

**IN THE DISTRICT COURT  
AT HAMILTON**

**CRI-2014-019-004960  
[2016] NZDC 1741**

**MINISTRY OF SOCIAL DEVELOPMENT**  
Prosecutor

v

**KAREN MARY MARKS (AKA WHYTE) & TYRONE JOHN MARKS**  
Defendant(s)

Hearing: 11, 12 and 13 November 2015

Appearances: Alcock and Price for the Prosecutor  
S Pohiva for the Defendant K M Marks  
R Barnsdale for the Defendant T J Marks

Judgment: 2 March 2016

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**RESERVED JUDGMENT OF JUDGE K B F SAUNDERS**

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[1] Between 2007 and 2014 the defendants Karen Marks (aka Whyte) and Tyrone Marks applied for and received various benefits from the Ministry of Social Development (MSD). On signing the various applications, they each agreed to advise the MSD if there were any changes to their circumstances that might affect their entitlement to a benefit, such as starting or ending a relationship, separation or the like.

[2] The MSD alleges that during that period of time the defendant's remained legally married and in a committed relationship. But when they each applied for and received a benefit they did not advise the MSD of the true nature of their relationship. Instead both defendants falsely stated they were living apart/separated or single. As a result, each defendant received benefits they were not entitled to.

[3] The defence case in respect of each defendant is that they were not living together as a married couple. Their relationship had broken down by August 2007 and although they never legally separated they did not reconcile and each considered they were single. While they may have resided in the same home for some periods of time that was for the sake of their children (including the children each defendant had from a previous marriage) but both defendants claimed that their relationship bore none of the hallmarks of a married relationship (nor of a relationship in the nature of a marriage) so that there was no deception or dishonesty.

[4] Karen Marks faces five charges. They are:

4.1 Two charges of obtaining benefit overpayments by deception by failing to disclose she was living in a relationship with Tyrone Marks pursuant to s 240 Crimes Act 1961. The offending occurred between 4 October 2007 and 23 July 2009 (CRN 2003) and between 23 September 2011 and 26 February 2014 (CRN 2002). The maximum penalty is 7 years imprisonment.

4.2 Three charges of dishonestly using a document pursuant to s 228(b) Crimes Act 1961. The documents were: A Transition to Work Grant Form on 21 April 2007 – CRN 2004; a Childcare and OSCAR Subsidy Application on 5 May 2009 – CRN 2005; and a representative charge between 3 August 2008 and 29 July 2013 of using Work and Income Review Forms – CRN 2006. The maximum penalty is also 7 years imprisonment.

[5] Tyrone Marks faces seven charges. They are:

5.1 Four charges of obtaining benefit overpayments by deception pursuant to s 240 Crimes Act 1961 by first failing to disclose he was living in a relationship with Karen Marks. That offending occurred between 28 November 2007 and 13 May 2009 (CRN 1993) and between 28 September 2010 and 26 February 2014 (CRN 1994); second by failing to disclose he was no longer living at [address 1

deleted] between 12 November 2007 and 13 May 2009 (CRN 1995); and that he was no longer living at [address 2 deleted] between 31 October 2013 and 26 February 2014 (CRN 1996). The maximum penalty is 7 years imprisonment.

- 5.2 Three charges of dishonestly using a document pursuant to s 228(b) Crimes Act 1961 for which the maximum penalty is 7 years imprisonment. The documents were: A Domestic Purposes Benefit Application on 28 November 2007 - CRN 2000; a Transition to Work Form on 29 April 2009 – CRN 1998; and a representative charge between 8 October 2008 and 29 September 2013 of using Work and Income Review Forms – CRN 1999.

[6] Much of the evidence applies equally to all of the charges and there is little to distinguish the position of each defendant. A Memorandum of Agreed Facts was admitted pursuant to s 9 Evidence Act 2006 so the following facts are not in dispute:

- 6.1 Tyrone Marks was in receipt of a Domestic Purposes Benefit at all material times.
- 6.2 Karen Marks was in receipt of a Domestic Purposes Benefit at all material times.
- 6.3 On 23 August 2007 the defendants joint benefit was cancelled.
- 6.4 Tyrone Marks completed signed and submitted the following Work and Income Forms:
- 6.4.1 Domestic Purposes Benefit Application – 28 November 2007.
- 6.4.2 Work and Income Review – 8 October 2008.
- 6.4.3 Transition to Work Application – 29 April 2009.
- 6.4.4 Work and Income Review – 21 July 2011.

