

CITATION: *O'Brien v Adamson and Kennedy v Adamson* [2007] NTMC 042

PARTIES: JAMIE THOMAS O'BRIEN  
v  
PETER FRANCIS ADAMSON  
AND  
GAVIN DEAN KENNEDY  
v  
PETER FRANCIS ADAMSON

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction

FILE NO(s): 20630482

DELIVERED ON: 13 July 2007

DELIVERED AT: Darwin

HEARING DATE(s): 21-25 May, 10 July 2007

JUDGMENT OF: Mr V M Luppino

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Prosecution: Mr Karczewski QC  
Defendant: Mr Tippett QC

*Solicitors:*

Prosecution: ODPP  
Defendant: Maleys

Judgment category classification: B  
Judgment ID number: [2007] NTMC 042  
Number of paragraphs: 167

IN THE COURT OF SUMMARY JURISDICTION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20630482

BETWEEN:

**JAMIE THOMAS O'BRIEN**

AND

**PETER FRANCIS ADAMSON**

AND

**GAVIN DEAN KENNEDY**

AND

**PETER FRANCIS ADAMSON**

REASONS FOR DECISION

(Delivered 13 July 2007)

Mr V M LUPPINO SM:

1. In this matter the defendant is charged both on information and complaint with a number of dishonesty offences, specifically:
  1. Obtaining the property of Darwin City Council by deception contrary to section 227 of the Criminal Code ('the Code').
  2. Stealing a refrigerator and gift vouchers the property of Darwin City Council contrary to section 210 of the Code.
  3. Making a false statement in a statutory declaration contrary to section 27F of the Oaths Act.

4. Furnishing false information in a document produced for an accounting purpose contrary to section 233 of the Code.

2. The sections of the Code relevant to this matter are set out hereunder, namely:

**1. Definitions**

In this Code, unless the contrary intention appears –

.....

"deception" –

- (a) means intentional deception by word or conduct as to fact or law and includes a deception as to the present intention of the person using the deception or another person; and
- (b) includes an act or thing done or omitted to be done with the intention of causing –
  - (i) a computer system; or
  - (ii) a machine that is designed to operate by means of payment or identification,

to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make;

.....

"property" means every thing, animate or inanimate, capable of being the subject of ownership including –

- (a) things in action and other intangible property; and
- (b) Omitted;

**227. Criminal deception**

- (1) Any person who by any deception –
  - (a) obtains the property of another; or

- (b) obtains a benefit (whether for himself or herself or for another),

is guilty of a crime and is liable to the same punishment as if he or she had stolen the property or property of equivalent value to the benefit fraudulently obtained (as the case may be).

(1A) In subsection (1), "benefit" includes any advantage, right or entitlement.

(2) For the purposes of subsection (1), a person "obtains property" if he obtains ownership, possession or control of it and "obtains" includes obtaining for another and enabling another to obtain or retain.

(3)-(4) Omitted.

## **209. Definition of stealing and interpretation**

(1) In this Division –

"appropriates" means assumes the rights of the owner of the property and includes, where the person has come by the property without stealing it, any later assumption of a right to it by keeping or dealing with it as owner;

"depriving" means permanently depriving and appropriating or borrowing property without meaning the person to whom it belongs permanently to lose the property if the intention of the person appropriating or borrowing it is to treat the property as his own to dispose of (including to dispose of by lending or under a condition as to its return that he may not be able to perform) regardless of the rights of the person to whom it belongs;

"steals" means unlawfully appropriates property of another with the intention of depriving that person of it whether or not at the time of the appropriation the person appropriating the property was willing to pay for it, but does not include the appropriation of property by a person with the reasonable belief that such property has been lost and the owner thereof cannot be discovered.

(2)-(6) Omitted.

## **210. General punishment of stealing**

(1) Any person who steals is guilty of a crime and is liable, if no other punishment is provided, to imprisonment for 7 years.

(2) Omitted.

### **233. False accounting**

Any person who, with a view to gain for himself or another or with intent to deceive or cause loss to another –

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose or any similar purpose or for any financial transaction; or

(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document referred to in paragraph (a), that is or may be misleading, false or deceptive in a material particular,

is guilty of a crime and is liable to imprisonment for 7 years.

3. The sections of the Oaths Act relevant to this matter are set out hereunder, namely:

### **4. Definitions**

In this Act, unless the contrary intention appears –

.....

"declaration" means a statutory declaration or an unattested declaration;

### **23C. Form of statutory declaration**

(1) A statutory declaration may be in accordance with the form in Schedule 8 and shall –

(a) contain an acknowledgement that it is true in every particular and a statement to the effect that the person making a false declaration is guilty of an offence; and

(b) be signed by the person making it in the presence of a person who has attained the age of 18 years.

(2) Omitted.

### **23F. False statements in declarations**

A person shall not make a false statement in a statutory declaration or unattested declaration.

Penalty: \$2,000 or imprisonment for 12 months.

4. In summary, the evidence as it relates to each of the charges is that the defendant, who is the current Lord Mayor of the City of Darwin, receives various allowances connected with that office. The charges result from an alleged misuse of one of those allowances.
5. On 30 June 2006 and after enquiring of the unexpended balance of his allowances for that year, and with a view to fully expending those allowances, the defendant purchased a new refrigerator from The Good Guys, an electrical retailer, and arranged to have it delivered to his apartment at the Marrakai Apartments. On the same day the defendant also purchased eighteen gift voucher cards (collectively, "the vouchers"), each of the value of \$100.00. Six of these related to Big W, six related to Coles and six were GPT cards which are redeemable at any of the retailers at Casuarina Shopping Centre.
6. The purchases were made on the defendant's credit card and thereafter the defendant's personal assistant arranged for reimbursement. The total amount for reimbursement was \$2,758.00. Reimbursement occurred on 25 August 2006 by an electronic funds transfer.
7. The reimbursement occurred after a number of enquiries were made of the defendant by Mr Alan McGill, who was the CEO of the Council. Those enquiries were prompted by the unusual nature of the expenditure from an allowance which was ostensibly for entertainment and donations. In response to those enquiries, at various times the defendant said that the refrigerator had been donated. One response was in the form of a statutory declaration which confirmed the donation. That is the basis of the charge in

count 3. A similar response was also made to members of the Council's Economic and Development Committee ("the Committee"), a committee charged with the responsibility for validation of payments and expenditure by Council. The refrigerator was ultimately donated on 28 October 2006 and until then the prosecution alleges, and it is apparently admitted, that the defendant used the refrigerator as his own. That is the basis of the stealing charge in count 2 in so far as it relates to the refrigerator.

8. The vouchers were redeemed at various places and in most cases were redeemed for purchases of a personal expenditure for the defendant and his partner. That is the basis of the stealing charge in count 2 in so far as it relates to the vouchers. When requested to account for the vouchers the defendant provided a document to Mr McGill which suggested that the defendant had donated vouchers of a value of \$50.00 each to various organisations in Darwin. The prosecution alleges that the document contained false information and that is the basis of the charge in count 4.
9. The prosecution's first witness was Mr McGill. He attested to the respective amounts of the two relevant allowances of the defendant, namely the entertainment allowance and the donations and sponsorships allowance. Supporting documentation was tendered (Exhibit P1), being the minutes of the relevant meeting of the Darwin City Council ("the Council"). The amount fixed by the Council for the financial year ended 30 June 2006 for the entertainment allowance was \$10,600 and \$4,000 for donations and sponsorships. Each allowance had a unique identifying code for accounting purposes. The former was 120000/300/343 and the latter was 120000/300/320. He said that the defendant was entitled to the use of a Council credit card for expenditure for allowance purposes but that in lieu the defendant chose to use his own credit card and then to seek reimbursement. He said that the usual process for reimbursement was that a requisition with invoices would be submitted to him through Ms Wendy Ettridge, the defendant's personal assistant.

10. He confirmed that on the 3 July 2006, Ms Ettridge provided him with the reimbursement documents for the refrigerator and the vouchers. He identified the document and it was received in evidence as Exhibit P3. He said this was a standard Council form which indicated the necessary details for accounting purposes particularly the budgeting code to which the payment was to be applied. In this case that code recorded was that of the entertainment allowance.
11. Mr McGill said that he perused the documentation including the attached invoices. He said that he initially queried why a refrigerator was purchased with the defendant's allowance as that was unusual in his experience. He has extensive experience as CEO of municipal corporations having had spent the last 25 years of his working life in such a role at various Councils. He said that the defendant then told him that he planned to donate it to an organisation as a raffle prize. Armed with that information Mr McGill said that he thereupon approved the payment by signing the form and adding the notation "OK" and sent it on for processing. Despite that he said that he remained troubled by the nature of the expenditure and thought about it over the next day.
12. Given that concern he made further enquiries. Specifically he said that he contacted the supplier and learnt from them that the refrigerator had been delivered to Unit 3 at the Marrakai Apartments. He was aware that the defendant was then living at the Marrakai Apartments.
13. He said that on the 7 July 2006, without the defendant's approval or knowledge, he searched through the defendant's office hoping to locate the vouchers that the defendant had claimed reimbursement for. Much was said of the propriety of that action and the breach of privacy involved. Despite that, there was no challenge to admissibility of any evidence in consequence of that. In lieu, Mr Tippett was ultimately to submit that this was a relevant factor against which the lies, which the evidence subsequently revealed were



told by the defendant, should be assessed to determine whether they indicated a consciousness of guilt.

14. Mr McGill said that the search resulted in the location of six Big W cards and six GPT cards, each of a value of \$100.00, in one of the drawers of the defendant's desk. He noted the unique identifying number of each of the cards and took a photocopy of one of each type of card.
15. He said that he continued to have concerns about the matter and accordingly he consulted the Council's lawyer on 11 July 2006 for advice. He said that following that advice he withdrew the reimbursement claim from the payment process pending further investigation. The nature of the advice was that although the purchase of a refrigerator may not have been the type of expenditure contemplated by the allowance, nonetheless there was no breach of any rule or policy of the Council as long as the defendant nominated a charity. It was however advised that a register be set up in which details of all gifts and donations would be kept. Mr McGill said that he put the matter of the register up to Council and its establishment was approved and implemented on 11 July 2006.
16. He said that on the 17 July 2006 he again spoke to the defendant. Although he had searched the defendant's office and had also obtained legal advice about the reimbursement, none of that was disclosed to the defendant. Mr Tippett also ultimately submitted that this was also relevant in assessing whether the defendant's lies were evidence of a consciousness of guilt. Mr McGill said that the meeting was for the purpose of obtaining some further information concerning the relevant expenditure. He said that the defendant indicated an intention to donate the refrigerator to a charitable organisation and that the defendant had confirmed that the refrigerator had been delivered to his home. Mr McGill said that he asked the defendant to notify him when he disposed of the refrigerator and to provide him with details of that disposal. According to the legal advice which Mr McGill had received, his

enquiries could justifiably have stopped there. However, he continued. This was also relied upon as setting the relevant context for the purposes of assessing whether the defendant had a consciousness of guilt when lying about the disposal of the refrigerator and the vouchers.

17. Mr McGill said that as the defendant had not been present at the Council meeting of 11 July 2006 when the Council resolved to set up the register suggested by Council's lawyer, he then informed the defendant of that resolution and specifically that details of donations were required to be entered into that register.
18. Mr McGill gave evidence of a number of other conversations he had with the defendant regarding the refrigerator. He said that on or about 16 August 2006 he was told by the defendant that it had been donated to St Vincent de Paul. Mr McGill was quite certain of this and gave a reason for recalling the actual organisation, namely that Mr Adamson had joked about giving to "one of his lot" i.e., a catholic organisation. The defendant was later to admit the effect of this conversation and that the information he gave to Mr McGill was untrue.
19. Again, despite the legal advice he had received, despite that he had all the information he then apparently needed according to that advice, (albeit that unbeknown to him the information he had been given was untrue) and that he could then justifiably have finalised his enquiries, thereafter Mr McGill says that he spoke to Mr Colin Burden at St Vincent de Paul who told him that no refrigerator had been donated. Thereafter on 23 August 2006, during another discussion with the defendant, Mr McGill informed the defendant of his discussions with Mr Burden and reiterated that he needed to know where it was and that he could not authorise payment without that knowledge. Mr McGill indicated to the defendant that he would accept a statutory declaration specifying that information and gave the defendant a blank form of statutory declaration for that purpose. Mr Tippett was later to submit that

Mr McGill was just adding requirements, which were not necessary given the available legal advice. He also relied on this as setting the context against which the defendant's lies were to be assessed. However that puts too much emphasis on the legal advice and does not have proper regard for Mr McGill's overriding obligation. I do not consider Mr McGill's requests to be as obviously unnecessary and as being driven by extrinsic factors as Mr Tippett suggested. This is because, despite the legal advice which Mr McGill had received, he continued to receive contradictory information.

