, those relevant to these charges being:-

(2) Evidence of firm order from Air Central Ltd;

(4) Aircraft to be purchased and registered in the name of Broadbank Corporation Limited;

(5) Payment will be made to supplier I.E. Dick Sawyer International Inc. as requested on presentation of following documents to Mr O. Hermida, the Liberty National Bank and Trust Co. Ltd.;

(8) A copy of FAA bill of sale (in Broadbank's name) to be despached to Broadbank as soon as available from FAA.

(9) Unconditional joint and several guarantees of take out by R.A. Connell and RCS International NZ Ltd (previously Southwst Helicopters Limited).

(12) If aircraft sold prior to 90 day period ending then settlement with Broadbank to be made on same

date as payment made by purchaser. Additionally, payment by Air Central Ltd to be made direct to Broadbank and transfer of ownership is not to be effected until purchasers cheque is cleared; and

(3) A telex from Southwest dated 2.9.81 accepting that offer.

On the question whether the contract should be construed as including representations of immediate availability or of availability at some date later than the making of the representation, I consider the normal and appropriate construction is that the aircraft would be available for unencumbered purchase when the purchase monies were exchanged for the invoices. I note that I did not understand that the distinction between "was" and "would be", raised by Mr Baragwanath for the first time at the very end of the hearing, was intended to raise any question of proof not matching the charge. Had I done so, I should certainly have amended the indictment.

Mr Baragwanath called in aid of interpretation of the contract the guarantee executed by Mr Connell pursuant to Clause 9 of Broadbank's offer. That document is said to be executed "in consideration of Broadbank's agreeing to provide import finance of $NZ450,000 ($US370,000) for the import of Juliet Lima and in Clause 6 includes an undertaking by the covenantors, Southwest and Mr Connell, to purchase the aircraft from Broadbank if so required at the expiration of the 90 day term, and that Broadbank's ownership of the aircraft "will provide unencumbered security until repayment".

Mr Baragwanath argued that this indicated that, although the transaction was for the purpose of providing import finance, this was to be done by means of a purchase by Broadbank in its own right giving Broadbank full proprietary rights in the aircraft.

I cannot so construe the contract which, in my view, was essentially a contract of loan, the property being taken in the name of Broadbank for security purposes and not to give it ownership as distinct from security.

Both Counts 1 and 2 require examination of the various transactions with "Juliet Lima" during 1980 and 1981. Listed in chronological order with as much particularity as the evidence permits, Southwest's contractual involvement with this aircraft was as follows:-

(1) In February 1980 it entered into a contract to purchase "Juliet Lima" from DSI for $US135,000, borrowing that amount by way of import finance from the National Bank.

(2) It resold the aircraft to DSI for $US225,000,"having owned it approximately 2 months", which would make the date of the sale about April 1980.

(3) In May 1980 it purchased the aircraft from RCS for $US250,000 with import finance from NZIF.

(4) In November 1980 it sold the aircraft to Lakeland for a nominal $NZ350,000, (brought into the books at $NZ280,000), by a hire purchase agreement under which Southwest assigned its interests in the aircraft to NZIF subject to Lakeland's interests as hire purchaser.

(5) In August/September 1981, it arranged through Broadbank the purchase of the same aircraft for $US370,000 for on-sale to Air Central, as evidenced by the documents of which details have previously been given. The funds were duly exchanged for invoices in America on or about 8 September and the NZ equivalent of the $US370,000 remitted back to Southwest by DSI, the credit being recorded in Southwest's Taupo account on 18 September 1981.

Throughout the whole period, the aircraft remained in America, where it was seen in DSI's lot in Oklahoma by a Broadbank officer in February 1982.

The Crown opposed endeavours by the defence at the deposition hearings to introduce evidence of the state of the American registration of the aircraft, and proceeded on the basis that NZ law determined its ownership. On that basis it argued that the hire purchase agreement of November 1980, which was not paid off until January 1982, vested property in the aircraft in NZIF, and that this established the falsity of the representation that the plane was unencumbered and available for purchase from DSI in September 1981.

I am satisfied that Mr Baragwanath's contrary submission that proprietary rights to the aircraft are to be assessed according to American law, the lex situs must be preferred; (see Cheshire & North "Private International Law, 10th ed.p.526, and Diplock, L.J. in Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Assn. (1966) 1 W.L.R. 287 at 330).