6.4.5 Work and Income Review – 21 July 2012.

6.4.6 Work and Income Review – 29 July 2013.

6.5 Karen Marks completed signed and submitted the following Work and Income Forms:

6.5.1 Domestic Purposes Benefit Application – 27 August 2007.

6.5.2 Transition to Work Application – 21 April 2009.

6.5.3 Temporary Additional Support Application – 5 May 2009.

6.5.4 Childcare and OSCAR Application – 5 May 2009.

6.5.5 Work and Income Review – 3 August 2012.

6.5.6 Work and Income Review – 29 July 2013.

[7] I am satisfied the evidence also establishes the following facts:

7.1 The defendants were married on 4 December 2006 and initially resided at [address 1 deleted].

7.2 On 4 October 2007 the defendants entered into a Joint Tenancy Agreement with Housing New Zealand (HNZ) for the property at [address 3 deleted].

7.3 Their daughter Ocean was born on [date deleted] 2007.

7.4 In September 2008 an application for release of the tenancy in the name of Tyrone Marks in favour of Karen Marks was received by HNZ. Karen Marks has written in the comments section “*Tyrone has 2 sort out his kids for the next 6mth. We may look at living together after Xmas*”.

- 7.5 On 24 April 2009 the defendant's signed an Income Related Application Form. The form was completed by Karen Marks as tenant and Tyrone Marks as partner. The address was [address 3 deleted] and under the heading change of circumstances Karen Marks has written "*Tyrone and his children have moved in 11,2,09*".
- 7.6 The Genesis Energy account for [address 3 deleted] was connected in the name of Karen Marks between 27 March 2009 and 1 December 2009 but Tyrone Marks was listed as an authority on the account and he had numerous dealings with Genesis staff in relation to it.
- 7.7 Karen Marks had a Sky connection at [address 3 deleted] from 9 April 2008 to 18 December 2008. Tyrone Marks was similarly authorised on that account.
- 7.8 In April 2009 the defendants purchased a share in a business in Raglan with a Mr Russell called A1 Foods Limited. Mr Russell subsequently left the business and the defendants continued to operate the business "The Hot Roast Shop" as equal partners in it for approximately a year.
- 7.9 Their son Devon was born on [date deleted] 2011.
- 7.10 In an Income Related Rent Application form completed in the name of Karen Marks as tenant and signed by her on 26 September 2012 and Tyrone Marks as partner and signed by him on 5 October 2012 Karen Marks has written the comment next to the name of Mr Marks that he is only at the [address 3 deleted] address three days a week and in another comment that he contributes nothing to the house bringing his own food for dinner.
- 7.11 In February 2013 Karen Marks left Hamilton and resided in Naseby in the South Island.

7.12 While residing in Naseby Karen Marks had dealings with various agencies and referred to Tyrone Marks as her husband. For example:

7.12.1 Mr Atkins the finance manager at Pioneer Generation produced notes of the account on 2 May 2013 when in response to a query as to why the direct debit had not gone through Karen Marks said *“she was going to contact her husband to see if he can put money into the account but business was a bit tight at the moment..”*

7.12.2 Again on 30 May 2013 she advised *“the money will be in the account tonight, her husband had a heart attack and she had to fly to the nrt island last week. Husband didn’t transfer the rent and power money into her account in time for the DD.”*

7.13 Text messages between the defendant’s personal mobile numbers for this period evidences the defendants used terms of endearment to each other including referring to one another as husband and wife and of the joint purchase of everyday household goods. These messages are set out at para [50] below.

7.14 Karen Marks returned to live permanently in Hamilton around late June 2013 and moved back into [address 3 deleted].

7.15 Tyrone Marks made a number of cash deposits into Ms Marks’ bank account (at her request) while she was in Naseby: \$70.00 on 4 April 2013; \$50.00 on 5 April 2013; \$280.00 on 13 April; \$80.00 on 15 April; \$200.00 on 7 May 2013; \$70.00 on 11 May 2013 and \$25.00 on 18 May 2013.

7.16 While Karen Marks was living in Naseby Tyrone Marks continued to live at [address 3 deleted]. During this period Tyrone Marks made regular payments to the Genesis Energy account by direct debit.