20. He said that the following day, Ms Ettridge brought in the statutory declaration. It was apparently signed by defendant but not witnessed. He said that he then told Ms Ettridge to refer it back to the defendant to have it witnessed. It was put to him in cross-examination that he in fact directed Ms Ettridge to witness the document there and then. He was quite certain that that was not the case. However, that is exactly what Ms Ettridge said occurred when she later gave evidence. Leaving that aside for the moment, Mr McGill said that ultimately the statutory declaration was provided to him properly signed and witnessed by Ms Ettridge and he therefore processed the reimbursement. That statutory declaration was tendered as Exhibit P4. It purports to declare that the defendant actually donated the refrigerator to the St Vincent de Paul Society, not that he intended to do so at some unspecified future time. Mr McGill said that he attached that declaration to the other reimbursement claim documents (being Exhibit P3) and again authorised the reimbursement.
21. He then said that he emailed the defendant advising of the reimbursement and seeking clarification in respect of the vouchers. This email was put in evidence as Exhibit P5. It is dated 25 August 2006.
22. The reimbursement proceeded and records in support were tendered as Exhibits P6 and P7. These are unchallenged and they satisfactorily establish that reimbursement occurred on 25 August 2006 when the sum of \$2,758.00

was paid out of the Council's bank account and the corresponding amount was credited to a bank account of the defendant by electronic funds transfer.

23. Sometime then elapsed between the next relevant events which were on Monday 13 October 2006. Despite having authorised the reimbursement some two months before based on the statutory declaration, (albeit that information regarding disposal of the vouchers were still outstanding), Mr McGill said that he again contacted St Vincent de Paul and again spoke to Mr Burden who again told him that St Vincent de Paul had no knowledge of the donation of a refrigerator and he provided a letter confirming that. That letter was subsequently tendered as Exhibit P8.
24. Mr McGill said that he then referred the matter to the Council's Corporate and Economic Development Committee ("the Committee") at its meeting on 24 October 2006. Mr McGill described the role of that Committee. He said that it is established under the Local Government Act and Regulations and that Committee is required to review and verify the Council's expenditure. It seems therefore that the Committee revisits payments made by Council and if that is the case, for that purpose, I would have thought that Mr McGill as CEO had some ongoing obligations to enquire and report on suspect payments, notwithstanding that the defendant had given him a statutory declaration. After all the statutory declaration, like other verbal statements made by the defendant, was at odds with other available information. Mr McGill said that he had alerted the defendant, ahead of that meeting, that the reimbursement was to be discussed. Mr McGill said that as the defendant would not be in attendance at that meeting, he told Mr McGill that if any further information was required of him they could ask him. Mr McGill said that the defendant then confirmed to him that the refrigerator had been delivered to St Vincent de Paul and that at that time the defendant specifically named the branch of the organisation, (albeit that he could not recall the name when he gave evidence), and its location, which was in

Coconut Grove. This information, later confirmed to be a lie, was at odds with information Mr McGill had obtained from Mr Burden.

25. The Committee discussed the matter at the aforesaid meeting and adjourned to the next day to enable the defendant to attend. Mr McGill said that Ms Moir, the Chairperson of the Committee, met with the defendant in advance of the meeting. Later evidence from Ms Moir and other Aldermen present went into the detail of the discussions there. Ultimately the matter was left until November to resolve given that the defendant was then shortly due to travel overseas until that time.
26. Next, on 26 October 2006, Mr McGill said that he met with the defendant on a number of occasions over a period of time between that day and the following day. On one of those days, which is probably on the 27 October 2006, he says that the defendant said that the “penny had dropped” after he thought of the involvement of The Good Guys. Mr McGill had previously mentioned to the defendant that the refrigerator in question had been purchased at The Good Guys. Mr McGill says that the defendant then told him that he had been erroneously referring to the wrong refrigerator and that he had inadvertently claimed for his own refrigerator, claiming he had purchased another one, and it was that other refrigerator which was donated. That is a most unlikely mistake in my view given the circumstances i.e., that he specifically went out on the last day of the financial year to expend the balance of his budget and that he initiated his reimbursement that same day.
27. It also appears that the defendant volunteered this information. Other than the ongoing context of whatever workplace tensions existed between the defendant and Mr McGill, it cannot be said that this lie arose out of anger or resentment as might be claimed in relation to previous lies. It is clearly untrue and the circumstances lead to no other conclusion that it was said defensively and in an attempt to cover up or favourably explain previous versions inconsistent with the growing contrary evidence. I accept that this

was a lie as I accept Mr McGill's evidence in relation to this for the reasons given hereunder. Coupled with evidence that there were no other purchases of a refrigerator by the defendant within the relevant time span, and the evidence of Mr Burden that the defendant had never donated a refrigerator to St Vincent de Paul, this amounts to strong evidence that the lie was probative of guilt.

28. At a second meeting on the same day at which Alderman Lambert was present, the defendant said that Alderman Lambert had very bluntly told the defendant that the refrigerator had to be located as a matter of priority and the donation was to be completed. According to the defendant's evidence later, this was a supposedly different environment than the occasions when he had lied to Mr McGill and to the Committee. That is difficult to fathom objectively. Other than a different person being involved, Alderman Lambert seems to have been quite blunt and forthright, at the very least no less than Mr McGill and the Committee members at other times. Mr McGill claims that Alderman Lambert told the defendant that he (Mr McGill) as the CEO had to know those details for accounting purposes. Mr McGill said that the meeting ended with a commitment from the defendant that the refrigerator would be dealt with. He said that arrangements were made that Mr McGill would be provided with the details of its disposal and an opportunity to view the refrigerator.
29. Mr McGill says that he was telephoned by the defendant on Saturday 28 October 2006 saying that the refrigerator was at the Dili Timorese Sunrise Centre at Nightcliff. Mr McGill said he that he drove there, observed the refrigerator and noted the serial number. He returned the next day to photograph the unit and to also examine it. He said that he noted dampness in the freezer compartment.
30. Mr McGill said that he then spoke to the defendant on the Sunday and the defendant attended at his office. Mr McGill said that he informed the

defendant that he was still concerned about the vouchers and again asked for information as to whom they were donated to. There was nothing said here about the context, presumably reliance is had on the previous instances as a continuous situation of apparent workplace tension. It is also worth noting that, accepting Mr McGill's evidence that he had requested details of disposal of the vouchers at the time that he authorised reimbursement, that information had not been provided in over two months.

31. Apparently thereafter, as the appropriate minutes tendered as Exhibit P11 show, the matter then went to the full Council meeting on 31 October 2006 where the Council resolved that the CEO refer the matter to the appropriate authorities for investigation. Mr McGill said that he commenced that process on 1 November 2006. He said that he had telephoned the defendant, who was then in Singapore, on the night of the Council meeting to advise him of the Council resolution. Mr Tippett also referred to this as setting the contextual framework against which the defendant's lies were to be assessed. I cannot see how that could possibly be on the evidence as it was presented, unless perhaps he is suggesting that Mr McGill was gloating, but the evidence does not support such a finding. He said there was a further discussion between him and the defendant on 9 November 2006. There was no discussion regarding the refrigerator. There was discussion of the vouchers and of Mr McGill's need to know where they were so that the information could go into the register.
32. Next, Mr McGill said that he was given a document titled "Acquittal of Gift Cards". It was tendered in evidence as Exhibit P12. It was provided to him by Ms Ettridge. It related to \$50.00 vouchers. Mr McGill said that next morning, he emailed the defendant concerning that and seeking clarification as to how they were converted to \$50.00 vouchers. He received an email in reply but that was not illuminating. Both emails were tendered in evidence as Exhibit P13.

33. Cross-examination of Mr McGill in part initially focussed on possible tension between him and the defendant in their respective roles. Some cross-examination concerned the results of his annual performance review and some suggestion, denied by Mr McGill, regarding various criticisms of his management style. Mr McGill largely disagreed with what was put specifically concerning the results of that review. There was no other evidence produced regarding the review such as the actual review (I expect that some written record of it exists), memos, letters, notes and the like so I have little available to assist me in objectively resolving this disagreement on the evidence. Leaving that aside for the moment, as well as how that impacts on the contextual framework against which to assess the defendant's lies, I cannot see how that can impact on Mr McGill's credibility in relation to this matter. It is one thing for there to be workplace tension, it is another thing for that to translate to the lack of bona fides implicit in the questioning. The review was apparently in the previous year and I had no evidence that there was any adverse impact on Mr McGill's continuing employment as CEO as a result. I can only conclude as a result that the review was not as significant an issue as the defence suggests. It is indeed a long bow to draw to suggest that Mr McGill's evidence might be tainted deliberately or exaggerated to the detriment of the defendant due to that. Moreover, that simply was not the impression that I formed of Mr McGill. I was quite impressed with his evidence overall particularly the spontaneity of his answers. This is especially so given the existence of objective evidence which supports and confirms much of the specifics of his evidence. In the circumstances it is inconceivable that any possible workplace tension or sensitivity regarding workplace criticism could translate to any manufacturing or tailoring of evidence to implicate the defendant with that motive.
34. Mr McGill confirmed in cross-examination that as at 3 July 2006 (the date that the defendant submitted his claim for reimbursement) there was no



obligation on the defendant to notify or record specific details of any donations that he made. Mr McGill however did make the point that notwithstanding that, he had the obligation to ensure that all expenditure of the Council was properly accounted for and for verification of all payments. This is true and it is correct and quite significant in my view. It is also very relevant in terms of the role of the Committee.

35. Mr McGill also confirmed that there was no time limit for the defendant to complete a donation. He conceded that essentially a donation could be made at any time during the financial year. How this ties in with the evidence that the vouchers and the refrigerator were purchased on the last day of the financial year is unclear. How the subsequent creation of a register of donations in one financial year impacts on items purchased in the one financial year for donation in a subsequent financial year is also unclear.
36. I think it is necessary to put the Council's legal advice into perspective. That advice was concerned with due diligence from an accounting perspective. The advice was in relation to the verification of payments and to that extent can only have a peripheral impact on the matter before the Court. The advice is not binding law. It sets a framework by which the Council was to approach the matter. There was flexibility in it. I think that accounts for why Mr McGill sought the statutory declaration despite the advice i.e., because he had an ongoing obligation to verify the payment and as he had conflicting information. Whether the defendant had a full year to make donations is peripheral. What I consider relevant from the point of view of the criminal charges is the intention of the defendant determined from the available direct evidence and inferences which can be drawn from the available evidence.
37. There was little controversy regarding the remainder of Mr McGill's cross examination. The only really contentious point was in relation to the witnessing of the statutory declaration. Mr McGill was both insistent and

certain that he did not request Ms Ettridge to witness the document on the spot. She was later to say in her evidence that that was precisely what occurred. Clearly both cannot be correct. As with a number of other similar aspects of the evidence, this was dealt with peripherally and I really have no basis on which to make a finding, particularly as I have no other basis to assess the comparative credibility of either Mr McGill or Ms Ettridge. Frankly I would have difficulty in making an adverse finding about the credibility of either as both impressed me.

