IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2013-485-379
[2016] NZHC 2046

THE QUEEN

v

RALPH HEBERLEY NGATATA LOVE

Hearing: 3-5, 8-11, 15-19, 22-25 August 2016

Appearances: G J Burston, M J Ferrier and R Parlane for Crown
C R Carruthers QC and B Farquhar for Defendant

Verdict: 1 September 2016

VERDICT OF LANG J

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[1] Dr Ngatata Love (Dr Love) faces two charges laid in the alternative. The first is a charge of obtaining property by means of deception.[1] The second is a charge of obtaining a secret commission.[2]

[2] For the reasons that follow, I am satisfied the Crown has proved the charge of obtaining property by deception beyond reasonable doubt. For that reason it has not been necessary for me to consider the alternative charge.

Background to the charges

[3] Dr Love is a prominent figure within Maoridom. He is a kaumatua of several iwi, and over the years has held many important public and commercial positions. At the time of the events giving rise to the charges he was a professor at the School of Business at Victoria University.

[4] The charges were laid as a result of Dr Love's involvement during 2006 and 2007 with the Tenths Trust (the Tenths), a trust established in its present form in 1985 by orders made under s 438(1) of the Maori Affairs Act 1953 and s 50 of the Trustee Act 1956. The Tenths owns significant holdings of Maori freehold land in and about the Wellington region. It manages and administers the land for the benefit of the beneficiaries of the trust, all of whom belong to Wellington and Taranaki-based iwi.

[5] The governance of the Tenths during this period was prescribed by orders made in the Maori Land Court on 16 December 2003 and 14 July 2006.[3] The affairs of the Tenths were managed by trustees elected by the beneficiaries for three year terms. The trustees were empowered to make decisions regarding the Tenths' affairs by way of resolutions passed by a majority vote at meetings of trustees. No trustee had the power to make decisions on behalf of the Tenths without the consent of the remaining trustees. Major decisions were required to be approved by means of votes cast by the beneficiaries at either the annual general meeting or a special general meeting. Property owned by the Tenths was held in the name of The New Zealand Guardian Trust Company Ltd as the custodian trustee for the Tenths.

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1 Crimes Act 1961, s 240(1).
2 Secret Commissions Act 1910.
3 *Re Wellington Tenths Trust* (2003) 134 Aotea MB 60-64; *Re Wellington Tenths Trust* (2006) 172 Aotea MB 102-104.

[6] Historically the Tenths has owned significant land-based assets, but has always had limited cash resources. It has therefore entered into joint ventures or partnerships with third parties to undertake projects designed to enable the Tenths to maximise the benefit it can obtain from its assets. The Tenths adopted a strategy of requiring those parties to bear the cost and risk of projects in return for being able to gain access to land owned or controlled by the Tenths.

[7] At all times material to this proceeding Dr Love was both a trustee and the Chair of the Tenths. In that capacity Dr Love maintained a close interest in the Tenths' affairs, and often dealt personally with third parties regarding property development projects.

[8] The present proceeding relates to a venture that the Tenths sought to undertake involving the development of land situated in Pipitea Street, Thorndon. Pipitea Street is situated a short distance away from Parliament, and numerous Government agencies and organisations have their offices in the area. By early 2006 the Tenths owned several properties in Pipitea Street, but the Crown owned adjoining land comprising 1 to 3 and 11 Pipitea Street. The Tenths regarded the land that it owned in Pipitea Street as having great potential. As at 2006, however, it was producing very little in the way of income.

[9] In order to boost that income the Tenths needed to develop the land. It provided an ideal site for the construction of a new office building that was likely to be an attractive rental proposition for Government and/or commercial organisations. Before the Tenths could undertake such a project, however, it needed to acquire ownership of 1 to 3 and 11 Pipitea Street from the Crown. By mid-2006 negotiations between the trustees and the Crown relating to the acquisition of those properties had reached an advanced stage.

[10] By May 2006 the trustees were also involved in discussions with Auckland property developers known as the Redwood and Equinox groups. Redwood had experience in the construction of large scale residential and commercial buildings whilst Equinox was both a property developer and a provider of mezzanine finance. Mr Tony Gapes was the principal of Redwood who dealt with the Tenths. Mr Kerry Knight, a partner in the Auckland law firm Knight Coldicutt McMahon Butterworth (Knight Coldicutt), dealt primarily with the Tenths on behalf of Equinox. Redwood and Equinox were keen to build a large office complex on the Pipitea Street land. They combined forces in a joint venture to achieve that result.

[11] In the early part of 2006 the developers dealt mainly with Matene Love, Dr Love's son. In or about March 2006 Equinox paid Matene's company, Yellowstone Consultants Ltd (Yellowstone), the sum of $150,000 plus GST for the role Matene had played in introducing them to the Pipitea Street project. By August 2006 Equinox had also agreed to pay Yellowstone a further sum of $1.5 million for services Matene was to perform in the future in respect of the project.

[12] By the beginning of September 2006, however, the developers had become disillusioned with Matene's performance. At that point Dr Love told Mr Knight that he wanted the developers to deal with his close associate, Ms Lorraine Skiffington, in relation to the Pipitea Street project. This is reflected in the following letter Ms Skiffington sent to Mr Knight on Sunday 3 September 2006:

> Hi Kerry,
>
> I gather you had a good clearing of the air with Ngatata over the weekend. I understand that Ngatata made it fairly clear that he wants me to be their (tenths) interface with KC [Knight Coldicutt].
>
> In practical terms that will mean that I will front and lead the relationship between them and KC and Ronette [a solicitor in Knight Coldicutt's Wellington office] will partner up with me on the commercial transaction side of things. That arrangement needs somehow to be formalised from KC's point of view so that roles are clear with the Tenths Client relationship.
>
> A consultancy fee will need to be struck for the tenths work somehow. Not sure how this is going to be structured, an hourly rate for consultancy services or a lump sum as part of the actual deal eg Pipitea Street at this stage with the clear prospect of future projects, if we make the relationship work.
>
> … I know that Ngatata is willing to work at it, but we have had a shakey (sic) start. Lets put it behind us, strike up a proper consultancy arrangement and get on with the job. Look forward to catching up with you.
>
> Cheers Lorraine.

[13] At or about this point Ms Skiffington and Dr Love began discussing the Pipitea Street project with Mr Shaan Stevens, an accountant and business advisor who conducted business through the Guinness Gallagher group of companies. In October 2006 Ms Skiffington became a director of one of those companies. Mr Stevens then became increasingly involved in the negotiations with the developers.

[14] By November 2006 the Crown had agreed to sell the land comprising 1 to 3 and 11 Pipitea Street to the Tenths for the sum of $1 million plus GST. The Tenths was therefore in a position to assure the developers that it now had control of all of the Pipitea Street land. This was an essential

aspect of the project because the developers could not begin to negotiate seriously with prospective tenants until they knew the Tenths could make all of the land available for the project.

[15] By this stage, however, the negotiations with the developers had reached a stalemate. This was eventually broken by a series of events that give rise to the charges that Dr Love faces. These began on 22 November 2006, when Dr Love and Ms Skiffington met with Mr Knight in Auckland. Thereafter matters moved quickly, and I discuss the events that followed in greater detail later in my reasons.[4] For present purposes it is sufficient to record that on 22 November Mr Stevens instructed Mr Andrew Henderson, a partner in the Wellington law firm Gault Mitchell, to incorporate a company under the name Pipitea Street Developments Ltd (PSDL). Mr Henderson obtained name approval from the Registrar of Companies the same day, and incorporated PSDL the following day.

[16] By the evening of 23 November 2006 Mr Henderson had also received from Mr Knight a draft agreement to lease in respect of the Pipitea Street land. The agreement provided for the developers to pay the Tenths the sum of $3 million as the purchase price for the right to lease the land for a period of 20 years at an agreed rental. The agreement also gave the Tenths the right to subsequently purchase the lessees' interest in the land at market value less a discount of $1 million.

[17] The trustees of the Tenths held their monthly meeting on 28 November 2006. In accordance with his usual practice Dr Love provided a Chairman's report that was circulated to the other trustees prior to the meeting. This contained several paragraphs dealing with the Pipitea Street project. At or before the meeting Dr Love also provided the trustees with a "Risk Management Proposal" setting out the strategy to be adopted in relation to the Pipitea Street project. The trustees then discussed the project and passed several resolutions in relation to it. In broad terms the resolutions approved the terms of the proposed lease to the developers as described to them in the material provided by Dr Love. The outcome of these discussions was also recorded in the Minutes of the meeting and circulated by Ms Aroha Thorpe, who carried out secretarial functions for the Tenths.

[18] The Crown alleges that Dr Love never disclosed the developers' offer to pay the sum of $3 million to his fellow trustees. Instead, he only disclosed the right to purchase the lessee's interest in the land and the proposed rental as set out in the draft agreement to lease prepared by Mr Knight.

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4 At [40]-[75].

As a result, the remaining trustees had no knowledge that the developers had also offered to pay the Tenths the sum of $3 million in order to purchase the right to lease the land.

[19] After the trustees had approved the proposed lease in principle, two events occurred on 22 December 2006. The Crown alleges that both occurred without the knowledge of the remaining trustees. First, Dr Love signed an agreement on behalf of the Tenths to lease the whole of the Pipitea Street land to Pipitea Street Ltd. That company was the corporate trustee of The Pipitea Street Trust, a trust settled by the developers to undertake the Pipitea Street project. Secondly, Pipitea Street Ltd entered into a Services Agreement under which it agreed to pay the sum of $3 million to PSDL.

[20] The Services Agreement provided for Pipitea Street Ltd to pay PSDL that sum in three instalments. An initial payment of $300,000 plus GST was to be paid immediately after the agreement was signed, and a further sum of $1.2 million plus GST was to be paid within 7 days thereafter. The balance was to be paid subsequently. By 15 January 2007 entities associated with the developers had paid a total of $1.5 million plus GST to PSDL pursuant to the Services Agreement.[5]

[21] On 12 and 16 January 2007 PSDL transferred sums of $1 million and $400,000 respectively into a bank account opened in the joint names of two family trusts. Dr Love and Ms Skiffington had settled these two trusts with Mr Stevens' assistance a few weeks earlier for the benefit of themselves and their respective families. Furthermore, on 7 December 2006 the trusts had completed the purchase of a substantial residence situated at 12 Moana Road, Plimmerton. The Moana Road property was acquired with the intention that Dr Love and Ms Skiffington would use it as their home.

