[2014] UKPC 4

Privy Council Appeal No 0046 of 2012

JUDGMENT

Holt (Appellant) vHer Majesty's Attorney General on behalf of the Queen (Respondent)

From the High Court of Justice of the Isle of Man

before

Lord Mance

Lord Kerr

Lord Wilson

Lord Hughes

Lord Gill

JUDGMENT DELIVERED BY

Lord Hughes

ON

19 February 2014

Heard on 15 January 2014

Appellant	Respondent
Joel Bennathan QC	David Farrar QC
Danielle Cooper	Jennifer Carter-Manning
(Instructed by Saunders Law)	(Instructed by Sharpe Pritchard)

LORD HUGHES:

1.
This is an appeal against conviction for money laundering and making false documents. The appellant was a young advocate acting for a prominent client (and his wife) in a criminal case. The essence of the allegation was that she had become concerned in an arrangement under which the clients' fees due to counsel and to the firm for which she worked had been paid out of money which was, in their hands, the proceeds of crime.

2.
The principal client was a man called Trevor Baines. He was a man of extravagant life style and apparently enormous wealth and was a prominent citizen of the Isle of Man. In December 2007 he and his wife were charged with money laundering offences, unconnected with the charge eventually

brought against this appellant and involving, it was said, a sum of about $175m. They both denied the charges. The events which gave rise to the indictment against the Appellant occurred in the run up to their trial, which was due to begin on 7 September 2009.

3.
The appellant, aged 28 or 29, had been called to the English Bar and had qualified as a Manx advocate in the autumn of 2006. She was of exemplary positive good character and was described in due course by the Deemster as the sort of daughter every parent would be proud of. She was employed by a firm called Moroneys which acted for the Baines from 2007, and she had regular dealings with them, especially with Mr Baines, after the former senior partner of the firm retired. In due course, although she had no experience at all of criminal work, she came to have day to day conduct of the defence of the two Baines. Prominent specialist leading and junior counsel from London were briefed by the firm on a private-paying basis to travel to the Isle of Man to defend them.

4.
Amongst the Baines' activities, they administered a number of trusts, via a company which they controlled called Molyneux Roche Corporation Ltd ("Molyneux Roche"). One of those trusts was the Hermitage Securities Trust ("Hermitage"). This had been set up some years earlier by a man called Bevan, whom the Baines had met in St Moritz where they socialised and skied together. Bevan had put into the trust something of the order of $20m which he had been given by a lady admirer. The beneficiaries of the trust were Bevan's daughters and any remoter issue. At the outset Baines and his wife were two trustees and the third was a London accountant called Riley, but in about 2006 Riley retired as trustee, becoming the protector of the trust, and the Baines substituted their company Molyneux Roche for themselves personally as trustee. That was largely a matter of mechanics; the reality was that throughout Baines and his wife had active control of the very large assets of Hermitage. The original settlor, Bevan, died in February 2007. In July 2009 the State financial regulatory authorities obtained a court order placing the affairs of Molyneux Roche, insofar as they consisted of administering the assets of others, in the hands of specially appointed managers. This meant that the Baines no longer had day to day management powers over Hermitage without, at least, the concurrence of such managers. The Appellant acted for Molyneux Roche in those court proceedings and was well aware of the effect of the order.

5.
In preparation for the criminal trial, earlier sums had been paid by the Baines to Moroneys for fees, but by July 2009 counsel's clerks were anxious to ensure that brief fees were paid up front as had been agreed and that machinery was in place to ensure that refreshers were duly paid thereafter weekly in arrears. The sum required up front was £280,000, and the expectation was that over a roughly five week trial the refreshers would amount to something of the order of a further £200,000. In addition there were of course fees due to Moroneys. The brief fees were not paid by the date agreed, and in the last few days of August counsel's clerks took steps to chase them by way, chiefly, of Emails sent to the appellant at Moroneys.