[8] The issues for me to determine in respect of each defendant and for each charge against them are twofold. First whether for the purposes of receiving a benefit the defendants were in a married relationship that had not broken down (this necessitates an analysis of the circumstances of their relationship). Second (if that point is reached) whether each defendant acted with the requisite dishonest intent/absent claim of right.

### **The law**

[9] The prosecution must prove each of these charges beyond reasonable doubt.

#### *Section 240 (1)(a) Crimes Act 1961 – Obtaining by deception*

[10] The prosecution is required to prove beyond reasonable doubt:

10.1 That there was a deception, and

10.2 Without claim of right; and

10.3 That the deception resulted in Karen Marks and in Tyrone Marks obtaining a pecuniary advantage.

[11] Deception as defined by section (2)(b) Crimes Act means:

11.1 That there was an omission to disclose a material particular; and

11.2 Karen Marks and Tyrone Marks had a duty to disclose that material particular; and

11.3 That there was an intention to deceive.

*Section 228(b) Crimes Act 1961 – Dishonestly using a document*

[12] The prosecution is required to prove beyond reasonable doubt:

12.1 Karen Marks and Tyrone Marks used a document;

12.2 Dishonestly and without claim of right; and

12.3 With intent to obtain a pecuniary advantage.

*Pecuniary advantage*

[13] A pecuniary advantage as defined by the Supreme Court in *Hayes v R*<sup>1</sup> is “simply anything that enhances the accused’s financial position”.

*Dishonestly and Claim of Right*

[14] Section 217 Crimes Act defines dishonestly as:

**Dishonestly**, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to or authority for, the act or omission from a person entitled to give such consent or authority.

[15] This is a subjective test. The Supreme Court referred with approval to the Crimes Consultative Committee:<sup>2</sup>

The term “dishonestly” remains but is confined by our proposed definition to conduct which is known or believed to be without proper authority. While the Committee does not support the use of an objective standard to assess the defendant’s belief that the act in question was authorised, at the same time the bill should remove any doubt that an idiosyncratic moral view about what actually constitutes dishonest behaviour will excuse the defendant from liability.

[16] Claim of right is defined in s 2 of the Crimes Act as:

**Claim of right**, in relation to any act, means a belief [at the time of the act in a proprietary or possessory right in property in relation to which the offence is alleged to have been committed], although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed].

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<sup>1</sup> *Hayes v R* [2008] 2 NZLR 321

<sup>2</sup> at [57]

## **The Charges and respective cases**

### ***Karen Marks***

#### ***Obtaining by Deception (relationship) 4 October 2007 to 23 July 2009 – CRN 2003***

[17] On 29 August 2007 Karen Marks applied for a Domestic Purpose Benefit sole parents and for Accommodation Supplement. In the benefit application Ms Marks stated she was living in [address 4 deleted]. Under the heading Reason for Application Ms Marks has written “*breakdown of a marriage*” and further that she was living apart from her partner Tyrone Marks. In the box under the question What do you consider to be the future of the relationship? Ms Marks has written “*Not worth any future when kids cannot be changed*”. She also answered No to the two questions whether she was getting any money from her partner and was he paying for any of her expenses.

[18] On 21 April 2009 Karen Marks applied for a Transition to Work Grant. She stated she was living at [address 3 deleted] and that she did not have a partner.

[19] On 5 May 2009 Karen Marks completed a Childcare and OSCAR Subsidy Application. Again she stated she was living at [address 3 deleted] and in response to the question Do you have a partner? she has ticked both No and single.

[20] On 7 May 2009 Karen Marks completed a Temporary Additional Support Application. In that document she stated that she does not live alone and lists each of her children as details of the persons living with her. She does not name Tyrone Marks.

[21] The prosecution case is that between 4 October 2007 and 23 July 2009 Karen Marks was living with Tyrone Marks as a married couple at [address 3 deleted] so that when she completed each of these applications she knew she was deceiving the MSD. The HNZ joint tenancy agreement is the prosecution submits a telling document.

[22] In addition to the evidence I have already referred to, the prosecution also relies on the following evidence to prove this charge.

22.1 Noeline Whyte is Ms Marks' mother and she was of the opinion that her daughter had been living with Tyrone Marks as his wife since their marriage. In cross examination she acknowledged she did not visit them often but she was sure that when she did visit Tyrone Marks was always present.