[22] The trusts purchased the Moana Road property using a loan in the sum of $1.8 million from the Westpac Banking Corporation. Dr Love and Ms Skiffington were jointly liable to Westpac in respect of that loan by virtue of a term loan agreement they signed on 6 December 2006. Immediately after PSDL paid the funds into the trusts' joint bank account a total sum of $1.385 million was transferred to a Westpac loan account. These transfers reduced the amount owing in respect of the loan obtained to purchase the Moana Road property. The personal liability of

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[5] The Appendix to these reasons is a flow diagram produced at the trial showing the flow of funds relevant to this proceeding.

Ms Skiffington and Dr Love under the term loan agreement was correspondingly reduced by the sum of $1.385 million as a result of the transfers.

[23] The developers never paid the final payment due under the Services Agreement. During 2008 they and the Tenths agreed to abandon the lease proposal in favour of a joint venture in which the Tenths would share in the ownership of the building to be constructed on the Pipitea Street site. This is what ultimately happened. The Tenths is now the part owner of a completed office building that is worth approximately $80 million and produces an annual rental income of approximately $6.5 million per annum.

The Crown and defence cases

[24] Section 240 of the Crimes Act relevantly provides as follows:

> **240 Obtaining by deception or causing loss by deception**
>
> (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—
>
> (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
>
> (b) in incurring any debt or liability, obtains credit; or
>
> (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
>
> (d) causes loss to any other person.
>
> …
>
> (2) In this section, deception means—
>
> (a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—
>
> (i) knows that it is false in a material particular; or
>
> (ii) is reckless as to whether it is false in a material particular; or
>
> (b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
>
> (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

[25] In order to prove the charge the Crown must prove beyond reasonable doubt that Dr Love obtained property and that he did so by deception and without claim of right. Deception will be established when the conduct is of one or more of the types described in s 240(2) and it is undertaken with intent to deceive. Such conduct will be without claim of right where it occurs without a belief that it is lawful.[6]

[26] The Crown alleges that Dr Love enabled PSDL to obtain the funds paid by the developers under the Services Agreement. It says he did so by deception because he led the developers to believe the Tenths had approved the arrangement under which payments were to be made to PSDL when that was not the case. In addition, he failed to advise the other trustees that the developers were prepared to pay the Tenths the sum of $3 million to acquire the right to lease the Pipitea Street land. Nor did he tell the other trustees about the arrangement between PSDL and the developers under the Services Agreement. Instead he arranged for funds that ought to have been paid to the Tenths to be diverted to PSDL under the Services Agreement. The Crown contends that Dr Love acted in this way with the intention of deceiving both the developers and his fellow trustees. He also acted dishonestly and without claim of right because he always intended that the funds paid to PSDL would be used to reduce his liability under the Westpac loan. As a result, the Crown alleges that Dr Love's conduct fell within the definition of deception under all three limbs of s 240(2).

[27] Dr Love says he was never aware that the developers were prepared to pay the sum of $3 million to gain access to the Pipitea Street land. He was also not aware that PSDL had entered into the Services Agreement with the developers or that it had received the sum of $1.5 million plus GST from the developers. In addition, he did not know that the bulk of the funds received by PSDL was used to reduce the loan obtained to purchase the Moana Road property. He said he always viewed the Moana Road property as belonging to Ms Skiffington, and she paid most of the outgoings in respect of it.

[28] Dr Love also says that the trustees expressly resolved at the meeting on 28 November 2006 to permit Mr Stevens' firm Guinness Gallagher to implement the Pipitea Street project on the basis that the developer would meet Guinness Gallagher's costs. In anticipation of this Mr Stevens had instructed Mr Henderson to incorporate PSDL as the entity that was to implement the Pipitea Street project on behalf of the Tenths. Thereafter the issue of any remuneration that the developers were to pay to PSDL was a matter to be negotiated between the developers and PSDL. The Tenths had

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[6] Crimes Act 1961, s 2.

no interest in that aspect of the project because the resolution made it clear that the developers were required to meet PSDL's costs. The Tenths was therefore not financially affected by any agreement regarding remuneration that the developers and PSDL might reach.

[29] As a result, Dr Love maintains that he did not obtain property and did not deceive or intend to deceive his fellow trustees.

Onus and standard of proof

[30] The most important principles I need to bear in mind are those relating to the onus and standard of proof. Dr Love faces a criminal charge. As a result, the Crown must prove each element of the charge beyond reasonable doubt. That is a very high standard, and it means I must be sure of Dr Love's guilt before I can find the charge proved. I remind myself, as I would be required to remind a jury, that it is not sufficient for the Crown to show that Dr Love is probably guilty, or that he is very likely guilty. The Crown is not required, however, to prove each charge to an absolute or mathematical certainty.

[31] Dr Love has elected to give and call evidence. In doing so, he has not assumed any onus or burden of proving anything at all. The burden of proof remains on the Crown throughout. This means that if I consider a factual scenario upon which Dr Love relies to be reasonably possible, I must give him the benefit of the doubt in relation to that issue.

[32] Furthermore, the evidence given by the witnesses for the defence forms part of the overall pool of evidence. In the event that I decline to accept any part of that evidence, I will put it to one side. I will then determine on the balance of the evidence whether the Crown has discharged the onus of proof to the required standard.

Evidential issues

[33] Before considering the facts in greater detail it is necessary to explain how I propose to approach certain aspects of the evidence.

Reliability issues

[34] Most of the events relevant to the charge occurred nearly ten years ago. This means that the memories of all of the witnesses have inevitably dimmed considerably with the passage of time.

This became obvious during the trial because many of the witnesses had a very vague recollection of the events they were asked about. Had this been a trial by jury, I would have been required to consider giving the jury a direction regarding about the unreliability of such evidence.[7] I proceed on the basis that great care must be taken in assessing the reliability of evidence given by any witness based solely on the witness's memory of events that occurred so long ago. The passage of time means that such evidence is likely to be inherently unreliable and therefore of limited probative value. The most reliable evidence is that which is supported by contemporaneous documents. Fortunately there is a reasonable body of contemporaneous documentary evidence relating to most of the important events I am required to consider.

Dr Love's evidence

[35] There is a further complicating factor in relation to the evidence given by Dr Love because he now displays symptoms of dementia, most probably in the form of Alzheimer's disease. This issue required me to conduct a pre-trial hearing in order to determine whether he was fit to instruct counsel and stand trial. In a judgment delivered on 23 May 2016 I held that although Dr Love suffers from a mental impairment, it was not sufficient to prevent him from participating fully in the trial process.[8]

[36] During the trial I heard evidence from Dr Anthony Duncan, a forensic psychiatrist employed by the Capital Coast District Health Board. Dr Duncan has also held a visiting appointment as a psychogeriatrician for the Wairarapa District Health Board for 20 years. Dr Duncan gave evidence at the pre-trial hearing, and he also sat through the trial as Dr Love gave evidence. He said he had observed the effect of Dr Love's impairment on the way in which he gave evidence at trial. In particular, he noted that at times Dr Love appeared to become "overloaded" when being asked questions, and would respond in a manner that did not address the issues raised by those questions. Dr Duncan said this was likely to reflect the fact that Dr Love's mental impairment meant he could not process the questions in a manner that enabled him to respond to them appropriately.

[37] I had noticed the same phenomenon whilst Dr Love gave his evidence, and had reached the same conclusion. The relevance of the issue for present purpose is that I need to assess the evidence given by Dr Love with care. In particular, I need to be careful not to draw conclusions adverse to Dr Love solely by virtue of the manner in which he responded to questions that he

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7 Evidence Act 2006, s 122(2)(e).
8 *R v N* [2016] NZHC 1062.

obviously found difficult to answer. I accept that his inability to answer some questions reflected his underlying mental impairment rather than a desire to avoid answering difficult questions. I record that in his closing address Mr Burston for the Crown accepted that such an approach was appropriate. As it happens, this particular issue is not of great moment because Dr Love was firm in his denial of the key aspects of the Crown's case.

The evidence given by Mr Stevens

[38] A further issue arises in relation to the evidence of Mr Stevens. He was undoubtedly closely involved in the key events that have led to the charges. There is therefore a risk that he may have been influenced in giving evidence by a desire to distance himself from those events and to attribute responsibility for them to Dr Love and Ms Skiffington. He also gave evidence that was seriously at odds with another Crown witness regarding a material aspect of the Crown case.[9] Had this been a trial by jury, I would therefore have given the jury a direction that they needed to treat Mr Stevens' evidence with real caution. He has been shown to be an unsatisfactory witness in several respects, and may well have motive to give false or misleading evidence prejudicial to Dr Love and Ms Skiffington.[10] I therefore treat Mr Stevens's evidence with real caution. To the extent that I do not refer to evidence given by Mr Stevens on material issues it is because I have concluded it is insufficiently reliable to be taken into account.

Circumstantial evidence

[39] In order to prove that Dr Love engaged in deceptive conduct the Crown necessarily relies on circumstantial evidence. In doing so the Crown is not required to prove each and every strand of evidence upon which it relies beyond reasonable doubt. As the tribunal of fact I am entitled to give individual pieces of evidence such weight as I consider appropriate in the circumstances. The combined weight of the evidence must ultimately be sufficient, however, to bring me to the point where I am sure the Crown has proved each of the essential elements of the charge.