6.
As events later showed, the Baines were experiencing difficulties in raising the necessary cash. They eventually provided some £400,000 to Moroneys, received by them on 27 August. This was in fact Hermitage money which Baines had persuaded one of the trust's bankers, Kleinwort Benson, to advance, by dishonestly pretending that it was to finance property in Douglas which he was buying as an investment for the trust. He must also have concealed from the bank the fact of the managers' appointment. Thus it was that the Baines had committed the offences of fraud and theft, and that the

£400,000 was, in their hands, criminal property because it was their benefit from criminal conduct. In due course they had no choice but to plead guilty to theft. Mr Baines also pleaded guilty to stealing further sums of about £370,000 from Hermitage, starting in or about July 2008, and to stealing some €43,000 from a quite separate client. The prosecution allowed yet further charges involving another £220,000 of Hermitage money to lie on the file in view of these extensive admissions. It follows that whilst facing charges for laundering several millions of pounds he had stolen extensively from clients and used the money for himself, including to finance expensive legal representation. It was the discovery of this which led not only to his facing new theft charges, but also to the Appellant being charged with money laundering.

7.
The prosecution did not suggest that the appellant had any knowledge of the other thefts from Hermitage or from the other Baines client. The allegation against her was confined to the dealings with the single sum of £400,000 paid to Moroneys at the end of August 2009. As to that, the prosecution did not suggest that she had any idea of the theft/fraud that Baines had perpetrated on the bank. Nor did it suggest that she stood to gain anything from what had been done. It confined itself to the allegation that she had connived in the use of the £400,000 by Baines, knowing or suspecting that it was criminal property. Her fault, the prosecution suggested in terms, was to get too close to a client who turned out to be a crook. The principal charge laid against her was framed as follows:

“First Count

Statement of Offence

Becoming concerned in an arrangement knowing or suspecting that the arrangement facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person, contrary to section 140(1) of the Proceeds of Crime Act 2008.

Particulars of Offence

JENNY DEE HOLT, between the 13th day of August 2009 and the 29th day of August 2009, in the Isle of Man, became concerned in an arrangement which she knew or suspected facilitated the acquisition, retention, use or control of criminal property, namely the sum of £400,000 belonging to Hermitage Securities Limited by or on behalf of John Trevor Roche Baines and Wendy Nicolau De Almeida Baines”

8.
As in due course the Deemster directed the jury, this charge involved the prosecution proving five elements:

i)
that there was an arrangement to transfer the £400,000 to Moroneys;

ii)
that the appellant was concerned in that arrangement;

iii)
that the £400,000 was criminal property, that is to say Baines' benefit from criminal conduct;

iv)

that the appellant knew or suspected that the arrangement would facilitate the use by Baines of that money; and

v)
that the appellant knew or suspected that the £400,000 represented the criminal property of another, here Baines and/or his wife.

9.
By the time of the summing up, the case was recognised to depend on proof of the last of these elements. There was a good deal of evidence that in the days immediately prior to the transfer of the £400,000 to Moroneys (a) counsel's clerks were chasing the brief fees from the Appellant and she was relaying their concern to Baines, and (b) Baines was telling the Appellant that he proposed to borrow money from Hermitage, that Hermitage wanted security from him and that he wanted her help, and that of Moroneys, to sort out what he said would be a loan. The Appellant accepted that she knew that £400,000 had been paid to Moroneys on account of fees for counsel and the firm. She gave evidence, however, that she did not connect in her mind the receipt of the £400,000 with what she knew about the live possibility of Baines taking a loan from Hermitage. Her evidence was that she thought the £400,000 paid for fees came from a different source, such as personal funds held by Baines in Molyneux Roche, which would not have been subject to the court-appointed managers. If this had been her belief, then she would not, of course, have known or suspected that the £400,000 was criminal property for if that had been its source, it would not have been such. The Deemster directed the jury that this was the principal disputed issue in the case. The jury by its verdict must have rejected the appellant's evidence that she believed the source to be other than Hermitage.