38. Mr McGill was also questioned regarding the ownership of the refrigerator and the time that its ownership passed to Council. That is essentially a question of law which Mr McGill nonetheless chose to answer. He agreed that the refrigerator did not have to go on the register until it became Council property. That is not consistent with the evidence of the purpose of the register which was essentially a recording of donations, not a register of Council assets. In any event, Mr McGill seems to contemplate that the refrigerator was the property of the defendant until he received reimbursement. I am not convinced that this is correct as the evidence reveals that it was purchased for Council purposes. The defendant made it clear from the outset that he was purchasing it for the purpose of donation. It is also clear from his actions in first checking the available balance and then in submitting a claim for reimbursement immediately after that he had a full expectation of receiving reimbursement, notwithstanding his initial coy response when asked about this in cross examination. It seems to me therefore that all he did was to purchase the refrigerator as agent of the Council, reimbursement being an entirely separate issue. It is a question of law and in my view the refrigerator and the vouchers were the Council's property on 30 June 2006. That does not necessarily materially alter things given the relevance of that to a charge of stealing based not on permanent deprivation but on the basis of dealing as if the stolen property was his own. What is relevant here is the intention of the defendant as to how he was to

deal with the property. Bearing in mind that the defences of authorisation and claim of right have been raised, what is relevant I think is that it was the defendant's belief that the property remained his until reimbursement, a view apparently shared by Mr McGill.

39. Ms Wendy Ettridge was the second witness called by the prosecution. She said that on the 30 June 2006 the defendant asked her to ascertain the unspent balance of his allowances. Ms Ettridge says that she checked and informed the defendant that the entertainment allowance had approximately \$2,600.00 left and the donations and sponsorships allowance was already overspent by the sum of \$800.00. Ms Ettridge says that the defendant thereupon indicated that he intended to go to Casuarina to spend the available balance. She says that he returned later that day and gave her invoices for the vouchers and for the refrigerator. She was asked to process them for reimbursement. The items had been purchased utilising two of the defendant's credit cards. Ms Ettridge says that she prepared the paperwork to arrange for reimbursement and later submitted that to Mr McGill for approval.
40. She added that on 22 November 2006 she was present when police officers executed a search warrant at the defendant's office at the Darwin City Council. She confirmed that on that occasion the police seized a shoe box and a Darth Vader mask. She said that both items had been on the floor behind the defendant's desk. Although she was able to say that she had seen both items there before that day, she could not recall when. She said that she never discussed those items with the defendant. She was not cross examined about any knowledge of the actual or intended use of the mask by the defendant. I note that the defendant was later to say in his evidence that the mask was purchased to use during visits by groups of school children. Query whether that is an allowable expenditure within the terms of the appropriate allowance in any event. The physical items were produced and

Ms Ettridge was able identify them and they were tendered by consent at that stage.

41. Ms Ettridge also confirmed that the defendant kept a diary at Darwin City Council. It is in electronic form and she had access to it. She said that the defendant's official appointments are noted therein. She confirmed that on the 11 May 2007 she printed out the diary entries covering the period 30 June 2006 to 28 November 2006. She identified those extracts which were tendered in evidence as Exhibit P18.
42. Ms Keryl Moir was next called by the prosecution. She has been an Alderman at Darwin City Council since 1992. She is on a number of Committees at the Council and is presently the Chairperson of the Corporate and Economic Development Committee. She confirmed that the Committee meets monthly and reviews all cheques and payments made by Council in compliance with the requirements of the Local Government Act and Regulations.
43. She confirmed that she was briefed by Mr McGill regarding the defendant's claim for reimbursement for the refrigerator and vouchers in the sum of \$2,758.00. She said that the Committee considered that item at its meeting on 24 October 2006. She said that on that occasion both the defendant and the CEO were absent and the matter was adjourned to the following day with an invitation extended to the defendant to attend.
44. She said that before the meeting, she, Alderman Collins and Alderman Mitchell met informally with the defendant. She described the discussions and events which occurred at that meeting. She had prepared an introductory speech setting out the background to the matter. She said that she read it through at the start of the meeting. She summarised the content of that speech namely:

- She referred to various sections of the Act and Regulations setting out accounting requirements.
- She referred to items from official Council minutes, specifically those that set the Lord Mayoral allowances.
- She noted a statutory declaration apparently completed by the defendant.
- She noted apparent contrary written evidence from St Vincent de Paul.
- She noted that the items in question were Council assets.
- She pointed out that the Council maintained a register and those items should have been recorded thereon.

45. She said that the defendant said that the matters were his own business because he had purchased the items before 11 July 2006, which more than coincidentally is the date that the Council resolved to set up the donations register. She claims that the defendant also said that the two allowances were his own to deal with as he pleased. If that is correct reported, then that is a rather extraordinary thing to say given that he was dealing with public funds. She said that she challenged him about this by reference to the description of the allowable expenditure in the minutes where those allowances were created.

46. She said that the informal meeting flowed into the formal Committee meeting when Mr Crawley, the Director of the Finance Department, and Mr McGill entered. Ms Moir said that she again repeated her background speech, albeit in summary form only. She said that she asked the defendant questions concerning the refrigerator specifically, when he donated it, how it was taken there, then from whom he hired the trailer used for that purpose

and to whom he delivered the refrigerator. She claims that the defendant indicated that he could not recall all those details.

47. She said that she then informed the defendant of the letter from St Vincent de Paul refuting any donation of a refrigerator. It is not clear whether she simply referred to the letter or produced it. She claims however that the defendant became agitated at that time saying that he had not known of the existence of that letter. She said that the defendant claimed that he did not think he needed to account for the refrigerator, again a rather extraordinary comment given the purpose of his allowance and the role of that Committee.
48. Ms Moir then added that she decided to refer the matter to the next full Council meeting which was scheduled to be on 31 October 2006. She said that the defendant asked for more time to enable him to make more enquiries and to give better information as he was to be away at that time. She said that the Committee meeting was adjourned for that purpose although the placement of the item on the agenda for the Council meeting of 31 October 2006 stood.
49. In cross-examination Ms Moir indicated that she was aware that the Council's lawyer had been consulted about the matter but was not aware when this had occurred. She was cross-examined about the atmosphere at the meetings on 25 October 2006 and she agreed that they were heated and unruly. That, as well as the apparent secrecy regarding the possession of the letter from St Vincent de Paul, it was submitted, contributed to the contextual framework for the purposes of assessing whether the defendant's lies were probative of guilt.
50. Suggestions were made that Ms Moir had some issues with the defendant and that she and the defendant did not get on. Again this was put up as relevant background for assessing whether the defendant's lies were probative of guilt. Although she would not concede that, there is at the least clear tension between the two. Specific allegations were put directed at

establishing animosity by her towards the defendant. She specifically denied the suggestion that the defendant had spoken to her about her behaviour in Council meetings at least to the extent that it was an issue. She minimised the effect of that by saying that she also spoke to the defendant about his behaviour at meetings.

51. She specifically denied being taken to task to by the defendant for alleged excessive consumption of alcohol during dinner breaks at Council meetings. She conceded that at times she turns her chair away from the defendant in Council meetings and mutters under her breath. She says that she has done this on occasion, but not always, and she said that other members of the Council do likewise. To the extent that it is relevant, I cannot reconcile these two opposites on the evidence as presented. If anything I would say that both contribute to the situation but more importantly I am not prepared to find that Ms Moir is either untruthful or so adverse to the defendant that she would fabricate or exaggerate her evidence against him. Save to that extent, the matter remains unresolvable by me on the available material. It confirms however the tension which existed and this remains relevant to the assessment of whether the defendant's lies were probative of guilt.
52. Lastly, in respect of the register set up by Council following the meeting of 11 July 2006, she said that she had never seen the register. Oddly however Alderman Jan Collins, another member of the Committee was later to tell me that the register was on the agenda for the Committee meeting every month since the register was set up, which she said that was from June 2006, but that is clearly the wrong date. Alderman Collins however said that the Committee specifically considers items in the register every month. Despite this conflicting evidence regarding the register, what has been satisfactorily established by official records is the existence and purpose of the register.
53. Alderman Alan Mitchell was next called to give evidence. He is also a member of the Committee and has been an Alderman at Darwin City Council

since 2004. He confirmed that he was present at both the informal meeting and the formal Committee meeting held on 25 October 2006. He made notes of discussions at the meeting and he was permitted to refresh his memory from those notes.

54. He confirmed that Alderman Moir asked the defendant to account for the refrigerator and the vouchers. He said that the defendant replied that no refrigerator had been delivered to his home or to Marrakai Apartments and that it went to a family through St Vincent de Paul. He claims that the defendant said that he did not think that he could account for all of the vouchers. He said that the vouchers were spent at the end of the financial year but he did not keep good records and that he would struggle to account for those. That is curious given that the defendant was to say in his evidence that he kept computer notes of the donations and utilised those when he prepared the acquittal document (Exhibit P12), a document which purports to contain in part the very information the Committee was seeking from the defendant. He said that the defendant said that he thought it was sufficient that he had made a statutory declaration concerning the disposal of the refrigerator. This is curious also given that the defendant was later to say in evidence that he did not know that the statutory declaration had gone into circulation, something which I found to be untenable in any event.
55. Mr Mitchell confirmed that one meeting flowed into the next when Mr McGill and Mr Crawley entered. He said that Mr McGill indicated that he had a letter from St Vincent de Paul indicating that no refrigerator had been received. He said that the defendant again indicated that he would have difficulty verifying the disposal of the vouchers and indicated that he would get the name of the family to whom the refrigerator was ultimately delivered. The defendant had said that he hired a trailer to take the refrigerator and he indicated that he would check on the hire of the trailer to ascertain when he delivered the fridge.



56. In cross-examination Mr Mitchell would not agree that the meeting was unruly and specifically he disputed that there was any yelling. Although he was willing to confirm raised voices, he said that was typical of Council meetings. He did agree that there were differences and tension between the defendant and Ms Moir at the meeting.
57. Alderman Jan Collins was next called to give evidence. She is a long standing Alderman at Darwin City Council (since 1987) and is on a number of committees including the Committee.
58. She confirmed that the Committee met on 25 October 2006. Her recollection was that it was a tense meeting. She said that the defendant was questioned regarding the whereabouts of the refrigerator. Her recollection is that the defendant said that he had taken it to St Vincent de Paul to donate to a needy family. In response to questions regarding the vouchers she recalled that the defendant said that he is often asked to donate things and he did not keep a record of any of the details.
59. Although she was aware that Mr McGill had consulted the Council lawyers regarding the matter, she was not aware of the nature of the advice received. Lastly she described how, contrary to the evidence of Ms Moir, the Committee has considered the donations register previously referred to.
60. Alderman Gary Lambert was then called. He was a member of the Committee in 2006. He confirmed that he met with the defendant and Mr McGill on 27 October 2006. Mr McGill had earlier said in his evidence that at this meeting Mr Lambert bluntly told the defendant to complete the donation and put an end to the matter. Mr Lambert confirmed this. Specifically he confirmed that the effect of what he said was “...*if you intend to donate the fridge do so as soon as possible and let’s put an end to it...*”. He said that the defendant did not really respond to this nor was he given much of an opportunity to respond. Given that last comment it is rather odd that the defendant was later to say that this supposedly different

approach by Alderman Lambert was the reason that he finally complied. The suggested different atmosphere here was also later submitted to warrant that new found compliance by the defendant. My impression however is that Alderman Lambert did no more than Mr McGill or the Committee members had done in the lead up and certainly in a no less favourable atmosphere.

61. In the end much evidence was not in dispute and was the subject of tendered statements and exhibits tendered by consent. In summary form the effect of that evidence is as follows:-

- The defendant holds a Diners Club Account No 367 381109 5006 and a Mastercard Account No 5163 2010 3041 9051.
- An LG432 litre 2 door refrigerator was purchased by a person from The Good Guys at Milner on 30 June 2006 for a purchase price of \$949.00 including delivery. Payment was made utilising the defendant's Diners Card. Instructions were given for the refrigerator to be delivered to Marrakai Apartments.
- On 1 July 2006 the refrigerator was delivered to Unit 3 at Marrakai Apartments. The defendant was present at the time of deliver and he requested the delivery man to unpack the refrigerator and put it into the fridge cavity in Unit 3. The delivery man did so and advised the defendant to leave the fridge sitting for one hour before switching it on to ensure that the gas settled.
- Prior to 1 July 2006 Unit 3 and the Marrakai Apartments holiday letting business were owned, occupied and operated by, as the case may be, Colmcard Pty Ltd, the manager being Ms Helen Bain.
- As of 1 July 2006 Colmcard Pty Ltd sold that business to Lea Lea Pty Ltd and the occupancy rights to Unit 3 were included as part of that sale arrangement.