The only evidence tendered for the defence at the trial was a certified copy of the Federal Aviation Administration file relating to "Juliet Lima" and a copy of the US Code Title 49 "Transportation", Chapter 20, which has the sub-title "Federal Aviation Program" contains various provisions governing the registration, creation and extinguishment of interests in US aircraft. Those provisions, as interpreted in a number of decisions of the American Courts to which Mr Baragwanath referred me, show that under American law:-

(1) Registration by a person without notice of previous unregistered dealings defeats rights attained under those dealings by effecting a "defeasance"; and

(2) As between claimants under successive unregistered dealings, failure by claimants under the earlier dealings to register is generally regarded as action

tending to mislead later parties without notice of the earlier dealings, so that later dealings will generally prevail over prior unregistered dealings, the reverse of the situation under our rules as to priority of unregistered interests.

The FAA file showed:-

(1) That at the relevant time, RCS was the registered owner of "Juliet Lima" and that the dealings in May and November 1980 on which NZIF's rights must rely were never registered;

(2) That RCS had filed a bill of sale in Broadbank's favour with the Registry on 11 January 1982 and that this had been "recorded" on 18 April 1982, the effect being to make Broadbank's title good as from the date of filing, and;

(3) That although there was no evidence of work being done to obtain an "Export Certificate of Airworthiness" to enable the plane to be brought to NZ following the purchase in February 1980, some work is recorded in November 1980 in an application for a certificate to permit delivery to the "foreign purchaser, Southwest Helicopters Ltd".

During the hearing, I indicated concern about the adequacy of my instruction upon and understanding of the relevant American law. I am still uncertain whether Broadbank is an entity entitled to registration on the FAA register, whether the loan transaction between Southwest and Broadbank would necessarily obliterate all prior interests of NZIF, and as to the significance in American law of any action by RCS, to which in terms of such decisions as Tesco Supermarkets Ltd v. Mattrass (1972) A.C. 153 and Belmont Finance Corporation v. Williams (1980) 1 All.E.R. 393, Mr Connell's knowledge of the prior dealings must be imputed, to perfect an arrangement in disregard of those dealings.

However, it is not for the accused to prove the truth of the representation, but for the Crown to prove its falsity beyond reasonable doubt. That must mean that in any case where the Crown is aware that the property in question has at all relevant times been outside the territorial jurisdiction of this country, particularly when notice has been given of the intention of the defence to rely upon the state of the foreign law it is under a duty to exclude any reasonable possibility that transactions which would be valid if governed by NZ law are made invalid or ineffective by reason of some apparently relevant provision of the lex situs.

On the evidence before me, the claim by the defence that the Crown has failed to exclude that possibility must be upheld.

Determination of the truth or falsity of the second representation in Count 1, namely that a firm order from Air Central Ltd had been obtained in respect of "Juliet Lima", does not raise any similar questions of law. It depends on the proper assessment of the relevant evidence.

The principal witness for the Crown was a Mr Gardiner, the Operations Manager for Air Central Ltd, at the relevant time.

He persuaded Mr Connell to take up half the share capital in Air Central Ltd in June 1981. The arrangement between them was that Gardiner would manage the day to day operations of Air Central Ltd, and Connell its financial arrangements. At the time Air Central was very short of capital, but Gardiner was assured by Connell that Southwest could obtain turbo prop. Mitsubishi aircraft suitable for Air Central business on terms which it could afford.

Mr Gardiner said, and I believe him, that he did not and still does not understand the process by which Mr Connell intended to achieve that task, but that he was impressed by the

MU 2G turbo prop aircraft which Mr Connell demonstrated to him, and "felt in my own mind he was a very successful businessman and of course modern aviation needs successful businessmen to run and finance it".

Following the re-arrangement in June, Air Central bought two MU 2G's from Southwest, and ordered a third.

The loan offer by Broadbank included in paragraph (2) the requirement that there be a firm order for the on-sale of "Juliet Lima" to Air Central. Mr Oliver states that he received an oral assurance from Mr Connell that such order existed, and would be confirmed in writing. He identified the letter dated 15 September 1981 from Air Central signed by Mr Gardner stating that Air Central wanted "another MU 2 in a similar configuration" as the written confirmation he received. The correct identity of that letter was of importance, because "Juliet Lima" was a MU 2B, a smaller plane than the MU 2G's being operated by Air Central.

Mr Baragwanath understandably emphasised that at depositions Mr Oliver had attributed both that letter and a second letter to the "Juliet Lima" dealing. Mr Oliver responded that when he had been asked to consider the letters in the lower Court, he had "no reference as to the identification that I could recognise. I had not had the opportunity to research the Broadbank files and after a somewhat successful attempt to confuse me in the lower court, I made sure that it was not going to happen again.".