10.
There was ample evidential basis for this conclusion. On 20 August at a restaurant in London Baines had told the appellant and her colleague Ms Dudgeon with some enthusiasm that he was borrowing money from Hermitage with the consent of the protector Mr Riley, whom he said he had recently met. Embarrassingly drunk as he undoubtedly was, that was what he had said.

11.
Next, the three-party Email traffic between counsel's clerk, the appellant and Baines concerning the fees was clearly linked to discussion of what Baines was saying was his proposed loan from Hermitage. That was particularly true of the traffic on 24 August, which ran as follows:

1119
From counsel's clerk to the Appellant chasing fees,

1127
From the Appellant to Baines: 'Really sorry to bug you but we really do need to get the fees issue sorted this week ... can you please let me know when you will be in a position to send funds?'

1130
From Baines to the Appellant: 'We discussed this already and I told you that I have the funds but I need to give all our possessions to Hermitage as security in case we fuck up ! You said no problem'

12.
At this point the Appellant made telephone calls to both junior and leading counsel. The exact content of the calls was in issue at the trial, and counts 3 and 4 charged her with subsequently creating a false file note of the conversations. But the making of the calls at 1136 and 1137 was demonstrated by

telephone records and the evidence of both counsel and Ms Dudgeon established that at a minimum the Appellant was telling counsel that Baines proposed to take a loan from "a trust" and asked whether there was any impediment. The conversations were on any view exceptionally brief and the answer of both counsel was no more than that if there was a proper arm's length or 'commercial' loan, there could be no objection. The principal issue relating to these calls was whether or not the Appellant had told counsel that the proposed loan would be coming not simply from "a trust" but from one of which Baines was a trustee (or at least in a fiduciary position, since the formal trustee was Molyneux Roche). She said she had and one of her file notes (if genuine) supported her; counsel did not recall this and both said in effect that such a piece of information would be likely to have made them ask for further information and/or to temper their answer with caution. But leaving aside for a moment the question of who was right on this issue, there could on the face of it have been no reason for defence counsel in the upcoming trial to be asked any question about the proposed loan unless the Appellant understood it to be a loan for the fees which their clerks were chasing. Within a few minutes of the second telephone call the Appellant resumed her Email exchange with Baines:

1150
From the Appellant to Baines: 'On a prima facie basis - yes it is fine although I would recommend that the trust takes very brielf [sic] but independent advice on the point and produce the required documentation. The clerks need me to give them an eta for the funds... its only the retained [sic] we need to send to them; the refreshers can go at a later date. '

1153 From Baines to the Appellant: 'My people will not do the soft loan until that is in place. T.

1155 From the Appellant to Baines: 'Cool. Well what do you need for this to be done ?'

1236 From Baines to the Appellant 'As the Hermitage Trust is looked after by Moroneys would you draft something. We need to get on if they want money this week.'

1245 From the Appellant to Baines: 'Ok, Can you please give me a list of your unencumbered assets that you wish the trust to have a collateral over? Can you also please let me have the value of the loan. Is interest being charged? What are the terms of the loan - i.e. is it a loan for an unspecified period or a specified period ? J'

13.
The following day, 25 August, the following further Emails passed:

0944 From counsel's clerk to the appellant chasing the fees.

0949 From the appellant to Baines: 'Any chance we can get this sorted today please (by 'sorted' I mean a fixed date at some point this week whereby the funds can be paid over?). I await Trevor's instructions on what assets etc need to be put up as collateral/ interest so we can put the loan documentation in place.'

0952 From Mrs Baines to the appellant: 'I have requested for the funds to be transferred today £400.000.00 GBP. I have to send the hard copy of the letter for the transfer and that has gone today. Should be with you tomorrow. I will ask Trevor to get in touch with you.'

1007 From the appellant to counsel's clerk, copied to Moroney's accounts clerk: 'I have now had confirmation from the client that a transfer has been requested today for a sum of over £500,000 [sic] which represents the brief fees...and funds for us to retain as refresher fees to be paid in arrears as

and when required. Once the funds hit our account we will immediately transfer the brief fees accordingly.'

14.