The events leading up to 22 November 2006

[40] During the period between May and October 2006 the trustees were considering the feasibility of undertaking the development of the Pipitea Street land by means of a joint venture with the Redwood and Equinox groups. Representatives of Redwood attended a meeting of trustees

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9 See [54].
10 Evidence Act 2006, s 122(2)(c).

on 23 May 2006 to provide the trustees with advice about the project in broad terms. Thereafter the Tenths sought advice from the law firm Gibson Sheat regarding the terms of a Development Deed prepared by Mr Knight containing the terms of the proposed joint venture. By early October 2006 Gibson Sheat had advised the Tenths that the proposed deed was in a form that met their requirements.

[41] The Pipitea Street project had also been discussed in very general terms at the Annual General Meeting of the Tenths on 30 September 2006. Those present at the meeting passed a resolution authorising the trustees to transfer the Pipitea Street land to a development company if the development of the site was to proceed.

[42] The Tenths' strategy appears to have altered course on or about 11 October 2006. On that date Dr Love arranged for an email to be sent out asking several persons who had been involved in the project, including representatives of Redwood Group and Gibson Sheat, to attend a meeting the next day. Later the same day he arranged for another email to be sent out cancelling the meeting on the basis that it was premature. The email told recipients that the trustees needed to work through several issues before taking matters further. Thereafter Gibson Sheat heard nothing further about the proposed joint development, and it appears to have been shelved.

[43] By this point Dr Love had made contact with Mr Adrian Burr, a property consultant based in Auckland. Dr Love, Mr Stevens and Ms Skiffington met with Mr Burr in Auckland on 18 or 19 October 2006. The calendar downloaded from Ms Skiffington's laptop computer suggests they had a further telephone conference with Mr Burr on 25 October 2006. During these discussions Mr Burr explained his philosophy in relation to property development. This was to the effect that it was best for the owner of land to retain ownership and to have others assume the risk of developing it and leasing out the finished product. Dr Love said that this did not reflect his own philosophy or that of the Tenths. They wanted to maintain control not only over the land but also in respect of the structures on top of the land.

[44] Mr Stevens said that Mr Burr also told them that the Pipitea Street land was a prime site for commercial redevelopment, and that a developer would pay a significant premium of between $1.5 and $3 million to gain access to it. I accept this evidence because it is supported by what subsequently occurred.

[45] The discussions with Mr Burr appear to have prompted Ms Skiffington and Mr Stevens to consider finding another property developer to undertake the Pipitea Street project. On 8 November they met with Mr Allan Fraser and Mr Tim Dromgool of Newcrest Holdings Ltd (Newcrest), a company recommended to them by Mr Burr. Mr Fraser then sent Ms Skiffington and Mr Stevens an email attaching a draft heads of agreement on 13 November 2006. This provided for Newcrest to pay the Tenths lease premium payments totalling $2 million. Mr Stevens forwarded the draft heads of agreement to Mr Burr later the same day by email and asked for Mr Burr's advice "on the numbers (premium in particular)". The email recorded Mr Stevens' view that the premium in the draft agreement "seem[ed] somewhat lower than what we discussed".

[46] Mr Stevens said that at or around this point Ms Skiffington told him that Guinness Gallagher could no longer be involved with the Pipitea Street project and that it would be necessary for a new entity to be formed to take it forward. He says that this prompted him and Ms Skiffington to instruct Mr Henderson to incorporate PSDL.

[47] Mr Stevens also says he was then effectively excluded from negotiations with the developers. I do not accept that this was the case. The reasons that Mr Stevens gave for the exclusion of Guinness Gallagher are not credible given the events that subsequently occurred. They demonstrate that Mr Stevens remained closely involved in the Pipitea Street project.

The events that occurred on 22 and 23 November 2006

[48] Negotiations with Redwood and Equinox recommenced at the meeting held in Mr Knight's offices in Auckland on 22 November 2006. Ms Skiffington and Dr Love were accompanied to the meeting by Mr Michael Reed QC, an Auckland barrister. Mr Burr had recommended that they instruct Mr Reed to assist them in adopting a more aggressive approach in dealing with the developers. Mr Knight's evidence suggests they succeeded on that score. He described the meeting as being more in the nature of a mediation than a conventional business meeting.

[49] Mr Knight and Dr Love were the only witnesses to give evidence at trial about the meeting on 22 November 2006. Dr Love did not have a clear recollection of what was discussed at the meeting but Mr Knight described the context in which the meeting occurred as follows:

> Q. What was Mr Reed endeavouring to negotiate from Pipitea Street Trust on behalf of the Tenths Trust in the meeting with you earlier that day?

A. I can't actually recall what, there was an argument, or a dispute had arisen between ourselves and Ngatata and he came up, guns blazing, and to tell us what we had to do, and I think I fired back, so I'm not quite sure what his angle was, but if, eventually, we said we'd either walk away or this is how we'd go forward.

Q. What was the disagreement that you had had with Dr Love at that stage?

A. Now, at this stage, I should remember, it would've been over the structure of us, got the tenant interested, but not being able to get the land in a, I suppose, packaged up in a way that would work commercially and financially. And so we sort of hit a stumbling block.

[50] Mr Knight also said that Mr Reed was seeking an upfront payment of $3 million to $4 million on behalf of the Tenths. I accept that evidence given the events that then followed.

[51] Shortly after the meeting Mr Knight arranged for the following letter to be hand delivered to Mr Reed:

Re: Tenths Trust/Pipitea St Trust

1. We act for Pipitea St Trust. Further to our meeting today we set out a proposal which would enable the current issues between both parties to be resolved.

2. If the agreement to lease proposal set out below is not ratified by the Tenths Trust, Tenths Trust will pay $225,000 plus GST to Pipitea St Trust as a contribution towards costs towards the current project. Such payment will be made 14 days after the Tenths formally confirms it will not agree to the lease proposal and Purchase Option. Upon payment Pipitea St Trust will hand over all plans and documents and assign the resource consent application to the Tenths Trust. (Tenths Trust will then be responsible for payment of any and further ongoing costs.)

3. Purchase Option: Tenths Trust to have the right to purchase upon giving 3 months notice either 50% or the entire leasehold interest at market value. This right to purchase is not assignable and will expire 9 months from date of practical completion of the building. Market Value will be calculated by 2 independent valuers, one to be chosen by each party.

4. Lease Proposal: The parties will enter into a conditional agreement to lease on the following terms:

    (a) Term – 50 year terms perpetually renewable

    (b) Lease payment, in the form of Prepaid rental, $3,000,000 plus GST to be paid at settlement.

    (c) Settlement Date: 30 days from unconditional date, subject to Pipitea St Trust having right to bring forward upon giving 14 days prior notice.

    (d) Rent Review – every 5 years.

    (e) Rental Amount – based on 6% of the value of the Land.

(f) Rent Free period – 3 years – to enable the building to be constructed.

(g) Form of lease – Ngati Whatua form – as attached, amended in accordance with these terms.

(h) Conditions: Subject to Tenths Trust approval within 7 days. Subject to Pipitea Trust having binding tenant arrangement within 3 months.

On the basis that these base commercial terms are acceptable, then an agreement to lease would be prepared encompassing the above, and on otherwise usual terms.

Yours faithfully

…

[52] At 12.59 pm on 22 November Ms Skiffington sent a handwritten facsimile to Mr Stevens on the letterhead of Mr Burr's company Tramco. This advised Mr Stevens of the essential terms of the offer contained in the letter from Mr Knight. Mr Stevens was in Wellington at this time.

[53] Mr Henderson said that on the following day Mr Stevens gave him a letter that Mr Stevens had obviously drafted. Mr Stevens asked Mr Henderson to transfer the letter to Gault Mitchell letterhead and send it to Mr Knight. Mr Henderson duly complied with this instruction and sent the letter to Mr Knight by email at 12.31 pm on 23 November 2006.

[54] Remarkably, Mr Stevens gave completely different evidence. He said he had seen the letter dated 23 November on Gault Mitchell letterhead for the first time the day before he gave his evidence at trial. Under cross-examination he accepted, however, that he and/or Ms Skiffington must have given Mr Henderson instructions regarding the contents of the letter. There is no reason for Mr Henderson to be mistaken or to lie about this issue, and I accept his evidence in preference to that given by Mr Stevens.

[55] The letter that Mr Henderson sent to Mr Knight on 23 November 2006 contained the following counter-proposal:

PROPOSAL

8. We are instructed the Tenths Trust requirements are as follows:-

(i) **__Purchase Option:__** The Tenths Trust will be given the right to purchase upon giving 3 months notice either 50 percent, or the entire leasehold interests, at market value. The first 50 percent to be on a discounted rate to be negotiated. This right to purchase is assignable and will expire at the end of an agreed period from the date of the practical completion of the building

intended to be constructed on the Property by the Pipitea St Trust. Market value will be calculated by two independent valuers, one to be chosen by each party.

(ii) **Ground Lease:**

(a) An initial term of 20 years;

(b) Thereafter perpetually renewable terms of 20 years;

(c) The lease premium of $4,000,000 plus GST (if any) will be payable to Pipitea Street Developments Limited at Settlement date;

(d) The annual ground rent will initially be $562,500 plus GST per annum, being 7.5% of the current valuation of $7,500,000, with the obligation to pay such rent commencing immediately; and

(e) The ground rent will be reviewed to market every 5 years.

(iii) **Settlement date:** 30 days from the Agreement becoming unconditional in all respects, subject to Pipitea St Trust having the right to bring the date forward upon giving 14 days prior notice.

(iv) **Form of lease**: Viaduct Harbour Lease form, amended in accordance with these terms.

(v) **Conditions:** This Agreement is subject to the following conditions:

(a) Pipitea Street Developments Limited securing the Tenths Trust approval to the purchase option and ground lease rental arrangement within 7 days from the signing of this Agreement; and

(b) The Pipitea St Trust securing a tenancy arrangement within 3 months of signing this Agreement.

(vi) **Participatory role**: The Tenths Trust will have the right to approve the design of the Building and the identity of the tenant, which approval may not be unreasonably withheld, including the right to have its advisors present at all meetings in respect of design and tenancy, if so required by it.