- As from 28 April 2006 and continuing Lea Lea Pty Ltd had two shareholders, namely the defendant and his fiancée Leanne Meharry.
- Ms Bain left Unit 3 in June of 2006 and at the time she vacated the unit it was empty and contained no furniture and particularly there was no refrigerator.
- Six distinctly numbered GPT vouchers were purchased by the defendant on his Mastercard on 30 June 2006. Each had a face value of \$100.00. Those vouchers were redeemed at Casuarina Shopping Centre as follows:-

Card 1: \$25.00 at Supre on 23 July 2006, \$11.20 at Jamaica Blue on 23 July 2006 and \$49.99 at Roger David on 3 September 2006.

Card 2: \$100.00 at Priceline on 15 July 2006.

Card 3: \$38.45 at Price Attack, \$14.64 at Priceline and \$9.95 at Sportsgirl, all on 15 July 2006.

Card 4: \$29.95 at Williams the Shoeman and \$31.96 at Kleins, both on 29 July 2006.

Card 5: \$99.95 at Williams the Shoeman on 23 July 2006.

Card 6: This card has not been redeemed at all as at 23 November 2006.

- The purchase using the GPT voucher at Roger David on 3 September 2006 in the sum of \$49.99 related to a shirt of the same, colour, brand and size as one seized at the defendant's apartment on 22 November 2006.
- Goods matching those purchased using one of the GPT vouchers at Priceline on 15 July 006 were seen and/or seized at the defendant's apartment on 22 November 2006.

- The purchase using the GPT voucher at Supre on 23 July 2006 in the sum of \$25.00 related to a pair of ladies pants matching those seized at the defendant's apartment on 22 November 2006.
- Goods matching those purchased using one of the GPT vouchers at Price Attack on 15 July 006 were seen and/or seized at the defendant's apartment on 22 November 2006.
- The purchase using the GPT voucher at Williams the Shoeman on 23 July 2006 in the sum of \$99.95 related to a pair of shoes of the type and with the same barcode as the shoebox seized at the defendant's office at Darwin City Council on 22 November 2006.
- The purchase using the GPT voucher at Sportsgirl on 15 July 2006 in the sum of \$9.95 related to a headband which matched a headband seized at the defendant's apartment on 22 November 2006.
- The defendant's Diners card was used to purchase six Coles gift vouchers on 30 June 2006. Each had a face value of \$100.00. Those vouchers were redeemed as follows:-

Card 1 was redeemed for its full face value at Target Palmerston on 20 August 2006.

Card 2 was redeemed to the extent of \$44.49 at Liquorland Darwin.

Card 3 was redeemed to the extent of \$11.59 at Bilo Casuarina on 5 September 2006 and further as to \$27.68 at Coles Darwin on 7 September 2006 and further as to \$53.64 at Coles Darwin on 8 September 2006.

Card 4 was redeemed to the extent of \$24.04 at Bilo Casuarina on 1 August 2006 and further as to \$55.00 at Liquorland Wynnum Queensland on 4 August 2006 and further as to \$20.89 at Liquorland Wynnum Queensland on 12 September 2006.

Card 5 was redeemed to the value of \$39.90 at Target Palmerston on 25 August 2006.

Card 6 was redeemed at Bilo Casuarina to the extent of \$34.00 on 17 August 2006, and further as to \$39.80 23 August 2006 and further as to \$26.20 on 30 August 2006.

- The purchases using the voucher at Target Palmerston on 20 August 2006 related to items of female underwear and a pair of ladies black Anthea shoes matching those seen and/or seized at the defendant's apartment on 22 November 2006.
- The defendant's Diners card was used to purchase six Big W gift vouchers on 30 June 2006. Each had a face value of \$100.00. Those vouchers were redeemed as follows:-

On 14 July 2006 one of the Big W vouchers was used to purchase a universal remote control from Dick Smith at Casuarina.

On 23 July 2006 one of the Big W vouchers was used to purchase Frasier and Mash DVDs from Big W.

On 22 August 2006 two more Big W vouchers were redeemed and used to purchase a punching bag, some hand wraps and a Star Wars Darth Vader mask.

- On 2 August 2006 the defendant travelled to Brisbane for Council business. During the course of that trip, one of the Coles vouchers was used at Liquorland Wynnum on 4 August 2006. It was again used at the same store on 12 September 2006.
- A search of the defendant's apartment on 22 November 2006 resulted in the seizure of one GPT voucher and covers for two other GPT vouchers in addition to the items hereinbefore referred to.

- The shoe box for the men's black shoes purchased from Williams was seized by police during the search of the defendant's office at Darwin City Council on 22 November 2006.
- Another search of the defendant's apartment effected on 20 December 2006 resulted in the seizure of the Frasier and Mash DVDs, the punching bag and the Anthea ladies shoes.
- The defendant attended functions of the various organisations named below and on the specified dates. The defendant was invited to attend various functions but was not seen by persons involved in the management of those organisations to give away any vouchers. The organisations were Seniors Bingo on 18 August 2006, Seniors Ballroom Dancing on 20 August 2006, Seniors Quiz at Karama Library on 25 August 2006, Darwin Fiji Association on 7 October 2006, Indian Diwlai Association on 4 November 2006, and Darwin Senior Citizens in August 2006.
- The defendant gave out four \$50.00 gift vouchers to the Darwin Senior Citizens on 4 December 2006.
- On 28 October 2006 the defendant took the refrigerator to the East Timorese store in Nightcliff and donated the refrigerator to them.
- In the months of June and July 2006, and other than for the subject LG refrigerator, no other sales of a refrigerator to either the defendant or to Leanne Meharry or to Lea Lea Pty Ltd were made by any of the major electrical retailers in Darwin.
- Other than the subject refrigerator, the records relating to the defendant's credit cards do not show a purchase of a refrigerator between May and October 2006.

- None of the \$100.00 gift vouchers had been converted to \$50.00 gift vouchers.
  - St Vincent de Paul has never sought nor received a refrigerator from the defendant as a donation.
62. The prosecution then closed its case. Extensive and detailed no case submissions were then made on behalf of the defendant. At the conclusion of the submissions I ruled that the defendant had no case to answer on counts 1 and 3 indicating that I would give reasons subsequently. I now do so.
63. The no case submission related to each charge and was made both on a prima facie basis as well as an all encompassing submission based on R v Prasad (1979) 23 SASR 161.
64. In relation to the charge of obtaining the property of another by deception in count 1, Mr Tippett's submission had three limbs. He commenced by summarising the elements of the offence, i.e., that there is a deception and that the defendant has obtained the property of another (in this case the property of Darwin City Council) as a result of that deception. He also pointed out that the prosecution, in particularising the charge, relied upon the statutory declaration (Exhibit P4) as the document containing the deception which has caused the Darwin City Council, via its CEO, to part with the property. That was acknowledged by Mr Karczewski in his opening.
65. Mr Tippett submitted that, as the statutory declaration is a very specific particular document of particular formality and effect, the prosecution must establish a valid statutory declaration to prove the deception. Moreover as the relevant document is not a valid statutory declaration due to non compliance with the requirements of the Oaths Act, no deception can be established.

66. I should note at this point that I agree, for the reasons set out below in relation to count three, that document which is Exhibit P4 is not a valid statutory declaration. Despite that I cannot agree with the effect of Mr Tippett's submission. Effectively his submission is that the prosecution relies on the nature of the statutory declaration i.e., its status. However I am of the view that the reference to a statutory declaration is merely descriptive, albeit a technically deficient description. It is the content of the document that is important, not its status. It can contain a deception irrespective of its status in law. The prosecution could simply have particularized the charge being based on a document in writing signed by the defendant and bearing a specific date. That would sufficiently identify the document irrespective of whether it is properly characterised as a statutory declaration or an unattested declaration for the purposes of the Oaths Act. In view of this it is not necessary to consider the effect of both Mr McGill and the defendant acting on it as if it were a valid statutory declaration. Mr McGill acted on it by approving payment upon its receipt. The defendant certainly held it out as valid by uttering it on a number of occasions specifically his plea that he thought the statutory declaration should have been accepted as sufficient.
67. The second limb of Mr Tippett's submission relies on the reference in the statutory declaration to the refrigerator and not the vouchers and the connection with the apparent payment of the sum of \$2,758.00, that amount being the particularised value of the property obtained. In his submission, and correctly in my view, there has to be causal connection or nexus between the deception and the transfer of the funds. He submitted that that is absent in this case and consequently the charge must fail.
68. That however ignores the totality of the evidence. It must be recalled that the claim for reimbursement started with the documents comprised within Exhibit P3. At that time queries were only raised in relation to the refrigerator because of the unusual nature of that item. For that reason the



defendant provided the statutory declaration in relation to the refrigerator only. This explains the absence of any reference therein to the vouchers. The evidence reveals that that statutory declaration was then attached by Mr McGill to the remaining documents that form Exhibit P3 and he approved payment of the whole amount claimed for reimbursement in Exhibit P3 based on that statutory declaration. The evidence goes on to reveal that in the interim in any event, and notwithstanding the payment, Mr McGill required further clarification regarding to the vouchers for accounting purposes. Moreover, the Committee had a role to review and ratify payments notwithstanding that payment had occurred.

69. Mr Tippett further submitted that there was an absence of evidence from Mr McGill to say that the words used in the statutory declaration caused him to approve the payment over the money. Whether he specifically said that or not I cannot recall, however his evidence is clear that on receipt of the statutory declaration he then immediately approved the payment and in fact asked the finance department to arrange for a prompt payment given the delay to that point. The effect of the statutory declaration on him is readily able to be inferred from that evidence.
70. The third limb of the submission relates to the nature of the property obtained. At the start of the case the prosecution sort to amend the charge, with no objection from Mr Tippett, to specify that the property for the purposes of the charge was a chose in action. Specifically this relates to the transfer of the funds by electronic bank transfer from the Darwin City Council bank account to the defendant's bank account.
71. In essence Mr Tippett's submission is that although a chose in action clearly comes within the definition of property for the purposes of section 233 of the Code, the transfer by electronic funds transfer and the effect of that under Australian banking law means that no property of another has been acquired. This is a very technical argument but a valid argument

nonetheless. Specifically the argument runs that the funds in the Darwin City Council account prior to the transfer are a chose in action i.e., specifically a debt owed to the Darwin City Council by its bankers. When an electronic funds transfer occurs then the Darwin City Council essentially calls in the part of the debt represented by the amount to be transferred and requests its bank to transfer that amount to another separate account. When that occurs the credit placed into that separate account creates a new chose in action i.e., in this case a debt owed to the defendant by his bankers coincidentally for the same amount. Accordingly there is no acquiring of the property of another because what occurs is not the transfer of a chose in action, (technically in law it is an assignment and not a transfer) but instead the extinguishment of one chose in action and the creation of another.

72. Mr Tippett based his argument on the House of Lords decision in *R v Preddy* [1996] 3 All ER 481. He pointed out that the High Court considered *Preddy* in *R v Parsons* (1999) 195 CLR 619. *Preddy* was a case concerning a charge of obtaining property by deception, but under English law. For the purposes of the argument, there is little material difference in the wording of the offence in England and the current charge. As in the present case, the charge in *Preddy* concerned the obtaining of property, being money in the form of a chose in action, via an electronic funds transfer. *Parsons* dealt with a similar charge albeit the property obtained was money but through the medium of cheques, not electronic funds transfer. Some obiter comments were made in *Preddy* as to how the matter may have differed if it involved the use of cheques in lieu of electronic funds transfer. Although *Parsons* did not follow *Preddy* in relation to cheques, the High Court did not address the issue of obtaining property by electronic funds transfer at all as that was not an issue in that case. Mr Tippett submitted that although *Parsons* rejected *Preddy* in so far as it applied to cheques (which was obiter dicta in any event), the effect of *Preddy* in relation to electronic funds transfer stands. Furthermore he submits that the High Court in *Parsons* overruled the obiter comments in

Preddy in relation to cheques based on the differences between Australian and English banking law.