The penultimate message foreshadowed the receipt of £400,000 which arrived at Moroneys on 27 August and was the money which, unknown to the Appellant, Baines had stolen from Hermitage and its bank by means of the false property investment story. It is clear that the exchanges on 25 August, like those of the previous day, provided very strong evidence that the Appellant knew that the money for the fees was coming from Hermitage, albeit that she thought by way of loan. Moreover, it was the evidence of Ms Dudgeon that the Appellant told her that Baines was proposing to obtain a loan from the trust to meet the fees, and both counsel remembered that the telephoned request to them was about a proposed loan for their fees.

15.

It is true that discussion about the preparation of a loan agreement continued after notification that the £400,000 was on its way. On 26 August, both Mr and Mrs Baines attended a meeting with the Appellant and Ms Dudgeon at which a list was drawn up of assets which could be provided as security for a loan of up to £1m. The Appellant's note of this meeting recorded that the protector (David Riley) was pleased to sanction the transactions, that written authority was required, which Baines was to provide, and that she and/or her colleague were to draft a loan agreement for discussion. Those events could, it is true, be said to be a pointer towards a belief that the source of the £400,000 might be something else, with the loan yet to come in addition, but the evidence the other way was very powerful. The issue of the Appellant's belief was one for the jury. It is rightly not contended on behalf of the Appellant that the jury was not entitled, if it thought right, to reject her account of believing the source of the £400,000 to be other than Hermitage.

16.

Mr Bennathan QC, who did not appear either at trial or on appeal before the Staff of Government, advances first the contention that there was no case to go to the jury on the principal charge of money laundering. He contends that there was no evidence on which the jury could find either the actus reus of being concerned in an arrangement or the men rea of knowledge or suspicion that the money was criminal property. In neither case is the contention sustainable.

17.

As to the actus reus, it is certainly true that there was no evidence that the appellant personally handled the £400,000 when it arrived. It was sent electronically and handled by the accounts department at Moroneys. The evidence suggested that the appellant would not personally have seen the computer screen recording its arrival and the source as Kleinwort Benson. But the offence of money laundering here charged does not consist in the defendant herself acquiring, retaining, using or controlling the criminal property. It consists in her being concerned in an arrangement which she knew or suspected would enable someone else (here Baines) to do one of those things. It is not necessary for the arrangement to be made only after the theft of the money, but in any event this arrangement, begun before, continued after Baines stole it. There can be no doubt whatever that her efforts to obtain the fees on behalf of counsel and to send the money on to them when it arrived amounted to an arrangement which facilitated the use by Baines of the £400,000 eventually sent for this purpose.

18.

As to the mens rea, there was evidence, which turned out to be undisputed, that the Appellant knew of the court-appointed managers, that she knew that in any event that the Baines were in a fiduciary position in relation to Hermitage, and that neither a loan agreement nor security was as yet in place. There was evidence, for resolution by the jury, suggesting that she had improved the notes of the brief telephone conversations with counsel. And she was making an assertion as to her belief in the source of the £400,000 which it was open to the jury to reject as a deliberate lie.

19.
On both the actus reus and the mens rea there was therefore a plain case to go to the jury. The evaluation of the evidence was for it and not for the Deemster. It would have been an impermissible usurpation of the jury's function for the money laundering count to be withdrawn from the jury.

20.
Mr Bennathan's more substantial ground of appeal relates to the manner in which the case was left to the jury. The Deemster was right to identify the only real issue as that of guilty mind. That had properly been conceded to be the only element of the money laundering offence which was in dispute. The Deemster was also right to identify the principal factual dispute on the evidence as whether or not the appellant believed the source of the £400,000 for fees to be separate from Hermitage and from any loan from that trust. But what he also did was to leave the case to the jury as one which would be concluded by the answer to the question whether she had that belief or not. Was he right to do so?