CONFIDENTIALITY

9. Our clients' note the extreme commercial sensitivity and nature of these arrangements and requires that the terms of this offer, including its existence, are kept confidential between the parties and that all correspondence and communications in respect of this offer is made to our offices unless otherwise advised by us.

10. Please confirm that these confidentiality arrangements are acceptable to you and your clients by return letter to our offices at your earliest opportunity.

[56] At 4.31 pm the same day Mr Henderson received the following email from Mr Knight in response:

From: Kerry Knight
Sent: Thursday, 23 November 2006 at 4:31 p.m.
To: 'Andrew Henderson'; Sophia Rigas; Tony Gapes; 'shaan.stevens@guinnessg.co.nz'
Cc: Ronette Druskovich
Subject: RE: Pipitea Street Developments

Thank you for your letter – since then we have discussed various issues with Ngatata Love, and have tentatively agreed to the commercial terms which are to be sent to you shortly by Sophia from our office in the form of an agreement to lease.

The agreement to lease refers to the Viaduct form of Lease, plus the Pipitea St development booklet which your client already has.

Our client is hoping to have a signed document to present to Dept of labour tomorrow – with the Tenths conditions to be satisfied by 1st December next.

Our client will require 5 months to obtain confirmation from the tenant rather than 3 months as initially indicated. This is as a result of discussions with Dept of Labour in the last hour.

We are unsure where the address for notices should be – Tenths, Guardian Trust or Pipitea St Developments.

We await to hear from you.

Regards

Kerry Knight
KNIGHT COLDICUTT MCMAHON BUTTERWORTH

[57] At 5.17 pm that same day Sophia Rigas from Knight Coldicutt sent Mr Henderson a draft agreement to lease by email. This provided for the developers' company Pipitea Street Ltd to pay the Tenths the sum of $3 million as the purchase price for the right to lease the whole of the Pipitea Street land on the following terms:

3. LEASE

3.1 Subject to the conditions contained in clause 2.1 being fulfilled and in consideration of payment of the Purchase Price by the Lessee to the Lessor, the Lessor agrees to grant the Lessee and the Lessee agrees to take on lease the land under the Lease on the following terms and conditions:

(a) The term of the Lease shall be for 20 years and shall commence on and from the Commencement Date.

(b) The Lease shall contain perpetual rights of renewal for terms of 20 years each.

(c) The rental shall be:

(i) $100,000 plus GST per annum for the first 36 months;
(ii) $250,000 plus GST per annum for years 4 and 5;

(iii) Thereafter reviewed in accordance with the lease terms in schedule 1.

(d) The rental shall be payable quarterly in arrears with the first payment being due 3 months after the Commencement Date.

(e) The rental shall be reviewed 5 yearly.

3.2 The Lessee shall execute the Lease after the Commencement Date has been determined and shall deliver it to the Lessor within five Working Days of the Lease being presented to the Lessee for execution (time being strictly of the essence). The Lessor shall execute the Lease and shall procure the consent of all mortgagees to the registration of the Lease and then attend to registration. Following registration the Lessor will forward the registered lease duplicate to the Lessee or at the Lessee's direction. The Lessee shall pay the registration fees of an incidental to this Lease and the Lessor's reasonable costs in obtaining the mortgagee's consent or other approvals associated with granting the Lease.

3.3 From the Commencement Date until the Lease has been properly executed and delivered by the Lessee to the Lessor, the Lessor and the Lessee shall be bound by the terms and conditions contained in this Agreement as if the Lease had been properly executed.

4. PURCHASE PRICE

4.1 The Lessee shall pay to the Lessor the Purchase Price on the date the Lease is registered in the Wellington Land Registry.

…

[58] The draft agreement defined "Purchase Price" as being $3,000,000.00 plus GST.

[59] The draft agreement also gave the Tenths the right to purchase the lessee's estate in the land after the developers had completed construction of the building to be built on the land. The purchase price was to be at market value less the sum of $1 million.

[60] Mr Henderson sent Ms Skiffington a copy of the draft agreement to lease by email on the morning of 24 November 2006. Thereafter he did not play any further role in the Pipitea Street project. On the same day, however, Mr Stevens and Ms Skiffington met with Mr Nigel Burton and Ms Carolyn Shirley of the Wellington law firm Burton & Co to provide them with instructions in relation to the proposed agreement to lease. They were accompanied at that meeting by Mr Burr. Thereafter Burton & Co continued to advise Mr Stevens and Ms Skiffington regarding the lease and option to purchase the Pipitea Street land. Mr Stevens and Ms Skiffington also continued to seek advice regarding commercial aspects of the proposed lease from Mr Burr and his associate Mr Snelling. Dr Love also accompanied Mr Stevens and Ms Skiffington to a meeting at Burton & Co on 27 November 2006.

[61] Remarkably, Mr Stevens and Ms Skiffington did not provide Burton & Co with the draft agreement to lease that Mr Knight had sent to Mr Henderson on 23 November 2006. Nor did they ever advise Burton & Co of the fact that the developers had offered to pay the Tenths the sum of $3 million by way of purchase price for the right to lease the land.

The meeting of trustees on 28 November 2006

[62] The trustees of the Tenths held their monthly meeting on 28 November 2006. In accordance with usual practice Ms Thorpe sent the trustees a draft agenda and other documents to be discussed at the meeting approximately a week before the meeting. On the afternoon of 24 November she also sent out the Chairman's report, which contained the following information in relation to the Pipitea Street project:

> **Pipitea Street Development**
>
> The sale and purchase agreement has been executed by Guardian Trust on our behalf and has been forwarded to the Crown's representative for final execution. From the date of execution the Trust has 15 days to make the payment of $1 million (+ GST). A loan facility for this amount has been arranged through Westpac Bank by the Executive Office. The loan is secured against Wellington South Intermediate School.
>
> The carpark at 1-3 Pipitea Street is currently operated on an informal month-by-month arrangement between CarePark and the Crown.
>
> The original development proposal has been realigned to cover the points raised by Trustees and advisers. A separate paper will be presented at the meeting with a summary to be distributed later today.
>
> …
>
> **Dr Ngatata Love**
> Chairman

[63] Trustees who attended the meeting on 28 November 2006 also received another document relating to the Pipitea Street project that was headed "Risk Management Proposal". There is dispute as to when the trustees first received that document, but for reasons given subsequently[11] I consider it most likely that the proposal was sent out by email with the Chairman's Report on the afternoon of 24 November 2006. This document contained the following information:

Pipitea Street Development

Risk Management Proposal

[11] At [93]-[94].

> Following consultation with Trustees and advisers on the development of the Pipitea Street site, a new strategy has been developed which will retain the land in the ownership of the Trust and take away any risk or obligations including the provision of Trust assets as security. In summary the following initiative has been agreed to by the Redwood Group and its associates in moving forward on the project.
>
> **TRUST / LAND**
>
> - The Trust will retain ownership of 1-3, 5, 9, 11, 13 and 15 Pipitea Street (long-term).
> - The land will [be] leased to the "development company" and be protected from any risk associated with the proposed development.
> - Income will be generated from commencement at the following levels:
>   - Years 1 to 3 = $100,000 per annum (plus GST)
>   - Years 4 and 5 = $250,000 per annum (plus GST)
>   - Year 6 on = market rental (estimated at $750,000)(plus GST)
>
> **DEVELOPER**
>
> - Leases land and pays rental from Day 1 at rates outlined above
> - Constructs building at their risk (e.g. financial and construction risks)
>
> **BUILDING**
>
> - High quality building
> - Future proofed to "green" standards
> - Will attract high quality tenant such as the Ministry of Labour, who have shortlisted the property
>
> **CONSULTING GROUP**
>
> - Project structuring and development will be supported by the nominated consulting group (to include quantity surveyors, engineers, lawyers, structuring financing experts engaged by the Trust's consulting group)
> - Negotiations with the developer has resulted in an agreement to fund the consulting group
> - The formal lease arrangements and consulting group is being supervised by Tramco Group (Adrian Burr – see attached article).

[64] Evidence was given at trial by five of the trustees who attended the meeting on 28 November 2006. The Crown called Mr Wayne Mulligan, Ms Liana Poutu and Mr Neville Baker. The defence called Dr Love and Mr Grant Knuckey. All five recall that the Pipitea Street project was discussed at the meeting, but none of them has a clear recollection of exactly what was said. The Minutes of the meeting are also of little assistance in this regard. They are in the following terms:

> *Pipitea Street Development*
>
> Sale and Purchase Agreement has been signed by Guardian Trust and it is with the Crown agents. It will take about five days finalise (sic) and then the Trust have 15 days to make payment of $1,000,000 (plus GST). The Chairman distributed a document – "Pipitea Plaza" – for the information and consideration of Trustees.
> Key Points of note:
>
> - The Trust to retain ownership of the land

- Land will be leased to a development company and be protected from risk associated with the proposed development
- Income will be generated from day 1 at levels estimated to be:
  - Years 1-3 = $100,000 per annum (plus GST)
  - Years 4 and 5 = $250,000 per annum (plus GST)
  - Year 6 on = market rental (estimated at $750,000) (plus GST)
- Trust has no risk exposure financially or related to construction
- Trust will have option to purchase all, or part of, completed building
- Purchase option will be discounted from market value
- Building will be future proofed to "green" standards, will be of a high quality
- Consulting group under the supervision of Tramco, and at the cost of the developer, will act as the Trust's agent

A full discussion ensued.

[65] The Minutes also record that the trustees passed the following resolutions in relation to the Pipitea Street project:

Resolution

It is hereby resolved that the Managing Trustees agree to the strategy of the development of Pipitea Street on the basis that the Trust retains the ownership of the land and leases it to the development entity in line with the income levels outlined in the risk management proposal

It is hereby resolved that if the Trust exercises its right to purchase all or part of the building on completion it will review the appropriate economic and legal processes for doing so.

It is hereby resolved that the Managing Trustees support the Tramco Group's (Adrian Burr) nomination of Wellington company Guinness Gallagher to continue under Tramcos supervision to provide deal structuring, commercial supervision and implementation of the project to the Trust. Such services to be funded by the developer (Redwood).