73. That is quite a persuasive argument. In contrast however is the authority of the Queensland Court of Appeal in *R v Capewell* (1994) 74 A Crim R 228. That also dealt a chose in action but the charge was stealing. The charge arose out of the withdrawal of funds from an account which had funds credited thereto by electronic funds transfer from another account purely as a result of bank error. The process of credit by electronic funds transfer there was described as an “assignment” of a valid chose in action from the original account holder to the holder of the account to which the funds were transferred. On my reading of the case it was not material that the transfer was there effected innocently and by mistake nor does there appear to be any relevance that the charge in that case was stealing, as opposed to the obtaining by deception charge in the current case and in *Preddy*. Both cases are of strong persuasive authority. *Preddy* however was a detailed consideration of the law and the historical background. The description of the transaction as an “assignment” in *Capewell* was, by comparison, an off the cuff remark. Importantly it was an obiter comment as it was unnecessary for the purposes of decision on the matters in issue in that case. For these reasons I accept *Preddy* as representing the law on that point. It is also logical as it is not possible to transfer a chose in action by a funds transfer. The chose in action is the property of the transferor (the Darwin City Council in this case). It is not transferred in the ordinary sense. Certainly a transfer of funds occurs but that is the creation of a new chose in action, not a transfer of the Darwin City Council’s chose in action. Accordingly, there is no evidence that the defendant obtained the property of another and there is consequently no case to answer on count 1.
74. I am of the view that a charge under section 227(1)(b) of the Code i.e., obtaining a benefit by deception, could have been maintained given the definition of “benefit” in the Code. An amendment to count 1 was made on

the application of the prosecution and without objection, at the start of the hearing. That indicates that the prosecution had considered the appropriateness of the charge and made a conscious decision to proceed on that basis. It is not appropriate to consider any further amendment to the charge having regard to that and also to the stage which the matter has now reached and the prosecution has rightly chosen not to make a further application for leave to again amend the charge.

75. Count 2 alleges the offence of stealing specifically that the defendant stole the subject refrigerator and the eighteen vouchers referred to in the evidence. The submission relies on applicability of section 26(1)(d) of the Code, namely authorisation as a defence. That section relevantly provides that *an act, omission or event is authorized if it is done, made or caused pursuant to authority, permission or licence lawfully granted*. Mr Tippett correctly pointed out that where the defendant satisfies the evidentiary burden of raising any defence, then the prosecution has the burden of rebutting that defence beyond reasonable doubt. In essence his submission is that there is no evidence negating authorisation.
76. To understand the submission it is necessary to revisit the relevant evidence. The genesis of the charge is the allowance paid to the defendant as Lord Mayor. The Lord Mayor is given two separate allowances, one for donations and sponsorships and one for entertainment. On the 30 June 2006, after enquiring of his personal assistant as to the balance standing to the credit of those two items, he proceeded to purchase the subject refrigerator and the subject eighteen vouchers. He did so utilising his own credit cards. Thereafter on the same day he provided the appropriate documentation to his personal assistant and asked her to obtain reimbursement for the expenditure which totalled \$2,758.00. There is nothing untoward in the procedure and it appears that it commonly occurred in relation to the Lord Mayor's expenditure and clearly for practical reasons.

77. The evidence as to the conditions attached to the allowances and the manner as to how or when the allowances might be expended indicates that it is largely in the discretion of the Lord Mayor. Mr McGill, the CEO said, correctly in my view, that notwithstanding that discretion there is still the overriding obligation to properly account for the expenditure. However he confirms that, as long as the expenditure was for the purposes of the allowances, the defendant could expend the funds in any manner that he saw fit, whether as to amount, time or nature of items. In terms of time, the curiosity in the current case is that the expenditure occurred on the 30 June 2006 i.e., on the last day of the financial year.
78. The evidence reveals that after some queries regarding the expenditure, the defendant was reimbursed the amount of \$2,758.00 on 25 August 2006. Ultimately the defendant donated the refrigerator on 28 October 2006.
79. The no case submission is essentially that as there was no resolution of Council controlling how or when the defendant could spend the money or when he could make donations, the prosecution therefore has no evidence to negative section 26(1)(d) i.e., that the defendant was authorised in terms of that section.
80. The submission needs to be addressed in the context of the evidence in its totality. There is evidence which indicates that the defendant had the refrigerator delivered to his residence, that it was unpacked for use and that it was placed in the refrigerator cavity at that residence. There is also evidence that indicates that on numerous occasions the defendant has lied about the disposal of the refrigerator. He had said on a number of occasions that it had been donated to the St Vincent de Paul Society but the evidence from authorised persons at that organisation was to the contrary. When challenged about that the defendant initially maintained his deception but thereafter suggested that he may have confused that refrigerator with another one that he purchased. There is evidence which shows that no other

refrigerator was purchased by him in the relevant period. There is also evidence which establishes that the refrigerator was used prior to its ultimate donation, namely the evidence of Mr McGill that when he inspected the refrigerator at that location almost immediately after it was delivered there by the defendant, the freezer compartment was damp.

81. A no case submission, leaving aside Prasad considerations for the moment, necessarily requires determination as to whether there is any evidence which can support the charge. It is not an issue of the extent or weight of the evidence, simply whether actual admissible evidence exists. Evidence can be direct evidence or indirect evidence. In the case of indirect evidence the most favourable inference to the prosecution which can be drawn from the available direct evidence must be drawn for that purpose. Applying that principle then there is evidence which can support the charge specifically that the defendant has treated the refrigerator as his own. The available evidence is the initial placement of the refrigerator in his residence, his proximate claim for reimbursement, the evidence that it had been used and importantly the lies that he has told about its disposal. Inferences about his intention overall can also be drawn from the timing of the purchase of the refrigerator i.e., on the last day of the financial year and after he had checked with his personal assistant to ascertain the extent of funds left in his allowance to ascertain the extent of funds left in his allowance. Drawing the most favourable inferences available to the prosecution, there is evidence to negative authorisation.
82. In relation to the vouchers, Mr Tippett's submission is based on the character of these gift cards as fungibles. Mr Tippett's submission is that there is no appropriation because the defendant was allowed to make the donations and that the defendant had until the end of the financial year to account. Again, I note that these cards were purchased on the last day of the financial year. Mr Tippett relied on authorities traced from *R v Feeley* [1973] 1 All ER 341 to *R v Glenister* [1980] 2 NSWLR 597 through to the

High Court decision in *McLeod v R* (2003) 214 CLR 230. Essentially his argument is that the Code requires any appropriation of property for stealing purposes to be unlawful and that includes without authority. Therefore absent proof that the appropriation is without authority, no offence is committed. He submitted that there was no evidence which required the defendant to deal with the actual cards themselves and that he was therefore entitled to spend them and use the cards himself if he wished as long as he then accounted for them. He says that he had until the end of the year to account for them but again a curiosity results there given that they were in fact purchased on the last day of the financial year.

83. Mr Tippett's argument developed through reference to section 30(2) of the Code, which excuses conduct undertaken under an honest claim of right and without the intention to defraud. He submitted that where that has been raised, if the prosecution has not negated that claim of right then there is no appropriation for the purposes of the stealing charge. He further submits that the evidential burden on the defendant to raise claim of right has been met because, as Mr McGill conceded, the defendant could deal with the donations as he wished throughout the financial year. Again query the relevance of the purchase of the gift cards on the last day of the financial year.
84. Moreover he submitted that the authorities he referred to in relation to the defence of claim of right stand for the proposition that as long as it is a genuine belief, then whether it is unreasonable is not an issue. With that proposition I agree. However, again this submission must be looked at in the context of the entirety of the evidence. Again it must be considered in the context of the inferences which can be drawn from the evidence.
85. Relevant evidence for this purpose is the evidence which can lead to the conclusion that the vouchers were redeemed for personal expenses. There is evidence which shows that the defendant has purchased clothing, groceries

and personal items for himself and his partner. Some of the evidence is very strong indeed for example, in relation to the shirt purchased from Roger David, in relation to the men's shoes purchased from Williams the Shoeman, in relation to the women's shoes purchased at Target, in relation to the punching bag (found hanging on the defendant's patio) purchased from Big W and in relation to other items of toiletries, cosmetics and items of a personal nature purchased from Priceline and Price Attack. Although looked at individually it might be said that inferences consistent with innocence could not be excluded, that is less likely when they are considered collectively. That however is not the issue at the no case to answer stage. At the no case to answer stage, the most favourable inference to the prosecution available on the evidence must be drawn.

86. Looking at it in that way, that very much cuts across the genuineness of the asserted claim of right and indeed the absence of intention to defraud in section 30(2).
87. For the purposes of a no case submission, I must take the available evidence at its highest. In the case of Edwards lies, that translates to a consciousness of guilt in this case at the no case to answer stage. Even absent that, the lies support a strong inference that there was an intention to defraud.
88. Ultimately in relation to count 3, there was no contention by the prosecution in relation to the submission. I had come to the conclusion that there was no case to answer in relation to that charge.
89. Count 3 charged a contravention of section 23F of the Oaths Act namely, making a false statement in a statutory declaration. That section of the Oaths Act makes it an offence to make either a false statement in either a "statutory declaration" or an "unattested declaration". Two separate offences are therefore created depending on the nature of the document. The Oaths Act distinguishes between a "statutory declaration" and an "unattested



declaration”. Both fall within the definition of “declaration” in that Act but they act clearly and distinctly demarcated.

90. The charge relates to the document tendered in evidence as Exhibit P4. It is a document prepared on a pro-forma statutory declaration form clearly intended to be a statutory declaration for the purposes of the Oaths Act.
91. The evidence however reveals that the defendant’s personal assistant Ms Ettridge found the document in the defendant’s out tray. She said that it was completed simply by the signature of the defendant, which she recognised, the date and the text as it appears in the document. Importantly she said that the document had not been witnessed. She said that she specifically drew this to the attention of Mr McGill. She says that Mr McGill asked her if she recognised the signature of the defendant on the document. When she indicated that she did, he asked her to witness the signature which she did. Mr McGill had a different recollection of the circumstances by which Ms Ettridge witnessed the document but there is no dispute on either version that it was not witnessed when it was first found and at that time the defendant had signed it. Consequently there is no evidence which establishes that it was signed by the defendant in the presence of a witness.
92. Section 23(c) of the Oaths Act however provides that “a statutory declaration...shall...be signed by the person making it in the presence of a person who has attained the age of 18 years...”. Clearly therefore it is not so much the identification of the signature on the document that is critical. What is critical is that the witness must actually observe the person signing the document else it is not a statutory declaration.
93. On that evidence the document does not satisfy the description of “statutory declaration”. It would apparently satisfy the definition of “unattested declaration” but the charge has been particularised specifically on the basis that the document is a statutory declaration. The evidence does not support the charge and I find no case to answer in relation to count 3.

94. Count 4 on the separate information lays a charge of false accounting under section 233(b) of the Code. An offence in breach of that section occurs when a person, with a view to gain for either himself or for another, or alternatively with the intent to deceive or cause loss to another, furnishes information for a purpose or produces or uses any account record or document that is false, misleading or deceptive in a material particular.
95. The charge particularises that the defendant, with intent to deceive (not naming the person to be deceived) produced a document, namely, the acquittal of gift cards document (Exhibit P12) for an accounting purpose, namely, the acquittal of the gift cards, which was false in a material particular.
96. Mr Tippett's submission is that firstly the document referred to does not have the effect that the charge alleges. He says that the document does no more than relate to expenditure on its face and it does not refer to any of the vouchers. That argument might support a claim for further particulars but it cannot maintain a submission of no case to answer. It also disregards the evidence. Looking at the evidence as a whole it is clear that the document was produced in response to a request for information concerning the eighteen vouchers which were the subject of the reimbursement claim in Exhibit P3. In light of that Mr Tippett's contention that the document is simply about the Lord Mayor's expense account and not the vouchers is untenable.
97. The second limb of Mr Tippett's submission was that there is no evidence of the accounting purpose referred to in the particulars to the charge. In his submission the prosecution is obliged to produce evidence as to how the accounts worked and how this document was used for that purpose. I cannot accept this interpretation of the section. The purpose specified here is a particular only. The section does not require proof as to the background matters for the purpose, just that there is a purpose. The submission cannot

be sustained on that basis alone. In any event there is ample evidence of the purpose. There is nothing magical in the use of the word “accounting” in the charge. It is descriptive only. It does not refer to any law or regulations whether specifically in terms of Local Government accounting or otherwise. It merely describes the particular purpose as required as an element of the offence.