21.
The basis on which this position was reached at the trial lay in skilful cross examination of the appellant. The Appellant accepted, first, that she knew that the court appointed managers would have to consent to any loan made by Hermitage to Baines, because the administration of Hermitage was part of the regulated business of Molyneux Roche. Second, she accepted that at the time that the £400,000 was received she had yet to see the Hermitage trust deed, and thus did not know whether or not it contained any impediment to a loan by the trust to Baines (as in fact it turned out that it did). Third, she accepted that the security which was under discussion was not in place. Fourth, she accepted that the loan agreement which Baines was talking about had not yet been prepared. With that background, there followed these questions and answers:

MR FARRER: So if the position was, were as I'm going to suggest indeed it was, that you knew throughout the relevant period that fees were going to be paid by money taken from Hermitage, you would know the Baines had no right to take that money at all, wouldn't you?

MISS HOLT: But I didn't know that the fees were coming from Hermitage.

DEEMSTER TURNER: Answer that question please. Answer it, would you please ask it again, it's a critical question.

MR FARRER: Yes

DEEMSTER TURNER: If the position was that you knew that the money was to be paid from the Hermitage Trust, yes.

MR FARRER: Then given all the factors we've already looked at, you would have known wouldn't you that the Baines couldn't honestly be taking that money from Hermitage at all?

MISS HOLT: Yes.

MR FARRER: Thank you. So it brings us doesn't it to the critical question whether you really believed that the loan arrangement was something quite separate from the payment of the fees.

MISS HOLT: Yes.

22.
This evidence certainly made clear that the principal factual issue in the case was the state of the Appellant's belief as to the source of the £400,000. For the prosecution, Mr Farrer QC accepted in this appeal that the correct direction to the jury would have been upon the following lines. The first question to be addressed was whether the Appellant may have believed the source of the £400,000 to be other than Hermitage. If she may have done, then acquittal followed. But if the jury was sure that she did know that the money came from Hermitage, the next question was whether or not she knew or suspected, when continuing the arrangement for the transmission of the money to counsel, that it was the product of criminal conduct on the part of Baines.

23.
The second part of this direction was simply absent from the summing up. There had been the (correct) formal direction that it was an essential element of the offence that the defendant be proved to have known or suspected that the money was criminal property, but when it came to the application of that rule of law to the facts of the case, it was simply assumed that if she was disbelieved in her evidence about where she thought the money was coming from, conviction followed.

24.
The case in which a defendant advances a defence which may well be disbelieved imposes a particularly acute duty on the trial judge. It is essential that he consider carefully what the position will be if the defendant's account is indeed rejected. Sometimes the result will be that the only proper verdict will be guilty, and indeed sometimes this may be expressly conceded on the defendant's behalf. But very often it will be necessary for the jury to be required to apply its mind to the remaining steps to conviction, and it is especially important that it be reminded that it must do so because defence counsel will normally not have addressed other possible obstacles to conviction which are inconsistent with the case being advanced by the defendant in evidence. A simple instance is the defendant accused of murder who advances an alibi which is seriously damaged in cross examination of the several witnesses, but whose actions, assuming that he was indeed the culprit, may not amount to murder, for example because there is a genuine decision to be made about intent. There are many other examples.

25.
In the present case the absence of the second part of the necessary direction was a central deficiency in the summing up. It may be, of course, that if it had been given, the jury would have concluded that the Appellant did in fact know or suspect not only that the £400,000 came from Hermitage but also that it must have been extracted by some crime. The cross examination set out above would have been very important in examining this question. It would not be necessary for the appellant to know that the law labelled what occurred a crime, still less which crime, if she knew or suspected facts which amounted to a crime of some kind. But it was necessary for the prosecution to prove that she had applied her mind to the circumstances in which the money had been produced. Actual knowledge or suspicion that there was criminal conduct of some kind involved is an essential element of the offence. It was not enough to show that she ought to have realised that some crime, such as theft or obtaining by deception, might well have been involved. Knowledge or suspicion that to receive the money from Hermitage would be irregular, in the sense of a breach of trust, is not automatically the

same as knowledge or suspicion that a crime is involved. The cross examination set out did not go beyond establishing that she realised that the money could not lawfully or properly be received by Baines from Hermitage without the consent of the managers and the provision of security. The addition of the adverb 'honestly' when the question was repeated, in place of 'had no right to', was not enough to make of her answer an admission that she had applied her mind to the question at the time and had actual knowledge or suspicion that the £400,000 was the product of conduct which amounted to a crime. Whilst the jury might have reached the conclusion that she had and did, this was a question which it had to address and it was wrong in law to withdraw it.