It is hereby resolved that the Managing Trustees nominate appropriate representation to the supervisory group

Moved Grant Knuckey
Seconded Piki Carroll
Carried unanimously

[66] Three other issues discussed at the meeting on 28 November 2006 are also relevant for present purposes. The first is that the Tenths needed to obtain funding in the sum of $1 million plus GST to enable them to complete the purchase of 1 to 3 and 11 Pipitea Street from the Crown. Secondly, the trustees had advised beneficiaries who attended the AGM on 30 September 2006 that a capital dividend would be paid prior to Christmas. This required the Tenths to obtain funding in the sum of $365,839. Thirdly, the Tenths required further funding in the sum of $615,000 plus GST in order to complete the purchase of a property situated at 19A Kate Sheppard Place. To meet these

funding issues the trustees resolved that the Tenths would borrow the sum of $2.2 million from the Westpac Banking Corporation. The loan would carry interest at the rate of 10.4 per cent per annum.

Events that occurred between 28 November and 31 January 2007

[67] Negotiations between the developers and Burton & Co regarding the form of the agreement to lease and option to purchase continued between 24 November and 21 December 2006. Burton & Co did not receive any further instructions after 21 December 2006. The final version of the draft agreement to lease on their file is different in one respect to that which Dr Love ultimately signed on 22 December 2006. I discuss that issue later in these reasons.[12]

[68] Negotiations in relation to the Services Agreement between PSDL and the developer ran alongside the negotiations relating to the lease and option to purchase. The evidence does not establish who prepared the Services Agreement that Ms Skiffington signed on behalf of PSDL on or about 22 December 2006. It is clear, however, that Ms Skiffington and Mr Stevens did not ask any of the law firms who had been involved in the Pipitea Street project to prepare it. Gault Mitchell had prepared an early version of the agreement providing for PSDL and the Tenths to be the parties, but this version of the agreement was subsequently abandoned. I consider it most likely that the final form of the agreement was prepared by Ms Skiffington with input from Mr Stevens. Ms Skiffington is a qualified solicitor, and versions of the agreement were found on her computer. The agreement appears to have been in final form by about 8 December 2006, but there was then a delay in having it signed.

[69] By January 2007 the trusts settled by Dr Love and Ms Skiffington had also completed the purchase of the Moana Road property. Dr Love and Ms Skiffington had first viewed the property on the morning of 6 November 2006, and through Mr Stevens they made a formal offer to purchase it later the same day. On 7 November Ms Skiffington applied to Westpac on behalf of herself and Dr Love for a loan to meet the purchase price in full. They both signed an agreement to purchase the property for the sum of $1.8 million on 8 November 2006. The purchasers were Dr Love and Ms Skiffington "and or nominee". The agreement was conditional upon the purchasers obtaining finance within ten working days, and settlement was to occur ten working days after the agreement became unconditional. The deposit of $90,000 was then paid on 21 November 2006 from an

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12 At [134]-[137].

overdraft facility provided to a Westpac account that was in Dr Love's sole name at that time.[13] Ms Skiffington was subsequently added as a signatory to that account.

[70] The agreement became unconditional on 14 November 2006, with settlement scheduled to take place on 8 December 2006. Settlement ultimately took place on 7 December 2006, with a loan from Westpac in the sum of $1.8 million being used to fund the purchase and repay the facility that had earlier been used to pay the deposit.[14] The loan was to be on an interest only basis for two years, and within that period the principal sum was to be reduced by $370,000. Interest was payable at a capped rate of 8.75 per cent per annum. This resulted in interest accruing at the rate of approximately $17,000 per month.

[71] As recorded above, the Services Agreement required the developers to pay the sum of $3 million to PSDL in three instalments. The developer made the initial payment of $300,000 to Mr Hay, the solicitor acting for Dr Love and Ms Skiffington in relation to the purchase of the Moana Road property, on 11 December 2006.[15] The developers made that payment notwithstanding the fact that the Services Agreement had not been signed by that date.

[72] On 11 January 2007 three entities associated with the developers had made payments totalling $1.287 million to PSDL.[16] On the next day PSDL paid the sum of $1 million to the joint Westpac account opened in the names of the two trusts.[17] On the same date the sum of $985,000 was transferred to another Westpac account in reduction of the loan obtained to purchase the Moana Road property.[18]

[73] Mr Hay held the funds paid to him by the developers on 11 December 2006 until 15 January 2007, when Mr Gapes authorised him to release the funds to PSDL. Mr Hay deposited the funds and accumulated interest into PSDL's bank account on the same date.[19] On the next day PSDL transferred the sum of $400,000 to the Westpac account in the joint names of the two trusts.[20] The sum of $400,000 was then immediately transferred to another Westpac account to further reduce the

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13 Step 1 in the Appendix.
14 Steps 2 and 3 in the Appendix.
15 Step 4 in the Appendix.
16 Steps 4, 6 and 7 in the Appendix.
17 Step 8 in the Appendix.
18 Step 9 in the Appendix.
19 Step 10 in the Appendix.
20 Step 11 in the Appendix.

loan obtained to purchase the Moana Road property.[21] By 16 January 2007 the loan obtained to purchase the Moana Road property had therefore been reduced by the sum of $1.385 million.

[74] On 31 January 2007 Westpac complied with a request by Mr Stevens to transfer the sum of $1.4 million back to PSDL.[22] On the same date PSDL made payments totalling $1,526,625 to a company called TPS Trust Ltd.[23] Those funds were used to pay fictitious invoices rendered by entities associated with two Wellington accountants, Messrs David Rowley and Barrie Skinner. On the same date TPS Trust Ltd paid the sum of $1,017,750 into a Westpac bank account in the joint names of Dr Love and Ms Skiffington.[24] The funds remained in that account until 25 May 2006, when the sum of $1.026 million was transferred to the loan account in reduction of the loan obtained to acquire the Moana Road property.[25] Ms Skiffington subsequently complained to Westpac about the fact that the funds had not been applied in reduction of the loan as soon as they had been deposited to the joint account on 31 January 2007.

[75] The transactions that occurred on 31 January 2007 subsequently came to light in an investigation by the Serious Fraud Office into the activities of Messrs Rowley and Skinner. They were subsequently prosecuted and convicted on tax fraud charges laid as a result of the investigation. Mr Stevens was also charged and convicted as a result of his participation in their activities.

Factual findings

[76] Against that background it is now necessary for me to make factual findings in relation to issues in dispute.

Dr Love's knowledge of Matene Love's involvement with the developers

[77] I propose to deal with this issue briefly, because the evidence relating to Matene's involvement with the developers was only led by way of background. Furthermore, Dr Love does not face any charges in relation to Matene's activities.

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21 Step 12 in the Appendix.
22 Step 13 in the Appendix.
23 Step 14 in the Appendix.
24 Steps 15 and 16 in the Appendix.
25 Step 17 in the Appendix.

[78] Dr Love denies that he was aware of Matene's involvement with the developers and says he had no knowledge of the payment that Yellowstone received from them. I find this to be unlikely having regard to several factors. First, the Tenths was interested in the development of the Pipitea Street land by early 2006. The first correspondence between the developers and Matene is a letter from Equinox to Yellowstone (C/- Matene) dated 7 March 2006. That letter refers to a meeting with Matene the previous week. From that point on until early September 2006 the developers appear to have dealt virtually exclusively with Matene.

[79] The evidence makes it clear that Dr Love was the driving force behind property development projects undertaken by the Tenths. Matene was Dr Love's son. It therefore seems inherently unlikely that Dr Love would not have been aware in general terms of the fact that Matene was in discussions with the developers, particularly given the fact that nobody else was dealing with them on behalf of the Tenths. Furthermore, it is highly likely that Matene would have reported to Dr Love regarding the progress he was making during this period. The fact that the developers attended a meeting of trustees during this period suggests that Matene was keeping in contact with Dr Love regarding progress.

[80] Furthermore, in one email to the developers Matene advised them that the reason for his delay in responding to them about the draft Development Deed was that Dr Love had been overseas and he needed to speak to him before responding.

[81] Finally, Mr Knight said he told Dr Love during the discussion on the weekend of 2-3 September 2006 that he and Mr Gapes did not want to deal with Matene in the future. This led Dr Love to tell him that he was to deal with Ms Skiffington from that point. Mr Knight's evidence is consistent with the email Ms Skiffington sent to him on 3 September,[26] and I accept his evidence regarding that issue.

[82] Although Dr Love would have been aware that Matene was dealing with the developers, there is no evidence to indicate Dr Love was aware of the payment that Yellowstone received. Nor is there evidence to suggest Dr Love knew Matene had reached an agreement with the developers that Yellowstone would receive a further payment in the sum of $1.5 million for Matene's efforts in relation to the project.

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[26] Set out above at [12].

The ability of the Tenths to obtain a lease premium for the Pipitea Street development

[83] Dr Love says he does not recall any discussion in which he was told the Tenths could expect to obtain a lease premium from a developer for the right to participate in the Pipitea Street development. His evidence in this respect is at odds with that given by Mr Stevens regarding the advice given by Mr Burr. I accept Mr Stevens' evidence on that point because of the email he sent to Mr Burr on 13 November 2006 in relation to the offer made by Newcrest.[27] That email provides confirmation that the issue of lease premium had been discussed with Mr Burr and that he had advised that a lease premium in excess of $2 million could be anticipated. Dr Love was present during the discussions that Mr Stevens held with Mr Burr. For that reason I am satisfied Dr Love was aware of the advice Mr Burr had given.

The events that occurred between 22 and 28 November 2006

[84] Dr Love has no recollection of there being any discussion of a lease premium at the meeting on 22 November 2006. He also says he did not see the letter Mr Knight wrote to Mr Reed later the same day, and was not aware of the counter-proposal that Mr Stevens asked Mr Henderson to send to Mr Knight on 23 November 2006. Dr Love accepts it is likely that he spoke to Mr Knight on the afternoon of 23 November, but denies receiving a copy of the email Mr Knight sent to Mr Henderson at 4.31 pm. He also denies having seen the draft agreement to lease that Sophia Rigas of Mr Knight's office sent to Mr Henderson at 4.31 pm that day.