22.2 Dean Powell was the defendant's neighbour living at [address deleted] for a number of years. From his observations over that time he assumed they were a married couple. He pointed in particular to the fact the cars driven by the defendants were parked in the driveway when he left for work in the morning and were there when he returned home in the evening.

22.3 Text messages and bank account analysis show that during the relevant period Tyrone Marks made cash deposits into Karen Marks' account.

[23] The defence case is that there was no deception and no omission to inform. Karen Marks described the unusual living situation as best she could and her written responses, she submitted ought to be weighed in light of her dyslexia.

[24] Karen Marks gave evidence as to the breakdown of the marriage by August 2007 and why it was impossible to blend the two families. Ms Marks explained the living arrangements at [address 3 deleted] were quite separate – each bought their own food and each were responsible for the care of their own children (except Ocean and Devon). There was no sexual relationship bar a celebratory period after the business was purchased and during which Devon was conceived. Tyrone Marks stayed in a separate part of the house and they did none of the activities usually associated with a married couple (eg holiday together).

[25] Karen Marks properly informed MSD the marriage had broken down and she (at least initially) moved to her brother's address. She also properly informed HNZ when Tyrone Marks left [address 3 deleted] (releasing the tenancy) and again when he returned. Indeed, it seems HNZ accepted that overall Karen Marks did advise of changes in circumstances.

[26] Little weight ought to be given to the evidence of Mr Powell and her mother because they did not have sufficient knowledge of the relationship to be able to comment accurately on it. Tyrone Marks was not the only authorised person on the Sky account.

[27] Two of Ms Marks' children gave evidence essentially mirroring their mother's account of the separate lives each defendant led.

***Obtaining by Deception (relationship) 23 September 2011 to 26 February 2013 – CRN 2002***

[28] In a Work and Income Review Form dated 3 August 2012 Karen Marks said that her address ([address 3 deleted]) had not changed. In response to the question Do you have a partner? Ms Marks chose to tick the response living apart/separated.

[29] Karen Marks answered similarly when she completed another Work and Income Review Form dated 23 July 2013.

[30] As to the proof of this charge, absence claim of right the prosecution points to additional factors such as:

30.1 Tyrone Marks having a Sky connection at [address 3 deleted] from 15 November 2010 to 31 October 2011.

30.2 When Ocean was enrolled at [name of school deleted] in July 2013 the enrolment form records she is living with both parents.

30.3 Two Police infringement notices dated 1 February 2012 and 21 July 2012 were sent to Tyrone Marks at [address 3 deleted]. Karen Marks

was also sent infringement notices and these were dated 9 July 2012 and 29 June 2012.

[31] The defence to this charge is as above although of course it is for a later period of time. In addition to the reasons stated above, specific to this charge the defence submit that the evidence from the Principal of [name of school deleted] where Ocean was enrolled cannot be viewed in isolation as in context there is nothing unusual about the fact both parents lived in the same house but had separate lives.

***Using a Document – Transition to Work Grant form 21 April 2009 - CRN 2004***

[32] Karen Marks ticked the box No in response to the question Do you have a partner. The prosecution case is that the evidence I have already referred to establishes Karen Marks was still living with Tyrone Marks at [address 3 deleted] as a married couple. Accordingly, she acted dishonestly when she answered she did not have a partner. The defence case is that they were not partners as the term is commonly used in the context of a relationship between two people. At its highest the defendants were business partners although in that respect I note that the MSD forms clearly distinguish between what is meant by a business partner and what is meant by a romantic partner.

***Using a Document – Childcare and OSCAR Subsidy Application 5 May 2009 - CRN 2005***

[33] Karen Marks stated she did not have a partner and that she was single. The prosecution case is that the evidence I have referred to above establishes Karen Marks acted dishonestly when she used this document because she was living at [address 3 deleted] with her husband Tyrone Marks as a married couple. The defence is as I have described above.

***Using a Document – Work and Income Review Form on two occasions 3 August 2012 and 29 July 2013 - CRN 2006***

[34] Karen Marks completed a Work and Income Review Form on 3 August 2012 and again on 29 July 2013. On each form she stated she did not have a partner and that she was living apart/separated claiming she lived only with her children. The prosecution case is that the evidence establishes these were intentionally dishonest statements as the defendants remained a married couple irrespective of the move by Karen Marks to Naseby in the first half of 2013. In particular, the prosecution point to the continued dependence each had on the other evidenced by the various text messages and agency notes I have already referred to that establishes they remained in a committed relationship.