26.
It is no answer to this defect that the appellant was not advancing this defence, either in her evidence or in counsel's speech on her behalf. It is precisely because she was advancing a different, and as the jury found untruthful, version of events, that neither she nor counsel did so. It is precisely in these circumstances that the duty falls upon the judge to address the elements of the offence if, as can be seen to be at least possible, the jury rejects her evidence.

27.
The more difficult question at the present stage is whether this clear error of law in the summing up renders the conviction unsafe. It will not do so if, had the error not been made, conviction would nevertheless have been inevitable because the jury could only have found that the appellant did indeed apply her mind to the point and did indeed know or suspect that Baines could only obtain this money from Hermitage by means of some form of theft or deception. But the evidence in this case does not warrant this conclusion. The question is not whether, looking at the picture ex post facto as judges now, a crime must or must not have been involved. What matters is the state of mind of this appellant in August 2009. In examining the critical question the jury would have had, first, to ask itself when the appellant must have applied her mind to this issue and acquired the necessary guilty knowledge or suspicion. True it is that the prosecution was asserting that she had acted dishonestly at least from 24 August when the first of the series of Emails set out above had been exchanged. It had been its case that the telephone calls to counsel on that day had been a dishonest ploy by her to provide some cover for what she knew was theft or deception by Baines. It is, however, quite impossible to say that the jury was bound to accept this analysis. If she had indeed been conscious of the likelihood of crime, to make the telephone calls to counsel was to invite an enquiry into what Baines' relationship with the trust was and the consequent frustration of the use of the money, even though such enquiry did not in the end ensue. Moreover, she had made these calls in front of Ms Dudgeon, to whom she had made it clear that Baines was a trustee. The jury might well have thought this an unlikely scenario if she was acting dishonestly in support of suspected crime by Baines. Moreover, the jury might well have thought that to take active steps to enquire about security for a loan, to ascertain the terms as to interest, and to draw up a formal agreement, all once again involving her colleague Ms Dudgeon, were events more consistent with a lack of guilty knowledge than with its presence. The jury would no doubt have had also to consider the position when at 0952 on 25 August the Email from Mrs Baines arrived, giving the assurance that the money was on its way, and at a time when no loan had been put in place. It is certainly true that at this point the prosecution case was stronger, for it is difficult to see how the £400,000 could in fact have been obtained by Baines from Hermitage without either theft or deception. Nevertheless, it cannot be said with confidence that the only possible conclusion that the jury could have reached was that between then and 1007 when the appellant notified the accounts department of the impending arrival, and, implicitly, endorsed the by then standing instructions to send the money on to counsel, she had applied her mind to the point and acquired the necessary knowledge or suspicion that a crime was

involved, nor that she did so later whilst still a party to the arrangement for the transmission to counsel of the money. It is a clear possibility that the jury might have concluded, if properly required to address the actual state of the appellant's mind, that she had simply never thought about any possible crime or facts amounting to such. Even if she realised that the £400,000 was coming irregularly from Hermitage, and in advance of the necessary loan arrangements being made, to include security, interest and the necessary consents of others, it was not an inevitable conclusion that she had applied her mind to possible crime rather than simply assuming, naively, that the necessary consents and formalities would follow and that that justified what was happening. It does not appear to have been suggested that Ms Dudgeon knew or suspected criminal origin of the £400,000. The appellant had after all been taken in by Baines just as the bank had. His drunken claim that he had the consent of the protector of the trust must have been a deliberate lie designed to induce her to accept the money when it came. Moreover, because the Deemster never invited the jury to consider her actual state of mind, he erroneously referred the jury to the provisions in the trust deed which, had she seen them, would have told her that the Baines could not derive a benefit from the trust. This was an additional error because the prosecution had consciously abstained from relying on the contents of the deed given the evidence that the appellant had not read it, and had explained that stance to the Deemster in the absence of the jury. Further, the appellant's positive good character had to be brought into account. It had not prevented her lying to the jury, as must have been found, but it remained relevant to the likelihood that she would, for no personal advantage, lend herself to the misuse of money obtained by crime. It is simply not possible to say whether, if the jury had been properly directed, she would have been convicted.