98. In that regard the evidence of Mr McGill is clear as is the evidence of Alderman Moir. Mr McGill said that he is obliged to ensure that all expenditure of Council funds is legitimate. Alderman Moir said that the role of the Committee is to confirm the legitimacy of all payments made by Council. Whether the document can also be categorised as a document to give notice of expenditure to the CEO as Mr Tippett suggested misses the point. The background evidence leading up to the creation of the document starts with Mr McGill reiterating his request for information regarding the eighteen vouchers. Tying that in to the evidence given by Mr McGill as to his obligations and responsibilities, there is ample evidence that the document was provided for an accounting purpose as particularised.
99. With that background, and having regard to the evidence as to why the document was created as referred to above, evidence of an accounting purpose sufficient for the case to answer stage exists.
100. Lastly a catch all submission was made based on R v Prasad namely that the evidence as a whole is of such little weight that it could not safely support a conviction. With all due respect to Mr Tippett’s submission, I consider that that authority has no application here. As I said in the course of his submissions I consider that the totality of the evidence is very strong having regard to the direct evidence given and all of the properly available inferences which can be drawn therefrom. The evidence of the use of the refrigerator, the evidence as to the use of the vouchers, the number of lies told by the defendant as to having disposed of the refrigerator and the

number of purchases made with the vouchers which can be validly traced to the personal use by the defendant or his partner provides very strong inferences in respect of all of the charges.

101. Accordingly I found a case to answer on counts 2 and 4 and no case to answer on counts 1 and 3.
102. Following my ruling on the no case submission, the defence commenced its case with the defendant giving evidence. He confirmed that on 30 June 2006 he asked Ms Ettridge to check the balance of his allowances. He said that he expressly did so as he preferred to expend the donations budget rather than having the balance fall back into general Council coffers.
103. He confirmed that he used his credit card to buy the refrigerator and the vouchers. He said that after purchasing the refrigerator and the vouchers, he placed the receipts for the purchase of those items on Ms Ettridge's desk and she then prepared the reimbursement paper work. He said that the refrigerator was purchased at The Good Guys and that he requested delivery to his residence at Unit 3 in the Marrakai Apartments. He said that the refrigerator was used by him thereafter. He maintained that his intention at the time of the purchase was to donate it if he was subsequently reimbursed by Council.
104. He said that the vouchers were kept at his home and at his office. He conceded that he spent some of the vouchers believing that it was appropriate and within the guidelines for the expenditure of that budget. He said this was so because he intended to account for the cards over the period of the ensuing financial year. He said that he shared the cards with his partner Leanne Meharry.
105. Although he could not be certain of the date, he could recall the nub of a discussion he had with Mr McGill regarding reimbursement for the expenditure. He seemed to accept that it would have been some time around

7 July 2006. He recalled that Mr McGill asked why he had purchased a refrigerator and the defendant said that he replied with words to the effect of it being an “end of year spend up” and that his intention was to “donate it to a worthy cause”. He said that at the time he had a number of organisations in mind as the donee but had not finalised his plans.

106. He described his relationship with Mr McGill as having soured over a period of eighteen months following a performance review of Mr McGill in 2005 where some criticisms were made of Mr McGill.
107. He was asked about the meeting on 17 July 2006 with Mr McGill. As with the meeting on 3 July 2006, he recalls the gist of the conversation but is unable to precisely confirm the date. He confirmed recalling some discussion regarding reimbursement and specifically saying he had done an “end of year spend up”. He couldn’t recall any specific discussion about the refrigerator but maintained that his intention then was to donate the refrigerator to a worthy cause. He claims that he was sure that he told Mr McGill that the refrigerator was at his unit. He could not specifically recall whether Mr McGill asked him to nominate a charity then and there.
108. He was asked of the discussion described by Mr McGill on 16 August 2006. Likewise he recalled the gist of the discussion but could not specifically recall the date. He recalled there was some discussion regarding the refrigerator. He had a recollection that he had nominated St Vincent de Paul Society as the intended recipient of the refrigerator although he said that he may have been confusing that with another meeting when he mentioned having given St Vincent de Paul Society another refrigerator. No such other meeting or possible confusion was put to Mr McGill. I note in any event the contrary evidence from Mr Burden of St Vincent de Paul that the defendant had never donated a refrigerator to that body. He could not recall any discussions regarding the vouchers on that occasion.

109. In relation to the discussions with Mr McGill on 23 August 2006, again he recalls the occasion by the nature of the discussion but could not confirm the date precisely. He recalled some discussion about a statutory declaration. He said that he was getting annoyed because he considered Mr McGill was interfering with the exercise of his discretion. He was resentful because he thought that he had done all that was required of him. He was shown Exhibit P4 and confirmed that he had signed and dated that.
110. He said that as of 23 August 2006 the information contained in that statutory declaration was not correct. He explained that he made a false statement therein because he was resentful and because he filled the form in hastily. He said that he now regrets his action and acknowledges that it was wrong.
111. Frankly I find this to be quite an extraordinary explanation. Whether angry or resentful, this cannot possibly explain the very specific information contained in that document if it is not true and why he would incorrectly state that he had donated the refrigerator to the St Vincent de Paul Society if that were not in fact the impression he wished to give. This raises credibility issues as well as issues as to whether the lies are probative of guilt.
112. He said that he was aware that the document required witnessing and it had not been witnessed. He did not request any one to witness it nor did he give the document to Mr McGill. He said that he either put it in his out tray or left it on his desk. He claimed that he did not realise that it had been passed on to Mr McGill at any stage. He did not see Ms Ettridge sign the document as a witness.
113. He initially acknowledged that sometime after 23 August 2006 he became aware that he had been reimbursed for the refrigerator and the vouchers although his evidence on that point became somewhat less precise in cross-examination. I thought he was increasingly evasive as to the date that he became aware of the reimbursement. It does not simply fit with the objective available evidence. His claim to possibly not seeing the email

(Exhibit P5) from Mr McGill confirming reimbursement and enquiring about the vouchers was unconvincing at best. Frankly it beggars belief that he can claim that he was unaware of the reimbursement in light of that email. After all he would have me believe that out of anger and resentment at the apparent interference by Mr McGill, he was somehow led to make a false statement in writing regarding the donation of the refrigerator. If the circumstances were such that they had such a pronounced affect upon him it is frankly inconceivable that he does not have better recall of events.

114. He confirmed his attendance at both the informal meeting preceding the Committee meeting on 25 October 2006 and the formal meeting thereafter. He confirmed that both meetings were chaired by Alderman Moir. He said that his relationship with Alderman Moir is strained. The issues that he said he had raised with her in the past were the drinking issues and attitude issues that had been put to Alderman Moir in cross-examination and which she refuted.
115. Again, the defendant claims to have been angry and resentful over the intrusion into the use of his allowance such that again, he was led to lie about the matter, this time to the Committee. Again he claimed to have regretted doing so. He did confirm that at that Committee meeting he said that the refrigerator had been donated to St Vincent de Paul. He said that he went as far as to tell the Committee that he had delivered it by trailer which was not true.
116. I have serious concerns about the defendant's explanation for his further lies about the donation of the refrigerator. Again I do not consider his explanation to be satisfactory. I cannot accept his claim to have made apparently false statements as a result of wishing to be uncooperative out of resentment and anger about either the process or the intrusion into the use of his allowance. I consider it most unlikely that that would cause him to embellish the lie by actually describing the mode of delivery i.e., by trailer.

His explanation for that embellishment, i.e., that that was how he intended to ultimately deliver the refrigerator, was entirely unconvincing and unsatisfactory in my view. Why he would have even given thought to how he would eventually deliver it at such an early stage is a mystery unless, as I believe, it was a deliberate embellishment to enable him to sound more convincing. Again that lie raises both credit issues and issues as to whether the lies are probative of guilt.

117. He then confirmed his meeting with Alderman Lambert and he confirmed that he affected delivery of the refrigerator within 24 hours of that meeting. By that time however Council had resolved to refer the matter to the authorities and Mr McGill had informed the defendant of that resolution. The defendant confirmed receiving a call from Mr McGill while he was away in Singapore to be advised of that resolution. He said nothing more about it yet curiously that was later submitted as forming part of the contextual framework in which I was asked to assess whether the lies were probative of guilt. The defendant seems to be able to recall the specifics of that telephone discussion, and with some precision, as he was able to specifically acknowledge that he was told that the resolution was to refer it to “proper authorities”. He was able to demarcate that resolution with the subsequent police involvement.
118. His evidence in chief was littered with comments that his understanding was that it was entirely within his discretion as to when and to whom the refrigerator was donated and he claims to have raised this on more than one occasion. Similarly in relation to the vouchers he said that his understanding was that it was acceptable as long as they went to an appropriate charity and they were accounted for. If I understood him correctly he seemed to be saying that he could treat the vouchers as his own, as a substitute for the cash value, as long as he donated a similar value within the appropriate accounting period. That is very simplistic and is frankly inconceivable as an explanation. That is relevant to the defence of



claim of right particularly the requirement of a genuine belief albeit not necessarily a reasonable belief. In other words, despite that the balance in the allowance would have fallen back into general Council coffers if not expended, he claims that he genuinely believed that it was within the terms of the allowance to fully expend the balance of the allowance (almost exactly) by converting it into a cash substitute, by then treating it as if it were his own cash and use the vouchers for personal purposes, as long as by some indeterminate time he donated the equivalent value. If I thought that he was genuine in this claim then, leaving aside whether there was any impropriety in the use of public funds in this way, that may have satisfied the requirements of the defence. However I need to look at the evidence as a whole to assess the genuineness of his claim. In my view an intention to defraud, and consequently a lack of genuine belief, is evident from what I am prepared to find are untruths in Exhibit P12 as to the disposal of the vouchers for legitimate purposes.

119. He acknowledged Exhibit P12, the acquittal document and acknowledged that he created it and signed it. He maintained throughout that its contents were entirely true. He explained the conversion to fifty dollar cards by saying that when he initially purchased the vouchers he did so hastily. In hindsight the hundred dollar vouchers were excessive for donation purposes so he chose to donate in fifty dollar values. He thought this was the same as he was donating the same amount. That however cannot be correct. The value of the gift vouchers purchased on 30 June 2006 was \$1,800.00 and the total monetary value of the vouchers listed in Exhibit P12 is \$1,100.00. There has been no evidence in relation to the balance.
120. The defendant confirmed having donated the refrigerator to the East Timorese Sunshine Association on the date already given in evidence. He said it is a group that is loosely associated with St Vincent de Paul. He says it is an association which raises money for the Timorese people through sales at a thrift shop. He said that his understanding is that the association

uses the facilities of St Vincent de Paul to make monthly donations to the Timorese people. Clearly however it is a separate and distinct body corporate to St Vincent de Paul.

121. Lastly he was asked regarding the acquisition of the Darth Vader voice changing mask which seems to have spiked the interest of the media in this case. He said he purchased it as on a previous occasion when he had met a group of school students in his formal Mayoral robes, one of the children commented that he looked like Darth Vader. Hence he thought of purchasing and using that mask as a gag for possible future school visits. Ordinarily, if I were prepared to accept his evidence, that might be an acceptable explanation. However my poor impression of the defendant as a witness of truth negatives that. I thought this explanation was suspiciously opportunistic. Some confirmation from anyone concerning this intended use or of the circumstances he described as giving him the idea to acquire the mask might have led me to a different conclusion. A perfect opportunity was presented to the defence in that regard as Ms Ettridge could have been asked about that. However she was not cross examined at all and the only evidence which fell from her concerning the mask was in chief where she said that although she had seen the mask in the defendant's office, she could not recall any discussion at all about the mask. Therefore I am not prepared to accept the evidence of the defendant alone.
122. The defendant's evidence in chief concluded by the defendant putting his character in issue. He said that he had no criminal record at all, something that I do not find surprising. Further character evidence was later called.
123. During the cross-examination of the defendant, at times I was left with the clear impression that he was evasive and that his evidence was rehearsed. For example, in relation to evasiveness, he said that he had the refrigerator delivered to his unit as he was going to keep it in the short term pending reimbursement. He went as far as to say that he would keep it if he was not

reimbursed. That was odd given that he acknowledged that he had a full expectation of being reimbursed. Despite that he made the suggestion of a possible failure to be reimbursed on a number of occasions when dealing with matters later in time and closer to the ultimate donation of the refrigerator.