[35] The defence case in respect of each of these three charges is the same. There was no dishonest intent. The marriage had broken down and at best the defendant's shared the same home but lived separate lives. The forms contained mandatory options which must be selected by an applicant and Karen Marks selected the option that best described her position separated/living apart and single.

***Tyrone Marks***

***Obtaining by Deception (relationship) 28 November 2007 to 13 May 2009 - CRN 1993***

[36] Dated 27 November 2007 Tyrone Marks completed a Domestic Purposes Benefit Application sole parents in which he gave his address as [address 1 deleted]. In response to the questions under the section headed Are you living apart from your partner Tyrone Marks has answered Yes and that they stopped living together on Monday 27 August 2007.

[37] On 8 October 2007 Tyrone Marks completed a Work and Income Review form. He stated his address had not changed and under the heading Do you have a partner? he has circled the answer No and ticked the box living apart/separated.

[38] In a Transition to Work Grant form dated 11 April 2009 Mr Marks stated (by putting a X in the box No) he does not have a partner and that he continues to live at [address 1 deleted].

[39] As with the case against Karen Marks the prosecution similarly relies on the evidence of Mrs Whyte and Mr Powell (see above) as to their perception of the relationship during this period together with the fact Tyrone Marks was authorised on the Genesis Energy account at [address 3 deleted]. Evidence establishes he made regular payments to the account by direct debit and interacted with staff in respect of payments. Additionally, Tyrone Marks had an account in his own name for [address 3 deleted] between 4 October 2007 and 17 March 2009. The prosecution point also to the fact Tyrone Marks was authorised on the Sky account in Karen's name.

[40] Similarly, the prosecution relies on the HNZ evidence in respect of the tenancy for [address 3 deleted]. To interpolate, in contrast the defence submit the defendants were honest in their dealings evidenced by the fact that Karen Marks advised HNZ when Tyrone left [address 3 deleted] and when he returned to it.

[41] In February 2007 the defendant's made a joint application for finance from Instant Finance. On 10 March 2008 there is a file note in respect of repayments that Tyrone Marks called into the office. He is described as partner.

The defence case is that there was no deception. Tyrone Marks gave evidence that the marriage had irretrievably broken down by August 2007. He explained he understood the words 'living apart' as meaning living separate lives although he accepted (in cross-examination) that on each occasion when he completed the three benefit applications that he was living at [address 3 deleted] with Karen Marks (albeit separated) and not [address 1 deleted] so that each application is incorrect in that respect. Otherwise he explained the presence of his car at [address 3 deleted] on a daily basis by the fact he made daily visits to see his children. If he stayed overnight, he lived upstairs. He made payments on the Genesis Energy account for the welfare of his children.

***Obtaining by Deception ([address 1 deleted]) 12 November 2007 to 13 May 2009 - CRN 1995***

[42] The respective cases and evidence referred to for CRN 1993 apply equally to this charge subject to amendment as to the relevant time period. In evidence Tyrone Marks admitted he did move into [address 3 deleted] in October 2007 and admitted he did not disclose he had done so, but explained his failure to do so was not dishonest, but because he had many other things on his mind (study, children, Karen Marks, life in general and the like).

***Obtaining by Deception (relationship) 28 October 2010 to 26 February 2014 – CRN 1994***

[43] In a Work and Income Review form dated 21 July 2011 (sent to [address 3 deleted]) Tyrone Marks stated that his address has not changed and in response to the question Do you have a partner? he has ticked the box living apart/separated.

[44] In another Work and Income Review form dated 21 July 2012 Tyrone Marks has circled the box No indicating he does not have a partner and again ticked the box living apart/separated. This particular form was sent to Mr Marks at [address 5 deleted]. Mr Marks said he lived there with Karen's adult daughter and partner. Shortly after that he moved to [address 2 deleted]. However, in this same time period Mr Marks told the police his address was [address 3 deleted] (traffic infringements) and that he was living jointly with Karen Marks there. [Address 3 deleted] he claimed was, by that stage, a postal address only.

[45] Their son Devon was born as a result of a night celebrating the purchase of their business.

[46] On 29 July 2013 Tyrone Marks completed a third Work and Income Review form. The form was sent to [address 3 deleted]. In that form Mr Marks provided a new address of [address 2 deleted].

[47] On this occasion Tyrone Marks has ticked the box indicating he is single.