All in all, while it was demonstrated that the basis of Mr Oliver's identification was not overwhelmingly strong, I conclude that the strong probability is that he was right. To that extent his evidence provides support for the evidence of Mr Gardiner who said quite flatly that he had not agreed to buy a MU 2B and that such an aeroplane would have been of no use to Air Central.

That assertion was attacked by reference to an agreement signed by Mr Gardner on behalf of Air Central seven days previously for the purchase from Southwest of the MU2B ZKWAL. Mr Gardiner conceded that on the first occasion that agreement had been referred to him he had said that while it appeared to have his signature he did not recall signing it and that it must have been filled in after he had signed it. He did not change his position until shortly before the trial when he was told that the police had "scientific proof" that the document had been filled in before he signed it.

At the trial, he contended he had no intention to buy ZKWAL. He added, and on these points his evidence was confirmed by other evidence, that Air Central had not taken delivery of ZKWAL, nor paid any instalment under the agreement, and that ZKWAL had continued as before to be used by Mr Connell for Southwest business.

The agreement was one of those where a nominal price of $350,000 was stated and the 20% "deposit" paid by Southwest, which then received the 80% financed by NZIF and retained the use of the aircraft. None of those circumstances support the view that it recorded a bona fide sale.

Having seen and heard Mr Gardiner I do not find it difficult to accept that he would sign any document relating to finance which emanated from Mr Connell without endeavouring to assess its commercial effect and reality. I believe I would have accepted his assertion that he had no intention of buying a MU 2B simply from my assessment of his evidence. However, apart from the support he gains from Mr Ollver's evidence, he gains considerable support from the evidence of Mr Prince, who seems to have no axe to grind. When he was employed in January 1982 as a salesman for Southwest Mr Prince discussed with Mr Connell its outstanding business. He was told that in addition to the two Mitsubishi's it was then using, Air Central was getting a third from America, this being a MU 2G then arriving at Auckland and cleared by Mr Prince through Customs. There

was no suggestion to Mr Prince that Air Central had purchased any other Mitsubishi, nor that it was considering purchasing "Juliet Lima", which was described to him as "parked up in Oklahoma", "not as presented to Mr Connell", and in Mr Connell's words "a dog".

It follows that I would find the falsity of the second representation in Count 1 proven.

I further note that this is a matter where, if there were an explanation for the use of the aircraft ZKWAL after its purported sale to Air Central, it could have been given by Mr Connell. That consideration adds further support for my conclusion that the falsity of the second representation has been proven to the required standard.

On the issue of fraudulent intent, this is a situation where the facts which establish falsity make it incredible that such falsity was not appreciated by the representor. Whether one adopts Lord Goddard's selection as the locus classicus on intent to defraud of Re Carpenter (1911) 22 Cox CC 618, or the more modern dicta in Balcombe v. De Simoni (1972) 46 A.L.J.R. 141 and R. v. Allsop (1976) 64 Cr. App. R. 29, the accused's actions in misleading Broadbank on what was clearly a critical term of the loan contract must constitute fraudulent intent.

The accused will accordingly be found guilty on Count 1.

Count 2 charges Mr Connell that on 18 September 1981 when he was governing director of Southwest, it received $442,160.61 from DSI on terms requiring it to account for such proceeds to Broadbank and fraudulently omitted to do so, and thereby committed theft.

Receipt by Southwest of that sum into its bank account, i.e. of failure to account if there was a duty to account, is not denied. What is in issue is the adequacy of proof of:-

(1) Any duty to account, this being challenged by the defence on the dual grounds -

(a) that the Crown has not proven that the contract between Southwest and Broadbank was not effectuated; and

(b) that in any event, the circumstances did not create an obligation to account in terms of s.222 and;

(2) Fraud.

Issue 1(a) involves a return to the dimly lit corridors of American law. Mr Baragwanath not only points to the fact of Broadbank's entry on the FAA register in January 1982 but also to the existence of a document introduced as Exb.109C which records arrangements made between Broadbank, DSI and the receivers of Southwest in America on 18.2.82.

When Mr Percy tendered that document, there was an immediate objection by Mr Baragwanath and I questioned its relevance and admissibility. After brief evidence about the circumstances in which it came to be executed, Mr Baragwanath indicated he would not object to it being received as evidence that Broadbank "claimed some domain" over the assets dealt with. Rightly or wrongly I allowed it to be admitted for that purpose. Later attempts by both counsel to extend the purpose for which the document was to be used brought further objections which were upheld. The trial having proceeded on that basis I am satisfied that the document should not now be given a wider significance. On that basis it is evidence going to show that in February 1982, Broadbank claimed ownership of

"Juliet Lima", and an interest in three Sikorsky helicopters on which they had advanced moneys which were also found at the DSI premises in Oklahoma, in need of repair.