[85] I do not accept Dr Love's evidence in relation to any of these matters. The email Mr Stevens sent to Mr Burr on 13 November 2006 seeking advice about the Newcrest offer demonstrates that the issue of a lease premium was of considerable significance by this point. The Newcrest offer would have demonstrated that the Tenths could command a considerable payment in consideration for granting a developer access to the Pipitea Street land. Dr Love must have been well aware of that fact by 22 November 2006.

[86] I consider that the issue of the lease premium is also likely to have been one of the principal issues discussed at the meeting on 22 November 2006. Mr Knight said that the Tenths' demands in relation to the lease meant that the project was not commercially sustainable. The quantum of the lease premium was clearly one of the principal factors contributing to that situation.

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[27] Discussed at [45].

[87] Furthermore, Mr Knight's recollection of the meeting, and in particular the fact that Dr Love "came up guns blazing", makes it clear that Dr Love played an important role during the meeting on 22 November. For that reason he would have had an obvious interest in matters that flowed from it. He and his associates may not have reached an agreement with Mr Knight by the end of the meeting. I have no doubt, however, that Mr Knight arranged for the letter to be hand delivered to Mr Reed soon after the meeting ended so as to ensure that the negotiations were able to continue.

[88] The fact that Ms Skiffington sent details of the offer contained in Mr Knight's letter to Mr Stevens by handwritten facsimile at 12.59 pm on 22 November means that Mr Reed had been able to convey the essence of the proposal to her by that time. The Crown submits it is likely that both Dr Love and Ms Skiffington went to Mr Burr's offices following the meeting to await receipt of a letter from Mr Reed. It is not necessary for me to draw that inference. Ms Skiffington and Dr Love were obviously both in Auckland that day. Given Dr Love's obvious interest in the Pipitea Street project it is inconceivable that Ms Skiffington did not make him aware of Mr Knight's offer as soon as she received details of it from Mr Reed regardless of where he may have been at the time.

[89] I also have no doubt that Dr Love's participation up until that point meant he would also have been party to the discussions with Ms Skiffington and Mr Stevens that must have taken place following receipt of Mr Knight's letter. In particular, I am sure Dr Love would have approved the counter-proposal that Mr Stevens prepared and asked Mr Henderson to send to Mr Knight the following day.

[90] The fact that it was Dr Love who spoke to Mr Knight on the afternoon of 23 November also speaks volumes. It demonstrates that he was maintaining personal oversight of the discussions with Mr Knight, and that he was the person with the necessary authority to negotiate directly to reach agreement with him. For that reason I am sure Ms Skiffington would have shown Dr Love a copy of the draft agreement to lease immediately after she received it by email from Mr Henderson at 10.42 am on 24 November 2006.

[91] The terms of the Risk Management Proposal that the trustees received at or prior to the meeting on 28 November 2006 also confirm that Dr Love was aware of the terms of the draft agreement to lease. That document set out the annual rental payable for the first five years of the proposed lease in terms that mirror those contained in the draft agreement to lease.

[92] The defence position is that Dr Love and Mr Knight must have reached agreement regarding that issue before the meeting on 22 November 2006 because the Risk Management Proposal was sent out to trustees about a week before the meeting. If this is correct it must have been sent out on 20 or 21 November 2006.

[93] I do not consider, however, that the defence proposition can be correct. First, there is nothing to establish definitively that the Risk Management Proposal was sent out to trustees as early as 20 or 21 November 2006. More importantly, the letter that Mr Knight delivered to Mr Reed following the meeting on 22 November contained a completely different proposal in relation to the annual rental payable under the lease. It provided for the lessee to receive a rent holiday for the first three years of the proposed lease.

[94] I consider that the proposed annual rentals set out in the Risk Management Proposal were agreed to during the telephone discussion between Dr Love and Mr Knight on the afternoon of 23 November. They were then incorporated in the draft agreement to lease that Ms Skiffington received from Mr Henderson on the morning of 24 November. Dr Love then inserted them in the Risk Management proposal that was included in the material sent to trustees on the afternoon of 24 November 2006. The fact that they were incorporated in the Risk Management Proposal means that Dr Love must have received a copy of the draft agreement to lease from Ms Skiffington. It would by highly surprising if that did not occur in any event given Dr Love's earlier participation in the negotiations with Mr Knight.

[95] It appears to be common ground that Dr Love did not disclose the developers' offer to pay the sum of $3 million to purchase the right to lease the Pipitea Street land to the other trustees at the meeting on 28 November 2006. Dr Love's position is that he was not aware the offer had been made. For the reasons I have just given I do not consider this can be correct.

The events that occurred after 28 November 2006

[96] As I have already recorded, Dr Love says he was not aware that Ms Skiffington and Mr Stevens had incorporated PSDL and that they subsequently signed the Services Agreement under which PSDL was to receive the sum of $3 million. He also says he was not aware that PSDL received payments totalling the sum of $1.5 million by 16 January 2007, and did not know that his liability to Westpac had reduced by $1.385 million by virtue of the payments made by PSDL to the

bank accounts in the names of the two trusts. Those assertions must be measured against the other evidence regarding these events.

[97] Mr Knight was obviously aware that the proposal in relation to the $3 million payment changed from that contained in the draft agreement to lease that he instructed Ms Rigas to send to Mr Henderson on the evening of 23 November 2007. The sum of $3 million was no longer to be paid to the Tenths' custodian trustee by way of purchase price for the right to the lease. Instead it was to be paid to PSDL for services that PSDL was ostensibly to perform in relation to the lease.

[98] It is not certain when the change was finally made. Mr Knight said, however, that Dr Love had told him from the outset that he (Dr Love) intended to set up a company to recover costs incurred by the Tenths during earlier treaty negotiations. The tenor of Mr Knight's evidence on this point was that he understood PSDL to be the entity established for that purpose. His evidence was also to the effect that he understood that the purchase price payable to the Tenths under the draft agreement to lease was ultimately replaced by the payments to be made to PSDL under the Services Agreement. It is clear, however, that the developers always considered the nature of the payment to be the same. It was commonly referred to by witnesses as a lease premium because it represented the premium the developers were required to pay in order to gain access to the project.

[99] Several factors persuade me that Dr Love was aware of the true position throughout. The first is that he was fully involved in the discussions with the developers up to and including 22 November 2006. The amount to be paid by way of lease premium was obviously one of the principal topics of discussion. There is no reason why Dr Love would suddenly lose interest in that aspect of the project at such a late stage. Furthermore, I do not accept that Dr Love genuinely believed the consideration to be paid to PSDL was a matter to be negotiated between PSDL and the developers. Up until 23 November 2006 the payment was to be made to the Tenths as the owner of the land. The annual rental the Tenths was to receive was also reduced for the first five years of the lease to reflect the fact that the $3 million payment was to be made. The reality must be that Dr Love and Ms Skiffington decided at some stage prior to 24 November 2006 that the lease premium that the Tenths was to receive would instead be diverted to PSDL.

[100] Secondly, the emails sent by other participants in the project during December 2006 and January 2007 make it clear that Dr Love was aware the Services Agreement had been prepared and formed part of the overall arrangement with the developers. They also show he had an interest in

the payments that were to be made to PSDL under the Services Agreement. Perhaps the most compelling example is the following email that Ms Skiffington sent to Mr Gapes on 6 December 2006:

> Ngatata has asked me to forward to you the services agreement, agreement to lease and option to purchase documents that he discussed with Kerry today. Kerry indicated that he wants to make some minor amendments and execute sign off of the finalised documents on Friday.
>
> Ngatata would like the amendments completed by midday tomorrow and forwarded to me at lorjs@paradise.net.nz. We will be in touch tomorrow to make final changes.
>
> Ngatata appreciates that you would like sign off on Friday as your deadline with DOL is Monday. This is possible. Ngatata will also expect bank cheques on Friday following sign off. We can discuss this detail tomorrow. It looks like we are close to making real progress on the development.
>
> Look forward to achieving sign off by the end of this week.
>
> Kind regards Lorraine

[101] I bear in mind the need to be cautious when assessing the weight to be given to statements made by Ms Skiffington attributing words or acts to Dr Love. Mr Stevens confirmed in cross-examination that she often used Dr Love's name when talking to others or asking them to perform tasks for her. I am satisfied that the email Ms Skiffington sent on 6 December falls into a different category. The email refers to a conversation Dr Love had had with Mr Gapes earlier the same day. I therefore consider it can be taken at face value, and demonstrates the extent to which Dr Love remained involved in all aspects of the transaction as at 6 December 2006

[102] I also place weight on a draft of the Services Agreement that was found in a bin uplifted from the Moana Road property by a document destruction company on 15 August 2012. In handwriting at the top of the document are the words "Ngatata's working copy". The words "note separate agreement" are also written on the front page of the document. In paragraph B of the Introduction section of the document the word "consent" has been inserted in handwriting that Dr Love could not exclude as being his. In the final version of the Services Agreement that Ms Skiffington signed on 22 January 2007 that paragraph has been amended to add the words "and procure all consents from the tenths Trust as required by the Lessee". I consider it likely that the draft found in the bin was Dr Love's working copy of the draft Services Agreement, and that he suggested the addition of the words that made their way into the final draft. This obviously demonstrates that he participated in the preparation of the Services Agreement.

[103] The same factors persuade me that Dr Love also knew that PSDL would use the funds to reduce the loan payable to Westpac in respect of the purchase of the Moana Road property. That provides the only reasonable explanation for the fact that he was obviously anxious to receive the bank cheques referred to in the email sent by Ms Skiffington to Mr Gapes on 6 December 2007.[28] Furthermore, the purchase of the Moana Road property would have been a very significant transaction for both Dr Love and Ms Skiffington. It left them both exposed to a very substantial personal liability to Westpac. I therefore consider it inconceivable that Ms Skiffington took it upon herself to cause PSDL to use the funds to reduce the loan without mentioning it to Dr Love. They both stood to share in the benefit of having their liability to Westpac reduced in that way.