[48] Again the prosecution relies on such evidence as the payments made by Mr Marks in March and April 2011 to the Genesis account held by Karen Marks at [address 3 deleted]. Mr Marks also had a Sky account at [address 3 deleted] from 15 November 2010 to 31 October 2011 and to the joint tenancy/subsequent release/return to [address 3 deleted].

[49] The prosecution also points to the issuing of Police infringement notices sent to [address 3 deleted] in February and July 2012 and also to the presence of both defendants on 9 December 2013 when the police were called to the house.

[50] Text messages are also relied on and point submits the prosecution, to the continued relationship as a married couple. Some examples are:

50.1 From Tyrone Marks to Karen Marks on 1 April 2013 *“Hi my wife r u on ur way bk now and is everything and everybody algds”*.

50.2 From Tyrone Marks to Karen Marks on 3 April 2013 *“The mean thing is 4 me 2 cm c my wife and my kids thts wht would mke me real happy”*.

50.3 From Karen Marks to Tyrone Marks on 5 April 2013 *“I talk to U tomorrow about it all. LV you XXX”* and from Tyrone in response *“Ok my lovely wife lv u 2 4ever xox”*.

50.4 From Karen Marks to Tyrone Marks on 16 May 2013 *“Good night love I love U for ever and ever miss you so much. Wish U where here”* and from Tyrone in response *Lv and miss u 2 4evr 2 and we b there real sn k”*.

50.5 From Karen Marks to Tyrone Marks on 25 April 2013 *“can you get one more washing powder”* and *“and light bulbs”*.

50.6 From Tyrone Marks to Karen Marks on 4 June 2013 *“Hi lv I got 2 butters 3 breads milk carrots and what else?”*.

[51] Similarly, HNZ tenancy notes record contact with Tyrone Marks in relation to issues over the [address 3 deleted] tenancy. Some examples are:

51.1 3 November 2011 entered by Alan Braid – *“called at tenancy re arrears, Tyrone does not handle rent and had no idea why account in arrears. Asked him to have Karen contact me asap as we must get matters settled once and for all as constant arrears unacceptable”*.

51.2 15 September 2011 – *“called to see tenant today re arrears, spoke with tyrone, karen unavailable, thought rent matter sorted out, said no, significant arrears that need to be dealt with, he said he would get Karen to ring me later today”*.

51.3 11 November 2010 – *“phoned today and spoke with Tyrone, Karen to pay \$243.00 today”*.

[52] On 18 November 2009 Tyrone Marks applied for finance from Instant Finance. He provided Karen’s name as his partner and ticked the box indicating he was married. His current address was stated as [address 3 deleted]. At the same time to the MSD Tyrone Marks did not tick the married box and claimed he was living apart/separated.

[53] In December 2013 police were called to [address 3 deleted] and police records evidence the defendants were both present as residents of that property.

[54] In addition to the general defence that they were not living together as a married couple Tyrone Marks in defence of this charge said that when he was living at [address 5 deleted] he used [address 3 deleted] as a postal address only thus explaining the Police infringement notices. The terms of endearment in the text messages were explained as the words of a man anxious to ensure he remained in contact with all his children and variously because “he was happy” or “he was angry” or “not sure”. The Genesis Energy payments were made to ensure the electricity was not disconnected and his children continued to live comfortably. The reference to having a partner is explained as meaning they were partners in the business only.

***Obtaining by Deception ([address 2 deleted]) 31 October 2013 to 26 February 2014 (CRN 1996)***

[55] In a Work and Income Review form dated 20 July 2013 sent to Tyrone Marks at [address 3 deleted] Mr Marks provided a change of address to [address 2 deleted]. In response to the question Do you have a partner? Mr Marks ticked single.

[56] The evidence establishes Tyrone Marks rented the property from 10 September 2012 to either October or November 2013. The prosecution case is that this property was business premises only and that he continued to live at [address 4 deleted].

[57] Genesis Energy records note on 17 January 2013 Tyrone Marks called wanting to open a new business account for [address 2 deleted]. A further connection was established under the name The Yard on Hamilton at the same address for the period 11 May 2013 to 26 September 2013.

[58] Mr Marks said that he did in fact live at the property and described it having a fully functional bathroom and kitchen so that it was not just used as business premises. He would sleep there four or five nights a week and while he would visit [address 3 deleted] it was to see his children. If he stayed at [address 3 deleted] he slept upstairs and he reiterated the separate nature of their day to day lives.