As previously noted, following the filing of a bill of sale by RCS in Broadbank's favour on 11 January 1982, FAA recorded Broadbank's ownership of "Juliet Lima" on 18 April 1982 thereby giving Broadbank title to the aircraft as from the earlier filing date.

The motivation for RCS' action in January seems to have been a telex from Mr Connell to DSI on 20 December 1981:-

> "Could you please ensure that N53JL is registered under Broadbank's name".

DSI replied the following day:-

"(1) Please advise for what I should make commercial invoice and customs invoice re Broadbank telex of December 18 regarding funds;

(2) Do not understand your telex of December 20 Stop Believe 53JL to be still registered to DSI stop".

A telex from Southwest on 22 December answered the first question with the comment:

> "Cut invoices for one only Mitsubishi MU 2G no serial Nos. stop I would appreciate if you can turn it round real quick stop".

The transaction there discussed was the second of those which were not completed and about which Mr Oliver made enquiry from Miss Webber on 20 January in respect of which funds sent from NZ had been remitted back to Southwest by DSI. But the final telex did not answer Sawyer's enquiry about registration of "Juliet Lima" in Broadbank's name.

Mr Baragwanath suggested that there may have been an earlier message which was overlooked. A more likely explanation seems to me to be that Mr Connell noted that Broadbank's loan offer required that a copy of the FAA bill of sale in Broadbank's name be provided as soon as was available from FAA.

There is no evidence of any intention to bring the aircraft to NZ at or about this time. The latest evidence of any such attempt relates to May 1981, when it was reported that further work would be necessary before this could be done.

Mr Baragwanath's theme on this part of the case was that "Broadbank cannot have the plane and the money too". In my view, that proposition does not face the criticial question, which is whether an arrangement under which Broadbank received title in the USA four months after its advance of moneys and without any accompanying order for on-sale can properly be classified as essentially the same arrangement as that for which it had contracted.

I cannot believe that is a tenable proposition.

As to whether, on the basis that the intended contract is found not to have been effectuated, the circumstances were such as to create a duty on Southwest to account for its moneys, I again adopt the principles developed in the cases cited in Ruling No. 9 and in particular the discussion at pp.181-2 of R. v. Scale.

The requirements in Broadbank's offer that the funds were to be used for the purchase of a specific aircraft and that proceeds of sale of that aircraft were not to be received by Southwest but paid direct to Broadbank make this a very different transaction from those the subject of Counts 4 and 6 in respect of which I held a duty to account had not been established.

The arrangement in respect of "Juliet Lima", although essentially a loan transaction, went further than simply creating a debtor/creditor relationship. It did, so far as it could, "earmark" the funds and make it plain they were not intended to be available for the general purposes of Southwest.

While the question is not an easy one, in my view the circumstances do establish a duty to account.

There remains the question of fraud. Here again the evidence establishes intentional misleading of Broadbank in at least two respects.

The first is the continuing influence of the false representation found to have been made in Count 1.

The second is disclosed in the evidence of Mr Cambie, the manager of the National Bank at Taupo. He advised that Mr Connell saw him on 27 August to arrange an extension of the company's overdraft to enable him to meet a bill for $473,000 due to NZIF the following day. This was approved on Mr Connell's assurance that Southwest would be receiving a like amount, being proceeds of sale of an aircraft, from the USA within two or three days.

The matter was clearly within Mr Kemp's memory because of the trouble he had tracing the promised funds. These finally arrived on 18 September by telegraphic transfer from DSI, the sum being (in US $ terms) the same as that remitted by Broadbank for the purchase of "Juliet Lima".

Mr Percy's contention that these funds cannot sensibly be accepted as proceeds of sale of aircraft but only as the pre-arranged repatriation of funds supposed to be used for the purchase of "Juliet Lima" seems the only sensible construction of the evidence. And the fact that Mr Connell knew four days before his application to Broadbank for a loan to purchase

"Juliet Lima" that the loan moneys would be repatriated to Southwest's account is strong evidence that the purported purchase of "Juliet Lima" was never intended to be completed, and that the transaction with Broadbank was a development of the 100% finance system.

It is also relevant, in considering the extent to which the credit problems of Southwest were then appreciated by Mr Connell to note his request to Sawyer on 3 September for the delivery of appropriate advice from the USA:-

> "Cld u pls send immediatly. A matter of life and death".