124. Although he was clear and spontaneous when he said that he considered the refrigerator was his, yet shortly after, when asked the same question about the vouchers, his initial response was that he had not thought about it. That in itself is something odd given that he purchased them at the same time, in the same circumstances and with the same purpose in mind. He quickly retracted that and acknowledged that it was his view that he could use them as he saw fit. This retraction then conveniently fitted in with what he had said evidence in chief. I was left with the strong impression that this part of his evidence was rehearsed.
125. He said that he was of the view that he had to acquit \$1,800.00 worth of donations whether by those gift cards or others. As such it appears that the only purpose of actually acquiring the cards was to ensure that there was something referable to the budget for the financial year ending 30 June 2006. Else the same effect could have been achieved with the defendant using his own funds for donations (which he did anyway in purchasing the \$1,800.00 worth of vouchers) and then seeking reimbursement, as he has subsequently done in respect to the vouchers actually purchased. In a bizarre way, the defendant is saying that as long as he made \$1,800.00 worth of gifts in accordance with the purposes of that part of his allowance and acquitted that by 30 June 2007, all was in order. The significant concern with that of course is that as the budget related to the previous financial year there was no relevance in acquitting it over the period of the ensuing financial year. Strictly he could in his view acquit those items whenever he wanted, something which was put to him in cross-examination and with

which he agreed. Specifically he acknowledged he could acquit them any time in the 2007 financial year or for that matter, the 2008 financial year.

126. He agreed that there was no refrigerator in his unit when he took possession but denied that the refrigerator was intended to stay there throughout. He confirmed that the refrigerator stayed in the unit until it was donated. Although he said that he acquired another refrigerator, he denied that he had two refrigerators in the unit at any one time.
127. I thought his answers in cross-examination on the question of reimbursement were evasive. He said that he left the receipts on his assistant's desk but gave her no instructions as to what to do and was apparently unaware that she had prepared the reimbursement documents. Contrast her evidence on that point. The defendant's version is unlikely and I think he was being evasive here as well. He said that he did not follow up the question of reimbursement and he was "hopeful" that he would be reimbursed. When pressed it was revealed, not surprisingly, that there was no expectation that he would not be reimbursed. I think this was designed to tailor his evidence to have a more favourable temporal connection between when he claims he became aware of reimbursement and the actual donation of the refrigerator. Moreover it is something which is untenable having regard to the objective evidence.
128. The unreliability of the defendant's evidence on this point was manifested when he was asked about the email which was tendered as Exhibit P5. This is an email which advises him of the reimbursement. It comes from Mr McGill and it is prominently titled "Reimbursement" in the subject matter line. His explanation that he has a lot of emails coming across his desk and accordingly that he could not recall whether he read that or not is unconvincing. Firstly he was very concerned about the reimbursement at that point such that he had been driven by resentment and anger to make a false statement in a document purporting to be a statutory declaration. This

email came from the person who caused that anger and resentment and it was about the same topic and came within a day or so of that episode. The reimbursement was therefore a particular issue for him and his claim that he was not totally absorbed by it belies the situation in my view.

129. That was in August 2006. When then asked about the occasion of the Committee meeting in late October 2006 he, most unbelievably in my view, would not acknowledge that either he knew about the reimbursement then or whether it was mentioned on that occasion. In my view that totally lacks credit. There had been a number of discussions between himself and Mr McGill regarding the issue before the reimbursement and clearly there would have been none between the date of the reimbursement and the date of the Committee meeting. That in itself should have alerted him to the fact of payment. He would have had ample opportunity and occasion to have seen that in bank statements in any event. This aspect of the defendant's evidence is suspicious as it does not suit his defence to have kept the refrigerator after he was reimbursed. The longer the delay between reimbursement and donation, the more untenable that defence becomes.
130. He said that he could not recall when he first started redeeming the vouchers but when pressed he could not dispute that it was 14 July 2006. He recalled the transaction of purchasing a universal remote control but could not recall the details as to who he gave that to. That is odd in that he was later to claim that he kept records on his computer of the donations, a claim however which I was not prepared to believe. He did not seem to dispute any of the transactions evident from the prosecution case. He maintained that it was his view that he could deal with the vouchers as his own personal property as there was no difference between using those vouchers and using his own cash. As I have said, I do not consider that to be credible or genuine.
131. He agreed that, at some point in time on date which he could not recall, he told the CEO that the refrigerator had been donated with the suggestion,

implicit at least, that although that statement was not true, he told Mr McGill that out of resentment that he had made the enquiry. When questioned though about the entitlement of Mr McGill to having that information given his role as the CEO of the Council, he was evasive as to that entitlement and at best would only concede that Mr McGill had an interest. Such semantics are regrettable.

132. Anomalously, although he agreed that he had received a specific invitation to the adjourned Committee meeting and knew that there was likely to be some discussion about his Mayoral expenses, he claimed that he did not have a great expectation that it was regarding the refrigerator and the vouchers specifically. Shortly afterwards however he conceded that it would have been a fair assumption at that time.
133. The misrepresentations in relation to the statutory declaration then continued. Although he said that he prepared it, signed it, dated it and that he left it on his desk, (Ms Ettridge, whose evidence I accept over that of the defendant, said it was in his out tray), his intention was that it would go no further. This was because he claims to have thought better of it and by then had cooled down. He claimed that he was not aware that the statutory declaration had gone into circulation at the Council. Despite that he confirmed that he agreed Mr McGill gave him the form, that he was aware at that time that St Vincent de Paul had advised Mr McGill that they had not received the refrigerator. He however said that he could not recall whether Mr McGill said that he needed the document to verify matters. This is unbelievable in itself given that it was so important to him at the time and specifically given that he was driven to make a false statement in the document. Despite that he claims to not have noticed that the document had gone missing or ever having looked for it. He was likewise asked about the comment attributed to him that he thought that a statutory declaration carried a lot of weight. He ultimately conceded making this statement. How he could make that statement yet maintain that he did not realise that the

document had gone, or was intended to go, into circulation is a mystery. That is entirely untenable especially in light of the events leading up to that comment being made. To compound matters he later said that he was not certain that he could recall making those comments.

134. Given his claimed intention to donate the refrigerator if and when he was reimbursed, he was then pressed as to what enquiries he made regarding the reimbursement. He said that he only had discussions with Mr McGill, that he did not recall any enquiries with other people and he could not recall the dates of his discussions with Mr McGill. Specifically he said that he could not recall Mr McGill ever telling him that he had been reimbursed around 25 August 2006. In the circumstances, that is unlikely. More unlikely was his claim that he could not recall anyone having told him that he had been reimbursed before the Committee meeting of 27 October 2006, some two months after actual reimbursement. Shortly afterwards he said that he thought that he became aware of the reimbursement surely before that meeting. This was after he was asked why he did not question the reimbursement given the importance of that.
135. In relation to the false accounting charge, he was asked about the purpose of the Committee. He confirmed that that Committee met monthly and reported to the next full Council meeting. He confirmed that its role was to ensure public accountability of Council expenditure. He confirmed that he knew that reimbursements for his allowances would go to the Committee at some point. Surprisingly he indicated that he did not understand the purpose of his invitation to the meeting of 25 October 2006 was to discuss his reimbursements, at least not in broad terms. He confirmed that the Committee recommends verification to the full Council and that upon Council ratifying the Committee recommendation then the matter is finalised.

136. He was asked whether he told anyone at that meeting that his intention was not to give away the vouchers that he had purchased on 30 June 2006 but to give away others in substitution. He claims he did not get a chance to do so because the meeting was a farce, he was angry (yet again), reacted inappropriately (yet again) and now regrets his actions (yet again).
137. Although he agreed that by the time of that Committee meeting he had already given away some of the \$50.00 gift cards, it was put to him that he told the Committee that he would have trouble remembering what he did with the cards. That is despite that according to the information he recorded in Exhibit P12, he had given away two \$50.00 vouchers only approximately three weeks before, i.e., on 7 October 2006.
138. His agreement to that is also at odds with his evidence that he prepared the acquittal document, Exhibit P12 from notes which were keyed into his computer after each of the donations. No such notes were produced. It is odd that he did not recall the notes on his computer, or mention them, when he told the Committee that he would have difficulty recalling his dealings with the vouchers. A lie about that, in the circumstances described and out of anger and resentment really makes no sense at all to me. The reaction I would have expected would be for him to walk out of the meeting, rather than tell more lies. That strongly indicates that the Exhibit P12 document was an untrue reconstruction, and if so, then a finding that it was specifically designed to mislead is unavoidable. I say that because at the time the defendant was under considerable pressure. There was ample information to show that his answers up to then were inaccurate at best. This became more apparent when he was referred to his diary, namely Exhibit P18. Each of the entries on Exhibit P12 were included in his diary bar one. The suggestion was made that he extracted the dates from his diary. He refuted this. Interestingly the dates for two events were transposed i.e., the Fiji event was on 7 October 2006 per his diary but is specified as 4 November 2006 in Exhibit P12. Similarly, the Indian Diwlai function on 4



November 2006 was transposed to 7 October 2006 in Exhibit P12. I think that sort of error is less likely if he has indeed kept notes in his computer as opposed to picking dates for events out of his diary.

139. He said that he specifically recalled the Seniors Quiz function on 18 August 2006. This is despite his poor recall of other pertinent matters and despite that he was not aware that there were any issues with his reimbursement at that time. In other words, he had no reason to remember that occasion out of the many he apparently attended. Despite that, his recall in addition was very good this time in that he remembered some specific details. He said however that he gave the cards out loosely in the course of socialising and not as official prizes.
140. Although he confirmed that he had an opportunity to make an explanation at the Committee meeting on 27 October 2006, he said that he did not make an explanation because he was angry. Again an extraordinary response in my view. He said that he would have had an opportunity to make a full explanation at the full Council meeting but he knew that he was not going to be in attendance at the next scheduled meeting.
141. He was evasive when asked if the police were involved by the time that he prepared Exhibit P12. The date on that document is 28 November 2006. His response was untenable as clearly he was aware of police involvement through the execution of a search warrant only eight days earlier. When he ultimately conceded that he prepared Exhibit P12 after the visit by police he said that was because he thought that it was then time to start acquitting the vouchers as he had been prompted by Mr McGill. That prompting however occurred months earlier. He confirmed that coincidentally until the police involvement, he had ignored all other requests to do so by Mr McGill.
142. Again in light of the charge of the false accounting he was asked what he expected would occur after he provided Exhibit P12. In an answer which I consider totally lacks credibility, especially for a person who has been

involved in local government for as long as the defendant has, he said that he thought that he might get some feedback on the next step required of him. For example, that he would be provided with the appropriate form. He said that he expected Mr McGill to only take it as a guide. Specifically he would not concede that he knew Mr McGill was going to use it for accounting purposes. In my view the answers here totally lack credit and are farcical. In my view everything points to Exhibit P12 being an untrue reconstruction, deliberately prepared in an attempt to satisfy the increasing pressure on the defendant to account. I so find.

143. There is ample evidence of the purpose which is an element of the charge in count 4. In part that comprises the combination of the evidence of the specific purpose of the defendant's budget, the CEO's overriding obligation to ensure verification of expenditure of Council funds, the role of the Committee in reviewing, verifying and ratifying Council payments the evidence of the defendant to the effect that he knew he had to account for his expenditure, the evidence that Mr McGill had told the defendant on 17 July 2006 of the establishment of the donations register and of the requirement to enter details of donations therein and specifically and critically, that on 9 November 2006 Mr McGill told the defendant that he needed the information regarding disposal of the vouchers to go into the donations register. This last instance was critical as it was proximate to the date when Exhibit P12 was provided by the defendant. These indicate the accounting purpose particularised in the charge. I do not consider it necessary that there be evidence of accounting procedures. Any bona fide purpose will suffice for the purposes of the charge. The accounting purpose here, put simply is the verification of Council expenditure. That has been sufficiently proved given the evidence of the nature of the requests for information, the timing of those requests, and the discussion of those items at the Committee meeting and the existence of the donations register.