***Using a document – Transition to Work form on 29 April 2009 – (CRN 1998)***

[59] On this form Tyrone Marks stated he was living at [address 1 deleted] and did not have a partner.

[60] The prosecution case is that this form was dishonestly completed because Tyrone Marks was living at [address 3 deleted] with Karen Marks as a married couple. In particular, the HNZ Income Related Rent Application dated 24 April 2009 records them living together as partners at that property. The defence case is that the term partner was used to describe their business relationship only.

[61] Additional evidence relied on for this charge has already been referred to above.

***Using a document Work and Income Review form on four occasions between 8 October 2008 and 29 July 2013 – (CRN 1999)***

[62] The four documents that form the basis of this charge were completed by Tyrone Marks on 8 October 2008, 21 July 2011, 21 July 2012 and 29 July 2013.

[63] In October 2008 Tyrone Marks stated that he still lived at [address 1 deleted]. He did not have a partner and was living apart/separated. In July 2011 he stated his address had not changed and he was living apart/separated. In July 2012 the form was sent to [address 5 deleted]. Tyrone Marks said that his address had not changed, he did not have a partner and was living apart/separated. Finally, in July 2013 the form was sent to [address 3 deleted]. Although Tyrone Marks provided a change of address to [address 2 deleted] he said he was single.

[64] The prosecution case is that Tyrone Marks acted dishonestly because on each occasion he used the four documents he was living at [address 3 deleted] with Karen Marks as a married couple. The evidence referred to above applies equally to this charge.

[65] The defence is no dishonest intent. Tyrone Marks was not living with Karen Marks as a married couple. They were separated and if not living apart at all times nevertheless remained separated but the MSD forms did not allow for that distinction. He chose to mark the boxes that best described his position.

***Using a document Domestic Purposes Benefit Application on 28 November 2007 – (CRN 2000)***

[66] In this document Tyrone Marks stated he was living at [address 1 deleted] and that he had separated from his wife as of Monday 27 August 2007.

[67] The prosecution case is that this document was dishonestly used because the defendants did not separate as evidenced in particular by the HNZ joint tenancy application for [address 3 deleted] dated a month earlier on 4 October 2007.

[68] The defence is as set out above – they had separated.

**Factors relevant to determine whether the defendants were a married couple for the purposes of this prosecution**

[69] The test in relation to what constitutes a married couple for the purposes of obtaining a benefit is that set out by Fisher J in *Excell v Department of Social Welfare* [1991] NZFLR 241. Although the charge was one of wilful omission in breach of s 127 Social Security Act 1964 the principles remain equally relevant to charges under the Crimes Act.

[70] *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 is not directly on point as the Court of Appeal had to consider the indicia of de facto couples living in a relationship in the nature of marriage and further at which point (if any) domestic violence repudiated that relationship. Nevertheless, there is no real conflict between the two cases given the Court of Appeal determined that the expression “relationship in the nature of a marriage” necessarily required a comparison with a legal marriage (albeit acknowledging it was not a straightforward exercise).

The facts in *Excell* are somewhat similar to the present case. The appellant was a married woman whose husband had obtained a domestic purposes benefit when she was imprisoned in March 1987. He continued to receive the benefit after her release in June 1997 and until he too was imprisoned in February 1989. The prosecution case was that during that period of time the appellant and her husband were not eligible for the domestic purposes benefit because they were ‘living together’ in terms of the Social Security Act 1964. The main issue on appeal was the presence or absence of co-habitation between the appellant and her husband.

[71] Justice Fisher held that the relevant statutory phrases with which he was concerned (“living apart from” and “living together”) were to be determined by

applying conventional family law principles with regards to cohabitation. Applied to that case he held that many of the indicia of cohabitation were present and he dismissed the appeal against conviction. Justice Fisher summarised the factors the Court should consider as:

- (a) Cohabitation for legal purposes normally requires both some form of mental commitment to live together as husband and wife and a manifestation of that commitment by conduct. No minimum period is involved. In cases of doubt an inference as to intention will usually need to be drawn from conduct.
- (b) The conduct in question is concerned not with any single factor but with an aggregation of many. No single factor is enough nor will its absence be fatal. It is the cumulative quality, quantity, continuity and duration of these factors that matters.
- (c) No list could ever be exhaustive but the indicia include the extent to which there is a sharing of one dwelling as each party's principal place of residence, emotional dependence and support, the pooling of labour and financial resources, the sharing of household activities, the provision of domestic services, the sharing of companionship, leisure and social activities, the sharing of parental obligations, presentation to outsiders as a couple and the exclusion of emotional and sexual relationships with third persons.
- (d) A distinction is to be drawn between legal and de facto marriage. A legally married husband and wife have a legal duty to cohabit. Cohabitation ceases only while there is an intention by either spouse to repudiate the obligations inherent in the matrimonial relationship and a manifestation of that intention by conduct. In a legal marriage it is therefore a very short step from physical proximity to an assumption of continued or renewed cohabitation, especially if the alleged cohabitation has not been preceded by any lengthy separation and where there are other ties such as children in common. The position is different where the couple in question are not legally married, especially if they have not cohabited previously or in recent times. In those circumstances the duration of the relationship to date, and signs of permanence for the future, will assume special importance.

## **Decision**

[72] It is submitted on behalf of both defendants that the prosecution has failed to prove any of the charges beyond reasonable doubt as the evidence in its totality does not prove one or both of the defendant's acted with the requisite dishonest intent/absent claim of right. There is no dispute in respect of the remaining elements of each charge.

[73] I remind myself that I must consider each of the charges faced by each defendant quite separately but as my analysis of the evidence shows much of it is in fact relevant to all charges.

[74] Moreover, Tyrone and Karen Marks advance the same defence; in a nutshell the benefit forms relating to marital status are confusing. They each did the best they could when completing the various applications to select the option from those provided that best fit the description of their relationship. Both defendants were adamant they separated in August 2007 and thereafter in the context of a somewhat unusual and dysfunctional extended family situation it is understandable that they would at times live at [address 3 deleted] but did so without resuming the status of a married couple; to the contrary separate living arrangements were put into practical effect. The birth of Devon in 2011 is explicable following a celebratory night having purchased a business together but it did not result in a resumption of their relationship. From August 2007 there was no commitment to a continuing relationship.

[75] Turning then to the two issues identified at para [6].

[76] First to the nature of the relationship. For the period covering all charges I am satisfied the defendants were in a married relationship that had not broken down. I refer in particular (but of course rely on the evidence in its entirety) to the following facts I find proven beyond reasonable doubt:

76.1 Principal place of residence for Tyrone Marks and Karen Marks from October 2007 to February 2014 was [address 3 deleted].

76.2 Mutual assistance with the children/ shared parental responsibility.

76.3 Joint Directors and Shareholders in a business in 2009/2010.

76.4 Occasional sexual activity (at the very least one occasion around mid-2010 given Devon was born in [date deleted] 2011). The date of his birth is inconsistent with the defence explanation they were intimate

because they were celebrating the purchase of their business. The business was purchased in 2009 and when pressed on the point by the prosecution neither defendant could provide a plausible explanation for that impossibility but were adamant as to their reason for it.

- 76.5 Financial interdependence (including shared expenses).
- 76.6 The use of terms of endearment to each other and referring to one another as husband and wife.
- 76.7 Ongoing financial dependence while Karen Mark was in Nasby.
- 76.8 Outsiders perceived the relationship to be as a married couple.
- 76.9 On documents other than MSD applications the defendants stated they were married or partners.

[77] There is no evidence before me that either Tyrone Marks or Karen Marks entered into any other relationship (or even attempted to do so) between 2007 and 2014. While not determinative it does serve to enhance the presentation and indeed reality to outsiders they were a couple.

[78] I reject the defendant's explanations that the various forms were confusing and did not allow them to truly select the option that fit their circumstances. For example, there can be no confusion over what it means to be single and it would have been quite simple when two words were used together such as living apart/separated to delete the words living apart.

[79] For the foregoing reasons I find the prosecution has proven each charge against Karen Marks and each charge against Tyrone Marks. When the defendant's completed the various benefit applications they knew that the statements they were living apart/separated/single to be false and absent claim of right. At the relevant time both defendants knew they were living together as a married couple but the purpose of making statements to the contrary was to receive benefits they would not

otherwise have been entitled to. The prosecution has proven the second part of the issues beyond reasonable doubt.

[80] Accordingly, I find Karen Marks guilty on all five charges. I find Tyrone Marks guilty on all eight charges.

K B F Saunders  
District Court Judge