Those circumstances disclose conduct which, in the language of Gresson, J. in R. v. Cheape (1955) N.Z.L.R. 63 was "altogether inconsistent with honesty and fair dealing and therefore fraudulent".

The accused will accordingly be found guilty on Count 2.

Counts 8 and 9 both charge breaches of s.241A of the Companies Act, 1955.

In Ruling No.9 I endeavoured to define the nature of such offences. I did not receive any submissions from counsel in their final addresses on this topic and have not myself seen any further material which would indicate the need for a different interpretation. It may however be desirable to note one matter not expressed in Ruling N.9, namely that in my view, the requirement of proof of actual fraud involves as a corollary that if the accused had a mistaken but honest belief he was entitled to do what he did, the equivalent of the defence of colour of right in theft, this would be a sufficient defence.

The state of Mr Connell's loan accounts with the company at the time he took the proceeds of the bullion is not clear. It may, as Mr Mace calculated, have been in debit, but there is at least a reasonable possibility that had the receivers had full information about the relevant dealings they would have concluded it was in credit. In any event, there was the debt of $55,000 secured by the mortgage back.

Those facts are not, on my construction of s.461A, decisive. However, they certainly call for very clear proof of fraud in the situation where, as here, it had been the practice of Mr Connell as governing director, to draw against his loan account without regard to whether it was in debt or credit and without reference to any third party, leaving the bringing of those transactions into account until the time for preparation of the company's annual accounts. The only extension of that practice beyond cash drawings seems to have been his use of a company vehicle as a trade-in on the purchase of a car in April 1981. However that event, being before the period when the company had reached a state of economic crisis, is of significance.

There are numerous matters pointing towards the contention urged by the Crown that Mr Connell foresaw the collapse of his company and was seeking tc prefer his own interests to that of its creditors. In particular I note:-

(1) the misrepresentation to the bank officer Mr Kemp of the purpose for which the gold was being withdrawn from the bank;

(2) the lodgment of the proceeds of sale in the Cromwell rather than the Taupo bank account;

(3) the failure to leave any contact address and the conflict between his advice to Miss Webber and Mr Prince that he was going to the USA on a business trip and his advice to Detective Sergeant Conway that he had had a breakdown and had decided to go to Australia for a holiday;

(4) the difficulty of reconciling his advice to Detective Sergeant Conway that he had taken the moneys on account of his mortgage debt with his later requirement that the whole $55,000 principal under that mortgage be paid into a retention fund in exchange for his execution of a release of the mortgage; and

(5) the certainty, in my mind, that by January 1982, the fact that despite receipt of the sums totalling $850,000 the subject of Counts 4 and 6, Mr Connell's personal acceptance in December 1981 of over $400,000 of company liability to the Edmonds group and an overdrawing of the Broadbank facility, the company was left with very large debts for settlement in the immedite future and no immediate prospects of receipts sufficient for that purpose, was appreciated by Mr Connell.

I accept that the outstanding success of the company up till 1980 would have strengthened Mr Connell's natural optimism and encouraged him to take substantial risks in an endeavour to keep the business alive. However, as I read the evidence, it is totally improbable that the accumulating indebtedness and the critical condition of the company was not appreciated by him in January 1982, even though the exact dimensions of the crisis may not have been.

Those circumstances and others which it would serve no purpose to discuss in detail, satisfy me that at the relevant time, Mr Connell had a guilty mind.

It is also my view that the suggestion that his actions were motivated by a breakdown cannot be accepted against the evidence of several who saw him at the time, that he appeared to be his normal self, and having regard to the absence of any explanation from Mr Connell himself.

However, even after bringing that factor into account, I am left with some doubts whether the evidence of deception relates to the question of the propriety or otherwise of his retention of the sale proceeds of the gold or to the other matters, such as a determination to leave the country to escape the pressures of the breakdown of his marriage and his creditors.

Giving all these matters the best consideration I can, I retain sufficient uncertainty to make it necessary that the accused be acquitted on Count 8.

The same reasons call for his acquittal on Count 9.

The verdicts indicated probably make it necessary that I record that the conditional rejection of Mr Baragwanath's submissions as to the effect of the Fugitive Offenders legislation which was set out in Ruling No.9 now takes the form of an unconditional rejection of those submissions.

The accused will now stand in the dock.

For the reasons which have been given, the verdicts of the Court are:

1.	On Count 1	Guilty
2.	On Count 2	Guilty
3.	On Count 8	Not guilty
4.	On Count 9	Not guilty.

You are accordingly convicted on Counts 1 and 2 and remanded until 9:30 a.m. today fortnight 9 November 1984 for the preparation of as probation officer's report and sentence.