[104] Although it is not strictly necessary for me to do so, I record that I do not accept Dr Love's evidence regarding the basis upon which he and Ms Skiffington purchased the Moana Road property. He says he always intended that the property would belong to Ms Skiffington, and he merely assisted her by permitting his income to be taken into account by the bank in assessing the ability of the borrowers to service the borrowing. He also says he attempted unsuccessfully on numerous occasions to transfer his trust's interest in the property to her. I find it difficult to believe that Dr Love would go to the trouble and expense of forming a family trust to own a half share in the property if his version of events was correct. He could have achieved his objective far more simply by offering to provide a guarantee in respect of a loan to Ms Skiffington.

[105] In this context a document that was found on Dr Love's computer is relevant. It is headed "Joint Venture Partnership: Strategic Directionz and Piptea (sic) Limited. The document begins as follows:

> 1. SERVICES AGREEMENT BETWEEN PIPITEA STREET DEVELOPMENTS LIMITED (PSDL) (Shaan and Lorraine) and PIPITEA STREET LIMITED (PSL)
>
> - This was signed up in 2006. It involved a 3m payment; 1.5 upfront on signing and 1.5 when construction started.
> - One and a half M was paid upfront to PSDL 500,000 paid in tax.
> - We loaned 1m from PSDL to purchase Moana Road.

[106] Dr Love denied any knowledge of this document when he gave evidence at trial. Given that it was found on his computer, however, I consider it likely that either he or Ms Skiffington created it. Either way I have no doubt that Dr Love would have seen it at some stage. The relevance of the

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28 Set out above at [100].

document for present purposes is the statement "We loaned 1m from PSDL to purchase Moana Road." This must be a reference to the funds that came from PSDL and ultimately ended up reducing the loan from Westpac after passing through the tax scheme operated by Messrs Skinner and Rowley. The importance of the statement lies in the fact that whoever created the document obviously viewed the funds from PSDL as being for the joint benefit of both Ms Skiffington and Dr Love in relation to the purchase of the Moana Road property. It contradicts Dr Love's evidence that he always viewed the acquisition of that property as being for the sole benefit of Ms Skiffington.

[107] The timing of the transactions is also relevant. The purchase of the Moana Road property occurred more or less contemporaneously with the negotiations that led to the developers agreeing to make the $3 million payment to acquire the right to lease the Pipitea Street land. The speed with which the funds were transferred from PSDL to reduce the amount owing under the mortgage suggests that Dr Love and Ms Skiffington had always intended the funds would be used for that purpose. I therefore accept the Crown's submission that Dr Love and Ms Skiffington were only prepared to assume liability for the loan from Westpac because they knew they had a source from which they could reduce it considerably in the near future.

Has the Crown proved the elements of the charge?

The obtaining of property

[108] The Crown must first prove that Dr Love obtained property. Section 240 falls within Part 10 of the Crimes Act 1961 (the Act). That part of the Act does not contain a separate definition of the term "property". As a result, it must be interpreted in accordance with the definition of "property" contained in s 2 of the Act:

> **property** includes real and personal property, and any estate or interest in any real or personal property, [money, electricity,] and any debt, and any thing in action, and any other right or interest:

[109] The money that PSDL received from the developers clearly falls within the definition of "property" for present purposes.

[110] Part 10 of the Act contains the following specialised definition of the term "obtain":[29]

[29] Crimes Act 1961, s 217.

> **obtain**, in relation to any person, means obtain or retain for himself or herself or for any other person.

[111] This makes it clear that the charge can be proved where the Crown can establish that the defendant obtained property for another person. In the present case the Crown alleges that Dr Love was instrumental in enabling PSDL to obtain the sum of $1.5 million under the Services Agreement.

[112] My earlier conclusions leave me in no doubt that the Crown's submission is correct. Dr Love played a very important role in enabling PSDL to obtain the payments from the developers. Mr Knight said it was a "consistent message" that the Tenths needed the money to follow up potential property projects. He understood that PSDL was going to use the money that it received under the Services Agreement to pay for consultants to assess other properties on behalf of the Tenths. In addition, Mr Knight said that Dr Love had told him "right from the beginning" that he wanted to set up a separate consultancy that supported the Tenths in their efforts "to commercialise offer-back property". Mr Knight obviously proceeded on the basis that PSDL was that entity.

[113] Dr Love was the person who concluded the agreement under which the developers agreed on 23 November 2006 to pay the sum of $3 million. He then remained party to the discussions with the developers that followed the meeting of trustees on 28 November 2006. This included the discussion with Mr Gapes on 6 December 2006 about the Services Agreement and the other two documents. Furthermore, Dr Love was the person who signed the agreement to lease on behalf of the Tenths on 22 December 2006. Ms Skiffington subsequently used advice that this had occurred to demand payment from the developers on 9 January 2006.

[114] By his words and conduct Dr Love therefore caused the developers to believe he was authorised to act on behalf of the Tenths in relation to the proposed agreement to lease and the Services Agreement. In doing so Dr Love created an environment in which the developers came to believe they were making the payments to PSDL for the benefit of the Tenths. This was a material issue for the developers, as is apparent from the following email that Mr Knight sent to Ms Skiffington on 23 March 2007:

> I left a message last week for you to call. I wanted to speak to you about our client wanting to be absolutely sure that funds that are paid to the services company are either being utilised by the Tenths Trust (less appropriate consultant fees) or the Tenths Trust has authorised them to be paid to the services company. Ngatata indicated in our office that the funds were covering the treaty claim costs etc – but can you please confirm this is the case.

> In the Pipitea St documents the payments to the services company are linked in the agreement to lease.
>
> …

[115] Furthermore, Mr Burston asked Mr Knight whether he would have agreed to pay $3 million to PSDL if he had been aware that $1.4 million would be paid immediately to a bank account operated by trusts set up by Dr Love and Ms Skiffington to purchase a house. Mr Knight said that he would only have agreed to pay the money if the Tenths approved it.

[116] All of these matters satisfy me beyond reasonable doubt that Dr Love was a substantial cause of PSDL obtaining the payments it received from the developers.

Deception

False representation

[117] I consider that the impression that Dr Love created for the developers amounted to a representation that he was acting with the knowledge and authority of the Tenths in respect of all aspects of the Pipitea Street project. The representation was clearly false, because the remaining trustees had no idea that the developers had offered to pay the $3 million lease payment to the Tenths. Nor did they know that PSDL had been set up and that the payments made under the Services Agreement were to be paid to PSDL. Given the circumstances in which the representation was made there can be little doubt Dr Love intended to deceive the developers.

[118] Similarly, the information that Dr Love provided to his fellow trustees prior to or at the meeting on 28 November 2006 amounted to a representation that it comprised the full extent of the offer the developers had made to the Tenths. That was plainly not the case because it omitted any mention of the developers' offer to pay $3 million to purchase the right to lease the Pipitea Street land.

[119] Dr Love must have intended to deceive the other trustees because he knew he was not providing them with an accurate description of the developers' offer. In this context I reject the submission for Dr Love that there was no point telling the other trustees about the payment because it did not fit within the business model the Tenths had adopted in the past. Dr Love knew he did not hold a mandate to make decisions unilaterally on behalf of the Tenths. It was for the elected

trustees to decide whether or not the developers' offer should be accepted, and they could only do that on a fully informed basis.

[120] During cross-examination Mr Carruthers suggested to several Crown witnesses that the offer from the developers had changed character between 23 November and the meeting of trustees on 28 November 2006. In particular, he suggested that the developers' offer to pay the Tenths the sum of $3 million to purchase the right to lease the Pipitea Street land was no longer available by 28 November. I do not consider this suggestion reflects the true position. Ms Skiffington and Dr Love did not sign the Services Agreement and the agreement to lease until 22 December 2006. The last communication from the developers prior to the meeting on 28 November was the email from Ms Rigas on the evening of 23 November attaching the draft agreement to lease. The developers' offer to pay the Tenths the sum of $3 million was therefore still open for acceptance when the trustees met on 28 November 2006.

[121] Furthermore, the trustees may well have been attracted to the developers' proposal. They may have concluded that the element of risk was sufficiently low that they should accept it despite the fact that it represented a different approach to that taken in the past. In this context the fact that the trustees resolved on 28 November 2006 to borrow the sum of $2.2 million in part to fund the acquisition of land for the Pipitea Street development becomes relevant. As a result, they were committing the Tenths to pay more than $220,000 per annum in interest. The trustees may well have been interested in a proposal that would result in a considerable portion of that loan being repaid within a short period.

[122] These factors persuade me that the Crown has proved beyond reasonable doubt that Dr Love caused PSDL to obtain the payments from the developers by knowingly making a false representation with intention to deceive both the developers and his fellow trustees.

Omission to disclose a material particular in circumstances where there is a duty to disclose it

[123] Similar observations can be made under this head. The fact that the developers had offered to pay the sum of $3 million to purchase the right to lease the Pipitea Street land was obviously a matter that would have been of considerable materiality to the remaining trustees. In particular, it may have affected their decision to borrow further monies from Westpac. They were also entitled to know that the level of rent the developers had agreed to pay during the first five years of the lease had been reduced as a result of the $3 million payment they were required to make.

[124] There is no dispute that Dr Love owed a fiduciary duty to the beneficiaries of the Tenths and to the other trustees to act in the interests of the Tenths. The remaining trustees had left the negotiations with the developers largely to him. He therefore had a duty to ensure that he provided them with full and correct information regarding any agreement he might reach with the developers. His failure to advise the other trustees regarding the developers' offer to pay the sum of $3 million amounted to a breach of this duty. It deprived the other trustees of the opportunity to consider whether the offer should be accepted.

[125] In his closing submissions Mr Carruthers placed considerable reliance on the following resolution passed by the trustees at the meeting on 28 November 2006:

> **It is hereby resolved that** the Managing Trustees support the Tramco Group's (Adrian Burr) nomination of Wellington company Guinness Gallagher to continue under Tramcos supervision to provide deal structuring, commercial supervision and implementation of the project to the Trust. Such services to be funded by the developer (Redwood).