144. He was questioned about the specifics of the discussions at the Committee meeting on 25 October 2006 and he accepted that he made reference to using a trailer to donate the refrigerator. Although accepting that he had said that as a statement of fact, he however said that it was actually a statement of intention as he proposed to use a trailer to actually dispose of the refrigerator. He said that he only embellished his lie because he was angry and was being uncooperative. I cannot see how that can possibly follow. That is nothing more than a lame attempt to recover ground from an untenable position. Again I find that totally lacking in credit and an extraordinary comment in itself.
145. It was put to him that he only donated the refrigerator when he was effectively given no alternative by Alderman Lambert. Temporally he agreed, his explanation being that Alderman Lambert was the first person who “eyeballed him” in a sensible non-confrontational approach. He said that his discussions on that topic with Mr McGill had a different atmosphere and confirmed that as a result of that, when the same questions had previously put by Mr McGill, he had lied. He then went on again to gratuitously state, yet again, how he regretted that action. However, as I have said elsewhere in these reasons, my impression is that the approach of Alderman Lambert, as described was no different from that point of view context to his discussions with Mr McGill or the Committee members.
146. The defendant’s evidence is therefore littered with inconsistencies and untenable explanations about intentional lies. It is also littered with many claims that he could not recall details. That is a claim that is inconsistent in itself. It is very surprising that he has a lack of recall of very pertinent very proximate matters concerning important issues, yet has such an excellent recall of specifics of attendance at a Spillet House function where no apparent reason is shown to explain that recall.

147. It is all of the foregoing which generally leads me to the view that he has rehearsed his answers and is attempting to present his evidence in the most favourable light, albeit that he is doing so badly. On the other hand the prosecution witnesses relied on notes to refresh their memory. They were then very precise about what was said. In other cases prosecution witnesses had the benefit of contemporaneous records to enable them to recall matters and dates.
148. Similarly his answers are inconsistent both between evidence in chief and between cross-examination as well as at different stages of cross-examination.
149. To the extent therefore that there is any difference in the version between prosecution witnesses and the defendant's, I have no hesitation in rejecting the defendant's version.
150. Mr Darren Davies was called as a character witness. He is acquainted with the defendant by reason of having worked with him for the relatively short period between October 2003 and September 2004 when he was employed as the Public Affairs Manager by the Darwin City Council, essentially a public relations role. He has maintained his contact with the defendant since leaving the Council. He spoke in highly glowing terms of the defendant, his capacity for hard work, his extensive community work and community mindedness, his willingness to apply his own funds for worthy causes and his willingness to do so despite not being able to verify donations and expenditure for later reimbursement.
151. In cross examination it was revealed that he had only a cursory understanding of the severity of the charges faced by the defendant. He said that his knowledge of the background came from his discussions with the defendant, which version he seemed to accept without question. Clearly however the defendant had not considered it necessary to inform him of the evidence of his various lies. Mr Davies was not aware that the defendant had

admitted that he told lies regarding the disposal of the refrigerator. He was not aware that the defendant had also admitted to lying to a council committee. He said the knowledge he had of the false statements in the document in the form of the statutory declaration derived from media reports only.

152. Despite learning of the defendant's admission of lying, it troubled me that he was prepared to then say that knowledge of that behaviour did not change his views. He also refused to accept the possibility that the defendant had committed offences despite his cursory knowledge of the charges and despite the recent revelation to him that the defendant had admitted to having told lies. As such Mr Davies is labouring under suspect background information. He appears to be overawed by his impressions of the defendant to the extent that he lacks sufficient objectivity for my liking.
153. A character reference of Sandra Richardson was next tendered by consent. She has known the defendant for some fifteen years through their common involvement in volunteer community work and through having worked for the defendant when he was a member of the Legislative Assembly. She referred to the defendant's appetite for community work and gave a number of examples. She, like Mr Davies, referred to the defendant's propensity to indifference towards appropriate documentation. In summary however she says that he is a kind and generous person and a very honest person.
154. Evidence of the accused's good character is relevant in two ways. Firstly it is relevant to bolster the defendant's credibility. Secondly it can also go to the question of guilt in that it can question the likelihood of the defendant having committing the crime as charged. Having said that, the evidence of the accused's good character does not prevail and has to be assessed as part of the evidence overall and given such weight as is appropriate. Courts recognise that persons do commit offences for the first time. Indeed, every

person who commits an offence does so for the first time at some point and until that point they would be considered to be of good character.

155. Still I have regard to the evidence and although I accept that the defendant is, at least until now, a person of good character, I am of the view that there is convincing evidence of guilt and the evidence of good character, as far as it goes, does not prevail over that.
156. I turn now to consider the impact of the evidence of the lies that the defendant has told. In law, lies by an accused are relevant both in terms of assessing the credibility of an accused as well as to being probative of guilt, or to use the vernacular, indicating a “consciousness of guilt”. I have already discussed the former in detail and have come to the conclusion that the lies the defendant has told impact very adversely on his overall credibility.
157. In the case of the latter the case law on what has become known as Edwards lies flows from the High Court decision in *Edwards v R* (1993) 178 CLR 93. The applicable principles are succinctly summarised in *Tilmouth*, Australian Criminal Trial Directions, Butterworths, 2005, at para 4-800. That is reproduced hereunder namely:-
  - Lies as probative of guilt should only be left to a jury in rare cases.
  - As a general rule, directions as to lies should only be given if the prosecution contends that a lie is evidence of guilt, i.e. the accused knew that the truth would implicate him in the commission of the offence and if, in fact, the lie in question is capable of bearing that character.
  - Before the jury can consider a lie by the accused as probative of guilt or as capable of being corroborative of the evidence of a witness requiring corroboration they must be directed that they need to be satisfied of the following matters:
    - The trial judge must first identify the lie, and the circumstances and events relied on by the Crown to indicate that it constitutes an admission against interest.

- The evidence must reveal a deliberate lie, not an error or an untruth arising from the confusion of the accused, or told inadvertently.
  - The lie must relate to a material issue, that is a fact or circumstance connected with the offence.
  - It must be clearly shown to be a lie by independent evidence.
  - Such a lie cannot arise simply from the denial of the Crown case.
  - They can only take such a lie into account if they are also satisfied that it reveals a knowledge of the offence or some aspect of it and because the motive for doing so was a fear of the truth or realisation of guilt which is for them to determine.
  - They could only draw that inference if they are satisfied there is no other reasonable hypothesis for the telling of a lie.
  - If it accepts the lie was told for a reason other than realisation of guilt or that a lie may be explicable upon other hypotheses, it cannot regard the lie as an admission against interest.
  - There may be reasons why the accused told the lie other than consciousness of guilt, such as panic, protecting another, to avoid another consequence extraneous to the offence, in an attempt to bolster up a just cause, out of the shame or out of a wish to conceal disgraceful behaviour from their family or to conceal some other culpable act.
- Careful directions are required distinguishing those lies going merely to the (dis)credit of the accused and those potentially probative of guilt.
  - In giving directions the judge should precisely identify the material said to be a lie capable of being used probatively, and distinguish that from lies which could only be used by the jury as a means of assessing the credit of the accused.
  - In cases where there has been cross-examination of an accused on potential lies a warning not to follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is itself evidence of guilt.
  - The jury should be directed that mere disbelief of a reason advanced for telling a lie is not a proper basis for treating it as evidence of guilt.
  - The expression “consciousness of guilt” should probably be avoided if possible as misleading and because it suggests a conclusion about the conduct which undermines the presumption of innocence.

158. The relevant lies relied upon by the prosecution in this matter are:-

1. 16 August 2006 when following inquiry from Mr McGill the defendant told Mr McGill that the refrigerator had been delivered to St Vincent de Paul's.
2. 25 October 2006 during the informal and formal Committee Meeting where the defendant said:-
  - a) the refrigerator went to a family through St Vincent de Paul;
  - b) the refrigerator was taken to St Vincent de Paul to donate to a needy family;
  - c) that he had signed a Statutory Declaration regarding the disposal of the fridge and that should be sufficient;
  - d) that a Statutory Declaration supposedly "carries a lot of weight";
  - e) that he did not keep good records of the gift vouchers and that he would struggle with the whereabouts of the vouchers;
  - f) that he did not keep a list of who the vouchers were donated to and wasn't aware of what happened to them;
  - g) that he bought a toaster for the office;
  - h) that he had used a trailer to deliver the refrigerator.
3. On 27 October 2006 when the defendant told Mr McGill that the "penny had dropped" and that he had claimed for the wrong fridge in that he had bought another fridge for himself and put the wrong claim in.

159. The lies are admitted by the defendant as deliberate lies. As to motive, the defendant claims that he did so out of anger and resentment directed towards Mr McGill on the one hand, and Alderman Moir on the other hand, at what he saw was interference with the exercise of his discretion regarding donations and in the context of an antagonistic political environment. This brings into play the requirement that I must be satisfied that the motive for the lie was a realisation of guilt and that I am to be satisfied that there is no other reasonable hypothesis for telling the lie.



160. Frankly I am unimpressed by the defendant's explanation. It is a most unlikely explanation further lacking credibility given the embellishment of his lies. The persistence and repetition of the lies in my view indicates that the continuing lies were made to distract attention from him and to muddy the waters and not as he claims, out of an inappropriate anger reaction.
161. In coming to this conclusion I have had regard to Mr Tippett's submission that the defendant's explanation must be assessed against the relevant context. In that regard the context is the antagonistic political environment and the personality clashes and tensions which he claims to be evident from the evidence. He relied on what he described as devious and outrageous behaviour by Mr McGill in secretly obtaining legal advice, in secretly gathering evidence, in searching through the defendant's office, in demanding more of the defendant than was required per the legal advice, in instructing Ms Ettridge to witness the defendant's signature on the statutory declaration and overall in the context of possible animosity between the defendant and Mr McGill over an alleged adverse performance review conducted of Mr McGill.
162. In relation to Ms Moir, Mr Tippett bases his submission on the unruly and intemperate nature of the relevant Committee Meeting (it is relevant because that is where the second set of lies was told), tension between her and the defendant and the claim by the defendant that he has had to take Ms Moir to task due to excessive consumption of alcohol at Council Meetings.
163. In terms of Mr McGill's alleged adverse performance review and the claim that he directed Ms Ettridge to witness the statutory declaration, I have already said that I am not prepared to make findings to that effect. Likewise in the case of Ms Moir I have indicated that I am not prepared to make findings in relation to the allegation the defendant made concerning the excessive consumption of alcohol.

164. Mr Tippett submits that having regard to this context, the lies told are not probative of guilt. Even allowing for that context the nature of the lies, the circumstances in which they are told and the gross improbability of the explanation given by the defendant lead me to reject that submission. Not only are the lies pertinent in determining the defendant's credit overall, however it is my view that the lies have been made deliberately and for the purpose of directing attention for the crime away from the defendant.
165. Having regard to my assessment of the evidence and my rejection of the defendant's version of events, the evidence then establishes to my satisfaction and beyond reasonable doubt that the defendant did not intend to donate the refrigerator or the vouchers and instead he has used both as if they were his own property. I consider that the elements of the offence of stealing in count 2 have been made out. It follows from my rejection of the defendant's evidence and the acceptance of the evidence of prosecution witnesses that the prosecution has negatived, beyond reasonable doubt, the possible defence of authorisation and claim of right.
166. In relation to count 4, I find that the defendant had the intention to deceive when providing Exhibit P12 to Mr McGill. I find that that document was provided for an accounting purpose, specifically the verification of expenditure of the funds of the Darwin City Council. I reject the evidence of the defendant as to the making of the donations therein. I find that the document was false in its entirety and consequently it is false in a material particular.
167. As such I find counts 2 and 4 proved.

Dated this 13th day of July 2007.

---

**V M LUPPINO**  
STIPENDIARY MAGISTRATE