28.
In those circumstances, the defect in the direction to the jury is fatal to the safety of this conviction on the principal money laundering count, which must be quashed.

29.
The remaining two counts, 3 and 4, charged creating false file notes relating to the telephone conversations with counsel on 24 August. For the reasons explained there was a prima facie case that the appellant had indeed committed these offences, supported also by a recovered ESDA impression of a prior version of one of the notes on which the critical reference to Baines being a trustee did not appear. Against that case was the real possibility that the jury might take the view that because the only possible reason for telephoning counsel must have been that she knew that the money for their fees was coming from a trust of which Baines was a trustee, she was likely to have told counsel this. The jury was sensibly invited to start with count 1 and to go on to counts 3 and 4 only afterwards, and it is likely that it did so. It is of course possible that even if it had acquitted of count 1 it might have taken the view that these notes had been fabricated to bolster a genuine defence of innocence. The case was, however, never left to the jury on this basis and it is clearly likely that the verdicts on counts 3 and 4 were influenced by the conclusion on count 1. Although the appellant's credibility would in any event not have survived unscathed, since she was disbelieved on the principal plank of her evidence, it is not possible now to say that the convictions on counts 3 and 4 are unaffected by the unsafe nature of count 1. Those convictions must in consequence also be quashed.

30.
This makes it strictly unnecessary to consider a separate ground of appeal based upon unfortunate judicial comment. Counsel for the Crown had, perfectly understandably and properly, made it a small part of his closing speech to remind the jury that even if sympathetic to the appellant as a newly qualified advocate out of her depth and taken in by a persuasive and dishonest client, such sympathy

was not a basis for acquittal. In the course of a summing up which was not only discursive rather than ordered but also heavily and unfortunately characterised by familiar asides to the jury, the judge took it upon himself to contrast the styles of counsel. He did so in terms which, although appreciative of both, might well be thought to bestow the greater approval and indeed admiration upon counsel for the prosecution. Having done so, he then recounted counsel's submission as to sympathy and added:

"…and as to that he really said well sympathy doesn't play a part here, and he's right of course because just as I trust you with the verdict and I don't come into your room and tell you what to do, and I am not trying to influence you, so you trust me as the Deemster with the rest, okay. And that's the way it works with our mutual respect and our mutual trust."

31.
From similar remarks made immediately after the verdicts of guilty were pronounced, and during counsel's mitigation, it would appear that by "the rest", the judge did indeed mean "sentence". The comments on the styles of counsel were unfortunate and misplaced, but this addition did carry the risk that the jury, sensitive to the judicial view, might divine from it that the judge thought that conviction was likely to follow. It should not have been said. Had this point stood alone, it is doubtful that it would have rendered the convictions unsafe, for the jury can have been in no doubt that there was both a powerful sympathy case to be made for the appellant, and much mitigation in her loss of job and no doubt career, so that if the occasion arose the additional sentence would no doubt take account of it. As it is, this provides a limited further reason for discomfort with the safety of the convictions.

32.
It follows that the Board will humbly advise Her Majesty that the convictions should be quashed. In the circumstances of this case the Board's present view is that the public interest is most unlikely to call for a re-trial. But the prosecution should have the opportunity to draw the Board's attention in writing, within 10 days of the handing down of this judgment, to anything which it suggests should lead to a different order, and the appellant should have in that event 10 days thereafter to reply. The parties should also make any submissions on costs in writing within 21 days of handing down.