[126] Mr Carruthers submitted that once the trustees passed this resolution Dr Love was free to sign the agreement to lease on behalf of the Tenths and to allow PSDL to implement the lease proposal the trustees had thereby approved. As a result, Dr Love cannot have deceived or intended to deceive the other trustees.

[127] This submission overlooks the fact that the trustees passed the resolution on the basis of the incomplete information Dr Love had given them in relation to the developers' offer. The fact that the information was materially deficient caused the trustees to make a decision on the basis of an incorrect view of the facts. Dr Love created that situation by failing to advise them of the correct position. For that reason I do not consider the resolution provided Dr Love with the authority to act as he did.

[128] The significance of the information that Dr Love omitted to disclose combined with the circumstances in which the omission occurred means it must have been deliberate. The only reasonable inference to draw from this is that Dr Love omitted to advise the other trustees of the true situation because he did not want them to know about it. I am therefore satisfied beyond reasonable doubt that Dr Love omitted to disclose the information with the intention of deceiving the other trustees regarding the nature of the developers' offer.

A fraudulent stratagem used with intent to deceive

[129] The manner in which events occurred between November 2006 and January 2007 suggests strongly that Dr Love and Ms Skiffington devised a plan or strategy designed to divert for their own benefit funds that would otherwise be payable to the Tenths. The factors that have assumed relevance in respect of the other two limbs of the Crown case establish equally an intention to deceive under this limb. The only additional element the Crown is required to prove under this limb is that the plan or strategy was also dishonest.

[130] The fact that deception has occurred and personal gain has resulted are both hallmarks of dishonesty. Another is concealment.

[131] From the outset Dr Love and Ms Skiffington appear to have been at pains to ensure the proposal that the funds be paid to PSDL was kept secret. This is evident from the provisions relating to confidentiality contained in the letter Mr Stevens asked Mr Henderson to send to Mr Knight on 23 November 2006.[30] That letter represents the first occasion on which it was suggested that the $3 million payment was to be made to PSDL rather than the Tenths.

[132] The manner in which instructions were given to Burton & Co is also suggestive of a desire for secrecy. Mr Stevens and Ms Skiffington did not provide Burton & Co with a copy of Mr Knight's draft agreement to lease when they first instructed Burton & Co on 24 November 2006 even though Ms Skiffington had received it from Mr Henderson earlier the same day. One inference to be drawn from this is that they did not want Burton & Co to know Dr Love had already reached a tentative agreement with Mr Knight regarding the amount the developers were prepared to pay the Tenths for the right to purchase the lease. It is clear from the material contained on Burton & Co's file Ms Shirley and Mr Burton were never advised of that fact.

[133] Furthermore, although it appears that Burton & Co were told on 24 November of the possibility that the sum of $3 million might be paid by way of lease premium, they were also told that the amount of the lease premium was to be left blank. Burton & Co proceeded thereafter on the basis that the amount to be paid by way of lease premium was yet to be determined. That effectively remained the position up until 21 December 2006 when Burton & Co ceased to have any further involvement.

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[30] Set out at [57].

[134] The final communication from Ms Shirley to Ms Skiffington and Mr Stevens on 21 December 2006 raised a concern about the manner in which the term "consideration" was defined in the current version of the draft. At that point the term was defined as follows:

> "Consideration" **$1.00** plus such sums as agreed to be paid indirectly to the Tenths Trust as part of the costs of the Lessee's Development.

[135] Ms Shirley advised Ms Skiffington and Mr Stevens that this definition was unacceptable because it was likely to be unenforceable beyond the sum of one dollar. This was because, as currently framed, it amounted to an unenforceable "agreement to agree".

[136] In the final version of the agreement to lease the term "consideration" was defined in slightly different terms:

> "Consideration" **$1.00** plus such other sums as agreed to be paid for professional services to support the facilitation of the Development.

[137] Ms Shirley did not see the agreement in its final form and I infer that Ms Skiffington or Mr Stevens must have amended the earlier draft before having Dr Love sign the agreement. Ms Shirley confirmed in evidence that the definition of the term "consideration" in the final form of the draft was still likely to be unenforceable.

[138] The important point about their dealings with Burton & Co is that Ms Skiffington and Mr Stevens were obviously anxious that their newly instructed solicitors should not know that the developers had already agreed to pay the sum of $3 million by way of lease premium. Furthermore, they did not tell Ms Shirley that the arrangement called for the sum of $1.5 million to be paid in the near future. This caused Ms Shirley some puzzlement when Mr Knight wrote to her on or about 20 December 2006 suggesting that the developers might caveat the titles to the Pipitea Street land in order to protect themselves in relation to the $1.5 million payment. Ms Shirley advised Ms Skiffington and Mr Stevens in an email on 21 December that any additional payment needed to be recorded in the agreement to lease. This was the last communication on Burton & Co's file before they closed it and rendered an account.

[139] Another issue arises in respect of the meeting of trustees held on 27 February 2007. The Minutes for this meeting contained the following information regarding the current status of the Pipitea Street project:

> *Pipitea Plaza*
>
> The Chairman and Executive Office are involved in continuing discussion with New Zealand Historic Places Trust. They will support the initiative providing some matters are addressed. We believe we have achieved first part which is that the consent will not have to be notified. The development of a relationship agreement would be preferable. A group identified as Grant Knuckey, Peter Love, Mark Te One and Liz Mellish will deal with these issues. In terms of the development itself, no further decisions will be required until a tenant has been secured for the building at which point it will be clear whether the project is economically viable and risk free for the Trust. A brief discussion was held concerning the carpark area at 1-3 Pipitea Street. Mark Te One and Keith Hindle are working through this – there should be more than $27,000 pa income and they are negotiating. This income will help offset the borrowing of $1 million for the purchase, as will the saved rent on 11 Pipitea Street of approximately $35,000 pa.

[140] One could reasonably expect Dr Love to have advised the trustees at this meeting that he had signed a binding agreement to lease the Pipitea Street land to the developers on 22 December 2006. His omission to mention that fact suggests he did not want the other trustees to know what was happening. They were clearly left with the impression that no decision had yet been made as to whether the project was economically viable, and that no final decision would be made until a tenant had been found.

[141] Finally, an unusual incident occurred in May 2008 after Ronette Druskovich from Knight Coldicutt inadvertently sent Nigel Moody from Gibson Sheat copies of the Services Agreement in draft form. This provoked an immediate reaction from both Ms Skiffington and Dr Love. Ms Skiffington sent the following email to Mr Knight on 1 May 2008:

> [D]ear Kerry,
>
> Ronette has inadvertedly (sic) sent Nigel a copy of the Agreement to Lease that include the service agreement. Please ensure that this is completely gathered back to KC and is never provided to third parties. It is strictly confidential as you know.

[142] Ms Druskovich says that Dr Love also called her and told her the Services Agreement was a confidential document that was not to be released. Ms Druskovich says that this was one of probably only two occasions on which Dr Love had contacted her directly. She also says he was upset and annoyed that she had released the document. This incident suggests that Dr Love and Ms Skiffington were anxious as late as 2008 that the Services Agreement should not be seen by others. It is difficult to see, however, how they could have had a valid objection to the document being sent to the solicitor who acted for the Tenths.

[143] All of these factors satisfy me beyond reasonable doubt that Dr Love's actions were not only deceptive but also dishonest.

Without claim of right

[144] At the time of the alleged offending s 2 of the Act defined the term "claim of right" as meaning:

> … a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the office is alleged to have been committed.

[145] In this context I accept the Crown's submission that Dr Love would have been well aware of his duties as a trustee of the Tenths. More importantly, he also knew that the funds paid to PSDL under the Services Agreement represented the consideration paid by the developers in order to gain access to land owned by the Tenths. He therefore knew that the Tenths ought to receive the benefit of those funds.

[146] Had PSDL used the funds it received from the developers for the Tenths' purposes in the manner that Dr Love represented to the developers it would, the position might be different. However, once Dr Love knew that the bulk of those funds were to be used to reduce his own liability to Westpac he had no basis upon which he could believe his actions were lawful. At that point he knew he was personally receiving the benefit of funds that ought to have for the benefit of the Tenths.

[147] For that reason the Crown has also proved beyond reasonable doubt that Dr Love obtained the property without colour of right.

Result

[148] The Crown has proved the charge of obtaining property by deception beyond reasonable doubt. It is therefore not necessary for me to consider the alternative charge of obtaining a secret commission by deception.

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Lang J

Counsel:
C R Carruthers QC, Wellington
Solicitors:
Luke Cunningham Clere, Wellington
Bisson Moss, Napier
Serious Fraud Office, Wellington

Purchase of 12 Moana Road & Pipitea Street Developments Ltd Payments

Pipitea St Trust (Westpac)

(4) 11/12/06 $300,000

I.D. Hay Trust Account (National)

(10) 15/01/07 $300,897.38

Oriental Limited (Westpac)

(6) 11/01/07 $187,500

Pipitea Street Developments (Westpac)

(7) 11/01/07 $1,200,000

Golden Fund Limited (BNZ)

(8) 12/01/07 $1,000,000

(11) 16/01/07 $400,000

M & M Trust 00 a/c (Westpac)

(14) 31/01/07 4 Transactions $75,037.50 $189,945.00 $530,055.00 $731,587.50

(13) 31/01/07 $1,400,000

(9) 12/01/07 $985,000

(12) 16/01/07 $400,000

(3) 7/12/06 $90,029.20

(5) 20/12/06 $90,600

TPS Trust Ltd 00 a/c (ANZ)

Purchase 12 Moana Road

(2) 7/12/06 $1,709,970.80

M & M Trust 91 Loan a/c (Westpac)

(17) 25/05/07 $1,026,000

(1) 21/11/06 $90,000

RHN Love & L Skiffington 00 a/c (Westpac)

(15) 31/01/07 $149,000

(16) 31/01/07 $868,750